REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C.A. CASE NO. 26 OF 2019

(FORMERLY EMBU HIGH COURT CIVIL APPEAL NO. 47 OF 2018)

KINYATA NJIRU.....APPELLANT

VERSUS

EUSTANCE NJIRU MITUKI.....RESPONDENT

(Being an appeal against the judgement and decree of the Hon. S.K. Mutai (P.M.)

dated 11.09.2018 in Embu CMCC No. 274 of 2014)

JUDGEMENT

1. This appeal arises from the judgement and decree of the Hon. S.K. Mutai (PM) dated 11th September 2018 in *Embu CMCC No. 274 of 2014.* By the said judgement, the trial court allowed the Respondent's suit as prayed in the amended plaint save general damages and mesne profits and proceeded to dismiss the Appellant's counterclaim. The Appellant was also condemned to bear costs of the suit.

2. The material on record indicates that by a plaint dated 28th October 2014 and amended on 29th February 2016 the Respondent pleaded that he was the registered proprietor of *Title No. Nguthi/Evurore/79* (hereafter the *suit property*) which he had allowed the Appellant to occupy for a limited period in 2008 or thereabouts. It was further pleaded that when the Appellant was called upon to vacate the suit property the latter refused to give up possession and instead claimed it to his own hence the suit. The prayers which the Respondent sought were a permanent injunction, mesne profits, general damages for unlawful occupation, costs of the suit, and interest at court rates.

3. By a defence ... 9th January 2015 and amended on 20th January 2016 to include a counterclaim, the Appellant denied the Respondent's claim in its entirety. The Appellant pleaded that he had been in occupation of the suit property since he was born and that he had inherited the suit property from his late father. The Appellant further pleaded that the Respondent had fraudulently caused the suit property to be transferred to himself. The Appellant consequently sought cancellation of the Respondent's title in his counterclaim. He also sought costs of the suit and the counterclaim.

4. The material on record shows that the suit was heard before Hon. S.K. Mutai who delivered a judgement on 11th September 2018 allowing the Respondent's suit and dismissing the Appellant's counterclaim. The trial court held that the Respondent had proved his ownership of the suit property to the required standard. The trial court also held that the Appellant had failed to prove the fraud and particulars of fraud pleaded in the counterclaim.

5. Being aggrieved by the said judgement the Appellant filed a memorandum of appeal dated 21st September 2018 raising the following seven (7) grounds of appeal:

> *a. The learned magistrate erred in law and fact and gravely misdirected himself by ordering that the suit be disposed of by way of written submission.*
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> *b. The learned magistrate erred in law and fact by imposing a permanent injunction against the defendant restraining him from interfering with the Respondent's ownership of land parcel Nguthi/Evurore/79 when it was very clear that the Appellant was in occupation.*
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> *c. The learned magistrate erred in law and gravely misdirected himself by awarding "interest at court rates".*

d. The learned magistrate erred in law and fact by dismissing the Appellants counterclaim.

e. The learned magistrate erred in law and fact in not considering that the land was ancestral land which the Appellant and other family members have ever lived and called home for a period of over 70 years.

f. The learned magistrate erred in law and fact in failing to visit the suit land for actualization of the facts on the ground more so about occupation of the land as prayed for in the application dated 6th July 2018.

g. The learned magistrate erred in law by delivering judgement without considering the application dated 6th July 2018 since the parties did not testify.

6. When the appeal was listed for directions on 28th October 2019 it was directed that the appeal be canvassed through written submissions. The Appellant was granted 21 days to file and serve his written submissions whereas the Respondent was granted 21 days upon the lapse of the Appellant's period to file and serve his. The record shows that the Appellant filed undated and unsigned submissions on 13th November 2019 whereas the Respondent filed his on 9th January 2020.

7. 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 in a first appeal were summarized in the case of **Selle & Another Vs 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."**

8. Similarly, in the case of **Peters Vs 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…"**

9. In the same case, **Sir Kenneth O'Connor** quoted **Viscount Simon, L.C in Watt Vs 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."**

10. The court has considered the material on record and the respective written submissions of the parties. The court is of the opinion that the Appellant's grounds of appeal may be summarized as follows:

a. Whether the trial court erred in directing trial of the suit without calling witnesses and the makers of documentary evidence.

b. Whether the trial court erred in allowing the Respondent's suit.

c. Whether the trial court erred in holding that the Appellant had failed to prove his counterclaim.

d. Whether the trial court erred in failing to visit the suit land.

e. Whether the trial court erred in awarding interest on costs at court rates.

11. The court has considered and re-evaluated the evidence on record on the 1st issue. The Appellant's main complaint is that he was denied an opportunity to testify at the trial in consequence of which he was denied a fair hearing. It was Appellant's contention that since the Respondent had testified orally, he ought to have been allowed to do likewise. It was the Appellant's submission that it was unfair, irregular, unlawful and discriminatory for the trial court to have allowed the suit to be disposed of on the basis of the statements, documents and submissions filed by the parties without calling oral evidence and procedural production of documents.

12. The court has perused the entire record of proceedings before the trial court. The record shows that the Respondent who was the Plaintiff tendered oral testimony on 16th June 2015 and he was cross-examined by the Appellant. The Respondent thereupon closed his case. The Appellant did not proceed with the defence case since he sought an adjournment to enable him call his witnesses.

13. The material on record shows that the suit was subsequently adjourned on several occasions mostly at the instance of the Appellant. The court ultimately gave a last adjournment to the parties on 20th March 2018 and fixed the suit for hearing on 8th May 2018. When the matter was listed for hearing on 8th May 2018 the court was ready to hear the parties but the Appellant's informed the court that the parties had consented to have the suit disposed of on the basis of written submissions. That position was confirmed by the Respondent's advocates.

14. The court therefore finds it strange that the Appellant is now complaining that he was denied a hearing when it was his advocate who informed the court that the parties had dispensed with the personal attendance of witnesses. It must have been the intention of the parties advocates to rely on the witness statements and documents on record as evidence. In fact, that is what the parties apparently did by filing written submissions in which they treated the statements and documents on record as the evidence tendered at the trial. The court finds absolutely no merit in the Appellant's complaint on the mode of disposal of the suit. That was the Appellant's mode of trial according to the material on record.

15. The court finds nothing unfair, irregular or discriminatory in the manner in which the trial was conducted. The trial court did not err in any way in adopting the consent of the parties on the chosen mode of disposal of the suit. In fact, under **Order 11 Rule 3 (2) (c)** of the **Civil Procedure Rules** the court is empowered to direct the admission statements without calling the witnesses and production of documents without calling their authors. The court finds that the Appellant did not suffer any prejudice by his chosen mode of trial. In any event, it would appear that the Appellant may have enjoyed a special advantage at the trial in that he was able to cross-examine the Respondent whereas the Respondent was unable to cross-examine him and his witnesses. Accordingly, the court finds no merit in the 1st ground of appeal.

16. The 2nd ground is whether the trial court erred in finding and holding that Respondent had proved his case to the required standard. The court has analyzed and re-evaluated the entire evidence on this issue. This court's own evaluation leads to the conclusion that the Respondent had ably proved his claim to the suit property. The Respondent's claim was well backed by oral and documentary evidence. The court is, therefore, unable to fault the trial court for reaching the holding it reached on the basis of the evidence on record.

17. The court has noted that the Appellant has placed great emphasis on the fact that the Respondent may not have sought an appropriate remedy in his amended plaint. It was submitted that the Respondent ought to have sought an eviction order as opposed to an order of injunction since the Appellant was already in possession.

18. The court is of the opinion that every litigant is at liberty to choose an appropriate remedy to vindicate his legal rights. The only restriction is that the remedy should be one which is legally tenable and practicable. A litigant's opponent has no business selecting an appropriate remedy for him. If the chosen remedy is inappropriate, less effectual that would be the concern of the claimant and not his opponent. The Respondent pleadings before the trial court were drafted in very unusual manner. The original plaint sought a "temporary mandatory injunction" against the Appellant. Later on it was amended to seek a "permanent injunction." As the court has stated, that should be the concern of the concern of the Respondent and not the Appellant.

19. The 3rd ground relates to the Appellant's counterclaim. By his counterclaim, the Appellant had pleaded that the suit property was his ancestral land which he had inherited from his late father and that the Respondent had acquired it fraudulently. The Appellant listed 3 particulars of purported fraud in paragraph 15 of the counterclaim. The trial court's holding was that the Appellant had failed to demonstrate the allegations of fraud against the Respondent.

20. The court is aware that allegations of fraud are serious allegations. Such allegations must be pleaded with specificity. The particulars of fraud must be properly pleaded and specifically proved to the satisfaction of the court. In the case of **Evans Otieno Nyakwana Vs Cleophas Bwana Ongaro [2015] eKLR** Majanja J held, *inter alia*, as follows:

> **"In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd Vs Trust Bank Ltd and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;**
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> **"The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the Appellant in this case than in an ordinary civil case".**

21. The court has re-evaluated the entire material on record on the issue of fraud. The court has considered the witness statements of the Appellant and his witnesses. This court finds that none of those statements can demonstrate the particulars of fraud pleaded in the counterclaim. The Appellant did not produce copies of the adjudication records for the suit property. The land register was not tendered in evidence to demonstrate the history of the suit property and the circumstances under which the Respondent came to be registered as

proprietor. The Appellant simply failed to prove the particulars of fraud to the required standard.

22. The 4th issue is whether the trial court erred in failing to visit the suit property during the trial. The court has perused the entire record of proceedings and finds no indication of an application by the Appellant to visit the suit property. The court is also unable to understand how a visit would have assisted the Appellant in proving the particulars of fraud alleged in his defence and counterclaim. It is also not clear how a site visit would have demonstrated whether or not the suit property was ancestral land. Accordingly, the court finds no merit whatsoever in this ground of appeal.

23. The final ground of appeal relates to the award of interest on costs. It was contended by the Appellant that the trial court erred in awarding the Respondent interest at court rates on costs. It is trite law that interest is a discretionary remedy which may be granted by the court regardless of whether or not it has been sought in the pleadings. See **Order 4 Rule 6** of the **Civil Procedure Rules.** In this particular case, it is clear that the Respondent had specifically pleaded for interest on costs. The award of costs is governed by the provisions of **Section 27 of the Civil Procedure Act (Cap. 21)** which stipulates as follows:

> **"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:**
>
> > **Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
>
> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."**

24. The court is of the opinion that where a trial court makes a discretionary award, such exercise of discretion ought not to be lightly interfered with by an appellate court. The appellate court would only interfere where the trial court has misdirected itself and acted the wrong principles or where it is manifest from the case as a whole that the discretion was not exercised judicially. See **Mbogo & Another V Shah [1968] EA 93.** This court finds no error of principle on the part of the trial court in the award of interest on costs. There is equally no material on record on the basis of which it may be concluded that the trial court did not exercise is discretion judicially. Accordingly, the court finds no merit whatsoever in this ground of appeal.

25. Before concluding the judgement there are two issues which were raised in the Appellant's submissions which deserve a mention. First, the Appellant submitted that there was a glaring error apparent on the face of the record of the trial court. The court was accordingly invited to review the judgement and set aside the judgement. This being an appeal. This being an appeal, this court has no jurisdiction to review the judgement and decree of the trial court under **Order 4 of the Civil Procedure Rules.** Moreover, a review can only lie to the court which passed the original decree. Second, it was submitted that the trial court erred in not finding that the Appellant had demonstrated an overriding interest in the nature of adverse possession within the meaning of **Section 28(1) of the Land Registration Act.** The court has noted that issue of adverse possession was not pleaded by the Appellant either in his defence or counterclaim. He never raised the issue in his written submissions before the trial court hence it cannot be the legitimate subject of the instant appeal.

26. The upshot of the foregoing is that the court finds no merit in the appeal. Accordingly, the Appellant's appeal is hereby dismissed in its entirety with costs to the Respondent.

27. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 30TH DAY of JANUARY, 2020

In the presence of Ms. Maina holding brief for Ms. Kithaka for the Appellant and Mr. Kathungu holding brief for Mr. Eddie Njiru for the Respondent.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

30.01.2020