



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC APPEAL NO. 25 OF 2019

CHRISTOPHER KOKO ONDWASI.....APPELLANT

VERSUS

ROSEMARY WAKHUNGU.....1ST RESPONDENT

JOHN KAUNDA WASIKE..... 2ND RESPONDENT

BEN OUMA MUNYARE.....3RD RESPONDENT

SOFIA ZAKARIA.....4TH RESPONDENT

RAMADHAN MAKHANDIA..... 5TH RESPONDENT

TELESINA ALOO.....6TH RESPONDENT

(Being an appeal from the Judgment of HON P. N. ARERI – PRINCIPAL MAGISTRATE

IN BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE NO. 102 OF 2007

DELIVERED ON 2ND APRIL 2015)

J U D G M E N T

The circumstances leading to the transfer of this appeal to this Court from the High Court are well captured in my comments dated 19th December 2020. I need not revisit them for purposes of this appeal. Suffice it to confirm that following the directions by **ARONI J** on 10th April 2017, all the parties herein have now filed and served their submissions as directed.

By a plaint filed in **BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE NO 102 OF 2007**, **CHRISTOPHER KOKO ONDWASI**, (the Appellant herein) sought Judgment against **ROSEMARY WAKHUNGU**, **JOHN KAUNDA WASIKE**, **BEN OUMA MUNYARE**, **SOFIA ZAKARIA**, **RAMADHAN MAKHANDIA** and **TELESIA ALOO** (the Respondents herein) seeking the main prayer that the Respondent be evicted from the plot **NO WEST BUKUSU/KHASOKO/933** (the suit plot). The basis of his claim was that the suit plot was purchased by **SAMWEL WERE ONDWASI** and **ANDREA ONDWASI** (both deceased) **DESTERIO BARASA** and himself from one **TENDE MISIKO** in 1972. However, in 2000 while he was in prison custody awaiting trial on a charge of creating disturbance, the Respondents invaded the suit plot and erected permanent structures from which they operate various businesses yet the Appellant is entitled to ¼ acre of the same. That precipitated the suit in the subordinate Court.

The record shows that the firm of **H. P. WAMALWA ADVOCATES** entered appearance on behalf of the Respondents on 26th April 2017. However, although **MS LUCY NANZUSHI ADVOCATE** subsequently filed a notice dated 31st January 2008 to act for the 5th Respondent, she did not file any defence. Indeed, from the record, the only parties who filed defences were the 2nd and 5th Respondents who did so and in person.

In his defence dated 11th May 2007 and filed on 18th May 2007, the 2nd Respondent pleaded that he does not stay on the suit plot and has no interest in it and therefore the averments against him are strange and the suit ought to be struck out.

The 5th Respondent also filed his defence on 23rd April 2007 in which he averred, inter alia, that he purchased a plot measuring approximately 0.0012 (12.5 x 100) from the sons of **SAMUEL WERE ONDWASI** at a consideration of Kshs. 33,000.00 which was curved out of land parcel **NO WEST BUKUSU/ KHASOKO/933**. That he has been staying peacefully on the said portion and therefore the Appellant has no cause of action over the suit plot. It is not clear what became of the suit as against the 1st, 3rd, 4th and 6th Respondents.

The suit was heard by **HON. P. N. ARERI (PRINCIPAL MAGISTRATE)** and by a Judgment delivered on 2nd April 2015, the Appellant's suit was dismissed with costs.

Although the 1st and 3rd Respondents testified during the trial, it is not clear how they did so having not filed any pleadings in the trial Court.

The Appellant has raised the following grounds of appeal against the said Judgment: -

- 1. The trial magistrate erred in law and fact when he dismissed the plaintiff's case even after the case had been proved by the plaintiff.**
- 2. The trial magistrate erred in law and fact when he based on one side (sic) and deliver Judgment in favour of the Respondents.**
- 3. The trial magistrate erred in law and facts when he did not base (sic) on evidence produced by the Appellant during the hearing of the matter.**
- 4. The trial magistrate erred in law and facts when he over looked the document produced by the Appellant.**
- 5. The trial magistrate erred in law and facts by giving a substantive Judgment.**
- 6. The trial magistrate erred in law and facts by misapprehending the issues before him and allowing himself to be influenced by extraneous matters.**
- 7. The trial magistrate erred in law and facts by failing to appreciate sufficiently or at all that he was allied (sic) upon to exercise Judicial discretion on the basis of evidence and consideration of all circumstances of the case.**
- 8. It is manifest from the Judgment as a whole that the trial magistrate was plainly wrong and thus caused misjustice (sic).**

Submissions on the appeal were filed both by **SICHANGI & COMPANY ADVOCATES** for the Appellant and **LUCY NANZUSHI & CO ADVOCATES** for the Respondent.

I have considered the record herein, the grounds of appeal and the submissions by counsel.

This is a first appeal and the duty of this Court is to reconsider the evidence, evaluate it and draw it's own conclusions. In so doing however, this Court must bear in mind that I neither saw nor heard the witnesses and should make due allowance for that. This Court is also not bound to necessarily follow the findings of the trial Court if it appears that they were not supported by the evidence, the law or were based on a misapprehension of the facts – **PETERS .V. SUNDAY POST LTD 1958 E.A 424** and also **SELLE & ANOTHER .V. ASSOCIATED MOTOR BOAT COMPANY & OTHERS 1968 E.A 123**.

Grounds 1, 2, 3 and 4 of the appeal can be considered together. They raise the issues that the trial magistrate erred in law and fact by dismissing the Appellant's case when it had been proved and by finding in favour of the Respondents while not considering the Appellant's evidence.

As the Appellant's suit in the subordinate Court sought to evict the Respondents from the suit plot he was required to prove to the satisfaction of the Court that they were trespassers. In a ruling delivered on 18th July 2009, the suit against the 2nd and 5th defendants was struck not on the basis that they were strangers to the suit plot. During the trial, it transpired that the 1st Respondent had already vacated the suit land. In the submissions by counsel for the Appellant, he states as follows in the last sentence at page 1: -

“It emerged in further cross 0 examination that during the pendency of the suit, some of the Respondents had moved out or abandoned the suit land to wit: -

2nd Respondent JOHN KAUNDA WASIKE

4th Respondent SOFIA ZAKARIA

5th Respondent TELESINA ALOO.”

With regard to the 3rd Respondent **BEN OUMA MUNYARE** his evidence during the trial was brief. He said: -

“My name is BENARD OUMA MUNYARE. I come from BUYOFU S KINGA village. I am a farmer. In my defence is that I

had a kiosk and it was removed. Currently it is not there. That is all.

When he was cross – examined, he stated that: -

“I removed my kiosk after I was served with papers from Court.

That is all.”

The 6th Respondent **TELESINA ALOO** appears not to have testified in the subordinate Court. However, that did not take away the onus from the Appellant to prove his case against all the Respondents on a balance of probabilities.

Whereas the Appellant takes issue with the trial magistrate for not finding in his favour and evicting the Respondents, he did not place before the trial Court evidence of ownership of the suit plot. The evidence placed before the trial magistrate by way of the Certificate of Search showed that the proprietor of the suit plot was one **SAMWEL WERE ONDWASI**. The Appellant’s case was that he and four others including **SAMWEL WERE ONDWASI** bought the suit plot in 1972. He however did not prove the sale agreement. This is what he said when cross – examined by counsel for the 2nd and 5th Respondents **MS NANZUSHI**: -

“In 1972 I was 41years old. We had an agreement with NATHAN TENDE. We gave it to SAMWEL ONDWASI now deceased. We cannot trace the sale agreement now.”

What the Appellant was claiming was an order to evict the Respondents from the suit plot on the basis that he was a co – owner together with other parties including **SAMWEL WERE ONDWASI** in whose names the suit plot was registered. The Appellant did not file the suit as a legal representative of the Estate of the said **SAMWEL WERE ONDWASI**. He filed it as one of the owners thereof. In paragraph 4 of the plaint, he pleaded as follows: -

“Plot NO W. BUKUSU/KHASOKO/933 measuring 0.20 Ha was purchased by SAMWEL WERE ONDWASI (deceased), ANDREA ONDWASI (deceased) DESTERIO BARASA (alive) and myself from one TENDE MISIKO in 1972.”

In the absence of the sale agreement and the suit plot being registered in the names of **SAMWEL WERE ONDWASI**, it is difficult to see what interest the Appellant had in the said plot. In the circumstances, his claim for eviction was bound to fail. It would have been different had he approached the Court as the Administrator of the Estate of the said **SAMWEL WERE ONDWASI**. Although the Appellant had obtained a limited grant of Letters of Administration in respect to the Estate of the said **SAMWEL WERE ONDWASI**, he did not file this suit in that capacity. In the absence of evidence by the Appellant that he owned the suit plot, I do not see how the trial magistrate erred in law or fact by dismissing the Appellant’s claim nor is there any evidence to suggest that he favoured the Respondents. Grounds 1, 2, 3 and 4 of the Memorandum of Appeal must therefore be dismissed.

Grounds 5 of the Memorandum of Appeal takes issue with the trial Court for ***“giving a substantive Judgment.”*** I do not see how the trial magistrate can be said to have erred both in law and facts if he gave a ***“substantive Judgment.”*** The term substantive is defined in **THE OXFORD ENGLISH DICTIONARY** as follows:-

“having a firm basis in reality and so important or meaningful.”

The same **DICTIONARY** defines the term with regard to law as follows:-

“defining rights and duties as opposed to giving the procedural rules by which those rights and duties are enforced.”

In essence therefore, the Appellant is applauding the trial magistrate for the manner in which he heard the dispute before him and arrived at a Judgment that properly determined the parties’ respective rights in relation to the suit plot. It is a contradiction to argue in the same breath that the trial magistrate erred in law and facts.

Grounds 6,7 and 8 question the trial magistrate’s lack of objectivity in being influenced by extraneous matters, failing to exercise Judicial discretion and arriving at a Judgment that was plainly wrong. There is no mention of what extraneous factors influenced the trial magistrate in arriving at the decision that he did or how his exercise of discretion was faulty. This Court does not take the view that the impugned Judgment was plainly wrong as submitted by the Appellant.

The main issue that the trial Court was called upon to determine was whether or not the Respondents were trespassers liable for eviction from the suit land. During the trial, it became clear that some of the Respondents had in fact already vacated the suit plot while some purchased the portion they were occupying from the sons of the registered owner in a process that had not been challenged. This is what the Appellant said when cross – examined by **MS NANZUSHI**: -

“The only people I want evicted are invaders not members of SAMWEL’s family. I could blame the sons of SAMWEL if they sold the land because we were to share the plot among the four of us. (shown the land sale agreement marked DMFI – 1) states it is dated 13/2/2003 the sale agreement was between MARTIN WABWILE and BENEDICT WAFULA and CLEMENT ONYANGO. MARTIN WABWILE and BENEDICT WAFULA are sons to SAMWEL ONDWASI. Then sold plot measuring 12.5 x 100 out of WEST BUKUSU/KHASOKO/933. ROSEMARY is an invader. She built a kiosk on the land. JOHN WASIKE is not on the land. BEN OUMA MUNYARE has a kiosk on the plot SOFIA ZAKARIA ran away and cannot be found. TERESINA ALOO removed her kiosk from the land. I want them evicted. No further questions.”

ROSEMARY WAKHUNGU the 1st Respondent confirmed in her testimony that she removed her kiosk when she was served with Court papers. **CLEMENT ONYANGO** was not a party in this suit. **BENEDICT WAFULA** and **MARTIN ONYANGO** are sons to the owner of the suit plot and sold a portion to **RAMADHAN MAKHANDIA** the 6th Respondent. Counsel for the Appellant, as I have already indicated above, submitted that the 2nd, 4th and 5th Respondents had already left the suit plot. **BENA OUMA MUNYARE** (3rd Respondent) vacated when the suit was filed. The 6th Respondent appears not to have been served with summons and if she was, there is no explanation as to why no Judgment was sought against him. The only reasonable conclusion is that she was not served.

Given the above scenario, it cannot be correct for the Appellant to submit, as has been done, that the trial magistrate was influenced by extraneous factors as that he did not exercise his discretion properly and therefore was plainly wrong in his Judgment. From the evidence on record, it would have been a miscarriage of justice for the trial magistrate to arrive at any other decision other than that the Appellant had failed to establish his claim of trespass against the Respondents.

The up – shot of the above is that this appeal is devoid of any merit. It is accordingly dismissed with no orders as to costs since the suit against the 2nd and 5th Respondents was infact withdrawn on 18th June 2009.

Boaz N. Olao.

J U D G E

30th January 2020.

Judgment dated, delivered and signed in Open Court this 30th day of January 2020 at Bungoma.

Ms Nanzushi for 2nd and 5th Respondents present

Mr Wasilwa for Mr Sichangi for the Appellant present

Appellant present

Joy/Okwaro – Court Assistants

Right of Appeal explained.

Boaz N. Olao.

J U D G E

30th January 2020.