



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELCA NO. 27 OF 2018**

**SAMUEL THILARI M'MAITAI.....APPELLANT**

**VERSUS**

**SUSAN KAIRUTHI MBIRITHI.....RESPONDENT**

**JUDGMENT**

**A. INTRODUCTION AND BACKGROUND**

1. This is an appeal against the judgment and decree of Hon. S. Abuya (SPM) dated 9<sup>th</sup> July, 2018 in *Meru CMCC No. 542 of 2009 – Susan Kairuthi Mbirithi v Samuel Thilari M'Maitai*. By the said judgement, the trial court allowed the Respondent's suit and dismissed the Appellant's counterclaim. The Respondent was also awarded costs of the suit and the counterclaim.
2. The material on record indicates that by a plaint dated 5<sup>th</sup> November, 2009 the respondent (who was the Plaintiff before the trial) court sought a declaration that she was the rightful owner of *Plot No. 23 at Kianjai Trading Centre (the suit property)*, a permanent injunction restraining the Appellant (who was the Defendant) from trespassing upon the suit property, and costs of the suit.
3. The basis of the Respondent's claim was that she had lawfully bought the suit property on 14<sup>th</sup> February, 2007 at a public auction and issued with a certificate of sale. It was pleaded that the said auction was conducted in execution of a lawful decree issued in *Meru CMCC No. 344 of 2005 Meru Central Farmers Co-operative Union v Charles Kithinji Mutuma*.
4. The Respondent further pleaded that the suit property was ultimately registered in her name but the Defendant had in October, 2009 trespassed thereon by depositing building materials and undertaking construction hence the suit.
5. The Appellant filed a defence to the action as well as a counterclaim dated 24<sup>th</sup> November, 2009 denying the Respondent's claim in its entirety. The Appellant denied knowledge of the public auction in execution of a decree and contended that such attachment and sale was irregular, bad in law and a nullity. The Appellant further contended that sale of the suit property was fraudulent and pleaded 2 particulars of fraud against the Respondent.
6. By his counterclaim, the Appellant pleaded that he had lawfully bought the suit property from one Charles Kithinji (*Charles*) on 1<sup>st</sup> December, 2005 for valuable consideration and that the same was transferred to him on 2<sup>nd</sup> December, 2005. It was his case that he had already taken possession of the suit property by the time of the public auction.
7. The Appellant asserted his ownership of the suit property and accused the Respondent of fraud in the acquisition of the suit property in collusion with the two auctioneers who auctioned the suit property. The Appellant therefore prayed for a declaration that he was the rightful owner of the suit property, an order for cancellation of the Respondent's registration as proprietor of the suit property and costs of the suit and counterclaim.
8. The Respondent filed a reply to defence and defence to counterclaim in which she denied any fraud, illegality or impropriety in the acquisition of the suit property. The Respondent further pleaded that she was not party to *CMCC No. 344 of 2005* and that he did not cheat the court in any way.
9. The Respondent denied that the Appellant was at any time the registered owner for the suit property and contended that any loss or damage the Appellant may suffer can only be as a result of his own iniquities in attempting to grab the suit property from her.
- 10 The material on record further indicates that upon a full hearing of the suit the court found for the Respondent and entered judgment in her

favour. The trial court was satisfied that on the basis of the evidence on record the Respondent was the rightful owner of the suit property as a purchaser at a public auction conducted in execution of a lawful decree of the court in *Meru CMCC 544 of 2005*. The court was not satisfied that the Appellant had demonstrated his ownership of the suit property or his registration as proprietor at any time prior to its sale at a public auction. Consequently, the trial court dismissed the Appellant's counterclaim with costs to the Respondent.

## **B. THE GROUNDS OF APPEAL**

11. Being aggrieved by the judgment and decree of the trial court, the Appellant filed a memorandum of appeal dated 6<sup>th</sup> August, 2018 raising the following 5 grounds of appeal:-

*(1) The learned Magistrate erred in law and in fact in that she did not take into account, consider or sufficiently consider all the issues and material placed before her.*

*(2) The learned Trial Magistrate made orders which prejudiced the Appellant's case as the most important witnesses could only be brought to court with powers of the court.*

*(3) The learned Trial Magistrate erred in law and in fact in that she refused the appellant a fair hearing and thus prejudicing his case.*

*(4) The learned Trial Magistrate's discretion to refuse the defendants/appellant a further adjournment was bad in law and against the provisions of the Constitution and the Civil Procedure Act.*

*(5) The decision/judgment of the Trial Magistrate is against the weight of evidence and bad in law.*

12. The Appellant consequently prayed for the appeal to be allowed; the judgment and decree of the trial court to be set aside; an order for dismissal for the Respondent's claim; and an order for an order for retrial of the action. Notably, there was no prayer asking the court to allow the Appellant's counterclaim.

## **C. DIRECTIONS ON SUBMISSIONS**

13. It would appear that when the appeal was listed for directions on 7<sup>th</sup> July, 2020 it was directed that the same shall be canvassed through written submissions. The Appellant was granted 21 days to file and serve his submissions whereas the Respondent was granted 21 days upon the lapse of the Appellant's period to do the needful. The record shows that the Appellant filed his submissions on 27<sup>th</sup> July, 2020 whereas the Respondent filed hers on 10<sup>th</sup> September, 2020.

## **D. THE APPLICABLE PRINCIPLES**

14. 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.”**

15. 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...”**

16. 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. ISSUES FOR DETERMINATION**

17. Although the Appellant raised 5 issues in his memorandum of appeal, the court is of the opinion that those issues may be condensed into the following 4 issues:-

- (a) *Whether the trial court erred in fact and in law in holding that the Respondent had proved her case to the required standard.*
- (b) *Whether the trial court erred in fact and in law in holding that the Appellant had failed to prove his counterclaim.*
- (c) *Whether the trial court erred in law in declining to grant a further adjournment to the Appellant.*
- (d) *Who shall bear the costs of the appeal.*

#### **G. ANALYSIS AND DETERMINATION**

##### **(a) Whether the trial court erred in holding that the Respondent had proved her case to the required standard**

18. The court has considered the material and submissions on record on this issue. The Appellant contended that the trial court did not consider or sufficiently consider all the evidence and material on record and as a result arrived at wrong decision. It was further contended that the decision was against the weight of evidence. Although the findings of fact by the trial court are entitled to be accorded due weight, this court is still bound to analyze and evaluate the entire evidence tendered at the trial and draw its own conclusions on the matters in dispute. A first appeal essentially proceeds by way of retrial. However, this court has to bear in mind that it did not have the benefit of hearing and seeing the witnesses at the trial hence due allowance for this should be made.

19. There is no dispute in this matter that the Respondent bought the suit property at a public auction conducted by an auctioneer in execution of a decree in *Meru CMCC No. 344 of 2005*. It was not contended that the decree was not a lawful and valid decree. The Appellant's contention was that the auctioneer wrongfully sold the suit property in 2007 in execution of the decree since the judgment debtor was no longer the owner thereof. The Appellant claimed to have bought it in 2005 from the debtor.

20. Although the Appellant claimed that the suit property was transferred and registered in his name by the County Council of Nyambene (*the Council*), there was absolutely no evidence of such transfer and registration on record. The transfer form which the Appellant produced at the trial was never approved by the Council since part D was not signed and the approval minute number appended. The said part was simply left blank.

21. The court has also considered the fact that by the time the Respondent sought to be registered in 2007, she paid arrears of rates in the sum of Kshs.1,800/- and a receipt was issued in the name of Charles and not the Appellant. That could only mean that by the time of payment of the arrears the suit property was still in the name of Charles and not the Appellant. The trial court could not, therefore, be faulted for finding and holding that the Respondent was the rightful owner of the suit property.

22. The court is further of the opinion that if the Appellant held the view that the sale by auction was irregular or unlawful for any reason the proper manner of impugning it would be seeking to set it aside in *CMCC No. 344 of 2005* and not by filing a separate suit or counterclaim in separate proceedings. The court has further noted that from the material on record, the Appellant filed an application on the same grounds as those contained in his counterclaim for setting aside the sale but the application was dismissed vide a ruling dated 4<sup>th</sup> October, 2010. There is no indication on record to show whether or not the Appellant appealed against that decision.

23. The court has further noted from the material on record that even though the Appellant accused the Respondent of fraud, illegality and impropriety in her acquisition of the suit property, none of the particulars of fraud pleaded in the defence and counterclaim were proved against the Respondent at the trial. The Respondent was simply one of the many persons who attended a public auction and put in their bids for the suit property. She was declared the successful bidder. There was no evidence to suggest that she colluded with the auctioneer or the council for her to be declared the successful bidder.

##### **(b) Whether the trial court erred in holding that the Appellant had failed to prove the counterclaim to the required standard**

24. The court has considered the material and submissions on record on this issue. The Appellant contended that the trial court had failed to take into account and consider all the evidence and material tendered at the trial and that the court decided the case against the weight of evidence.

25. The basis of the Appellant's counterclaim was that he was the rightful owner of the suit property as a purchaser for valuable consideration from Charles. He also contended that a transfer was done and the council registered the suit property in his name. The Appellant was thus of the view that the auctioneer wrongfully sold the suit property which did not belong to the judgment debtor.

26. As indicated before, there was absolutely no evidence before the trial court to demonstrate that the suit property was even transferred to the Appellant. There was no evidence to demonstrate that the suit property was ever registered in the name of the Appellant in 2005 or at all. On the contrary, the material on record indicates that the suit property was still in the name of Charles by the time of the auction and the time of its transfer to the Respondent.

27. The material on record further shows that the Appellant was unable to demonstrate his unregistered interest in the suit property before the court which executed the decree in question hence the reason for dismissal of his application for setting aside the sale. In those circumstances, it could not be said that the trial court erred in fact and in law in holding that the Respondent had failed to prove his counterclaim to the required standard.

***(c) Whether the trial court erred in declining to grant the Appellant a further adjournment***

28. The Appellant faulted the trial court for refusing to grant him a further adjournment at the trial of the action to enable him call all the necessary witnesses. The material on record shows that on 6<sup>th</sup> June, 2018 the trial court declined the Appellant’s application for adjournment for two reasons. First, that the Appellant had been granted a last adjournment on 8<sup>th</sup> March, 2018 and a “very” final adjournment on 17<sup>th</sup> April, 2018. Second, that the suit was a very old one which had been pending in court since 2009.

29. The court has perused the record of proceedings and noted that it was the Appellant who secured the highest number of adjournments in the suit. The record shows that the Respondent closed her case on 16<sup>th</sup> August, 2017. The Appellant did not proceed with the defence hearing but he sought an adjournment on that date. The suit was stood over to 23<sup>rd</sup> October, 2017 for defence hearing. The Appellant did not proceed on that date but he sought another adjournment. The adjournment of 23<sup>rd</sup> October, 2017 was marked as a last adjournment for the defence but the matter was adjourned on several subsequent occasions at the instance of the Appellant.

30. The court is aware that a trial court exercises judicial discretion in granting or declining an adjournment. Such discretion must, of course, be exercised judicially and not arbitrarily or capriciously.

It has also been held that an appellate court should not lightly interfere with the judicial discretion of the court of first instance unless it is demonstrated that the court misdirected itself on a matter of law or acted on wrong principles.

31. In the case of **Mugachia v Mwakibundu** [1984] eKLR the court of Appeal held, *inter alia* that:

**“The granting of an adjournment involves as exercise of discretion by the presiding Judge and this court will not interfere with the presiding Judge’s exercise of discretion unless he has either acted on wrong principles or exercised his discretion unjudiciously: Mbogo and Another v Shah [1968] EA 93, Mohindra v Mohindra (1953) 20 EACA 56 ...”**

32. The court is satisfied from the material on record that the Appellant was granted an adequate opportunity to call his intended witnesses through several adjournments. The court is of the opinion that the Appellant should be grateful for securing additional adjournments after a last adjournment was granted on 23<sup>rd</sup> October, 2017. The court finds that the suit had been pending for nine (9) years by the time a further adjournment was denied on 6<sup>th</sup> June, 2018. Accordingly, the court finds no evidence to demonstrate that the trial court acted on wrong principles or that it exercised its discretion was not exercised judicially.

***(d) Who shall bear costs of the appeal***

33. 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 party should not be awarded costs of the appeal. Accordingly, costs of the appeal shall be awarded to the Respondent.

**H. CONCLUSION AND DISPOSAL**

34. The upshot of the foregoing is that the court finds no merit in the Appellant’s appeal. Accordingly, the appeal is hereby dismissed in its entirety with costs to the Respondent.

**Judgment dated and signed in chambers at Nyahururu this 20<sup>th</sup> day of May 2021.**

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**Y. M. ANGIMA**

**ELC JUDGE**

**Judgment delivered at MERU this 27<sup>th</sup> day of May 2021.**

In the presence of:

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**L. N. MBUGUA**

**ELC JUDGE**