



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT MIGORI

ELC APPEAL NO. 5 OF 2019

GEORGE OSINGO OJODE.....APPELLANT

VERSUS

PAMELA AKINYI OJODE.....1ST RESPONDENT

PETER AWOUR OJODE.....2ND RESPONDENT

(Being an Appeal from the Judgement and Decree of Hon. B. R. Kipyegon, RM in the Principal Magistrate's Court at Ndhwa Civil Case No. 18 of 2018 delivered on 22nd January 2015).

JUDGEMENT

A. INTRODUCTION

1. The central property in dispute herein is **Land Parcel No. 3128 Kamdar Adjudication Section (the suit land)**. It is alleged that the 1st respondent was holding the suit land in trust for the 2nd respondent. However, the appellant intentionally defrauded the 2nd respondent of the suit land and caused the same to be registered in his name. That the appellant is currently in occupation of the suit land to the detriment of its rightful owners.
2. The appellant herein was the defendant in the main suit before the trial court. The 1st and 2nd respondents were the 1st and 2nd plaintiff, respectively in that suit.
3. The appellant is represented by learned counsel, Ms. Miranga of P.R. Ojala & Company Advocates.
4. The 1st and 2nd respondents are represented by learned Counsel, Mr. G.S. Okoth of G.S. Okoth & Company Advocates.

B. THE GIST OF THE CASE BEFORE THE TRIAL COURT

5. By a Complaint dated 4th day of August 2014 which was subsequently amended on 1st day of September 2014, the respondents' sought the following reliefs against the appellant.

a. An order of permanent prohibitory injunction directed at the defendant prohibiting and restraining the defendant by himself, his children, workers, servants, employees, agents or anybody deriving authority from or through the defendant from entering into, cultivating, erecting any structure thereon, alienating or leasing or in any other way dealing with the said land Parcel No. 3128 Kamdar Adjudication Section as long as the same remains registered in the name of Peter Owour Ojode.

b. An order of declaration that the plaintiffs are the ones entitled to cultivate and occupy the said land during the land adjudication until the time of registration under the Land Registration Act and issue of title deeds.

c. Cost of the suit together with interest thereon at 14% p.a. from the date of filing and until payment until in full.

d. Any other relief the honourable court may deem fit.

6. PW1, the 1st plaintiff testified on 15th July 2015. She produced copies of proceedings (PEXhibit 1) and a letter dated 14th February 2014 for Kamdar Adjudication Section (PEXhibit 2) in her favour. The 2nd plaintiff (PW2) fortified her testimony.
7. From the availed documents before this court, there is no statement of the defence duly filed by the appellant in the trial court. However,

in the proceedings of 5th May 2015, the Honourable trial Magistrate granted time for the defendant to file his defense.

8. In the trial court's proceedings of 15th July 2015, the defendant in person stated:-

“I am ready and indeed I have been served thrice. I brought my defense statement to court registry in November last year.”

9. The trial court then ordered and directed that:-

“ Indeed the defendant has had enough time to participate in this trial. The formal proof shall proceed shortly.”

10. Judgment in the suit before trial the Court was rendered in favour of the respondents/plaintiffs on 22nd January 2015. The court ordered that the costs of the suit be borne by the defendant/appellant.

C. THE INSTANT APPEAL

11. The appellant having been aggrieved by the judgement and decree of the trial court lodged this appeal on 12th February 2016 raising 4 grounds in the memorandum of appeal dated 8th February 2016 as follows: -

I. That the Trial Magistrate erred in law and fact in hearing and determining the case which was properly (sic) filed.

ii. That the Trial Magistrate erred in law and fact by closing the appellant case without giving his fair hearing.

iii. That the entire proceeding was defective from the beginning.

iv. That the Trial Magistrate erred in Law and fact by condemning the appellant without giving him a chance to be heard, hence the entire proceedings and judgement is in breach of the Rule of natural justice.

12. The appellant therefore, prays thus: -

i. The judgement and/or decree of the Learned Trial Magistrate dated 22nd January 2016 be set aside and/or quashed and the suit in the subordinate court be dismissed.

ii. The court do order for re-trial of this case afresh.

iii. Costs of the appeal and the suit in the subordinate court be borne by the respondent.

iv. Any other or such further orders that the Honourable Court shall deem just and expedient in the circumstance.

13. On 25th June 2019 by consent of counsel for the respective parties, it was proposed that the appeal be canvassed by way of written submissions. So, the court ordered and directed accordingly.

D. APPELLANT'S WRITTEN SUBMISSIONS.

14. In his submissions dated 11th March 2021 and filed in court on 12th March 2021, learned counsel for the appellant made reference to the prayers in the memorandum of appeal, triable issues apparent in the plaint and the constitutional parameters. The appellant submitted that he filed his memorandum of appearance which was acknowledged by the trial court as shown at page 25 of the record of appeal. That further at page 28 thereof, the appellant indicated to court that he had filed his defence in November last year but the same was not put into consideration by the trial court.

That the court proceeded with the plaintiff's case which the defendant participated through cross examination of the plaintiffs.

15. The appellant also submitted that according to the Black's Law Dictionary, 9th edition at page 1644, 'a triable issue' is deemed to mean subject or liable to judicial examination and trial. That the term **“trial”** means a formal judicial examination of evidence and termination of legal claims in the adversarial proceeding.

16. Relying on Articles 159 (2) (d), 48, 50 (1) and 25 (c) of the Constitution of Kenya, 2010 (the Constitution) and Sangram Singh vs= Election Tribunal, Kotah, ALR1 955 SC 644, at 711, Mungai vs= Gachuhi & Anor (2005) cited in Signature Tours & Travel Limited Vs. National Bank of Kenya Ltd, Sebel District Administration =Vs= Gasyali & Others (1968), the appellant urged this court to find that he was not afforded an opportunity to be heard on merit. That a retrial be ordered and the judgement and order of the trial court, be set aside.

17. The appellant further submitted that the issues raised have several unsettled factual issues to be resolved on trial on merit. That the respondent's claim is not plain and obvious. The same requires discovery and oral evidence subject to cross examination to ascertain the explicitness of the respondents' claim. The appellant hence prayed that the court set aside the judgment and order for a retrial of the case.

E. RESPONDENTS' WRITTEN SUBMISSIONS.

18. The respondents' counsel filed their submissions dated 6th April 2020 in court on 21st April 2020. The counsel framed the issues for determination from the grounds of appeal as follows: -

- a) *Whether the proceedings were valid or defective.*
- b) *Whether the suit was properly conducted and the defendant was given a chance of being heard.*
- c) *Whether the case was heard ex parte.*

19. It was the submission of the respondents' counsel that the instant suit does not claim an interest in land but for orders that prohibit interference with the adjudication process where the adjudication officer has made a decision. Reliance was made on Section 30 of the Land Adjudication Act Cap 284, Section 2 of the Land Act No. 6 of 2012 and case of **Martha Kigen =vs= Johana Tibino Eid ELC Land case 470 of 2013** cited in the case of **William Mutuura Kairiba =vs= Samuel Nkari & 2 Others (2018) eKLR**.

20. On the issue of proceedings before Land Adjudication Officer, it was submitted that Mr. B.O. Oduge in objection No. 1161 on the 31st August 2005 transferred the whole of Plot No. 3128 in Kamdar Adjudication Section to Peter Owour Ojode thus determining the issue of rights and interest in that land. Thus, grounds 1 and 3 of the Memorandum of Appeal have no merit and should be dismissed as the court had jurisdiction to hear and determine the matter.

21. On the issue of whether the appellant was granted a fair hearing, the respondents submitted that pages 26 and 33 of the record of appeal show that the appellant was properly served with summons to enter appearance and plead. That on 5th May 2015, the court ordered the defendant to file and serve his defence within two weeks but the defendant failed to do so. The appellant was present during the whole trial and allowed to cross-examine witnesses. Since he failed to file and serve a defence he could not be allowed to adduce evidence in his defence citing Order 2 rule 11(3) and Order 7 Rule 1 of the Civil Procedure Rules 2010. The respondent's counsel urged that the appeal is misconceived and should be dismissed with costs.

F. ISSUES FOR DETERMINATION

22. Having considered the entire record of appeal inclusive of the grounds of appeal and rival submissions, all the authorities cited therein, the issues for determination are whether; -

- i. The suit was competent before the trial Court.
- ii. The appellant was accorded fair hearing or not in the trial court.

G. DISCUSSION AND DISPOSITION.

23. As the first Appellate court, it is well settled law, that the evidence and findings of the trial court must be scrutinized afresh and the court make its own independent findings bearing in mind that this court did not have the opportunity of seeing and hearing the witnesses firsthand; see **Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123** where it was held in the following terms: -

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hamed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).”

24. Similarly, the Court of Appeal for East Africa took the same position in **Peters v Sunday Post Limited [1958] EA 424**, where Sir Kenneth O'Connor stated as follows: -

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion...”

25. On the first issue, the appellant's first ground of appeal is that the Trial Magistrate erred in law and fact in hearing and determining the case which was properly (*sic*) filed. I would perceive that there was a typographical error as the appellant apparently meant that the case was not properly filed before the trial court,

26. The suit was precipitated by the decision of the Land Adjudication Board in the proceedings of Objection No. 1162 of 2005 filed by the 1st respondent on behalf of the 2nd respondent who was then a minor on the suit land. The proceedings form part of the record of appeal as

disclosed at page numbers 14 to 22 thereof.

27. After hearing the objection, the Land Adjudication Officer allowed the same in favour of the 2nd respondent. The appellant was given the right of appeal within 60 days as per the provisions under Section 29 (1) of the Land Adjudication Act Chapter 284 Laws of Kenya. However, he did not exercise that right or at all.

28. **Section 30 (1) of the Land Adjudication Act (supra)** provides for stay of suits. This applies to suits that spring from adjudication proceedings as long as they do not concern an interest in land in the adjudication section which has not been finalized by the Land Adjudication further to the Minister's determination under section 29 (2) and (3) thereof.

29. **Section 13 (2) (d) of the Environment and Land Court Act 2015 (2011) (the ELC Act)** empowers this Court to hear and determine disputes, inter alia;-

(d) relating to public, private and community land contracts, choses in action or other instruments granting any enforceable interests in land; and...

30. Furthermore, Section 13 (7) (h) of the ELC Act provides that the Court can make any order and grant any relief as it deems fit including -

(h) declaration;

31. Pursuant to Section 26 (3) and (4) of the ELC Act and by dint of Gazette Notice No. 11930 dated 5th December 2017, the Honourable Trial Magistrate was duly gazetted to hear and determine land dispute; see also section 9 of the Magistrate's Courts Act, 2015.

32. In this matter, there being no appeal and complaint on the suit land pending before the Director of the Land Adjudication, the respondents rightly filed a suit before the Principal Magistrate's Court at Ndhiwa seeking certain declarations. This was clearly, in line with section 13 (7) (h) and 26 (3) and 4 of the ELC Act.

33. On that score, I find that the suit was competently filed before the trial Court. Indeed, the same proceeded in consonant with the law.

34. Regarding the second issue, the appellant asserted that he was not accorded an opportunity to be heard thus, not given a fair hearing and in breach of the rules of natural justice. That there was allegedly a defence on record which was not considered by the trial court. So, what constitutes a fair hearing?

35. **Article 45 (c)** of The African Commission on Human and People's Rights provides one of the elements of a fair hearing as follows: -

2(e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

36. **Halsbury's Laws of England, 5th Edition 2010 Vol. 61** at para. 639 states:

"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice..."

37. It is borne in mind that, the right to fair hearing/trial is considered a basic human right which is universal and inalienable. Article 25 (c) of the Constitution provides: -

25. Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a)...

(b)...

(c) the right to a fair trial.

38. Article 50 (1) of the Constitution provides: -

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."

39. In addition, Article 50 (2) (2) (c) of the Constitution stipulates; -

(2) Every accused person has the right to a fair trial which includes the right-

(a).....

(b).....

(c) to have adequate time and facilities to prepare a defence.

40. There is no dispute that the appellant was served with the pleadings and/or the summons to enter appearance in the suit before the trial court. Notably, page 25 of the record of appeal, reveals that at the registry that on 18th August, 2014, the appellant filed his memorandum of appearance. The instant proceedings being civil in nature, the appellant had the opportunity to be heard through filing of defence.

41. Order 7 Rule 1 of the Civil Procedure rules 2010 reads;-

“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”

42. From the proceedings in the Trial court, more particularly at page 27 of the record of appeal, on 5th May 2015, the appellant prayed for more time to file his defense. This was outside the 14 days period prescribed for filing a defense from the date of service of summons to enter appearance. There was delay thereof for almost a year. Nonetheless, the court in furtherance of its discretion, granted the appellant more time to file his defense.

43. Be that as it may, the appellant did not comply with the order/directions to file his defense. Thus, on 5th June 2015, the respondents fixed the matter for formal proof hearing on 15th July 2015.

44. Once again, the appellant was duly served with the date of formal proof hearing as the record indicates that he was present in person before court. He stated;-

I am ready and indeed I have been served thrice. I brought my defense statement to court registry in November last year.”

45. There is no doubt from the proceedings and delivery of judgement that the appellant was present in court. He submitted in part:-

“the appellant had demonstrated from the proceedings filed in court that he had indicated to court that he had filed his defence in November but the court did not put the fact into consideration.”

46. A careful perusal of the trial court’s proceedings indicates that there was no defence that was ever filed on record. Even at this stage of the appeal, the alleged defence does not form part of the record of appeal. The learned trial Magistrate observed so even in his judgement of 22nd January 2015 where he indicated in paragraph 1: -

“the Defendant failed to put in his pleading and the Plaintiffs through counsel proceeded by way of formal proof.”

47. It should be borne in mind that the right to fair trial is not one-sided. It is a double-edged sword. It should cut both ways. All parties must be given an equal platform to exhaustively present their cases, including pleadings and evidence in order for the court to balance their divergent interest as held by the court of Appeal in **Kanwal Sarjit Singh Dhiman =vs= Kasharji Jirvaji Shah (2015) eKLR**.

48. If the trial court would have proceeded to receive to the evidence of the appellant and ignore the defense if any, then it would amount to injustice on the part of the respondents. This court is conscious of the unlimited right to fair hearing as enshrined in inter alia, Articles 50 (1) and 25 (c) of the Constitution.

49. I have considered all the authorities cited by Counsel for the appellant. In the case of **Sebel District Administration =Vs= Gasyali & Others (1968) E.A 300**, the circumstances case were that the appellant did not enter appearance and default judgement was entered. On appeal, judgement was set aside subject to payment of costs. It should be distinguished from the facts of this case in which the appellant entered appearance, participated in the proceedings and even attended the judgment date at the trial court.

50. Clearly, the appellant has not approached this court with clean hands. Thus, the court cannot come to his aid as equity aids the vigilant and not the indolent as envisaged under Article 10(2) (b) of the Constitution.

51. In the end, the decision of the trial court is sound. I proceed to uphold the same unreservedly.

52. A fortiori, I find this appeal devoid of merits. It is hereby dismissed with costs to the respondents.

DELIVERED, DATED and SIGNED at MIGORI this 23rd March 2021.

G.M.A. ONGONDO

JUDGE

In presence of :-

Ms. Miranda learned counsel for the Appellant

Mr. Titus Kipngetch holding brief for G.S. Okoth learned counsel for the Respondent

Tom Maurice – Court Assistant