**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT CHUKA**

**CHUKA ELC APPEAL CASE NO. 1 OF 2020**

**JENNIFER KAINDI KITHURE.....APPELLANT**

**VERSUS**

**MAGONDU M'IGWETA .....1ST RESPONDENT**

**GRACE KABUKO NYUNGU.....2ND RESPONDENT**

**LAND SETTLEMENT OFFICER THARAKA DISTRICT.....3RD RESPONDENT**

***(Being an appeal from the Judgment of the Senior Resident Magistrate's Court at Marimanti before Honourable S. M. Nyaga (SRM) delivered on 17th December, 2019 at Marimanti CMCC N. 20 of 2018)***

**JUDGMENT**

1. The Memorandum of Appeal in this suit states as follows. It lacks a heading. It states as follows:

The Appellant being greatly aggrieved by the judgment/decree of Honourable court appeals against the entire judgment and sets herein below his grounds of appeal.

1. The learned honourable trial court erred in law and fact by holding that the plaintiff was in actual occupation and possession of suit property.

2. That the honourable trial court erred in law and fact by proceeding unprocedurally without the presence of parties in the matter.

3. That the honourable trial magistrate erred in law and facts by failing to consider evidence duly filed by all the parties herein.

4. That the honourable magistrate misapprehended the facts and the law in the suit before him and thus reached an erroneous conclusion on both the law and facts.

5. That the whole judgment is without basis on both the law and facts.

2. The suit was canvassed by way of written submissions.

3. The Appellant's written submissions have been pasted in full herebeow without any alterations whatsoever.

**APPELLANT'S SUBMISSIONS**

The genesis of the dispute giving rise to the present appeal was vide a plaint dated 27th November 2014 seeking court to declare that the appellant who was the 2nd defendant, occupied land L.R No 24 of 25 Mukothima A Adjudication Section unlawfully and sought a permanent injunction restraining the defendant's jointly and severally from interfering with the plantiff's (now 2nd respondent) peaceful possession of the same plus costs of the suit.

The appellant filed her defense and counterclaim on the 8th of January 2015 denying all the averments by the plaintiff and also sought a permanent injunction barring the plaintiff and her agents from trespassing on the suitland.

Owing to a lack of communication between the appellants advocates on record and the appellant the court found for the Respondent and granted all the prayers.

The appellant, being dissatisfied with the judgment brought this appeal.

Appellant in his Memorandum of appeal had listed 5 grounds of appeal from which we have come with two issues.

**Issues**

1. Whether or not the honourable trial magistrate erred in law and in fact by proceeding unprodecurally without the presence of parties in the matter.

2. Whether the honourable trial magistrate erred in law and in fact by failing to consider evidence duly filed by the parties.

**Whether or not the honourable trial magistrate erred in law and in fact by proceeding unprodecurally without the presence of parties in the matter?**

In ground 2 of the appeal the appellant stated that the trial magistrate acted unfairly and in total prejudice of the appellants by proceeding unprocedurally without the presence of the appellant in the hearing and also denying her a chance to be heard.

The 1st and 3rd respondents who were the 1st and 3rd defendants respectively never filed any documents in court in defence of the suit. Neither of these two were served with documents for interlocutory judgment under **Order 10 Rule 4 (2) (cap 21)** for the 1st respondent and under order 1 rule 20 **(cap 21)** for the 3rd respondent for their lack of response if at all they were served and the judgment seemingly overlooked them by noting on the 2nd paragraph of the same that:-

> "The other defendants failed to enter appearance. There was however unsubstaciantedword that the 1st defendant is deceased".

If at all the 1st defendant is/was deceased, it behooved the 2nd respondent to take out papers for citation as set out in part VI of the Probate and Administration Rules (P&A Rules) to the adiministrator of his estate but again just like the failure to file for summary judgment as it should be the same was neglected.

Your lordship taking a look at the plaint , **the plaintiff sought orders of injunction against the government, a deceased party and the appellant** herein , a party is bound by its pleading , we submit that this not legally possible .

The court heard only the 2nd respondents case without the presence of the other parties and never afforded the appellant the opportunity to be heard. The alleged notices were not send to all parties herein infact the fact of alleged death of the 1st defendant only arose on the day of purported hearing , we submit this is the most ridiculous attempt to defile the rule of law .

A cursory glance at the 2nd respondents supplementary record of appeal from pages 3 to 8 shows that he served the appellants advocates with a mention for pretrial directions coming up on the 5th September 2019, a hearing for 17th October 2019 and a mention notice for the 26th November 2019 all with accompanying affidavits of service respectively.

The effect of the aforesaid can be surmised by the statement at line 6 page 3 of the judgment where the trial magistrate observed that:-

> "Trial closed after the 2nd defendant failed to attend court to defend her contention despite proper notice to appear in court and to do so".

The above observation led to the conclusion on page 4 of the judgement where the 2nd paragraph is captured as follows:-

> "The defendant has failed to challenge the plaintiff case as proved. The 2nd defendant has similarly failed to prove her counterclaim that was denied……."

Your lordship it is our humble submission that the honourable magistrate erred in fact and in law in proceeding unprocedurally without the presence of party(s) in the matter resulting to a miscarriage of justice.

**Whether the honourable trial magistrate erred in law and in fact by failing to consider evidence duly filed by the parties?**

In her statement dated 8th January 2015 , the appellant noted that she is the 1st registered owner of L.R No 24 of 25 Mukothima A Adjudication Section upon gathering and averred that she has been at all material times been in exclusive use, possession and developments on the properties even prior to registration. She has a dwelling house thereon, planted trees and did not recognize the 1st respondent who allegedly sold land to the 2nd respondent . The appellant went on to note that the 2nd respondent had her own farm which was different from hers and the same are distinct and separated by a road. She relied on a letter from the district land and settlement officer, an agricultural officers report and statements in a criminal matter to prove her case.

**Your lordship**, given that there were diametrically opposed assertions and each party was saying that she was in occupation of the

subject matter, a consent dated the 18th day of April 2016 whose effect was to have the executive officer to visit to the suitlands and report on who was/is in actual occupation of the land was adopted as an order of court . Its also imperative to note that the 1st respondent as per plaint paragrapgh 7 was denied the parcel number. He ought to have followed the laid down procedure to challenge the land adjudication officer decision to award/give the appellant the suit property, this he did not as per the law . Further its clear the purported purchase of land was not proved from the 1ST DEFENDANT who not only did not own the land but also had no capacity if any to sell

Your lordship, **on the 30th day of May 2016, the 2nd respondents advocate on record asserted that the executive officer had not visited the locus in quo and parties sought for a 45 day period to enable the executive officer to visit the locus in quo and file his report. This has not been done hitherto**.

**Your lordship**, due to constitutional petition number 3 of 2016 (**Malindi Law Society v Attorney General & 4 others)** whose effect is in the public domain the matter was later transferred to the Senior Principal Magistrate Marimanti and was first mentioned on the 14th day of June 2018 . It is with great regret to note that the appellants Advocate never for once appeared in court nor communicated to the appellant about the goings on of her matter.

The appellant contends further that she had a good defence and counterclaim and the mistakes made by her advocate if any which is denied should not be visited upon her and she is bound to suffer prejudice as a result of a fault which was not of her own making she prays to have a day in court .

Your Lordship, It is our submission that the learned trial magistrate erred in fact and in law by failing to conduct the matter procedurally.

**Conclusion**

Your Lordship, it is our humble submission that had the trial magistrate erred in a manner he did conduct the matter denying party(s) herein the right to be heard , did overlook the basic principles to consider before allowing a party to proceed exparte, failed to discern that the plaintiff/1st respondent had not approached court with clean hands , the order sought as pleaded in the plaint cannot be allowed against the government , the advocate purportedly on record was not properly on record , the first registration was never objected at the adjudication stage as per the law , and failure to consider the counter claim duly filed herein thus opened a very wide window to miscarriage of justice. Hence we seek for dismissal of suit and or retrial with costs to appellant.

We so pray.

DATED AT MERU THIS …8TH …DAY OF……FEBRUARY,…...2121

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OTIENO C& CO ASSOC ADVOCATES

ADVOCATES FOR THE APPELLANT

4. The second Respondent's written submissions are pasted herebelow without any alterations whatsoever.

**SECOND RESPONDENT'S SUBMISSIONS**

**A. BACKGROUND**

1. This appeal was filed on 11th January, 2020.

2. The appeal seeks to challenge the judgment delivered on 17th December, 2019 allowing the second respondent's suit in Marimanti civil suit No. 20 of 2018.

3. The appellant was the second defendant in the trial court while the second respondent was the plaintiff.

4. The first defendant passed on before the suit was heard but essentially the case in the trial court was basically between the plaintiff and the second defendant.

5. During the hearing of the suit in the trial court, neither the appellant nor her advocate attended the hearing although a hearing notice was served. The suit therefore proceeded with the plaintiff only in the trial court.

6. The appellant has now brought this appeal to challenge the judgment delivered in the case where she failed to attend the hearing in the trial court and has raised the following grounds;

i. The learned Honourable trial court erred in law and fact by holding that the plaintiff was in actual occupation and

possession of the suit property.

ii. That the Honourable trial court erred by law and fact by proceeding unprocedurally without the presence of parties in the matter.

iii. That the Honourable trial magistrate erred in law and facts by failing to consider evidence duly filed by all the parties.

iv. That the Honourable trial magistrate misapprehended the facts and the law in the suit before him and thus reached an erroneous conclusion on both the law and the facts.

v. That the whole judgment is without basis on both the law and the facts.

7. In our submissions, we will address the grounds of appeal enumerated above to oppose the appeal.

**B. THE GROUNDS OF APPEAL**

**Ground 1**

8. It is not correct that the trial court erred that the plaintiff is in actual occupation and possession of the suit property.

9. The suit in the trial court was filed by the plaintiff who is the second respondent in this appeal.

10. The plaint which is at pages 4 to 7 of the record of appeal clearly shows that the second respondent is the owner of the suit property and she is in actual occupation and possession.

11. During the hearing of the suit in the trial court the plaintiff testified and called one witness in support of her case.

12. The appellant did not offer any testimony and evidence to counter the evidence tendered by the second respondent.

13. The trial court having heard the evidence of the plaintiff and also saw her demeanor, the trial court was justified in finding as it did that the second respondent is in actual occupation and possession of the suit property.

14. It is trite law that the court of appeal will not lightly differ from the findings of fact of a trial court and will only interfere with them if they are based on no evidence.

15. In **Samson Wafula Wanyonyi v Ngugi Njuguna t/a Golden Eagle Bus Services[2016] e KLR (page 1 to 6 of the authorities)** the court referred to the case of **Makube v Nyamoro(1983) KLR 403** where the court held as follows;

> **"…A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong legal principles in reaching the findings he did…"**

16. In that case of **Samson Wafula v Ngugi Njuguna (Supra)** the court also cited the case of **Kiruga v Kiruga & Another(1988) KLR 348** where the held as follows;

> **"….An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution. Where it happens that a decision may seem equally open either way, the appellate court approach is that the decision of the trial court that has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed..."**

17. We submit that the finding of fact by the trial court should not be interfered with by this court because the appellant has not demonstrated that the trial court has acted on the wrong legal principles.

18. The trial court based its judgment on evidence adduced before it by the plaintiff and therefore it cannot be said that the trial court's finding was based on no evidence.

19. We submit that the appellate court has jurisdiction to review the evidence of the trial court to determine whether the conclusion reached on the evidence should stand. This jurisdiction however should be exercised sparingly and with caution since the appellate court did not have the advantage of seeing the witnesses at the trial. (Emphasis added).

20. Our submission it that this court should adopt the trite principle of the law that the appellate court's approach is that the decision of the trial court who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed.

21. We submit that having regard to the above submissions the court finds that this ground of appeal has no merit and dismiss it.

**Ground 2**

22. The appellant allege that the trial court proceeded unprocerally without the presence of the parties in the matter.

23. We submit that the plaintiff was present and gave evidence at the trial. The appellant cannot blame trial court for her failure to attend the hearing.

24. It is necessary to give a little background on the matter culminating on the date for the hearing which the appellant did not attend.

25. The matter was fixed for pretrial conference on 5th September, 2019. A hearing notice was served on 9th July, 2019. The affidavit of service is at (page 3 and 4) of the supplementary record of appeal.

26. On 5th September, 2019, the appellant and her advocate did not attend court and the matter was certified ready for hearing and fixed for hearing on 17th October, 2019. A hearing notice was served and an affidavit of service was filed. The affidavit of service is at (page 5 and 6) of the supplementary record of appeal.

27. On the day for hearing that being the 17th October, 2019, the appellant and her advocate did not attend the court for hearing. When the matter was called outside the court only the plaintiff was available to proceed with the hearing.

28. **Order 12 Rule 2 of the Civil Procedure Rules** provides as follows;

> **"if on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied-**
>
> **(a) That notice of hearing was duly served, it may proceed exparte.**

29. The trial court was satisfied that the hearing notice was served on the appellant and they did not attend the hearing. The trial court could do nothing more other than to proceed with the plaintiff who was in court and ready to proceed with the hearing.

30. Where the defendant fails to attend the hearing of the suit and the court is satisfied that he has been served with the hearing notice, the court will proceed with the hearing of the plaintiff's case. See this court's judgment in **M'arichia Mwithaga Kiriga v Romano Muthengi Nduyo & 3 Others [2017] e KLR**. **(Pages 7 to 9 of the authorities).**

31. We submit that this ground as well does not merit and should be dismissed.

**Grounds 3, 4, and 5**

32. We will submit on these grounds together since they are similar. We submit that the trial court considered the evidence tabled before it. The plaintiff produced the witness statement and gave oral evidence. The plaintiff also called a witness who also produced his witness statement and gave oral evidence.

33. The appellant was absent and so did not give evidence at the hearing to counter the plaintiff's evidence.

34. Since the appellant did not attend the hearing to offer her evidence to counter the plaintiff's evidence, she cannot therefore lay any blame on the trial court.

35. In **Okal Ongaro v James Owiyo Odipo [2015] e KLR (pages 10 to 12 of the authorities)** the court held as follows;

> **"As I have stated earlier in this judgment, the defendant filed a statement of defence but failed to turn up for the hearing of the case. The evidence that was tendered by the plaintiff in support of his claim against the defendant was not controverted.** (Emphasis added)

36. We submit that the trial court considered all evidence before it in coming up with the judgment. Since the appellant did not give evidence the plaintiff's evidence was not controverted. The appellant therefore cannot rely on her failure to lay blame upon the trial court.

37. As regards the allegation that the trial court misapprehended the facts, we submit that there is no indication or evidence that the trial court decision was based on a misapprehension of facts or on application of the wrong legal principles.

38. We do not need to say much on **ground 5** other to say that the judgment of the trial court is based on sound legal principles based on the evidence adduced by the plaintiff. The judgment should not be interfered with and should therefore be allowed to

remain.

39. In a nutshell we submit that the appellant's appeal is not meritorious and it should therefore be dismissed.

Dated at Nanyuki this 29th day of January, 2021

**JESSE MWITI ADVOCATES**

**Advocates for the Second Respondent**

5. The second Respondent filed further submission which are pasted herebelow without any alteration whatsoever.

**SECOND RESPONDENT'S FURTHER SUBMISSIONS**

1. Theses submissions are further to the second respondent's submissions filed on 4th February, 2021.

2. The submissions are made in response to the appellant's submissions filed on 8th February, 2021.

3. The appellant states that the respondent proceeded with the hearing without all the parties in the trial court.

4. The respondent stated that the first defendant passed on before the suit could be heard and the other defendant is the Attorney General who did not file any papers in the suit.

5. Be that as it may this suit is essentially between the appellant and the second respondent regarding the suit property.

6. The respondent submits that where a party is clear as to who should be held liable in a suit he can proceed with the suit against that party alone regardless of the joinder or misjoinder of parties

7. In the case of **Eliud Gibson Murigi v Bernard Ndung'u Ngotho [2014] e KLR** it was held as follows,

> ***"No suit shall be defeated by reason of misjoinder or non-joinder of parties…the court has the leverage in every suit before it to deal with the matter in controversy so far as regards the rights and interest of the parties before it".***

8. It is submitted that the respondent was clear that the appellant was the one to be held liable and that is how the suit before the trial court.

9. The respondent's suit should therefore not be defeated by reason of the misjoinder or joinder of the parties and the judgment of the trial court should not therefore be disturbed and should be left to remain as the court acted according to the law.

10. The appellant has also submitted that the mistakes made by her advocate should not be visited upon her as the mistakes were not her own making.

11. We submit that this is not a good ground necessitating the disturbance of the trial court judgment.

12. If the appellant feels offended by the mistakes of her advocate, she can seek recourse against the advocate requiring to be compensated by the advocate who made the mistakes.

13. in the case of **J.G Builders v plan international [2015] e KLR** the court referred to the case of **Three Ways Shipping Services Group Limited v Mitchell Cotts Freighters (K) Limited [2005] e KLR** where the court held as follows regarding the question of advocates mistakes being visited on the client;

> **"The question of advocate's mistake being visited on the client has been raised from time to time. Rt. Hon. Lord Denning M.R in "The Due Process of Law "London Butterworth's at p. 93 said:-**
>
> > ***"Whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action can claim damages against him as for instance when a solicitor does not issue a writ in time or serve it in time or does not renew it properly. We have seen I regret to say, several such cases lately. Not a few are legally aided. In all of them the solicitors have, I believe been quick to compensate the suffering client or at least their insurers have. So the wrong done by the delay has been remedied as much as can be. I hope this will always be done".***

14. In light of the above authority, we submit that the appellant can always look upon her advocate who allegedly did not advise her properly for compensation for the mistakes done.

15. Besides the appellant who is the litigant had a duty to constantly check with her advocate the progress of her case to avoid disappointments.

16. In case of **J.G Builders v Plan International (Supra)** the court referred to the case of **Savings & Loans Limited v Susan wanjiru Muritu Nairobi HCCC No. 397 of 2002** where Kimaru J stated as follows;

> ***"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocates failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case".***

17. The respondent submits that the appellant has herself to blame for not checking with her advocate. Had she done so she would know when the matter was fixed for hearing and would probably have attended the hearing.

18. Having regard to what has been submitted herein above we reiterate that the appeal is not meritorious and should be dismissed with costs.

Dated at Nanyuki this 19th day of February, 2021

**JESSE MWITI ADVOCATES**

**Advocates for the Second Respondent**

6. I have considered the pleadings, the submissions and the authorities proffered by the parties in support of their diametrically incongruent assertions. I have carefully studied the judgment delivered by the Honourable S.R. M at Marimanti Law Courts on **17th December, 2019**. I have juxtaposed the grounds of appeal against the Judgment, the pleadings, the submissions and the authorities proffered by the parties.

7. Regarding ground 1, I wish to point out that findings of fact cannot be interfered with lightly by an appellate court. From the proceedings, I find that I have no ground whatsoever to interfere with the trial court's finding that the plaintiff was in actual possession of the suit property. I hereby dismiss this ground.

8. Regarding ground 2 that the honourable court erred in law and fact by proceeding unprocedurally without the presence of parties in court, I need not reinvent the wheel. By dint of statutorily buttressed law, courts are in proper circumstances entitled to proceed to deal with cases without the presence of the parties.

9. Order 12 Rule 1 of the Civil Procedure Rules states as follows:

> ***"Order 12 Rule 1 – if on the day fixed for hearing after the suit has been called on for hearing outside the court neither party attends, the court may dismiss the suit."***

10. Order 12 Rule 2 states as follows:

> ***"Order 12 Rule 2 – if on the day fixed for hearing after the suit has been called on for hearing outside the court only the plaintiff attends, if the court is satisfied:-***
>
> ***a) that notice of hearing was duly served, it may proceed exparte.***
>
> ***b) that notice of hearing was not duly served, it shall direct a second notice to be served or***
>
> ***c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing."***

11. Order 12 Rule 3 states as follows:

> ***"(1) If on the day fixed for hearing, after the suit has been called on for hearing outside court only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good reason to be recorded by the court.***
>
> ***(2) If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.***
>
> ***(3) If the defendant has counterclaimed he may prove his counterclaim so far as the burden of proof lies on him."***

12. The defendant has not shown to the satisfaction of this court that the trial court acted beyond what is provided by the law. This ground is hereby dismissed.

13. I wish to point out that litigants have in many cases placed courts in veritably invidious situations. What can courts do when litigants refuse or fail to come to court? Should courts just calmly sit and watch such shenanigans? One of the criticism levelled at the Judiciary is the exponential growth of backlog of cases. Justice delayed is justice denied. Courts should not be held to ransom by litigants who do not show

up in court when matters are listed for hearing. Courts are entitled to deliver justice without inordinate and inexcusable delays. That is what the learned magistrate in the lower court did.

14. Ground 3 says that the trial magistrate erred in law and facts by failing to consider evidence duly filed by the parties. In his five pages' judgment the learned magistrate has split the Judgment into the following sections:

a) Background

b) Issues of trial

c) Decision

d) Conclusion

15. From my reading of the Judgment, I find that the trial magistrate considered the evidence available to him. I find the Judgment well-reasoned. I dismiss this ground.

16. The 4th ground of Appeal says that the honourable magistrate misapprehended the facts and the law in the suit before him and thus reached on erroneous conclusion on both the law and facts. This ground is a rather omnibus one and is nebulous. In his submissions, the appellant has not shown to the satisfaction of the court how the trial court had misapprehended the facts and the law. To me the conclusion reached by the trial magistrate is sound. It is that the plaintiff is the owner of the land, is in occupation and possession without interruption and the plaintiff had proved her case against the defendant and that the defendant's counterclaim had failed. This conclusion is based on the matters discussed by the Hon. Magistrate which led to his decision.

17. Ground 5 says that the whole judgment is without basis on both law and facts. Again this is an omnibus claim which is veritably nebulous. From his submissions, the appellant has not shown how the whole Judgment is without basis on both law and facts. He has not by any stretch of imagination attempted to provide specificities to buttress his veritably broad claim. I dismiss this ground.

18. I wish to say something about the authorities proffered by the parties to buttress their veritably incongruent assertions. They are all good authorities in their facts and circumstances. I, however, opine that no two cases are congruent to a degree of mathematical exactitude in their facts and circumstances. I have taken into account the principles espoused by those authorities. I, however, find it unnecessary to regurgitate them as they have all been reproduced in full in an earlier part of this Judgment.

19. In the circumstances, the following orders are issued:

a) This appeal is dismissed.

b) Costs shall follow the event and are awarded to the respondents.

**Delivered in open Court at Chuka this 26th day of July, 2021 in the presence of:**

**CA: Ndegwa**

**Mwiti present for the 2nd Respondent**

**Appellant and his advocate absent**

**Other Respondents absent**

**P. M. NJOROGE,**

**JUDGE.**