



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELCA CASE NO. 29 OF 2019**

**COLLINS KIDIYA OMBEVA.....APPELLANT**

**VERSUS**

**CRISPO OMBEVA KIDIYA.....RESPONDENT**

**JUDGEMENT**

The appellant being dissatisfied with the judgment of Hon. M.L Nabibya (SRM) delivered in HAMISI ELC NO. 9 OF 2019 on the 25<sup>th</sup> July 2019 do hereby prefer this appeal and puts forth the following grounds of appeal:-

1. That the learned trial magistrate failed to consider, evaluate and analyze the evidence or records from both parties, thereby coming to a wrong conclusion on both point of fact and law.
2. That the trial court failed to safeguard his rights (appellant) to secure a fair trial.
3. That, the trial court based its findings on wrong principles of the law.
4. That the learned trial magistrate erred in law and in facts in failing to grant an adjournment to the appellant to enable him instruct counsels of his choice as required by the law, thereby infringing his constitutional rights to legal representation.
5. That the trial court amplified on the weakness on his side to buttress on otherwise a very weak civil case.
6. That the trial court imported extraneous consideration and reasons in arriving at the judgment.
7. That the learned trial magistrate erred in both point of law and facts by failing to give reasons and or justifications to the judgment of eviction given to the appellant in extremely harsh and manifestly high in the circumstances.
8. That, the learned trial magistrate erred in both point of law and facts in failing to evaluate his statement of defense and his witnesses which was strong enough to secure him in this case.
9. That the learned trial magistrate erred in both point of law and facts when she delivered her judgment based on the matter which were solved by the family members 15 years back, of which was not a matter before the court, and failing to consider that him and his sister Loyce Kidiya Ombeva one of his defense witness were to inherit their late father's possession.
10. That the learned trial magistrate failed to observe that the submissions by the learned council Mr. Mukabi were irrelevant, the learned council based his argument on a criminal charge of arson which was not before the table.
11. That, since he cannot recall all that was adduced before the court during trial, he prays to be served with certified copies of the court proceedings and judgment under section 170 of the CPC Cap 75 Laws of Kenya.
12. That the learned trial magistrate failed to observe before delivering her judgment that he was not given the title deed before the court of which he ordered that he was to move before giving order of eviction.
13. That the learned trial magistrate never considered the sizes of the two lands before giving judgment.

The respondent submitted that the trial learned magistrate did not err in any way whatsoever because she entirely relied on the evidence on

record. That the appellant has his piece of land which was bought for him by his grandfather Crispo Ombega Kidiya. That the appellant has no reason to demand land from him (grandfather). The appellant without any lawful authority or justifiable cause decided to trespass on the respondent's piece of land which he, the respondent has a title deed. That from the court proceedings, there is nowhere the appellant requested the court to adjourn the case because he wanted to engage an advocate to represent him. The trial magistrate gave reasons for eviction in her judgment. He urges the court to uphold the lower court's verdict and evict the appellant from his lawful piece of land.

This court has carefully considered the appeal and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyang'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

I have perused the records of the lower court and it is a finding of fact the plaintiff/respondent is the registered proprietor of Land parcel No.Tiriki/Gisambai/2033. It is a finding of fact the plaintiff is the defendant's grandfather. It is in evidence that he distributed his properties and gave the estate of his deceased son a piece of land which was to be shared among his children the defendant included. I find that the learned trial magistrate did not err in both point of law and facts when she delivered her judgment based on the evidence and the defendant/appellant was accorded a fair trial.

In the case of Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF JULY 2020.**

**N.A. MATHEKA**

**JUDGE**