REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 127 of 1999

MWONGERA NKURARU…….APPELLANTAPPLICANT

V E R S U S

M'LINTARI M'LIBACHI…….RESPONDENT

APPEAL

- When an appellate court will interfere with findings and decision of subordinate court.
- Appeal – Appellate court will interfere with findings and decision of subordinate court upon mis-direction on point of law or judgment is against weight of evidence.

(Appeal from the judgment of Hon. P. Okille dated 30.09.1999 in Meru Chief Magistrates Court Civil Case No. 634 of 1992)

JUDGEMENT

By a judgment delivered on 30.09.1999 the lower court granted orders of permanent injunction against the appellants intention to bury the body of his brother Jacob Nkubitu on Land parcel No. 1393 within Athanja Adjudication section which the appellant claimed belonged to his brother but the court found was owned by the Respondent, then Plaintiff. The Appellant (the Defendant in the lower court) being aggrieved with that decision appealed to this court on four grounds, the essence or gist of which appeal is that the decision of the lower court was against the weight of the evidence and that it was against the rules of natural justice.

As the first appellate court, it is my duty to re-evaluate the evidence presented before the lower court and make my own conclusions and findings. Before I do this however I will dispose of the contention that the judgment of the lower court was against the **rules of natural justice**.

The principle of natural justice is posited in two propositions, **hear the other party** (**audi alteram partem**); and no man person shall be condemned unheard. The rules which developed in proceedings before quasi – judicial bodies, equally apply to judicial proceedings by the courts. They connote that the court or adjudicating authority must act fairly in good faith, without bias, and in a judicial temper, to give each party the opportunity of adequatily stating his case, and correcting or contradicting any relevant statement prejudicial to his case, and not to hear one side behind the back of the other. A man must not be a judge in his own cause (**nemo debet essee Judex in propria sua**) so that the presiding judicial officer or judge must declare any interest he has in any subject matter of the dispute before him. A man must have notice of what he is accused. Relevant documents which are looked at by the court or tribunal should be

disclosed to the parties interested.

In short, not only should justice be done, but it should be seen to be done. See for instance **Local Government vs Arlidge [1915)A.C. 120, Errington vs Minister of Health {1935)IKB 249 Board of Education vs ric**e [1911]AC 179,In **Lord Lorevurn at p.182, and CITY OF Westminster Assessment Committee** [1941]IKB. 53.

In this matter the appellant was served with the plaint, he was represented by the same counsel in the lower court and in this court. An elaborate defence was filed. The appellant attended all the hearing sessions in the lower court, he was part of the group of supporters together also with the Respondent, who were unruly and chaotic when the court visited the disputed land on 2.09.1999. The appellant gave evidence and called witnesses in support of his case. His counsel also cross - examined the respondents witnesses. In other words he was given all and ample opportunity of adequately stating his case and correcting or contradicting any relevant statement prejudicial to his case and no matter was heard behind his back.

I am satisfied that no rule of natural justice was breached by the court, justice was not only done but was seen to be done. The appeal must therefore fail on this ground and I so hold.

Turning to the equally important issue of evaluating the evidence, two factors clearly emerge from the evidence of both the plaintiff (now Respondent) and the Defendant(now Appellant) before the lower court. First the subject matter of the dispute is the parcel of land number 1393 situate at Athanja Land Adjudication This land measures 3 acres according to the evidence of P.W.1, the Plaintiff (Respondent). The second factor which emerges from the evidence of the Defendant (appellant) is that the land in dispute is Parcel No. 1690. The Appellant stated in cross - examination by the Plaintiff's counsel that my brothers land measures 5 acres. My brothers land is land Parcel No. 1690. I do know about Land Parcel No. 1393. It belongs to the Plaintiff. I do not know the acreage. It is not true that my brother is staying on land parcel on which the plaintiff is staying.

In his evidence in chief the appellant testified to the same effect:

> **"The Plaintiff's land is No. 1393 our land parcel is No. 1690. I know where Land Parcel No. 1393 is. I do not know its acreage I have known the plaintiff since childhood. He has never disputed my brother's ownership of land parcel No. 1690**".

It is thus clear from the evidence of both the appellant/Defendant and Responent (Plaintiff) that both parties are speaking of two distinct parcels of land. The appellant expressly acknowledges both in his evidence in chief and in cross examination that Land Parcel No. 1393 belongs to the Respondent. This evidence was confirmed by P.W.3, Mr. Wilfred Mutwiri, the demarcation officer of the Nyambene Muthara Akanja Adjudication Section. He testified and produced a letter authored by himself that Land Parcel No. 1393 within the said adjudication section belonged to the respondent M'Lintari M'Alibachi and that one Jacob Nkubitu the deceased brother of the appellant had no land in his name in the Athanja Adjudication Section.

In cross examination by the defendant (Appellant) P.W.3 testified that land parcel No. 1690 belongs to one M'Rimberia Ibiri and on which Jacob Nkubitu had done some development on the land. I know the land (L.P. 1393?) belongs to Rintari. Nkubitu did not do any gathering in 1965.

In further cross examination by Mr. Kimathi learned counsel for the appellant, P.W.3 reiterated his evidence. I have evidence in the office to show that M'Lintari M'Libuchi is the owner of land parcel No. 133 Jacob Nkubitu had no land in that section.

In his judgment the learned trial magistrate considered the above evidence of both the appellant and Respondent and raised the issue whether the parcels of land in dispute are one and the same piece of land. On the evidence the lower court concluded that-

> **"this court is left with no doubt that the deceased had no land parcel in the adjudication section the land parcel which the defendant believed to be L.P. 1690 allegedly owned by his deceased brother is in fact part of LP No. 1393 owned by the plaintiff."**

The trial court added further it is immaterial that the deceased lived on the disputed land. Mere occupation cannot automatically amount to ownership and found that the plaintiff had proved his case on the balance of probability and proceeded to grant the orders of injunction.

An appellate court will interfere with judgment and findings of the lower court only where that court has misdirected itself on a material point of law, or that the decision was against the weight of the evidence. None of those conditions are present in this appeal. I affirm the findings and judgment of the lower court dated 30th September 1999.

In the circumstances I find no merit in the appeal herein and the appellant's appeal dated 11th October 1999 is dismissed with costs to the Respondent.

I affirm the orders of the lower court as stated above.

There shall be orders accordingly.

DATED, DELIVERED AND SIGNED THIS 14th DAY OF JANUARY 2010

M. J. ANYARA EMUKULE

JUDGE.