REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. APPEAL NO. 30 OF 2018

DAVID NTHIGA.....APPELLANT

VERSUS

THENDERU MBARE.....RESPONDENT

(Being an appeal against the judgement and decree of Hon. M.N. Gicheru (Chief Magistrate) dated 8th October 2018 in Embu CMCC No. 226 of 2013)

JUDGEMENT

1. This is an appeal against the judgement and decree of Hon. M.N. Gicheru (Chief Magistrate) dated 8th October 2018 in *Embu CMCC No. 226 of 1990.* By the said judgement the trial court dismissed the Appellant's suit and allowed the Respondent's counterclaim. Costs of the suit were awarded to the Respondent.

2. The material on record indicates that by a plaint dated 28th August 2000 the Appellant pleaded that he was the registered proprietor of *Title No. Evurore/Nguthi/889 ("the suit property")* and that the Respondent had trespassed thereon without lawful justifiable or excuse. The Appellant therefore sought the following reliefs against the Respondent:

a) An order of eviction.

b) General damages for loss of user.

c) Costs of the suit.

d) Interest on costs.

e) Any other relief the court may deem fit to grant.

3. By a defence dated 5th September 2000 and amended on 8th November 2015 the Respondent denied the Appellant's claim and pleaded that he was born on the suit property and had lived there all his life. The Respondent further pleaded that the dispute concerning the suit property had been referred to the Land Disputes Tribunal for resolution vide *Embu PMCC No. 177 of 1996* hence he contended that the suit was premature.

4. By his counterclaim dated 8th November, 2015 the Respondent pleaded that he was the legitimate owner of the suit property. He reiterated the contents of his amended defence and contended that the Appellant had fraudulently obtained registration of the suit property and set out 3 particulars of fraud against him in paragraph 12 of the counterclaim. Consequently, the Respondent sought cancellation of the Appellant's title and an order for his registration as proprietor in place of the Appellant.

5. The material on record further shows that the suit was heard before the Hon. M.N. Gicheru (CM) on 30th July 2018 and he delivered judgement on 8th October 2018 dismissing the Appellant's suit whilst allowing the Respondent's counterclaim. The trial court found and held that the Appellant had failed to prove his ownership of the suit property. The court found that the suit property had been the subject of an appeal to the Minister under **Section 29** of the **Land Adjudication Act (Cap. 284)** and that the Respondent was the successful party hence he should have been the one to be registered as proprietor.

6. Being aggrieved by the said judgement, the Appellant filed a memorandum of Appeal dated 18th October 2018 raising the following nine (9) ground of appeal:

i. The learned magistrate erred in law and fact by finding that the Defendant had proved that the suit land parcel No.

Evurore/Nguthi/889 belongs to the Defendant.

ii. The learned magistrate erred on a point of law and fact in making a finding that the Plaintiff had not proved a case of trespass against the Defendant.

iii. The learned magistrate erred in law and fact by proceeding to issue judgement in the suit without hearing witnesses from both sides.

*iv. The learned magistrate erred in law and fact by misapplying the provisions of **Order 11** of the **Civil Procedure Rules.***

v. The learned magistrate erred in law and fact by relying on the ambiguous decision in Ministerial Appeal No. 232 of 1979 without considering that the said decision was never conclusive in respect of parcel number Evurore/Nguthi/889.

vi. The learned magistrate erred in law and fact by placing undue reliance on Nairobi Civil Suit No. 1445 of 2005 even though the said suit has never been determined and is still awaiting determination under Embu ELC Suit No. 26 of 2017.

vii. The learned magistrate erred in law and fact by failing to take into account the documentary evidence availed by the Plaintiff in the suit.

viii. The learned magistrate erred in law and fact in failing to take into account the Plaintiff's submissions.

ix. In all the circumstances of the case, the findings of the learned magistrate are unsupportable in law on the basis of the evidence adduced/available at his disposal.

7. The record shows that by an amended memorandum of appeal dated 16th May 2019 and filed on 20th May 2019, the Appellant added one more ground of appeal. The Appellant contended that the trial court erred in proceeding with the suit after it had already transferred it to the Environment and Land Court. The Appellant also amended the reliefs sought by abandoning the prayer for judgement to be entered in his favour and sought an order for a hearing *de novo* before another competent court.

8. When the appeal was listed for directions on 28th January 2020, it was directed that the appeal shall be canvassed through written submissions. The Appellant was granted 21 days to file and serve his written submissions whereas the Respondents were granted 21 days upon the lapse of the Appellant's period to do the needful. The record shows that the Appellant filed his submissions on 17th February 2020 but the Respondent's submissions were not on record by the time of preparation of the judgement.

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 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. The court has considered the entire material on record and the submissions on record. Although the Appellant raised 10 grounds of appeal in his amended memorandum of appeal, the court is of the opinion that the appeal may be conclusively determined on the following three (3) grounds, namely:

a) Whether the trial court erred in proceeding with the hearing of the suit whereas it had previously transferred it to the Environment and Land Court.

*b) Whether the trial erred in applying **Order 11** instead of **Order 12** of the **Civil Procedure Rules** during the trial.*

c) Whether the judgement of the trial court is unsupportable on the basis of the evidence tendered at the trial.

12. The court has considered the record of proceedings on the 1st issue. The record shows that by **consent** of the parties, the trial court purported to transfer the suit to the Environment and Land Court on 27th February 2016. It was, however, not indicated under what provisions of the law the transfer order was made. The record shows that thereafter, the advocates for the parties proceeded with

preparations for hearing and took a hearing date as though such order did not exist.

13. The court is of the opinion that the trial court had no jurisdiction to transfer the suit to the Environment and Land Court. The only provisions under which the suit could be transferred are to be found in **Section 18** of the **Civil Procedure Act (Cap. 21)** which confer such jurisdiction upon the superior courts. It does not matter that the order was made by consent of the parties. As was held in **Mary Osundwa V Nzoia Sugar Co. Ltd [2002] eKLR,** parties to a suit or proceeding cannot by consent confer jurisdiction upon a court where none is conferred by law.

14. In the case of **"The Motor Vessel Lilian S" [1989] 1 KLR** the Court of Appeal referred to the meaning of jurisdiction in the treatise *'Words and Phrases Legally Defined'* vol. 3 pg. 113 and concurred that "where a court takes it upon itself to exercise a jurisdiction which it does not possess its decision amounts to nothing." Similarly, in the case of **Macfoy V United Africa Co. Ltd (1961) 3 ALL ER 1169** it was held that any decision made without jurisdiction is null and void and of no legal consequence.

15. In the circumstances, therefore, the court finds and holds that since the trial court had no jurisdiction to transfer the suit in the first place, the consent order of 27th February 2016 was a nullity and of no legal consequence. Accordingly, the court and the parties were right in proceeding with the suit as if it did not exist. It would, therefore, follow that there is really no merit in the Appellant's objection relating to transfer of suit. This issue was mischievously raised by the Appellant knowing very well that he was party to the consent.

16. The 2nd issue relates to the manner in which the hearing was conducted by the trial court. The material on record indicates that even though the hearing date was taken by consent, neither the Respondent nor his advocate turned up for trial on 30th July 2018. There was no explanation whatsoever for the Respondent's absence. In the premises, the trial court was obligated to apply the provisions of **Order 12 Rule 2** of the **Civil Procedure Rules** in conducting an *ex parte* hearing. The said Rule stipulates as follows:

> **"2. If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is attends satisfied —**
>
> **(a) that notice of hearing was duly served, it may proceed ex parte;**
>
> **(b) that notice of hearing was not duly served, it shall direct a second notice to be served; or**
>
> **(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing."**

17. The court is of the opinion that the trial court was clearly obligated to proceed *ex parte* on the basis of the Plaintiff's evidence alone. However, the material on record shows that the learned Chief Magistrate adopted an unusual mode of proceeding which was captured on page 96 of the record of appeal as follows:

> **"COURT – Today's date was taken on 19th March 2018. Neither the defendant nor his advocate is present. There is no explanation for their absence. Since both parties have filed their witness statements and documents and since under the Sustaining Judiciary Transformation this case must be concluded by the end of the year, I direct under Order 11 Rule 2 (c) that there is no need to call any of the witnesses. The evidence on record be adopted as the evidence of the parties. Judgement on 24th September 2018. Plaintiff to file written submissions by 3rd September 2018 and to serve the defendant."**

18. Although the court appreciates the noble intention of the trial court to conclude the suit before the end of the year 2018, the same end could still have been achieved by conducting an *ex parte* hearing as per the dictates of **Order 12 Rule 2 (a)** of the **Civil Procedure Rules.** With due respect, the trial court fell into error in attempting to conduct an *ex parte* hearing as if it were an *inter partes* hearing. Neither **Order 11 nor Order 12** of the **Civil Procedure Rules** could have made up for the absence of the Respondent. The pleadings, witness statements and documents the Respondent had filed prior to the hearing could not be taken as evidence in his absence. The court is of the opinion that whereas the court could legitimately make a pre-trial order for the admission of witness statements and documents without calling witnesses and authors of documents, it could not properly do so at the trial in order to make up for the absence of one of the litigants.

19. The court is thus of the opinion that the trial court erred in law in admitting the Respondent's witness statements and documents as evidence in the suit in his absence and without any request by him for such admission. The trial court was in the circumstances obligated to conduct an *ex parte* hearing and to consider the evidence tendered by the Appellant who attended court to prosecute his suit. The Respondent was not present either by himself or through his advocate to demonstrate his defence or to prosecute his counterclaim. Accordingly, the court finds merit in the Appellant's grievances concerning the manner of trial.

20. The 3rd issue is whether the judgement of the trial court was supportable in view of the evidence tendered at the trial. The trial court held and found that the Appellant had failed to prove his claim to the required standard and that the Respondent had proved his counterclaim. The material on record indicates that it is only the Appellant who attended court to prosecute his suit on the hearing date. Neither the Respondent nor his advocate attended court to challenge his evidence. The Respondent did not prosecute his counterclaim and neither did he tender any evidence in support thereof. Even though the findings of fact of the trial court are entitled be accorded great weight, the same can be upset if the evidence at the trial and the circumstances of the case do not support such findings. See **Selle & Another V Associated Motor Boat Co. Ltd & Others** (*supra*).

21. The court is unable to appreciate how a party who never attended court to defend a suit and to prosecute his counterclaim could be said to have proved his defence and counterclaim. It is equally difficult to appreciate how an appellant whose evidence was not challenged at the trial could be said to have lost his case in the absence of evidence in rebuttal. In **Safarilink Aviation Ltd V Trident Aviation Kenya Ltd & Another [2015] eKLR** Mabeya J held, *inter alia,* that:

> **"It has been held severally by this court that failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true. See Karuru Munyoro V Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 where Makhandia J discussed the effect of failure to rebut evidence as follows …"**

In the circumstances, the court is of the opinion that the trial court erred in its findings and holdings hence its judgement is unsupportable on the basis of the evidence tendered at the trial. Accordingly, the court finds merit in this ground of appeal hence the appeal shall be allowed.

22. The next aspect for consideration is what are the appropriate orders to be made in the circumstances. **Section 78** of the **Civil Procedure Act (Cap. 21)** provides for the powers of an appellate court as follows:

> **"(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—**
>
> **(a) to determine a case finally;**
>
> **(b) to remand a case;**
>
> **(c) to frame issues and refer them for trial;**
>
> **(d) to take additional evidence or to require the evidence to be taken; (e) to order a new trial.**
>
> **(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."**

23. The court has noted that whereas the Appellant had originally desired a final determination of the matter by having judgement in his favourr as per the plaint dated 28th August 2000, he abandoned that recourse vide his amended memorandum of appeal. All that the Appellant wanted was a new trial. It is not clear what motivated the Appellant's change of strategy. However, this court must be guided by the principles which would guide an appellate court in ordering a trial *de novo.*

24. It has been held that a re-trial may be ordered where the proceedings were irregular or defective thus resulting in a mistrial. See **Chandaria V Njeri [1982] KLR 84**. A retrial may also be ordered where there is no valid judgement. See **National Bank of Kenya V Thomas Owen Ondieki [2016] eKLR.** In the criminal case of **Ahmedi Sumar V R [1964] EA 481,** it was held that whether an order for re-trial should be made depended on the particular facts and circumstances of each case but that it should only be ordered where the *interests of justice* so required and where it was unlikely to cause prejudice to the accused person. In the circumstances of this case, the court is of the opinion that the proceedings before the trial court were conducted in an irregular manner in contravention of **Order 12** of the **Civil Procedure Rules** and as a result occasioned a miscarriage of justice. Accordingly, the court is inclined to order a new trial before any competent court. The court is satisfied that it would be in the interest of justice to order a retrial.

25. The upshot of the foregoing is that the court finds merit in the appeal hence the same is allowed in the following terms:

> *a) The judgement and decree of the Hon. M.N. Gicheru (CM) dated 8th October 2018 together with all consequential orders be and is hereby set aside.*
>
> *b) The suit shall be heard de novo before any competent court.*
>
> *c) Each party shall bear his own costs of both the appeal and the suit before the trial court.*

26. It is so decided.

JUDGEMENT DATED and **SIGNED** in Chambers at **EMBU** this **30TH DAY** of **APRIL 2020** in the absence of the parties due to the prevailing Covid-19 situation. The judgement was transmitted to M/s Njiru Kithaka & Co. Advocates for the Appellant and M/s Momanyi Gichuki & Co. Advocates for the Respondent through the email addresses which they provided.

Y.M. ANGIMA

JUDGE

30.04.2020