REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 100 OF 2013

(An appeal arising from the Judgment of the Honourable Senior

Resident Magistrate L. O. Onyina delivered on 16th February

2010 in Vihiga SRMCC No. 40 of 2001)

JOHN IBRAHIM ASANKA.....APPELLANT

VERSUS

KENNETH BWAMU LUMWAGI.....RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and Decree of the learned Senior Resident Magistrate, L. O. Onyina, delivered on 16/2/2010 in SRMCC No. 40of 2001, at Vihiga. JOHN IBRAHIM ASANKA, (the Appellant), had sued KENNETH BWAMU LUMWABI, (the Respondent), seeking to evict him from Plot No. 7, Viyalo Market and General damages for loss of user. He also sought costs and interest.

2. The Appellant pleaded in his Plaint filed in that court on 11/7/2001, that he was the owner of Plot No. 7, Viyalo Market within Vihiga Municipality which he had purchased on 26/8/1993 at a public auction. That the Plot was initially owned by the Respondent's father, Meshack Lumwagi, who owed money to Industrial Commercial Development Corporation (ICDC) and had offered the Plot as security. After default, the plot was sold to the Appellant who emerged the highest bidder.

3. The Appellant averred that the Respondent had unlawfully entered and occupied the property depriving the Appellant use thereof, causing the Appellant loss and damages.

4. The Respondent filed a Defence denying the Appellant's claim and also denied knowledge of the auction alleged to have taken place or that his father had been indebted to I.C.D.C. He also denied knowledge of the transfer of the Plot into the Appellant's name. The Respondent further denied occupying the suit property and invited the Appellant to prove his claim.

5. After hearing the parties, the learned magistrate delivered his judgment on 16/2/2010 dismissing the appellant's suit, thus provoked this appeal. The Appellant has raised seven (7) grounds of appeal as follows;

> **1. That the learned magistrate erred in law and fact in finding that the Appellant was not and or is not the registered proprietor of Plot No. 7 Viyalo market situated within Vihiga**

Municipality when the evidence adduced in court clearly indicate that the Appellant was and is registered as Proprietor thereof and his title was endorsed by Vihiga County Council

2. That the trial magistrate erred in law and fact in relying on the evidence adduced by the Respondent when the same had not been pleaded for in the statement of Defence.

3. That the learned trial magistrate erred in law and fact in finding that the Appellant had failed to prove his case on the balance of Probability when the evidence on record clearly showed that the Appellant proved his case to the required standard.

4. That the learned trial magistrate erred in law and fact in failing to consider the evidence of the Plaintiff.

5. That the learned magistrate erred in law and fact in making a finding that was not backed by the evidence on record.

6. That the learned trial magistrate erred in law and fact in dismissing the Appellant's case in failing to address himself to the real issues in controversy and arrived at a decision that was not supported by evidence on record.

7. That the learned trial magistrate erred in law and fact by failing to analyse the issues before it (sic) judgment was evidently Pre-determined, biased, flawed, indefensible and was arrived at in a cursory and pufunctory and is devoid of sense, reasoning and justification and occasioned a serious miscarriage of justice.

6. The Appellant prayed that the appeal be allowed with costs and the judgment of the learned magistrate set aside.

7. During the hearing of the appeal, Mr. Kubebea appeared for the Appellant while Mr. Matete was for the Respondent. Mr. Kubebea, learned counsel for the Appellant, submitted that the learned magistrate was in error in finding that the Appellant was not the owner of the suit Plot yet there was evidence that he had purchased it at a public auction. Counsel referred to PEx.1, an advertisement in which Plot No. 7 was shown as item No. 15. Counsel further submitted that the appellant had paid 25% down payment and produced the receipt thereof as PEx.2. The balance of the purchase price was paid on 30/8/1993 and the appellant had produced a receipt as PEx.3, A certificate of sale was issued to the appellant which he had produced as PEx.4 and that the appellant was issued with the certificate of lease which he produced as PEx.5 'a' and 'b'. Rates were later demanded from the appellant and he produced the rates demand as PE.6.

8. Counsel submitted that the Plot was previously in the name of Meshack Lumwaji, the Respondent's father and that the Respondent came onto the land in 1993, when the land had already been sold to the Appellant. Counsel therefore submitted that the Appellant's evidence and exhibits produced in court clearly showed that the land belonged to the appellant and that the magistrate was in error in finding otherwise.

9. Mr. Matete, learned counsel for the Respondent, on his part submitted that the appeal was filed out of time. He submitted that the decree complained of was made on 16/2/2010 while the appeal was lodged on 27/8/2013, more than 3 years of the court's decision. Counsel added that although leave to appeal out of time was sought and eventually granted on 6/6/2013, no appeal was filed until 27/8/2013 more than two months later. Counsel argued that the appeal was therefore filed out of time.

10. On the grounds of appeal, Mr. Matete submitted that the appellant did not prove his case to the required standard. According to counsel, the appellant did not prove that Plot 7 existed in the first place. The respondent had testified that he resided on Plot No. Kakamega/Viyalo/738 and produced a Search as PEx.1 showing that the land on which he was residing belonged to Kakamega County Council.

11. It ws further submitted that the Respondent had produced DEx.2 a Search which showed that Plot No. Kakamega/Viyalo/7 belonged to Framise Ltd, and not the Appellant. Counsel also submitted that the learned magistrate framed issues for determination and referred to page 18 of the record as proof of his assertion. One of the issues was whether Plot No. 7 Viyalo Market was one and the same as Parcel No. Kakamega/Viyalo/7. He therefore submitted that the learned magistrate was write in finding that the appellant did not adduce evidence on the exact parcel of land on which the Plot (7) is situated and the registered owner of that parcel of land (Plot 7) and that there was no proof that Plot No. 7 Viyalo market existed. He prayed that the appeal be dismissed with costs.

12. I have considered this appeal, submissions by counsel as well as perused the record of appeal. I have to deal with a preliminary issue raised by Mr. Matete that this appeal was filed out of time and is therefore incompetent.

13. The decision by the learned magistrate, the subject of this appeal, was made on 16/2/2010, and as correctly pointed out by learned counsel, the appeal was filed on 27/8/2013. Under Section 79 G of the Civil Procedure Act;

> ***s. 79 G "Every appeal from a subordinate court to the High Court shall be filed within thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."***

14. The appellant should have filed his appeal within thirty days but he sought and was granted leave to file his appeal out of time within the meaning of Section 79G. Although leave was granted on 6/6/2013, the appeal itself was not filed until 27/8/2013, more than sixty days from the date leave was granted. Mr. Matete has argued that this was outside the time allowed and therefore wrong. However, the reading of Section 79G does not appear to impose time within which the appeal should be filed upon leave being granted.

15. Even though no timelines are given when an appeal should be filed after leave, it is my considered view that where no time lines are set, an appeal should be filed within a reasonable time. The question would then be what is reasonable time and whether between 6/6/2013 and 27/8/2013 can be said to be reasonable time! Reasonable time is a relative term and will depend on a case to case basis. In this case, I do not think the delay can be said to have been inordinate although it should not necessarily be condoned. As was held in the case of ***Essaji –vs- Solanki [1968] EA 218*** at page 224;

> ***"The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights.***

16. This principle was re-stated in the case of ***Trust Bank Ltd. –vs- Amolo Company Ltd. – [2002] eKLR*** where the Court of Appeal held that the principle which guides the Court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This principle has since been included in the Supreme Law of this county in Article 159 (2) of the Constitution and further amplified by Section 1A and 1B of the Civil Procedure Act. It is my respectful view that the delay was not inordinate and the appeal should be decided on merit in furtherance of the principle contained in Article 159 (2) of the Constitution and the overriding objective under Sections 1A and 1B of the Civil Procedure Act, (Cap 21) Laws of Kenya.

17. Turning to the appeal itself, this being a first appeal, it is my duty to re-assess and re-evaluate the evidence adduced before the trial court and draw my own conclusions while bearing in mind that this

court neither saw the witnesses nor heard their testimonies and make due allowance for that. See ***Selle -vs- Associated Boat Co. Ltd. [1968] EA 123***. This principle was re-stated in ***Williamson Diamonds Ltd. –vs- Brown [1970] EA 1*** where it was held as follows at page 12;

> ***"An appeal from the High Court to this court is by way of a retrial and, as this court has often pointed out, it is not bound necessary to accept the findings of fact by the court below but this court must re-consider the evidence and make its own evaluation and draw its own conclusions although always bearing in mind that it has not had the advantage of the trial judge in seeing and hearing the witnesses."***

18. The Appellant testified that he purchased the suit property on 26/8/1993 at a public auction conducted by Regent Auctioneers on behalf of Industrial Commercial Development Corporation (ICDC) at Kshs.70,000/= and paid the purchase price in full. The Auction had been advertised and upon purchasing the property, it was transferred into his name thus becoming the owner thereof. He produced receipts and other documents to demonstrate this. The property, Plot No. 7 Viyalo Market, belonged to the respondent's father and the respondent was said to be staying on this plot.

19. The respondent on his part, denied staying on the suit plot (plot No. 7 Viyalo Market), and stated that he resides on Parcel No. Kakamega/Viyalo/738 which belongs to Kakamega County Council and produced a Search to prove this point. He also said that there is another parcel of land No. Kakamega/Viyalo/7 which belongs to Framise Ltd. and again produced a Search to demonstrate this fact. The respondent therefore argued that the appellant did not show that there was a parcel of land known as Plot 7 Viyalo Market or if the said plot 7 was the same as Kakamega/Viyalo/7 or whether Plot 7 Viyalo market, was on parcel No. Kakamega/Viyalo/738.

20. The learned magistrate after considering this matter stated as follows at page 2 of his judgment (page 16 of proceedings and page 18 of record) –

> ***"I have gone through the pleadings, the written submissions filed by the advocates on record for the parties herein and considered the evidence on record. The main issue here is whether the plaintiff herein has proved on a balance of Probabilities that he is entitled to the reliefs sought against the defendant herein. Is Plot No. 7 Viyalo Market one and the same as land Parcel No. Kakamega/Viyalo/7? The Defence (sic) contended that it is, while counsel for the plaintiff in his submissions contended that it is not. The plaintiff himself did not deal with this aspect in his evidence. Evidence cannot be adduced from the bar. No personnel from either the Lands Registry or the local authority in whose jurisdiction Plot No. 7 Viyalo Market falls was called as a witness to shed light on this point."***

21. The appellant has attacked the learned magistrate's decision saying that he was wrong in finding that the appellant was not the registered owner of plot No. 7 Viyalo Market within Vihiga Municipality. I have re-evaluated the evidence adduced before the learned magistrate and the exhibits produced before him. The exhibits show that there is a Plot known as Plot 7 Viyalo Market which was purchased by the appellant at a Public Auction. It is also apparently true that that plot was transferred to the appellant as shown by PEx.5. As to who the registered owner of Plot No. 7 Viyalo market is is not in doubt according to the local authority's records. However, that was not the important issue in the case before the magistrate's court and the appeal before me.

22. According to my assessment, the appellant's appeal lies on grounds 2 and 3 of the appeal. In those grounds, the appellant has complained that the learned magistrate relied on evidence adduced in court by the respondent when it had not been pleaded and that the magistrate was in error for holding that the appellant had not proved his case as required.

23. The respondent testified that he did not reside on Plot No. 7 Viyalo market but on Plot No. Kakamega/Viyalo/738 which belonged to Kakamega County Council according to DEx.1. The respondent had also pleaded at paragraph 5 of his defence that he was not in occupation of the suit premises. This is in tandem with the evidence adduced when he testified in court that he did not occupy

Plot No. 7 but parcel No. Kakamega/Viyalo/738. The learned magistrate was therefore in order to consider the evidence adduced by the respondent because it was in support of his pleadings.

24. The learned magistrate also found that the appellant did not prove his case as required and dismissed it. The appellant has contended that this was wrong and has further argued that the learned magistrate did not consider the appellant's evidence. A court sitting on appeal will not normally interfere with the finding of fact by the court below unless satisfied that that court failed to take into account proper principles of law or took into account wrong principles of law thereby arriving at an erroneous conclusion. The Court of Appeal deciding in the case of ***Sumaria & Another –vs- Allied 2 Industries Ltd. [2007] eKLR*** held as follows;

> ***"Even in ordinary civil Appeals, the court of appeal could only interfere with the decision of the High Court on a finding of fact where it was based on no evidence, it was based on a misapprehension of the evidence and the judge was shown demonstrably to have acted on the wrong principle in reaching the finding he did."***

25. In this case, the learned magistrate was confronted with three parcels of land namely; Plot No. 7 Viyalo market, which the appellant had purchased at a public auction, and whose documents he had from the County Council and the Auctioneer. There was also parcel No. Kakamega/Viyalo/7 which belonged to Framise Limited and parcel No. Kakamega/Viyalo/738 which belonged to Kakamega County Council and which the defendant said he was residing on.

26. The learned magistrate considered this issue and raised the question of whether Plot No. 7 Viyalo Market was the same as parcel No. Kakamega/Viyalo/7. The appellant thought it was not. However, there was no independent evidence to assist the court make a determination on this. According to the appellant's counsel, Plot No. 7, Viyalo Market, fell within Kakamega/Viyalo/738. The learned magistrate rejected this submission saying this was evidence from the bar. The learned magistrate was of the view that an official from the Lands Office or the Local Authority from Kakamega County Council should have testified to clear this issue and assist the court determine whether the suit property, that is Plot No. 7, Viyalo Market, was the same as parcel No. Kakamega/Viyalo/7 or whether Plot 7 Viyalo Market was within parcel No. Kakamega/Viyalo/738. I do not see how I can fault the learned magistrate on this finding. Clearly, there are three parcels that is Plot No. 7 Viyalo Market, parcel No. Kakamega/Viyalo/7 and Kakamega/Viyalo/738. It was not proved where Plot No. 7, Viyalo market falls. It is true Plot No. 7 Viyalo Market may exist on paper but it was not established where it is on the ground. Consequently, the learned magistrate was right in rejecting evidence from the bar and in his holding that the Appellant did not prove his case on a balance of probability.

27. In a matter like the one that was before the learned magistrate, it was not only important to prove that the property in dispute existed on paper but also that it did exist on the ground. This is a fact that required proof, and in this case, it was the duty of the Appellant to prove that Plot No. 7 Viyalo Market existed and clearly prove by evidence where it was on the ground. As it is, no one can point out the suit property on the ground given the conflicting evidence adduced by both the Appellant and the Respondent. The fact of existence of Plot No. 7 Viyalo Market on the ground was vital but was not established let alone proved.

28. **Section 107** of the Evidence Act (Cap 80) Laws of Kenya provides as follows;

> ***S. 107 (1) "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence facts which he asserts must prove that those facts exist.***
>
> ***(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."***

29. The appellant asserted that Plot No. 7 Viyalo Market existed and it was his duty or burden to prove that the plot existed on the ground and lead concrete evidence to that effect which he failed to do.

30. The learned magistrate had also held that the Respondent resided on the suit property. This he said

was based on the evidence by the Appellant and his exhibits. The Appellant testified that the Respondent was occupying the plot, but the Respondent on his part denied this both in his defence and testimony. The Respondent had testified that he did not reside on Plot No. 7 Viyalo Market but on Plot No. Kakamega/Viyalo/738. The Respondent had also pleaded at paragraph 5 of his defence as follows;

> ***5. "The Defendant denies occupation of the suit premises and puts the plaintiff to strict proof thereof."***

31. Without establishing the existence of Plot No. 7 Viyalo Market on the ground, it could not be possible to establish as a fact that the Respondent was residing on that Plot. The Respondent put the Appellant to strict proof but the appellant did not discharge this burden. On this, the learned magistrate was wrong. This is because Section 3 (4) of the Evidence Act is clear and aptly applies to this case when it provides as follows;

> ***S. 3 (4) "A fact is not proved when it is neither proved nor disproved."***

32. In the case of Plot No. 7 Viyalo Market, it was neither proved nor disproved that it did nor did not exist. It was also neither proved nor disproved that the Respondent resided on that plot. Consequently, the learned magistrate could not hold with certainty that the Respondent lived on the Plot.

33. On grounds 4 and 5 of the appeal, I am satisfied that the learned magistrate considered the evidence on record and made a finding that was supported by the evidence except where I have held otherwise. I am also satisfied that the learned magistrate considered the real issue before him which was whether the Appellant had proved his case as required in law. On ground 7, I do not find any evidence that the learned magistrate's judgment was pre-determined or that his decision is indefensible. The learned magistrate decided the case based on the evidence before him and overall he was right in his final conclusion.

34. In the end, the Appellant's appeal is dismissed with costs.

Dated and delivered at Kakamega this 25th day of March, 2015

E. C. MWITA

J U D G E