REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

CIVIL APPEAL NO. 57 OF 2015

TOM WAMALWA WANJALA.....APPELLANT

VERSUS

ISAAC SIMIYU WAMBOKA.....RESPONDENT

(Being an appeal from the Judgment of HON. C. L. YALWALA (PM) delivered in BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 419 OF 2011 TOM WAMALWA WANJALA -VS- ISAAC SIMIYU WAMBOKA)

J U D G M E N T

TOM WAMALWA WANJALA (the Appellant herein) was the plaintiff in **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE NO 419 OF 2011** wherein he had sued **ISAAC SIMIYU WAMBOKA** (the Respondent herein) seeking the main prayer that the Respondent was a trespasser on the Appellant's land parcel **NO EAST BUKUSU/WEST SANGALO/1554** measuring 0.6 Ha and should be evicted therefrom. The Appellant's case was that the Respondent had purchased one (1) acre out of the suit land from the Appellant in 1994 but later surrendered the same seeking a refund of the purchase price which the Appellant did. However, the Respondent remains on the suit land.

The Respondent filed a defence admitting that he had purchased one (1) acre out of the suit land from the Appellant but denied that he had demanded a refund of the purchase price. He added instead that it was the Appellant who had refused to attend the Land Control Board for purposes of obtaining the relevant consent to transfer.

The suit was heard by **HON. C. L. YALWALA (PRINCIPAL MAGISTRATE)** who by his Judgment delivered on 31st July 2015 dismissed the Appellant's claim with costs to the Respondent. In his Judgment, the trial magistrate found that the Respondent occupies the portion which he purchased from the Appellant lawfully having paid for it and was not therefore a trespasser. Further, he found that there was no evidence to prove that the Appellant had infact refunded the purchase price to the Respondent.

Aggrieved by that Judgment, the Appellant filed this appeal seeking to have the same set aside. He had put forward the following grounds of appeal: -

1. That the learned magistrate erred in law and in fact when he dismissed the Appellant's suit where he was seeking for an eviction.

2. That the learned magistrate erred in law and in fact when he failed to appreciate that the Respondent had not proved his case on balance of probability.

3. That the learned magistrate erred in law and in fact in failing to appreciate that the Appellant had an arguable suit.

4. That the learned magistrate erred in law and in fact in failing to appreciate that the Appellant had a counsel on record who was supposed to proceed with the case but instead insisted to proceed in the absence of the Appellant's counsel.

5. That the learned magistrate erred in law and in fact in failing to appreciate the issues raised by the Appellant in cross – examination and failed to issue summons to the Area Chief and the D.O KANDUYI to testify on the same and decided to close the Appellant's suit failing to appreciate that the Appellant had an arguable and merited suit.

6. That the learned magistrate misdirected himself in arriving at a wrong decision in entering Judgment against the Appellant.

7. That the learned magistrate erred in law and in fact in failing to disqualify himself as the Court had no jurisdiction.

Though served, the Respondent did not attend Court for directions and therefore the appeal was heard in his absence but upon my direction, he was notified by the Deputy Registrar that Judgment would be delivered on 23rd January 2020.

This is a first appeal and the law is that an appellate Court is entitled to revisit the evidence on record, evaluate it and arrive at it's own conclusion. Ordinarily, an appellate Court will not interfere with the findings of fact by the trial Court unless they were based on no evidence at all or were arrived at on a misapprehension of the evidence and the law **MWANASOKONI .V. KENYA BUS SERVICE LTD 1982 – 88 1 KAR 278**. I must also take into account the fact that I neither saw nor heard the witnesses and should therefore make due allowance in that respect **SELLE & ANOTHER .V. ASSOCIATED MOTOR BOAT CO & ANOTHER 1968 E.A 424**. I shall be guided by the above principles in determining this appeal.

I have considered the appeal. The parties are acting in person and none has filed any submissions.

In my view, this appeal can be determined on the basis of the following condensed issues: -

1: Whether the Appellant was made to proceed in the absence of his counsel -ground 4.

2: Whether the trial magistrate erred in law and in fact by failing to issue summons to the Area Chief and District Officer (D.O) – ground 5.

3: Whether the trial magistrate erred in law and in fact by failing to disqualify himself in a matter in which he had no jurisdiction – ground 7.

4: Whether the trial magistrate misdirected himself in law and in fact in dismissing the Appellant's claim for eviction when there was merit in his case – grounds 1, 2, 3, and 6.

Ground 7 raises the issue of jurisdiction of the trial magistrate. Jurisdiction is everything and without it, the Court must down its tools – **OWNERS OF THE MOTOR VESSEL 'LILIAN S' .V. CALTEX OIL (KENYA) LTD 1989 KLR 1**. Therefore, if the trial magistrate had no jurisdiction to determine the dispute before him, the resultant Judgment is a nullity.

There is nothing to suggest that the value of the land in dispute was beyond the pecuniary jurisdiction of the trial magistrate. According to the sale agreement between the parties dated 14th November 1994, the consideration for the portion of one (1) acre which the Respondent was purchasing from the Appellant was Kshs. 34,000/=. The dispute was heard and determined by **HON. C. L. YALWALA** a **PRINCIPAL MAGISTRATE** and the orders being sought by the Appellant were for the eviction of the Respondent. Clearly, the trial Court was seized with the requisite jurisdiction to determine the dispute between the parties. That ground fails.

On **ground 4**, the Appellant faults the trial magistrate for proceeding with the case in the absence of his counsel. From the record, the Appellant filed his Plaint in the subordinate Court on 21st July 2011 while acting in person. It was not until 12th April 2013 that the firm of **LUCY NANZUSHI ADVOCATE** filed a Notice of Appointment to act for him. By that time, the matter was already part heard before the trial magistrate having commenced hearing on12th September 2012. On that date, the record reads as follows: -

"12.9.2012

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C/CLERK: NANCY

Plaintiff present: I am ready to proceed

Defendant: I am ready too."

It is clear from the above record that the plaintiff who was then acting in person informed the Court that he was ***"ready to proceed."*** At no time did he intimate that he wished to have an advocate to represent him. He was acting in person. He cannot now claim that the trial magistrate proceeded in the absence of his counsel. In any event, even after the Appellant had engaged counsel, the record shows that the said counsel **MR ONKANGI** holding brief for **MS NANZUSHI** applied on 13th February 2015 to recall the Appellant to produce some documents. The Respondent objected to the production of those documents insisting that the makers be called. The Court up – held that objection and granted the Appellant time to call the makers of the said documents. However, the said witnesses were not availed by the Appellant who on 12th June 2015 told the trial Court that: -

"Plaintiff: - My advocate is not here yet. I have no witnesses to call. The Chief already wrote a letter."

As the hearing date had been taken by consent and there being no explanation for the absence of the Appellant's Counsel, the trial magistrate made the following orders: -

"Court: - In the premises given that to-day's date was taken by consent and the defendant is ready, I note that the case proceeds the non attendance of the plaintiff's Counsel withstanding (sic)"

The trial magistrate then proceeded to order the Appellant's case closed and heard the Respondent's evidence and that of his witnesses after which he directed that Judgment would be on 17th July 2015. Given those circumstances, the trial magistrate cannot be faulted for proceeding in the manner that he did bearing in mind that on 13th February 2015, he had granted the Appellant the final adjournment. That ground similarly fails.

In **ground 5**, the trial magistrate is faulted for failing to issue summons to the Area Chief and District Officer (D.O) to testify on behalf of the Appellant. From the record, there is nothing to show that either the Appellant or his counsel applied for witness summons for the Area Chief or District Officer as witnesses in support of his case. That ground fails.

Finally, in **grounds 1, 2, 3** and **6** which I shall consider together, the trial magistrate is faulted for dismissing the Appellant's case seeking the eviction of the Respondent from the suit land yet there was sufficient evidence before him and therefore arriving at a wrong decision.

From the evidence by both parties, it was common ground that the Respondent took possession of the one (1) acre of land purchased from the Appellant in 1994 having paid the purchase price. However, the Appellant's case was that the Respondent subsequently declined the land and sought a refund of the purchase price and that an agreement to that effect was drawn. That agreement was however not produced.

The Respondent's case however was that the Appellant had refused to transfer the one (1) acre which the Respondent was in possession having constructed his home thereon.

The trial magistrate framed only two questions for his determination that is:-

1. **Whether the Respondent's occupation of the one (1) acre was unlawful and amounted to trespass.**

2. **Whether the Respondent could therefore be evicted.**

After evaluating the evidence, the trial Court found, and rightly so in my view, that the Respondent's occupation of the land in dispute was not unlawful and he could not therefore be a trespasser and liable for eviction having paid for the same. He found further that it was the Appellant who had refused to complete the transaction by transferring the one (1) acre to the Respondent. On the issue of the refund of the purchase price, the trial magistrate found no evidence to support that assertion by the Appellant and in any event, the Respondent did not want a refund. This is how the trial magistrate addressed the issue: -

> ***"The defendant himself stated that he did not want refund. H wants the plaintiff to effect the transfer and registration of the land said (sic) portion of land to him. In the premises, I found that the agreement made between the plaintiff and defendant on 14/11/1994 still stands and is binding on the parties. On the basis of the same, the defendant is lawfully entitled to possession of one acre of land comprised in title NO E. BUKUSU/W.SANGALO/1554. He thus cannot be a trespasser on the said portion of land as alleged by the plaintiff. On issue No. 2, it follows that since the defendant is lawfully on occupation of land and is not a trespasser, he cannot be evicted from there from (sic)."***

The trial magistrate cannot be faulted for that finding. The Appellant's case in the trial Court was that he wished to refund the purchase price after re-selling the same portion he had earlier sold to the Respondent. He however wanted the Respondent evicted first. This is what he said in his evidence in chief: -

> ***"I thus want the defendant to be evicted from the piece of land I sold him so that I can re-sell it, I get money and refund him his money. He paid me Kshs. 34,000/= for it. That is the money I want to refund him. I want him to be evicted because he is troublesome. He does not respect. He accuses me of being a thief and also has been stealing my chicken. I thus pray for orders sought."***

Having voluntarily sold one (1) acre of his land to the Respondent and having received the purchase price, the Appellant could not resile from the agreement simply because he had now found out that he had sold land to a troublesome thief who lacks respect for him. He must accept the Respondent as he found him and if the Respondent is a troublesome thief, there are other ways of dealing with him. The Appellant must keep his part of the bargain. There is no evidence to suggest that the sale agreement between the parties was illegal or un – enforceable. The trial magistrate did not err either in law or fact in arriving at the decision that he did in dismissing the Appellant's case. That was the only inevitable decision that any Court properly seized of the matter could have arrived at. Grounds 1, 2, 3 and 6 of the appeal are also dismissed.

That should be enough to dispose of this appeal.

However, there is an issue of law which the parties did not canvass in the trial Court but which this Court must consider. In doing so, I am guided by the Court of Appeal's decision in the case of **D.E.N .V. P.N.N C.A CIVIL APPEAL NO 226 OF 2012** where the Court quoted with approval the following words from the Ghanaian case of **ATTORNEY GENERAL .V. FAROE ATLANTIC CO LTD [2005 – 2006] SCGLR 271**:-

> ***"The salutary and well-known general rule of law is that where a point of law is relied on an appeal, it must be one which was canvassed at the trial. But there are exceptions to this rule; the question of jurisdiction being one of them. A jurisdictional issue can therefore be taken or raised at any time even for the first time on appeal.***
>
> ***Another exception is where an act or contract is made illegal by statute.***

> ***Again, the well-established general rule is that where a legal question sought to be raised for the first time is <u>substantial and can be disposed of without the need for further evidence, it should be allowed</u>."*** Emphasis added.

In **SECURICOR KENYA LTD .V. E.A DRAPERS & ANOTHER 1987 KLR 338**, the Court of Appeal said the following about raising a new point on appeal: -

> ***"But MR GAUTAMA seriously warned this Court of the dangers of such a course. Certainly, the cases show that the discretion must be exercised sparingly. The evidence must all be on the record and the new point must not raise disputes of fact. The new point must not be of variance to the facts or case decided in the Court below."***

See also **NYANGAU .V. NYAKWARA 1986 KLR 712**. It is clear from case law that a new point may be taken on appeal but the Court has a discretion on the matter based on the circumstances of each case.

In this case, the parties did not address the trial Court on the issue of limitation although the evidence clearly shows that the Appellant's claim was statute barred. It is common ground that the Respondent took possession of the one (1) acre of the suit land in 1994 following the sale agreement. He then put up a home which he continued to occupy at least upto the time this suit was filed on 21st July 2011 which was some seventeen (17) years later. **Section 7 of the Limitation of Actions Act** provides as follows: -

> ***"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action occurred to him or, if it first accrued to some person through whom he claims, to that person."***

Even assuming that the cause of action first accrued on 1st September 1996 when the Appellant went to complain to the Chief who then wrote a letter to the Respondent over their dispute, the suit was filed in the subordinate Court well after the limitation period and was dead on arrival. It ought to have been struck out without much ado.

The up – shot of the above is that this appeal lacks merit. It is hereby dismissed with costs.

Boaz N. Olao.

J U D G E

23rd January 2020.

Judgment dated, delivered and signed in Open Court at Bungoma this 23rd day of January 2020.

Appellant present

Respondent absent

Joy/Okwaro – Court Assistants

Right of Appeal explained.

Boaz N. Olao.

J U D G E

23rd January 2020.