



REPUBLIC OF KENYA



KENYA LAW
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**Wainaina v Abdi (Environment and Land Appeal 05 of 2020)
[2022] KEELC 2199 (KLR) (21 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 2199 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 05 OF 2020
MN GICHERU, J
APRIL 21, 2022**

BETWEEN

ANNA WANJIKU WAINAINA APPELLANT

AND

ABDI ADEN ABDI RESPONDENT

*(Being an appeal from the judgment of Hon. Kahuya I.M. (P.M) dated 11th March, 2020
in the Chief Magistrate's Court of Kenya at Kajiado in CMCC-ELC NO. 74 OF 2018)*

JUDGMENT

- 1) This judgment relates to Kajiado CMCC ELC Case No.74 of 2018 in which Hon. I.M. Kahuya Principal Magistrate, dismissed the suit by Anna Wanjiku Wainaina (Appellant) for failure to prove the precise location of her plot on the ground.
- 2) Dissatisfied with the decision of the Learned Magistrate, the Appellant filed this Appeal on 11th May, 2020 vide a Memorandum of Appeal dated 19th May, 2020 citing the following grounds.
 - (i) The Learned Magistrate erred in law and thus occasioned a miscarriage of justice in proceeding without involving the parties in taking directions to determine the suit without laying any basis for so doing, yet she was not the trial magistrate.
 - (ii) The Learned Magistrate erred in Law and fact by framing the description of the suit land as the sole issue and upon which issue she then proceeded to dismiss the suit against the weight of pleaded facts, the witnesses' testimonies and the material evidence adduced before the trial magistrate.
 - (iii) The Learned Magistrate erred in law and fact in holding that a site visit to the suit land was the only way of resolving the dispute before her.



- (iv) That the Learned Magistrate erred in law and fact in failing to take into account and make a determination on the issues raised in the pleadings and testimony adduced and evidence relied upon by the parties before her.

The Appellant therefore proposes the following

- (a) That a Magistrate who heard the parties and conducted the entire trial should ordinarily be the one to write the judgment unless for exigencies to be recorded upon taking directions involving all parties to the suit.
- (b) That prayers (a) to (f) as sought in the Plaint filed on 15/2/2018 in the original suit, Kajiado MCL2E No. 74 of 2018 be granted as prayed.
- (c) That the costs of this Appeal be provided for.
- 3) Only the Appellants' counsel filed written submissions on 15/12/2021. The Respondents' counsel though duly served did not file any submissions.

It is only the record of Appeal and the Appellant's submissions that will be considered in this case. The Duty of the first Appellate Court is to subject the whole of the evidence to fresh exhaustive scrutiny and make its own conclusion albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of *Selle and another v Associated Motor Boat Co Ltd*(1968) EA, 123.

I will look at each ground of Appeal separately as here below.

I have carefully considered the material before me before coming to the following conclusions. The material includes the record and the submissions by the Appellants' Counsel.

- 4) On the first ground of Appeal, I find that the trial Magistrate did not err in writing the judgment in a case heard by another Magistrate. Order 18 Rule 8(1) of the [Civil Procedure Rules](#) provides;

"Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it".

The Magistrate therefore complied with the law because it is admitted that her predecessor was transferred to Kitui Law Courts before she could conclude the case.

Secondly, the record is incomplete as to how the directions were taken concerning the judgement. The Appellant has not said that she was denied an opportunity to submit on the way forward before directions on judgment writing were given. Under Section 2 of the [Civil Procedure Act](#) "judge" means the presiding officer of the Court and therefore includes a Magistrate.

- 5) Regarding the second ground of appeal, I find that the Learned Magistrate did not err. She had discretion under Order 21 Rule of the Civil Procedure Rules to identify the issues for determination. The rule provides;

Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision".



I find that the only issue for determination in the case before the learned Magistrate was whether Plot No. 3716/Business was the same as Plot No. 123/Residential. It was incumbent upon the Plaintiff to prove this point by way of cogent evidence because failure to do so was fatal to her case.

The above finding also answers grounds number 3 and 4 as they are both related to ground number 2 in that they concern the one issue determination.

- 6) Further to the above finding, I find that the Plaintiff/Appellant did not prove her case on a balance of probabilities for two more reasons.
- 7) Firstly, the Appellant did not prove at the trial that she complied with paragraph 2 of the letter of allotment issued to her and dated 11th September 1991. It reads as follows;

"This plot should be developed within 2 years and the plan for building should be submitted for approval by the Health Officer, the District Physical Planning Officer, M.O.W. Building Officer, District Commissioner and Clerk to Council within six months of allocation".

The Appellant should have had a very good reason as to why she had not complied with that paragraph more than 28 years since the plot was allotted to her. She offered no reason at all.

- 8) Secondly, the Respondent was not only in possession of Plot No. 3716/Business but he produced in evidence at the trial a Property Search Certificate dated 21/2/2018 showing that he is owner thereof.

Under Section 116 of the [Evidence Act](#) it is provided as follows;

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner".

- 9) The Appellant had a mountain to climb in terms of proof and it is clear that she did not climb it. In all the circumstances of this case, the dismissal of the Appellants' case was proper and well founded both in fact and in law.

I dismiss the Appellants' Appeal for the above stated reasons.

I make no order as to costs because the Respondents' Counsel did not file any submissions.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 21ST DAY OF APRIL, 2022.

M.N. GICHERU

JUDGE

