



**Editorial Summary**

1. *Civil Appeal*
2. *Subject of main Subordinate Court Case*

*LAND*

- 2.1 *Plot No R1872 County Council of Wajir (100ft by 100ft)*
  - 2.2 *Abdia Mohammed Ismail claims parcel of land given to her by her late sister and wife to Adow Abdi (appellant/original Defendant)*
  - 2.3 *judgment after trial entered in favour of Abdia Mohammed Ismail duly declared rightful owner of the plot 15<sup>th</sup> July 2010*
3. *Appeal 30<sup>th</sup> July 2010*
  - 3.1 *Plaintiff produced no document to prove ownership*
  - 3.2 *Plaintiff's evidence never mentioned the suit premises*
  - 3.3 *Plaintiff never signed her plaint*
  - 3.4 *Defence disregarded*
4. *Respondent/Original Plaintiff absent during appeal*
5. *Held:*

*Appeal allowed  
Judgment of Subordinate Court set aside  
Subordinate Court suit dismissed*

6. *Advocates :*
  - i) *S.K. Kivuva instructed by M/s Kivuva, Omuga & Waweru & Co Advocates for the Appellant/Original Defendant*
  - ii) *M/s Omollo & Co Advocates for the Respondent/Original Petitioner absent*

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**CIVIL APPEAL NO. 301 OF 2010**

**ADOW ABDI ..... APPELLANT/ ORIGINAL  
DEFENDANT**

**VERSUS**

**ABDIA MOHAMMED ISMAIL ..... RESPONDENT/ ORIGINAL  
PLAINTIFF**

*(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Wajir by Hon. A. Ingutya delivered on 15<sup>th</sup> July 2010 in Civil Suit No. 2 of 2010)*

**RULING**

**I. INTRODUCTION**

1. A civil suit was filed in the Senior Resident Magistrate's Court at Wajir on the 27<sup>th</sup> January 2010 by Abdia Mohamed Ismail in which she claimed ownership to a plot within the County Council of Wajir being

R. 1872 (measuring 100 by 100m).

2. The original defendant and now appellant herein Adow Abdi denied the allegations and claimed he was the correct owner of the plot.

3. The parties are related to each other as in laws. The original defendant was husband to the late sister of the original plaintiff.

4. When the suit came up for trial, the Hon. Magistrate in his judgment entered judgment for the original plaintiff and awarded her the ownership of the plot.

5. The original defendant filed appeal to this High Court on the 30<sup>th</sup> July 2010.

**II PROCEDURE**

6. The orders of the Subordinate Court was that the original defendant/appellant give vacant possession. The appellant filed an application during the court vacation dated 2<sup>nd</sup> August 2010 seeking to be heard and by a subsequent application to be given a stay of execution of these orders pending appeal. This was granted

Nambuye J and the matter was to be heard interparte.

7. On the 20<sup>th</sup> August 2010 and 25<sup>th</sup> August 2010 the file was placed before Warsame J. He subsequently made orders that the District Commissioner Wajir East District, in consultation of the

County Council of Wajir East file a comprehensive report on the ownership of the plot R 1872 or 4587 on or before the 28<sup>th</sup> September 2010.

8. A report was duly filed and confirmed by the Principal Judge, Mbogholi Msagha J.

9. The appeal was admitted to hearing (13<sup>th</sup> June 2011 Angawa J) and directions taken under Order 42 r 13(2)(4) for on the 1<sup>st</sup> July 2011. It was then that the respondent/original plaintiff who was appearing in person requested she engage the services of an advocate. The court granted her request and on 18<sup>th</sup> July 2011 it was confirmed to court that one C J Omollo whose brief was held by R M Kioko would represent the respondent original plaintiff.

10. On the day called out for hearing 20<sup>th</sup> September 2011, the respondent and advocate were absent. The law provides on the day called out for hearing and the respondent is absent the hearing may proceed ex-parte order 42.

### **III APPEAL**

11. On the original plaint forwarded by the appellant, the evidence before the trial court showed that the respondent, original plaintiff did not once mention the property in question. That she provided no documents of ownership and therefore should never have been declared the lawful owner of the property.

12. The appellant prayed that the judgement be set aside and the suit dismissed.

### **IV OPINION**

13. In land matters, where there are disputes in question and a suit is filed, it is imperative that the Commissioner of Land and the

County Council, local authority (where the property is held in trust by them) are enjoined. See the decision on this point of .....

14. The trial magistrate did not hear the evidence from the Commissioner of Lands who issues titles and from the County Council of Wajir who allocate the land in question.

15. The respondent/original plaintiffs informed the court that her late sister passed away in 1989. She left her the property R.4587 as a legacy. Her evidence was believed by the trial magistrate. There was no letter of grant of letters testate or intestate held by her to allow her to have the legal ownership of the land. There was also no letter by the lands department though the County Council is there.

16. The appellant on the other hand produced an official letter by the County Council confirming he was the owner of the parcel of land.

17. I would hereby find that the learned Hon. Magistrate erred in declaring the plot R 4587 (measuring 100 ft by 100 ft) belonging to the original plaintiff/respondent. There was no proof as to this.

18. This appeal is allowed. The judgment of the trial court is set aside. The orders is that the plaint is dismissed with costs to the appellants.

19. There will be costs awarded in this appeal to the appellant/original defendant.

**DATED THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2011 AT NAIROBI**

**M.A. ANG'AWA**  
**JUDGE**

*Advocates* :

i) *S.K. Kivuva instructed by M/s Kivuva, Omuga & Waweru & Co Advocates for the*

*Appellant/Original Defendant*

ii) *M/s Omollo & Co Advocates for the Respondent/Original Petitioner absent*