REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL APPEAL NO 17 OF 1994

MOSES MUTIE NDAISI)

SOLOMON KAMOLO NDAISI) ……..……. APPELLANTS

VERSUS

PRACXEDIX KAMENE ……...……...……. RESPONDENT

JUDGMENT

The Respondent filed the suit in the lower court seeking Judgment against the Appellants as follows:

> ***"(a) A declaration that the … (Appellants) are in unlawful occupation of a portion of the ... (Respondent's) land parcel No KYANZAVI/KIBOKO/BLOCK V/090 (hereinafter referred to as "the Suit Land") the property of the … (Respondent)***
>
> ***(b) An order restraining the … (Appellants) by themselves, their agents and servants from interning, burying or dumping the mortal remains of MUTHEU NDAISI (hereinafter referred to as "the Deceased") in … (the suit Land)***
>
> ***(c) (Other Relief)***
>
> ***(d) (Costs)."***

In their Defence, the Appellants denied the Respondent's claim and applied for the same to be dismissed with costs. They also sought orders requiring the Respondent to be ordered to vacate the suit land and to be allowed to bury the Deceased, who was their mother, on the same land.

After hearing the witnesses called by the contending parties and considering the submissions of their counsel, the Learned Trial Magistrate found for the Respondent and entered Judgment in her favour as follows:

> **"(a) That the … (Appellants) are hereby declared trespassers on … (the suit land) which belongs to the Plaintiff**
>
> **(b) That the … (Appellants) are hereby perpetually restrained to bury the remains of their**

mother Mutheu Ndaisi or any other relative on … (the suit land)

(c) That the Defendant do meet the costs of the suit."

The Appellants were aggrieved by the decree of the lower court and appealed to this court. The appeal is based on six grounds set out in the Memorandum of Appeal as follows:

"1. The Learned Magistrate erred in both law and fact in drawing conclusions which were not supported by the evidence and thus arriving at an incorrect Judgment

2. The Learn ed Magistrate erred in fact in failing to appreciate the correct evidence given

3. The Learned Magistrate erred in fact and mis directed herself in the assessment of the evidence and thus arriving at an erroneous conclusion and judgment

4. The Learned Magi strate erred in law and fact in declaring the appellants trespassers and restraining them from burying their mothers' remains

5. The Learned Magistrate erred in law and fact in failing to appreciate the evidence given by the parties

6. The Learned Magistra te erred in law and fact in finding that the Respondent had proved her claim on a balance of probability."

At the hearing of the appeal, Mr Enonda, for the Appellant, argued only grounds 1, 3 and 5 of the Appeal together. In the circumstances, I take it that the remaining grounds of the appeal were abandoned.

I have carefully perused the record of the lower court and I do not think that Mr Enonda's criticism of the Trial Magistrate is fair. He argued that the Magistrate having found that the Respondent had agreed to be compensated Kshs.52,000/= for the developments she had carried on the suit land, she (the Magistrate) could not then say that the Respondent was entitled to the land. The Magistrate did not make any such finding in her Judgment. The Judgment Mr Enonda referred to in support of his submission in this respect was that of an Arbitrator in an arbitration under the Co-operative Societies Act between the Respondent and one Ndaisi Sila who was the Appellants' father. In fact, the same Arbitrator found for the Respondent after the Appellants' father had failed to comply with a condition to compensate the Respondent before she could leave the suit land to him. When this fact was pointed out to Mr Enonda by Mr Kamiro for the Respondent, he conceded that the Judgment he was referring to was not the correct one.

It was not also correct for Mr Enonda to argue as he did that there was no evidence that his clients were occupying a portion of 1.2 acres of the suit land. PW 2 said as much. In fact, the dispute in the lower court concerned the Appellants' occupation of the suit land and in my view, it did not matter the extent of the portion they occupied. The main question in the dispute was whether their occupation as such was justified.

At one point, the Trial Magistrate stated in her Judgment that the Respondent did not call any witnesses in support of her case which was not true. As Mr Enonda properly pointed out, the Respondent's husband was also called as a witness on behalf of the Plaintiff as PW 2. It is obvious that the Trial Magistrate slipped in this respect but there was no evidence that, that mistake resulted in a wrong decision or that it caused a miscarriage of justice. If one cared to look at the claim in the lower court, the same was proved by the Respondent who was the claimant and the main witness in her case. The Trial Magistrate was contended with her testimony and the fact that the Magistrate erroneously failed to factor in the evidence of PW 2 was not grave. Mr Enonda argued, without elaboration, that PW 2 contradicted the Respondent's testimony. I have perused the record of the lower court and I did not see any such contradiction.

Mr Enonda conceded that the Respondent was allocated the suit land first. However, he argued that the allocation of the same land to the Appellants' father nullified the first allocation. He did not support his

submission in any way.

Returning to the decision of the Arbitrator, which was still the subject of an appeal, Mr Enonda argued that the same rendered the suit in the lower court res *judicata* . This submission was raised for the first time in this appeal. It was neither pleaded by the Appellants in their defence, nor was it a ground of the appeal. The same must, for those reasons, be disregarded.

There were other matters raised by Mr Enonda which in my view were not material to the decision of the court below. The main question for decision in the lower court was who between the Appellants and the Respondent was entitled to the suit land. The involvement of the Government administrators in the dispute was completely unnecessary. Yet even if the same is to be taken into account it supported the Respondent's ownership of the land in dispute.

There was also the legal question of the Appellants' locus to agitate for ownership of the suit land which in their own admission allegedly belonged to their deceased father. They did not have any grant to represent their father. Mr Enonda argued that his clients were claiming ownership of the suit land on the basis that they were in occupation thereof, yet this was not borne out of their own defence nor in their testimony. In their defence they clearly stated that the suit land was allocated to their father. They repeated the same in their testimony. That was the only basis of their claim to the suit land. That being the case, they did not have any basis to agitate a claim in the suit land. Mr Enonda further argued that the Respondent's claim in the lower court was statute barred. This submission must also fail for the reason that, that defence was neither pleaded nor raised in the lower court and also because it was not one of the grounds of the Appeal.

It is, however, curious that the Trial Magistrate entered Judgment which was at variance with what the Respondent sought in her Plaint. But again this did not occasion grave injustice. It would appear that the Magistrate equated "unlawful occupation" by the Appellants to them being "trespassers" which in my view is a matter of terminology only. However, for the sake of clarity, I am of the view that the Decree of the lower court be varied to read as follows:

> "Judgment is entered for the Plaintiff (Respondent) as follows:
>
> (a) A declaration that the Defendants (Appellants) are in unlawful occupation of a portion of the Plaintiff's (Appellant's) land parcel No KYANZAVI/KIBOKO/BLOCK V/090 the property of the Plaintiff (Respondent).
>
> (b) An order restraining the Defendants (Appellants) by themselves their agents and servants from interning, burying or dumping the mortal remains of MUTHEU NDAISI in land parcel No KYANZAVI/KIBOKO/BLOCK V/90
>
> (c) That the Defendants (Appellants) do meet the costs of the suit."

For the conclusiveness of record and in fairness to the Appellants' Counsel, I must state that I have perused all the authorities cited by him and I do not think that the same affect the decision I have come to.

In the result, the Appellants' appeal must fail save for the order varying the decree of the lower court as set out above. The Appellants will also meet the Respondent's costs of this appeal.

Dated and delivered at Nairobi this 29th day of April, 2004.

ALNASHIR VISRAM

JUDGE