



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**Civil Appeal 80 of 2001**

**PAUL MULELA.....APPELLANT**

**VERSUS**

**VINCENT WAMBUA MULI.....RESPONDENT**

*(From the decree and order of S.S. Pareno, Resident Magistrate in Machakos S.P.M .CC*

*NO. 62 of 1999)*

**JUDGEMENT**

By a plaint dated 26.1.1999 filed in Machakos Senior Resident Magistrate's Court, the appellant herein claimed that the respondent without colour of right entered appellant's plot No. 22, Kikoko Market, and thereon started construction, thereby, trespassing on the said plot. He claimed also that the respondent had caused extensive damage thereon. He accordingly sought general damages for trespass and costs of the suit.

In his defence to the claim the respondent had denied the plaintiff's claim, and particularly that he had trespassed on the said plot. He in the alternative claimed ownership for the plot in question, and averred that he was the rightful owner, being a bona fide purchaser for a good consideration from the appellant, by an agreement dated 27.5.1996.

The trial court found that the appellant had sold the plot to the respondent for a sum of Kshs. 25,000/= of which Kshs. 11,500/= remained unpaid. He concluded that the plot, subject to the payment of the said Kshs. 11,500/= by the respondent to the appellant, belonged to the respondent. He accordingly saw no trespass and therefore dismissed the claim for damages for trespass. The appellant appealed to this court.

I have carefully considered the evidence on the record. I have as well considered the arguments from counsel who represented the two sides. Mr. Makundi argued seven grounds of appeal. In ground one he thought that the trial Magistrate erred in awarding the plot to the respondent who had not counterclaimed the same. But the trial magistrate, from the evidence on record, made the finding over the issue of ownership because it came out in the evidence of both parties for the purpose of deciding whether or not there was trespassing. In my view both parties could not prove or disprove trespass unless they testified about ownership of the plot No. 22 Kikoko Market. That is why the appellant testified that he had purchased the plot from the appellant and the latter denied the same and alleged that the plot was sold not by him but by his son. Put another way, there was no way the trial magistrate would possibly say that there was or there was no trespass without establishing, from the evidence, the ownership of the plot. It makes little legal or factual sense to argue that the magistrate could have said that the entry onto the land was justifiable or not unless ownership was established. Ground one of appeal therefore carries little merit.

In ground two the appellant thought a consent of the Makueni County Council was required to legalise the transfer of the plot from the plaintiff/appellant to the respondent/defendant. In the court's view, however that issue was not before the trial court and was not being relied by the plaintiff in the trial court. It cannot be sprung upon the respondent at the appeal stage. In any case there is no explanation from the appellant as to why he thought the consent was necessary. He did not for example argue that the plot was an agricultural land or that the rules of the Makueni County Council required such consent.

On the other hand the trial magistrate found adequate evidence that the appellant had sold the plot to

the respondent. Indeed on the independent view of this court, there is adequate evidence to support the conclusion that the appellant indeed sold the plot to respondent. The evidence that this court finds more convincing, is that the appellant and his son Zachariah Mulela approached the respondent to purchase the plot in 1996. This court also believes that Kshs.13,500/= was paid by the respondent to the appellant through the appellant's son Zachariah Mulela. This court does not believe the appellant's version that the appellant did not know about the sale of the plot which he alleged was done solely by his son, thus admitting that a sale took place.

The appellant also argued in ground three that the trial magistrate concluded that money did not pass hands. Examination of the evidence however does not bear that out. What the trial court said is that although it might appear that the appellant's son was receiving the purchase money, the appellant nevertheless must have known what was going on. In this court's view the appellant's evidence that he did not even see the respondent construct on the plot because the respondent did so at night is incredible. If that were to be so, then the appellant would have noticed the construction during the day! If so, why did he keep quiet for so long? Further, the trial magistrate did not find that the appellant did not receive purchase price but that only part payment passed to the appellant which accordingly completed the sale, except that the balance should be paid by the respondent.

As to grounds four and five the appellant thought that the trial court concluded that no sale agreement was signed. But the judgement indicates clearly that the trial court considered the sale agreement and took it into account in arriving at the conclusion she reached. Further more there is evidence that the appellant fronted his son Zachariah to receive to receive the purchase price. He cannot be heard to claim that the plot was sold by his son and that he did not participate. If so, why did the appellant not intervene when he realised that his son had received part of the purchase money? Further more it is very telling that appellant did not call his son Zachariah to testify. To establish the fact that he had sold the plot on his own and without the knowledge or participation of the appellant. On other hand there is credible evidence from the appellant that the sale transaction of the plot only started when the appellant and his son Zachariah approached the respondent offering to sell the plot. The fact that he later withdrew and began to front his son will not disconnect him from the sale. Agency contrary to what Mr.Makundi argued, was adequately proved.

There is an allegation in the evidence of the appellant that he had sold the plot to a third party for value and that the 3<sup>rd</sup> party had obtained title. That, in this court's view was not proved. The alleged third party was not called to testify to defend his interest. Nor was there production of evidence for the proof that the plot was registered in the name of the third party as alleged by the appellant.

There was ample evidence that the respondent had taken possession of plot No. 22 aforesaid and started construction when he was restrained by an injunction of the lower court to await the trial. But such entry and taking possession was explained away by the respondent when he established that he did so because he had bought the plot. The trial court could have acted illogically to simply find trespass and order for damages when the respondent negated the tort of trespass by proving colour of right.

In conclusion, the lower court suit was filed by the appellant. He accordingly had to discharge the burden of proof on the balance of probability. In this court's view, as also was the opinion of the lower court, the appellant failed to discharge this burden, thus losing this case. This court finds no reasonable ground to interfere with the finding of the trial court. For that reason, this appeal must fail. It is dismissed with costs to the respondent here and in the court below.

The respondent should within 30 days pay the unpaid part of the purchase price of Kshs. 11,500/= with interest on it at court rates from 26.1.1999 to date. In default the appellant is at liberty to file execution proceedings.

Orders accordingly.

Dated and delivered at Machakos this 16<sup>th</sup> day of June 2006.

D.A. ONYANCHA

JUDGE