REPUBLIC OF KENYA

IN THE ENVIRONMENT &LAND COURT

AT VIHIGA

ELC APPEAL NO. 02 OF 2021

(FORMERLY KAKAMEGA ELCA 40 OF 2019)

(Being an appeal against the judgement of Hon. M.L. Nabibya in

Hamisi ELC. Case No. 05 Of 2019 made on1st November, 2019)

ALICE AYUMA.....APPELLANT

VERSUS

EDWARD CHAKAVA.....1ST RESPONDENT

VOKOLI YEARLY MEETING OF FRIENDS QUARKERS.....2ND RESPONDENT

LAND REGISTRAR MBALE OFFICE.....INTERESTED PARTY

JUDGEMENT

A. Introduction

1. Vide the Memorandum of Appeal dated 27th November, 2019 and filed in court on 2nd December, 2019 the Appellant appeals against the Judgement dated 1st November, 2019 by Hon. M. L. Nabibya in Hamisi PMC (EL) Case No. 5 of 2019(the suit)

2. The Appellant was the Plaintiff in the suit. Her claim was that she was the registered owner of a parcel of land known as NORTH MARAGOLI/MUDETE/1950 (the suit land). That, however, the District land Surveyor fraudulently forged and created parcel NO. KAKAMEGA/KIGAMA/994 on map sheet No.9 of NORTH MARAGOLI/MUDETE where the Defendant resided. She therefore sought orders of eviction of the Defendant from the suit land and costs of the suit. The court heard the suit, found that it had no merit and dismissed it with costs to the Defendants.

3. Dissatisfied with the Judgement, the Appellant appeals on 5 grounds of appeal raised in the Memorandum of Appeal namely:

> **a. The learned trial magistrate grossly erred in law and fact by failing to give an opportunity to the appellant to canvass her case.**
>
> **b. The learned trial magistrate grossly erred in making contradictory findings on the issue before her.**
>
> **c. The learned trial magistrate evaluation of the evidence before her is wanting.**
>
> **d. The learned trial magistrate grossly erred in dismissing the Plaintiff's case prematurely before receiving the final surveyors report.**
>
> **e. The learned trial magistrate grossly erred in making findings not based on any evidence before her. The final orders of the magistrate have occasioned miscarriage of Justice.**

The Appellant prays that the entire judgement be set aside and the suit be remitted back to a court of competent jurisdiction for hearing and final determination.

4. The Respondents oppose the appeal.

5. Directions on the appeal were given on 3.10.2020, that the appeal be canvassed by way of written submissions. Pursuant to these directions, the Appellant through the firm of M. Kiveu Advocates filed written submissions dated 29th October, 2021 and the 1st and 2nd Respondents filed written submissions dated 25th June 2021 through the firm of Ben Oduol Nyanga & Co. Advocates.

6. It was submitted on behalf of the Appellant that she had demonstrated in her evidence that the suit land and land parcel NO. NORTH MARAGOLI/KIGAMA/994 fall under two different registration maps and are clearly separated by a road of access. That while NORTH MARAGOLI/MUDETE/1950 fell in the Mudete registration map, NORTH MARAGOLI/KIGAMA/994 was in the Kigama map and that there was no overlap of the two.

She submitted further that the road of access was the boundary between the two parcels of land. She faulted the trial court for making an order that the same surveyor whose conduct was being impugned in the suit makes a report on the dispute. She contends that it was wrong for the court to rely on the surveyor's report without availing it first to the affected parties to interrogate it further.

She further faults the court for failing to inquire into the issue of encroachment onto the road of access that arose in the course of the proceedings. She prays that the appeal be allowed.

7. The 1st and 2nd Respondents submit that the Appeal has no merit. That a visit by the court to the site of the dispute which visit was done in the presence of the Plaintiff revealed that the dispute was a boundary dispute. That the Plaintiff raised no objection to the visit. The 1st and 2nd Respondents rely on the case of **Beatrice Ngonyo Ndungu and Another –vs- Samuel K. Kanyoro and 2 others [2017] e KLR** to support their submission. They pray that the Appeal be dismissed.

8. I have read the Memorandum of Appeal, Record of Appeal, the court record generally and the written submissions filed by the parties. I have also reminded myself of the duty of this court being the 1st appellate court in this matter. The duty of the court in case of a first appeal has been stated in a number of decisions. In this case I have referred to the Court of Appeal decision in **Peter M. Kariuki –vs- Attorney General [2014] e KLR** where the court held that a first appellate court is duty bound to reconsider the evidence adduced before the trial court and re-evaluate it to draw own independent conclusions and to satisfy itself that the conclusions reached by the trial court are consistent with the evidence.

In the case of Gitobu Imanyara & 2 others –vs- Attorney General [2016] e KLR the court added that the Principals upon which a first appellate court proceeds are well settled.

> ``**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 allowances in this respect''.**

Guided by the above stated Principles, I proceed to determine each of the grounds of appeal on the basis of the evidence adduced, the submissions by the parties and relevant law.

1. Whether or not the learned trial magistrate erred by failing to give the appellant an opportunity to canvass her case.

In response to this ground of appeal, the Respondent submit that the Appellant was given opportunity by the trial court which even visited the site on its own motion and made its findings. There is no direct submission on this in the submissions by the Appellant. Opportunity to be heard is a fundamental Constitutional right of any litigant in Kenya. Article 50 of the Constitution provides for the right to be heard. Article 50(1) provides:

> **Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, amounting independent and impartial tribunal or body.**

A right or opportunity to be heard as concerns a plaintiff in civil proceedings would comprise the liberty to file all his/her pleadings and documents as he/she may wish to file and rely on in the case, a right to information concerning the dates when he/she needs to attend court, a right to understand the court proceedings and freedom to present his/her case before the court and participate in the proceedings generally, all in accordance with the law that governs prosecution of civil cases.

The Appellant has not demonstrated how the trial court failed to give her an opportunity to canvass her case. The record shows that she filed her pleadings which included a plaint, witness statements and bundle of documents, she attended court and testified and produced her exhibits, she called her witnesses who testified and she was given a chance to and did cross examine the Defendants and their witnesses. Later the court visited the ***locus in quo*** in her presence. I don't find anything in the record that suggests that the Appellant was denied opportunity to be heard and/or hindered in any way in presenting her case before the trial court. Ground 1 of the appeal therefore fails.

2. **Whether or not the trial magistrate made contradictory finding on the issues before the court.**

The issue before the trial court as identified in the judgement was whether the Defendants (Respondents) had encroached onto the Appellants land. On this issue the court found

> ``**the findings were that the plaintiff's parcel of land on the ground was distinct from the Defendants'. There were separate maps for the two parcels of which were adjoining one another and separated by a road…. There were trees on the access road between the Plaintiff and the Defendant''.**

On the basis of the above findings, the trial court concluded that:

> **``my conclusion therefore and just as the land surveyor's registrar report indicate, there is no encroachment on the plaintiff's parcel and the road reserve should be opened by cutting down of the trees demolition of the latrine to enable plaintiff have free access''.**

The Appellant in the submissions has not pointed out the contradictions. This court finds no contradictions in the findings of the trial court in regard to the issues in the case. Ground 2 of the appeal also fails.

c.) **The learned trial magistrate's evaluation of the evidence before her is wanting**

The evidence adduced before the trial court comprised of the testimony of the plaintiff and her 2 witnesses, the testimony of the 1st Defendant, testimony of representative of the 2nd Defendant, Land Surveyor's Report dated 31st October 2018 and Replying Affidavit Sworn on 23rd September, 2019 by the Land Registrar, the Interested Party in the suit.

I have read the testimony of the plaintiff and her witnesses and the witness statements that they filed. The totality of their evidence is that the suit land is on the land registration scheme/adjudication area called Mudete while the Defendants' land is on a neighboring scheme/adjudication area called Kigama. That the two schemes are separated by a road of access. That the defendants with the assistance of the Interested Party fraudulently imposed land parcel NORTH MARAGOLI/KIGAMA/994 on the Plaintiff's parcel NO. NORTH MARAGOLI/MUDETE/1950. They called on the court to evict the Defendants therefrom.

I have also read the testimonies of DW1, DW2 and DW3. They simply denied the plaintiff's allegations.

The Replying Affidavit by Land Registrar Vihiga who is the Interested Party outlined in detail how each of the two parcels of land came into being. She deposed in paragraph 3 of the Replying Affidavit that Land Parcel NO NORTH MARAGOLI/ KIGAMA/994 was created during adjudication in the year 1973. The same was first registered in the name of Kakamega County Council and reserved for Kilitu Friends African Mission Church until 7th January 2019 when it was transferred vide a transfer duly signed by the National Land Commission to the 2nd Respondent.

Concerning the Plaintiff's land parcel NO. NORTH MARAGOLI/MUDETE/1950 she deponed in paragraph 8 of the replying Affidavit that the parcel was a result of a subdivision of Land Parcel No. NORTH MARAGOLI/MUDETE/254.

In paragraph 9 of the Replying Affidavit, the Interested Party deposed that:

> **"THAT Kigama and Mudete are two different registration sections and thus have two different maps. One cannot find a number in a map for Kigama registration section in a map for Mudete registration section."**

Concerning the surveyor's report, a copy of the same is not included in the Record of Appeal. However, the original copy in the trial court file is dated 31/10/2019 and filed in court on 1/11/2019.

The Record shows that the court analyzed the evidence adduced and referred to the surveyor/land registrar's report in its judgement as follows

> **"I have also analyzed the presented evidence and conclude that the main issue for determination is a boundary dispute which falls within the mandate of the county Land Registrar. I therefore made an order that the said office visits the scene and which she did on 31/10/2019 together with the surveyor and also this court. The findings were that the Plaintiff's parcel of land on the ground was distinct from the Defendants, there were separate maps for the two parcels which were adjoining one another and separated by a road."**

My re-evaluation of the evidence as against the finding of the trial court do not identify any gaps or any miscarriage of justice. There was no evidence placed before the trial court showing that Land Parcel NO NORTH MARAGOLI/KIGAMA/994 had been fraudulently imposed on the suit land. There was no evidence of fraud on the part of the Defendants or the Interested Party. Ground 3 of the Appeal fails as well.

d.) **whether or not the trial magistrate dismissed the plaintiffs' case prematurely before receiving the surveyor's final report.**

As the record shows, the land Registrar, land surveyor, the parties in the suit and the court visited the ***locus in quo*** on 31.10.2019. As part of the proceedings at the site the court made an order on the same day that the Land Registrar files her report before 8.00am on 1/11/2019. And judgment was set for 1/11/2019 at noon. Indeed in the court file there is a report by the land Registrar dated 31/10/2019 but filed in court on 1/11/2019 in accordance with the court order. The findings of the Land Registrar are referred to in the trial court's judgement as already indicated.

I find that the Plaintiff's case was not dismissed prematurely.

f. **The learned trial magistrate grossly erred in making findings not based on any evidence before her. The final orders of the magistrate have occasioned miscarriage of Justice.**

The appellant has not specifically pointed out which findings in the judgement were not based on the evidence. However, on the basis of the

analysis of the evidence herein this court finds that the findings of the trial court were based on the evidence placed before it. Part of the judgement reads as follows:

> **"Parties filed submissions which I have carefully considered. I have also analyzed the presented evidence and my conclusion is that the main issue for determination is whether the defendants have encroached on the plaintiff's parcel since it is not disputed that each has a distinct parcel..."**

On the basis of my independent analysis of the evidence on record I find that the court did not err in the findings that it made and the conclusions it arrived at. There was no miscarriage of justice in the conduct of or decision arrived at in the case.

The evidence adduced revealed that the place of conflict was on encroachment and not registration schemes/ areas.

In order for this court to interfere with the decision of the trial court, it needs to be satisfied that the trial court misdirected itself in some matters and as a result arrived at a decision that was erroneous or it is manifest from the case as a whole that the court is clearly wrong in the exercise of judicial discretion which as a result has caused an injustice. See case of **Mbogo & Another vs Shah [1968]EA, p. 15**. As all the grounds of appeal have failed, I find no reason to interfere with the findings or decision of the trial court.

The upshot is that I find that the Appeal lacks merit and make the following orders:

1. The Appeal is dismissed

2. Each party to bear own costs.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 30TH DAY OF NOVEMBER,2021

E. ASATI

JUDGE

In the presence of

Appellant present in person

N/A for the Respondents

N/A for the Interested party

Court Assistant Ajevi

E. ASATI

JUDGE