



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI**

**ELC APPEAL CASE NO. 6 OF 2018**

**JOHN MBEWA OLANDE.....APPELLANT**

**VERSUS**

**KIBIRI CONSTRUCTION AND**

**TRADING COMPANY LIMITED.....RESPONDENT**

**(An appeal from the Judgment and order of Hon. J.P.Nandi, Principal Magistrate dated and delivered on 12<sup>th</sup> September, 2018 in Oyugis PMCC No. 115 of 2015)**

**JUDGMENT**

1. The instant appeal is a challenge by one Moses Mbewa Olande (the appellant herein) against the Judgment of Honourable P.Nandi (Principal Magistrate) dated and delivered on 12<sup>th</sup> September, 2018 in Oyugis PMCC No. 115 of 2015 in favour of the respondent, Kibiri Construction and Trading Company Limited, the defendant in that suit. It is noted that the learned trial magistrate rendered himself as follows:-

*a) Order of eviction and permanent injunction to issue against the defendant from continuing to remain/or trespassing upon land parcel West Karachuonyo/Koyugi/501 (the suit property herein).*

*b) Costs of the suit and interest.*

2. The appeal is anchored on eight (8) grounds as disclosed in the memorandum of appeal dated 19<sup>th</sup> September 2018 and filed in court on 25<sup>th</sup> September 2018. The grounds are that :-

*i. The Honourable court was biased and failed to consider the evidence of the appellant.*

*ii. The Honourable court erred in law and fact in denying the appellant his constitutional right to fair hearing.*

*iii. The Honourable court erred in law and fact in ordering removal of the appellant from the suit property which translated into potential removal of the owner of the suit property without hearing her.*

*iv. The Honourable court erred in law and fact in locking out the appellant's potential witnesses from giving evidence or testifying.*

*v. The Honourable court erred in law and fact in failing to appreciate that it was fundamental to go into the issue of ownership of the suit property before making orders of eviction of the appellant who was merely an employee.*

*vi. The Honourable court erred in law and fact in holding that the applicant was working on the suit property illegally.*

*vii. The Honourable court erred in law and fact by allowing witnesses on the part of the respondent to give evidence without the mandatory ostensible authority of the respondent before its directors give evidence.*

*viii. The Honourable court erred in law and fact in allowing a stranger to give evidence on behalf of the respondent and relying on the very evidence to arrive at the Judgment.*

3. The appellant is represented by learned counsel, Mr. Omino of Abuodha and Omino Company Advocates.

4. The respondents is represented by learned counsel, Mr. Samwel Nyauke of Nyauke and Company Advocates.
5. On 12<sup>th</sup> November 2019, this court directed that this appeal be argued by written submissions. Accordingly, on 24<sup>th</sup> February 2020 the appellant's counsel filed his submissions dated 15<sup>th</sup> February 2020 while on 26<sup>th</sup> February 2020, the respondent's counsel filed his submission dated 25<sup>th</sup> February 2020.
6. In his submissions, learned counsel for the appellant referred to the suit before the trial court, the evidence adduced and the decision rendered by the trial court. Counsel submitted that the appellant was merely a servant employed to work on the suit property. That the disclosed principal thereof should bear all the consequential acts committed or admitted by the agent under the Law of Agency as counsel argued that the trial magistrate erred in law and fact in arriving at the impugned decision. He relied on the case of **Manuel Amidos –vs- Kinangop Windpark Ltd (in Receivership) and 2 others (2019) eKLR** to fortify the submissions. Thus, counsel urged this court to sustain the appeal and reverse the trial court's decision with costs in this appeal.
7. On the other hand, learned counsel for the respondent stated brief facts of the matter and made reference to the grounds of appeal. Counsel proceeded to frame and analyze in favour of the respondents, two (2) issues for determination namely whether the appeal is meritorious and whether the appellant deserves the orders sought in the appeal. To buttress his submissions, counsel cited **sections 24 and 26 of the Land Registration, 2016 (2012) (the LRA herein) and Article 50 of the Constitution of Kenya, 2010**.
8. Counsel further relied on the case of **Hassan Mohamed Haji –vs- Mohamed Keynan and another (2019) eKLR** to reinforce his submissions. He therefore, craved for dismissal of this appeal with costs to the respondent.
9. Briefly, the genesis of the instant appeal was a claim initiated before the trial court by way of a plaint dated 30<sup>th</sup> September 2015 whereby it was alleged that the appellant had trespassed into the suit property. Thus, the respondent sought orders of eviction and permanent injunction and costs of the suit against the appellant.
10. In his statement of defence dated 16<sup>th</sup> October 2015, the appellant denied the respondent's claim and sought dismissal of the suit with costs. The appellant stated, inter alia, that he occupies, utilizes and has indefeasible ownership over the suit property which is part of their family land. That the registration of the suit property in the name of the respondent was procured by fraud, misrepresentation and collusion as the appellant is entitled to the suit property.
11. The trial court heard the evidence of Hibraham Genga Onyango (PW1), a director of the respondent company as well as the evidence in support of the appellant's case in form of testimonies of Plista Odero (DW1) Margaret Opiyo Opapa (DW2) and the appellant (DW3) on 4<sup>th</sup> July 2018. The court then rendered its decision on 12<sup>th</sup> September 2018 hence provoking the instant appeal.
12. I have duly considered the pleadings, the evidence, the proceedings and the judgement of the trial court alongside the grounds of appeal and rival submissions including the authorities cited therein. As a first appellate court, it is my singular duty to exhaustively re-evaluate and re-appraise the entire evidence afresh to come to my own conclusions and inferences of fact as held in **Williamson Diamonds Ltd –vs- Brown (1970) EA 1**.
13. This court is pretty attentive to the findings of the learned trial magistrate who had the added advantage of having seen and heard the witnesses at the trial. Obviously, I am limited to the said advantage; see **PIL Kenya Limited-vs- Oppong (2009)KLR 442**.
14. While this court has jurisdiction to review the evidence of the trial court as aforesaid, the jurisdiction should be exercised with great caution. So, the trial court's decision should not be interfered with unless the same is based on no evidence or a misapprehension of the same or premised on wrong principles of fact and law in arriving at it as recognised by the Court of Appeal in the case of **Mwanasokoni-vs- Kenya Bus Services Ltd (1982-88) IKAR 278**.
15. It is important to note that what is at hand for determination is whether the respondent established his case before the trial court on a balance of probabilities. As such, is the present appeal merited to prompt this court to grant the orders sought herein?
16. Clearly, the respondent's claim against the appellant in the plaint was for trespass to the suit property. The alleged trespass is distinctly pleaded at paragraph 5 of the plaint.
17. The respondent through one of its directors (PW1), testified that the appellant encroached into the respondent's land namely the suit property. PW1 relied on a certificate of official search dated 26<sup>th</sup> August 2015 (PEXh1) in respect of the suit property, among other documents, to tighten the respondent's claim.
18. PW1 further testified that the appellant was a trespasser on the suit property as the respondent's title deed to the property came as a first registration. It is pretty clear from PART B of PEXh1 that title deed thereto was issued in favour of the respondent on 2<sup>nd</sup> May 2013.
19. In his defence dated 16<sup>th</sup> October 2015 and filed in the trial court on 21<sup>st</sup> October 2015, the appellant termed the respondent's allegations spurious, unmaintainable and sought dismissal of the appellant's suit with costs. While denying the respondent's claim, he stated inter alia, that he had indefeasible proprietorship over the suit property which is part of their family land.
20. At paragraphs 3 and 7 of the defence, the appellant alleged that any registration and conveyance in favour of the respondent was procured through fraud, misrepresentation and collusion. On that score, I take into account the definition of the said three terms in the **Black's Law Dictionary 10<sup>th</sup> Edition**. No doubt, under section 26 (1) of the LRA, prima facie evidence of title to land can be challenged on the grounds including fraud and misrepresentation; see also the decision of Kneeler, J in **Kimani Ruchine and another-vs- Swift Rutherford Co Ltd**

and another (1976-80) which I endorse accordingly.

21. Quite plainly, the appellant challenged the respondent's right and registration of the suit property in the trial court. However, he failed to succinctly plead and provide evidence to establish fraud and misrepresentation on the part of the respondent to the requisite standards as held in a long range of authorities including **Kuria Kiarie and 2 others-vs-Sammy Magera (2018)eKLR** and **Koinange and 3 others-vs-Koinange (1986) KLR 23**.

22. The respondent asserted that the appellant is a trespasser on the suit property. *Clerk and Lindsell on Torts, 18<sup>th</sup> Edition* at paragraph 18-01 defined "Trespass" thus;

*"An unjustifiable entry by one person upon the land in possession of another..."*

23. The appellant (DW3) admitted that he was utilizing the suit property following the permission of DW1. This was affirmed by DW1 and DW2 in an attempt to show that the appellant is in unlawful possession of the suit property. However, it is pointedly evident that the respondent is the proprietor of the suit property by virtue of sections 2,24,25 and 26 (1) of the LRA.

24. Article 40 (1) of the Constitution of Kenya, 2010 anchors protection of right to property. The respondent has demonstrated that the appellant is in unlawful possession of the suit property as stipulated under section 152A of the Land Act, 2016 (2012) which reads:

*"A person shall not unlawfully occupy private, community or public land." (Emphasis laid)*

25. To this end, it is the finding of this court that the learned trial magistrate correctly applied himself to the facts and the law in arriving at the impugned decision. Wherefore there are no sound reasons or at all, to disturb his informed findings. This appeal is want of merit.

26. Accordingly, the present appeal generated by way of a memorandum of appeal dated 19<sup>th</sup> September 2018 and filed in court on 25<sup>th</sup> September 2018 be and is hereby dismissed.

27. By dint of the proviso to section 27 (1) of the Civil Procedure Act chapter 21 Laws of Kenya and the Supreme Court of Kenya decision in **Rai-vs-Rai (2014) eKLR**, the costs of this appeal and in the original suit, shall be borne by the appellant.

**Delivered, Signed and Dated at Migori through email pursuant to,inter alia, Articles 7 (3) (b),159 (2) (b) and (d) of the Constitution of Kenya, 2010, Section 3A of Civil Procedure Act chapter 21 Laws of Kenya and Sections 3 and 19 of the Environment and Land Court Act, 2015 (2011) due to the prevailing Corona Virus pandemic, this 27<sup>th</sup> day of May, 2020.**

**G.M.A. ONGONDO**

**JUDGE**