REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HCA 22 OF 2005

LAWRENCE AKWIMA.....APPELLANT

VERSUS

JAMES NGIRINE.....RESPONDENT

(Being an appeal against he judgment of the Resident Magistrate's court at Maua RMCC NO. *194 (C. Oyugi)*

JUDGEMENT

The Memorandum of Appeal dated 4th April, 2005 has the following grounds:

1. **The Learned resident Magistrate erred in law and in fact in awarding judgment for the respondent against the appellant when the respondent did not prove case on a balance of probability.**

2. **The Learned Resident Magistrate erred in law in not finding that the consent produced in court as P. Ex.1 was not properly produced and should have been filed together with the plaint as provided for in Cap 283 and Cap 284 Laws of Kenya. He should have dismissed the suit on that ground alone.**

3. **The Learned Resident Magistrate erred in law in not finding that the respondent has forcefully encroached and constructed on the appellants land in light of all the exhibits produced by the appellant.**

4. **The Learned Resident Magistrate did not consider the decision of the land committee which recommended that the suit land be returned to the appellant which recommendation was ignored by the land office. The decision was through objection No.271 which ordered the respondent to leave appellant's land.**

5. **The judgment of the Resident Magistrate is against the weight of the law and evidence.**

6. **The Learned Resident Magistrate totally ignored the appellant's evidence and that of his witnesses hence arriving at a wrong judgment.**

Both parties proffered written submissions.

In his original submissions dated 27th of May, 2008 prepared by his advocate, the appellant supported his six grounds of appeal. He submitted that the Respondent did not prove ownership of the suit land through his evidence and the evidence of the other witnesses. He opined that the respondent should have moved

to court by way of Judicial Review Proceedings and not by way of a plaint in the Principal Magistrate's Court. He further submitted that there was no evidence to show that the appellant had encroached upon the respondent's land.

The appellant also argued that there was no consent as required by the land Consolidation Act and if there was any, it was null and void as it did not bear the name of the appellant. He further argues that the plaint was not signed by counsel for the plaintiff/respondent.

In his second set of submissions dated 13th September, 2012 the appellant generally restated his earlier submissions. He, however, did not repeat his submission to the effect that the Plaint in the lower court had not been signed. He however submits that the court had not jurisdiction to hear the matter in view of S.29 of the Land Adjudication Act and opines that the respondent having been aggrieveded by the decision of the Land Adjudication officer should have appealed to the Minister of Lands. He also repeated his earlier submission that the other option the respondent should have considered was to file a Judicial Review Application in the High Court.

The Respondent through his advocates opposed the Appeal. He submitted that the appellant had failed to name the other parties in the lower court in the appeal. The other parties were the Demarcation officer, the Land Adjudication officer and the Attorney General. He submitted that failure to join them in the appeal was fatal to the appeal. He submitted that the requisite consent as required to be given by the Land Adjudication officer had been obtained and that this fact had been proved in the Lower Court. He argued that the consent issued was proper as it showed the land in dispute as being No.2063, AKITHI Adjudication Section. It also showed the name of the person it was issued to, in this case the respondent. He argued that there was no requirement for the consent to contain the name of the person intended to be sued.

The respondent also submitted that he had provided evidence to prove that the suit land belonged to him including sketch plans produced by PW1V, the Land Adjudication Officer. He further submitted that the respondent had an inherent right to move to court to agitate for his rights, as if he did not do so, his permanent house would have been destroyed through the arbitrary decision he had gone to court to oppose. He opined that there was no express provision that barred a court to deny a litigant from accessing justice in proceedings relating to objections under the Land Adjudication Act.

He reiterated that he had proved his case and said that the lower court had been extremely fair and wholly relied on the evidence placed before it. He argued that none of the appellant's witnesses gave evidence to the effect that the respondent had encroached upon the appellant's land. He stated that the trial court had rightly stated that the appellant had not mentioned the acreage or extent of the land allegedly encroached upon by the respondent. He further stated the respondent had relied on Exh. 3, a letter dated 24th January, 1996, which was written by the land Adjudication Officer and was addressed to the Demarcation Officer. Its contents were to the effect that the respondent's homestead should not be disturbed in any manner and that the initial boundary should subsist.

I have gone through the record of proceedings in the lower court. I have also considered the submissions made by the parties.

I will first deal with two issues which spawn a nexus with order 42(4) of the Civil Procedure Rules which reads:

"The appellant shall not, except with the leave of the court urge or be heard in support of any ground of objection not set forth in the memorandum of appeal, but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth with the Memo of Appeal or taken by leave of the court under this rule."

I do note that the appellant's submission that the respondent's plaint had not been signed was not a ground contained in the Memorandum of Appeal. What is contained in the record of appeal is a Copy of the plaint and I am not sure that the signature of the advocates representing the respondent had not been

erased. I also note that this issue had not been raised in the lower court. I will, therefore, not consider that submission.

The respondent in his first submission argued that failure by the appellant to include all parties who were named in the suit in the Lower Court was fatal to the appeal. These other parties were the Attorney General, the Demarcation Officer and the Land Adjudication Officer. I note as a fact that the three parties were not named in the Appeal. I opine that it would have been desirable to have named all parties whether some had filed pleadings or not in the lower court. This is the practice in Common law Jurisdictions. For example, in Sri Lanka, such failure would lead to summary dismissal of the appeal as happened in the case of **M. Selasinghe (Appellant) vs D. M. Kanakarathna (Respondent D. A.864/20000 (F)**. Failing to name some of the parties in the original suit amounts to severing a suit in some manner. It is not desirable. Such unnamed parties if even where they did not file pleadings in the lower court are embraced by that part of Order 42 (4) that says "......, but the High court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of Court under this rule."

This is to say that they should be allowed their day in court unless they elect not to be participants. Who knows? They may even elect to support the appellant's case. My final decision, however, will not be predicated upon this submission.

I will now deal with the appellant's grounds one by one:

On ground 1, I find that the trial magistrate on a balance of probability had rightly entered judgement for the respondent. This finding also takes care of grounds 3, 4, 5 and 6. Regarding ground 2, I find that the trial magistrate correctly found that the consent obtained by the Respondent to file a suit was valid.

I find it necessary to address myself to the submission by the appellant that the respondent should have appealed to the Minister of Lands instead of filing a case in the Magistrate's Court at Maua. The appellant also submitted that the respondent had an option to file a Judicial Review to challenge the decision of the Land Adjudication Officer in Objection No.271.

Section 30 (1) of the Land Adjudication Act reads as follows:

"Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of the Act."

The meaning of this provision is that an aggrieved person cannot go to court until the adjudication register for the apposite adjudication section has become final **UNLESS** the consent of the Adjudication Officer has been granted. in the present case consent had been obtained. Therefore, the respondent properly instituted the suit in the Lower Court.

I find that the record of proceedings in the lower court handled the pertinent issues properly, dealt with germane issues judicially and the trial court set out a cogent basis for reaching its conclusion.

In the circumstances, this appeal is dismissed with costs.

Dated and Signed at Meru this 2nd day of August, 2014.

P. M. NJOROGE

JUDGE

Delivered in Open Court at Meru this 17th day of February, 2014 in the presence of
Cc Daniel

Kiogora h/b Ayub Anampiu for Appellant's

Muriuki for Respondent Absent

P. M. NJOROGE

JUDGE