REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL 11 OF 1996

MONICAH WANGUI GITHINJI……..….APPELLANT

VERSUS

JOYCE GATHONI GACHAU…….…….RESPONDENT

JUDGMENT

By her plaint dated the 3rd of May 1991, the appellant Monica Wangui Githinji sought the orders of the lower court for the respondent, Joyce Gathoni Gachau and the members of her family be evicted from all that parcel of land known as **Plot No. 235 Mawingo Salient Scheme.** The appellant further prayed that the appellant be permanently restrained from entering the said parcel of land. When the respondent was served with the summons to enter appearance together with a copy of the plaint, she filed a defence. She denied that she had entered into the appellant's parcel of land. She averred that she was residing in a distinct and different portion of land which she had purchased from one Ester Wanjiru Gicharu in 1989. When the case was listed for hearing before the lower court at Nyahururu for the hearing of an application for injunction, the lower court ordered that the dispute, being essentially a determination of the boundaries between the two parcels of land, namely parcels number **235 and 246 Mawingo Settlement Scheme** be referred to the District Officer Ol Kalou, together with the District Surveyor and the District Land Registrar to sought out the dispute.

From the record it is apparent that the parties to this suit appeared before the District Officer Ol Kalou who heard the dispute after the District Land and Adjudication Officer had visited the two parcels of land and determined that there was a parcel number 306 which had previously existed but had been wrongly excluded from the Registered Idented Map (R.I.M.). It is this parcel of land that the District Officer, Ol Kalou and the elders who heard the case determined that it belonged to the respondent. The award of the District Officer, Ol Kalou and the elders was duly filed in court. The appellant was apparently aggrieved by the said award. She applied to the lower court to bar the said court from adopting the said award as the judgment of the court. Her attempt was unsuccessful. The award was adopted as the judgment of the court. The appellant made an application before the said court to review the said judgment of the court. The application for review was similarly disallowed. The appellant being aggrieved by the said decision filed this appeal before this court.

In her memorandum of appeal, the appellant raised four grounds of appeal. The appellant was aggrieved that the lower court had refused to review its order adopting the award of the District Officer Ol Kalou and the elders in view of the new and important evidence which had arisen after the award had been made. The appellant was further aggrieved that the trial magistrate exercised his discretion wrongly in dismissing the application for review. She was further aggrieved that the trial magistrate had not acceded to the appellant's application to order the District Land Adjudication Officer and the District Land Surveyor to visit the parcels of land in dispute so that its acreages could be established on the ground.

The appellant having complied with all the preliminary issues related to this appeal, duly listed this appeal for hearing. On the day fixed for the hearing of the appeal, the respondent did not make any appearance. This court was duly satisfied that the respondent was properly served. It ordered the hearing of the appeal to proceed, the absence of the respondent notwithstanding. Mr Nderitu, Learned Counsel for the appellant submitted that the trial magistrate erred in dismissing the application for review. He argued that when the District Officer Ol Kalou and the elders had made their decision they did not have the benefits of properly being availed the documents that showed the true position of the parcels of land in dispute. It is for this reason that the appellant sought an application for review from the trial magistrate so that the District

Land and Adjudication Officer and the District Surveyor could visit the ground to establish the true position of the acreage on the ground.

Learned Counsel argued that the letter of allotment for parcel number **235 Mawingo Settlement Scheme** which was issued to the appellant showed that the acreage of the said parcel of land was twenty five acres. He submitted that this fact was not disputed by the respondent. It was contended on behalf of the appellant that, the appellant after paying the required fees to the settlement fund trustees was allowed to take possession of the land. She fenced the same. The total acreage that she occupied was twenty five acres. She took possession in the year 1974. Later in 1982 the parcels of land in question were surveyed and numbered. The appellant was still allocated twenty five acres. It is only later that the respondent lay claim on part of the parcel of land belonging to the appellant. The respondent claimed that the appellant had encroached on part of parcel number 246. When the case was referred to the District Officer Ol Kalou and the panel of elders for the purposes of determining the dispute, the relevant documentation was not availed to the said District Officer and therefore an erroneous decision was arrived at.

Learned Counsel submitted that if the District Officer and the panel of elders had been availed this information they would not have reached the decision that they did. Learned Counsel further submitted that the certificate of search had established that parcel number 235 measured twenty five acres whilst parcel number 246 measured ten acres. According to the appellant, the award made by the District Officer was thus erroneous in that it ordered that parcel number 306 be excised from parcel number 235. He submitted that the acreage of the said parcel of land had not been reduced when parcel number 306 was created. The appellant contended that if the District Officer had sought the advice of the technical arm of the government, that is, from the District Land and Adjudication Officer and the District Surveyor, the said officer and the panel of elders who heard the case and made the award would most probably have arrived at a different decision. The appellant submitted that the lower court was wrong in adopting the said erroneous award. It further erred when it refused to allow the application for review. The appellant contended that the lower court ought to have allowed the application for review to enable the District Land and Adjudication Officer and the District Surveyor to visit the ground and ascertain the acreages of the disputed parcels of land. The appellant urged the court to allow the appeal with costs.

I have carefully read the pleadings filed by the parties in the lower court. I have also read the proceedings of the lower court. This being a first appeal in civil cases, this court is mandated to hear this appeal by way of retrial. This court is not bound to follow the trial court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence adduced generally. (See **Selle & Anor –versus- Associated Motor Boat Co. & Anor [1968] E.A. 123).** In the instant appeal, the appellant was aggrieved by the decision of the trial magistrate to disallow her application to review the decision of the trial court is adopting the award made by the District Officer, Ol Kalou and the panel of elders, which the said officer was chairing. Upon close perusal of the application for review that the appellant made on the 10th of September 1994, the appellant was not actually making an application for review but was rather seeking the lower court to make another determination whose effect would have been asking the court to sit on appeal against its decision.

As stated as the beginning of this judgment the District Officer, Ol Kalou and the panel of elders who sat with him reached the decision to award the respondent the parcel of land in dispute after hearing the parties to the dispute and also after considering the report made by the District Land Adjudication Officer vide his letter dated the 20th of March 1991 under reference **DSO/NYA/C33/246/16**. In her application for review, the appellant did not seek the setting aside of the order of the trial magistrate in adopting the award of the District Officer, Ol Kalou. Rather, the appellant sought the order of the lower court to have the District Land and Adjudication Officer and the District Surveyor visit the disputed parcels of land to determine the actual acreage on the ground of the two parcels of land.

I have re-evaluated the evidence which was adduced before the lower court. I have also considered the submission made before me by the counsel for the appellant. If the appellant were to have been successful in her application for review before the lower court, she had to establish that there was new and material evidence which was not before the District Officer and the lower court when the award was made and

adopted by the lower court. From the evidence on record, it is clear that at the time of the hearing of the dispute by the panel of elders chaired by the District Officer, Ol Kalou the maps of the area including the Registered Idented Map (R.I.M.) was placed before the said panel of elders. The District Land Adjudication Officer had also visited the parcels of land in dispute and made a technical report. The report was availed to the District Officer and the panel of elders before the award was made. In his report, the District Land Adjudication Officer noted that there had been an error on the Registered Idented Map (R.I.M.) which had excluded parcel number 306 which belonged to the respondent. The District Land Adjudication Officer advised that the error be rectified. On my re-evaluation of the evidence, it is not therefore true as submitted by the appellant that the panel of elders chaired by the District Officer did not consider the technical advice of the District Land Adjudication Officer before arriving at the said award. On the contrary, the panel of elders relied on the technical report which was placed before it by the District Land Adjudication Officer. The fact that the said panel of elders were not shown the certificates of search of the said two parcels of land in dispute could not have changed their award in view of the report made by the District Land Adjudication Officer.

On re-evaluation of the evidence, I do hold that the appellant is being mischievous by seeking to rely on a certificates of search which were obviously based on the erroneous Registered Idented Map (R.I.M.) to support her application to review the decision of the lower court to adopt the award of the panel of elders. In my view, the trial magistrate correctly dismissed the application for review as the same lacked merit.

I have perused the award of the panel of elders that was adopted as the judgment of the court. I noted that the appellant attended the entire proceedings and ably put her case. The award cannot therefore be faulted on grounds of natural justice. Neither can it be faulted that all the matters in dispute were not considered. The lower court had no option in law but to adopt the award of the panel of elders. The application for review was therefore misguided in that respect.

This appeal therefore lacks merit. The same is dismissed with costs to the respondent.

DATED at NAKURU this 13th day of May 2005.

L. KIMARU

JUDGE