



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**CIVIL APPEAL NO. 64 OF 2009**

JASON M'LAICHENA..... PLAINTIFF

VERSUS

FRANCIS MUGAMBI LIKAUNYA.....1ST DEFENDANT

DISRICT LAND ADJ. OFFICER (NYAMBENE).....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

*(Being an appeal arising from the judgment of the Honourable Principal Magistrate Mr. W. K. Korir,  
in Meru CMCC NO.213 of 1995 delivered on the 9.6.2009)*

**J U D G M E N T**

In this appeal, the appellant prays that it be allowed, that the Court sets aside the Judgment of the Lower Court, that a Judgment be entered in favour of the appellant and costs both in the lower Court and in this Court be awarded. The Memorandum of Appeal States.

1. **The Learned Principal Magistrate erred in law in failing to find that the 1st Respondent's claim was untenable in law as it was filed without the written consent of the District Land Adjudication Officer since the land in dispute falls within an Adjudication Section.**
2. **The Learned Principal Magistrate's finding that the 1st Respondent had bought two acres of land at Mikuune was without support of any evidence, more so, after the trial magistrate rejected the sale agreement relied upon by the Respondent.**
3. **The Learned Principal Magistrate erred in law and in fact by making a decision in favour of the 1st Respondent against the weight of the evidence.**
4. **The Learned Principal Magistrate erred in failing to find that the Appellant had proved his case on a balance of probabilities.**
5. **The Learned Principal Magistrate erred in law in failing to analyze and sufficiently evaluate the evidence of the Appellant because, had he done so, he would have found for the Appellant**

The appellant submitted as follows:

1. **Since a counterclaim is a suit on its own, the respondent was required to obtain the consent of the Land Adjudication Officer. The appellant submitted that apposite consent had not**

**been obtained and for that reason the counter claim must fail.**

- 2. The evidence that the Respondent had bought 2 acres from the appellants father fell short of the required standard. It was submitted that none of the respondent's witnesses had witnessed the sale agreement.**
- 3. That the Appellant's Exhibit 1 dealt with the distribution of L. R. Nos 3825 and 3659 by the appellant's father and did not mention the respondent as one of the beneficiaries. It was also submitted that the Lower Court should not have conceded that because the appellant's father did not participate in the objection proceedings between the two parties, it meant that he had sold land to the respondent.**
- 4. The appellant's case before the Lower Court was clear, straight forward and proved on a balance of probabilities and it was submitted that the Lower Court did not apply its mind properly to the facts as proved in evidence. It was also argued that the Lower Court had failed to analyze the evidence.**
- 5. Regarding the submissions by the respondent that there was no decree annexed to the appeal, the appellant submitted that there was a copy of the judgment and final orders which were sufficient as they evinced no ambiguity.**

It was argued that Order 42 (2), Civil Procedure Rules allowed the Court hearing the appeal to make an order calling for a certified copy of the decree. It was urged for the appellant that the section did not provide that the appeal would be incompetent for failure to attach a copy of the Decree. It was also argued that as the Court had admitted the appeal without ordering the filing of the decree, it meant that the Court was satisfied with the appeal as it was filed. It was also urged that the Court should find recourse in the provisions of Sections 1A and 1B of the Civil Procedure Act and eschew technical requirements. During the highlighting of the submissions, this position was buttressed through invocation of the provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010.

The 1st Respondent submitted as follows:

- 1. The judgment of the Learned Trial Magistrate which dismissed the Plaintiff's/Appellant's case and allowed the 1st Respondent's/Defendant's counter claim was well balanced and as such, the appeal lacked merit and should be dismissed.**
- 2. The Appeal was incompetent as no certified copy of the Decree was filed as the Civil Procedure rules require.**
- 3. After the Plaintiff/Appellant had obtained the consent of the Land Adjudication Officer, it was not necessary for the 1st Defendant/Respondent to obtain another consent to file a counter claim over the same dispute and subject matter. It was submitted that the 1st Defendant/Respondent had indeed obtained a consent which had not been challenged by the Appellant and had been accepted by the Court.**
- 4. There was no dispute as to the purchase of 2 acres by the Respondent from the respondent's father. The only dispute was as to whether the 2 acres were at an area called Twale which is where the Plaintiff/Appellant insisted it was or an area called Mikuune where the Defendant/Respondent insisted the land was. It was urged that the learned Trial Magistrate had accepted that the land was at Mikuune and that the Defendant/Respondent had worked on the land for fifteen years before the Appellant had forcibly occupied it.**
- 5. It was submitted that the Appellant's father died after the dispute had arisen over the situation of the 2 acres and that during the proceedings before the Land Adjudication Committee, he had not supported his son, the appellant. It was said that a new Land Adjudication Committee was indecisive and pretended to act like the Biblical Solomon by**

**splitting two acres between the Appellant and the Respondent therefore necessitating recourse to the Court by the two parties.**

- 6. The Learned Trial Magistrate had the opportunity to look and assess the demeanour of the witnesses and rightly rejected the Appellant's case.**

The 2nd and 3rd Defendants/Respondents submitted as follows:

- 1. The appeal offends the mandatory provisions of section 16 (1) (1) of the Government Proceedings Act requiring that no relief as may be sought in proceedings between subjects maybe granted by way of injunction or specific performance against the Government. As the Appellant had sought such orders in the suit that spawned this appeal, which orders could not be availed, the Appeal lacked merit.**
- 2. The relief sought in the original suit offended section 4(1) of the Limitation of Actions Act. As the contract for the sale of land had been entered into in 1975, the Plaintiff/Appellant slept on his rights for 20 years until 1995. It was urged that this offended section 4(1) of the Limitation of Actions Act, which limits the period to 6 years.**
- 3. It was further submitted that the plaintiff had not demonstrated the claim he had on the piece of land in dispute. As in his pleadings he had claimed that the land had belonged to his father, he should have obtained letters of administration. As a result, it was argued that he was a stranger to the proceedings, therefore meriting the failure of the Appeal.**

I have carefully perused the typed proceedings of the trial Court. I have read the submissions of the parties. I have also considered the arguments of the parties during the highlighting of the submissions.

Regarding the submission by the Appellant that the respondent's claim was untenable as he had not obtained the consent of the District Land Adjudication Officer, I find as a fact that the apposite consent had been obtained. As both the Appellant and the 1st Respondent were in agreement that the Appellant's father had sold two acres of land to the 1st Respondent, no further evidence was needed to prove an admitted fact.

The 1st respondent had sought to have the Appeal dismissed for being incompetent on account of non-failure to file a certified copy of the Decree as required by the Civil Procedure Rules. I agree with the Appellant that a copy of the Judgment containing its final orders had been availed and that there was no ambiguity as to the orders being appealed against. Whereas it is important that procedural requirements be followed, I am inclined to agree with the appellant that this is one area where the exigencies of substantial justice stumps technicalities. The Court had admitted the Appeal and it should be considered on its merits.

I wish to say something about the submissions of the 2nd and 3rd Respondents. They were to the effect that the Appeal should be dismissed for non-compliance with the provisions of section 16 (1) (1) of the Government Proceedings Act and Section 4(1) of the Limitation of Action Act. They also submitted that the disputed land belonged to the estate of the father of the appellant. This being the case, they submitted, the appeal must fail as the appellant had not bothered to obtain apposite letters of administration. I consider that these arguments should have been agitated before the trial court. For this reason, I will not accord them any weight.

I now turn to the submission that the trial magistrate had reached a decision in favour of the 1st Respondent against the evidence as the Appellant had proved his case on a balance of probabilities and that he had failed to analyze and to evaluate the evidence sufficiently.

I find that the trial magistrate analyzed and properly evaluated the evidence proffered by the parties and had arrived at a proper and sound judgment. Consequently, this Appeal is dismissed with costs to the Respondents.

**Delivered in open Court at Meru this 26th day of September, 2013 in the presence of:**

Mwonjaru/Daniel

Rimita for 1st Respondent

Rimita h/b Mogaka for 2nd and 3rd Respondent's

Murango Mwenda for Exparte Applicant – Absent

**P. M. NJOROGE**

**JUDGE**