



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

CHUKA ELC CA CASE NO 20 OF 2017

FORMERLY MERU HCA CASE NO.41 OF 2014

FORMERLY CHIEF MAGISTRATE’S COURT AT CHUKA CIVIL CASE NO. 131 OF 2013

JUSTIN GITONGA MBAKA

**E M (MINOR) APPEALING THROUGH HIS NEXT FRIEND/MOTHER F
G.....APPELLANTS**

AND

**MISSION TO HEAVEN CHURCH THRO’ ITS REGISTERED TRUSTEE’S CHAIRMAN,
SECRETARY AND TREASURER RESPECTIVELY)**

PETKEY SHEM MIRITI.....1ST RESPONDENT

ANNE KWERA MIRITI.....2ND RESPONDENT

ISAIAH NJERU TITUS.....3RD RESPONDENT

RULING

1. This is an Appeal from the Ruling of the acting Principal Magistrate’s Court of Kenya at Chuka dated 16th day of October, 2014.

2. In their Memorandum of Appeal, the appellants appeal against the whole decision made by the Honourable Magistrate on the following grounds:

1. THAT the learned magistrate erred in law and fact and/or misdirected himself in law and in fact by finding that the Respondents deserved an order of temporary injunction pending the hearing and determination of the suit whereas the prayer for permanent injunction was not anchored in the plaint despite clear and express authorities supplied by the appellants thereof.

2. THAT the learned Magistrate erred in fact and law by failing to recognize that the agreement supplied by the Respondent failed to comply with mandatory provisions of Section 3 of the Contract Act, laws of Kenya.

3. THAT the learned magistrate erred in law and fact in failing to recognize that the agreement between the 1st appellant and the 1st respondent had been frustrated by the transfer of land to the

name of the 2nd and 3rd appellants therefore the only remedy available to the Respondents is refund of purchase price together with compensation for developments.

4. THAT the learned magistrate erred in law and fact and or misdirected himself in law and facts by finding that the Respondents had proved a prima facie case against the Appellants.

5. THAT the learned magistrate erred and/or misdirected himself in law and in fact in finding that the Respondents had proved their case against the 2nd appellant (minor) without appointing a guardian ad litem on his behalf and against clear and express provisions of Order 32 Rule 3 of the Civil Procedure Rules, 2010.

6. THAT the learned magistrate erred in law and facts by ordering the 2nd Appellant to pay costs where no guardian ad litem has been appointed on his behalf to safeguard his interest.

7. THAT the learned magistrate erred and/or misdirected himself in law and in fact by misinterpreting and or failing to comply with the principles of *stare decisis* in that the decision in the case of **TIMOI FARMS & ESTATE LTD VS. KIPNGENO A. NGENY (2010) eKLR** is binding and authoritative in this case.

3. They pray for orders that:

A. The Appeal be allowed and the orders made by the Learned Magistrate be set aside.

B. The costs of the Appeal be granted to the Appellants against the Respondents.

4. According to their submissions the appellants main arguments in support of their appeal are:

a) The Learned Magistrate erred in facts and law by granting an order of temporary injunction when an order of permanent injunction had not been anchored in the plaint. They argue that grant of a temporary injunction was untenable because the plaintiff was seeking for a refund of the purchase price. They say that the respondent wanted to remain on the land pending determination of the suit whereas he sought a refund of the purchase price and this would cause the appellant great harm and prejudice. They referred the court to the cases of **Kihara Versus Barclays Bank [2001] 2 EA** and **Timau Farms & Estate Limited Versus Kipngeno A. Ngeny [2010] eKLR**.

b) The respondent entered occupation of the Appellants land by force of a non-existing contract of sale of land contrary to section 3(3) of the Contracts Act, Cap 23. They argue that a contract does not grant ownership and laconically aver that there never existed a legally binding contract as concerns parcel **No. MAGUMONI/THUITA/3175**. They further assert that granting of the suit land to the appellant without proof of ownership was tantamount to interfering with a registered title document contrary to Article 40 of the Constitution and Sections 24, 25, 26, 27 and 28 of the Land Registration Act 2012.

c) The magistrate had ignored the principles of *stare decisis* that a lower court shall be bound by decisions of a superior court.

5. I have considered the pleadings proffered by the parties in support of their respective propositions. I have also considered the submissions filed by the appellants.

6. I find that the appellants are economical with the truth when they say in their submissions that the respondent was only seeking refund of the purchase price. We need not reinvent the wheel. In the plaint which spanned this appeal, the plaintiff prays this Honourable court to enter judgment against the defendants for:-

(a) Specific performance and compel the defendant to effect transfer as it is in the land control board consent or in the alternative the executive officer of the court do so.

(b) In alternative (sic) pay all the developments effected by the plaintiff in the said portion together with the built church as per valuation and refund the purchase price together with interest at court rate.

7. Issues concerning whether there was a contract or if it existed whether it was valid are issues to be decided by the lower court as the trial court. I do not find any merit in my delving into those issues. Many of the issues raised in paragraphs 2, 3, 4, 5 and 6 would be best considered by the trial court after hearing of the suit.

8. I do note that in ground 3 of their Memorandum of Appeal, the appellants state:

“That the learned magistrate erred in law and in fact in failing to recognize that the agreement between the 1st Appellant and the 1st Respondent had been frustrated by transfer of land to the names of the 2nd and 3rd appellants therefore the only remedy available to the Respondents is refund of purchase price together with compensation for developments.”

9. This is clear evidence that there was an agreement in existence. It is instructive and not controverted that the 1st plaintiff transferred the suit land to the 2nd and 3rd appellants.

10. Regarding a grant of temporary injunction, I do not agree that the Hon. Magistrate would only be entitled to grant a temporary injunction if there was a prayer for permanent injunction. There are suits in which prayers for permanent injunction are craved for such as in suits for eviction. This was not a proper suit for a prayer for permanent injunction to be craved for. The appellants are not taking into account that no one superior court’s decision fits the facts and circumstances of all suits being heard by the lower courts. It seems to me that the Hon. Magistrate considered the authorities proffered and found that they did not suit the circumstances of this case.

11. I find that the appellants have not demonstrated how the learned Hon. Magistrate refused to be bound by decisions of superior courts. I opine that the authorities given by the appellants have been proffered out of context. Indeed if courts embraced the assertions of the appellants this would by a sleight of hand torpedo courts’ approach to interlocutory injunctions as it is known today. I unequivocally state that it is not in all cases that for an interlocutory injunction to be granted, there must be a prayer for a Permanent Injunction in the plaint.

12. I find fault with the appellants claim that the respondents entered occupation of the appellants land by force. They admit in the Memorandum of Appeal at paragraph 3 that the respondent was entitled to ***“refund of the purchase price together with compensation for developments.”*** Of course, these developments include the church being used as a prayer house by the 1st Respondent. It is clear that the 1st Appellant was all along aware that the respondents were constructing a church on the suit land.

13. In one of the authorities proffered by the appellants:-

Lucy Wangui Gachara – Appellant AND Minudi Okemba Lore – Respondent, Court of Appeal Civil Appeal No.4 of 2015 at Malindi, the Court of Appeal quoted with approval the Indian Case of **BHARAT PETROLEUM CORP LTD VERSUS HARD CHAD SACHDEVA, AIR 2003**, where **GUPTA, J** of the **Delhi High Court** opined as follows:

“While courts power to grant temporary mandatory injunction on interlocutory application cannot be disputed, but such temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury complained of is immediate and pressing and was likely to cause extreme hardship. If a mandatory injunction has to be granted at all on interlocutory application, it is granted only to restore status quo and not to establish a new state of things.”

14. This quotation is highlighted by the appellants. In the present case, the Hon Magistrate did not grant a

mandatory injunction. He only restrained the appellants from interference with the respondents' use of the church and other developments they were already using on the suit premises. In other words the orders granted by the Hon. Magistrate were meant to preserve the status quo. They did not contrive to establish a new state of things. Failure to grant those orders would have entailed the spawning of immediate and pressing circumstances likely to cause extreme hardship upon the respondents.

15. In the circumstances, I find no merit in all the grounds of Appeal proffered by the appellants.

16. I dismiss the appeal.

17. Costs shall be in the main cause in the lower court.

18. I deprecate the veritably unprofessional conduct evinced by advocate Moses Kirima of Meenye & Kirima, Advocates who forsook the respondents in the lurch by not filing written submissions within the time frame prescribed by the court. The absence of submissions does not, however, mean that every appeal must be allowed. The totality of all apposite circumstances must be taken into account.

19. For clarity and avoidance of doubt, it is reiterated that this appeal is dismissed.

20. It is so ordered.

Delivered in open court at Chuka this **18th day of July, 2017** in the presence of:

CA: Ndegwa

Justin Gitonga – Appellant

Other Parties not in court

P.M. NJOROGE

JUDGE