



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Appeal 30 of 1997

[Being an appeal from the Judgment of Honourable Japhet Mahasi – R.M in Resident Magistrate’s Court - Kabarnet, Land/Civil case Nos. 1 & 2 of 1992 dated the 24th March 1997]

DANIEL KIPKEMEI CHEROGONY APPELLANT

VERSUS

RICHARD CHELELGO CHEPTOO RESPONDENT

JUDGMENT

It is not clear from the records of appeal and the subordinate court’s record how the two suits being Land Case Number 1 of 1992 and Land Case Number 2 of 1992 that have given rise to the present appeal were consolidated and heard together.

In **Land Case Number 1 of 1992** by way of a homemade, handwritten plaint, the plaintiff, **Daniel Kipkemei Cherogony** who is the appellant herein sought for judgment against the defendant, **Richard Chelelgo Cheptoo** as follows;

The statement of claim stated: -

“That on or around 1979, the defendant constructed houses in my land and refused to move to his one acre plot awarded by Land committee Officers it had already excised by the said officers

The plaintiff prays:

- 1) *Judgment against the defendant*
- 2) *Costs of the suit*
- 3) *To be ordered to move from my land to his one acre land*

4) To pay interest for occupying the said land to-date.”

It is not clear from both the records of appeal and the original record whether a defence was filed by the defendant.

While in **Land Dispute Case Number 2 of 1992, Richard Chelelgo Cheptoo** is the plaintiff and in a similar manner by way of a homemade and handwritten plaint dated 12th February 1992 the statement of claim stated as follows;

“That in 1972 the defendant took my land of about six (6) acres at Sekwanin Plot Number 363.”

He therefore prayed for judgment and the costs of the suit. The defendant, **Daniel Kipkemei Cherogony** who is the appellant in this appeal in a similarly home made and handwritten statement of defence stated as follows in defence:

“That the cause of action arose in 1972 and the defendant is claiming 1992 which is around twenty years ago. That the said Plot Number Baringo Penwai 363 is in my name.

That I was given the said land by my father after he was given by my grandfather. That the said land was demarcated in 1970 and there was no objection done by the plaintiff since then.”

The records show that the parties were subsequently represented by Advocates although in the pleadings were not amended and several applications and counter applications were presented at the interlocutory stage.

Finally, the matter was heard and by a three paragraph judgment, the learned Resident Magistrate dismissed the claim by the appellant in Land Case Number 1 of 1992 and allowed the claim by the respondent in Land Case Number 2 of 1992. The appellant being aggrieved by the said judgment has appealed to this court and raised several grounds of appeal to wit:

- 1. That the learned District Magistrate erred in law and in fact in dismissing the appellant’s case without giving any reasons at all.**
- 2. That the learned District Magistrate erred in law and in fact in arriving at his judgment without considering and evaluating the evidence tendered by the parties.**
- 3. That the learned District Magistrate erred in law and in fact in awarding the respondent what he never prayed for.**
- 4. That the learned District Magistrate erred in law and in fact in making his judgment which is not supported by law.**
- 5. That the learned District Magistrate erred in law and in fact on reaching his judgment as the respondent herein had not proved his case within the required standard.**
- 6. That the learned District Magistrate erred in law and in fact in handling a case having no jurisdiction to do so.**

This appeal was filed way back in April 1997 but for unknown reasons it was never prosecuted.

During the hearing of this appeal, Counsel for the appellant argued ground number 2 and number 4 and raised the following issues.

That the judgment of the trial court does not comply with the provisions of order 20 Rule 4 of the Civil Procedure Rules as the Learned Magistrate failed to identify the issues for determination and also failed to give reasons for the decision. The trial court did not restate the evidence and Counsel therefore invited this court to find this judgment by the lower court is a nullity.

Secondly, Counsel for the appellant argued that the respondent failed to prove his case, besides he was awarded prayers that he never sought in his plaint. The plaint has no prayers for a parcel of land. The court thus erred by making a finding and granting the suit land which was not specifically prayed for.

Counsel for the appellant also faulted the way the trial was conducted by the magistrate and the way the proceedings were recorded which he contended resulted in a miscarriage of justice. This appeal was not opposed by the respondent.

This being the first appeal, I have the duty to re-evaluate the evidence before the trial court while bearing in mind that this court has neither seen or heard the witness and therefore give due allowance for that.

Firstly, the way this judgment is written leaves a lot to be desired. It is certainly not in compliance with the provisions of the law. However, if this was the only problem, this court can rewrite the judgment (*See Section 78 of the Civil Procedure Act*). The records of proceedings and the evidence by the parties is so jumbled that I find it impossible to make sense of the evidence that was adduced before the trial court. Due to the nature of the proceedings, this appeal should be allowed and the matter referred to retrial but looking at the pleadings, certain issues emerge that touches on the validity of the claims and the jurisdiction of the trial court. The claim involved a land dispute and a plot that is registered in the name of the appellant (*see the defence filed on 22nd May 1992*). This therefore raises the issue of whether the trial court had jurisdiction to entertain this claim.

Secondly and more fundamentally, the respondent claim is that in 1972, the appellant took six (6) acres of his land. The issue of limitation of time immediately comes into mind as this suit was filed twenty (20) years after the cause of action arose.

In **Civil case number 1 of 1992** the appellant's claim was that the respondent had moved in this land in 1979. This suit was also filed almost thirteen (13) years after the cause of action.

Due to the foregoing reasons, the learned magistrate ought to have dismissed both suits.

Having re-evaluation the evidence, the pleadings and considering the nature of the proceedings, I come to the inescapable conclusion that both suits ought to have been dismissed and I hereby allow the appeal and order that the judgment of the lower court be substituted with an order dismissing both suits with no orders as to costs.

It is so ordered.

Judgment read and signed on 15th December 2006.

MARTHA KOOME

JUDGE