Kameni v Daudi Wamwandu Mwandisha (Sued as the Representative of Gamaleli Mwandisha (Sued as the Representative of Gamaleli Mwandisha Mwakulomba) (Environment and Land Appeal 15 of 2021) [2022] KEELC 2251 (KLR) (29 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2251 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 15 OF 2021

NA MATHEKA, J

JUNE 29, 2022

BETWEEN

MUIYA MAILU KAMENI .... APPELLANT

AND

DAUDI WAMWANDU MWANDISHA (SUED AS THE REPRESENTATIVE OF GAMALELI MWANDISHA (SUED AS THE REPRESENTATIVE OF GAMALELI MWANDISHA MWAKULOMBA) .... RESPONDENT

JUDGMENT

1 The above named appellant appealed to this Court against the whole of the above mentioned judgment and decree in the following grounds hereof:-

1. The learned magistrate erred in law and in fact in entering judgment in favour of the Respondent without the matter going into a full hearing and the witnesses heard.
2. The learned magistrate erred in law and in fact in entering the Judgment in favor of the Respondent without the District (Land Surveyor giving evidence on how the curved a road in the. Appellants plot without his knowledge.
3. The learned magistrate erred in law and in fact in entering the Judgment in favor of the Respondent in Application stage without matter going into a full hearing as this was a land case which was sensitive and denied the owner of the parcel of land who sold the Appellant from giving evidence.
4. The leaned magistrate erred in law and in fact entering judgment in favor of the Respondent without all the Respondents witnesses heard and cross examined by the Appellant.

5. The learned magistrate erred in law and in fact in entering the Judgment in favor of the Respondent without putting into consideration that was there any public road between the plots as the District Land Surveyor did not testify.

6. The learned magistrate erred in law and in fact in entering the Judgment in favor of the Respondent without putting into consideration the appellant's submissions while the same had merit.

7. The learned magistrate erred in law and in fact in entering the Judgment in favor of the Respondent by allowing the Respondent to open the road without adhering to the issues raised by the appellant concerning the fraud of curving a road without his consent.

2. They pray that the judgment of the learned magistrate together with all consequential orders or decree be set aside and this Appeal to be allowed with costs. The Appellant submitted that they never provided substantial proof of how they stand to suffer harm by not using the access road which was on his land. The surveyor was never called to testify how a public road was curved out of his private land. That the trial court did not evaluate the evidence of both parties and the finding was not supported by evidence.

3. The Respondents submitted that by consent they were given a hearing date of 14th December 2020. Both parties indicated that they will not be calling any witness. On 14th December 2020 the Plaintiff proceeded and adduced evidence in respect to his case and closed his case. The Defendant proceeded with his case on that material day and closed his case too. The matter was then slated for mention for submissions on 21st December 2020. The Defendant was given more time to put in his submissions. Parties exchanged their submissions and a Judgment date was given to be on 4th February 2021. That Procedures are hand maid to Justice. Failure to abide with the rules and procedure leads to miscarriage of Justice. Article 50 of *the Constitution* of Kenya provides for a right to fair hearing. Article 50 provides as follows:

> "Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate another independent and impartial tribunal or body".

4. That all steps and stages of hearing were taken by the trial court when this matter was heard. The Appellant could not now allege that this matter was concluded at an application stage. This was a straight forward case where there were reports by the Land Registrar confirming that the disputed area was a public access road. They were not technical reports that required them to come and produce them. They were self-explanatory and were accompanied by maps. There was no encroaching but just a confirmation whether the disputed area was a public access road or not. Section 143 of the *Evidence Act* Cap 80 Laws of Kenya provides that there is no limit to the number of witnesses a party wishes to call. The said Section reads as follows:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact".

5. That the Respondent presented his case by himself and tendered all the relevant documents in support. The Appellant was free to look for a surveyor of his choice and table his survey report if he was of the contrary opinion with the findings of the Land Registrar. The Appellant also chose not to call any witness. The Appellant cannot now allege that there were witnesses who did not testify. His claim is neither here nor there. The Respondent's evidence convinced the court that he had proved his case on balance of probabilities and deserved the prayers that he was seeking.

6. This court has carefully considered the appeal and the submissions therein. This being a first appeal, this court has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. In the case of Gitobu Imanyara & 2 others vs Attorney General (2016) eKLR, the Court of Appeal held that;

7. This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

8. I have perused the proceedings of the lower court and find that the Plaintiff and the Defendant both gave evidence on the 14th December 2021The Plaintiffs gave evidence. From the records the Plaintiff produced the surveyors report in a letter dated 26th November 2020. The surveyor one Mwambire K.M recommended as follows;

    1. *Status quo* should remain until the matter is resolved amicably.

    2. Because the current ground situation is in conformity with the current map situation, the obstructed public road of access should be reopened for use until further notice.

    3. The point of objection by one Mr. Muya Mailu Kamene on 29th September, 2020 a copy of which is attached should be dropped as it does not hold water unless otherwise justified."

9. A map certified on 26th October 2020 by the Assistant Director Surveys shows that they exists an access road between parcel numbers Taita/Taveta Scheme Phase 1/2200 and Taita/Taveta Scheme Phase 1/2201. That the blocked public road of access was serving Taita/Taveta Scheme Phase 1/117 and Taita/Taveta Scheme Phase 1/2199 as per the map. The Plaintiff testified that his father bought the land in 2007 from John Kamoso Ngui and built there. The Defendant bought his parcel number Taita/Taveta Scheme Phase 1/2200 later in 2007 from the same seller John Kamoso Ngui and blocked the access road. From the evidence on record I do find that the said access road exists and has been blocked by the Appellant in this case. No contrary evidence was provided to rebut the Government Land Surveyors report produced in court as an exhibit. Section 107 of the *Evidence Act* Cap 80 of the laws of Kenya states that;

> "Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

In *Mbogo & Another vs Shah* (1968) EA 93, the Court, (Sir Newbold, P.) stated at page 96:

10. A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself 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 judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice."

In the case of *Nkube vs Nyamiro* (1983) KLR 403, the same court stated that;

11. A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

The trial court in his judgement stated that;

> "It is clear from the foregoing observations that the plaintiff's claim lacks in certainty and specificity. This prejudiced the defendant as it could not understand the case it had to meet. Be that as it may, the defendant has endeavored to produce various vouchers, cheques and bank statements tending to show that he surrendered the rent collections to the plaintiff"

12. I agree with the trial magistrate that from the evidence on record the plaintiff has proved his case on a balance of probabilities. For these reasons I find this appeal is not merited and I dismiss it with costs.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF JUNE 2022.

N.A. MATHEKA

JUDGE