

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CIVIL APPEAL 69 OF 2007

JOHN BARASA MATIFARI.....APPELLANT

~VRS~

SIMON WANJALA MABONGA.....RESPONDENT

(Appeal from Senior Resident Magistrate Hon. G. Sogomo at Bungoma in civil case no.5 of 2005)

JUDGMENT

The Respondent filed this suit seeking that the Appellant be compelled to deliver up to him vacant possession of land parcel E. Bukusu/S. Nalondo/2862 in respect of which he was the registered owner. Also sought was a permanent injunction to restrain the Appellant, and all those acting under him, from preventing him from using, cultivating and enjoying his rights over the suit land. His case was that on 21/2/1995 he bought the suit land from the then registered owner Titila Mayuu Muluoni (now deceased), paid for it and subsequently became the registered proprietor. At the time of the purchase the Appellant was occupying a portion of the suit land. The occupation was on licence from the deceased. It was agreed among the three that the Appellant would deliver up possession to the Respondent within a reasonable time. By the time the deceased died he had not, and had subsequently refused to vacate. Hence the suit.

The Appellant filed a defence denying that the Respondent had any valid claim to the suit land, or had any valid registration. He pleaded that up to the time the deceased died he (the deceased) was the registered proprietor of the suit land. Following the death, the Appellant's father Simon Matafari had filed HC P&A case no.91 of 2001 at Bungoma and appointed the administrator of the estate of the deceased. The cause was still pending. The Appellant pleaded that the portion on which he is staying is ancestral land owned by his father Simon. If the Respondent has any title to the suit land, he stated, the same was obtained fraudulently. Otherwise, the Respondent had no capacity to bring the suit now that he was not the administrator of the estate of the deceased.

When the suit came for hearing the Respondent gave evidence-in-chief and produced the agreement, payment receipts and the title deed in his name. He eventually closed his case and Mr. Sichangi for the Appellant begun to cross-examine him. Cross-examination was adjourned to 11/9/2006. On that day Mr. Sichangi and his client were absent. Mr. Ocharo and his client (the Respondent) were present. The matter was ordered "*placed aside*" apparently to wait for Mr. Sichangi and his client. It was mentioned at 3.00 p.m. Mr. Sichangi and his client were absent. The court decided to close the Respondent's case and to ask for written submissions. The matter was adjourned to 2/10/2006. The next event was on 2/4/2007 when Mr. Ocharo's representative took a date in the registry. The date taken was on 4/5/2007. Nothing happened. On 16/5/2007 another date was taken in the registry. It was 18/6/2007. When the date came only the Respondent and his counsel were present. Judgment was ordered for 2/7/2007. It was eventually delivered on 23/7/2007 allowing the claim with costs.

On 22/6/2007 the Appellant had filed a chamber application to stay the drafting or delivery of the judgment to allow him present his defence. Mr. Sichangi swore that on 11/9/2006 he was present but the Respondent was not. The file was placed aside. He remained in court until 2.30 p.m. He left to go to court one for another matter. When he returned he found that the court had ordered the Respondent's case closed. The Respondent filed a replying affidavit in which he did not specifically deny that averment by the Appellant. The trial court dismissed the application with costs. This is what led to this appeal.

When a court orders a file to be placed aside it, has to indicate what time it will call it. That is the only way the parties can be expected to be present. They cannot be made to wait without such indication. When Mr. Sichangi states that he waited until 2.30 p.m and moved to another court only to return and find the matter concluded, there would be no defence to the claim. In other words, the Appellant and his advocate had no notice of what time the case was coming for hearing. It follows that the closure of the Respondent's case was irregular and all other proceedings that led to the judgment were irregular in so far as the Appellant was not afforded an opportunity to present his defence.

Even if the Appellant was notified of when his case would come for hearing and did not attend, he had a defence on record that raised substantial issues to be resolved at trial. This was a land matter and justice was only going to be better served by the court affording every opportunity for both sides to present their case.

In short, I allow the appeal. The judgment and any consequent decree are set aside. It is ordered that the suit be heard a fresh by another competent court. Costs of the appeal shall be borne by the Respondent.

Dated, signed and delivered at Bungoma this 18th day of September, 2012.

A. O. MUCHELULE
JUDGE