



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND OF KENYA

AT KISII

ELC CIVIL APPEAL NO. 8 OF 2018

WHEATON MANGUKO.....APPELLANT

VERSUS

DIOCESE OF KISII.....1ST RESPONDENT

CHAIRMAN BOARD OF TRUSTEES

NYAMAKOROTO CATHOLIC CHURCH.....2ND RESPONDENT

(Being an appeal from the judgment of Hon. S.RM B.M. KIMTAI

delivered on 24th July 2018 in Keroka PMCC No. 31 of 2013)

JUDGMENT

INTRODUCTION

1. This appeal arises from the judgment of *Hon. B. M. KIMTAI - SRM delivered on 24th July 2018 in Keroka PMCC No. 31 of 2013. In the lower court* the Respondents filed suit against the Appellant claiming that the Appellant who is the registered proprietor of LR. EAST KITUTU/BONYANDO II/581 had trespassed into their parcel of land known as LR. EAST KITUTU/BONYANDO II/59 and started cultivating the same without the Respondents' consent. The Respondents averred that before filing suit, they lodged a complaint with the District Lands Office Nyamira County to determine the boundary between themselves and the Appellant. The dispute was heard and determined in their favour on 24th September, 2012. The Respondents further claimed that despite the determination by the District Land Registrar, the Appellant continued to occupy their property hence denying them their peaceful enjoyment thereof. This is what prompted them to institute a suit against the Appellant in the lower court. In the said suit the Respondents sought a permanent injunction restraining the Appellants from trespassing into their property together with an order of eviction.

2. The Respondents filed a statement of Defence denying the Appellant's claims.

3. After hearing both parties, the trial court delivered its judgement on 24th July, 2018 in favour of the Respondents. The court held that the 1st Respondent (then Plaintiff) was the absolute owner of parcel no. LR. EAST KITUTU/BONYANDO II/951 while the Appellant (then Defendant) was the absolute owner LR. EAST KITUTU/BONYANDO II/581 and thus the Appellant had no rights over parcel LR. EAST KITUTU/BONYANDO II/951. The court further directed the District Land Surveyor to demarcate the boundary of LR. EAST KITUTU/BONYANDO II/951 within 30 days. The Appellant was ordered to move out of land parcel LR. EAST KITUTU/BONYANDO II/951 within 30 days failing which the Respondents would be at liberty to move the court for an eviction order.

4. Being aggrieved by the decision of the trial court, the Appellant filed this Appeal citing the following Grounds:

(i) The learned trial magistrate erred in law and in fact by wrongly evaluating the evidence on record and thereby arrived at the wrong judgment.

(ii) The learned trial Magistrate erred in law and fact by failure to note that the suit before court was *res-judicata*.

(iii) The learned trial Magistrate erred in law by misinterpreting the District Land Surveyor's report while determining the suit.

(iv) The learned Magistrate erred in law and in fact to identify (sic) that the issues (sic) in dispute was not ownership but the issue of boundary in relation to parcel no. 581 and 686 with different title of ownership.

(v) The learned Magistrate erred in law and in fact to note that the Plaintiff was not properly represented as the Advocate who was on record showed disinterest in the case and the Honourable Court had a duty to advise the Appellant to seek legal representation.

5. The court directed that the Appeal be canvassed by way of written submissions and whereas the Appellant filed his submissions, the Respondents did not file any.

ISSUES FOR DETERMINATION

6. I have analysed the evidence before the trial court as required of a first appellate court, giving due deference to the findings of the court which had the benefit of hearing the witnesses testify. I have also analysed the Record of Appeal, Supplementary Record of Appeal and Memorandum of Appeal as well as the Appellants' submissions and I deduce the main issues for determination as follows:

(a) Whether the learned trial Magistrate erred in law and fact in failing to note that the suit was *res judicata*.

(b) Whether the learned Magistrate erred in law and in by failing to identify that the issue in dispute was one of boundary and not ownership.

ANALYSIS AND DETERMINATION

Whether the learned trial Magistrate erred in law and fact in failing to note that the suit was *res judicata*.

7. Learned counsel for the Appellant submitted that the dispute which was basically a boundary dispute had been adjudicated by the District Land Tribunal. He further submitted that the verdict of the Tribunal was adopted as an order of the court by the Senior Resident Magistrate Court at Keroka vide a decree dated 27th July, 2011. He contended that the verdict having been heard and determined by the tribunal and the very verdict adopted by a court of competent jurisdiction, it was erroneous of the trial court to proceed to hear a suit that had already been determined. He therefore urged that the Respondents suit, KEROKA PMCC NO. 31 OF 2013 was misplaced and a waste of the court's time and the trial court ought to have dismissed it as being *res-judicata*.

8. It is unfortunate that the Respondent chose not to file any submissions in rebuttal to the Appeal. However, I note from the record that the issue of *res judicata* was never raised by the Appellant in the lower court. Worse still, the Appellant never produced the proceedings of the Land Disputes Tribunal and Provincial Appeals Tribunal, or the decree that was adopted by the court as his exhibits. His evidence was very brief and the only exhibit he produced was a letter from the Lands office. I however note that in an effort to salvage his case counsel for the Appellant filed a supplementary Record of Appeal pursuant to the court's leave in which he introduced the documents I have alluded to irregularly, since the same never formed part of the lower court record, and were not produced by the Appellant. Had these documents been brought to the court's attention at the right time during the trial, the court might have arrived at a different finding. In the circumstances, I cannot fault the magistrate for arriving at the decision he did based on the material that was presented before him. He was of the view that what was before him was purely a boundary dispute and he proceeded to reaffirm the ownership of the Respondent's title to parcel no. 951. He also found that the Appellant had encroached on the Respondent's land and directed the County Surveyor to go and mark the boundary within 30 days after which the Appellant was to vacate the suit property. I find no good reason to interfere with the lower court's decision.

9. The upshot is that I find no merit in the Appeal and I dismiss it. Each party shall bear their own costs.

Dated, signed and delivered at Kisii this 19th day of May, 2021.

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J.M ONYANGO

JUDGE