



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

HCCA NO. 190 OF 2009

JOSEPH MWANGI GIKONYO APPELLANT
-VERSUS-
KHALID KHAMISI 1ST RESPONDENT
ALI KHAMISI 2ND RESPONDENT

JUDGMENT

This is an appeal from the decision of the Senior Resident Magistrate Kisumu in **C.M.C.C No. 32 of 2009**. The appellant being dissatisfied with the said judgment, he has moved this court on the following grounds:-

1. The learned trial magistrate erred in finding that *res judicata* was pleaded when there was no such plea.
2. The learned trial magistrate erred on principles guiding the application of the doctrine of *res judicata*.
3. The learned trial magistrate erred in not finding that the plaintiff herein was suing as a representative of Wambacha Gikonyo when the same was not proved.
4. The learned magistrate erred in not finding that the cause of action in the original suit was in respect of allottees while this suit was in respect of registered proprietorship and therefore *res judicata* could not apply.
5. The learned trial magistrate's findings were contrary to evidence.
6. The learned trial magistrate's decision was contrary to known principles guiding registered proprietorship of land and not finding that circumstances under which indefeasibility of title were neither pleaded nor proved.

The appellant **Joseph Mwangi Gikonyo** moved the court by way of a plaint dated 30th February, 2011. He describe himself *inter alia* as the registered proprietor of the suit property claiming that the respondents **Khalid Khamisi** and **Ali Khamisi**, without any colour of right and/or lawfully justification unlawfully and illegally entered into the land Parcel No. **Kisumu/Municipality/Block 5/872** and held themselves as the proprietors of the same. He sought for:-

1. An order of permanent injunction and vacant possession.
2. General damages for trespass and interests.
3. Cost of the suit.

On their part the respondents filed a defence on the 11th of February, 2009. They denied that the appellant was the registered owner of the suit property, they claimed on their part that the appellant had never been in occupation of the said land. They sought for the dismissal of the suit.

This being the first appellate court it has the duty to re-consider the evidence, examine and analyze the same in order to arrive at an independent decision. See **Selle & Another** Versus **Associated Motor Boat Company Ltd & Another**, (1963) E.A at 123, and **Peters** versus **Sunday Post** (1958) E. A at 428.

The evidence of the parties and their witnesses may be summarized as follows:-

PW1 – JOSEPH MWANGI GIKONYO stated that he is known to the defendants, who built on his plot Kisumu Block Municipality 5/872, which he bought from **Mr. Wambacha** in 2009. He produced a title deed. He further stated that there are 3 semi permanent homes on the property. He sought the assistance of the court to get his plot back.

In cross examination he said that he bought the land from one **David & Wambacha**. He however did not have the sale agreement was not in court. He did not know whether the seller was also **Gikonyo**. He also did not bring the land control board consent to court. He promised to bring **David Wambacha** as a witness. He denied being the son of **David Wambacha Gikonyo**.

PW2 ISIAH MBOYA ADUDA a land surveyor stated that he carried a survey of the suit plot. The surveyed plot was given a new number **L. R KISUMU MUNICIPALITY BLOCK 5/872**. It was originally **KISUMU 70L/87**. He formed the opinion that the 2 numbers referred to the same plot.

DW1 – KHALID KHAMIS SHAABAN the 1st respondent, he stated that the 2nd respondent was his younger brother. He was not aware of **KISUMU/BLCOK 5/872**. His plot was No. 87. He referred to an allotment letter to **Rukaya Ali Mohamed** his deceased mother and a letter written by Commissioner of Lands confirming ownership of plot no. 87. He stated further that the appellant is a neighbour and son of **David Gikonyo Wambacha**. Further that he had taken out grant of letters of administration for his mother's estate.

DW2 – ISMAIL JUMA KHASUR stated that the appellant is the son of Gatambo who had a land dispute with the respondent's family.

In her judgment the learned magistrate identified the following issues for determination.

1. Is plot 87 the same as KISUMU MUNICIPALITY BLOCK 5/872.
2. If so is the suit barred by *res judicata*?
3. Is the plaintiff entitled to the orders sought.

From the pleadings it is clear that the issue of *res judicata* was not pleaded. Neither was any evidence in pursuit of the said principle. Although the 1st respondent mentioned that the respondent's father and his mother had a dispute in court regarding the land Parcel No. 87 and he produced the proceedings in evidence of the dispute.

The other 2 issues identified by the learned trial magistrate in my view can settle this matter effectively and I shall proceed to do so with the said as issue in dispute.

Is plot no. 87 the same as KISUMU MUNICIPALITY BLOCK 5/872.

PW2 a surveyor gave expert evidence in relation to the above 2 numbers he stated that:-

“ A Mr. Mwangi came to our office and requested for a confirmation of whether 70L Kisumu/87 was also Kisumu Block 5/872.”

In exercising his work the surveyor obtained from the lands office RA of Block 5, a Survey plan F/R/446/40, a part development plan N9/94/15 wherein parcel 87 was marked in red. He testified further that he formed the opinion that the plots were the same. Parcel 87 after survey was done was given reference no. **L. R. KISUMU MUNICIPALITY/BLOCK 5/872.**

I am persuaded by the above evidence that original plot no. 87 upon being surveyed was given a new reference now **L. R. Kisumu Municipality Block 5/872.** The documents relied upon by the said witness PW2 were public documents, their authenticity was not challenged, indeed the witness appeared credible.

The next question is whether the plaintiff is entitled to the orders sought?

The plaintiff stated that he bought land from one **David Wambacha**. He denied however that he is the son of the alleged seller. He promised to bring the seller which he did not. This would have shed more light to the matter. Indeed the title produced in court indicate that the previous owner of the land was the **David Wambacha Gikonyo**. Although I cannot fault the appellant for failing to bring to court the seller, the court is left to wonder why he was kept away yet his presence would have gone a long way in assisting the court.

Having held that the principle of *res judicata* was not pleaded, however I am of the view that the court cannot shut its eyes to facts and evidence placed before it and not disputed by the parties as to do so will be contrary to the O2 Principles, otherwise known as the overriding Principles that must at all times guide the court. Indeed the O2 Principles enhanced the jurisdiction of the court under S.1A & 1B of the Civil Procedure Act. The overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of disputes.

In **Caltex Oil (Kenya) Ltd** (now renamed **Total Marketing Kenya) Ltd vs Evanson Njiri** – Civil Application Nai No. 1990 of 2009 (ur 131/2009) the Court of Appeal had this to say of the overriding objectives.

“ Although the overriding objectives has several aims, the Principle aim is for the court to act justly in every situation either when interpreting the Law or in exercising its powers. The court has therefore been given latitude to overcome any past technicalities which might hinder the attainment of the overriding objectives ---“

Inevitably therefore I must consider the evidence before me. Exhibit D3 **Rukaya Ali Mohamed** versus **David Gikonyo Wambacha & Municipal Council of Kisumu** – Civil appeal No. 9 of 2011, emanated from a trial in the lower court where the claim by **David Gikonyo Wambacha** then was based a temporary occupational licence. The court rejected the claim found that the plaintiff (appellant) had interest on the land derived from an allotment letter. The court ordered eviction of the said **David Gikonyo Wambacha** and removal of all his structures this leaving the appellant on the land. There was no indication made that the said suit was appealed against.

Coming closer home, Exhibit D2 a letter from the Commissioner of Lands dated 10th December, 2004 confirmed that **Rukaya Ali Mohamed** was the owner of unsurveyed Plot No. 87.

The plaintiff now appellant claiming ownership against the above background failed to satisfy the court how Exhibit D2 & D3 ceased being relevant, how the seller obtained title to pass to him despite the above. Having a title deed *per se*, without proof of sale, proof of the certificate of title the alleged previous owner had obtained and indeed failure to call the previous owner as a witness in my view is a big failure on the part of the plaintiff, it weakened his case. He failed to prove his case on a balance of convenience in my view.

As against the evidence of the defence. In my view therefore the plaintiff did not deserve any of the prayers sought for in the plaint. For the reasons given above I see no need to quash or set aside the trial courts findings and I accordingly dismiss the appeal with costs.

DATED AND DELIVERED THIS 19TH DAY OF OCTOBER, 2011.

**ALI-ARONI
JUDGE**

In the presence of:

..... present for Appellant

.....present for Respondent