



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & OTIENO- ODEK. JJ.A.)**

**CIVIL APPEAL NO. 16 OF 2013**

**BETWEEN**

**WILLIAM KAMUNGE GAKUI.....APPELLANT**

**AND**

**EUSTACE GITONGA GAKUI..... RESPONDENT**

(An appeal from the Judgment and Decree of the High Court of Kenya at

Nyeri, (J. K. Sergon 1.) dated 18th February, 2011

**in**

**H.C.C.C NO. 5 OF 2007)**

**JUDGMENT OF THE COURT**

1. The appellant and the respondent are brothers. The suit property is **LR No. Kirimukuyu/Mutathini/937** registered in the name of the appellant. By a plaint dated 28<sup>th</sup> January, 2007, the appellant sought an order for eviction of the respondent, his family and properties from the suit property and damages for trespass.
2. In his defence, the respondent averred that the title of the appellant to the suit property was obtained by fraud and asserted that the respondent/defendant had rights over **LR No. Kirimukuyu/Mutathini/461** which parcel of land belonged to their late father and which the appellant fraudulent caused a sub-division thereof to create **LR No. Kirimukuyu/Mutathini/937**. The respondent averred in his defence that **LR No. Kirimukuyu/Mutathini/937** is part of LR No. **Kirimukuyu/Mutathini/461** which is the estate of their deceased father and the subject of Nairobi **High Court Succession Cause No. 372/1997** which is pending before the Nairobi High Court.
3. The trial court (**Sergon J.**) upon hearing evidence from the appellant in the absence of the respondent dismissed the appellant's suit for trespass and eviction and expressed himself as follows:

***"In his evidence in chief, the plaintiff states that the defendant is in occupation of the land. In his evidence in cross-examination, the plaintiff stated that the defendant is not in occupation. In fact he stated that the structure standing on the land in dispute is his mother's house. He further stated that his mother resides in the aforesaid house. The plaintiff further clarified that the defendant actually lives in Garden Estate. He alleges that the***

*defendant utilizes the land through his agents. He did not name the defendant's agents; hence this later piece of evidence cannot be relied upon. In the end, I am not convinced that the plaintiff has proved his case against the defendant to the required standard in civil cases. The plaintiff miserably failed to prove the tort of trespass against the defendant. The plaintiff's evidence appears to exonerate the defendant. For the above reasons, I see no merit in the suit".*

4. Aggrieved by the decision of the trial judge, the appellant lodge this appeal citing 10 grounds of appeal which can be compressed as follows:

*(a) That the learned trial judge erred in law and fact in failing to find and hold that the appellant had made out a proper case for trespass.*

*(b) The learned judge erred having found that the respondent was in occupation of the land completely misdirected himself in failing to find and hold that indeed the respondent was a trespasser and misdirected himself in holding that the respondent was not personally in occupation of the land and utilized the land through workers/agents.*

*(c) The learned judge erred in failing to appreciate and consider that the appellant was forcefully evicted from the suit property by the respondent.*

*(d) The learned judge erred in law and fact in finding that the appellant did not present evidence on how he acquired the land.*

*(e) The learned Judge erred in law and fact in holding that the appellant did not explain the process of acquisition of his title when the title itself clearly shows that it was a sub-division of LR No. Kirimukuyu/Mutathini/461 an exercise, that was undertaken by the appellant's father while he was alive and the learned judge erred in law in holding that LR No. Kirimukuyu/Mutathini/461 is the subject of Nairobi HCCC No. 372 of 1997 when no such evidence was placed before him.*

5. At the hearing of this appeal, the learned counsel **Masaviru K. Nelson** appeared for the appellant while the respondent was represented by the firm of Karago S.N. Advocates who were absent although they were duly served with the hearing notice. This Court having been satisfied that the hearing notice was duly served upon the respondent's counsel proceeded to hear the appeal. At the outset, we emphasize that the fact that one party to a suit is absent during hearing does not necessarily lead to the conclusion that all the submissions and evidence tendered by, the present party is uncontroverted and the Court must uphold his case. It is the duty of the Court to analyze the evidence on record and submissions made in light of all pleadings on record and arrive at its own independent conclusion.

6. In the instant appeal, learned counsel **Masaviru K. Nelson**, for the appellant elaborated on the grounds of appeal. Counsel submitted that the appellant and respondents were brothers. That their deceased father was the registered proprietor of **LR No. Kirimukuyu/Mutathini/461** and that during his life time, he sub-divided **LR No. Kirimukuyu/Mutathini/461** into five portions and he gave one of the five portions to the appellant as a gift *inter vivos*. That the portion given to the appellant is registered in the appellant's name as **LR No. Kirimukuyu/Mutathini/937**. That the appellant's case before the High Court was for trespass against the respondent seeking orders to evict the respondent and his family from the said **LR No. Kirimukuyu/Mutathini/937**. That the appellant acquired title to **LR No. Kirimukuyu/Mutathini/937** on 20<sup>th</sup> February, 1997 and their deceased father died on 2<sup>nd</sup> January, 1997. That the respondent has never raised or challenged the title of the appellant to **LR No. Kirimukuyu/Mutathini/937**. Counsel submitted that the respondent forcefully evicted the appellant from the suit property; that the respondent is using agents and hirelings to prevent the appellant from entering, using and cultivating the suit property; that the respondent is tilling the land using the said hirelings and agents.

7. Learned counsel for the appellant cited judicial authorities in support of his submission. He referred

this Court to the case of *Charles Ogejo Ochieng - v- Geoffrey Okumu, (1995) eKLR* where this court differently constituted stated that trespass is an injury to a possessory right and therefore the proper plaintiff in an action for trespass to land is the person who has title to it or a person who is deemed to have been in possession at the time of trespass. Counsel submitted that the appellant has title to the suit property and is entitled to be in possession of the land. It was submitted that the appellant had a certificate of title and was the absolute and indefeasible owner thereof. Counsel relied on the Nigerian case of *Okorie & others- v- Udom & Others, (1960) 5 FSC 162* wherein it was stated that where there is a claim for trespass coupled with injunction, it is incumbent upon the judge to consider the question of title to the land and exclusive possession of it. In the same judgment, the Nigerian court stated that a person cannot trespass on his own property. Counsel for the appellant emphasized the dicta in the Nigerian case of *Amakor - v- Obiejuna, (1974) S.C. 67, at 75* wherein it was stated that trespass to land in law constitutes the slightest disturbance to possession of land by a person who cannot show a better title or right to possession; and that a court of law is under a duty to pronounce on the validity or otherwise of documents of title tendered in evidence by the parties in arriving at a decision.

8. We have considered the submissions by learned counsel for the appellant and examined the Record of Appeal as well as the relevant law on trespass to land. As this is a first appeal, it is our duty to analyze and re assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in *Selle -vs- Associated Motor Boat Co., [1968] EA 123*, thus:

*"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif. vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).*

This court further stated in *Jabane - vs- Olenja [1986] KLR 661*

664, thus:

*"More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did - see in particular Ephantus Mwangi -vs- Duncan. Mwangi Wambugu (1982-88)1 KAR 278 and Mwanasokoni vs. Kenva Bus Services (1982-88) 1 KAR 870.*

9. There are two critical issues in this appeal for determination by the Court. The first is the legality and genuineness of the certificate of title produced by the appellant in relation to the suit property, **LR No. Kirimukuyu/Mutathini/937**. The second is whether the evidence on record establishes that trespass to land was committed by the respondent. The appellant in citing the Nigerian case of *Amakor - v- Obiejuna, (1974) S.C. 67, at 75* beseeches this court to pronounce on the validity or otherwise of the document of title tendered in evidence by the appellant in respect of the suit property **LR No. Kirimukuyu/Mutathini/937**. The certificate of title shows that the appellant is the registered proprietor of the suit property. The respondent in his pleadings contend that the appellant fraudulently obtained the title to **LR No. Kirimukuyu/Mutathini/937** which is a sub-division of **LR No. Kirimukuyu/Mutathini/461**. We have considered the submission of the appellant and the certificate of title tendered in evidence. It is our considered view that the appellant's case is founded on trespass to land which is a tort against possession of property and not necessarily a wrong to title. The appellant's certificate of title to the suit property has been challenged and whether or not the suit property is part of the estate of their deceased father is a matter to be canvassed and determined in the **Nairobi HC**

**Succession Cause No. 372 of 1997.** The suit by the appellant before the High Court was founded on trespass and not a claim that the High Court was to confirm that his certificate of title to the suit property was genuine and or was acquired legally. We reiterate that the legality or genuineness of the appellant's certificate of title and title to the suit property was not an issue before the High Court and is not an issue for determination in this appeal. The issue before the High Court and this Court is whether the respondent committed acts of trespass in the suit property and whether damages for trespass should be awarded.

10. Counsel for the appellant cited **Section 3 (1)** of the **Trespass Act** to demonstrate that cultivation or tilling land of another is trespass. **Section 3 (1)** of the **Trespass Act, Cap 294 of the Laws of Kenya** provides that:

***"Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence".***

11. We have considered the provisions of **Section 3(1)** of the **Trespass Act** and note that it creates the criminal offence of trespass but does not define the tort of trespass. The Plaintiff filed by the appellant does not plead that the respondent/defendant is cultivating or tilling or grazing stock on the suit property. There is no evidence on record to support the allegation that any cultivation, tilling or grazing is taking place on the suit property on instruction or account of the respondent. The statement that the respondent is cultivating and tilling the suit property was made from the bar by counsel for the appellant and with due respect, this is not supported by the evidence on record. Our evaluation of the evidence on record leads us to conclude that cultivation and tilling of the suit property by the respondent was not proved.

12. The appellant contends in his ground of appeal that the trial court misdirected itself and erred in failing to find that the respondent was in occupation of the suit property. That the judge erred in not finding that the respondent was not personally in occupation of the land and utilizing it through agents/workers. This ground of appeal fails. We have examined and analyzed the judgment on record and on this issue; the trial judge did not make a finding that the respondent was in occupation of the suit property. The judge found that no evidence was tendered to prove that the respondent had workers/agents on the suit property. The trial judge stated as follows:

***"In his evidence in chief, the plaintiff states that the defendant is in occupation of the land. In his evidence in cross-examination, the plaintiff stated that the defendant is not in occupation. The plaintiff further clarified that the defendant actually lives in Garden Estate. He alleges that the defendant utilizes the land through his agents. He did not name the defendant's agents; hence this later piece of evidence cannot be relied upon".***

13. Our re - evaluation of the evidence on record shows that the respondent is not in physical possession or occupation of the suit property. Even the appellant is not in physical possession of the suit property. In the case of **M'Mukanya -v- M'Mbiiwe, (1984) KLR 761**, the ingredients of the tort of trespass were revisited and restated. It was stated that trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See **Thompson- v- Ward, (1953) 2 QB 153**). In the instant case the appellant has dangled his certificate of title to prove that he is not only the owner of the suit property but he is entitled to exclusive possession thereof. Trespass to land is a tort against possession and there must be an entry on the suit property by the tortfeasor. The evidence on record does not show that the respondent had entered the suit property. The record does not show that the respondent is cultivating or tilling the land. We find that the action of entry, cultivation or tilling was not proved by the appellant on a balance of probability. The evidence shows that the respondent lives in Garden Estate and he is not in physical occupation or possession of the suit property. We concur with the trial court that the appellant did not prove who are the workers or agents of the respondent and no evidence was tendered to prove entry or cultivation or tilling of the land by the workers or agents whoever they might be. We find that the trial court did not err in holding that trespass was not proved. The appellant contend that the respondent's agents or workers are cultivating the suit property; this raises the legal issue whether there is vicarious liability in the tort of trespass. The appellant did not tender evidence on a balance of probability to

prove and establish vicarious liability (if any) for trespass to land.

14. The appellant further contend that the trial court erred in failing to appreciate that the respondent had forcefully evicted the appellant from the suit property. That the trial judge erred in finding that **LR No. Kirimukuyu/Mutathini/461** is the subject to Nairobi **HC Succession Cause no. 372 of 1997**. We have analyzed the testimony of the appellant before High Court on this issue and observed that he testified as follows:

*"My brother lives in Garden Estate. My brother has no building on the land. I am unable to access the land. He evicted me and placed his agents. I and my mother filed letters of administration in Succession Cause No. 372/97. We listed LR No. Kirimukuyu/Mutathini/461 as part of the assets of the deceased".*

15. From the testimony of the appellant before the trial court, we find that the trial judge did not err in stating that **LR No. Kirimukuyu/Mutathini/461** was subject to the **Nairobi HC Succession Cause No. 372/1997**. From the appellant's own testimony, this property is listed as part of the assets of the estate of their deceased father. **LR No. Kirimukuyu/Mutathini/461**, was sub divided to create a portion of land registered in the appellant's name bearing title **LR No. Kirimukuyu/Mutathini/937**. If **LR No. Kirimukuyu/Mutathini/461** is part of the estate of the deceased, it follows that the status and ownership of **LR No. Kirimukuyu/Mutathini/937** must be determined in the **Nairobi HC Succession Cause No. 372/97**. It is our considered view that the learned judge did not err when he stated that **LR No. Kirimukuyu/Mutathini/461** was subject to the Succession Cause as this property was listed by the appellant himself as an asset subject to the Succession Cause.

16. On the issue of forceful eviction of the appellant from the suit property by the respondent, it is our considered view that this cannot be proved by mere allegation. The appellant in his testimony stated that he was forcefully evicted by the respondent from the suit property. He also admits that the respondent is not in possession of the suit property. Trespasses in the present case cannot be proved by a mere allegation that eviction has taken place; the appellant ought to provide corroborative evidence to support the alleged eviction. Testimony as to how the eviction was done, by whom and when should have been given. The burden of proof of the eviction is not discharged by mere allegation that eviction has taken place the more so when such evidence has not been subjected to cross-examination.

17. The appellant further contends that the learned judge erred in holding that the appellant failed to prove how he acquired title to the suit property. This ground of appeal fails. The issue before the trial court was one of trespass and not how the appellant got registered as the proprietor of **LR No. Kirimukuyu/Mutathini/937**. The record shows that in cross-examination, the appellant testified as follows:

*"My title does not show how parcel No. Kirimukuyu/Mutathini/937 came into being. My father died on 2/1/1997. The title was given to me on 20/2/97. The process of sub-dividing the land was done by my father".*

18. Our perusal of the judgment shows that the trial judge stated *"there is no doubt the plaintiff has shown he has title to the suit property."* Nowhere in the judgment did the trial court hold that the appellant did not prove how he acquired title to the suit property. This was not an issue before the trial court. As we have pointed out, the appellant's case before the High Court was one of trespass to land and not a determination as to whether the appellant had a genuine or valid certificate of title to the suit property.

19. Based on the reasons given, we find that this appeal has no merit. The appellant should challenge any right or claim by the respondent to the suit property in the **Nairobi HCC Succession Cause No. 372 of 1997**. This appeal is dismissed with costs. No costs are awarded as the respondent did not appear before court.

**Dated and delivered at Nyeri this 5th day of February, 2014**

**ALNASHIR VISRAM**

**JUDGE OF APPEAL**

**MARTHA KOOME**

**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

**JUDGE OF APPEAL**

I certify that this is a true  
copy of the original.

**DEPUTY REGISTRAR**