REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 139 OF 2012

DANIEL SIMOTWO……..... APPELLANT

VERSUS

JACOB J KIPYA KOMEN..... RESPONDENT

JUDGEMENT

1. This appeal is brought by the appellant following a long protracted dispute between him and the respondent challenging the decision of a ruling delivered by **Hon J Mwaniki PM** on **25th July, 2012** in **Nakuru SRM No 1417 of 2000** between **Jacob J Kipya Komen** and **Daniel Kipkorir Simotwo**. The dispute between the parties herein relates to **Nakuru/ Sururu/ 1547** which is currently registered in the respondent's name.

2. The respondent claims that the appellant unlawfully occupied his land. Summary judgment was entered on **9th July, 2004** after hearing by way of formal proof where the respondent was adjudged to own the land and eviction of the appellant was ordered, as well as costs of the suit and interest thereon.

3. The appellant filed a Notice of Motion on **4th June, 2012** seeking stay of execution of the decree as well as setting aside the judgement on the grounds that summons to enter appearance and hearing notice were not duly served upon him.

4. The motion was determined on **25th July, 2012.** In dismissing the application, the learned trial Magistrate held that the application was vexatious because the appellant had been duly served with summons to enter appearance and had even instructed an Advocate who filed a memorandum of appearance but failed to file a defence.

5. The appellant dissatisfied with the decision in the above ruling preferred this appeal on five grounds: That the learned trial Magistrate:

> **(i) Erred in law and in fact in entering the ruling against the Appellant without directing himself as to whether proper service was effected upon the Appellant**
>
> **(ii) Erred in law by ignoring the rules of natural justice**
>
> **(iii) Erred in law and in fact in entering the ruling against the Appellant without considering his submissions**
>
> **(iv) Erred in law in failing to consider the Land Dispute Tribunal judgement which was never challenged by the respondent**

(v) Erred in law and in fact by considering unsubstantiated evidence in making his decision

6. The appellant prays that the appeal be allowed and judgement and decree against him be set aside.

7. The appellant also filed a further supporting affidavit sworn on **30th April, 2013** in which he deponed that the respondent wished to execute the decree awarded in the Magistrates' Court, despite there being an order by the same court confirming his award by the Land Dispute Tribunal.

8. On **4th December, 2013** parties agreed to dispose of the appeal by written submissions. The appellant did not file his submissions, although given an opportunity to do so but the respondent filed his on **2nd December, 2013.**

9. The respondent submitted that the appeal did not raise any new matters to warrant its success. Judgement had been entered against the appellant and his application dated **7th August, 2012** was dismissed. Furthermore, the appeal was defective as the memorandum of appeal was filed by **M/S Aminga Opiyo Masese and Co Advocates**, while the record of appeal was filed by the firm of **L.R Kipsang & Co Advocates** without any notice of change of advocates.

10. I shall now proceed to consider each of the grounds of appeal. Before I do so, I just wish to rehash the principle governing the duty of an appeal court on a first appeal. The appeal court has got a solemn duty to re-evaluate the evidence before the trial court and make its own decision. This age-old principle was reiterated by the court in **Bemugisa & others -vs- Tibebaga (2004) 2 EA 17,** where the court held inter-alia;

> ***"...the legal obligation of a first appellate court to re-appraise evidence is founded on common law rather than in the rules of procedure. It is a well settled principle that on a first appeal, the parties are entitled to obtain from the appellate court its own decision on issues of fact and law, giving due allowance for the fact that it has neither seen nor heard witnesses.'***

11. This principle has variously been followed by our own High Court on many occasions while resolving appeals emanating from the Magistrates courts see the case of **Amalgamated Saw Mills Ltd v Tabitha Wanjiku (2006)** eKLR and **Japheth Ifedha v Colindale Security Company Ltd (2005)**

12. And now to the grounds of appeal:

On the first ground that the learned trial Magistrate erred in law and in fact in entering the Ruling against the appellant without directing himself as to whether proper service was effected upon the appellant, I find that the learned trial magistrate did consider that service was effected. From the court record, summons to enter appearance were taken out on **29th June, 2000.** The firm of **L.R Kipsang & Company Advocates** entered appearance for the appellant on **17th July, 2000.** For that reason this ground fails.

13. On the second ground that the learned trial Magistrate erred in law by ignoring the rules of natural justice, I find that the learned trial Magistrate did consider this issue as well. The appellant did not file any defence, therefore interlocutory judgement was entered against him as the law stipulates. He cannot claim that he was never given an opportunity to be heard as the rules of natural justice provide. This ground also fails.

14. On the third ground that the learned trial magistrate erred in law and in fact in entering the ruling against the appellant without considering his submissions, I find that the learned trial Magistrate did consider the appellant's submissions The court record indicates the following;

> **"I have carefully considered the application herein. I have also perused the proceedings herein..."**

It is clear that the submissions were considered. Due consideration does not mean that submissions must

be reproduced word for word in the court record but rather that the Magistrate has taken the sentiments expressed therein in making his decision. This ground equally fails.

15. On the fourth ground that the learned trial Magistrate erred in law in failing to consider the Land Dispute Tribunal judgement which was never challenged by the Respondent, I refer to the ruling made by **Hon Aganyo, RM** delivered on **25th February, 2013** on an application filed by the appellant addressing these same issues in the appeal. The learned Magistrate found that the dispute had been filed by the appellant before the Land Disputes Tribunal in 2011 as an afterthought after interlocutory judgement had been entered in 2004. The award by the Land Disputes had no effect on the earlier judgement. This ground also fails.

16. On the fifth and last ground that the learned trial Magistrate erred in law and in fact by considering unsubstantiated evidence in making his decision, I find that evidence has been meticulously provided to show that indeed the appellant was duly served and even instructed the firm of **L.R Kipsang and Co Advocates** who filed a memorandum of appearance on **17th July, 2000** but for reasons best known to him decided not to pursue his case and put forward a defence. This would have averted interlocutory judgment being entered against him. For that reason this ground also fails.

17. This appeal is a clear example of a litigant who has refused to accept his fate. It is in the interests of justice that litigation in this matter comes to an end and the respondent be left to enjoy the fruits of his decree. The appellant has tried all possible avenues to delay execution of the same but there is always an end to everything.

18. For the above reasons, I find that this appeal lacks merit and consequently dismiss it with costs to the respondent.

Dated and delivered at Nakuru this 19thday of September 2014.

L N WAITHAKA

JUDGE

PRESENT

Jacob Kipya Komen : Defendant

N/A for the plaintiff

Emmanuel Maelo :Court Assistant

L N WAITHAKA

JUDGE