



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL 12 OF 2003

BENSON MAKUTWA.....APPELLANT

VS

AGNES KHISA.....RESPONDENT

J U D G M E N T

In a plaint dated 29th February 1997, the appellant, Benjamin Makutwa was sued by Agnes Khisa, the Respondent. In the aforesaid plaint the Respondent prayed for:

- (a) The eviction of the appellant from L.R. NO. BUKHAYO/KISOKO/1792
- (b) Mesue profits
- (c) Costs of the suit.

The appellant filed a defence and an amended defence to resist the Respondent's claim. He claimed that he lawfully acquired the suit premises hence he was a stranger to the Respondent's claim.

The senior Resident Magistrate sitting at Busia heard the protagonists and their witnesses and came to the conclusion that both parties were entitled to the suit premises and hence none should evict the other. She issued an order restraining any of the parties from occupying L.R. NO. BUKHAYO/KISOKO/1792. She also advised the combatants to sue the Land Registrar for issuing two title deeds over the same piece of Land. The appellant felt aggrieved and hence this appeal. When the appeal came up for hearing Mr. Balongo who appeared for the appellant sought to argue the seven grounds of appeal all together. The appellant opposed the appeal in person.

The history of this case leading to this appeal can be deduced from the evidence tendered before the trial court. The plaintiff's (Respondent's) case before the trial court was supported by the evidence of Pesla Auma a holder of a power of attorney for Agnes Khisa, the Respondent. She produced a copy of the title deed and a copy of the register in respect of L.R. NO. BUKHYAYO/KISOKO/1792 to prove that the aforesaid parcel of land was registered in the name of Agnes Khisa. These two documents also showed that the Respondent acquired the parcel of land from one Albert Nyagenye Birenge on 8th November 1990. The Respondent says that she bought the land in 1986 though she was issued with the title deed on 8th November 1990. She averred that the appellant entered her piece of land and put up a structure in 1996 which action prompted her to seek for eviction proceedings.

The appellant's defence attracted three witnesses in total. He told the trial magistrate that he bought land reference no. BUKHAYO/KISOKO/3681 from Albert Nyegenye Birenge in 1995. He said that his parcel of land was curved out from LR. NO. BUKHAYO/KISOKO/3341. The Deputy, BUSIA/TESO

DISTRICT Surveyor, Joash Wafula Simiyu testified as DW2. This witness gave the history of how L.R. NO. BUKHAYO/KISOKO/3341 evolved from L.R. NO. BUKHAYO/KISOKO/635 which underwent several subdivisions. He pointed out that the land was in map sheet No. 17. Consolata Wanyama, testified as D.W.3. She was an assistant Land Registrar serving in Busia by the time this case came up for hearing. She confirmed that L.R. NO. BUKHAYO/KISOKO/3681 was a subdivision of LR BUKHAYO/KISOKO/3341. She pointed out that the appellant's land was on map sheet number 11 and that of the Respondent was on Map sheet number 17.

On the basis of the above evidence, the senior resident magistrate found that the two parties each had a stake over the same property which according to her had two separate titles. She accused the Land Registrar for creating the mess. The appellant averred on his first ground of appeal that the trial magistrate erred when she failed to frame the issues. It is apparent that the issues were not framed by the parties nor the trial magistrate. This was a fatal mistake which resulted to the absurd decision pronounced by the trial court. The provisions of order XIV of the Civil Procedure rules makes it mandatory for issues for determination to be framed. The appellant also accused the trial magistrate for failing to critically analyse the evidence placed before her so as to arrive at a decisive conclusion in the matter. The appellant was of the view that his evidence had more weight as opposed to that of the Respondent. He was therefore of the opinion that the trial court should have proceeded to dismiss the Respondent's suit.

The view I have about the grounds of appeal raised by the appellant is that this court is being urged to re-evaluate the evidence and come to its conclusion. I think I have the discretion to do that in view of the fact that I am sitting as a first appellate court in this matter. The evidence presented to the trial court appear to me to be straightforward. The appellant does not claim any interest in L.R. NO. BUKHAYO/KISOKO/1792. The Respondent also does not have any interest over L.R. NO. BUKHAYO/KISOKO 3681. The trial magistrate was of the view that the two title deeds refer to the same parcel of land on the ground. According to the evidence of Joash Wafula Simiyu D.W2, a surveyor by profession, the two parcels of land are in Map sheet number 17. However his evidence was contradicted by the evidence of Consolata Wanyama D.W. who said that L.R. No BUKHAYO/KISOKO/1792 is Map sheet Number 17 and LR No. BUKHAYO/KISOKO/3681 is in Map sheet No. 11.

I have also perused copies of the title deeds and the green cards in respect of the two parcels of land. The title deed and the Green Card in respect of LR NO. BUKHAYO/KISOKO/1792 which were produced by the Respondent shows that the aforesaid parcel of land is found in Map Sheet No. 17. This is consistent with the evidence of Joash Wafula Simiyu (D.W.2) and Consolata Wanyama (D.W.3). They both were in agreement that the Respondent's land is in Map sheet number 17. The title deed and the Green Card in respect of L.R. NO. BUKHAYO/KISOKO/3681 are at variance. The title deed shows that the Land is map sheet No. 17 whereas the Green Card shows that the same is found in Map Sheet number 11. D.W.3 agrees with the green card that L.R. NO. BUKHAYO/KISOKO/3681 is found in Map sheet No. 11.

From the above analysis therefore the trial magistrate should have come to a conclusive decision. After considering the submissions of Mr. Balongo for the appellant and upon re-evaluating the evidence on record I have come to the conclusion that Respondent's evidence were consistent and credible as opposed to the contradictory evidence by the defence raised by the appellant and his witnesses. I am of the view that the plaintiff (Respondent) proved her case before the trial court on a balance of probabilities. She was able to establish that she had proprietary interest over L.R. NO. BUKHAYO/KISOKO/1792 as opposed to the appellant. She was also able to show that her parcel of land is located in the Registry Map sheet number 17.

The trial magistrate therefore misapprehended the issues when she came to a wrong conclusion that the two parcels of land referred to the same parcel of land. The final order is that the appeal is allowed with a resultant order that the judgment of the senior resident magistrate dated 25th April 2003 is set aside and substituted with an order giving Judgment to the plaintiff (Respondent) in terms of prayer (a) and (c) of the plaint. The prayer on mesne profits is refused since there was evidence laid to prove it.

The appellant shall be paid costs of the appeal in any event.

DATED AND DELIVERED THIS 8th DAY OF April 2005

J.K. SERGON

JUDGE