



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

CIVIL APPEAL NO. 90 OF 2012

MADALINA MWARI.....1ST APPELLANT

DICKSON KINJA.....2ND APPELLANT

VERSUS

JANE KATHURE EZEKIEL.....RESPONDENT

(Appeal from the ruling of C.N. Ndubi SRM in Nkubu P.M.C.C No. 108 OF 2011 Dated 26:09:12)

J U D G M E N T

1. The Appellant herein were the Defendants in the Lower Court case, while Respondent was the Plaintiff. Plaintiff had filed suit against Defendants on 11.11.11 seeking orders of;

“A permanent Injunction to restrain the Defendants either by themselves their agents, servants or employees from interfering with the ownership and possession of the plaintiff’s land parcel No. Abothuguchi/ Makandune/1953 and a declaration that the defendant is not entitled to any part of the suit land”.

2. Plaintiff had then filed an Application of 30.08.12 seeking orders:-

1) That Honourable Court issue an order of eviction directed to the defendants herein to vacate the Plaintiff’s/Applicant parcel of land L.R. No. ABOTHUGUCHI/MAKANDUNE/1953.

2) That after issuance of the said order, it be directed to the Area Chief, O.C.S Mitunguu Police Station for compliance.

3. A Ruling thereof was delivered on 26.09.12 whereby the application to have defendants evicted from the suit land was allowed.

4. It is this Ruling that prompted this appeal. Defendants moved quickly and by the following day on 27.09.12, they had obtained an order of stay of execution of the order of 26.09.12. The stay orders were extended now and then (see dates of 18.12.12, 28.01.13, 14.11.12).

5. The memorandum of appeal contains 8 grounds which I will reduce to 3 and I proceed to summarize them as follows:-

1) That the Court lacked Jurisdiction.

2) That the trial Magistrate erred in law and fact in holding that the ownership of the land had not been challenged.

3) That the trial Magistrate erred in law in granting orders of eviction at the interlocutory stage.

6. The Appellants were represented by H.G Gitonga in both the Lower Court and in this Court. Respondent on the other hand was acting in person in the lower Court but was represented by Wamache Advocate before this Court. On 22.02.17, I gave directions for the appeal to be heard by way of Written Submissions. Both side have complied. However, there are two sets of Submissions for the Respondent. One is filed by herself (filed on 22.09.17), and the other set is filed by Wamache Advocate (filed on 21.09.17). On 02.10.17, Respondent urged the Court to rely on her own submissions and not those of her advocate.

DETERMINATION

7. Jurisdiction

It has been submitted by the Appellant that the Court lacked jurisdiction to hear the matter and that this was captured in paragraph 12 of their defence. This issue was however not canvassed before the Magistrate. The appellant had not made the application to have the suit struck out, by way of a Preliminary Objection or otherwise. I therefore reject the contention that the trial Magistrate had deliberately ignored the issue of jurisdiction. The appeal cannot succeed on this ground.

8. Land ownership

The trial Magistrate had ruled that ***“the applicant has stated and proved the fact of ownership which fact remains uncontroverted by the Respondent”***.

9. This appears to have been the basis upon which the eviction orders were granted. In her Submissions, Respondent herein has emphasized that one Julius Gikunda Murithi is the one who sold the suitland to her, the same being L.R. NO. Abothuguchi/Makandune/1953 and 1954 in year 2000. She has gone further to state that ***“Your ladyship the vendor herein and the appellants are better placed to produce all the legal registration documents for the land parcels that they are in occupation to prove their legality or illegality”***. This clearly shows that even Respondent is in agreement that evidence is required for the appellants to support their claim.

10. Pursuant to Section 24 of the Land Registration Act, the process of Registration confers upon the title holder the absolute ownership of that land. That title can still be challenged under Section 26 of the same Act. Further, all registered land is subject to the overriding interests outlined under Section 28 of the said Act. What this means is that in a claim of ownership in land, the rights and interests thereof ought to be determined in a full trial unless the issues are clear and straight forward.

11. In their defence, the present Appellant were claiming a portion of 0.5 acres. It was incumbent upon the trial Court to give them a chance to indicate the basis of their claim. On this point, the appeal succeeds.

Orders of eviction at Interlocutory stage.

12. Appellants aver that the main prayer in the plaint was a substantive prayer for a permanent injunction. Appellants contend that the trial Magistrate erred in granting the eviction orders at the interlocutory stage when such prayers had not even been pleaded for.

13. Respondent on the other hand avers that the eviction and Injunction Orders were necessary as the Appellants just intruded violently on her land.

14. In paragraph 4 of the Plaint, it is indicated that the Appellants had trespassed upon the Respondents

land, they were cultivating and had even built a temporary house. This appear to buttress the appellant's contention that they were in occupation of the land before the suit was filed. In any event, the prayer for eviction could not have been made if defendants were not in occupation. I therefore find that the orders granted by the Magistrate were in the nature of a Mandatory Injunction.

15. **In the Court of Appeal case of Kenya Breweries Ltd v. Okeyo (200) 1 EA** it was held that;

“...a Mandatory Injunction can be granted on an Interlocutory Application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied

.....a mandatory Injunction will be granted in an interlocutory application.

16. Land matters are neither simple, nor clear. They are emotive and complex.

17. In **Bernandetta Atsieno Wesange vs. Joseph M. Sakwa and 6 others H.C.C.C 77/08 Kakamega**, where defendants were in occupation of the suit property, it was stated that;

“Given the pleadings herein I do find that the dispute is highly volatile. Defendants, are in occupation and restraining them from dealing with the land will cause loss and damage. The best way forward is to finalize all the requirements before the matter is heard and thereafter fix the case for full hearing...”

18. The present case is one whereby on 01:08:12 (barely a month from when Respondent filed the application of 30:08:12), the trial magistrate had allowed the appellants to amend their pleadings to join Julius Gikunda Miriithi as a party to the suit. Julius happens to be the person who had apparently sold the land to both litigants. This person (Julius) was surely in a better position to explain the interest and rights of the parties in the land. It is not even clear whether he had been served with the suit papers by the time the ruling was delivered. Certainly, he had not filed any documents to indicate his stand on the matter.

19. In the case of **Thomas Mungira & 9 others vs Joseph Mutuma & 4 Others H.C.C. 12/10** at Meru, it was held that

“Issues of land are very sensitive. Any person claiming an interest in land should be given a chance to be heard. The duty of the Court at the interlocutory stage is to ensure that the suit is not rendered nugatory.

20. And in **Dynamic Sports House Limited vs. School Equipment Centre Ltd H.C.C 190/2012 NBI**, it was stated that:-

“the Court in responding to prayers for interlocutory Injunctive relief should always opt for the lower rather than the Higher risk of injustice.....”

21. My conclusion is that the Magistrate erred in granting the eviction orders at the interlocutory stage. The appeal herein succeeds and the ruling delivered on 26:09:12 is hereby set aside.

22. Respondent is condemned to bear the costs of this suit.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MERU THIS 24TH DAY OF OCTOBER, 2017 IN THE PRESENCE OF:-

CA: Janet

Jane Kathure Ezekiel –Respondent present

Hon.L.N. MBUGUA

ELC JUDGE