



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
IN THE HIGH COURT AT NYERI
HCCA CASE NO. 77 OF 2012

Originally Nyeri Chief Magistrate's Civil case No. 50 of 2011

FRANCIS WACHIRA GITHUUAPPELLANT

VS

MARGARET NJOKI NGUNYI.....RESPONDENT

JUDGMENT

Francis Wachira Githu, (*hereinafter referred to as the appellant*) sued Margaret Njoki Ngunyi (*hereinafter referred to as the respondent*) in the Chief Magistrates Court at Nyeri in civil suit No. 50 of 2011 claiming that he was the registered owner of parcel of land **No. NYERI/NDATHI/1222** , while the respondent was a wife to the former proprietor of title **No. NYERI/NDATHI/514** which upon subdivision and closure thereof resulted into **NYERI/NDATHI/1222** and **NYERI/NDATHI/1223**. The proceedings herein revolve around title **no. NYERI/NDATHI/1222**.

The appellant further claimed in the plaint filed on 25/3/2011 that the respondent by her own or acting through her employees, servants or agents, has stayed put on the parcel **number NYERI/NDATHI/1222** since the 21st of August, 2009 when the land was transferred and registered in his name as the absolute proprietor of the same, and all his efforts to have her vacate the same have been futile and that the said acts of intrusion have been against the appellant's right of quite possession of his property as guaranteed to a holder of absolute title to land, and further the acts of the respondent and/or her agents or servants have occasioned and continue to occasion the appellant great pecuniary loss on top of mental anguish and anxiety as the respondent has adamantly refused to willfully move out of the land despite her knowledge that the land is lawfully the appellant's and which he is now not able to work and or use the land as he would desire to do. The appellant therefore claimed damages for trespass, a permanent injunction restraining the respondent whether by herself, her agents, servant or otherwise from remaining on, or continuing occupation of the suit property, for an order of eviction of the defendant from the suit land and for vacant possession thereof.

In response to the plaint, the respondent filed a statement of defence whose import was that she stays in **L.R. NYERI/NDATHI/1223** registered in the name of **Ngunyi Munuhe** and was to enjoin the said Ngunyi Munuhe in the proceedings. Moreover, she raised a preliminary objection that the Magistrate court had no jurisdictions to entertain the claim which objection appears to have been abandoned.

During hearing the appellant's case was that his land known as Nyeri/Ndathi/1222 measures 0.3 hectares or 0.75 acres and that he was registered as the proprietor of the land after agreeing with the original owner of land title No. Nyeri/Ndathi/1222 and Nyeri/Ndathi/1223 that came into existence after

closure of Nyeri/Ndathi/514. Initially, Ngunyi Munuhe sold Nyeri/Ndathi/1222 to John Kariuki Gichangi by agreement dated 9/3/1999 whereby he sold Gichangi half an acre but the same was not transferred. The appellant bought Nyeri/Ndathi/1222 from John Kariuki Gichangi but the land was still in Ngunyi Munuhe's name. In July 2009, Ngunyi Munuhe approached the appellant for a loan of Ksh.26,000 because of a financial problem which money he was to pay in kind and that he had another piece of land and when he failed to pay the money he offered to add the appellant 0.2 hectares as long as the appellant paid the costs of survey. The appellant produced the agreement in court as P Exh 1. The transfer was done in August 2009, Ngunyi attended the board and the board approved the transaction and the process went on until appellant received the title deed for the property. He produced the title deed and the certificate of official search indicating that the land was in his name. He claimed that he occupied half an acre of the said land whilst the respondent was occupying the remaining $\frac{1}{4}$ of an acre.

PW2 Wilson Muthee Mbugua testified that he was a friend of Ngunyi and witnessed Ngunyi receive Ksh.26,000 from Wachira. The agreement was that if Ngunyi was not to repay within a certain time he was to repay with an interest of 20% failure of which he was to give the appellant land. Ngunyi did not have money and therefore he added the appellant a shamba. They went to the Land Control Board and the consent was obtained hence transfer effected to Wachira, however he did not get possession of the $\frac{1}{4}$ of an acre.

The respondent on her part gave evidence that she is the wife of Ngunyi Munuhe and stays in his shamba which has not been subdivided. She knows the appellant who also stays on the shamba though they are not related. The land was initially sold to Kariuki Gichangi who later sold it to the appellant. Ngunyi Munuhe sold $\frac{1}{2}$ an acre to Kariuki which is now being occupied by the appellant.

On cross examination she stated that she stays on land No. Nyeri/Ndathi/514 which is not divided. In short, the respondent claims not to be aware of the transactions involving the original suit land.

DW2, was the proprietor of the original land **Nyeri/Ndathi/514**. He claims to have sold Kariuki half an acre who left the land to the appellant who stole more land and has been told to return it. He acknowledges having received Kshs.26,000 which the appellant has not collected. He claims that he would pay the money when the appellant calls for it. He agrees that he went to the board with the appellant to transfer the land without his wife and children but they had only agreed that he transfers $\frac{1}{2}$ an acre.

The learned Magistrate heard the parties and their witnesses and found that the plaintiff does not specify the issue of $\frac{1}{4}$ acre in the plaint hence it appears that the respondent occupies the entire shamba.

The appellant has appealed to this court that the learned magistrate's Judgment made on 27/6/2012 be set aside and in its place be substituted with an order allowing the claim as preferred in the plaint .

The suit against the respondent by the appellant was for damages for trespass and an order for a permanent injunction against the defendant from remaining on or continuing occupation of the suit property or in any other way interfering with the plaintiffs' quiet possession and enjoyment of his land Title No. NYERI/NDATHI/1222 and an order for eviction of the defendant from the suit land and vacant possession thereof. I do hold that in a suit for damage for trespass and eviction, its the claimant's duty to prove that the property is registered in his name as the absolute proprietor. In this regard I do find that though the appellant had not specified the $\frac{1}{4}$ acre in the plaint and that the agreement was vague since it did not specify what was to be paid in kind and did not specify the time lines with which money was to be repaid, the appellant produced a valid title as evidence of proprietorship.

The leaned magistrate considered the facts that the appellant never specified the $\frac{1}{4}$ acre in the plaint and also that the agreement relied upon was vague and found that the appellant had not proved his case on a balance of probabilities as required by the law and therefore dismissed the appellants case with costs to the defendant. She also found that the plaintiff in a way sued the wrong person as DW 2 is alive and should give vacant possession.

The court finds that the appellant was registered as the absolute proprietor of land **No. Nyeri/Ndthi/1222** which parcel of land measures 0.30 Ha subject to the entries in the register relating to the land and to such of the overriding interest set out in section 30 of the Registered Land Act Cap 300 Laws of Kenya (repealed) as may have affected the land at the time of Registration. **Section 30 of the Registered Land Act Cap 300 Laws of Kenya (repealed)** did not list spousal rights as an overriding interest but **section 28 of the Land Registration Act 3 of 2012** provides for spousal rights in land as an overriding interest, however the same cannot be applied in retrospect hence the applicable law is the repealed law. By producing the title deed and certificate of official search indicating that the appellant was registered as the absolute proprietor of the land, the appellant had discharged his burden of proof that he was the absolute owner of the property hence entitled to the orders sought.

The burden of proof shifted to the defendants to prove that land was registered in the names of the appellant fraudulently and that due process was not followed by the appellant in obtaining title deed. The respondent did not do so.

Section 27 of the Registererd Land Act Cap 300 Laws of Kenya (Repealed) conferred absolute interest of land together with all rights and provided as belonging and appointment thereto to a person.

Section 28 of the said Act also provided that:- **“the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-**

- a. **to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**
- b. **unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register;**

provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The meaning of the two sections is that once a person is registered as an absolute proprietor of a parcel of land he is entitled to the entire land subject to the overriding interest.

I agree with Mr. Kimunya on grounds 1 and 2 of the Memorandum of Appeal because the issue before the learned magistrate was not the validity of the title as it was not raised in the pleadings. The appellant was only required to prove that he was the title holder for the court to grant the prayers sought while the Respondent was required to prove that she was entitled to remain on the land by dint of overriding interest, however, the old law did not provide for spousal rights as an overriding interest in land.

The respondent stays on the disputed portion with her children her husband stays in Kieni according to the evidence of DW 1 and therefore I do not agree with the respondent's argument that DW 2 should have been made a party because the orders sought could not have been relevant as he does not reside on the parcel of land.

Lastly this court finds that the respondent did not counter-claim and plead fraud to challenge the appellant's title and therefore, it was not available to claim that the appellant was fraudulently registered in the parcel of land as a proprietor of ¼ acre more than he occupies.

The upshot of the above is that the appeal is allowed and the learned magistrate's judgment delivered on 27/6/2012 is hereby set aside and in the place substituted with an order allowing the claim as prayed in the plaint. costs of the suit in the lower court and costs of appeal are awarded to the appellant.

DATED AND SIGNED AT ELDORET THIS.....DAY OF.....2015

ANTONY OMBWAYO

JUDGE

DELIVERED AND SIGNED IN NYERI THIS 4TH DAY OF FEBRUARY, 2015

LUCY WAITHAKA

JUDGE