



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 55 OF 2011

MUSILI WAMBUA.....APPELLANT

VERSUS

NINI KISAINGU.....RESPONDENT

(Being an Appeal from the Judgment of Senior Principal Magistrate's Court at Kangundo in Civil Case No. 278 of 2009 delivered on 17th March, 2011 by Hon. J.K. Ngeno– SPM)

JUDGMENT

1. This Judgment is in respect of an Appeal filed against the decision of the Kangundo Senior Principal Magistrate in Civil Case No. 278 of 2009. In his Judgment, the learned Magistrate held that the Appellant had obtained a title to the late Ndolo's land by misrepresentation and dismissed his case.
2. In the Memorandum of Appeal, the Appellant has averred that the trial Magistrate erred when he took into account extraneous matters which were not issues for determination before him; that the learned Magistrate failed to recognize that the Appellant was the sole registered owner of parcel of land number Kangundo/Matetani/2075 and that the learned Magistrate failed to appreciate that issues of succession were dealt with in Machakos HCCC No. 37 of 2007.
3. The Appeal proceeded by way of written submissions. The Appellant's advocate submitted that at the hearing, the Appellant produced in evidence a Title Deed in respect of Kangundo/Matetani/2075 as proof of ownership of the land; that the Respondent did not file any claim impugning the Title Deed; that no evidence was adduced to prove that the Respondent's husband owned the suit land and that the Appellant only allowed the Respondent's late husband to live on the suit land temporarily.
4. The Appellant's advocate submitted that the learned Magistrate purported to sit in Appeal of a superior court by faulting the finding in Succession Cause No. 37 of 2007 and that in any case, the Respondent had another parcel of land. The Respondent did not file submissions.
5. In the Complaint that the Appellant filed in the lower court, he averred that he is the registered proprietor of a parcel of land known as Kangundo/Matetani/2075; that the Defendant's husband requested him to allow him stay on the suit premises where he had built his house and that the Defendant had failed to vacate the suit land. The Plaintiff sought for orders of vacant possession.
6. In her Defence, the Respondent/Defendant averred that she has been residing on the suit land since 1972 when she was married to Musili Wambua; that the land previously belonged to Wambua Ndolo and that the Plaintiff dishonestly proceeded to register himself as the sole beneficiary of the Estate of the deceased. The Defendant finally averred that the Plaintiff fraudulently registered himself as the owner of the suit land.
7. The Appellant (PW1) informed the court that he was the registered proprietor of the suit land and that he had only allowed his late brother to live in the house that he (PW1) had constructed on the suit.
8. According to the Appellant, he wanted the Defendant to move to her farm. When the Appellant informed the court that Succession proceedings had been finalized, the court directed that he avails those proceedings in Machakos Succession Cause No. 37 of 2007. However, it would appear that the Appellant never produced the said proceedings when the matter came up for further hearing.
9. The Respondent's witness (DW1) was categorical that he saw the Respondent's late husband put up a house on the suit land; that the Appellant continued "taking care" of the Respondent when the Respondent's husband died and that later on, the Appellant informed them that he had succeeded the Estate of their late father.
10. On her part, the Respondent informed the court that the suit land does not belong to the Plaintiff; that he obtained the title to the suit land secretly from the late Wambua's property and that she has been living in the house on the suit land since 1975.

11. It was the evidence of the Respondent that when her husband died in 1986, the Appellant took care of her until the year 2008 when they differed and that he has sired a child for him who is now an adult.

12. The only evidence that the Appellant produced in evidence is a Title Deed that is dated 8th October, 2009. Indeed, the Plaintiff did not produce the Succession proceedings to show how the suit land was registered in his favour.

13. Although the Succession proceedings in respect of the Appellant's father Estate were not produced in trial, the Respondent did not adduce to show that the said Title Deed was procured fraudulently. Consequently, the said Title Deed is prima facie evidence that the land belongs to the Appellant. Indeed, until it is proved that the Title Deed for a parcel number Kangundo/Matetani/2075 was procured fraudulently or by mistake, the land remains the property of the Appellant.

14. However, the evidence before the trial court shows that the Respondent has been living on the suit land since 1975 with her late husband, who died in 1986. Thereafter, the Appellant continued living with the Respondent as a man and wife until the year 2008. The two even had a child who is now an adult.

15. Having lived with the Respondent in the same house that the Respondent had lived with her late husband since 1975, the Appellant cannot seek to evict the Respondent without informing the court the parcel of land that the Respondent is entitled to. Indeed, it was incumbent on the Appellant to produce the Succession proceedings in respect of his late father's Estate. That is the only way that would have enabled the trial court to ascertain if indeed the Respondent's late husband had also benefited from the Estate of his late father.

16. Although this court faults the reasons that the trial court gave to dismiss the Appellant's Plaint, I find that ultimately, the suit for the eviction of the Respondent from the suit land would still not have succeeded. The Appellant should have made full disclosure of the Succession proceedings in Succession Cause No. 37 of 2007. It is only after such disclosure is made that the Respondent will be in a position to take an appropriate action. In the meantime, she cannot be evicted from the suit property with the benefit of the decision of the court in Succession Cause No. 37 of 2007.

17. It is for the reasons I have given above that I dismiss the Appellant's Appeal with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 8TH DAY OF FEBRUARY, 2019.

O.A. ANGOTE

JUDGE