



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT OF KENYA AT KAPSABET**

**ENVIRONMENT AND LAND CIVIL APPEAL NO. 4 OF 2021**

**(FORMERLY ELDORET ELC CIVIL APPEAL NO 21 OF 2020)**

**AINEA KISALA.....APPELLANT**

**VERSUS**

**ELAM KISALA.....RESPONDENT**

**(Appeal from the Judgment and Decree of the Senior Principal Magistrate’s Court of Kenya at Kapsabet**

**(Hon. D. A. Alego) dated the 10<sup>th</sup> day of December 2018 in civil case no 166 of 2005**

**Between**

**ELAM KISALA .....PLAINTIFF**

**VERSUS**

**AINEA KISALA .....DEFENDANT**

**JUDGMENT**

1. Vide the Memorandum of Appeal dated 8<sup>th</sup> November 2019, the Appellant has raised 7 Grounds of Appeal appealing against the whole judgment delivered by the Hon. Senior Principal Magistrate (Hon. D. A. Alego). The grounds raised are;

- i) The learned Magistrate erred in law and in fact in disregarding the evidence tendered by the Defence witnesses.
- ii) The learned Magistrate erred in law and in fact by failing to consider the Exhibits produced in court
- iii) The Learned Magistrate erred in law and in fact by holding that the suit land belonged to the Respondent without any evidence being tendered to prove ownership.
- iv) The Learned Magistrate generally erred in law and in fact when she delivered her judgment against the Appellant based on hearsay evidence.
- v) The Learned Magistrate generally erred in law and in fact when she failed to consider the weight of the evidence adduced by the Appellant during the hearing of the case.
- vi) The Learned Magistrate erred in law and in fact in failing to consider the history, full facts and circumstances surrounding the suit land before arriving at her judgment.

vii) The Learned magistrate erred in law and in fact in giving a judgment which was generally contrary to law and facts placed before her.

The Appellant thus prays for orders that;

- a) The Judgment by Hon D. A. Alego delivered on 10.12.2018 to be set aside.
- b) The Counterclaim filed by the Appellant in Kapsabet PMCC no.166 of 2005 be allowed.

c) The Appellant be awarded costs of this appeal.

d) The court be pleased to make any such further orders as it may deem just to grant in the circumstances.

2. During the pendency of the appeal several applications were filed and determined, the last application being the contempt of Court application dated 19<sup>th</sup> April 2021 whose ruling was delivered on 18.10.2021 where after the Respondent filed his submissions on the main appeal as the Appellant had already filed his submissions.

### **BACKGROUND**

3. The Appellant and the Respondent are step brothers, being the sons of the late James Kisala Andai but from different mothers.

4. The genesis of the dispute giving rise to this appeal, is the ownership and occupation of NANDI/KOIBARAK /A 811' which is in the occupation of the Respondent and which the Appellant as the defendant in the original suit, claims the same on behalf of the family of the late Jones Mmbone and refers the suit property as NANDI/KOIBARAK/469 and that the same initially formed part of the Estate of the late James Kisala Andai, his late father who had bequeathed it to his third house of the late Jones Mmbone, and that the Respondent being from the first house had been bequeathed elsewhere.

5. The Respondent on the other hand maintains that the NANDI/KOIBARAK A/ 811 was first registration in his name and has never formed the part of the Estate of the Late James Kisala Andayi as he occupied and built thereon during the lifetime of his late father and that when the adjudication process was undertaken he was registered as the proprietor thereof.

6. The Respondent as the Plaintiff in the Subordinate court thus filed a plaint seeking injunctive orders to bar the Defendant who is the Appellant herein. The Respondent was successful in the Subordinate court provoking this appeal.

### **APPELLANT'S CASE**

7. It is the Appellant case before this case as was his counterclaim in the court below that the suit property formed part of the estate of his father who had bequeathed the same to the third wife his mother the late Jones Mmbone and that the subdivision giving rise to NANDI/KOIBARAK A/ 811 from NANDI/KOIBARAK/ 469 had been reversed by the District Arbitration Board although the adjudication committee had initially approved the same.

8. It is the Appellant's case and submission on the first two grounds of appeal that once the District Arbitration Board reversed the decision of the Land Adjudication Committee then parcel No NANDI/KOIBRAK/811 ceased to exist and the whole parcel formed the parcel bequeathed to the third house.

9. In this regard the Appellant cites the Court of Appeal decision in **Caroget Investments Limited vs Aster Holdings Limited & 4 others (2019) eKLR** where the court dismissed an appeal and concurred with the trial court to wit ' **the title to the suit property had ceased to exist as an independent title upon amalgamation**'

10. The Appellant further submits that no prove of title was exhibited before the trial court so as to have reached the decision that it made further cites the decision in **Caroget Investments Limited vs Aster Holdings Limited & 4 others (2019) eKLR** where the court further held that; ' **where two parties assert competing proprietary interest over one parcel of land each must produce evidence in support of his claim**'.

11. The Appellants further submits that this being a first appeal the court has a duty to review the evidence and was held in the case **Selle and Another vs Associated Motor Boat Co. Limited** and urges the court to review the same.

### **RESPONDENT'S CASE**

9. It is the Respondents case that the Learned Magistrate did not err as NANDI/KOIBARAK A /811 was a first registration in his name and was registered in his name in the life time of his late father and as such he was entitled to quiet possession and enjoyment of the property hence the appeal ought to be dismissed.

10. In support of this position and the fact that the Respondent is the proprietor of the suit property, the respondent cites section 26 of Land Registration Act, which provides that the Certificate of Title is prima facie evidence of Proprietorship. The Respondent further cites section 24 of the Land Registration Act which vests proprietary interest on the registered owner.

11. The Respondent further submits that the Appellant is not the Administrator of the Estate of his late mother Jones Mmbone and his late father the late James Kisala Andayi, so as to bring the action on their behalf and submits that he is not and therefore the Appellant lacked capacity to institute the counterclaim in the first instance.

12. The Respondents in support of this submissions cites the case of **Virginia Edith Wamboi Otieno vs Joash Ochieng Ougo C.A No.31 of 1987** in which the Court of Appeal held that " **But an administrator is not entitled to bring an action as.....before he has taken out Letters of Administration. If he does the action is incompetent from the date of inception.**"

## **ANALYSIS AND DETERMINATION**

13. Being a first appeal this court has a duty as established in the decision of **Selle and Another vs Associated Motor Boat Co. Limited** to evaluate the evidence and make its own findings thereon.

14. In reviewing the evidence before the trial court, the finds that a Certificate of Official search in respect of NANDI/KOIBARAK- A/811 was produced by the Respondent in the trial court as P Exhibit 1 as can be confirmed on page 19 of the impugned decision. The import of a Certificate of Official Search is provided for in section 34 and 35 of the Land Registration Act. Section 34 **Land Registration Act** provides that;

**“ A person who requires an official search in respect of any parcel, shall be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.’**

Whilst Section 35(2) provides **(2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document.**

15. Accordingly, as the Certificate of Official Search is a document signed by a Registrar it follows that there was adequate and prima facie evidence of ownership and proprietorship placed before the Learned Magistrate and ground no. 3 of the Memorandum of Appeal in this respect fails.

16. With regard to the main grounds 1 and 2 of the appeal, indeed there was placed sufficient evidence in terms of exhibits before the Learned Magistrate as to the decision of the District Arbitration Committee on the reversal of the decision of the Land Adjudication Committee and amalgamation of the two plots into one.

17.The District Arbitration Board as it then existed was a quasi-judicial body established under section 7 of the Land Adjudication Act (herein after referred to as the Act). It derives its powers from the statute. The District Arbitration Board could not therefore exercise or assume powers outside those conferred by the Act.

**Section 7** of the Act provides that;

### **7. Appointment of Arbitration board**

**(1) The Provincial Commissioner of the province in which the adjudication area lies shall, upon the request of the adjudication officer, appoint a panel for the adjudication area, consisting of not less than six and not more than twenty-five persons resident within the district in which the adjudication area is situate, and the adjudication officer may from time to time appoint in writing not less than five persons from the panel to form an arbitration board for a particular question arising in an adjudication section within the adjudication area**

18. The Board had Appellate powers to determine disputes arising from the Land Adjudication Committee as per sections 20-22 of the Land Adjudication Act. Under the said sections the Land Adjudication Committee could hear disputes on demarcation and boundaries; it follows there from that the District Arbitration Board could only hear appeals that related to demarcation and boundaries the same as the ones heard by the Lands Adjudication Committee but on appeal.

19. As observed above the District Arbitration Board could only deal with matters as conferred by the Act and since the Land Adjudication Committee could not deal with Amalgamation, it follows therefrom that the District Arbitration Board could not order the Amalgamation of the two properties having already being registered separately.

20.The decision by the District Arbitration board to Amalgamate was therefore a nullity and of no legal consequences. The Court thus finds that NANDI/ KOIBARAK A/811 was not a subdivision from NANDI/KOIBARAK 469 and was actually a first registration in the name of the Respondent.

21.Having found then that the NANDI/KOIBARAK A /811 is a separate parcel that was initially registered in the names of the respondent it follows therefrom that the grounds 1and 2 must equally fail. The other 4 grounds of appeal were auxiliary to the 3 main grounds and the three main grounds having failed, this Appeal equally fails.

22. The Learned Magistrate therefore made the correct findings and did not err having reached the correct conclusion and her decision thereof is hereby upheld, consequently, this appeal therefore lacks merit and it is hereby dismissed with costs.

**DATED AT KAPSABET THIS 24TH DAY OF JANUARY, 2022.**

**M. N. MWANYALE**

**JUDGE**

In the presence of Ms. Tirop.