



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 117 OF 2019

KIBITI M'NAITURI.....1ST APPELLANT

WINFRED KARUTHU M'IKIARA..... 2ND APPELLANT

M'INOTI RUKARIA.....3RD APPELLANT

M'RUKWARU ABURUGUA *Alias*

M'RUKARIA MUTHURI ABURUGUA.....4TH APPELLANT

-VERSUS-

GIDEON GIKUNDA KIRIGIA.....1ST RESPONDENT

M'IKIUGU M'MUKUI.....2ND RESPONDENT

GEDION M'IKIUGU M'RIMBERIA..... 3RD RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal from the judgment and decree of Hon. S. Abuya (SPM) dated 29th August, 2018 in **Meru CMCC No. 466 of 1992** consolidated with **Meru CMCC No. 467 of 1992** and **Meru CMCC No. 468 of 1992**. By the said judgment, the trial court entered judgment in favour of the Respondents and ordered eviction of the Appellants from the various suit properties.

2. The material on record indicates that the Respondents were Plaintiffs in the consolidated suits whereas the Appellants were sued as Defendants. By various plaints filed before the trial court, the Respondents sought eviction of the Appellants from **Titles Nos. Kibirichia/Ntumburi/948, 849 & 4 (the suit properties)**. They also sought damages, costs and interest among other reliefs.

3. The Respondents contended that they were the registered proprietors of the suit properties and that the Appellants had trespassed thereon and occupied certain portions thereof without lawful justification or excuse. It was further contended that despite issuance of demand and notice of intention to sue the Appellants had failed to oblige hence the legal proceedings.

4. The Appellants filed defences to the said suits denying the Respondents' claim in their entirety. They denied the alleged trespass and pleaded that it was the Respondents who intended to encroach upon their parcels of land. They claimed that they were lawfully undertaking their farming activities within their own land hence they denied the allegations of trespass.

5. The Appellants further pleaded that the legal proceedings had been irregularly and prematurely filed by the Respondents since the dispute concerned a boundary issue which ought to have been referred to the land registrar for resolution in the first instance. They all prayed for dismissal of the suits against them with costs.

6. The material on record shows that upon full hearing of the suit the trial court found for the Respondents and entered judgment in their favour. The Appellants were granted a period of 60 days to vacate the suit properties. The trial court found that it had jurisdiction to entertain the suit and that the Respondents had proved the allegations of trespass against the Appellants on a balance of probabilities.

B. THE GROUNDS OF APPEAL

7. Being aggrieved by the said judgment, the Appellants filed a memorandum of appeal dated 8th October, 2019 raising the following 9 grounds of appeal:

- (a) The learned Magistrate erred in law and fact in finding that the court had jurisdiction to hear and determine the dispute.*
- (b) The learned Magistrate erred in law and fact in failing to find that the Plaintiffs did not prove their cases on a balance of probabilities.*
- (c) The learned Magistrate erred in law and fact in failing to find that the 1st Respondent had no authority to testify on behalf of the 2nd and 3rd Respondents and therefore his evidence could only be taken in respect of his claim in Civil suit No 466 of 1992.*
- (d) The learned Magistrate erred in law and fact in considering the 1st Respondent's evidence as proof of the 2nd and 3rd Respondents' claims in Civil Suits No. 467 and 468 with the resultant conclusion that the 2nd and 3rd Respondents had proved their case to the required standard.*
- (e) The learned Magistrate erred in law and fact in finding that the 2nd and 3rd Respondents had proved ownership of land parcels number Kibirichia/Ntumburi/4 and 849 despite the fact that 2nd and 3rd Respondents did not offer any evidence to prove ownership.*
- (f) The learned Magistrate erred in law and fact in failing to find that the 2nd and 3rd Respondents did not adduce any evidence in support of their claims and therefore did not prove their cases at all.*
- (g) The learned Magistrate erred in finding that the Appellants had trespassed on the Respondents' land parcels number Kibirichia/Ntumburi/948, 4 and 849.*
- (h) The learned Magistrate erred in law and fact in that she failed to consider the Appellants' submissions tendered before court, because, had she done so, she would have come to a different conclusion.*
- (i) The learned Magistrate erred in finding that the Plaintiffs were entitled to the reliefs sought.*

8. The Appellants, therefore, prayed for the appeal to be allowed, the judgment of the trial court to be set aside and for the Respondents' consolidated suits to be dismissed with costs.

C. DIRECTIONS ON SUBMISSIONS

9. When the appeal was listed for hearing on 2nd September, 2020, it was directed that the appeal shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record shows that the Appellants filed their submission on 17th September, 2020 whereas the Respondents filed theirs on 1st October, 2020.

D. THE ISSUES FOR DETERMINATION

10. Although the Appellants raised 9 grounds of appeal in their memorandum of appeal, the court is of the opinion that the appeal may be effectively determined by resolution of the following 4 issues:

- (a) Whether the trial court erred in law in holding that it had jurisdiction to entertain the consolidated suits.*
- (b) Whether the trial court erred in law in allowing the 1st Respondent to testify on behalf of the 2nd and 3rd Respondents as well.*
- (c) Whether the trial court erred in law and fact in holding that the Respondents had proved their cases to the required standard.*
- (d) Who shall bear costs of the appeal.*

E. APPLICABLE LEGAL PRINCIPLES

11. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows:

“...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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally.”

12. Similarly, in the case of **Peters v Sunday Post Ltd [1958] EA 424 Sir Kenneth O’ Connor, P.** rendered the applicable principles 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 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 the 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...”

13. In the same case, **Sir Kenneth O’Connor** quoted **Viscount Simon, L.C** in **Watt v Thomas [1947] A.C 424 at page 429-430** as follows:

“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

F. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in law in holding that it had jurisdiction to entertain the consolidated suits

14. The court has considered the material and submissions on record on this issue. Whereas the Appellants contended that the dispute between the parties was simply a boundary dispute within the meaning of **Section 21 of the Registered Land Act (repealed)** the Respondents contended that it was a case of trespass to land.

15. The court has noted from the material on record that the parties had long running disputes over the suit properties during the process of land adjudication. The dispute was also considered by the Land Adjudication Officer (**LAO**) during the land adjudication process. It is evident from the material on record that the Appellants and Respondents had competing claims over the suit property but it would appear that the Respondents were awarded the suit properties after due process of land adjudication. It would further appear that the Appellants never accepted the verdict of the adjudicating authorities and they refused to move out of the portions they believed rightfully belonged to them.

16. In their respective defences to the consolidated suits, they asserted the properties they occupied belonged to them and that it was the Appellants who wanted to encroach upon their parcels. At the trial of the action, the Appellants and their witnesses claimed that they did not even share a common boundary with the Respondents. Moreover, in their pleadings, the Respondents had pleaded that the Appellants had wrongfully occupied 6.1 acres out of parcel 948, 1.9 acres out of parcel 849, and 1.9 acres out of parcel 4.

17. Whereas it is possible to miss a boundary by a very big margin, the material on record reveals that the Appellants believed that the portions of land they were occupying were theirs. So, they had a competing claim over the suit properties which were registered in **the names of the Respondents. In the circumstances, the court is satisfied that the nature of the dispute was not a boundary despite per se but a case of trespass to land.**

(b) Whether the trial court erred in law in allowing the 1st Respondent to testify on behalf of the 2nd and 3rd Respondents

18. The Appellants contended that the trial court erred in law in allowing the 1st Respondent to testify not only on his own behalf but also on behalf of the 2nd and 3rd Respondents without a power of attorney to that effect. It was the Appellants’ contention that since the 2nd and 3rd Respondents did not testify personally, their claims ought to have been dismissed for lack of evidence. The Respondents, on the other hand, contended that the 1st Respondent had been granted leave by the trial court to produce documentary evidence on behalf of his co-Respondents. The Respondents further contended that, in any event, the Respondents’ suits had been consolidated since they raised common questions of fact and law hence there was nothing wrong in having one party tender evidence on behalf of the rest.

19. The court is of the opinion that in civil cases, there is no legal obligation for each and every party to personally testify in a suit. The

Appellants did not cite a single authority in support of their submission. The only legal obligation cast upon a claimant is to prosecute his suit. It is the business of the claimant and his legal advisors to determine their prosecution strategy. In the instant case, it was the business of the Respondents to decide how many witnesses to call and what documents to produce to prove the consolidated suits.

20. There was no legal obligation upon each of the Respondents to testify individually and separately in the consolidated suits. Similarly, the Respondents were at liberty to call any additional witnesses who were not even parties to the suit to testify on their behalf. Consequently, the court is not satisfied that there was anything wrong in having one Respondent to testify on behalf of the other two. Accordingly, the court finds no merit in this ground of appeal.

(c) Whether the trial court erred in law and fact in holding that the Respondents had proved their claims to the required standard

21. The court has considered the material and submissions on record on this issue. Whereas the Appellants contended that the Respondents had failed to prove their claims to the required standard, the Respondents contended otherwise. The court has noted from the material on record that whereas the Respondents were the registered proprietors of the suit properties, the Appellants appeared to have competing claims not to the entire suit properties but to portions thereof, that is, approximately 6.1 acres out of parcel 948, 1.9 acres out of parcel 849 and 1.9 acres out of parcel 4. The Appellants claimed that they had been in occupation of their respective portions of land since allocation in 1967 or thereabouts.

22. The Respondents, on the other hand, tendered evidence of registration as proprietors of the suit properties. The Respondents' case was that the suit properties were located within **Kibirichia/Ntumburi Adjudication Section** which had been fully adjudicated whereas the Appellants' land falls within an adjacent **Kiirua/Nkando Adjudication Section** which was still under adjudication at the material time. They contended that they were registered as proprietors upon completion of the adjudication process in their section.

23. The material on record indicates that the Appellants or the persons under whom they claimed lodged objections during the land adjudication process to reclaim the suit properties from the Respondents. These were objections Nos. 808, 809, 810 and 811 which were all dismissed by the LAO on or about 29th August, 1990. The aggrieved objectors then lodged an appeal to the Minister being **Land Appeal No. 106 of 1996** which was heard and dismissed by the Minister under **section 29 of the Land Adjudication Act. (Cap 284)**.

24. In its judgment, the trial court found and held that the Appellants who were the owners of parcels Nos. 6, 7, 10 and 11 in **Kiirua/Nkando Adjudication Section** had trespassed into the Respondents' parcels (*the suit properties*) which were all located in **Kibirichia/Ntumburi Adjudication Section**. The trial court's finding was in tandem with the decision of the LAO dismissing the Appellants' objections and the Minister's decision dismissing their appeal. The adjudicating authorities were very clear that they could not alter the administrative boundaries of **Kibirichia/Ntumburi Adjudication Section** to accommodate the Appellants whose land fell **within Kiirua/Nkando Adjudication Section**. The legal notice declaring the boundaries of the two Adjudication Sections was dated 26th September, 1981 and the adjudicating authorities including the LAO and the Minister determined that it should be maintained.

25. The subsequent report by the Land Registrar and the District Surveyor pursuant to the court order also found that the Appellants from **Kiirua/Nkando Adjudication Section** had encroached upon the Respondents' parcels which were in **Kibirichia/Ntumburi Adjudication Section**.

26. The court finds that on the basis of the material on record the trial court was entitled to reach the decision which it did. There was overwhelming evidence on record to demonstrate that the Appellants were the trespassers and that they knew all along that they were on the wrong side of the law. They had lodged objections during the land adjudication process and lost. They had appealed to the Minister and lost. The land registrar and district surveyor had visited the site and prepared a report pursuant to a court order. They knew they were simply taking the court for a ride and squandering judicial time. In the premises, the court finds no merit in this ground of appeal.

(d) Who shall bear costs of the appeal

27. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful parties should not be awarded costs of the appeal. Accordingly, the Respondents shall be awarded costs of the appeal.

I. CONCLUSION AND DISPOSAL

28. The upshot of the foregoing is that the court finds no merit whatsoever in the instant appeal. Accordingly, the appeal is hereby dismissed with costs to the Respondents.

It is so decided.

JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 20TH DAY OF MAY 2021.

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Y. M. ANGIMA

JUDGE

JUDGMENT DELIVERED AT MERU THIS 27TH DAY OF MAY 2021.

In the presence of:

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L. N. MBUGUA

ELC JUDGE