REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELCA NO 18 OF 2017

(FORMERLY NAKURU HIGH COURT CIVIL APPEAL No. 41 OF 2015)

JACKSON WAIGWA MUNDIA.....APPELLANT

VERSUS

PETER MAINA MAINGI.....RESPONDENT

Being an appeal against the Judgment of the Honorable Resident Magistrate P.O. MUHOLI

in the Nyahururu Principal Magistrate's Court delivered on 24th March 2015

in

PMCC No. 148 of 2013

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard and determined by P.O Muholi Resident Magistrate in the Principal Magistrate's Court at Nyahururu, in Civil Case No. 148 of 2013 where the then learned trial Magistrate, upon taking the evidence, delivered his judgment on the 24th March 2015 where he upheld the tenancy agreement entered into between the Respondent and the defunct Municipal Council of Nyahururu.

2. *The Appellant, being dissatisfied with the judgment of the trial Magistrate has filed the present Appeal before this court.*

3. *The grounds upon which the Appellant has raised in his Memorandum of Appeal include:*

i. The learned trial Magistrate erred in law and fact in upholding the tenancy agreement entered between the Respondent and the defunct Municipal Council of Nyahururu whereas the same was legally null and void and incapable of founding a cause of action in law.

ii. The learned trial magistrate erred in law and fact in upholding the minutes of the Town Planning Works and Housing subcommittee meeting held on 19th November, 2012 by Municipal Council of Nyahururu which offended the principles of natural justice in regard to the Appellant.

iii. The learned trial magistrate erred in law and fact in granting reliefs which had not been sought for by the Respondent in his pleadings.

iv. The learned trial magistrate erred in law and fact in ordering the appellant to give vacant possession of the suit premises notwithstanding the fact that he had all the necessary legal documents from the County Government of Laikipia to operate his business therein.

v. The learned trial magistrate erred in law and fact in granting an order of injunction in favour of the Respondent despite his failure to bring himself within the applicable principles.

vi. The learned trial magistrate erred in law and fact in failing to consider the Appellant's Counsel's submissions and thereby proceeded on an incorrect exposition of the applicable law thereby occasioning a miscarriage of justice.

4. The Appellant thus sought for;

i. The appeal be allowed with costs.

ii. That the Respondent's case in the subordinate court be dismissed with costs.

5. The Appeal having been filed on the 21st February 2012 was admitted to hearing on the 30th June 2014

6. The Appellant's submission was to the effect that this being the first appellate court, it was bound by the decision in the case of **Selle vs. Associated Motor Boat Company Ltd, [1968] EA 123, wherein it was expected** to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and come to its own independent conclusion.

7. On the first ground of his memorandum, it was the Appellant's submission that the trial Magistrate upheld the minutes of the Town Planning works upholding the tenancy agreement entered between the Respondent and the defunct Municipal Council of Nyahururu whilst the same was legally null and void and incapable of founding a cause of action in law.

8. In so doing, the Appellant made reference to the provisions of Section 3 of the Law of Contract to submit that although the tenancy agreement was in writing, yet the same was not witnessed, and further that at the time the said agreement was purportedly made, the Municipal Council of Nyahururu had ceased to exist thus making the whole transaction null and void.

9. On the Second ground of the memorandum, the Appellant faulted the trial Magistrate for upholding the minutes of the Town Planning Works and Housing subcommittee meeting held on 19th November, 2012 by Municipal Council of Nyahururu because the same offended the principles of natural justice.

10. It was his submissions that although Article 47 of the Constitution provided for fair administrative action, yet in the above captioned meeting, an adverse resolution was reached against the Appellant in his absence which resolution disentitled him from the use of the stall in dispute and thus denying him a chance to be heard which was against the principles of natural justice. The Appellant relied on the decided case of **Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR** to buttress their position.

11. The Appellant further faulted the Trial Magistrate for granting reliefs which had not been sought for by the Respondent in his pleadings while the law was clear to the effect that the court ought to confine itself to matters that were pleaded only as was held in the case of **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR**.

12. It was the Appellant's submission that the trial Magistrate erred in ordering the Appellant to give vacant possession of the suit premises without considering the fact that he had all the necessary legal documents from the County Government of Laikipia to operate his business therein. That the Appellant had produced the business permits for the years 2008-2013 in respect of the suit stall as well as the rent payment receipts to the county Government of Laikipia to confirm the fact that he had been in actual possession of the suit stall. That with the said evidence adduced and since it was only the County Government which had the only mandate to evict him since it owned the stalls, the Respondent had no right to evict him therein, matters which were not considered by the trial Magistrate.

13. The Appellant also took issue with the fact that despite the Respondent not having satisfied the principles in **Giella vs Cassman Brown**, the trial Learned Magistrate had granted him orders of injunction. It was their submission the Respondent having failed to so establish prima facie case in the first instance, all the other principles ought to have failed. That had the Trial magistrate considered the submission by the Appellant's Counsel, none of the prayers by the Respondent would have been granted. The Appellant prayed for his Appeal to be allowed with costs and that the Respondent's case in the lower court be dismissed wit costs too.

Respondent's Submission

14. The appeal was opposed by the Respondent who submitted that vide a plaint dated the 6th August 2013, the Respondent had sought for declaratory orders over Stall No. 84 Nyahururu bus park, a permanent injunction and any other relief that the court would deem fit and just to grant. The suit was fully heard and judgment delivered wherein the Appellant being dissatisfied, lodged the present appeal.

15. The Respondent gave a brief history of the evidence that was adduced in the lower courts after which he submitted that since the stall in question was owned and managed by the County Government of Laikipia who had offered it on a rental basis to a tenant of its choice who happened to be the Respondent herein, the Appellant herein could not force himself to be the tenant against the Landlord's wish.

16. The Appellant neither applied for allocation of the said stall nor met the conditions set thereafter for him to claim tenancy rights to it. That even after the stall was issued to the Respondent, he did not challenge its allocation meaning that he was contended with the said allocation.

17. The Respondent further submitted that the Appellant neither produced receipts of payment of the rent for the stall nor documents to prove ownership of the same.

18. It was the Respondent's further submission that Section 3 of the Law of Contract dealt with issues on agreement in regard to disposition of interest of land, the matter before court was on the issue of tenancy agreement of a stall and not disposition of interest land. That the subject of agreement between the Respondent and the Defunct Municipal Council of Nyahururu was in regard to renting a stall No. 84 and not disposition of interest of land. Nowhere on the agreement was there a land reference number but a structure known as stall No. 84 and therefore the provisions of Section 3 of the Law of Contract were inapplicable in the present circumstance.

19. Secondly that although the agreement was executed by the defunct Municipal Council, there were transition clauses that allowed the said document to be executed by the officials of the defunct council and when the County Government of Laikipia took over the management of the stall, it still recognized the Respondent as its tenant and continued collecting rent from him.

20. That at the time when the defunct Municipal Council organized the stakeholders meeting that had included the kiosk owners, certain requirements had been set for all upgraded stalls, facts which were within the knowledge of the Appellant who chose not to attend the meeting and not to adhere to the set requirements. He could therefore not claim that he was denied an opportunity to be heard and neither can he claim that he was adversely affected by the allocation of the stall to the Respondent because he was not its occupier prior to its allocation to the Respondent.

21. That further since the Respondent has sought for declaratory orders over stall No 84, a permanent injunction and any other relief fit to be granted, the learned trial magistrate had only declared the Respondent the owner of the stall wherein the Appellant was given 45 days to vacate, the trial court therefore did not issue orders that had not been sought in the plaint.

22. That the principles of **Giella vs Cassman Brown** are only applicable at the interlocutory stage wherein after the learned Magistrate had heard the parties it had made its determination based on the facts presented before it. The respondent submitted that the court had jurisdiction to consider all the facts of the case afresh and to come to its own conclusion. That the appeal ought to fail as it was devoid of any merits.

Analyses and Determination

23. I have considered the record, the judgment by the trial Magistrate, the submissions by learned counsel, the authorities cited on behalf of the respective parties and the law. Conscious of my duty as the first appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial magistrate, of seeing and hearing the witnesses as they testified. ***(See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).*** *I* also remind myself that this Court will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. ***(See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278).***

24. *T*he Plaintiff/Respondent's case in the trial court had been that in the year 2009, the Laikipia County Government were issuing stalls at the Nyahururu bus park wherein the Respondent made an application to be considered for allocation of one of the stalls and even paid Ksh 36,000/=, as evidenced by a receipt herein produced as Pf Exh 1, which was the required amount.

25. That later in the year 2012, a vetting exercise was conducted where he had been considered for stall No. 84 and had signed an agreement for tenancy with the Municipal Council and proceeded to pay the monthly rent. He produced the agreement and receipts as Pf exh 2(a-e)

26. It was his evidence that he had taken possession of the stall in January the year 2013 wherein he had started conducting his business. In February of the same year the Appellant had removed his padlock and replaced it with his on allegation of ownership of the stall wherein the matter was reported first to the police before he sought legal redress.

27. In cross examination, the Respondent had confirmed that he did not have the application letter to the Municipal Council and that prior to the year 2009, he had no license to operate the stall. That the said agreement was not witnessed and that he had been disposed toward the end of March or April 2013 having taken possession of the stall in March 2013.

28. He also confirmed that he had paid rent for January 2013, July 2013, October 2013 and November 2013 for stall No. 84, payments which were not suspended by the Municipal Council.

29. Pw2, the Deputy Administrator Laikipia West County testified that the town planning, works and housing were allocating stalls at the Nyahururu bus park wherein people were to make applications for the same giving reasons and making a payment of a sum of Ksh 36,000/=

30. That a verification committee had sat on the 19th November 2012 where the Respondent was allocated stall No. 84. The said minutes of the meeting were produced as Pf exh 4.

31. That thereafter, there had been a special meeting held on the 17th December 2012 where the report and award of the meeting of 19th November 2012 had been adopted The minutes of 17th December 2012 were produced as Pf exh 5.

32. That vide a full committee meeting of the 17th December 2012 the minutes had been adopted wherein the respondent had been recognized as the tenant of stall No. 84 and it was decided that he pays the Rent.

33. The witness further testified that, he had worked with the Defunct Municipal Council and there had been an upgrading of the bus park stalls which had been called for by the stakeholders where traders currently occupying the stalls had been given a first priority where persons were to pay Ksh 36,000/=

34. That the stalls were owned by the County Government of Laikipia and were to be operated on tenancy agreement where tenants were to be issued with single business permits which did not confer any tenacy rights.

35. That the documents that the Appellant sought to rely on which had been marked as DMFI 2-9 related to kiosk No 84 which was different from bus park stall 84 and therefore he did not understand why the Appellant was in court.

36. It was further his evidence when he was referred to Pf exh 5, that any aggrieved party had a window to appeal to the relevant committee but that they had not received any complaint for the Appellant.

37. When he was referred to DMFI 8-10, the witness confirmed that the documents did not refer to any stall and that Kiosks were different for stalls, further, that it had not been automatic for persons who held the stalls to be allocated the new upgraded stalls. What he was sure of was that stall No. 84 had been allocated to the Respondent herein.

38. The Defence/Appellant's case on the other hand had been that the Appellant herein had run an Agro vet Kiosk No.84 at the Nyahururu bus park since the year 1998 as per the permits produced as Def exh 2-8 for the years 2008-2014 respectively, licenses which had been issued by the Municipal Council Nyahururu.

39. The Appellant had testified that prior to the upgrade of the bus park stalls, there had been wrangles on allocation of kiosks as there had been double allocations. That as per the minutes of the 27th April 2009 which he produced as Df exh 1, member of the public were not allowed to make applications for the Kiosks but the ones in occupation and holding licenses of the year 2008 and 2009 were the ones to be given first priority.

40. He testified that he had given out his kiosk on rental basis but that he had a license to the same and also paid rent. That he had never been called to the vetting committee and therefore was not involved in the allocation of the stalls. That the kiosks had no title, he was a tenant which tenancy had never been terminated.

41. In his cross examination, the Appellant confirmed that the wooden kiosks had been replaced with permanent stalls wherein person were to pay Ksh 36,000/=. That he had not paid the rent for the year 2014 and the rent for 2013 as exhibited in his Df exh 9 did not show the stall number.

42. He also confirmed that although he had heard about the vetting and the vetting committee, he had not fulfilled the conditions set therein and therefore would not have been vetted before meeting the conditions. That he did not challenge the results of the vetting committee. That stall No 84 had been allocated to someone else after he had been brought to court. He reiterated that his kiosk was No. 84 and that he did not apply for the new stall because there was no application to be done.

43. *Considering the evidence adduced in the trial court* I find that the issues that have arisen for determination as being;

i. Whether Respondent and the Municipal Council were proper parties to the Agreement entered into on the 16th March 2013.

ii. Whether the contract between the Respondent and the Defunct Municipal Council of Nyahururu offended the provisions of Section 3 of the law of Contract.

iii. Whether the minutes of the Town Planning Works and Housing subcommittee meeting held on 19th November, 2012 by Municipal Council of Nyahururu offended the principles of natural justice in regard to the Appellant.

iv. Who was the rightful tenant of the suit park stall?

44. A look at the Bus park stall tenancy agreement that was entered into between the Respondent and the defunct Municipal Council of Nyahururu that gave rise to the present situation, one would not miss to note the fact that the same was executed on the 16th March 2013. The question would then arise as to whether the said Municipal Council of Nyahururu had the locus to enter into the said agreement in lieu of the fact that by that time, it had ceased to exist by virtue of Section 134 **of the County Government Act which** come into operation upon the final announcement of the results of the first elections under the Constitution thereby repealing the Local Government Act and transmitting issues that may arise as a consequence of the repeal to be dealt with and discharged by the body responsible for matters relating to transition.

45. Indeed the local authorities became defunct after the 2013 general elections. A new constitutional and statutory framework was put in place. It is therefore necessary to examine what rights and obligations of the local authorities were saved or survived.

46. It is in the public domain that there were several governance and structural changes brought about after the promulgation of the Constitution 2010. Local authorities were done away with and Counties established instead to succeed them. Various statutes provide for the transition.

47. One of the statute that came into operation on the repeal of the Local Government Act was the Urban Areas and Cities Act which I find useful in the present circumstance

48. Section 58 of the said Act provides as follows;

> *Any act, matter or thing lawfully done by any local authority before the commencement of this Act and any contract, arrangement, agreement, settlement, trust bequest, transfer, division, distribution or succession affecting any service delivery, trade of any form, sale or dealings on land or any other matter affecting assets, liabilities or property belonging to a local authority whether moveable, immovable or intellectual property shall, unless and until affected by the operation of this* Act, *continue in force and be vested in a body established by law*.

49. Indeed there was a consensus by parties that the Car park stalls that had once been properties of the Municiple council of Nyahururu were now the property of the County government. To this end, I find that the Respondent and the Municipal Council were proper parties to the

Agreement entered into on the 16th March 2013.

50. The next issue for determination would therefore be whether the said agreement passed the test as provided for under Section 3 of the Law of Contract which provides as follows:

> *No suit shall be brought upon a contract for the disposition of an interest in land unless—*
>
> *(a) the contract upon which the suit is founded—*
>
> *(i) is in writing;*
>
> *(ii) is signed by all the parties thereto; and*
>
> *(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:*

51. *From the above provisions of the law, it is clear that the same relates to agreements that are made for* disposition of interest of land, *which agreement should contain the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract.*

52. *The matter at hand was not based on a sale of land contract but* a reading of the documents clearly created a land lord tenant relationship *where the County council of Nyahururu o*ffered park stalls for rent which offer was accepted, consideration paid, consideration accepted and operation of business started. The business was to be carried on from the time the first monthly rent was accepted up to the period the events leading to these proceedings were set in motion.

53. I have considered paragraph 3 of the said agreement and note that it had stipulated that the stall be held on a periodic basis of one year effect from the date of commencement to the 31st December of every year and shall attract a payment of Ksh 400/= as rent per month. To me this was not a contract under section 3(3) of the Law of contract Act but a controlled tenancy agreement to which the provisions of the Landlord and Tenant Act Cap 301 of the Laws of Kenya would be applicable. (see the case of **Sandeep Singh Benawra v Shimmers Plaza Ltd & Another [2007] eKLR**

54. Indeed evidence had been adduced to the effect that the Nyahururu Municipal Counsel had sought to upgrade the bus park stalls which had been called for by the stakeholders where traders currently occupying the stalls had been given a first priority to own the same upon payment of Ksh 36,000/=. That there had been several meetings wherein interested parties were vetted and a list of the successful candidates had been compiled where an avenue was provided for persons who had complaints as per the minutes of 19th November 2012 Pf exh 4, to appear before the relevant committee to air their grievances.

55. The Appellant in his testimony before court confirmed that he was aware of the fact that the stalls where being upgraded and that person who were in possession were to be given priority. He also confirmed that he was aware of the conditions set for allocation which conditions he did not meet and never filed his grievances to the committee when the stall was allocated to the Respondent.

56. That the Appellant's argument was that he was not part to the proceedings before the committee and therefore his interest on the said stall were affected without giving him a chance of being heard. I find that this argument was misplaced by the evidence adduce in court by none other than the Appellant himself who testified that:

> "*I heard about the vetting, I could not be vetted before meeting the conditions, I did not challenge the results of the vetting committee."*

57. The Appellant therefore cannot be said not to have been accorded fair hearing when he knew of the vetting process but chose not to fulfill the condition and subject himself to the process.

58. In the end, having found as above, I am of the view that the Appellant's appeal must fail, the Respondent having established that he was legally allocated the bus park Stall No 84 and that he is the rightful owner. This Appeal is herein dismissed with costs to the Respondent both in the trial court and in this appeal.

Dated and delivered at Nyahururu this 9th day of July 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE