



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**ENVIRONMENT & LAND COURT**

**ELC APPEAL NO. 51 OF 2017**

ELIAS KIMANI.....1<sup>ST</sup> APPELLANT

STEPHEN WACHIRA.....2<sup>ND</sup> APPELLANT

LIVINSTONE MAGANJO.....3<sup>RD</sup> APPELLANT

**VERSUS**

MARY WAMBUI.....RESPONDENT

*(Being an appeal from the Judgment of Hon. D. O. Mbeja Senior Resident Magistrate delivered on 17<sup>th</sup> November, 2017 in Chief Magistrate's Court at Nairobi Milimani Court in Civil Suit No. 10068 of 2007).*

**JUDGEMENT**

**BACKGROUND**

1. The Appellants are all sons of Daniel Mwangi Muhia who died on 9<sup>th</sup> August, 2006 (Deceased). The deceased and the Respondent were living together on Plot No. 109 at Kasarani Nairobi (Suit Property). The Appellants were also residing on the suit property since early 80's. Prior to the demise of the deceased, the Respondent had separated with him in or around 1997.

2. It is the Respondent's case that the suit property was her property which she acquired on 14<sup>th</sup> December, 1984. The Respondent and the deceased had entered into an agreement that the deceased was to collect rent from the premises on the suit property on her behalf. The Respondent had stated that she put up five shops on the suit property. It is the Respondent's case that this agreement continued even after she separated with the deceased.

3. The Respondent's case is that after the demise of the deceased, the Appellants chased her away from the suit property. This is what prompted her to file a suit against the Appellants in the High Court in 2007. The suit was later transferred to the Lower Court. This is the suit which was heard and determined. The Respondent was granted all her prayers in the suit. This is what triggered this appeal.

**THE APPEAL**

4. The Appellants filed an Amended Memorandum of Appeal dated 6<sup>th</sup> December, 2017 in which they raised the following grounds:-

***1. The Learned Trial Magistrate erred in Law and Fact in arriving at a finding that the Plaintiff had proved her case on a balance of probabilities and awarded the prayers sought for in the Plaintiff.***

***2. The Learned Trial Magistrate erred in Law and Fact when making a finding on the ownership of the suit premises, when there were many glaring contradictions as to the ownership as depicted by the various documents produced in Court.***

***3. The Learned Trial Magistrate erred in Law and Fact when making a finding on the ownership of the suit premises, when there were many alterations on the Plaintiff's share certificate.***

***4. The Learned Trial Magistrate erred in Law and Fact that no evidence was tendered in Court on how the Plaintiff acquired the***

*suit premises on 14<sup>th</sup> December, 1984 and how she acquired a share certificate dated 29<sup>th</sup> November, 1977.*

**5. The Learned Trial Magistrate erred in Law and Fact in failing to arrive at a finding that the Appellant's father, the late Daniel Mwangi Muhia had acquired the suit premises and had also constructed a permanent building on the suit premises in which he was in possession thereof with the Appellants herein.**

**6. The Learned Trial Magistrate erred in Law and Fact in holding that the Appellants were trespassers having taken possession of the suit property after the death of their father, the late Daniel Mwangi Muhia in the year 2006 when the Respondent had in her pleadings sought an order directing the Appellants to account and pay to the Respondent rent collected by them since 1998.**

**7. The Learned Trial Magistrate erred in Law and Fact in holding that the deceased had agreed to collect rent for the Respondent.**

**8. The Learned Trial Magistrate erred in Law and Fact in condemning the Appellants to account and pay rent collected by them since 1998 without due regard to the fact that the Respondent had in her Plaint pleaded that the deceased collected rent and gave the same to her until he passed away in the year 2006.**

**9. The Learned Trial Magistrate erred in Law and Fact in failing to arrive at a finding that the suit should have been filed against the Legal Representatives of the late Daniel Mwangi Muhia since the Plaintiff claimed that she had entered into an agreement with the deceased to collect rent on her behalf.**

**10. The Learned Trial Magistrate erred and misdirected himself on Law and Fact in failing to take into account all the submissions filed in Court and relying solely on the Respondent's submissions.**

### **ANALYSIS**

5. I have carefully considered the grounds of appeal vis-à-vis the evidence adduced before the Lower Court. I have also considered the submissions filed in this appeal by the Appellants and the Respondent. Before I embark on analysing the evidence, it is important to state in verbatim the Respondents prayers in her claim before the Lower Court. The Respondent had sought the following reliefs:-

- a) A declaration that Plot No. 109 of L.R No. 3811/8/4 Kasarani belongs to the Plaintiff and the Defendants are trespassers.**
- b) An Eviction Order against the Defendant directing them to vacate the two shops of the said plot.**
- c) A permanent injunction against the Defendant restraining them from collecting rent in respect of the other three shops.**
- d) An Order directing the Defendants to account and pay to the Plaintiff the amount of rent they have been collecting in respect of the three shops since 1998.**
- e) Costs of this suit.**
- f) Interest on (d) and (e) above.**

6. As a first Appellate Court, I am obliged to evaluate the evidence adduced before the Lower Court and arrive at my own conclusion but of course bearing in mind that I did not see the witnesses testify. The main issue before the Lower Court was determination of ownership of the suit property. Once this issue was determined, the rest were to follow as a matter of course. The Learned Magistrate made a finding that the suit property belonged to the Respondent. The Learned Magistrate granted all the prayers in the plaint.

7. After considering the submissions herein as well as the evidence adduced as against the grounds of appeal raised, the issues which emerge for determination in this appeal are firstly, whether the trial magistrate made a correct finding that the Respondent was owner of the suit property. Secondly, whether the suit ought to have been directed at the estate of the deceased as opposed to the Appellants. Thirdly, whether the Appellants were trespassers who were liable to be evicted from the suit property and lastly, whether the Appellants were liable to account for rent and pay the same with effect from 1998.

8. The Respondent had pleaded in her statement of claim that she acquired the suit property on 14<sup>th</sup> December, 1984. In support of her case, she produced a share certificate issued by Mukinye Enterprises Limited and a letter dated 22<sup>nd</sup> February, 2008 written by Kingara & Co Advocates who are said to have been the Advocates for Mukinye Enterprises Limited. Mukinye Enterprises Limited was a land buying company which sold the plots in the area where the suit property lies.

9. The Appellants argued that the suit property belonged to the deceased who was cohabiting with the Respondent. The evidence in the Lower Court was that the Appellants started living on the suit property in early 80's. As at the time they started staying on the suit property the deceased who was their father was still cohabiting with the Respondent. The deceased and the Respondent differed bitterly in 1997 and the Respondent moved out of the suit property and went and was married by one Wangare. In June 1998, the deceased discovered that the share certificate in respect of the suit property was lost. He made a report at Ruiru Police Station where he was issued with a police abstract.

10. In the Memorandum of Appeal, one of the grounds is that the trial Magistrate was wrong in making a finding that the Respondent had proved that she was the owner of the suit property. I have looked at the share certificate produced by the Respondent. Though the evidence of the Respondent was that she acquired the suit property on 14<sup>th</sup> December 1984, the share certificate was issued on 29<sup>th</sup> December, 1977.

There are alterations just above her name on the certificate with handwritten date of 14<sup>th</sup> December, 1984 with a signature on it. The Respondent tried to explain the anomaly by claiming that the certificate was issued before she completed paying for the Plot and that that is why the date of 14<sup>th</sup> December, 1984 was endorsed on the share certificate.

11. The Respondent did not produce even a single receipt to show that she made any payment towards the purchase of the suit property. On the other hand the Appellants produced documents to show that the deceased had three plots in the area. When Mukinye Enterprises Limited asked the deceased why he was occupying three plots yet he had paid for only one plot, the deceased produced proof that he had paid for three plots. Though this letter did not specify the plot numbers that the deceased was occupying, it is clear that he had paid for three plots. He was asked by Mukinye Enterprises to clear the outstanding balance.

12. The Respondent produced a share certificate with alterations which included insertion of the parcel number by hand. Though these anomalies were brought to the attention of the Trial Magistrate, he did not address his mind to the same. The letter from M/s Kingara & Co Advocates shows that the firm was acting for Mukinye Enterprises Limited but surprisingly, the letter was copied to Githurai Mukinye Plot Owners Self Help Group and the Respondent but not Mukinye Enterprises Limited. There was no evidence called from the said law firm or Mukinye Enterprises Limited.

13. The deceased had been issued with receipts from the County Council of Ruiru bearing the Plot No in respect of the suit property. The receipts were issued in 1994. This is long before the deceased and the Respondent differed. Soon after the deceased and the Respondent differed, the share certificate in respect of Plot 109 suit property got lost. The loss was reported to police and a police abstract issued. The Respondent did not lay any claim to the suit property until after the demise of the deceased. There was no basis upon which the Trial Magistrate would have made a finding that the Respondent was the owner of the suit property. I therefore find that Trial Magistrate was wrong in finding that the Respondent had proved ownership to the suit property. This finding disposes of grounds 1, 2, 3 and 4 of the Amended Memorandum of Appeal.

14. The Trial Magistrate made a finding that the Appellants forcefully moved into the suit property after the death of the deceased for their own benefit. The Respondent's evidence is that the deceased had requested that the Appellants be allowed to reside on the suit property and that he would be paying rent. The Respondent's own evidence is that the Appellants were living in the suit property from the 80's. This is the same evidence that the Appellants gave. There is therefore no basis upon which the Trial Magistrate would have made a finding that the Appellants moved into the suit property forcefully after the deceased died. If the Appellants were not in the suit premises, there is no basis upon which the Respondent would have asked them to account and pay her rent from 1998.

15. There is no evidence at all which was adduced by the Respondent to show that the deceased was paying rent to her. The Respondent claimed that she was demanding rent from the deceased because the deceased had not paid dowry. Though the Respondent claims that she was married to the deceased since 1975, her subsequent averments contained in a further affidavit sworn on 30<sup>th</sup> May, 2008 contradict this claim. In paragraph 5 of the further affidavit, she stated that the only relationship which she had with the deceased emanated from the agreement she had with him to collect rent on her behalf from the suit property.

16. The evidence on record shows that the Appellants were staying in their father's premises. They cannot therefore be called trespassers on a property which belonged to their father. A trespasser is one who enters or remains on the real property of another wrongfully or without the owner's or possessor's authority or consent (**See Merriam Webster online Dictionary**). The Trial Magistrate was wrong in finding that the Appellants were trespassers on the suit property in the face of evidence on record. This finding disposes of ground 6.

17. The Trial Magistrate granted the prayer which sought to compel the Appellants to account for rent and pay the same to the Respondent from 1998. The evidence on record is that the deceased collected rent and remitted it to the Respondent until he died. The Respondent's own pleadings are that the deceased collected and remitted rent to the Respondent until when he died in August, 2006. There was therefore no basis upon which the Trial Magistrate would order that the Appellants account for rent from 1998 which rent had already been paid if at all there was any such rent being remitted as claimed. In any case there was no evidence adduced of how much rent which was being received which would form the basis of the account by the Appellants. This finding disposes of ground 8.

18. The Respondent's claim before the Lower Court was based on trespass. Paragraph 6 of the Complaint clearly showed that the Respondent's claim is that after the demise of the deceased on (Sic) 8<sup>th</sup> August, 2006 the Appellants unlawfully entered the suit property, occupied two shops and let out three other shops and that they have been collecting rent. It is therefore clear that the Respondent did not have to sue the estate of the deceased. I therefore find that ground 9 has no merit.

19. I have looked at the judgment of the Trial Magistrate. The Trial Magistrate did not make any finding that the deceased was collecting rent on behalf the Respondent or not. The Magistrate only observed that whether this was the position or not would not have altered the position that the Respondent had proprietary interest in the suit property. There is therefore no merit in ground 7.

20. The Appellants had prepared comprehensive submissions which if the Trial Magistrate would have given due consideration to the same *vis- a- vis* the evidence tendered, he would not have arrived at the findings which he made.

## **CONCLUSION**

21. It is clear that the Trial Magistrate did not properly direct his mind to the evidence before him. This resulted in him falling into error. I find that the Appellant's appeal has merits. The same is hereby allowed with the result that the Judgement of the Trial Magistrate delivered on 17<sup>th</sup> November, 2017 is hereby set aside and in place thereof, an order is made dismissing the Respondent's suit in the Lower Court with costs. The Respondent shall bear the costs of this appeal.

**Dated, Signed and Delivered at Nairobi on this 10<sup>th</sup> day of April, 2019.**

**E .O.OBAGA**

**JUDGE**

M/s Inimah for M/s Chepngeno for Respondent.

Mr. Mwangi for Mr. Kingori for Appellant.

Court Assistant – Hilda

**E .O.OBAGA**

**JUDGE**