REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT GARISSA

CIVIL APPEAL NO. E002 OF 2020

NUR OLOW FARAH AKA OLOW

FARAH AKA DIRIYE MOHAMED OLOW.....APPELLANT

-VERSUS

MUDA ARALE FARAH.....1ST RESPONDENT

COUNTY GOVERNMENT OF WAJIR.....2ND RESPONDENT

(Being an Appeal from the judgement of Hon. Amos Mokoross-P.M

delivered on 27th November, 2020)

JUDGEMENT

This is an appeal from the judgement of the Principal Magistrate Hon. Amos K. Mokoross delivered on 27th November, 2020 in Wajir Magistrate's Court. Being aggrieved by the impugned decision, the Plaintiff Nur Olow Farah aka Olow Farah aka Diriye Muhumed Olow lodged his appeal on the following grounds;

1. The learned magistrate erred in law and in fact when he allowed the 1st Respondent's claim and granted the orders sought in the amended plaint dated 11th March, 2019.

2. The learned magistrate erred in law and in fact when he failed to cite or rely on any statute or case law authority before arriving at his decision.

3. The learned magistrate erred in law and in fact when he failed to consider the compelling evidence tendered by the Appellant in defending the claim against him.

4. The learned magistrate erred in law and in fact when he held that the Appellant and the 1st Respondent had produced evidence before the court that had the same probative value.

5. The learned magistrate erred in law and in fact when he relied on pleadings filed in Civil Suit No. 10 of 2005 yet the Appellant did not rely or make any averments contained in those pleadings.

6. The learned magistrate erred in law and in fact when he failed to point out the inconsistencies by the 1st Respondent's son contained in the pleadings filed in Civil Suit No. 10 of 2005.

7. The learned magistrate erred in law and in fact when he failed or ignored to consider the documentary evidence produced by the Appellant regarding the ongoing investigations relating to forgery on the part of the 1st Respondent by the Directorate of Criminal Investigations.

8. The learned magistrate misdirected himself when he relied on the evidence of the Chief Officer of Lands, Wajir County whose name does not appear anywhere in the judgement without any documentary evidence to collaborate his testimony.

9. The learned magistrate misdirected himself when he found that the 1st Respondent had proved his claim yet the Chief

Officer of Lands, Wajir County testified that the owner of the land is Muda Arale Farah whereas the 1st Respondent's name is Muda Arale Farah.

10. The learned magistrate misdirected himself when he issued two contradictory orders directed at the 2nd Respondent.

APPELLANT'S WRITTEN SUBMISSIONS

The Appellant through the firm of Tim Njenga & Co. Advocates submitted as follows;

GROUND 1, 2 AND 3

On the three grounds combined, the Appellant's Advocate submitted that the learned trial magistrate failed to consider the evidence he tendered during the hearing and therefore erred in both law and fact thereby allowing the Respondents claim and granting the orders sought. He further submitted that the oral evidence presented in support of the Appellant's case is captured in pages 17 t0 199 of the record of appeal while the documentary evidence is captured at pages 98 to 133 which in totality proves that he is the bona fide owner of plot No. R2264. He cited the case of **PIL KENYA LIMITED VS JOSEPH OPPONG (2009) eKLR** . He argued that the Appellant occupied the suit property in 1970 to date. He submitted that the Appellant produced receipts before the trial court showing that he has been paying land rates for the suit property and a letter from Wajir County Council dated 29th August 2002 and another letter from the County Government of Wajir dated 21st July, 2016 confirming the Appellant as the owner of the plot.

The Appellant through his Advocates on record further submitted that the Appellant lodged a complaint with the Directorate of Criminal Investigations in respect of forged documents by the 1st Respondent on 21st March, 2010 which was duly acknowledge by the Directorate of Criminal Investigations the same date. After thorough examination of the documents, the Directorate of Criminal Investigations prepared a forensic report to the effect that the documents held by the Appellant are original and genuine whereas the document held by the 1st Respondent are attached (See page 122-127 of the Record of Appeal).

GROUND 4 AND 5

On the two grounds, the Appellant submitted that in his judgement, the trial magistrate gave the Appellant testimony in cross-examination a wide berth and did not consider his testimony at all. As a result, the learned trial magistrate considered the Appellant as an untrustworthy person which was not true. He submitted that by failing to consider the Appellant's testimony and relying on the averments made in pleadings filed in another suit, the learned trial magistrate arrived at an erroneous decision.

He cited the case in **REPUBLIC VS ATTORNEY GENERAL & 2 OTHERS EX-PARTE WILLIAM KARIUKI NGUGI (2016) eKLR.**

GROUNDS 6 AND 7

The Appellant submitted that the trial magistrate misdirected himself at page 31 of his judgement by finding that there was a tie in evidence which could only have been broken by an officer from the "County Government Lands Officer". He submitted that the learned magistrate summoned the Chief Officer Lands from Wajir County Government whose employment credentials e.g personal/staff number are not indicated anywhere in the judgement. He submitted that the said officer did not produce any documents from the County Government from the County Government of Wajir to corroborate his testimony and that the same officer did not deny or controvert the documentary evidence adduced by him (Appellant) from the County Government.

The Appellant referred to page 36 of the judgement where the learned magistrate held that the Chief Officer testified that the National Land Commission Wajir office conducted a ground report following a compliant by Diriye Ahmed Olow and found that the land exclusively belonged to Muda Arale Farah. However, he submitted that the purported ground report that was referred by the Chief Officer in his testimony was not produced before the trial court. He submitted that it was inconceivable how a Chief Officer in charge of Lands in the County Government of Wajir could respond to a court summons and attend court without any documents relating to the subject matter of the dispute in court and testify about the ownership of the suit property. He cited the case of **Alfred Kioploo Keter Vs Benard Kibor Kilur & Independent Electoral & Boundaries Commission (2018) eKLR.**

GROUND 8

The Appellant referred to orders (a) and (b) of the judgement by the trial magistrate and submitted that the two orders contradict one another. He cited the case of **Christopher Kiura Vs Mary Wawira Muriithi (2011) eKLR**.

RESPONDENTS SUBMISIONS

The 1st Respondent filed its submissions through the firm of Eric Kinaro & Associates Advocates.

GROUND 1,2,3

The Respondent submitted that he produced letter of ownership dated 10th September 1987 and payment receipts in respect to rates paid. That all these documents were an indication that he had been allocated the plot by the defunct Wajir County Council. That the appellants claim to the property is based on receipt dated 27/2/1996 and a disputed letter confirming ownership dated 29/8/2002.

The Respondent took issue with the letter of ownership and receipt. He submitted that the same did not bear the names of the appellant. The same beared the names Direye Mohamed Olow and Deriye Mohamed Olow as opposed to the appellant's names Direye Olow Farah.

It was his further submission that the appellant knew him as the owner of the disputed plot when he sought to get ownership documents as can be deduced in Civil Case Number 10 of 2005. That the appellants claim to the property is contradictory as he first stated that he purchased the property then reverted to the fact that he was allocated the property.

The appellant relied on the cited cases of **M'Rinkanya and Another vs Gilbert Kabeere M'Mbijiwe (1982-1988) 1KLR** to submit that his allocation was the first in time and was never cancelled hence the council had no power to allocate the same without following the laid down procedure for re-allocation.

On these grounds he lastly urged the court not to consider the report by the document examiner in page 122 to 133 of the record of appeal as this were not there during the trial court proceedings and leave has not been sought to introduce the same as is prerequisite in Section 78 of the Civil Procedure Act and Order 42 Rule 27 He equally cited several authorities in this regard which I have dully considered.

GROUND 4 AND 5

The Respondent submitted that the trial court was correct in relying to the pleadings in **Wajir Magistrates Court Civil Suit Number 10 of 2005 and Appeal No. 563 of 2011** as the same were produced as exhibits 8-18 and used for the sole purpose of discrediting the appellant's testimony as per **Section 163 of the Evidence Act.**

He also relied on the provisions of **Section 34 of the Evidence Act** and **Section 11 of the Oaths and Statutory Declaration Act t**o affirm that evidence relied on by a witness in judicial proceedings is admissible in subsequent judicial proceedings or at a later stage in the same proceedings.

He questioned whether the Respondent and his advocate committed perjury in either of the court proceedings because in the Wajir case and subsequent appeal the appellant had stated that he had bought the suit premises form the 1st Respondent for a sum of Kshs. 16,000/= which was different form the impugned trial court proceedings where he testified that he had been allocated the suit premises by the now defunct Wajir Council.

GROUNDS 6 AND 7

The 1st Respondent submitted that in paragraphs 29 to 29 of the impugned judgement the trial magistrate explains the reasons why he called the Chief officer of the 2nd Respondent to testify. That this was well within his prerogative under Section 173 of the Evidence Act.

That the chief officer was cross-examined by advocates of both parties. No opposition was raised in the trial courts proceedings as to whether he was an officer of the 2nd Respondent hence the same cannot be raised at the appellate stage.

GROUND 8

The Respondent submitted that the Trial magistrate did not issue contradictory Orders. That Order (a) is preservatory in nature while prayer (b) directing the 2nd Respondent to issue Ownership documents to the 1ST Respondent was to actualize what was being preserved and protected.

ANALYSIS AND DECISION

I have considered with anxious care the record of appeal and the submissions by counsels for the Appellant and the authorities relied on. This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and re-consideration of the evidence afresh and a determination of this court with reasons for such determination as was observed in the case of **Peters V Sunday Post Ltd (1958) EA 424** where the court held;

> **"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide."**

Again in the case of **Abok James Odera t/o A.J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates (2013) Eklr**, the court held;

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reason either way."**

From the extract on record, it is not in dispute that the Plaintiff and the Defendants testified and called witnesses in support of their positions. The parties also produced documents as evidence in their respective cases. The two combatants are laying claim to the same plot described as Plot No. R2264. The learned trial magistrate at page 4 paragraph 30 of the judgement made the following observation;

> **"30 with these realization the court formed the opinion that there was a tie in evidence which could only have been broken by the officer from the County Government Lands Officer and since no party had called that officer as a witness, the court on its own motion and in the interest of a just and fair determination, issued summons to the said officer ..(emphasis mine)"**

The court has stated that the witness from the County Government Land Officer was summoned *suo moto* without any prompting by the parties. Since the system of dispute resolution adopted in Kenya is adversarial in nature, the court was plainly wrong to have summoned a witness without involving the parties to give a say.

In the case of **POLITICAL PARTIS DISPUTE TRIBUNAL & ANOR VS MUSALIA MUDAVADI & 6 OTHERS EX-PARTE PETRONILA WERE (2014)** eKLR Odunga J (as he was then was) dealt on the issue of suo moto and cited the decision in NAGENDRA SAXENA VS MIWANI SUGAR COMPANY (1989) LIMITED (UNDER RECEIVERSHIP) Kisumu HCCC No. 225 of 1993 where Mwera J (as he then was) while citing Habig Nig Bank Limited Vs Nashtex International Nig Ltd Nigeria Court of Appeal Kaduna Division CA/K/13/04 and playing God; A critical look at sua sponte decisions by Appellate Courts by Adam M. Milani and Michael R. Smith, Tenesse Law Review (Vol. 69 XXX 2002) dealt with the suo moto procedures extensively as follows;

> **"The term *suo moto* is a Latin term meaning "on its own motion" and it is approximately an equivalent of the term "*sua sponte*" (Latin) which means, "of one's own accord". The term defines one acting spontaneously without prompting from another party. *Blacks Dictionary* defines "*sua sponte*" as "of his or its own will or motion, voluntarily and without prompting or suggestion". In our jurisdiction action "*suo motu*" or "*sua sponte*" for the two mean the same thing, a judge or court in a given case takes a course or decision without prior motion or request from the parties. Usually the matter being decided *suo motu* or *sua sponte* is not in the pleadings, briefs, submissions, issues and evidence placed before the court for determination. For that is the essence of the adversarial systems where the parties direct the course of the litigation that brought them to court while the judge plays the referee. He/she hears them and makes a decision. In matters *suo motu* the court usually on perusing the file before it comes by a matter that is of the essence of the case but not raised by the parties. It could be a matter of law or procedure or other. Then that is considered by the judge who rules on it. *The better course in matters dealt with sua sponte is to notify the parties to the cause of the point(s) in question, inviting them to submit on it, before a ruling/finding is arrived at. There is no dispute that the fundamental premise of the adversary process is that the advocates do uncover and present more useful information and arguments to the decision-maker than would be developed by a judicial officer acting on his own in an inquisitorial system*. Accordingly, most lawyers probably never think about a possibility that a court will decide a case or an issue that the court itself raises and which was neither briefed nor argued by the parties. But it happens and it is known as *sua sponte.* Once a court raises an issue *sua sponte* the court can go about deciding it in one of two ways. First, it can involve the parties and request that they submit briefs on the issue to assist the court in reaching a decision. In this context, while the issue may be raised *sua sponte* the decision on the issue is made in accordance with the principles and traditions of the adversarial system. Alternatively, the court can decide the issue on its own without the input from the parties. In this context, the issue is not only raised *sua sponte,* but is also decided *sua sponte. The proper approach to decide sua sponte issues is the former approach – the approach that involves the parties in the decision-making process…It is not in doubt that hearing parties on issues sua sponte or suo motu is better favoured since the parties have been heard before a decision…Even when a court raises a point suo motu the parties must be given an opportunity to be heard on the point particularly the party that may suffer a loss as a result of the point raised. The law is well settled that on no account should a court raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve it one way or the other without hearing the parties…If it does so, it will be in breach of the parties right to fair hearing*."**

It is clear from the above decision which was cited with approval from a Myriad of other decisions by the Superior Court that before a court decided to act on an issue *sua moto* the manner the trial magistrate did in the instant case, it must seek concurrence and approval from the parties. There is no evidence that the trial magistrate involved the parties or their advocates on record before summoning the County Government Lands Officer as a witness.

There is no witness statement recorded by the said officer as required under the law before attending court to testify. When the trial court summoned the witness, she ceased to be a referee as required in law and therefore breached the parties right to fair hearing.

The rule of the thumb in adversarial system which emphasized under the evidence Act Cap 80 Laws of Kenya Section 107, 108 & 109 is that he who alleges must prove. The Respondent who was the Plaintiff in the original suit had the responsibility of demonstrating before the trial court that the suit property belonged to him. Being an unregistered and un-adjudicated property, it was incumbent upon him to show how he acquired the same.

There is no letter of allotment or minutes of the County Council of Wajir showing that the Plaintiff/Respondent was allocated the suit plot No. 2664 Bulla Jogoo Wajir within Wajir County.

I therefore find that the trial magistrate misdirected himself in law and in fact in holding that both the Appellant (Defendant) and the Respondent (Plaintiff) had tendered evidence before the court that had the same probative value and went ahead to rely on the evidence of a witness summoned by the court *suo moto* without involving the parties and recording a witness statement. The alleged witness was called way after both the Plaintiff/Respondent and the Defendant/Appellant had closed their cases.

The trial magistrate in his judgement at page 212 of the extract of Appeal paragraphs 41, 42, and 43 stated as follows;

> ***"41 To begin with, now the court has an understanding of why there are apparently two legitimate and authentic letters of ownership to the same land. Secondly, the court is able with better conscience, to make a determination on the curious turn around in the Defendant's assertion as presented in Civil Suit No. 10 of 2005 and the assertions as presented in the defence of this case.***

42. The most glaring assertion from my comparison of the defence filed in Civil Suit No.10 of 2005 and the defence filed in the present suit regards how the 2nd Defendant came into possession of the suit land, with the Defendant staying in Civil Suit No. 10 of 2005 that he had bought the land from the Plaintiff and then completely flipping around in this suit to aver that the land had been allocated to him.

43. Paragraph 3 of the defence in Civil Suit No. 10 of 2005 (p. exh.7) is the most telling. In that paragraph the Defendant states;

"Further to the claim of the Plaintiff, Defendant admits that the Plaintiff's mother Mrs Udgon Ahad Hussein left behind unregistered plot situated along Wajir-Moyale road but denies to have acquired illegally since he bought the plot from the Plaintiff's father after the death of the Plaintiff's mother (attached is agreement of sale)"

Though the Respondent/Plaintiff included the pleading and proceedings in SPMCC No.10 of 2005 (Wajir) in his further list of documents dated 5th March 2019 and produced as exhibits before the trial court, the original court file together with certified proceedings were not produced by the authorized officer from the registry. The said SPMCC No. 10 of 2005 (Wajir) was not even consolidated with the former suit to be considered.

It was wrong for the trial magistrate to rely on pleadings in a separate suit which was not consolidated with which was before him. The Respondent/Plaintiff even in his amended plaint dated 11th March, 2019 at paragraph 8 averred that the same suit being SPMCC No. 10 of 2005 had been withdrawn. If indeed the suit had been withdrawn, it was inappropriate for the trial court to rely on pleadings and proceedings in a case the claimant had withdrawn.

In view of the re-evaluation of the extract in the record of appeal, I find this appeal merited and the same is allowed as follows;

1. An order be and is hereby issued setting aside the judgement and orders issued by the Principal Magistrate Hon. Amos K. Makoross on 27th November, 2020 in PMCC No. 17 of 2015.

2. An order is hereby issued dismissing the 1st Respondents claim/suit before the trial magistrate's court and the appellate court to be borne by the 1st Respondent.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 26TH DAY NOVEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of;

1. Mr. Njenga for Appellant

2. Respondents/Advocate: absent

3. Fardowsa: Court Assistant