



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS

CIVIL APPEAL NO. 95 “A” OF 2011

GRACE MWIKALI NZIOKA.....APPELLANT

VERSUS

MICHAEL KIMANTHI.....RESPONDENT/DEFENDANT

(Being an Appeal from the Judgment of Kangundo Senior Principal

Magistrate’s Court in Civil Case No. 207 of 2010 delivered on

23rd March, 2011 by Hon. S.N. Mwangi -(DMII - Prof))

JUDGMENT

1. This Judgment is in respect to an appeal arising from the Judgment of the lower court.
2. In the lower court, the Appellant sued the Respondent seeking an order restraining him from interfering with parcel of land number Kangundo/Isinga/1054. The lower court dismissed the Plaintiffs’ claim because the Defendant had put on the suit land a permanent house.
3. In the Memorandum of Appeal, the Appellant has averred that the trial magistrate did not consider that the Plaintiff is the registered proprietor of the suit land; that the magistrate erred by considering the suit property as family land and that the magistrate erred by introducing extraneous matters.
4. The parties agreed to argue the appeal by way of written submissions.
5. The Appellant’s advocate submitted that the trial court ought to have taken into account the fact that the Appellant’s title was never challenged; that the Appellant does not hold the title in trust for the Respondent and that a title document is conclusive proof of ownership.
6. The Appellant’s counsel submitted that parties are bound by their pleadings and that there was no claim in the Defence that the Appellant’s title was obtained fraudulently.
7. In three (3) short paragraphs, the Respondent’s advocate submitted that the Respondent was allowed on the land by the Appellant where he constructed his house and that the appeal seeks to introduce new issues which were not ventilated before the trial court.
8. As I have already stated, the Appellant sought for a permanent injunction as against the Respondent in

respect to the suit property.

9. In his evidence, the Appellant, PW1, informed the court that he acquired the land by inheritance from his late mother and father; that she has lived on the suit property since she was born in 1947 and that she was in possession of a Title Deed.

10. PW1 informed the trial court that the Defendant put up a house on her land in the year 2009 and should be evicted.

11. The Respondent, DW1, stated that the Appellant is his step-sister; that the Appellant changed the title documents into her name in 1991; that it is the Appellant who showed him where to build his house and that he has build on the suit property a two roomed bricks house, a kitchen and a bathroom.

12. DW2 stated that she was present when the Appellant gave to the Respondent a portion of the suit land to put up a house.

13. The Appellant's neighbour, DW3, informed the trial court that it is the Appellant who allowed the Respondent to put up a house on the suit property.

14. According to DW3, after one (1) year, the Appellant sought to evict the Respondent from the suit land.

15. The only document that was produced in evidence is the Title Deed which was issued on 1st August, 1994 to the Appellant.

16. Other than stating that the Appellant, who is his step-sister, invited him on the land, the Respondent did not adduce any evidence to challenge the assertion by the Appellant that she is the registered proprietor of the suit property.

17. If the Appellant invited the Respondent on the land, then he is either a licensee or a lessee on the land.

18. I say so because under Section 27 of the Registered Land Act (*repealed*), the registration of a person as the proprietor of land vests in that person the absolute ownership of the land together with all rights and privileges.

19. A Title Deed issued pursuant to the provisions of the Registered Land Act can only be defeated if it is proved that the same was procured fraudulently or by mistake.

20. The only other instance that a Title Deed can be defeated is if it is shown that the registered proprietor is holding the land in trust for someone else, or where one pleads that he is entitled to the land by way of adverse possession.

21. The Respondent neither pleaded nor proved the fact that the Appellant procured the title deed fraudulently or by mistake. The Respondent did not also allege or prove that the Appellant was holding the suit property in trust for her or that he is entitled to the suit property by way of adverse possession.

22. The evidence that was presented before the court points to the fact that the Respondent was merely a licensee, and could therefore be evicted from the suit land by the Appellant upon being served with a notice. That is what the Appellant did when she served the Respondent with the demand letter of 16th September, 2010.

23. In the circumstances, it was erroneous for the trial court to have dismissed the Appellant's claim only on the basis that the Appellant allowed the Respondent on the land.

24. For those reasons, I allow the Appellant's Appeal with costs and set aside the Judgment of the subordinate court and substitute it with an order allowing the Plaintiff's Claim in Kangundo PMCC No. 207 of 2010

as prayed.

DATED AND DELIVERED AT MACHAKOS THIS 17TH DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE