



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT KAJIADO**

**ELC APPEAL NO. 13 OF 2020**

**REHEMA KISINYINYE OLOITIPTIP.....1<sup>ST</sup> APPLICANT/APPELLANT**

**KOIKAI OLOITIPTIP.....2<sup>ND</sup> APPLICANT/APPELLANT**

**-VERSUS-**

**WILSON M. TINKEET AND KAYIOK OLE TINKEET**

**(suing as the Administrators of the estate of TOKOYO OLE TENGETI (deceased)....RESPONDENT**

(Being an appeal against the decree and judgment delivered on 26/5/2020

in Kajiado CMCC 337 OF 2015)

**JUDGMENT**

1 Rehema Kisinyinye Oloitiptip and Koikai Oloitiptip referred to in this Judgment as the Appellant filed this Appeal on 28<sup>th</sup> August, 2020 against Wilson M. Tinkeet and Kayiok Ole Tinkeet referred to in this judgment as the Respondents.

2. The Appeal seeks to set aside the Judgment and decree passed by Hon. B.M. Cheloti, Senior Resident Magistrate Kajiado, in Kajiado CMCC 337 OF 2015.

3. In the Judgment and decree aforementioned, the learned Magistrate issued a permanent injunction against the appellants restraining them or anybody claiming through them from interfering with the respondents quiet possession, enjoyment and utilization of plot number 33/Resident-Bulbul Township Trading Centre; an order of eviction and demolition of the temporary structures erected on the suit property; mesne profits from 2006 be declared by the Defendants for rental income collected from their temporary structures; costs of the suit and interest on Mesne Profits and costs at Court rates from 26<sup>th</sup> May, 2020 which was the date of Judgment.

4. The grounds of Appeal as can be discerned from the Memorandum of Appeal can be summarized as follows;

a. The trial Magistrate erred in law and in fact by failing to find that the decree contained a grave error on the face of the record in that Appellant does not reside on the suit property and is not a beneficiary or administrator of the estate of the first Appellant.

b. The Learned Trial Magistrate erred in law in failing to find that the decree contained an error on the face of record for including one administrator and leaving out the other and therefore adversely affecting the rights of the children and successors of the deceased who were not parties to the suit.

c. The learned trial Magistrate erred in law and in fact in relying on and entertaining the expert opinion of an officer of the County Government of Kajiado who had vested interest in the matter and denied the Appellants the opportunity to cross-examine him.

d. The learned trial magistrate erred in failing to consider the Appellants evidence, submissions and affidavit testimony in making her determination.

e. That the learned trial Magistrate erred in failing to notice that the Appellants were not the right parties to be sued in the Lower Court because the land belonged to a deceased person.

f. The learned trial Magistrate erred in law in entering Judgment in favour of the Respondent for loss of income when it was neither pleaded nor proved.

g. The learned trial Magistrate erred in law in awarding Mesne Profits from 2006 which was not specifically proved and therefore the award of Mesne Profits is erroneously and legally untenable.

h. The trial Magistrate erred in fact and in law in believing the Respondents evidence and opinion of the expert without subjecting the same to thorough and exhaustive scrutiny and hence failed to discern the material discrepancies.

i. The learned trial Magistrate erred in law and in fact in not properly or at all applying the decision/authority in ***Giella –vs- Cassman Brown (1973) EA 358***.

j. The appeal is not filed out of time because the Lower Court did not comply with the Covid –19 Practice Directions issued by the Honourable the Chief Justice which affected the normal Court business including delivery of judgments, ruling and extraction of orders.

5. In support of their case, the Respondents who were the Plaintiffs in the Lower Court had filed the following;

i. A witness statement by Wilson M. Tinkeet dated 13<sup>th</sup> May, 2019.

ii. A letter by the Kajiado North Sub-County Administrator dated 11<sup>th</sup> July, 2014 showing that the County Government of Kajiado was to resolve the dispute between Plot Numbers 32 and 391 Residential Bulbul Trading Center.

iii. A letter dated 2<sup>nd</sup> July, 2014 confirming that the County Government of Kajiado resolved that the plot in dispute was number 32 /Residential and belonged to Tokoyo Ole Tengeti of P.O.Box 11 Ngong.

The same letter required Fatuma Nasira Oloiptip of Plot Number 391/Residential Bulbul to remove her structures from the suit premises within 7 days.

iv. A letter dated 20<sup>th</sup> March, 2014 from the County Government of Kajiado saying that Fatuma Nasera Oloiptip owned a temporary Mabati Structure on plot No. 32

v. A letter dated 18/8/2011 written to mama Saituni Oloiptip by Olkejuado County Council saying that Wilson Ole Tenkeet had complained against her over trespass to the suit premises.

vi. A letter dated 6/4/2004 written by Olkejuado County Council to Fatuma Oloiptip telling her of a complaint against her concerning encroachment into the suit plot.

vii. A map of Embulbul Trading Centre.

viii. 2 receipts dated 20/9/2016 and 18/2/2019 showing that Tokoyo Tenget was paying property rates to the County Government of Kajiado for plot no 32 Residential Bulbul.

ix. Grant dated 12/5/2005 in the estate of Kokoyo Ole Tenkeet issued to the Respondents by the High Court of Kenya at Nairobi in succession cause no. 128 of 2005.

x. Letter of allotment for the suit plot dated 22/12/1999 issued to Tokoyo Ole Tengeti.

6. At the trial in the Lower Court, the first respondent testified on 25/6/2019 and produced the above named documents as exhibits. He said that he is a son of Kokoyo Ole Tenkeet the allottee of the suit plot who died in the year 2004. The deceased had been allocated the plot in May, 1999.

Before the Respondent's father died, he had developed the suit premises and put up some structures which he rented out. The Respondents continued collecting rent from the tenants after the death of their father.

At one time when the first Respondent went to collect rent, he found that the structures put up by his father had been demolished and others put up on the suit plot.

The second Appellant said that she is the one who did it. She said that she had been allocated the land by the Council and wanted to exchange with the first Respondent. The first Respondent was not agreeable to this arrangement and that is when he complained to the County Council and the County Government.

The County Government resolved the dispute in favour of the Respondents after finding that the lawful allottee of the suit plot was their father Kokoyo Ole Tenkeet. When the Appellants failed to vacate the suit plot as ordered by the County Government and demanded by the Respondents, the filing of the suit in the Lower Court became necessary.

7. On the other hand, the Appellant's case is as follows. She is the mother to Fatuma Nasira Oloiptip who is now deceased and whose

children occupy the suit plot. The suit plot was allocated to her daughter. This was after the Respondents father exchanged the suit plot with a bigger one. The bigger plot was fenced by the first Respondent who later sold it.

Menye Baby alias Kisimei Ole Pemba knew about the sale of the bigger plot by the first Respondent but he is now deceased.

According to the first Appellant the County Government of Kajiado never resolved the ownership dispute because when this was to happen, the matter was already in Court. She blames the County Government Surveyor one Mr. Kasuku for failure to amend the records and reflect her daughter as the true and legal owner of the suit plot.

At the trial on 21/1/2020, the second Appellant testified on behalf of the Co-appellant who is his mother. He repeated the evidence of his mother in the

witness statement above. He did not produce any document to prove that the suit plot was owned by his late sister.

Both parties filed written submissions on 3<sup>rd</sup> May, 2021 and 15<sup>th</sup> December 2021 respectively.

8. I have carefully considered the entire appeal including the record of appeal and the submissions as well as the case law contained in the said submissions.

This being a first appeal, this Court is under a duty to consider the evidence adduced before the trial Court, evaluate it afresh and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses as they testified.

Secondly, an appellate Court should not interfere with the exercise of the discretion of the trial Court unless it is satisfied that the Court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of its discretion and that as a result there has been an injustice.

This was so held in the case of *Pithon Waweru Maina –vs- Thuka Mugiria Civil Appeal No. 27 of 1982 or eKLR 1983*.

9. I find that the following issues arise from the memorandum of appeal and the entire case.

Firstly, are the Appellants the proper parties to have been sued?

Secondly, was it proper to rely on the documentary evidence of the County Government of Kajiado without calling the makers of those documents?

Thirdly, did the trial Magistrate disregard the evidence and the submissions of the Appellants?

Fourthly, was it proper for the trial Court to award the Respondents costs, income and Mesne Profits and were they pleaded and proved?

Fifthly, was the trial Magistrate wrong to believe the Respondents evidence as it was and without more?

Finally, was the Appeal filed out of time?

On the first issue, I find that the Appellants were the proper parties to have been sued because according to the Respondents, they or their agents are the ones in occupation of the suit land. They are the trespassers. If they were not the proper parties, they would not have defended the suit at the Lower Court. They would also not have filed the current appeal.

Further to the above, if the Appellants wished to add other parties to the suit, they would have done so under **Order 1 Rule 15 Civil Procedure Rules**. They cannot therefore be heard to say that there were other parties who ought to have been joined. They should have done so at an earlier stage.

On the second issue, I find that it was proper for the Trial Court to rely on documentary evidence of the County Government without calling the makers of those documents.

The Appellants participated in the trial and it was open to them to object to the production of any document. They did not do so at the right time and it is now too late in the day to do so.

Thirdly, I find that the trial Magistrate did not disregard the crucial evidence of ownership as presented before the Court.

Fourthly, I find that the trial Magistrate did not award anything that was not prayed for. She allowed the claim as presented. She did not assess the Mesne Profits and left the prayer open for proof before award. This was proper.

What the Appellants are calling lost income is actually what the Court called Mesne Profits. It is one and the same thing. It was pleaded and proved though not specifically.

Fifthly, I find that the trial Magistrate was right to believe the Respondents. This is because their evidence was corroborated sufficiently in

all material particulars by the evidence from the County Government of Kajiado including the allotment letter and all subsequent correspondence from the County Government.

In contradistinction, the Appellants did not have even one official document to prove ownership of the suit property. They had no evidence of the so called exchange including the agreement and minutes of the meetings that approved those exchanges.

The Respondents case against the Appellants was properly proved on a balance of probabilities.

The final issue of whether the Appeal was filed out of time is superfluous because the appeal has actually been heard on merit and was admitted before it was urged.

For the above stated reasons, I find that the Appeal herein has no merit at all and I dismiss it with costs to the Respondents.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2022**

**M.N. GICHERU**

**JUDGE**