



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**ELC APPEAL NO. 17 OF 2018**

**SOLOMON MWENDA M'TUERANDU.....APPELLANT**

**-VS-**

**CHARLES NDEGWA MUNGANIA.....RESPONDENT**

**JUDGMENT**

***(Appeal from judgement of D.W Mburu Ag P.M in Meru CMCC No.171 of 2008)***

1. This appeal arises from the judgment of the Ag Principal Magistrate Hon D.W Mburu, delivered on 7<sup>th</sup> June 2013, in Meru CMCC No. 171 of 2008, in which the Learned Trial Magistrate ordered the Appellant to inter alia vacate L.R NO. MERU MUNICIPALITY BLOCK 11/803 and pay the Respondent mesne profits of Kshs 60,000 with interest at court rates from the date of filing suit. The Appellant was aggrieved by the said judgment thus provoking the instant appeal via a Memorandum of Appeal filed in court on 25<sup>th</sup> June 2013, raising the following grounds of appeal;

- a). The Learned Magistrate erred in fact and in law in failing to appreciate that the Respondent was only a tenant of Municipal Council of Meru who are the bonafide owners of the said plot.**
- b). The Learned Magistrate failed in fact and law to consider any of the compelling evidence adduced by the Appellant at the trial.**
- c). The Learned Magistrate erred by failing to find that in fact the Appellant had discharged its responsibility under a lease agreement with the Municipal Council of Meru Council.**
- d). The Learned Magistrate erred in law by awarding costs and mesne profits to the Respondent from an innocent purchaser.**
- e) The Learned Magistrate erred and proceeded on the basis of discredited and unreliable evidence.**
- f). The Learned Magistrate erred by disregarding and failing to take into account credible and reliable evidence presented by the Appellant.**
- g). All in all the Learned Magistrate misdirected himself on matters of both law and fact hence occasioning miscarriage of justice against the Appellant.**

2. On 25.1.2018, the court gave directions for the appeal to be canvassed by way of written submissions. These directions were revived again on 24<sup>th</sup> July 2018. Briefly it was submitted for the Appellant that the Respondent had claimed that he was the owner of the suit property and produced a certificate of lease and certificate of search to that effect. It was further submitted that the Respondent did not own the suit plot as the same had been repossessed by the Municipal Council of Meru who had evicted the Respondent and had given possession to the appellant. Appellant submitted that he is therefore not a trespasser. Consequently, it was submitted that the court erred in law and fact in its findings on the issue of ownership of the suit property. With regard to damages, it was submitted that it was erroneous for the court to award the same since the Appellant was in occupation of the same as a tenant of municipal council of Meru but not as a trespasser. Consequently, the Appellant urged the court to allow the appeal.

3. On the other hand it was submitted for the Respondent that he had proved ownership of L.R NO. Meru municipality Block 11/803 and tendered documents in support thereof namely; lease documents and Certificate of search in respect of the suit property and that the certificate of lease was conclusive evidence of ownership of land by the Respondent and that therefore he had on a balance of probabilities proved that he was the owner of the land. With regard to the allegation that the Appellant was a tenant of Meru County Council, it was contended that the council was a stranger to the land as it had no title to the land and therefore had no protectable interest. Consequently, the

Respondent urged the court to dismiss the appeal.

4. This being a first appeal, the court is enjoined to analyze and re-assess the evidence afresh and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify. See Selle v Associated Motor Boat Co. [1968] EA 123 and Kiruga v Kiruga & Another [1988] KLR 348.

5. I have carefully considered the evidence on record and the rival submissions by the parties. The Respondent in this case contended that the suit property belonged to him. He further produced a certificate of lease and official search to prove his claims. He indeed admitted that in March 2003 he was evicted from the land whereupon he filed a suit at the High Court which ruled in his favour confirming him as the owner. His evidence towards this respect remained uncontroverted throughout the trial. Similarly, there was no evidence that the decision by the High Court confirming him as the owner had been appealed against/overturned.

6. The Appellant on the other hand in his evidence in chief in the lower court stated that the suit property belonged to Meru County Council, and that he had been paying rent to the council up to 2008, when the instant suit was filled. In cross examination he insisted that he knew Meru County Council as the owner and further contended that he was ready to vacate the land if the Respondent proved the land to be his.

7. I find that the certificate of lease is prima facie evidence that Respondent is the registered proprietor of the suit land. Meru County Council could therefore not purport to enter into a tenancy agreement with the Appellant in a property that was not theirs and if they did such agreement was null and void ab initio and of no legal effect. As was held in JANE CATHETHA VS PRISCILLA GITUNGU & ANOTHER 2006 e K.L.R:

***“A thief acquires no right or interest which is transferrable in stolen property. The transaction would be void ab initio and the property is traceable”.***

8. In CHEMEY INVESTMENT LTD VS ATTORNEY GENERAL & OTHERS C.A CIVIL APPEAL No. 349 of 2012 (2018 e K.L.R) it was stated that:

***“The above provisions have consistently been held to guarantee sanctity of title which cannot be defeated except on the specific and serious grounds set out therein. However, we must hasten to add that title to property that is obtained fraudulently or illegally in violation of the provisions of the Statute is and was not sacrosanct and did not enjoy protection of the law under the repealed Act”.***

9. The Learned Trial Magistrate in his judgment while holding that the Respondent had proved on a balance of probabilities that the suit property belonged to him rendered himself thus:

***“On the first issue, my finding is that the plaintiff has on a balance of probabilities proved that he was the owner of L.R No. Meru/Municipality Block/11/803. This he did by producing a certificate of lease and certificate of official search showing that he is the registered owner thereof. This evidence was never rebutted by the defendant. On the second issue, it is admitted by the defendant that he (the defendant) has been in occupation of the suit property since the year 2001 without the plaintiff’s consent. The defendant alleges that he was a tenant of the Municipal Council of Meru. The defendant did not however, show what interest, if any, the Municipal Council of Meru has over the suit property. In absence of any better evidence from the defendant, my finding is that the defendant is on the plot illegally and without the plaintiff’s consent.”***

10. I fully associate myself with the sentiments expressed by the Learned Trial Magistrate in the above passage and I have no reason to fault him.

11. Similarly, with regard to the issue of damages for mesne profits, the same is reasonable and fair in the circumstances. The appellant admitted he was in occupation of the suit property since 2001. Even when he was apparently given a notice to vacate by the Respondent, he declined to do so. I therefore have no reason to interfere with the Learned Magistrate finding on this issue.

12. I must add that I have not seen any record of Appeal in this file. The matter appears to have been in limbo from the time Appellant was denied a stay of execution vide the court’s ruling of 14/8/2013. This is however no longer a matter for consideration in view of the court’s findings regarding the entire appeal.

13. In conclusion, I find that this appeal is without merit and the same is hereby dismissed in its entirety with costs to the Respondents.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 17<sup>TH</sup> DECEMBER, 2018**

**IN THE PRESENCE OF:-**

C/A: Kinoti

Materi for respondent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**