



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU**

**E.L.C.A CASE NO. 15 OF 2016**

**PATRICK RUGENDO IRERI.....APPELLANT**

**VERSUS**

**JOHN NJAGI NJERU.....RESPONDENT**

*(Being an appeal from the judgement of the Honourable M.N. Gicheru Chief Magistrate at Embu on the 14<sup>th</sup> November 2016)*

**BETWEEN**

**PATRICK RUGENDO IRERI.....PLAINTIFF**

**VERSUS**

**JOHN NJAGI NJERU.....DEFENDANT**

**JUDGEMENT**

1. This is an appeal against the judgement and decree of the Hon. M.N. Gicheru, Chief Magistrate, in Embu CMCC No. 193 of 2016 dated 10<sup>th</sup> November 2016 delivered on 14<sup>th</sup> November 2016. By the said judgement, the court dismissed the Appellant's suit against the Respondent. The Appellant was the Plaintiff whereas the Respondent was the Defendant in the said suit.
2. The brief facts of the said suit were that the Appellant as the registered owner of *Title Nos. Kyeni/Kigumo/3890 and Kyeni/Kigumo/3891* (hereinafter described as the suit properties) had sued the Respondent for eviction from the suit properties. It was pleaded by the Appellant that the Respondent was unlawfully occupying the suit properties and had refused to vacate despite request.
3. The Respondent did not enter appearance and neither did he file any defence to the action. By a letter dated 15<sup>th</sup> September 2016, the Appellant's counsel requested for interlocutory judgement against the Defendant and the same was duly entered on 21<sup>st</sup> September 2016.
4. The said suit consequently proceeded for hearing *ex-parte* before the learned Chief Magistrate on 10<sup>th</sup> October 2016 when the Plaintiff testified and closed his case. The suit was thereupon fixed for mention on 17<sup>th</sup> October 2016 whereupon it was fixed for judgement on 14<sup>th</sup> November 2016.
5. The learned trial magistrate duly delivered the judgement on 14<sup>th</sup> November 2016 whereby he dismissed the Appellant's suit. The trial court held that the Appellant had failed to prove his case on a balance of probabilities. The trial court specifically held that in order to succeed, the Appellant had to prove that the Respondent did not enjoy any overriding interest protected by **section 28 (b) and (h) of the Land Registration Act 2012**.
6. Being aggrieved by the said judgement, the Appellant filed a memorandum of appeal dated 13<sup>th</sup> December 2016 raising the following six (6) grounds of appeal;
  - a) *The learned trial magistrate erred in law and in fact when he failed to find that the Appellant proved his absolute ownership of land parcels No. Kyeni/Kigumo/3890 and 389 when he produced the sale agreement dated 7<sup>th</sup> April 2014, certified copies of title deeds and certificate of official searches.*
  - b) *The learned trial magistrate erred in law and in fact when he found that the Appellant had not proved his case on a balance of probabilities against the Defendant who had not entered appearance nor filed defence against the Appellant's claim against him.*

c) *The learned trial magistrate erred in both law and in fact by finding that the Respondent's illegal occupation of the Appellant's land parcels No. Kyeni/Kigumo/3890 and 3891 amounted to an overriding interest as provided for under section 28 of the Land Registration Act No. 3 of 2012.*

d) *The learned trial magistrate erred in law and in fact by finding that the Respondent was protected by the law.*

e) *The learned trial magistrate erred in law and in fact by dismissing the Appellant's case against the Defendant whereas the Appellant's evidence was not challenged by the Respondent.*

f) *The trial magistrate erred in law and in fact by failing to find that the Appellant had proved his case on a balance of probabilities that the Defendant was in illegal occupation of his land parcels No. Kyeni/Kigumo/3890 and 3891 and therefore enter judgement in favour of the Appellant.*

7. The Appellant therefore sought that the judgement in Embu CMCC No. 193 of 2016 be set aside; that the appeal be allowed in its entirety; that he be awarded costs of the appeal and of the Magistrate's Court.

8. That when this appeal was listed for mention on 4<sup>th</sup> October 2017, the court directed the Appellant to serve the Respondent with the record of appeal within 30 days. The appeal was ultimately listed for hearing on 17<sup>th</sup> January 2018 when only the Appellant's counsel appeared. The Respondent did not attend court despite service. The Appellant had by then filed written submissions and wished to rely entirely thereon. The court consequently fixed the appeal for judgement on 28<sup>th</sup> June 2018.

9. The court is aware of its duty as a first appellate court. The court is obligated to re-look at the entire evidence before the trial court, make its own evaluation and draw its own conclusions thereon. The guiding principles were summarized in the case **Selle Vs Associated Motor Boat Co. Ltd & Others [1968] EA 123 at 126** as follows;

**“...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”**

10. The court has perused the pleadings and the record of proceedings before the trial court. The Appellant's case was fairly straight forward. He contended that he was the registered proprietor of the suit properties hence entitled to enjoy all the rights which pertain to such ownership. He, therefore, wanted the Respondent, who was in occupation thereof, to be evicted.

11. The Appellant was the sole witness at the trial. He produced certificates of official search for the suit properties to establish his ownership. He later on produced certified copies of the relevant title deeds as directed by the trial court. His evidence at the trial was not challenged by the Respondent since the Respondent did not participate in the proceedings.

12. As indicated before, the learned trial magistrate held that the Appellant had failed to prove his case on a balance of probabilities and dismissed his suit. That is what provoked the instant appeal. The court has evaluated the evidence before the trial court. It is clear from the record that the Appellant's evidence was not challenged at the trial. The Appellant produced certificates of official search and certified copies of title deeds for the suit properties. In my view, the learned trial magistrate erred in law in holding that the Appellant had not proved his case. There was adequate evidence on record in support of the Appellant's case which was not controverted. That disposes of the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> grounds of appeal.

13. The 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal fault the trial magistrate for holding that the Respondent had an overriding interest over the suit property which was protected under **section 28 of the Land Registration Act 2012**. The court has considered those grounds in light of the pleadings and evidence on record. The court is unable to find any averment by the Respondent that he had any overriding interest either on account of trust or adverse possession. Similarly, there was no evidence on record to support the existence of either of those interests.

14. In the cases of **George Omondi Vs Guilders International Bank Ltd [2015] eKLR** and **Dakianga Distributors (K) Ltd Vs Kenya Seed Co Ltd [2015] eKLR**, it was held that parties were bound by their pleadings and that a court should not base its decision on a ground which was neither pleaded nor canvassed by the parties.

15. Under **Order 15 Rule 1 of the Civil Procedure Rules**, an issue arises when one party makes a material proposition of fact or law which is denied by the other party. **Order 15 Rule 2** which deals with the framing of issues provides as follows;

**“2) The court may frame the issues from all or any of any of the following materials –**

**a) Allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;**

**b) Allegations made in the pleadings or in answer to interrogatories delivered in the suit;**

**c) The contents of documents produced by either party.”**

(Emphasis added)

16. This court is of the view that the question of the Respondent having an overriding interest over the suit properties was not a legitimate issue for decision. It was not raised, pleaded or proved by the Respondent. In my opinion, the learned trial magistrate erred in basing his judgement on an issue which was not pleaded nor canvassed by the Respondent. In the circumstances, the 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal are merited and the same are allowed.

17. The upshot of the foregoing is that the court finds merit in the appeal. All the grounds of appeal are hereby allowed. Consequently, the appeal is hereby allowed in the following terms;

- a) The judgement of the learned Chief Magistrate in Embu CMCC No. 193 of 2016 dated 10<sup>th</sup> November 2016 is hereby set aside.
- b) The Appellant's suit in Embu CMCC No. 193 of 2016 is hereby allowed as prayed in the plaint.
- c) The Appellant is awarded costs of the appeal and costs of the suit in the Magistrate's court.
- d) The eviction of the Respondent shall be conducted strictly in accordance with the applicable law including the **Land Laws (Amendment) Act 2016**.

18. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 28<sup>th</sup> day of JUNE, 2018.**

In the presence of Ms Muriithi holding brief for Ms Muthoni for the Appellant and in the absence of the Respondent.

Court clerk Mr Muinde.

**Y.M. ANGIMA**

**JUDGE**

**28.06.18**