



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MERU**

**ELCA CASE NO. 61 OF 2015**

**SAID LIBAN.....APPELLANT**

**VERSUS**

**IRENE WANJIKU WAMUYU.....RESPONDENT**

**(An appeal from the judgment of Hon. Joan M. Irura, Senior Resident Magistrate in SPMCC No. 6 of 2012 Delivered at Isiolo Cm's court on 8<sup>th</sup> December, 2015)**

**JUDGEMENT**

**INTRODUCTION**

The Appellant SAID LIBAN who was the Defendant in the case before the Lower Court had been sued by the Respondent who was the Plaintiff before the magistrate court for an order of permanent injunction restraining him from interfering with plot No. 276 Bula Pesa and an order for demolition of illegal structures. The Plaintiff was also seeking costs of the suit. In her plaint at paragraph 3, the Plaintiff averred that she was given the suit property by one M'Murithi M'Iburi who is her father as a gift. The Defendant merely denied the Plaintiff's claim and put him to strict proof thereof.

**PLAINTIFF' S CASE**

The Plaintiff in her evidence stated that Plot No. 276 was given to her by her father as a gift. She stated that on 22/04/2010, her father called her and they proceeded to one Ibrahim who was County Council of Isiolo Engineer. She paid him Kshs.3000/= for survey. They then proceeded to the County Council of Isiolo where they found one Habiba who was the County Council Clerk and one Satur who is an Engineer with the County Council. Habiba told them to take her to the plot so that she could establish if the plot belonged to her father. They then proceeded to the suit plot where they met one Liban Saidi whom her father had given the suit plot to be looking after for him. He was asked about the plot and he confirmed that it belonged to her father. Thereafter they went to the County Council Offices where Habiba told them to go and have the plot legally transferred into her name through an advocate. They went to a firm practicing in the name and style of Ombati & Co. Advocates and had a sale agreement drawn.

Thereafter, they went to the County Council Offices where her father paid all the outstanding rent. They also paid clearance fee of Kshs.1600/= and Kshs.12,000/= transfer fees. On 14/12/2011 she went to the suit property and found one house had been demolished and a kiosk had been put up. She went and made a report at the police station. She also reported to the County Council Offices.

On cross-examination the Plaintiff said that the plot belongs to her after her father transferred it to her as a gift. However, she does not know how her father acquired the plot. She also said that the plot was being occupied by said Liban. When they visited the plot, they found one Said Liban. She said that she did not see Liban Wario share as he was said to be in Nairobi. He only saw Said Liban when her father took her to the plot she has been paying rent to the County Council of Isiolo. He did not also sue Liban Wario share. She sued the one she found. The court directed that the suit property be visited where the following was noted:

- The suit plot had four (4) rooms
- It is surrounded by euphorbia trees
- There is one side with a timber house which Plaintiff stated was not put up by her father
- She said that she has never occupied the timber house in the plot.
- The Plaintiff stated that the Defendant's father was collecting rent from the tenants in the plot and giving to her father.
- She has never been paid any rent since she took over the plot.

**DEFENDANT'S CASE**

The Defendant stated that he was born in the suit property and that he lives there with his family. He said that the plot is in the name of Liban Wario Share who is his late father who passed away in the year 2013. He produced receipts in respect of payment of rates. He also produced a survey map for the suit plot No. 2755. The Plaintiff further stated that in the year 1992 the County Council of Isiolo asked them to avail ownership documents as prove of ownership of the suit property by his father. He produced the letter as D. Exhibit No.3. They paid Kshs. 8,500/= as survey fee which he also produced as D. Exhibit No. 4. He said he does not know Murithi M'Iburi. He said that the plot belong to his late father.

On 8/12/2015, the court rendered its judgment in favour of the Plaintiff. The Defendant was aggrieved and filed this appeal on the following grounds:

- 1. THAT the learned Senior Resident Magistrate erred in granting orders of injunction against the Appellant when the Respondent had not satisfied the conditions upon which such orders could be granted.**
- 2. THAT the Learned Senior Resident Magistrate erred in law and in fact in finding that the suit land Plot No. 2755 Bula Pesa belongs to the Respondent in the absence of any documentary to prove or even any other evidence to support her claim.**
- 3. THAT the Learned Senior Resident Magistrate erred in law and in fact in failing to hold that the suit land/plot No. 2755 belongs to one Liban Wario Share (deceased) father to the Appellant and that the Appellant was wrongly sued without any letters of Administration first being sought as is required in law.**
- 4. THAT the Learned Senior Resident Magistrate erred in law and in fact in failing to find that plot No. 276 Bula Pesa and Plot No. 2755 Bula Pesa are two distinct plots and the Respondent had no lawful claim over Plot No. 2755 Bula Pesa.**

#### **APPELLANT'S SUBMISSIONS**

The Appellant submitted that during the trial of the case, the Respondent failed to produce ownership documents in support of her case. The Appellant further urged that the Respondent did not call M'Murithi M'Iburi who transferred the land to her as a witness to corroborate her evidence. It was further submitted that the Appellant is in actual possession and occupation of the plot in dispute as confirmed by the court when it visited the scene. The Appellant also submitted that there are houses in the suit property which he occupies with his family and which were constructed by the Appellant's father. In conclusion, the Appellant submitted that the Respondent failed to produce rent and rates receipts to show that she is the owner of the suit property.

On the issue of applicable law, the Appellant submitted that the Respondent did not prove his claim as against the Respondent on the required standard as set out in the celebrated case of **Giella –Vs- Cassman Brown Co. Ltd (1973) EA 358**. He cited the case of **Trusted Society of Human Rights Alliance –Vs- Mumo Matemo & 5 Others 92014) eKLR**.

#### **RESPONDENT'S SUBMISSION**

The Respondent did not file any submissions within the time directed by the court.

#### **ANALYSIS, RE-EVALUATION AND DECISION**

I have analyzed and evaluated the evidence adduced before the trial court and applicable law. I have also looked at the submissions by the Appellant. The plot in dispute as claimed by the Plaintiff is No. 276 Bula Pesa within Isiolo. According to the averments contained in the plaint, the plot was given to the Plaintiff in the year 2010 by one M'Murithi M'Iburi as a gift. The Respondent/Plaintiff did not call the said M'Murithi M'Iburi as a witness to confirm the same. The receipts produced by the Plaintiff/Respondent being rent for plot No. 276 issued on 24/5/2010 are in the name of M'Murithi M'Iburi who was not called as a witness. The Plaintiff/Respondent also failed to call a witness from the County Council of Isiolo to confirm from their records the actual owner of the plot on the ground. The Plaintiff also failed to call a surveyor to produce a map showing that the plot she was claiming in paper is actually what is on the ground. The court visited the scene where they find that there were four (4) rooms in one side and another timber house on the other side. The Plaintiff said that the house was not built by her father M'Murithi M'Iburi. The Plaintiff stated that her father was collecting rent from the rooms. However, her father was not called to confirm that position. The rule of evidence is that he who alleges must prove. The Plaintiff said that she was given plot no. 276 by her father. She did not call her father as a witness. She did not also call any witness from the County Council of Isiolo to confirm that indeed she was the allottee of plot No. 276 from their records. To the contrary, the evidence produced shows that the Defendant's father one Liban Wario Share is the allottee of parcel No. 2755. Several rent receipts produced shows that the said receipts were issued to him in the year 2011, long before the Plaintiff/Respondent allegedly acquired the same. The visit to the scene also confirmed that the Defendant was living in the suit property with his family.

In my respective view, the evidence adduced before the Learned Senior Resident Magistrate was in favour of the Defendant and not the Plaintiff. In the upshot, I find and hold that the appeal is merited and the same is hereby allowed as follows:

- 1. The judgement of the Hon. J.M Irura Senior Resident Magistrate delivered on 8<sup>th</sup> December, 2015 and all consequential orders be set aside.**
- 2. Each party to bear his own costs of this appeal and the lower court case.**

**DATED AND SIGNED THIS 18<sup>TH</sup> DAY OF OCTOBER, 2018.**

**E. C. CHERONO**

**ELC JUDGE - KERUGOYA**

**DELIVERED IN OPEN COURT AT MERU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2018**

**LUCY N. MBUGUA**

**ELC JUDGE - MERU**

**In the presence of:**

Maamu for appellant

Muthamia H/B for Nyenyire

C/A: Janet/Galgalo