REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 43 OF 1996

LUCAS CHANGAWONY & 6 OTHERS.....APPELLANTS

-Versus-

STANLEY CHEBIATOR.....RESPONDENTS

(An Appeal from the judgment of K. Bett, Principal Magistrate in Eldoret PMCC No. 803 of 1988 dated 28th April 1995)

JUDGMENT

1. The respondent filed a suit against the appellants in the year 1988 claiming to be the owner of land Parcel No s IRONG/KAPSOIYO/11 comprising 58.0 acres on grounds that the appellants had encroached 7.0 acres, erected a building and had started cultivating thereon without his consent. He thus sought orders for:

- Eviction of the appellants from Land Parcel No IRONG/KAPSOIYO/11
- General damages for loss of use of 7 acres of the said parcel
- Costs and incidentals

2. The appellants denied the allegations and filed a counter-claim saying the suit land was originally a forest area which had been set aside for their habitation during the colonial times. They challenged the title document the respondent had saying it was obtained fraudulently. When the hearing commenced before Walekhwa (PM), she heard two witnesses, and the matter was later taken over by R. Mutitu (SRM), whereupon the appellants sought de novo hearing. At the next hearing on 5th January 1995, counsel for respective parties were not present, and the court ordered that the defence case was deemed closed. The hearing was thus concluded without the appellants tendering any evidence. Eventually judgment was delivered ion 10th January 1995 in favour of the respondent.

3. Being dissatisfied with the outcome, the appellants filed an application for review of the orders of 5th January 1995, and setting aside of the judgment of 10th April 1995. The same was dismissed by a ruling dated 9th April 1996 on grounds that the matter had been in court for almost a decade and litigation had to come to an end.

4. The appellant thus filed this appeal on grounds that;

I. That there was an error when the learned trial magistrate allowed /held that the court had the jurisdiction deeming it was only dealing with 7 acres of land whereas the entire land parcel of 52 acres.

II. The defendants' in the case were not heard on this matter on the basis of his defense and counterclaim.

III. Legal technicalities were emphasized to the detriment of the substance or merit

IV. An error was made in disallowing the defendants application on the basis of inter alia the learned trial magistrate's own speculation regarding the fate of the defendants vis-a vis the plaintiff's owners while not having heard the defendant's defense and counterclaim.

V. The learned trial magistrate erred in law and in fact by sacrificing natural justice for the ligation in question to come to an end.

VI. The learned trial magistrate erred on all points of law and fact in arriving at his ruling.

5. In view of this, the appellant seeks that the ruling of the lower courts be set aside and;

a) The defendant's application of 22nd September 1995 be allowed and the order of the senior principal magistrate dated 5th January 1995 deeming the defense case closed together with the judgment of 28th April 1985 be set aside.

b) The case go for full hearing on merit before a court of competent jurisdiction

c) The court makes any other orders as it deems expedient

6. The court has a duty to re-evaluate the evidence, assess it and make their own conclusions. This was seen in the case of ***SELLE V ASSOCIATED MOTOR BOAT COMPANY LTD., [1968] EA 123*** *at P. 126 and* ***WILLIAMSON DIAMONDS LTD. V BROWN, [1970] EA 1***.

7. **PW1 (Stanley Kiplagat Chebiator)** told the court that he owned the land **parcel Irong/Kapsoiyo/11** and the appellants who were known to him, left the land where they were staying and encroached on his land. Some have used the land to reside and plough while another portion is in use as a school compound. He stated that all the defendants present had never been rightfully permitted to live or plough the land. On cross examination, PW1 stated that one of the defendants **Luka** had been given **4 acres** of the land by the court and he had even buried his mother on the plot, yet he had not relinquished the land to him.

8. **PW2 (Samson Ngodot),** the Elgeyo Marakwet Land Registrar based in Iten told the court that the suit land which was under his jurisdiction belonged **Stanley Kiplagat** who was the first registered as the proprietor in 1976 when the register was opened. He stated that the land had a restriction in the title which restriction had been issued by the court. The restriction was later removed and a charge was registered by **AFC in 1978**. The defendant's case remained dormant.

9. The trial magistrate countered the averment of the counsel for the defendants who stated that the court had no jurisdiction to handle the case saying the suit subject matter was only 7 acres which was within his court's jurisdiction. He stated that the case proceeded due to the defendants own fault because they and their counsel were absent and therefore declined the request to set aside the judgment.

10. **JURISDICTION:** The appellant's counsel pointed out that since the suit land was registered under the repealed Registerd Land Act (Cap 300 Laws of Kenya), then section 159 of the repealed Act applied and which provided that:

Civil suits and proceedings relating to title to, or the possession of land...registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registerable under this Act, or which is expressed under this Act not to require registration, shall be tried by the High Court, and where the value of the subject matters in dispute does not exceed twenty-five thousand pounds, by the Resident Magistrate's court…

It is argued that the suit involved a claim to ownership of 58.0 acres, and therefore fell outside the jurisdiction of the magistrate's court. Although the respondent's counsel did not make submissions on this issue, a perusal of the pleadings and even the evidence by the respondent is very clear-the claim does not involve the entire 58.0 acres, but only a portion measuring 7 acres. This was properly addressed by the trial magistrate, and the appellant's counsel is splitting hairs…I need not say more as in my view the trial court's interpretation of what was involved in the dispute in relation to the court's jurisdiction was correct. The Appellants introduced the 58 acres as a means of escaping issues- the suit land may be 58 acres but the subject matter before the court is the 7 acres which the Respondent states have been encroached by the appellant. The Principal Magistrate's court had the jurisdiction to handle a 7 acre piece of land as was noted by the learned trial magistrate.

11. **The right to be heard:** It was argued on behalf of the appellants that the trial court violated their right to be heard by ordering that the defence case be deemed as closed in their absence, saying this violated a basic principle of natural justice. I have considered a host of past decisions cited by the appellant's counsel on the issue as well as constitutional provisions regarding the right to a fair hearing. As the respondent's counsel states, the appellant's counsel is deliberately misrepresenting the state of affairs. Indeed on 5th January 1995 when the matter was before court for hearing, neither parties nor their counsel were present to give evidence in their defence or prosecute their counter-claim. Was the non-attendance of counsel caused by the trial court, yet the date had been taken by consent? Was there any communication made to the court explaining why the appellants and their counsel were not in court? The suit before the court is a very old matter and the long drawn out nature of the case in my opinion has obstructed the course of justice for over a year. Through the years, a look at the proceedings shows little effort on the part of the Appellants to prosecute. In my view, the Appellant's appeal against the ruling on the application is evasive, lacks merit and ought to be dismissed. Order 12 Rule 2 (a) of the Civil Procedure Rules is very clear that f on the day fixed for hearing after the suit has been called out and the court is satisfied that the opposite party was aware of the date, it may proceed ***exparte***. In this case the both parties were aware of the hearing date, and the ***exparte*** position applied as the respondent had already testified. The step taken by the trial magistrate was the most appropriate one which I cannot fault. The appeal lacks merit and is dismissed with costs to the respondent.

Delivered and dated this 10th day of January 2018 at Eldoret

H. A. OMONDI

JUDGE