REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT VIHIGA

ELC APPEAL NO.3 OF 2021

(FORMERLY KAKAMEGA ELC APPEAL NO. 31 OF 2019)

FESTUS SHINYALA ……..……. APPELLANT

VERSUS

KALASINGA AHMED…….. RESPONDENT

(*Being an Appeal from the judgement of the Principal Magistrate's Court at Hamisi by the Honourable Magistrate M.N. Abindi, delivered on 1st August, 2019 in HAMISI PMC (EL) CASE NO. 21 OF 2018)*

JUDGEMENT

A. Introduction

1. The history of this case commenced on 22nd May 2008 when the Respondent herein filed a suit in the Chief Magistrate's Court at Kakamega namely KAKAMEGA CMCC NO.237 of 2008 (herein called the suit) against the Appellant and another person. The orders sought in the suit were substantively for nullification and/or cancellation of the registration of land parcel No. **TIRIKI/SENENDE/794 (**the suit land) in the name of the Appellant herein and transfer of a portion thereof measuring 0.16 Hactares in favour of the Respondent.

2. Vide court order dated 9th July 2009 made in KAKAMEGA H.C Misc.CIVIL APPL. NO.25 OF 2008 the suit was transferred to the High Court for hearing and final determination. It was assigned a new number namely; KAKAMEGA HCCC NO.61 OF 2010. With the creation of the Environment & Land Court, the matter was transferred to the Environment & Land Court at Kakamega as KAKAMEGA ELC NO.857 OF 2014 and later to the lower court at Hamisi as HAMISI PMC (EL) CASE NO. 21 OF 2018 for hearing and disposal.

3. After hearing the case the court at Hamisi delivered its judgement on 1st August 2019 allowing the Plaintiff's claim as presented.

4. Dissatisfied with the Judgement, the Appellant, vide a Memorandum of appeal dated 28th August 2019 and filed in court on 30th August 2019, appeals to this court against the Judgement.

5. The appeal was canvassed by way of written submissions pursuant to directions given on 19th October 2021.

C. **The Appellant's case.**

6. The Appellant's case is that he was dissatisfied with the judgement of the trial court because the trial court in arriving at the judgement, erred in the manner described in the Grounds of Appeal in Memorandum of Appeal namely:

> ***a. The learned Magistrate erred in law and fact in cancelling the 2nd Defendant's title without legal and/or evidential justification.***
>
> ***b. The learned Magistrate erred in law and in fact in failing to appreciate the long established principle of stare decisis, bringing law into confusion and thereby deciding on erroneous finding/ conclusion.***
>
> ***c. The learned Magistrate erred in law and in fact in failing to appreciate as follows:***

i) that the Plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining his prayers which the court allowed,

ii) that the honourable court did not act in the interest of justice by failing to take regard of overriding interest of justice.

d. The learned Magistrate erred in law and fact in failing to grant the 2nd Defendant a chance to be heard.

e. The learned Magistrate erred in law and in fact in allowing the Plaintiff his prayers on grounds that the suit was unopposed without regard to the Defendant's intention to defend the suit.

f. The learned trial Magistrate erred in law and in fact in entering judgement in favour of the Plaintiff against the Defendant in spite of the Plaintiff's miserable failure to establish his case.

7. He seeks that the appeal be allowed with costs and that the Judgement of the trial court and consequential orders therefrom be set aside.

On 19th October 2021, the Appellant was granted fourteen (14) days to file and serve his written submissions. He did not do so. On 2nd November 2021 he was added seven (7) more days within which to file and serve the written submissions. He has not done so.

D. **The Respondent's case.**

8. The Respondent opposes the appeal. Vide the written submissions filed on his behalf dated 15th October 2021 he contends that the learned trial magistrate made her decision upon considering the unchallenged evidence tendered by the Respondent to arrive at a right decision. That the appeal is an afterthought, frivolous and vexatious and the same should be dismissed.

Issues for determination

9. The six (6) grounds of appeal in the Memorandum of Appeal revolve around two issues for determination namely;

a. whether or not the evidence adduced was sufficient to sustain or support the orders made in the judgement and

b. whether or not the defendant was denied a chance to be heard.

Analysis and determination

10. This being a first appeal, this court will be guided by the established principles of handling a first appeal. The court is under a duty to reconsider the evidence adduced and re-evaluate it so as to arrive at its own independent conclusions and thus determine whether the conclusions reached by the trial court are consistent with the evidence adduced and the applicable law. See case of Peter M. Kariuki vs Attorney General [2014] eKLR.

In Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR the Court held that:

> **"this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal 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 allowance in this respect."**

11. Guided by the above stated principles, I proceed to determine the issues on the basis of the evidence adduced and the applicable law.

Whether the evidence adduced was sufficient to sustain or support the orders made in the judgement

12. I have perused the Record of Appeal filed herein dated 30th September 2021 and found that there is no defence, witness statements and/or bundle or list of documents filed by the Appellant. I have also perused the lower court record and found the same position. The only pleadings placed on record by the Appellant is a Memorandum of Appearance filed on 5th June 2008. So the evidence available for the trial court to consider was the testimony of the Plaintiff (the Respondent herein), the testimonies of his two (2) witnesses and a bundle of documents filed by him.

13. In his testimony before the trial court the Respondent adopted his already filed witness statement dated 30th May 2019 as his evidence in chief. The Respondent's testimony as contained in the statement was that he bought a portion of Land measuring 0.16 hectares out of the suit land from one James Shamwama Mudheli who was the 1st Defendant in the suit. That he paid the full consideration of kshs.30,000/= by instalments. Exhibit 1 was the Land sale agreement while exhibits 2 and 3 were the acknowledgement for subsequent payment of the balance of the purchase price. That after paying the purchase price in full, consent of the Land Control Board for Sub-division of the suit land so as to curve out the sold portion was obtained. Exhibit 4 was the letter of consent dated 25-01-2007 issued by Tiriki East Land Control Board. He testified that he was in the process of having the land surveyed when the seller and the Appellant denied him vacant possession and chased him from the sold portion of land.

14. The record shows that the Respondent's two witnesses namely: Philip Amuleka Shibadili and Francis Ashitiva Lubangi who testified as PW2 and PW3 respectively confirmed that they participated in the sale transaction and witnessed payment of parts of the purchase price.

15. Perusal of the Judgement shows that the trial court considered the evidence and found that the Respondent had proved his case to the required degree and proceeded to allow his claim. The trial court evaluated the evidence before her and stated:

> ***" My finding is that the plaintiff's evidence is unchallenged. There is proof of purchase of land from the 1st Defendant. There is no contradiction that he has been stopped to occupy the purchased portion. Since the process of obtaining title was at an advanced stage, I proceed to allow the prayers sought for the purchased measurements or portion purchased. The Plaintiff's suit is therefore allowed as presented, costs shall be paid by the Defendant."***

When can it be said that the evidence adduced is sufficient to support a finding? I find the answer in the standard and degree of proof required for the particular class of case. The standard and degree of proof in civil cases is proof on a balance of probabilities. In the case of **William Kabogo Gitau vs George Thuo & 2 Others [2010]** e KLR the court stated:

> ***" In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations he made occurred."***

The Court of Appeal in the case of **Palace Investments Ltd vs Geoffrey Kariuki Mwenda & Another [2015] eKLR** held that:

> ***"Denning J in Miller vs Minister of Pension (1947) ALL ER 372 discussing the burden of proof had this to say***
>
> ***"That degree is now settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability is equal it is not. This burden on a balance of preponderance of probabilities means a win however narrow."***

From the analysis and reevaluation of the evidence as above, and guided by the cited authorities I find that the Respondent discharged the burden of proof. The first issue is determined in the affirmative that there was sufficient evidence on record for the trial court to enter judgement in favour of the Respondent as it did.

Whether or not the court denied the Appellant a chance to be heard

16. The Constitution of Kenya 2010 at article 50 makes the right to a fair hearing one of the rights and fundamental freedom secured by the constitution. It states:

> ***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.***

My understanding of right to be heard in the trial of civil cases comprises, on the part of a Defendant, of a right to be notified of the existence of the case and the dates when court attendance is required, liberty to file documents in response to the Respondent's claim and entitlement to attend court and participate in the proceedings as provided for in the law guiding trial cases of this nature. The court record shows that the Appellant was served with summons to Enter Appearance as a way of notifying him of the existence of the suit. In response thereto, he filed a Memorandum of Appearance dated 5th June 2008 and paid for it the requisite court filing fees of kshs.75 vide court revenue receipt No. 1922900 issued on 5.6.2008.

As already stated, there is no copy of Defence or receipt for payment of filing fees for defence on record. However, there is a Reply to Defence filed by the Respondent dated 16th June 2008. The Respondent in his submissions mentions a defence filed by the Appellant which he describes thus:

> ***" …just as the defence that was filed by the appellant in the subordinate court, which defence was a mere denial."***

The Appellant has never referred to the defence at all in the proceedings. Not even when he filed an application for the court to reopen the case. It is not part of the Record of Appeal filed by him herein. There are no witness statements or bundle of documents by the Appellant in the Record of Appeal or the court record generally.

By the time the case was finally heard on 30. 5. 2019, it had been pending in court for more than ten (10) years since it was filed in 2008.

The Proceedings on record show that the Appellant had been notified of the hearing date of 30.5.2019. When the matter came up for hearing the Appellant was represented by counsel. The matter was placed aside for hearing at 2.00 pm at the request of Counsel for the Appellant. At 2.00 pm, both the Appellant and his lawyer were absent. The matter proceeded to hearing and a date for judgement was set.

The Appellant subsequently filed an application dated 3rd June 2019 seeking that the case be reopened. The application was heard and disallowed. In its ruling dated 20th June 2019, the court noted that it was an old case. The court further noted that the Appellant had not filed a defence and hence there were no grounds for re-opening the case. The court further reminded the appellant of his right to appeal the ruling within 30 days.

Order 12 Rule 2 and Order 17 Rule 3 Civil Procedure Rules, 2010 allow the court to proceed to hear a matter *ex parte* where the Defendant had sufficient notice of the hearing date but fails to attend court. The overriding objective of the Civil Procedure Rules as stipulated in section 1A of the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. This objective could not have been served by delaying hearing of the suit further.

The Appellant cannot be described as a party who was denied a chance to be heard. He was notified of the existence of the suit. He had the liberty to file as many documents as the law allows him in response to the Respondent's case and in preparation for the hearing. He was notified of the hearing date but in most of the instances he failed to seize the chance.

Based on the findings herein that there was sufficient evidence to support the decision of the trial court and that the Appellant was not denied a chance to be heard, I find that the Appeal lacks merit and make the following orders:

1. The Appeal herein is dismissed

2. Costs of the Appeal to the Respondent.

Orders accordingly.

Dated, delivered and signed in open court at Vihiga this 23rd day of November 2021.

E. ASATI

JUDGE

In the presence of

Appellant in person

Respondent in person

Ajevi Court Assistant.

E. ASATI

JUDGE.