REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 48 of 2004

SIMON NJAGE NJOKA …………………….…………… APPELLANT

VERSUS

SIMON GATIMU KANYI …………………..…………… RESPONDENT

(Appeal from the judgment of the principal magistrate's court at Kerugoya in Civil Case No. 131 of 2002 dated 27th day of April 2004 by Miss Lucy W. Gitari – P.M)

J U D G M E N T

This is an appeal from a decision and or judgment of he principal magistrate's court at Kerugoya **(Ms Gitari)** dated 27th April 2004 who dismissed with costs the suit filed by the appellant, **Simon Njage Njoka**. The appellant was dissatisfied with the judgment of the said court and hence preferred this appeal.

The memorandum of appeal filed on 19th May, 2004 by **Simon Njage Njoka's advocates, Messrs Waweru Macharia & Karweru Advocates** has five (5) grounds of appeal to wit:

a) That the learned magistrate erred in law and in fact in failing to uphold the statutory rights of a registered owner of land as conferred upon by section 27 through 30 of the registered Land Act Cap 300.

b) That the learned trial magistrate erred in law and in fact in ruling that the defendant had shown that the plaintiff/appellant "had acquired the land illegally has merits," while in fact such transfer and registration had been effected through valid court order vide Kerugoya Principal Magistrate's Court Land Dispute Tribunal Award No. 44 of 1975 thereby purporting to sit on appeal on a judgment of the same court.

c) That the learned trial magistrate erred in law and in fact in failing to note that the tort of trespass to land is actionable perse and general damages accrue as a matter of right upon proof of the trespass.

d) That the learned trial magistrate erred in law and in fact in ruling upon matters that had not been placed before her if (sic) trial and determination, and in any event, matter concerning the alleged acts of person not before court.

e) That the learned trial magistrate erred in law and in fact in arriving at a decision against the weight of evidence and the law applicable.

The litigation between the parties began on 10th May, 2002 when the appellant as the plaintiff then filed a plaint in the principal magistrate's court at Kerugoya against the respondent, then the defendant claiming a permanent prohibitory injunction restraining the respondent from illegally dealing in the suit land, Damages for trespass, costs of the suit and interest. The plaint was subsequent thereto amended on 18th February 2003 so as to include another prayer for Eviction of the Respondent from land parcel No. **Baragwi/Kariru/1932**. The allegation was that "**At all material times, the plaintiff was and continues to be registered proprietor of land parcel No. Baragwi/ Kariru/1932. The defendant herein has no colour of right (sic) been trespassing and committing a waste on the above stated land causing loses (sic) to the Plaintiff….."**

The Respondent's written statement of defence denied all liability contending that:

"…**..the plaintiff acquired this land illegally as he bought it from Michael Kagari who we were having a case with him which is still pending in Embu High Court Civil Appeal No. 20 of 2000. The plaintiff should wait my appeal to be finalized so that it can be known whether he has got right to occupy it ……..**"

The learned magistrate recorded Evidence from the appellant and his one witness as well as the Respondent and his two witnesses. From the testimony of these witnesses what emerges is that one **Michael Kagari Kanyi** and **Simon G. Kanyi** had a land dispute which was referred to the land disputes tribunal at Kerugoya. The dispute related to land parcel number **Baragwi/Kariru/219**. The tribunal deliberated on the matter and returned a verdict which was filed in court and subsequently adopted as a judgment of the court in LTD No. 44 of 1997 in the principal magistrate's Court at Kerugoya. The decree was subsequently extracted and in terms of the said decree the land was subdivided into **Baragwi/Kariru/1932** and **Baragwi/Kariru/1933**. The appellant bought **Baragwi/Kariru/1932** from **Michael K. Kanyi.** When the appellant attempted to take possession of his land, he was rebuffed by the respondent. To date the appellant has not been able to enjoy the benefits of the land by virtue of the respondent sitting pretty on the land and refusing to vacate. Hence the suit.

As for the respondent and his witnesses his contention is that the appellant acquired the land from respondent's brother illegally. He bought the subject piece of land whilst the respondent had a pending case in Embu High Court against his said brother, the vendor, over the suit land. That the land had never been subdivided and the respondent continues to occupy the whole parcel of land. The respondent was thus not guilty of trespass and or acts of waste on the subject peace of land.

In deciding in favour of the respondent, the learned magistrate held tht there was no consent of land control board to the transfer of the land to Michael Kagari Kanyi and thence to the appellant; that **Michael Kagari Kanyi** had no capacity to dispose of the land which had been entrusted to him to hold in trust, that the said **Michael Kagari Kanyi** had not acquired title to the land to enable him sell and transfer it to the appellant as it was still registered in the name of the respondent. Accordingly the purported sale and transfer of the land to the appellant was fraudulent and illegal.

In support of the grounds of appeal, **Mr. Karweru**, learned counsel for the appellant submitted that as at the time of the institution of the suit, the appellant was the registered owner of the suit premises and since the registration was under the registered Land Act and by virtue of section 27 through to 30 of the said Act the appellant acquired absolute proprietorship of the subject piece of land. As regards the pending appeal involving the respondent and his brother, **Michael Kagari Kanyi** over the said parcel of land, counsel submitted that the appeal has since been dismissed. Counsel submitted that the rights of the appellant as the registered proprietor of the land are not subject to defeatance by a stranger to the land. The respondent is enjoying illegal possession and utility of the land contrary to the decree in LTD 44 of 1997. That being the case, counsel submitted that he was the person bound to be evicted by an order of court properly sought by the registered proprietor the appellant. Counsel further submitted that the respondent did not file a counterclaim to the appellants claim. Counsel maintained that the learned magistrate erred in attempting to investigate a title that had been procured by virtue of execution of the judgment of the court and in effect impeach the title that passed resultant to the decree. Finally on damages counsel submitted that in failing to award damages against the respondent for trespass the

magistrate erred as the tort of trespass is actionable perse and one need not prove any damage. The respondent was served with notice to vacate the land but refused and has persisted in such refusal. In support of his submissions counsel relied on the case of **M'Ikiara M'Rinkanya and another v/s Gilbert Kabeere Mbijiwe (1982 – 88) 1 KAR 196.**

The appeal was opposed. **Mr. Ndana**, learned counsel for the Respondent submitted that the judgment of the lower court was proper and could not be faulted. He conceded however that there was a land dispute between **Michael K. Kanyi** and the respondent that was the subject of the proceedings in LTD No. 44 of 1997. The decision of the tribunal was that **Michael K. Kanyi** be given ½ an acre from land parcel number **Baragwi/Kariru/219** then registered in the name of the respondent and to hold the same in trust for his family. Counsel submitted that consents produced in the trial court were doubtful and therefore the learned magistrate was right in holding that there was no consent obtained from the relevant land control board for the transaction. Counsel further submitted that the said **Michael K. Kanyi** could not have entered into a valid sale agreement when the land the subject matter of the agreement was not in his name. He could not sell what he did not own in the first place counsel further submitted. Counsel further alluded to the various contradictions in the testimonies of the appellant and his witnesses to cast doubt as to the alleged sale and transfer of the land from **Michael K. Kanyi** to the appellant. On damages counsel submitted that trespass was not proved as the land had not been demarcated on the ground. That the appellant conceded that much. The appellant has never entered the land and accordingly he cannot accuse the respondent of trespass. Finally on the authority cited by counsel for the appellant in support of his submissions, it was counsel's contention that it was distinguishable in that the said authority dealt with Trust Land Act and not Registered Land Act.

It has been stated time and again that an appeal to the first appellate court as in this one is by way of a retrial and the first appellate court is not bound to follow the trial court's findings of fact if it appears either that it failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with evidence in general. See **Selle and another v/s Associate motor boat company Limited & Another (1968) E.A. 123**. But in exercising the jurisdiction the appellate court must bear in mind the caution to be found in the case of **Peters v/s The Sunday Post Limited (1958) E.A. 424** to the effect that:

"……**whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is not evidence to support a particular conclusion, or it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide…."**

In this case, the learned magistrate was confronted with a fairly straight forward case. The case was for eviction of the appellant from land parcel number **Baragwi/Kariru/ 1932** on account of him being a trespasser. Her task was not to investigate the title. It was not the business of the trial court to investigate how the title was acquired. Yes the Respondent might have pleaded in his defence that the appellant had acquired the land illegally. However the particulars of the illegality were not given in the defence. Order VI rule 4 of the Civil Procedure Rules specifically provide for matters which must be specifically pleaded. It is worded as follows:

"**A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant statute of limitation or any fact showing illegality"**

As it appears the rule is couched in mandatory terms. It therefore follows that failure to comply with the same renders the suit fatally defective Subrule (2) is even poignant in the circumstances of this case and it provides:

"**Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.**

The respondent did not at all comply with any of the above provisions of the law and his suit was doomed to failure from the onset. It matters not that he is in possession of he subject piece of land as he claimed in his evidence. The respondent stated in his defence that the sale was illegal because the transaction went on whilst he had a pending case in the High court of Kenya

bu arising out of the award by Kerugoya land disputes tribunal. The mere fact that a sale goes through as parties are engaged in court battles canot on its own amount to an illegality or fraud. If the respondent had obtained a stay of the execution of the decree resulting from the award and the said Michael Kagari Kanyi went ahead to sell and transfer the land in dispute oblivious of the order of stay then perhaps such an action would be questionable. In the circumstances of this case it is apparent that the respondent did apply for an order of stay of execution of the decree in the Principal Magistrate's Court at Kerugoyua pending the hearing and determination of Embu High Court Civil Appeal number 20 of 2000. The application was turned down by the learned magistrate. In effect the said Michael Kagari Kanyi was given a free hand to enforce the decree issued by the said court against the respondent.

It was in a bid to execute the decree that Michael Kagari Kanyi caused the land parcel number Baragwi/Kar**iru/219** to be subdivided into two portions so that he could get his portion of ½ an acre as ordered by the land disputes tribunal. After the subdivision and transfer his portion became **Baragwi/Kariru/ 1932**. This is the portion he then sold to the appellant. The decree extracted from the court dated 28th July 2000 specifically provided that:

1. THAT the plaintiff be given ½ acre out of land parcel No. Baragwi/Kariru /219.

2. THAT the plaintiff be registered as a trustee of the ½ for his family.

3. THAT the subdivision of the above quoted parcel of land be carried out by a licensed surveyor.

4. THAT the executive officer of this court do sign all the relevant documents to facilitate the subdivision and transfer……"

The respondent has faulted the sale and transfer of the land to he appellant on the basis that the suit land was not available for sale and transfer as the land was the subject of court proceedings and was still registered in the name of the respondent. I have looked at the sale agreement dated 8th May 2001 and noted that in the recital and condition 1 thereof it specifically that the vendor was selling a parcel of land to be excised from land parcel No. **Baragwi/Kariru/ 219**. The sale was only to crystallise once the vendor went ahead and had the land subdivided in accordance with the court decree. The mere fact that he Respondent had appealed against the decision of he tribunal was not a bar therefore to **Michael Kagari Kanyi** subdividing the land in accordance with the decree. It matters not that the subject piece of land was still registered in the name of the appellant. The decree specifically authorised the executive officer of the court to sign all the relevant documents to facilitate the subdivision and transfer of the land. It is not suggested by the Respondent that in effecting the subdivision, **Michael Kagari Kanyi** did not call in aid the services of the executive officer as decreed. There is evidence that indeed the executive officer so acted. Accordingly the subdivision and the eventual transfer or a portion of Baragwi/Kariru/219 to Michael Kagari Kanyi and which became Baragwi/Kariru/1932 cannot be faulted. It was not suggested at all in the evidence that signature and stamp of he executive officer on the documents was a forgery.

How about the Mutation forms. It is the contention of the respondent that the mutation forms were not properly executed as there is no evidence that a licensed surveyor carried out the subdivision. A closer scrutiny of the forms reveal that indeed a licensed surveyor was involved and indeed signed the mutation forms. The respondent did not challenge the signature of the surveyor on the mutation forms as being forgery or that the surveyor was not a licensed surveyor at the trial.

As I have already stated elsewhere in this judgment the issue before the learned magistrate was to determine whether the Respondent was a trespasser on the appellant's land and therefore liable to eviction. It was not her task to investigate how the appellant came by the said title. If the respondent was

challenging the appellant's title he could have done so by way of a counterclaim. There was no such counter claim in his pleadings before the trial court and for the learned magistrate to have embarked on uninvited trip of establishing the authenticity or otherwise of the appellant's title, the learned magistrate fell into error. It was not open to her to hold that the transfer was *void abnitio* in the absence of a consent from the relevant land control board. The transfer is normally effected at the land Registry. Before such transfer is effected, some documents must be presented, one of which must be a consent from the relevant land control board. There was no evidence that no such consent was presented to the land registrar before the transfer was effected. The least that the learned magistrate should have done before reaching her verdict was to ask the respondent summon evidence from the lands registry as to how the transfer was effected. In the absence of such evidence, the learned magistrate erred in impugning the consents presented in evidence. There was no claim that they were a forgery.

It is also the respondent's case that his brother should not have sold the land as it was transferred to him to hold in trust for his family. As correctly submitted by learned counsel for the appellant it is not for him to complain on behalf of the beneficiaries of the trust. The beneficiaries of the trust should be the ones complaining and not the Respondent. Further I am not aware of any provision of law which bars the sale of a property that is subject to a trust. In his evidence **Michael Kagari Kanyi** testified as to what necessitated him to sell and transfer the land to the appellant. He stated:

"……… **I realised I could not stay with the Defendant as he could kill me ……."**

Under cross-examination by counsel for the respondent then he stated:

"……… **Simon Gatimu and his sons brought problems so I decided to come to court. I stay with my brother pending the dispute to be finalised. The defendant cut a tree on the land ……….."**

So the reason why **Michael Kagari Kanyi** sold the land is bad blood between him and the respondent together with his sons. The beneficiaries of the trust having not complained it was not open to the learned magistrate to hold that since the land was subject to a trust it was not available to be sold.

I agree with counsel for the appellant that the appellant was a bona fide purchaser for value and without notice. Accordingly and pursuant to section 27, 28, 29 and 30 of the Registered Land Act, he acquired absolute proprietorship with appurterent rights of use and disuse if he so wishes. His title therefore is not liable to be impeached. By frawning on the title passed to the appellant by a person who was not even a party to the suit before her, the learned magistrate gravely misdirected herself. Before impeaching the title, it behoved the learned magistrate to at least cause **Michael Kagari Kanyi** to be enjoined in the proceedings. As it is **Michael Kagari Kanyi** was condemned unheard which was an error on the part of the learned magistrate.

All in all I would say that the learned magistrate in approaching the case the way she did fell into error. It is obvious that the learned magistrate erred in law and fact in dealing with matters that had not been placed before her for trial and determination. The appellant having provided a valid title to the piece of land and the Respondent having not impugned it by way of counterclaim in the suit, the learned magistrate had no choice in the matter really than to hold that the Respondent was a trespasser to that parcel of land belonging to the appellant and liable to eviction. She should then have proceeded to evict the respondent.

The appellant has asked for an award of damages for the 7 years that the Respondent has illegally remained on the land. The Respondent has admitted that indeed he continues to occupy the suit premises. I am aware that the count of trespass is actionable perse and one need not prove damage. It matters not that the trespasser has been in occupation before or believes mistakenly that he has a right to land. What matters is whether he has been given notice. See generally **M'Ikiara M'Rinkanya and another (supra)**. There is no doubt at all that the Respondent is a trespasser. He was served with the notice to vacate the land despite his denial. In any event such notice was gratuitous as the Respondent already had such notice by virtue of the decree in the case, which decree he unsuccessfully tried to stay. He is also aware that the appeal he had filed against **Michael Kagari Kanyi** and which was his pretext to

continue occupying the appellant's land has since been dismissed. Ideally the appellant would be entitled to damages for the period that the respondent has locked him out of his land. How are those damages to be assessed? Counsel for the appellant was not of assistance in this regard. No evidence was led evidence in the lower court that would have assisted this court to arrive at an appropriate award. Neither did the appellant's counsel submit in this court on matters that would have assisted this court in considering appropriate damages payable. One would have expected that the appellant would have led evidence to show what he intended to do with the parcel of land. It is possible that he would have wanted to do farming. It is also possible that he could have left it to remain fallow in which event he would have lost nothing. However as the tort of trespass is actionable perse without prove of any damage I am bound to award appropriate damage despite my above misgivings. Doing the best I can in the circumstances and balancing one thing against the other an award of Kshs.50,000/= for every year that the respondent has remained on the piece of land as a trespasser will meet the ends of justice in this case. The record shows that Respondent has been in occupation of the land albeit as as a trespasser since 11th June 2001 when he was given formal notice by the appellant to vacate his portion of the land. He did not heed the notice according to the appellant and since then he has indulged in growing crops on the land and felling trees. That roughly works out to 6 years. Accordingly and in total I would award the appellant general damages in the total sum of Ksh.300,000/=

In the upshot, I do allow the appeal with costs to the appellant. I do set aside the judgment and order of the learned magistrate and substitute therefor with the orders as prayed in the amended plaint dated 14th November 2002. I assess general damages for trespass at Kshs.300,000/= plus interest at court rates from the date of judgment of the subordinate court. The appellant shall also have the costs in the subordinate court.

Dated and delivered at Nyeri this 26th day of October 2007

M. S. A. MAKHANDIA

JUDGE