



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 82 OF 2010

JEREMIAH MWANZA APPELLANT

VERSUS

DANIEL KAKUI KIOKO RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate's Court at Makueni of Hon F. Nyakundi (P.M) Civil Case No. 42 of 2007 dated 19th May 2010)

(Before B. Thurania Jaden J)

J U D G M E N T

1. The Appellant, **Jeremiah Mwanza** was sued by the Respondent in the lower court, **Daniel Kakui Kioko**. The Respondent's claim was that he was the owner of **Plot No. 134** situate at **Shimo Estate in Wote Town**. The Respondent's claim was that the Appellant had unlawfully trespassed into the said plot, stored materials there and also carried out his business there.
2. It was the Respondent's case that as a result of the aforesaid trespass, he had suffered loss as he could not develop his plot. The Respondent prayed for judgment against the Appellant as follows:-
 - a. **"An order that the Defendant is a trespasser to the suit premises and should be evicted.**
 - b. **The Defendant be permanently barred from occupying or in any way dealing with the suit premises.**
 - c. **Mesne profits at Kshs.2,000/= per month from August 2005 to the date the Defendant is evicted.**
 - d. **Costs and interest on (c) at court rates."**
3. The Appellant denied the Respondent's claim as per the statement of defence dated 2/4/2007. The Appellant also objected to the court's jurisdiction and referred the court to the **Registered Land Act (Cap 300)** and the **Land Disputes Tribunal Act (Act No. 18 of 1990)**.
4. After hearing the case, the trial court entered judgment for the Respondent as prayed. The Appellant was dissatisfied with the said judgment and appealed to this court on the following grounds:-
 - a. **That the Respondent had not produced any letter of allotment or title deed to prove ownership of the plot.**
 - b. **That the evidence adduced that the disputed plot was on a road reserve was not considered.**

- c. **That the disputed plot was a freehold title and the trial court lacked jurisdiction to hear the Respondent's suit which related to trespass to land.**
 - d. **That there was no documentary evidence to prove that one Maitha Nthenge who the trial magistrate wrongly described as Bernard Maithya had obtained the Land Control Board consent to subdivide the land.**
 - e. **That the Respondent had not proved his case against the Appellant on a balance of probabilities.**
 - f. **That the judgment was against the weight of the evidence.**
5. The appeal was canvassed by way of written submissions which I have duly considered.
 6. This being a first appeal, the court is duty bound to re-evaluate the evidence on record and come to its own findings. *See for example Selle –vs- Associated Boat Co. Ltd (1968) EA 123.*
 7. Both parties are in agreement that the plot in question is part of land parcel No. **Makueni/Unoa/464**. It is also not in dispute that the said land parcel was subdivided and the original title deed surrendered to the lands office for purposes of issuance of titles for the resultant subdivisions. The photocopy of the surrendered title deed was produced in court as an exhibit by the Appellant. The land is registered under the **Registered Land Act Cap 300 Laws of Kenya**.
 8. One of the grounds of appeal raised is that the lower court had no jurisdiction over matters of trespass to land and ought to have been heard by the **Land Disputes Tribunal**. The jurisdiction of the **Land Disputes Tribunal** is provided for under **section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990** (repealed) as follows:-

“Subject to this Act, all cases of a civil nature involving a dispute as to-

- a. **The division of, or the determination of boundaries to land, including land held in common;**
- b. **A claim to occupy or work land; or**
- c. **Trespass to land,**

Shall be heard and determined by a Tribunal established under section 4.”

9. **Section 159 of the Registered Land Act (repealed) provides:-**

“Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration, shall be tried by the High Court and where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court, or where the dispute comes within the provisions of Section 3 (1) of the Land Disputes Tribunal in accordance with that Act”.

10. **Section 2 of the Land Control Act (repealed) provides as follows:-**

“In this Act, unless the context otherwise requires –

“agricultural land” means-

- a. **Land that is not within-**
 - i. **a municipality or a township; or**
 - ii. **an area which was, on or at any time after the 1st July, 1952, a township under the townships Ordinance (now repealed); or**
 - iii. **an area which was, on or at any time after the 1st July, 1952, a trading centre under the Trading Centres Ordinance (now repealed); or**

iv. a market;

b. **land in the Nairobi Area or in any municipality, township or urban centre that is declared by the Minister, by notice in the Gazette, to be agricultural land for the purposes of this Act.”**

11. In the case at hand, the land in dispute is situated in **Wote Town** and falls within a municipality. The case fell squarely within the jurisdiction of the trial court.
12. It is clear from both the evidence of the Respondent (PW1) and the Appellant (DW2) that they were talking about the same plot. The two parties are neighbours at their business premises on land parcel No. **Makueni/Unoa/464**. The trial court also visited the site.
13. The Respondent's evidence was that he bought the 10 x 4 x 48 size plot that is in dispute at the price of Kshs.70,000/= from one **Agnes Maitha** (PW4). According to the Respondent, the transfer of the plot was approved by the council and the development plans that he submitted were approved. The Respondent's evidence in respect of the said purchase was corroborated by the vendor (PW4) and her husband, PW3 **Bernard Maithya** whose evidence was that he was the registered owner of the land.
14. The Appellant (DW1) on the other hand testified that he bought the plot in dispute from one **Kyatha Maithya** but the plot turned out to be a road reserve. The Appellant did not deny that he is the one who is in possession of the disputed plot. Indeed the Appellant's evidence is that he carries out his business on the said plot.
15. Although the evidence of PW3, **Bernard Maithya** was that he was the registered owner of the disputed plot, the copy of the title deed No. **Makueni/Unoa/464** which both parties have testified is the plot in dispute, the registered owner is reflected therein as **Maitha Nthenge**. The sale agreement between the Respondent (PW1) and the vendors (PW3 **Bernard Maithya** and PW4 **Agnes Maitha**) names in the sale agreement are reflected as **Agnes Nthamba Maitha** and **Bernard Maithya Nthenge**. The trial magistrate captured PW3's name as per the sale agreement but there seems to be a disparity in the name of PW4 (Agnes). However, the name "**Maitha Nthenge**" which appears on the title deed has not been clarified by the evidence of any of the parties, yet they both claim that the plot in dispute is a subdivision of the land parcel No. **Makueni/Unoa/464**. None of the parties' have given the name of "**Maitha Nthenge**" which is the name on the copy of the title deed as the person they purchased the plot from. The evidence of DW2 **Ambrose Musyoka** the Secretary to **Atangwa clan** shows that the land parcel No. **Makueni/Unoa/464** has had ownership wrangles and the clan tried to intervene. However, the witness did not know the plot number sold to the Appellant. The issue whether the plot is a road reserve or not is however a matter between the owner of the plot and the council.
16. The Plaintiff's claim as per paragraph No. 3 of the plaint relates to "parcel No. 134 situated at **Shimo Estate in Wote Town.**" A party is bound by his pleadings. I will now turn to the evidence relating to the said plot **No. 134**. The Respondent's evidence is that he bought the plot **No. 134** from **Agnes** (PW4). The sale agreement (Exh.2) produced by the Respondent does not reflect the plot number. The application for plot registration and the receipt for the registration (Exh.3a & 3b) do not reflect the plot number although the size of the plot and the Respondent's name are reflected therein.
17. The Respondent also produced a demand notice dated 4/9/08 for payment of rates for plot **No. 134**. The demand notice is addressed to the Respondent. However, the said demand notice on its own without any other document is not conclusive proof of ownership. There must be records at the council reflecting ownership of the plot. No such records have been produced.
18. The District Planning Officer, **Reuben Mwaviulanga** (PW2) pointed out the plot in dispute to the trial court when the site was visited. However, PW2 failed to give the plot number in his evidence and proceeded to produce a development plan (Exh.1) which though approved did not have the plot number reflected therein.
19. Turning to the Appellant's (DW1) evidence in regard to the plot number, his evidence was that plot **No. 134** is in the name of one **John K Maithya** and not the Respondent's name. The Appellant produced a register from the **Wote Town Council** (D Exh.8). The Appellant's further evidence is that the plot in dispute is not in anybody's name.
20. The Town Engineer, DW3 **Charles Mutisya**, testified that plot **No. 134** according to the records

of the council is in the name of **John Maithya**. His further evidence is that the plot in dispute falls within the freehold title held by one “**Kyatha**” which land covers the whole of **Shimo Estate**. However, land parcel No. **Makueni/Unoa/464** which according to the evidence of both the Appellant and the Respondent is for the plot in dispute is in the name of **Maitha Nthenge**.

21. From the foregoing, the evidence adduced by the Respondent has failed to establish the ownership of plot No. 134. On the other hand, the Appellant’s evidence linked plot No. 134 to one **John K. Maithya**.

22. The burden of proving the ownership of the plot in dispute fell on Respondent. The Respondent in my view failed to discharge that burden. The Respondent failed to produce cogent evidence to prove on a balance of probabilities that he owns the plot in dispute. This court’s view is that the person who could have shed light on the plot in question is “**Maitha Nthenge**” who is named as the proprietor in the title deed No. **Makueni/Unoa/464**. If there has been any subdivisions of the said land and if the same subdivisions have been registered by the council, then the correct number of the plot in dispute ought to be reflected in the council records and made known to the owners.

23. With the foregoing, I find merits in the appeal and allow the same with costs.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 3rd day of **October** 2014.

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B. THURANIRA JADEN

JUDGE