



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC CIVIL APPEAL CASE NO. 11 OF 2018**

**FORMERLY MARIMANTI ELC 01 OF 2013**

**FORMERLY MERU HCCC NO. 213 OF 2013**

**PATRICIA KARIANDIGU.....APPELLANT**

**VERSUS**

**GERALD KIRIMI MUTEGI..... RESPONDENT**

*(Being an appeal from the Judgment/decree of the Honourable Senior Principal Magistrate P. N. MAINA delivered on 6<sup>th</sup> day of December, 2018)*

**JUDGMENT**

1. The Memorandum of Appeal in this Appeal states as follows:

**MEMORANDUM OF APPEAL**

The appellant Patricia Karandigu (sic) being aggrieved/dissatisfied by the judgment of the learned Senior Principal Magistrate Hon. P. N. Maina (Mr.) delivered on 6<sup>th</sup> December, 2018 in Marimanti SPMC Environment & Land Case No. 1 of 2013 appeals to the High Court Environment and land court at Chuka against the whole of the aforesaid judgment and sets out herein below her grounds of appeal;

1. The Learned Senior Principal Magistrate erred in law and in fact for holding and for reasons that he held that the appellant had trespassed on the suit land whereas the respondent did not prove on balance of probability that the appellant had trespassed on the suit land.
2. The Learned Senior Principal Magistrate erred in law and in fact for holding and for reasons that he held that the appellant had trespassed on the suit land whereas according to land surveyor's and land registrar's report the appellant was in on (sic) occupation of land parcel No. Tharaka/Marimanti/3375 and not the suit land.
3. The Learned Senior Principal Magistrate erred in law and in fact for holding and for reasons that he held that the plaintiff's evidence was not challenged whereas the plaintiff denied in her evidence that she had trespassed on the suit land.
4. The Learned Senior Principal Magistrate erred in law and in fact for holding and for reasons that she (sic) held that the appellant did not in her defence deny that she had trespassed on the suit land where the appellant had in her statement of defence categorically denied that she had trespassed on the suit land.
5. The Learned Senior Principal Magistrate erred in law and in fact in deciding the case on the principles applicable in an application for temporary injunction.
6. The judgment was against the weight of evidence.

**REASONS WHEREFORE**, the appellant prays that:

- a) The Senior Principal Magistrate's aforesaid judgment be set aside and the respondent's aforesaid suit be dismissed with costs to the appellant.

b) The appeal be allowed with costs to the appellant.

**Dated at Meru this 19<sup>th</sup> day of December, 2018**

**J.G. GITONGA & COMPANY,**

**ADVOCATES FOR THE APPELLANT**

2. The Appeal was canvassed by way of written submissions.

3. The Appellant's written submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes, if any exist:

**APPELLANT'S WRITTEN SUBMISSIONS**

Your lordship, we submit as hereunder on behalf of the appellant;

Your lordship, the appellant filed this appeal vide a memorandum of appeal dated 19<sup>th</sup> December, 2018 and filed in court on 21<sup>st</sup> December, 2018. The appeal is against the whole of the judgment delivered in the Senior Principal Magistrate's Court at Marimanti E& L Case No 1 of 2013. There are six (6) grounds of appeal, which we submit on as hereunder;

**GROUND 1, 2, 6**

Your lordship, the Learned Senior Principal Magistrate erred in law and in fact for holding and for reasons that he held that the appellant had trespassed on the suit land whereas the respondent did not prove on balance of probability that the appellant had trespassed on the suit land.

Your lordship, according to the appellant and her witness, she is occupation and/or has built a temporary structure in land parcel no Tharaka/Marimanti/2059 (later sub-divided into land parcel Nos 3374 & 3375), which she bought from one Njeru Katheru Mwenda. Further according to the appellant and her witnesses the appellant had not trespassed on the suit land i.e Tharaka/ Marimanti/2424.

Your lordship, the Learned Senior Principal Magistrate erred in law and in fact for holding and for reasons that he held that the appellant had trespassed on the suit land whereas according to land surveyor's and land registrar's report, the appellant was in occupation of land parcel no Tharaka/Marimanti / 3375 and not the suit land (See the said report at page 113 of the record of appeal).

Your lordship, the evidence of the appellant and her witnesses to the effect that she was in occupation and has built a temporary structure in land parcel no Tharaka/Marimanti/2059 (Later sub-divided into land parcels no Tharaka/Marimanti/3374 & 3375) was supported by the said report of the land registrar and land surveyor.

Your lordship, the said report of the land registrar & surveyor was not challenged as the respondent did not produce another survey's report to counter and/or controvert contents of the said report.

Your lordship, the Learned Trial Magistrate decision to the effect that the appellant was trespassing on the suit land had no factual basis in view of the said land registrar's and land surveyor's report.

**GROUND 3 & 4**

Your lordship, the Leaned Senior Principal Magistrate erred in law and in fact for holding and for reasons that he held that the plaintiff's evidence was not challenged whereas the appellant denied in her evidence that she had trespassed on the suit land.

Your lordship, Leaned Senior Principal Magistrate in his judgment alleged that the respondent's evidence was not challenged by the appellant (See page 117 of the record of appeal). The appellant and her witness clearly denied in their evidence that the appellant had trespassed on the suit land (See appellant's list of witnesses and witnesses statement at pages 31-35 of the record of appeal. Further see the appellant's and appellant's witnesses evidence at pages 85-90 of the record of appeal).

Your lordship, the learned trial magistrate had no factual basis on which he held that the respondent's evidence was not challenged.

Your lordship, the learned senior principal magistrate erred in law and infact for holding and for reasons that he held that the appellant did not in her defence deny that she had trespassed on the suit land whereas the appellant had in her statement of defence categorically denied that she had trespassed on the suit land.

Your lordship, the Learned Trial Magistrate in his judgment alleged that the appellant did not in her defence deny that she had trespassed on the suit land (See page 117 of the record of appeal). The appellant in her statement of defence specifically denied that she had trespassed on land parcel no Tharaka/Marimanti /2424 (See statement of defence at pages 23 &24 of the record of appeal).

Your lordship, the Learned Trial Magistrate had not factual and/or legal basis on which he held that the appellant's had not in her defence denied that she had trespassed on the suit land.

## **GROUND 5**

Your lordship, the learned senior principal magistrate erred in law and in fact in deciding the case on the principles applicable in an application for temporary injunction. (See page 118 of the record of appeal).

Your lordship, it is trite law that a party has to prove his case on balance of probability in order to succeed on the prayers that he is seeking. It was therefore legally wrong for the Learned Trial Magistrate to rely on the principles applicable in an application for interlocutory injunction, where an applicant is only required to establish a Prima facie case.

## **CONCLUSION**

Your lordship, in view of our above submissions, we urge the Honourable court to find that the appeal has merit and accordingly allow the same as prayed with costs to the appellant.

The appellant humbly submits.

**Dated at Meru this 16<sup>th</sup> day of April 2019**

**J.G GITONGA & COMPANY**

## **ADVOCATES FOR THE APPELLANT**

4. The Respondent's written submissions are reproduced in full herebelow without any alterations whatsoever, including correction of spelling or any other mistakes, if any exist:

### **RESPONDENT'S SUBMISSIONS.**

Your lordship, we submit as hereunder on behalf of the respondent.

### **INTRODUCTION.**

The appellant instituted this appeal vide a memorandum of appeal dated 19<sup>th</sup> December, 2018 and filed in this Honourable court on 21<sup>st</sup> December, 2018 listing the following grounds of appeal:-

1. THAT the learned senior principal magistrate erred in law and in fact for holding and for reasons that he held that the appellant had trespassed on the suit land whereas the respondent did not prove on balance of probability that the appellant had trespassed on the suit land.
2. THAT the learned senior principal magistrate erred in law and in fact for holding and for reasons that that he held that the appellant had trespassed on the suit land whereas according to land surveyor's and land registrar's report, the appellant was in occupation of land parcel no. **Tharaka/Marimanti/3375** and not the suit land.
3. THAT the learned senior principal magistrate erred in law and in fact for reasons that he held that the plaintiff's evidence was not challenged whereas the defendant denied in her evidence that she had trespassed on the suit land.
4. THAT the learned senior principal magistrate erred in law and in fact for holding and for reasons that she had trespassed on the suit land where the appellant's had in her statement of defence categorically denied that she had trespassed on the suit land.
5. THAT the learned senior principal magistrate erred in law and in fact in deciding the case on the principles applicable in an application for temporary injunction.
6. THAT the judgment was against the weight of the evidence.

On these grounds, the appellant prays that the judgment of the learned magistrate be set aside and the respondent's claim against her be dismissed with costs. In addition, the appellant prays for costs of this appeal.

### **BACKGROUND.**

The respondent, who was the plaintiff in the trial court, instituted this suit against the appellant vide a plaint dated 22<sup>nd</sup> November, 2012 seeking: -

1. An order of demolition of the defendant's structure extending into his land parcel no. **Tharaka/Marimanti/2424** measuring approximately 0.04ha
2. An order of permanent injunction against the defendant to prevent her, her agents and/or any person claiming under her

name from interfering/ trespassing and/or dealing in any way with land parcel no. **N.Tharaka/Marimanti/2424**.

3. Costs of the suit and any other relief the court may deem fit.

The matter proceeded to hearing where the plaintiff summoned the testimony of one witness while the appellant relied on the testimony of 3 witnesses.

In his judgment, the learned magistrate found in favour of the respondent and granted the orders as prayed by the respondent.

The appellant felt aggrieved by the decision of the learned magistrate hence filed this appeal before this Honourable court.

### **ON GROUNDS 1 &2.**

Your lordship, at the hearing in the trial court, it was the testimony of the respondent and his witness that the respondent was the owner of land parcel no. **Tharaka/Marimanti/2424**. He produced a copy of the sale agreement dated 15/02/2010 as P EX 1( see page 101 of the record of appeal) showing that he had purchased the said property from one **Daniel Mutegi Mwenda**. In further support of his case, the respondent adduced a copy of the title deed in respect to the same property as P EX 2 (See page 102 of the record of appeal).

From the above evidence my lord, the respondent proved on a balance of probability that he is the legal owner of land parcel no. **Tharaka/Marimanti/2424**.

My lord, **Section 24 (a) of the Land, 2012 Registration Act as read together with section 25 (1)** provides that the registration of as person as the proprietor of land shall vest in that person the **absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.**

Section 26 of the Land Registration Act further provides that a certificate of title issued to a proprietor shall be taken as prima facie evidence that the person named there under is the absolute and indefeasible owner of the land. The title may only be challenged **where it was acquired fraudulently or illegally through a corrupt scheme.**

While dealing with a similar issue, the court in the case of **Esther Ndegi Njiru & Another V Leonard Gatei (2014)Eklr**, the court interpreted the above provisions of the Land Registration Act as follows:-,

**“...the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must be proved to be party. The second is where the certificate of title is obtained through a corrupt scheme...”**

Your Lordship, the only question that should be before the Honourable court should only be **whether the appellant herein adduced any evidence to challenge the legality of the title held by the respondent or the procedure in which the same was acquired.**

My lord, it is our most humble submission that from the evidence tendered by the appellant and her witnesses, the answer to this question is a resounding no.

Firstly, in an attempt to challenge the respondent's title, the appellant produced a copies of alleged agreements between her and one **Mr. Njeru Katheru Mwenda** as D EX 1 and D EX 2 (see page 109 and 110 of the Record of Appeal). Interestingly my lord, the agreements **did not** mention the property which was being purchased.

Secondly my lord, the respondent produced another copy of an agreement between her and the said Njeru Katheru Mwenda which agreement was made in respect to the purchase of a plot which was to be excised from **land parcel no. 323**. From the report filed by the registrar in respect to the locus in quo, it was noted that land parcel no. Tharaka/Marimanti/323 was registered in the name of one **Augustine Nyaga Kiraithe.**

Further my lord, it was the testimony of the appellant and her witnesses, that the appellant later abandoned the property she had purchased in **land parcel no. 323** and moved to another plot which she was allegedly shown by the alleged seller.

In her testimony, the appellant also produced a copy of a search in respect to land parcel no. **N.Tharaka/Marimanti/2059**. however, as noted in the report filed by the land registrar, this title (**N.Tharaka/Marimanti/2059**) was closed as a result of subdivision.

From the foregoing my lord, it is clear that the appellant did not carry out any due diligence before entering into agreements with someone who was not even the owner of the property she was purchasing. She only moved into the respondent's property after she was tricked by the said **Njeru Katheru Mwenda** and purchased property which did not belong to him.

Thus my lord, from the evidence tendered, it is our most humble submission that not even a shread of evidence was adduced by the appellant herein to show that the respondent acquired title by way of fraud or misrepresentation as contemplated by the Act.

The respondent is thus the **absolute and indefeasible** owner of land parcel no. **Tharaka/Marimanti/2424** making the appellant a trespasser on the said property.

**ON GROUND 3,4 &6.**

My lord, in civil cases , the general rule is that the burden of proof should be on a balance of probability. The law is that he who alleges must prove.

My lord, it is trite that if any party, makes any allegation in his/her pleadings, the onus is always on that party to adduce evidence in support of his/her case. If the party fails in his/her duty, **the averments remain just mere denials and nothing more.**

In its statement of defence, the appellant herein denied having trespassed on the respondent's property. However, the appellant did not adduce any evidence to support her pleadings. The appellant further stated that she was in occupation of land parcel no. **Tharaka/Marimanti/323** and not the plaintiff's land.

In her testimony before the trial court, the appellant and her witness told the Honourable trial court that she was first in occupation of land parcel no. 323 which had been the property she was purchasing from the agreement (D EX 2). She was later informed by the purported seller that in fact, the property did not belong him. She moved out of land parcel no. Tharaka/Marimanti/323 and occupied another property which was reportedly shown to her by the seller.

Despite the averments stated in her statement of defence stating that she was in occupation of land parcel no. 323, the appellant produced a copy of a search for property no. **Tharaka/Marimanti/2059**. As per the expert report filed in the trial court, land parcel no. **Tharaka/Marimanti/2059** was closed as result of subdivision.

Further my lord, as per the expert report filed in the trial court, the property occupied by the appellant is registered in the name of Lydia Kanunkunu Charle. As such my lord, the appellant does not have any locus to institute this appeal claiming property which is not in her name and she does not have any power of attorney to deal with the suit property.

Thus my lord, it is our humble submission that the appellant herein did not provide any evidence in the trial court to support her allegations that she had not trespassed on the respondent's property.

We therefore urge this Honorable court to dismiss this appeal with costs to the respondent.

We humbly pray.

**DATED AT MERU THIS 2<sup>ND</sup> DAY OF MAY 2019.**

**FOR. KAIMBA PETER & CO.**

**ADVOCATES FOR THE RESPONDENT.**

5. I have perused the pleadings and the submissions proffered by the parties in support of their diametrically incongruent assertions.
6. This being a first appeal, this court is entitled to peruse the totality of the evidence contained in the pleadings, filings and the oral evidence proffered in the lower court. This court is, ipso facto, entitled to come to its own conclusions and make a determination informed by what it finds.
7. I have carefully gone through the lower court's file. I find the lower court's judgment to be fully in congruence with the evidence before it. I find that the Hon. Magistrate carefully addressed all pertinent issues. Under ground 1 of the Memorandum of Appeal, the finding that the appellant had trespassed on the respondent's land had been proved on a balance of probability. Under Ground 2 of the Memorandum of Appeal, the surveyor's and Land Registrar's report had not stated that the appellant had not trespassed on the suit land. Under ground 3, what the Learned Magistrate in the lower court stated was that in her oral evidence the appellant had not successfully, on a balance of probability, challenged the assertion by the respondent that she had trespassed upon his land. This applies to ground 4. Paragraph 5 does not affect the fact that the Learned Magistrate took the totality of the evidence before him into account.
8. In the circumstances, this appeal is hereby dismissed.
9. Costs in the lower court and in this appeal are awarded to the respondent.
10. Orders accordingly.

Delivered in open court at Chuka this 13<sup>th</sup> day of November, 2019 in the presence of:

CA: Ndegwa

Mwiti h/b J. G. Gitonga for the Appellant

Respondent and his advocate Absent

**P. M. NJORGE,**

**JUDGE.**