



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

ENVIRONMENT AND LAND APPEAL NO 5 OF 2021

(FORMERLY ELDORET APPEAL NO E001 OF 2021)

KIBIWOT ARAP TARUSAPPELLANT

-VERSUS-

JOHN KIPKEMBOI RONO.....1ST RESPONDENT

WILLY KIPROTICH SAWE.....2ND RESPONDENT

STEPHEN KIPKOECH KEINO.....3RD RESPONDENT

(Being an appeal from judgment of HON. J. ORWA SENIOR PRINCIPAL MAGISTRATE’S in KAPSABET ELC no. 9/2018 on 14th December 2020)

KIBIWOT ARAP TARUS.....PLAINTIFF

-VERSUS-

JOHN KIPKEMOI RONO.....1ST DEFENDANT

WILLY KIPROTICH SAWE.....2ND DEFENDANT

WESLEY KIPNGETICH SAWE.....3RD DEFENDANT

STEPHEN KIPKOECH KEINO.....4TH DEFENDANT

JUDGMENT

1. Being dissatisfied with the whole Judgment of the Learned Hon. Senior Principal Magistrate (Hon. Jacinta Orwa) the Appellant who was the Plaintiff in the subordinate court has raised 9 Grounds of Appeal seeking to overturn the decision of the Learned Hon. Senior Principal Magistrate.

2. The grounds thereof are that;

i. The Learned Trial Magistrate erred in law and in fact by failing to appreciate the fact that the Appellant had proved his case on a balance of probabilities as required by the law and the Appellant had adduced evidence to prove his case as pleaded in the Plaintiff.

ii. The learned Trial Magistrate erred in law and in fact by failing to take into account and consider the Appellants evidence in arriving at his decision.

iii. The Learned Trial Magistrate erred in law and fact by failing to consider the submissions made on behalf of the Appellant in arriving at his decision.

iv. The Learned Trial Magistrate erred in law and fact by applying the wrong principles of law in arriving at his judgment

- v. The learned Trial Magistrate erred in law and fact by considering issues that were neither raised neither pleaded nor submitted upon by the Respondents,
- vi. The Learned Trial Magistrate erred in law and in fact by failing to find the evidence of the respondent as incredible, contradictory and inconsistent.
- vii. The Learned Trial Magistrate erred in law and in fact by dismissing the Appellant case on sole grounds that the Appellant failed to vail a surveyors report and yet the same was part of the Court record and was available for consideration
- viii. The Learned Trial Magistrate erred in law and in fact in failing to consider and recognize that the Respondents had sold their share of the suit property in the Estate and that plot no. NANDI/CHEPTARIT/228 is part of NANDI/CHEPARIT 227.
- ix. The Learned Trial Magistrate erred in law and fact by showing open biasness against the Appellant.

3. Wherefore the Appellant prays that this Appeal be allowed and the judgment of the Court of the first instance be set aside.

BACKGROUND

4. By way of background the Appellant and the Respondents are related being an uncle and nephews. The Appellant and the Respondents late father were beneficiaries of half share each in Nandi /CHEPTARIT /10 which measured approximately 21.5 acres.
5. Upon the demise of the Respondent's father the Respondents undertook succession in respect of his half share and upon confirmation subdivided the property where the Appellant got his half share and the Respondents got the other half but subdivided this other half into smaller units as per the Certificate of Confirmation of Grant.
6. The Appellant case in the Subordinate court and is in this appeal is that 0.7 acres of his share was illegally excised by the Respondents and he sought in his Further Amended Plaint injunctive orders against the Respondent as well as an order directing the Land Registrar to register NANDI/CHEPTARIT/228 in his name and an order of resurvey to ascertain the correct boundaries.
7. Directions in respect of the Appeal were issued and parties directed to file written submissions on the Appeal, hence this judgment.

APPELLANTS CASE AND SUBMISSIONS

8. It is the Appellants case that the 0.7 acres known as NANDI/CHEPARIT/228 actually formed part of NANDI/CHEPARIT/227 which belongs to him as the Respondents excised the said acreage without his knowledge and therefore ought to be registered to him.
9. Although the Appellant raised 9 grounds of appeal he did not address any of the grounds in his submissions and did not demonstrate how the Learned Senior Principal Magistrate erred in law and in fact in any of the grounds he has raised in the appeal but largely submitted generally on the need to have a resurvey done. The Appellant has also submitted that the subdivision into NANDI /CHEPTARIT/228 was illegal and fraudulent.

RESPONDENTS CASE

10. The Respondents' case is that NANDI/CHEPARIT/228 is rightful theirs and it was not subdivided from NANDI/CHEPTARIT/ 227 but was subdivided from NANDI/CHEPTARIT/10. Although Mr. Choge Learned Counsel, confirmed filing his submissions when the matter came up for mention on 9.12.2021, the submissions were not on the court file at the time of writing this judgment and were not considered.

ANALYSIS AND DETERMINATION.

11. This court being the first appellate court is under a duty, as was stated in the case of **Selle and Another vs Associated Motor Boat Co. Limited**, to evaluate the evidence and make its own findings thereon. As stated earlier in this judgment, the Appellant is an uncle to the Respondents, the Appellant and the Respondents' father were all entitled to half share each in NANDI CHEPTARIT /10 which measured approximately 21.5 acres.
12. Upon the Demise of the Respondents' father NANDI/CHEPTARIT/10 was into two halves which resulted into NANDI/CHEPATARIT 227 which was the half share belonging to the Appellant and the other half share was subdivided into small sections to wit NANDI/CHEPTARIT /228 to 237.
13. The mutation form was produced in evidence as **P Exhibit 2**, it shows that NANDI/CHEPTARIT /10 was subdivided into portions A-227, B -228, C - 229, D- 230, E - 231, F- 232, G- 233, H-234, J-235, K-236 and L -237.
14. Whilst numbers 229 to 237 are on one side of the property, Number 228 is very close to 227 and it appears as though it has been excised from 227 but it is actually a subdivision from NANDI/CHEPTARIT/10 as per the mutation form and this seems to be the bone of contention as can be garnered from paragraphs 9 to 12 of the Further Amended Plaint.
15. The mutation form equally gives the acreage of NANDI/CHEPTARIT/10 as 21.5 acres it further provides the approximate Hectares of each subdivided parcel. The same are:

A – NANDI/CHEPTARIT /227 4.30 Ha,
 B – NANDI/CHEPTARIT/2280.30Ha,
 C – NANDI/CHEPTARIT/229.....0.16Ha,
 D – NANDI/CHEPTARIT/2300.04Ha,
 E - NANDI/CHEPTARIT/231.....0.68Ha,
 F - NANDI/CHEPTARIT/232.....0.64Ha,
 G -NANDI/CHEPTARIT /233.....0.12Ha
 H - NANDI/CHEPTARIT/234064 Ha,
 J - NANDI/CHEPTARIT/2350.84Ha,
 K - NANDI/CHEPTARIT/236.....0.32 Ha,
 L - NANDI/CHEPTARIT/2370.52Ha,
 Road Access0.04Ha.

16. The above data captured from the mutation form produced as **P exhibit 2** were also reproduced on page 9 of the impugned judgment. As noted above paragraph 9 of the Further Amended Plaintiff, the appellant was entitled to half share of NANDI /CHEPTARIT/10 which after subdivision was NANDI/CHEPTARIT /227 measuring 4.30Ha according to the mutation produced by the Appellant, while the Respondents half share in NANDI/CHEPTARIT /10 after the subdivision, comprised of subdivisions numbers 228 to 237 all sum up to 4.26 Ha Plus the road access makes it 4.30 Ha, same as the one owned by the Appellant at least on paper.

17. The Certificate of Official Search in relation to NANDI/CHEPTARIT/228 produced as **P exhibit 6** by the Appellant reveals that the said parcel was a subdivision of NANDI/CHEPTARIT /10, so the contention that the same was a subdivision of NANDI/ CHEPTRIT/227 fails.

18. A reading of section 29 of the Land Registration Act implies the import of a Certificate of Search the said section provides, “**Every proprietor at the time of acquiring any Land Lease or Charge shall be deemed to have had notice of every entry in the Register relating to the land, lease or charge and subsisting at the time of the acquisition.**”

19. Had the Appellant, and his Counsel, calculated the acreages on the mutation form and made sense out of the Certificate of official search that he produced as his exhibits before the Trial Court he would not have filed the suit in the first instance and this appeal too. It follows thus that the Learned Trial Magistrate therefore reached the correct factual conclusion backed by evidence produced before her and did not therefore err.

20. Upon evaluation of the evidence placed before the Trial Court, the Court finds that the Learned Trial Magistrate did not err in law and in fact to invite a reversal of her decision which is hereby upheld.

21. This appeal lacks merit and it is hereby dismissed with costs to the Respondents for the Appeal and the suit in the Trial Court and the orders issued on 27th April 2021 are hereby vacated.

DATED at KAPSABET this 31st day of JANUARY, 2022

HON. M. N. MWANYALE

JUDGE