



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL 57 OF 1994**

**JOSEPH CHEPKONG'A ROTICH.....APPELLANT**

**VERSUS**

**MICHAEL CHERONO.....RESPONDENT**

**JUDGMENT**

The appellant, Joseph Chepkonga Rotich, filed suit against the respondent, Michael Cheronno at the Resident Magistrate's Court, Kabarnet seeking declaratory orders of the court declaring him to be the owner of a portion of land measuring 0.5 of an acre which is part of parcel number BARINGO/KAPCHEPKOR/270 which the appellant is registered as the owner thereof. The appellant also prayed for an order seeking the eviction of the respondent from the said portion of land (*hereinafter referred to as the suit land*). The appellant further prayed to be paid general damages for trespass and mesne profit for loss of user of the suit land for the period since the year 1982 when the appellant claims the respondent took occupation of the suit land. When the respondent was served, he filed a defence denying that he had trespassed into the appellant's parcel of land and particularly on the suit land. He counterclaim for the said suit land (*measuring 0.5 of acres*) from the appellants parcel of land known as BARINGO/KAPCHEPKOR/270 which he claimed to have purchased from the appellant's father, one Rotich Chelimo in 1972 before the said parcel of land was registered or adjudicated. The respondent therefore claimed the suit land on the basis that he had purchased the same and was therefore a purchaser for value. After hearing the evidence offered by the appellant and the respondent in support of their respective cases, the trial Resident Magistrate dismissed the appellant's suit and entered judgment as prayed in the counterclaim of the respondent. The trial magistrate found that the appellant in filing the suit was trying to disown the fact that his (the appellants) father has sold the suit land to the respondent. He ordered the said 0.5 of acre (the suit land to be excised from the parcel of land owned by the appellant (namely BARINGO/KAPCHEPKOR/270) and the same be registered in the name of the respondent. The trial court declined to make any order as to costs. The appellant was aggrieved by the said decision and duly filed his appeal to this court.

In his memorandum of appeal, the appellant raised five grounds of appeal challenging the decision of the trial magistrate. The said grounds of appeal may be summarized as thus; The appellant was aggrieved that the trial magistrate had arrived at the said decision contrary to the adduced evidence and further contrary to the established law. The appellant was aggrieved that the trial magistrate had introduced extraneous matters in his judgment and thus reached a finding against the appellant contrary to the overwhelming evidence adduced. Lastly, the appellant was aggrieved that the trial magistrate had put into consideration inadmissible evidence and thus arrived at the said erroneous decision.

At the hearing of the appeal, Mr Tarus, Learned Counsel for the appellant argued the appeal in the absence of the respondent. This court was satisfied that the respondent's counsel had failed to attend court without any reason after being served with the hearing notice to attend court during day that the hearing

of the appeal had been fixed. Mr Tarus submitted that the trial magistrate had erred in law by arriving at the said decision which was unsupported by the applicable law. He submitted that the suit land was registered land in the name of the appellant. He argued that the trial magistrate had entertained the case and ordered the subdivision of the appellant's parcel of land yet he did not have jurisdiction over the suit land as provided by Section 159 of the **Registered Land Act**. He submitted that the suit ought to have been heard by the **Land Dispute Tribunal** as established by the Land Disputes Tribunal Act. He further submitted that the trial magistrate lacked jurisdiction to deal with land cases that involved alteration of boundaries fixed by the Land registrar. He referred the court to the case of **Muruguri –vs- Rukenya [1983]KLR 543** in support of his submission. He urged the court to allow the appeal and set aside the judgment of the trial magistrate with costs to the appellant.

This being a first appeal, this court is mandated in law to re-evaluate and reassess afresh the evidence adduced before the trial magistrate and arrive at its own independent decision. In reaching its determination, this court has to put in mind the fact that it neither saw nor heard the witnesses. I will first address the first issue raised by the appellant as regard whether or not the trial Resident Magistrate had jurisdiction to hear and determine the case that was before him. The suit land was portion of land measuring 0.5 of an acre within parcel number BARINGO/KAPCHEPKOR/270 which is registered under the **Registered Land Act**. **Section 3** of the **Registered Land Act** defines a court to mean the court having jurisdiction in the matter in question by virtue of **Section 159**.

**Section 159** provides that:

*“Civil suits and proceedings relating to the title to, or possession of land, or to the title to a lease or charge registered under this Act, or to any interest in land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act not to require registration shall be tried by the High Court and where the value of the subject matter in dispute does not exceed twenty five thousand pounds (i.e. Kshs 500,000/=) by the Resident Magistrates Court, where the dispute comes within the provisions of Section 3(1) of the Land Disputes Tribunal Act, in accordance with that Act.”*

The suit land in this case was a portion of land within land registered under the **Registered Land Act**. Being registered land, it could not therefore be referred to the **Land Disputes Tribunal** as provided by the Land Disputes Tribunal Act. The determinant factor on whether the trial Resident Magistrate had jurisdiction or not was the value of the suit land. If the suit land exceeded the value of Kshs 500,000/=, then the Resident Magistrate would lack jurisdiction to hear the matter. Such suits ought to be filed in the High Court. In the instant suit, the suit land measures 0.5 of an acre. This court does not know where Kapchepkor is in Baringo District, but is aware of the fact that land in areas of rural Baringo District would not cost more than Kshs 500,000/= per acre. In the circumstances of this case even if this court were to accept the generous value of Kshs 500,000/= per acre, (*which this court is of the view is a bit far fetched*), then the suit land would be valued at Kshs 250,000/= which is within the jurisdiction of the resident magistrate's court. I therefore find no merit with the ground of appeal to the effect that the said trial Resident Magistrate's Court lacked jurisdiction to hear the matter. I do hold that the said court did have jurisdiction to hear and determine the suit before it.

According to the respondent, he purchased the suit land from the father of the appellant Rotich Chelimo in the year 1972 before the adjudication and consolidation of the land within the area. He complained that after the land was adjudicated, the father of the appellant did not provide particulars to the adjudication officers to enable them register him as the owner of the suit land. It was his evidence that the father of the appellant transferred the parcel number BARINGO/KAPCHEPKOR/270 (*of which a portion the suit land was comprised of*) to the appellant without excising the said 0.5 of an acre from it.

Having evaluated the evidence, and particularly the applicable law, I do hold that the respondent had no claim whatsoever on the suit land now registered in name of the appellant. Under **Section 26 of the Land Adjudication Act**, the respondent was required to file an objection with the adjudication officer, if he was aggrieved that his name had been excluded from the register. **Section 28, 29 and 30 of the Land Adjudication Act** provides a procedure under which the respondent could have adopted if he was

aggrieved by any aspect of the adjudication process. As it were, the respondent did not file any objection or appeal against the decision of the Land Adjudication Officer when the register reflected the father of the appellant as the owner of the entire parcel of land which came to the known as BARINGO/KAPCHEPKOR/270. When the appellant's father was registered as the first registered owner of the said parcel of land, his title to the same could not be impeached save as provided for by **Section 28** of the **Registered Land Act**. The respondent interest over the suit land cannot be said to be an overriding interest as provided by Section 30 of the Registered Land Act. Any claim that the respondent had over the suit land was extinguished once the appellant's father was registered as the owner thereof.

When the said parcel of land was transferred to the appellant in 1988, the respondent could not therefore claim against the appellant. After re-evaluating the evidence adduced on record, I do hold that the trial magistrate erred in considering extraneous evidence in arriving at the decision that the respondent owned the suit land. Once the appellant presented a copy of the title comprised of the suit land, the trial magistrate was not at liberty to look beyond the said title and trawl the history leading to the registration of the appellant, if fraud was not alleged. The registration of the appellant as the owner of the suit land was *prima facie* and the only evidence that the trial magistrate required to establish the ownership of the suit land.

In any event, even if the trial court were to entertain the respondent's claim, the said court ought first to have established if the suit filed by the respondent was within the limitation period. According to **Section 7** of the **Limitation of Action Act**, all action to recover or claim land ought to be filed within twelve years of the accrual of such a cause of action. The respondent claimed that he purchased the suit land in the year 1972. He ought to have filed suit by the year 1984. To do so in the 1994 was to file suit beyond the limitation period. The suit was therefore time barred.

Having carefully re-evaluated the evidence, I do find the appeal filed by the appellant that the trial magistrate found in favour of the respondent against the preponderance of evidence and against the law to have merit. The complaints raised by the appellant against the said judgment are valid. In the premises therefore the appeal is allowed. The judgment of the trial magistrate entered in favour of the respondent is hereby set aside in its entirety and substituted by the judgment of this court in favour of the appellant and against the respondent as hereunder;

*(i) The 0.5 of an hectare is hereby declared to be owned by the appellant, being part of that parcel of land registered as*

*BARINGO/KAPCHEPKOR/270.*

*(ii) The respondent is hereby declared to be a trespasser on the said suit land.*

*(iii) The respondent is hereby ordered to vacate the said parcel of land within forty five (45) days upon being served with the decree of this court in default the appellant be at liberty to have him evicted therefrom.*

*(iv) The counterclaim filed by the respondent is hereby dismissed with costs.*

*(v) The appellant shall have the costs of the suit both in the Lower Court and on this appeal.*

**DATED at NAKURU this 28th day of October 2005.**

**L. KIMARU**

**JUDGE**