



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELCA NO. 56 OF 2019**

**M'IMANA M'ITHALIA.....APPELLANT**

**-VERSUS-**

**KAMOTHO NTONJIA.....1<sup>ST</sup> RESPONDENT**

**SAMUEL NTONJIA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**A. INTRODUCTION AND BACKGROUND**

1. This is an appeal against the judgment and decree of **Hon G.H. Wakahiu (CM)** dated 31<sup>st</sup> December, 2018 in *Maua CMCC No. 120 of 2011 – M'Imana M'Ithalia v Kamotho Ntonjia & Another*. By the said judgment, the trial court dismissed the Appellant's suit against the Respondent and directed that each party shall bear his own costs.

2. The material on record indicates that vide a plaint dated 21<sup>st</sup> May, 2011, the Appellant sued the Respondents claiming the following reliefs:

*(a) An order of permanent injunction, restraining the Defendants, whether by themselves, or through their agents and/or servants and/or employees and/or whomsoever acting for, on behalf of or through them, from entering into and/or interfering with the Plaintiff's peaceful, quiet, exclusive, continuous, and uninterrupted and undisturbed actual possession, use, occupation, cultivation and development of the suit land.*

*(b) An order directing the Defendants to remove the temporary structure they have erected on Plot No. 814 Akirangodu "B" Adjudication Section and in default the Plaintiff be at liberty to remove the same at the Defendant's costs*

*(c) Costs of this suit and interests thereon at court's rate.*

3. The Appellant pleaded that he was the owner of the Plot No. 814 in **Akirangodu "B" Adjudication Section** (*the suit property*) which he was allocated in the late 1990s. He further pleaded that sometime in 2001 a dispute arose as to the location of the Appellant's said property and the property of one Charles Ntonjia (*Charles*) who was represented by his wife, the 1<sup>st</sup> Defendant in that suit. The Appellant further pleaded that the said dispute was considered and determined in 2001 by the Arbitration Board during the land adjudication process which resolved that the concerned parties were to retain the respective portions they were occupying since Charles had already started developing his portion.

4. It was the Appellant's case that sometime in February 2011, the Respondents and their agents invaded the suit property and forcibly erected a temporary structure thereon purporting to assert ownership rights over it. It was further pleaded that despite demand and notice of intention to sue being issued the Respondents had failed to make amends hence the suit.

5. The record indicates that the Respondents filed a joint defence dated 13<sup>th</sup> July 2011 in which they denied the Appellant's claim in its entirety. They denied that the Appellant was the owner of the suit property and put him to strict proof thereof. They denied the existence or determination of any land dispute between the Appellant and Charles before the Arbitration Board and put the Appellant to strict proof thereof.

6 The Respondents further pleaded that they were in occupation of parcel Nos. 323 and 385 in **Akirangodu Adjudication Section** which were owned by Charles and they denied that the suit property was part and parcel thereof. The Respondents further pleaded that it was the

Appellant who was attempting to ‘superimpose’ the suit property upon their Parcel Nos. 323 and 385. They also denied the jurisdiction of the court to entertain the suit and prayed for dismissal of the Appellant’s suit with costs.

7. The record shows that upon a full hearing of the suit the trial court dismissed the Appellant’s suit on various grounds. First, the trial court held that it had no jurisdiction to entertain the suit. Second, that the Appellant’s failure to join the Land Adjudication Officer (LAO) was fatal to the claim. Third, that the adjudication process was already complete and any objections should have been raised during the adjudication process. Fourth, that the suit property was already registered in the name of Charles and the Appellant had failed to sue his legal representatives.

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

8. Being aggrieved by the said judgment and decree the Appellant filed a memorandum of appeal dated 8<sup>th</sup> April, 2019 raising the following 5 grounds of appeal:

*(a) That the learned Magistrate erred in law and in fact by holding that the court lacked jurisdiction to determine the question of ownership and still proceeded to hold that the 1<sup>st</sup> Respondent’s husband was the owner of the suit property thereby occasioning a miscarriage of justice.*

*(b) That the learned Magistrate erred in law and in fact by disregarding the weight of evidence adduced by the District Land Adjudication Officer, Igembe District (DLASO) with respect to the suit property thereby arriving at wrong conclusions.*

*(c) That the learned Magistrate erred in law and fact by failing to appreciate the applicable principles of law in respect to the issues in contention rather the learned Magistrate based his findings only on the evidence adduced by the Respondents thereby occasioning grave injustice to the Appellant.*

*(d) That the learned Magistrate erred in law and in fact in failing to sufficiently consider the Appellant’s case and evaluate evidence that was adduced therefore he misconstrued the testimony of the Appellant thereby arriving at the wrong conclusions.*

*(e) That the judgment of the learned Magistrate is against the law and weight of evidence on record.*

9. As a result, the Appellant sought the following reliefs:-

*(a) That the appeal be allowed.*

*(b) That the judgment of the trial court in **Maua CMCC No. 120 of 2011** be set aside and in its place the Appellant’s suit be allowed as prayed with costs.*

*(c) That the Appellant be awarded costs of the appeal.*

## **C. DIRECTIONS ON SUBMISSIONS**

10. When the appeal was listed for directions on 25<sup>th</sup> June, 2020 it was directed that the appeal shall be canvassed through written submissions. The Appellant was granted 30 days to file and serve his submissions whereas the Respondents were to file and serve theirs within 30 days upon service. The record shows that the Appellant filed his submissions on 10<sup>th</sup> August, 2020 whereas the Respondents filed theirs on 31<sup>st</sup> August, 2020.

## **D. THE ISSUES FOR DETERMINATION**

11. Although the Appellant raised 5 grounds as stated in his memorandum of appeal, the court is of the opinion that the appeal may effectively be determined on the basis of the following issues:

**(a) Whether the trial court erred in law in holding that it had no jurisdiction to entertain the suit.**

**(b) Whether the trial court erred in law in holding that failure to join the Land Adjudication Officer was fatal to the Appellant’s claim.**

**(c) Whether the trial court erred in law in holding that the Appellant had failed to prove his claim against the Respondents.**

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

## **E. THE APPLICABLE LEGAL PRINCIPLES**

12. 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.”

13. 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...”

14. 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 no jurisdiction to entertain the suit

15. The court has considered the material and submissions on record on the issue of jurisdiction. It is evident from the judgment of the trial court that it was of the opinion that it had no jurisdiction to entertain the suit because it was of the view that the suit property was still under adjudication and that it did not want to usurp the powers of the various officers and institutions responsible for land adjudication.

16. There is no doubt from the material on record that the suit property and the properties the Respondents were occupying (*L.R. Parcel Nos. 323 and 385*) were in the same adjudication section of **Akirangondu “B” Adjudication Section**. It is also apparent from the record that the process of land adjudication was conducted in the said section including the lodging and determination of objections under **Section 26 of the Land Consolidation Act (Cap. 283)**. One such objection was Objection No. 73 filed by Charles concerning Parcel 814 which was determined in 2001.

17. The material on record further indicates that some of the parcels which were involved in Objection No. 73 such as parcel Nos. 323 and 358 had already been registered and titles thereto issued. In particular, the trial court found that these two parcels were already registered in the name of Charles who was deceased at the time of trial. So, how could it be said that the adjudication process was not yet complete when some of the warring parties had already been issued with title deeds which were tendered in evidence? The court is thus of the opinion that the trial court erred in law in holding that it had no jurisdiction to entertain the suit in the circumstances.

### (b) Whether the trial court erred in law in holding that failure to join the Land Adjudication Officer was fatal to the Appellant’s claim

18. The court has noted that the trial court held that the Appellant’s suit was untenable for failure to join the LAO as a Defendant in the suit even though he was called by the Appellant as a witness. The trial court held that the failure to join the LAO had denied him a chance of being heard in the proceedings. As indicated before, the process of land adjudication had already been conducted to its logical conclusion and completed. Title deeds had already been issued to some of the concerned parties as early as 2014. The Appellant did not have any cause of action against the LAO. In fact, he called him as his witness. So, why would the failure to join him as a party to the suit be fatal to the Appellant’s claim? The court is of the opinion that the trial court erred in law in holding that the failure to join the LAO in a situation where the adjudication process had been completed and titles issued was fatal. In any event, non-joinder of a party is not fatal under **Order 1 rules 9 and 10 of the Civil Procedure Rules**. An omission to join a necessary party can always be cured under **rule 10** by the court adding such party with or without application by any of the parties.

### (c) Whether the trial court erred in law in holding that the Appellant had failed to prove his claim against the Respondents

19. The court has considered the material and submissions on record on this issue. Whereas the Appellant contended that the Respondents

had been sued in their personal capacities for their alleged wrongful actions, the Respondents contended that the properties in dispute actually belonged to and were registered in the name of Charles who was deceased. They contended that their claim over Parcel Nos. 323 and 358 was through Charles hence they could not be sued in their personal capacities.

20. The trial court found and held that the properties in dispute were registered in the name of a deceased person hence the proper persons to be sued were the legal representatives of the deceased. The trial court was, therefore, of the opinion that the Appellant's claim was directed to the wrong parties and that no adverse orders could be issued against the estate of a deceased person in the absence of his personal representatives.

21. Even though the Appellant contended that he had a separate cause of action against the Respondents personally which was distinct from the land dispute with Charles, the court is of a contrary opinion. The material on record indicates the existence of a land dispute between the Appellant and Charles over Parcel 814. The late Charles had a competing claim over the same property during the land adjudication process. It is evident from the material on record that Charles had lodged an objection claiming that the Appellant had occupied his land which already had permanent buildings. The determination of the objection was that the parties were to exchange or swap their parcels of land which also involved making adjustments to several other parcels of land including Parcel Nos. 814, 323, 358 among others.

22. The alleged invasion of parcel 814 by the Respondents cannot be divorced from the underlying property dispute. The Respondents were claiming the properties the subject of the suit through the late Charles. The 1<sup>st</sup> Respondent was the widow of Charles whereas the 2<sup>nd</sup> Respondent was his son. The court is thus of the opinion that the dispute amongst the parties could only be effectually and completely resolved by joining the personal representative of the deceased who was the registered proprietor of Parcel Nos. 323 and 358. The evidence on record also revealed that the building which the Appellant complained of belonged to the late Charles. Accordingly, the trial court was right in holding that the Appellant had not sued the right parties.

**(d) Whether the trial court erred in law in holding that the Appellant had failed to prove his claim against the Respondents**

23. The court is of the opinion that on the basis of the evidence on record the Appellant had failed to prove his claim against the Respondents. The claim before court could only be directed against the personal representative(s) of the estate of Charles. There was no evidence on record to demonstrate that the Respondents, although close relatives of Charles, were actually his legal representatives duly appointed as such under the **Law of Succession Act (Cap 160)**. The court is of the opinion that the Appellant could not prove his case to the required standard against the wrong parties. Accordingly, the court is of the opinion that in spite of the various errors of law on the part of the trial court, the ultimate decision was correct in so far as the Appellant had failed to join the personal representative(s) of Charles in the suit.

24. The above notwithstanding, the court is of the opinion that upon finding that the Appellant had sued the wrong parties instead of the legal representatives of the deceased, the trial court should have struck out the suit as opposed to dismissing it. Where a suit is struck out against a Defendant for lack of capacity the claimant may resuscitate the claim by subsequently suing the right parties. In the premises, the court is inclined to substitute the trial court's dismissal order with an order striking out the Appellant's suit with no order as to costs.

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

25. 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)**. The court has noted from the record that the Appellant's suit was dismissed with an order for each party to bear his own costs. There was no cross appeal on the issue of costs which is an indication that both parties were satisfied with the order. Accordingly, the court is inclined to make a similar order on costs in the instant appeal.

**G. CONCLUSION**

26. The upshot of the foregoing is that the court finds no merit in the appeal as a whole. Accordingly, the court makes the following orders for disposal thereof:

- (a) The judgment of the trial court be and is hereby varied by substituting the order for dismissal of the Appellant's suit with an order striking it out.**
- (b) Save for the variation indicated in paragraph (a), the Appellant's appeal be and is hereby dismissed.**
- (c) Each party shall bear his own costs of the appeal.**

27. It is so decided.

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 16TH DAY OF JUNE 2021.**

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**Y. M. ANGIMA**

**ELC JUDGE**

**JUDGMENT DELIVERED THROUGH EMAIL THIS 8TH DAY OF JULY, 2021.**

L. N. MBUGUA

ELC JUDGE-MERU