



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO.14 OF 2010

BETWEEN

FRANCIS KEGOLI MASILWA

JOSEPHAT ADIKA MASILWA.....APPELLANTS

AND

ROSE MUKAMI

FREDRICK MUKAMI.....RESPONDENTS

**(An appeal arising out of the ruling in the C.M's Court at Kakamega civil case No.500 of 2008
before Hon. P. Okoth R.M on the 25/1/2010)**

J U D G M E N T

Introduction

1. The appeal herein arises from the ruling of P.Okoth Resident Magistrate dated 25/1/2010 dismissing the Preliminary Objection raised by the Appellant in Kakamega Civil Case No.500 of 2008.
2. The Appellant has raised the following pertinent grounds in his appeal:-
 1. THAT the learned Resident Magistrate misdirected himself in ruling that the cause of action in the matter before him was not trespass.
 2. THAT the learned Resident Magistrate erred in failing to rule that he lacked jurisdiction to entertain the case before him in view of the provision of Section 3(1) as read with Section 3(9) of the Land Disputes Tribunals Act No.18 of 1990.
3. The Appellant wants the decision of the learned Resident Magistrate reversed with costs to the appellant. The parties agreed to canvass the appeal herein by way of written submissions. From the record it is only the Respondents who filed their submissions.
4. This Court notes from the record that the Appellants have not been keen to pursue this appeal which was lodged by the Respondents on their behalf. The Respondents submit that their claim was one for breach of contract and that the Resident Magistrates Court thus had jurisdiction to entertain it. They have asked this Court to dismiss the Appellants appeal.

Background

5. The appellants were the plaintiffs in Hamisi PMCC No.500 of 2008. At paragraph 3 of the plaint

dated 06/06/2008, the appellants averred that they were the absolute registered proprietors of the land parcel number Butso/7822. At paragraph 4 of the plaint the appellants averred that their father, one Jairus Masilwa purchased the said parcel of land from one Marko Alule who was the husband and father of the 1st and 2nd respondents respectively. The appellants further alleged that contrary to the terms of an agreement made on the 22/11/2005, the respondents without any excuse or colour of right refused to move out of the said parcel of land hence the proceedings. The appellants prayed for an order of eviction against the respondents. They also prayed for costs of the suit and such other orders as the honourable Court would deem fit and just to grant.

6. In their defence dated 18/01/2009 and filed in Court on the same day, the respondents denied knowledge of any sale of land agreement and the allegation that the appellants were the absolute registered proprietors of the suitland. The respondents also disputed that the appellants were entitled to the reliefs sought in the plaint. At paragraph 10 of the Statement of Defence, the respondents gave notice of a Preliminary Objection on a point of law on grounds that the appellant's suit was an abuse of the process of the Court as it disclosed no cause of action capable of being heard and finally determined.
7. When the appellant's suit came up for hearing before the trial Court on 21/12/2009, Counsel for the respondents raised the Preliminary Objection in terms of the notice dated 19/05/2009. It was contended in the Preliminary Objection that the appellant's suit was premised on breach of contract and therefore the trial Court had jurisdiction to hear it.
8. After carefully considering the rival submissions by both Counsel, and after carefully considering the pleadings, the trial Court was of the view that the claim before it was one based on breach of contract and not trespass. For that reason, the trial Court proceeded to dismiss the Preliminary Objection and to make a finding that it had jurisdiction to hear the case. It is that ruling delivered on 25/01/2010 that gave rise to the instant appeal.

Issues for determination by this Court are:

9. a) whether the Respondents claim was breach for contract and
b) whether the Resident Magistrate in RM CC No.500 of 2008 had jurisdiction to entertain the said suit.
10. In determining the first issue this Court is guided by the Respondents plaint and the Appellants defence. The Respondents claim to be the absolute registered proprietors of land parcel known as L.R. No.BUTSOTSO/SHIKOTI/7822 their father having purchased the same from one MARKO ALLILE the husband and father of the 1st and 2nd appellant's respectively. The Respondents in their plaint claim that the Appellants agreed to move from the suit property and give them vacant possession as per the agreement dated 22/11/2005 but in total disregard to the said agreement they have refused to do so.
11. The Appellants on their part have denied the Respondents claim and demanded strict proof of the allegations. They have stated in their Defence that they have been living and occupying the suit land which is their only livelihood peacefully without any interruptions for over 12 years.
12. From the above brief I do concur with the Residents Magistrates findings that the cause of action herein was solely premised on breach of contract. Trespass has not been mentioned anywhere in the pleadings and this Court cannot construe or make up or even infer what was not intended by the Plaintiff. The plaint is clear and unambiguous as rightly stated by the Resident Magistrate and there is no other interpretation that this Court can give it. Having come to the above conclusion, the first ground of appeal must fail.
13. The second issue for determination is on the jurisdiction of the Resident Magistrates Court. This Court is guided by Section 9(b) of the Magistrate's Court Act Cap 10 Laws of Kenya. Having found that the issue for determination was on contract which is of a civil nature then the Resident Magistrate's Court had jurisdiction to hear and determine the same. It is also worth noting that the Land Disputes Tribunal Act has since been repealed and no longer binding our Courts.

Conclusion

14. For the reasons stated above, I find that this appeal has no merit. The same is hereby dismissed with costs to the respondents.

Orders accordingly.

Judgment delivered, dated and signed in open Court at Kakamega this 3rd day of December 2015.

RUTH N. SITATI

J U D G E

In the presence of:

Mr. Kiveu (absent) for Appellants

Miss Wilunda (present) for Respondents

Mr. Lagat - Court Assistant