

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 116 OF 2001

ELIJAH NYAWIRI ===== APPELLANT

=VERSUS=

JACKTON OYUNGU & ANOTHER ===== RESPONDENT

J U D G M E N T

This is an appeal from judgment and orders of the Principal Magistrate's Court Maseno in SRMCC no. 139 of 1997 delivered on 17th July, 1999.

In his plaint dated 27th August, 1996, Elijah Nyawiri, the appellant, averred that his claim against Jacton Oyungu and Joseph Alinyo Ochuo, the respondents, was an order for a return to him of the premises on Plot no. 3 at Rabuor Market in Yala Division of Siaya District. He further averred that he was the rightful and the registered proprietor of the said property which he bought in 1975 from one George Nyambara. He also claimed that after he had bought the Plot he carried out construction of the premises which was then occupied by the 2nd respondent. The respondents filed a joint defence denying that the appellant had ever owned the said property. They averred that the property was owned by the 1st respondent and that he has sold it to the 2nd respondent and that a transfer had been effected as confirmed by Yala Town Council in 1995.

The case was eventually tried before the late T. O. Miseda the Principal Magistrate who at the end of trial dismissed the appellant's claim with costs which prompted him to file this appeal.

In his submission on behalf of the appellant, Mr Ashioya stated that the Magistrate had erred in disregarding credible evidence in his judgment. According to Mr Ashioya the contents of the agreement for sale were confirmed by PW2 and PW3 who was at the time the Assistant Chief of the area who had witnessed the sale of the property in 1975. He added that PW4 who worked for Yala Town Council produced a copy of an application by the appellant for transfer of the said plot to his name made in 1976 and that the Town Clerk approved the transfer. According to Mr Ashioya, PW4 also produced receipts for Plot rents for the year 1983, 1984, 1985, 1986 and 1987 and that to PW4 Plot no. 3 belongs to the appellant. Mr Ashioya contended that an application in 1995 by the 1st respondent for a transfer of the property to the 2nd respondent was not approved by the Council. According to Mr Ashioya the 1st respondent also claimed that he bought the said plot on the same date as the appellant and from the same vendor for a similar consideration. Mr Ashioya claimed that DW3 who was not a party in the suit was wrongly permitted to testify and to produce a copy of what was claimed to be the sale agreement. Mr Omondi for the respondents opposed the appeal contending that it was not against the judgment of the Principal Magistrate's Court Maseno in PMCC no. 139 of 1996 in that the judgment in that case was delivered on 21st July, 1999. He also claimed that the decree on the record does not relate to this suit. According to Mr Omondi the Magistrate had carefully analyzed the evidence adduced and had come to the right conclusion. He added that the proper sale agreement was in two parts both of which were produced by DW3 who was the eldest son of the vendor and who had witnessed the sale. Mr Omondi further contended that the trial Magistrate was correct in rejecting the evidence of the appellant and accepting that of the 1st respondent. He therefore urged that this appeal be dismissed with costs.

I agree with Mr Omondi that the judgment in Maseno PMCC no. 139 of 1996 was delivered on 21st July 1999 and not on 17th July 1999 as stated in the memorandum of appeal. I also find that the decree on record of the appeal is that of Maseno SRMCC no. 17 of 1996 which indicated as a suit between the same parties as are in SRMCC no 139 of 1996. Mr Ashioya who appeared before me in this

appeal for the appellant did not make any comment on these serious errors. It is not therefore clear whether this appeal relates to the case whose file is before me.

The first ground of appeal advanced by Mr Ashioya is that the learned Magistrate had erred in law and in fact in disregarding credible evidence of the appellant and his witnesses. The record indicates that the learned Magistrate analyzed evidence of all the witnesses for the appellant and that of the respondents and their witnesses. The claim that PW2 was given a red cow by the appellant so as to testify on his behalf was not controverted. Unfortunately Mr Ashioya did not give particulars of any piece of evidence which was disregarded by the learned magistrate in his judgment. As there was no evidence in support of the claim made by the appellant against the 2nd respondent, the Magistrate first examined the evidence relating to that part of the case. When it came to the evidence of the appellant as against that of the 1st respondent the learned Magistrate accepted the evidence of the 1st respondent and rejected that of the appellant. Mr Ashioya has not advanced any ground which would entitle this Court to interfere with the exercise of discretion by the Magistrate. There was also no law relating to the sale of goods or transfer of property which the Magistrate should have invoked in his judgment.

Having carefully gone over the evidence adduced and the judgment of the learned Magistrate I find that this appeal does not have any merit. The same is therefore dismissed with costs.

Dated and delivered this 12th February 2004.

B. K. TANUI

JUDGE

BK/hao