



**REPUBLIC OF KENYA**

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

**E & L APPEAL NO. 3 OF 2015**

**HELLEN NYAMBURA MUNYOROKU.....APPELLANT**

**VERSUS**

**JOHN MIGWI MAINA.....RESPONDENT**

**JUDGMENT**

This is an appeal against the decision of honourable G.A M'maisi in Eldoret Chief Magistrates Court Civil Case No 139 of 2005 dated the 16<sup>th</sup> day of March 2010 between **Hellen Nyambura Munyoroku**, (hereinafter referred to as appellant) and **John Migwi Maina** (hereinafter referred to as the respondent). The respondent moved the lower court claiming that at all material times to the suit, he was the legitimate owner of that parcel of land known as **Langas Phase 1 Section II (Block 2) Plot No. 23**, having purchased Moses Theuri Wangai (deceased) vide a sale agreement dated 6.5.1989 at a total consideration of Kshs.40,000 for which the plaintiff paid in full. The land comprised some semi-permanent houses standing thereon.

The respondent claimed that the appellant had trespassed on the parcel of land and took control and management of the houses. The respondent's suit was also based on defamation and assassination of character. The respondent prayed for a permanent injunction to restrain the appellant either acting by herself, her agents and or servants from trespassing into, selling, letting, occupying, wasting, transferring and/or in any other manner from interfering and/or dealing with the plaintiff's parcel of land known as **LANGAS PHASE 1 SECTION II (BLOCK 2) PLOT NO. 23** measuring one eighth (1/8) of an acre together with ten (10) houses standing thereon.

The respondent further prayed for a mandatory injunction to compel the appellant to forthwith remove the illegal tenants she had put in the respondent's houses on the suit land and to tender an account. He further claimed general, exemplary and punitive damages as against the appellant for slander and defamation.

The appellant's reply was that the respondent was not the owner of the suit parcel and that he fraudulently altered the Municipal computer register to read his name but the Municipal records still bear the correct names. The appellant denied trespassing on the land. She claimed that she was the right owner of the land having purchased it in 1996 and having been in possession until the date of filing the case. Lastly, she denied having uttered defamatory words to the respondent.

When the matter came for hearing, the respondent stated that he bought the plot from Moses Theuri Wangai in 1989 at Kshs.40,000 as consideration. The plot measured 1/8 of an acre and had 10 semi-permanent houses. He left the seller occupying one room when he went to Mombasa in 1992 and when he came back to Eldoret, he found some other persons being the appellant collecting rent. He went to the Municipal Council and found that the plot was still in the name of the seller. The Council changed the plot in his name and he started paying rates. He stated that the appellant called him a thug and yet he is a

preacher. On cross examination, he states that the seller died in 1993 while in the plot. This information was availed by the grandson of the seller. The plaintiff called Silvanus Ambani who stated that he was the village elder of Kisumu Ndogo. He claimed that the elders heard the dispute between the appellant and the respondent and gave a verdict.

The respondent called Kaitano Museveni Handa, a security officer at maize millers in Eldoret who stated that he was in the meeting where the respondent was abused as a thug. Moses Kipsang Maritim came as PW4 and stated that he is a farmer and a village elder at Racecourse. He was called by the village elders of Langas to participate in a land dispute. The village elders resolved that the land belonged to the respondent. Last but not least, was Allan George Kamau an advocate by profession having been practicing for 30 years. The agreement dated 6.5.1989 was made in his office. He had the receipts in respect of the agreement. He produced the agreements and the receipts. The seller was Moses Theuri Wangi and that the due consideration was paid.

The appellant opened her case with her testimony on 9.10.2008. she claimed to have bought the disputed plot from Naomi Theuri. The plot was sold at Kshs.221,000. She bought the plot with 9 houses. The plot name at the Municipality was changed from Naomi Theuri to the appellant's husband and she started taking rent. John Migwi did not own the plot. She was removed from the plot by village elders on two occasions. She was lastly removed by the court order which allowed the respondent to take possession. She claimed to have never abused the respondent as a thief or thug. On cross examination, she claims to have bought the land from Naomi Wairimu Theuri. In the agreement, there was no rent for houses. She never signed as a witness of Naomi. Ibrahim Munyoroku was her husband. He died but they did not apply for letters of administration.

The appellant further called Susan Njoki, a farmer residing at Kinangop. Before moving to Kinangop, she was staying at Yamumbi in Uasin Gishu district. She stayed at the said place for 25 years. Moses Theuri was the father whilst Naomi Theuri was her mother. Theuri died in 1992 leaving behind 2 children. She claimed that her mother sold the plot to Ibrahim Munyoroku after her father's death. She was present when the plot was sold. The plot was sold at Kshs.200,000 and Ibrahim Munyoroku took possession. She claimed that the plot was not sold to the respondent. Samuel Njuguna Macharia testified that he was the one who wrote the agreement marked as DMFI.8. the plot number is described as Langas, the seller is Naomi Theuri whilst the buyer is Ibrahim Mwaura. On cross examination by Mr. Njuguna, he states that the agreement is not attested by an advocate and that the agreement does not have the name of Moses Theuri.

After considering the evidence on record and submissions of counsel, the learned Magistrate found that there is no dispute that the plaintiff (respondent) bought the land from the late John Theuri. The sale agreement was produced in court. The respondent was collecting rent and was still collecting rent on the date of judgment. The defendant never produced any document to show that he bought the land. The document produced did not show that the appellant was the purchaser. The court found that the respondent was the proprietor of the land.

The appellant appeals on grounds that:

**1. That the purported letter dated 5<sup>th</sup> September, 2007 allegedly from the Ministry of Lands as contained at Page 43 of the Record of Appeal was not marked for identification or produced as a defence exhibit per the learned Magistrate's Ruling dated 11.09.2007 at Page 87.**

**2. The document contained at Page 44 of the Record of Appeal was not produced as a defence exhibit.**

**3. The documents contained in pages 45, 46 and 47 of the Record of Appeal were neither marked for identification nor produced as defence exhibits.**

**4. The document contained at page 49 was not produced as a defence exhibit.**

**5. The appellant has deliberately failed to attach a list of the defence exhibits.**

**6. The typed proceedings attached to the Record of Appeal herein and Supplementary Record of Appeal contains a lot of typographical errors.**

The appellant prays for an order that the appeal be allowed, the subordinate court's judgment dated the 16<sup>th</sup> day of March, 2010 with the consequential orders thereto be set aside and the honourable court do evaluate the evidence and the proceedings and give a second opinion on the matter.

I have considered the submission by both parties and do find that the following issues are ripe for determination:

**1. Whether the issue of time barred is res judicata.**

**2. Whether the suit was defective for misjoinder of causes of action.**

**3. Whether the honourable Magistrate erred by considering the matter without affording the estate of Moses Theuri Wangai a hearing and failure to enjoin the Estate of Moses Theuri Wangai.**

**4. Whether the appellant was entitled the costs on the dismissed claim on defendants.**

On the 1<sup>st</sup> issue, the appellant argues that the learned Judge erred in law and fact by entering judgment for the respondents based on a claim that was time barred under the provisions of limitation of Action Act, Chapter 22, Laws of Kenya. According to the appellant, the cause of action arose on 6.5.1989 and the suit was filed on 17.2.2005, 15 years later. The respondent argues that this issue was heard and determined by way of preliminary objection and a decision made on 16.11.2005. The appellant did not lodge any appeal within the prescribed period or apply for review against the ruling.

On this issue, this court agrees with the submission by the respondent that having failed to appeal within the prescribed time from the 16.10.2005, the appellant lost his right to appeal on the issue and therefore, this ground is not available. On the issue, as to whether the suit is defective for joinder of issues, I do find that the appellant's argument that the suit is fatally defective for multiplication of suits due to the claim based on the recovery of land and defendants is mis-apprehensive of the law since joinder of causes of action does not invalidate a suit for recovery of land. On whether the honourable Magistrate erred by considering the matter without affording the family of Moses Theuri a hearing, this court finds that it was not necessary to enjoin the legal representative of the late Moses Theuri as he was not in possession of the suit land at the date of filing the suit.

This court finds that none of the parties produced a document of title to the land. Neither the appellant nor the respondent produced the evidence that the parcel of land was registered in their name. Neither the Certificate of title nor grant was produced and therefore, the parties sought to rely on secondary documents. It is upon these secondary documents that the learned Magistrate relied upon to determine the dispute. I do not agree with the argument by the appellant that the agreement produced by the respondent was disowned by the maker as he states that it was signed in his office by an authorized person. I do agree with the learned Magistrate that the respondent proved on a balance of probabilities that he had a beneficial interest in the property under dispute. Ultimately, I do not find any error either in law or fact committed by the learned magistrate and therefore the appeal is dismissed with costs. On the issue of costs of the suit in the Lower Court, I do find that the respondent is entitled to half costs as he did not succeed on all the prayers in the said claim.

**DATED AND DELIVERED AT ELDORET THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2017.**

**A. OMBWAYO**

**JUDGE**