REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C.A. CASE NO. 19 OF 2019

MARIKO NDWIGA.....APPELLANT

VERSUS

EDITH MUTHANJE.....RESPONDENT

(Being an appeal against the judgement and decree of the Hon. M.N. Gicheru (C.M.) dated 24.6.2019 in Embu CMCC No. 119 of 2018)

JUDGEMENT

1. This appeal arises from the judgement and decree of the Hon. M.N. Gicheru (CM) dated 24th June 2019 in *Embu CMCC No. 119 of 2018.* By the said judgment the trial court held that the Appellant had failed to prove his case against the Respondent and accordingly dismissed his suit with costs.

2. The record shows that by a plaint dated 25th July 1995 filed before the Chief Magistrates' Court at Embu the Appellant sought recovery of *Title No. Kyeni/Kigumo/398* (hereafter *parcel 398*) from the Respondent. He also sought an order of injunction, general damages, and costs against the Respondent. The Appellant's claim was based upon Aembu customary law and partly upon *Runyenjes Succession Cause No. 86 of 1977.*

3. By a statement of defence dated 10th August 1995, the Respondent denied the Appellant's claim in its entirety. It was contended that the Appellant and his father were fraudulently trying to disinherit her whereas parcel *398* belonged to her late father. The Respondent further pleaded that the suit was *res judicata* and an abuse of the court process since the matters in controversy had been conclusively litigated in previous proceedings whereby the Appellant and his late father lost before the Magistrates courts, the High Court and the Court of Appeal. Particulars of all the previous proceedings were cited in the statement of defence. She therefore prayed for dismissal of the Appellant's suit with costs.

4. The material on record further shows that when the suit came up for trial on 27th November 2018 the court directed that the suit be canvassed on the basis of the witness statements and documents on record without calling either the witnesses or the makers of the documents. The trial court made the directions under **Sections 1A and 1B of the Civil Procedure Act** and **Order 11 Rule 2 (c) of the Civil Procedure Rules.** The court directed the parties to adopt their witness statements and their documents as their evidence and gave the parties until 14th January 2019 to file and exchange their respective submissions.

5. The record further shows that none of the parties or their advocates objected to the directions of the trial court on the manner of disposal of the suit. The record further shows that the parties dutifully filed their submissions as directed and none of them raised any issue on the mode of trial of the suit.

6. By a judgement dated and delivered on 24th June 2019 the trial court held that the Appellant had failed to prove his case against the Respondent to the required standard and accordingly dismissed it with costs. The trial court found as a fact that although the Appellant was at some point registered as proprietor of parcel *398* he lost such registration through a judicial process. The trial court further held that the only way through which the Appellant could recover *parcel 398* or its subdivisions was through a judgement of a higher court and not by filing a fresh suit before the Magistrates' court.

7. Being aggrieved by the said judgement, the Appellant filed a memorandum of appeal dated 23rd April 2019 raising the following grounds of appeal:

a) That the learned magistrate erred in law and fact in dismissing the appellant's case solely based on the doctrine of res judicata.

b) That the learned magistrate erred in law and in fact in finding that the defendant had proved his case on a balance of probabilities.

c) The learned magistrate erred in law in failing to accord the parties the right to be heard by way of adducing evidence and being cross-examined.

d) The learned magistrate erred in law in summarily determining the parties case without hearing them.

e) The learned magistrate erred in law and fact in failing to recognize that the property from which the appellant was to be evicted had been extensively developed and or improved by him.

f) The learned magistrate erred in law and fact in determining that the appellant should yield up possession and or occupation of the suit property despite occupation for over 20 years.

g) The learned magistrate erred in law and fact in failing to decisively review the evidence adduced by the parties and their respective claims and consequently arrive at a different finding.

h) The learned magistrate erred in law in admitting documents summarily in evidence without having them produced in a procedural manner.

8. When the appeal came up for directions on 29th July 2019, the Appellant was directed to file and serve his record of appeal within 60 days. Thereafter, when the appeal was mentioned on 7th October 2019 the Appellant was granted 30 days to file a supplementary record of appeal and written submissions. The Respondent was granted 30 days to file her submissions upon the lapse of the period granted to the Appellant. However, by the time of preparation of the judgment none of the parties had filed their submissions.

9. 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."**

10. 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…"**

11. 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."**

12. The court has considered and re-evaluated the entire evidence on record in this matter. The court has also considered the judgement of the trial court as well as the grounds of appeal raised by the Appellant.

13. Although the Appellant has raised eight (8) grounds of appeal the court is of the opinion that the same can be condensed into the following three (3) grounds, namely;

a) Whether the trial court erred in directing the disposal of the suit without calling the witnesses and makers of documents.

b) Whether the trial court dismissed the suit solely on the basis of the doctrine of res judicata, and if so, whether the court erred in doing so.

c) Whether the trial court erred in its evaluation of evidence and in holding that the Appellant had failed to prove his case to the required standard.

14. The court has considered the entire evidence on record on the first issue. The court has also considered the relevant provisions of **Order 11 of the Civil Procedure Rules** (hereafter Rules) on trial directions and conferences. The Appellant lamented that it was wrong for the trial court to direct the parties to adopt their witness statements without calling the witnesses and to direct the admission of documents without calling the makers. It was also contended that the suit was summarily tried without according the parties an opportunity of being heard. Since the parties did not file their written submissions, this court did not have the benefit of detailed arguments from the concerned advocates.

15. As indicated earlier, the pretrial directions on the mode of disposal of the suit were given by the trial court in the presence of the parties and their advocates. None of the parties objected to those directions. In particular, the Appellant did not raise any objection either at the time the directions were given or afterwards. In fact, Appellant's advocates happily based their submissions upon the witness statements and documents which they considered as evidence pursuant to the directions of the court under **Order 11 Rule 2 (c)** of the **Rules.** The court has noted that under the said **Rule** the court may:

> **"Order the admission of statements without calling the makers as witnesses where appropriate and the production of a copy of a statement where the original is unavailable."**

16. The court is not persuaded that there is merit in the Appellant's protestation on the manner of trial. The parties had long filed and exchanged their witness statements and documents. The Appellant did not file any notice of objection to any particular witness statement or document. He did not give any notice indicating that he wanted any particular author of a document to be called or cross-examined. The Appellant's own statements and documents were admitted as well. The court is unable to discern any prejudice the Appellant may have suffered as a result of the trial directions. Accordingly, the court finds the first ground devoid of merit.

17. The second ground relates to the application of the doctrine of *res judicata.* It was contended that the trial court dismissed the Appellant's suit solely on account of *res judicata* and that it was wrong in doing so. The court has carefully perused the judgement of the trial court. It is not true that the Appellant's suit was dismissed solely on account of the doctrine of *res judicata.* The trial court gave several reasons for dismissal of the Appellant's suit including the fact that he had failed to prove his claim on a balance of probabilities.

18. A perusal of the trial court's judgement reveals that the court did not make any direct reference to *res judicata.* In its reference to previous cases involving the parties the trial court stated as follows:

> **"On the second issue, I find that the plaintiff was to regain registration through a judicial process of appeal to a higher court. Having lost in the High Court, the plaintiff could not lawfully or procedurally bring another suit in the lower court."**

19. The court's understanding of the trial court's holding is that the legal bar referred to is not necessarily confined to *res judicata.* It could as well include abuse of the court process. So, the mere fact that the trial court found that the appellant's remedy lay in appeal as opposed to filing a fresh suit did not mean that the suit was dismissed, or solely dismissed, on account of *res judicata* even though that may well have been a legitimate reason for dismissal. Accordingly, the court finds no merit in the second ground of appeal.

20. The 3rd ground relates to the evaluation of the evidence on record. It was contended by the Appellant that the trial court had failed to properly or correctly evaluate the evidence with the consequence that it arrived at a wrong decision. The court has perused and re-evaluated the entire evidence on record. The court is of the opinion that the Appellant's suit was properly dismissed. It was a perfect candidate for dismissal not only because there was inadequate evidence to prove it, but most importantly because it was a gross abuse of the court process.

21. The court has perused and considered the history of the dispute between the parties since the matter was filed as a succession cause in 1977 or thereabouts. Although the Appellant was initially successful in acquiring the *parcel 398*, his success was subsequently overturned in various judicial proceedings before the District Magistrate's Court, the High Court, and the Court of Appeal.

22. The material on record indicates that both the Appellant and his late father (whom he sued as the 1st Defendant before the trial court) were involved in previous litigation with the Respondent. The Appellant apparently took a back seat whilst his father battled with the Respondent. It was only upon his father conclusively losing the litigation that he opened a new war front with the Respondent on the basis that he was not party to the earlier proceedings.

23. Unfortunately for the Appellant, none of the courts which heard his plethora of applications believed his feigned ignorance. The High Court did not believe him in his applications for review and setting aside. He was not believed in his application for stay pending appeal. He was not believed by the Court of Appeal which heard one of the interlocutory appeals in connection with the land dispute. The trial court, too, did not believe the Appellant when he claimed that he was unaware of previous proceedings through which he lost ownership of the suit property. In the same vein, this court does not believe the Appellant that he was unaware of previous proceedings through which he lost the suit properties.

24. It is also instructive that during the earlier proceedings before the District Magistrates' court, the Appellant was not awarded any portion of the suit property. It was his late father who was awarded one half of the property whilst the Respondent was to get the other half. There is no indication of the Appellant having filed any appeal to challenge his exclusion. It was his late father who pursued an appeal because he wanted to disinherit the Respondent and take the entire suit property. The material on record indicates that the Appellant's father pursued the

appeal to its logical conclusion and lost.

25. The material on record further indicates that when the Appellant came to a dead end he decided to file a fresh suit before the Chief Magistrates' court on the same issues which had been litigated upon and decided in previous proceedings. The question as to who was entitled to inherit the suit property was canvassed and determined in previous proceedings. The High Court at Meru heard and determined an appeal on those issues. It also heard and determined an application for review and setting aside. The Court of Appeal dismissed an application for leave to appeal out of time with respect to the same dispute.

26. It was, therefore, a gross abuse of the court process for the Appellant to commence a new suit before the Chief Magistrates' court to canvass issues which were heard and conclusively determined by courts of competent jurisdiction. It is sad and unfortunate that the Appellant was allowed to hold back the Respondent from enjoying the fruits of her judgement since 1995 by filing a frivolous suit before the Chief Magistrates' court. The court finds the instant appeal to be merely frivolous and a continuation of the Appellant's abuse of the court process.

27. The upshot of the foregoing is that the court finds no merit whatsoever in the grounds of appeal raised by the Appellant. Accordingly, the appeal is hereby dismissed in its entirety with costs to the Respondent. For the avoidance of doubt the interim orders in place are hereby vacated.

28. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 16TH DAY of JANUARY, 2020

In the absence of both the Appellant and the Respondent.

Court Assistant: Mr. Muinde

Y.M. ANGIMA

JUDGE

16.01.2020