



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Appeal 9 of 2003

DAVID MUTEGI NJURU.....
.....APPELLANT

VERSUS

PAULINE WANJIRU THUO.....RESPONDENT

JUDGMENT

The respondent, Pauline Wanjiru Thuo, filed suit against the appellant, David Mutegi Njuru seeking the order of the subordinate court to perpetually restrain by means of a permanent injunction the appellant, his successors and assigns from entering or continuing in occupation on part of the parcel of land registered as Gilgil/Karunga Block 1/92 (*hereinafter referred to as the suit land*). The respondent further prayed to be paid general damages for trespass and mesne profits for the period that she had been prevented from using the suit land that is in illegal occupation by the appellant. The appellant filed a defence. He denied that the respondent was the registered owner of the suit land. He averred that the respondent was illegally registered as the owner of the suit land and on his part had filed a suit challenging the legality of the title issued to the respondent. He averred that he had never trespassed onto the suit land but was in occupation of the same in 1985 when the title was issued to the respondent. He urged this court to dismiss the respondent's suit with costs.

After hearing the suit, the trial magistrate found in favour of the respondent. He held that the respondent had established that she was the registered owner of the suit land and her ownership of the suit land could not therefore be challenged by the appellant. He further held that the respondent was therefore entitled to possession of the said suit land. The trial magistrate then declared the appellant to be a trespasser on the suit land. The trial magistrate did not however award general damages for trespass or the mesne profit which was sought by the respondent. The appellant was aggrieved by the said decision of the trial magistrate and duly filed an appeal to this court. On her part, the respondent filed a cross appeal challenging the decision of the trial magistrate in failing to award her general damages and *mesne* profit even after finding that the appellant was a trespasser.

In his memorandum of appeal, the appellant raised several grounds of appeal challenging the decision of the trial magistrate in finding against him. He was aggrieved that the trial magistrate had failed to consider the fact that there existed another suit which had been filed by the appellant challenging the issuance of the title to the suit land to the respondent. He faulted the trial magistrate for finding that the respondent was the legal owner of the suit land without putting into consideration that the appellant had challenged the legality of the said title. He was further aggrieved that the trial magistrate had failed to appreciate the evidence that was adduced before him and therefore reached the wrong conclusion

determining the case in favour of the respondent. He was aggrieved that the trial magistrate had found that the respondent was a first registered owner of the suit land which an irrelevant consideration when determining the dispute between the appellant and the respondent. He was finally aggrieved that the trial magistrate had put into consideration extraneous facts and therefore determined the case in favour of the respondent.

At the hearing of the appeal, Mr. Kimatta learned counsel for the appellant submitted that the trial magistrate determined issues which were not before him and further acted without jurisdiction in deciding a matter which was pending determination before the High Court. He submitted that the appellant had challenged the issuance of the title to the respondent in a case which he had filed in the High Court and the same was pending determination by the High Court. He submitted that the judgment of the subordinate court therefore offended the rules. He took issue with the fact that the trial magistrate had made a determination on the validity of the title issued to the respondent yet the case before the trial court was for trespass. He further submitted that the trial magistrate had erred when he held that the title held by the respondent was a first registration yet there was no evidence which was adduced to support such a finding. He submitted that the title to the suit parcel of land was first issued to a land buying company called Kasambara Farmers Co. Ltd. before it was issued to the respondent. On the cross appeal which was filed by the respondent, he submitted that the same did not have merit and ought to be dismissed with costs because the respondent had not adduced any evidence to support her contention that she ought to be awarded general damages for trespass or *mesne* profits. He therefore urged this court to allow the appeal and set aside the judgment of the subordinate court and substitute it with an order dismissing the respondent's suit with costs.

Mr. Karanja for the respondent opposed the appeal. He submitted that the respondent had established that she was the registered owner of the suit land and was therefore entitled to possession of the same. He submitted that there was a pending suit in the High Court which however did not affect the claim filed by the respondent against the appellant. He submitted that the appellant had objected to the suit being heard by the trial magistrate before another suit which had been filed by the appellant against Kasambara Farmers Co. Limited was heard. However, the objection by the appellant was overruled by the trial magistrate who ordered the suit to proceed to hearing. He submitted that the appellant had not appealed against the said preliminary decision of the trial magistrate, and it was therefore not open to him to raise it again on appeal.

Mr. Karanja submitted that the issue as to whether the respondent was a first registered owner or not was not relevant in the circumstances of the case. What was however relevant is that the respondent was the registered owner of the suit land and was therefore entitled to possession of the suit land until or unless the said title is cancelled. He submitted that the issue in dispute between the appellant and the respondent was actually the fact that the appellant had been allocated land at a different location than where he was then residing. The appellant had refused to take occupation of the parcel of land that he was allocated and had instead insisted on staying on the suit land. As regard the award of damages, Mr. Karanja submitted that the respondent was entitled to be awarded damages as she had been deprived the opportunity of utilizing the same while the said suit land was in the possession of the appellant. He urged this court to dismiss the appeal with costs.

As the first appellate court, this court is mandated to hear the appeal by way of a retrial. This court is required to reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it neither saw nor heard the witnesses as they testified and should therefore make due allowance in this respect. This court is not bound to follow the trial magistrate's finding if it appears that the trial magistrate misapprehended the evidence or applied the wrong principles of the law in arriving at the said decision (*See **Selle –vs- Associated Motor Boat Co. [1968] EA 123 at p. 126***). The issue for determination by this court is whether the respondent proved her case before the trial magistrate's court to the required standard of proof on a balance of probabilities. I have considered the submissions made before me by Mr. Kimatta on behalf of the appellant and by Mr. Karanja on behalf of the respondent. I have also re-evaluated the evidence that was adduced before the trial magistrate.

Certain facts are not in dispute in this appeal. It is not disputed that the respondent is the registered

owner of all that parcel of land known as **Gilgil/Karunga Block 1/92 (the suit land)**. The said parcel of land measures 8.74 hectares or approximately 21 acres. According to the evidence which was adduced before the trial magistrate's court, the respondent claimed that the appellant was illegally occupying part of the suit land measuring approximately four acres. It is the appellant's contention that the respondent was unlawfully registered as the owner of the said portion that he is occupation. He argued before the trial magistrate that he and his family, had been in occupation of the suit land since the 70s. He testified that his father had been buried on the said parcel of land. It was his case that when the titles were issued in respect of the parcels of land which were initially owned by a land buying company called Kasambara Farmers Co. Limited, the officials of the company did not take into consideration that he had extensively developed the said parcel of land before they made the decision to move him elsewhere within the said farm. The appellant was aggrieved by the decision of the land buying company and filed a suit challenging the said decision. From the submissions made before this court, it is apparent that the said suit is still pending hearing and determination before the High Court.

The appellant made spirited attempts to stop the hearing of this case before the trial magistrate on the basis that he was challenging the issuance of the title to the respondent by the land buying company in another suit. His objections were however overruled by the trial magistrate. The respondent did not appeal against the said decision of the trial magistrate overruling his objection. The hearing of this case therefore proceeded before the trial magistrate. The issue for determination before the trial magistrate was simply whether or not the respondent was entitled to the prayers sought in her plaint. The appellant did not file any counterclaim challenging the title that was issued to the respondent.

Having carefully re-evaluated the evidence adduced before the trial magistrate's court and the submissions made before me on this appeal, I am unable to fault the trial magistrate for arriving at the said decision in favour of the respondent that he did. The respondent established that she was the registered owner of the suit land. Although the appellant contended that he had filed another suit before the High Court challenging the issuance of the title to the respondent, the said fact was not a bar to the trial magistrate finding in favour of the respondent on the claim of trespass. In my opinion, the appellant ought to have applied before the High Court for the consolidation of the present suit and other pending suits challenging the issuance of the title to the respondent. He did not do that.

The evidence placed before the trial magistrate was that the respondent was the registered owner of the suit land. The Court of Appeal has held in several cases that once a litigant proves that he is the registered owner of a suit land, he is entitled to judgment and to the enjoyment of the rights of ownership of the said parcel of land (See **Dr. Joseph Ng'ok –vs- Justice Moiwo ole Keiwua & others CA Civil Application No. NAI 60 of 1997 (unreported)** and **Wreck Motor Enterprises –vs- The Commissioner of Lands & Others CA Civil Appeal No. 71 of 1997 (Nairobi) (unreported)**). Although the above decisions relate to titles registered under the **Registration of Titles Act**, their reasoning similarly apply to titles issued under the **Registered Land Act (see Section 27 & 28 of the Registered Land Act)**.

In the present appeal, the respondent established to the required standard of proof that she was the registered owner of the suit land, part of which the appellant is occupying. As long as she is the registered owner of the said parcel of land, she is entitled to possession. The appellant is at liberty to pursue his claim before the High Court but not at the expense of denying the respondent occupation of the suit land. I hold that the trial magistrate properly appreciated the law when he found in favour of the respondent and declared the appellant to be a trespasser. I agree with the trial magistrate that the respondent had not placed any materials before him that could have enabled him to award general damages for trespass or mesne profits. The cross appeal is therefore dismissed.

The upshot of the above reasons is that the appeal filed by the appellant herein lacks merit and is hereby dismissed with costs. Taking into consideration the period that this suit has remained pending before this court, I hereby further order the appellant to vacate the portion of the suit land that he is in illegal occupation of within sixty (60) days of the date of the delivery of this judgment or in default thereof, the respondent shall be at liberty to obtain his eviction therefrom.

It is so ordered.

DATED at NAKURU this 1st day of December 2006.

L. KIMARU

JUDGE