**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**HC. APPEAL NO. 56 OF 2012**

**JAMES NG'ANGA MURIUKI…….1ST APPELLANT**

**DRICOS HELP GROUP……..2ND APPELLANT**

**VERSUS**

**JAMES NAKHULO ORODI……RESPONDENT**

**J U D G M E N T**

## 1. BACKGROUND

a. **JAMES NG'ANG'A MURIUKI** and **DRICOS SELF HELP GROUP,**

hereinafter referred to as the 1st and 2nd Appellant, filed Busia CMCC. NO. 406 of 2008 against **JAMES NAKHULO ORODI,** hereinafter referred to as the Respondent, through the plaint dated 27th November, 2008. They prayed for Respondent to be restrained from interfering with the ***''2nd Plaintiff's peaceful and quiet occupation and use of LR. No. Bukhayo/Bugengi/5198.''*** and costs. The trial court delivered its judgment on 30th August, 2012 in which the Appellants suit was dismissed with half the costs.

b. The Appellants, not being satisfied with the trial court's judgment of 30th August, 2012 filed this appeal through the Memorandum of appeal dated 27th September, 2012 on the 28th September, 2012 setting out seven grounds.
c. The Appellant then filed the Record of Appeal dated 25th March, 2014on the 26th March, 2014 following the directions issued by this court on 5th March, 2014.
d. The 1st Appellant , who is also Chairman to the 2nd Appellant, and Mr. Ipapu advocate for Respondent, appeared in court on 2nd March, 2015 and agreed to have the appeal heard on 13th May, 2015.
e. The 1st Appellant presented submissions on behalf of the 2nd Appellant and himself on 13th May, 2015. Mr. Ipapu advocate for the Respondent also offered his submissions on the same date.

## 2. THE APPEAL.

a. The Appellants' seven grounds in the memorandum of appeal are summarized for the purposes of this judgment as follows;

i. That the learned trial Magistrate erred in fact and law by allowing a person not lisenced to practice as an advocate to represent the Respondent. [Ground 1].
ii. The learned trial Magistrate erred in fact and in law by preparing and delivering a judgment in

a case heard by another judicial officer over a land parcel not pleaded and against a person who was not a party in the proceedings. [Combination of grounds 2, 3 and 6].

iii. That the learned trial Magistrate erred in fact and law by shifting or attempting to shift the burden of proof of allegations made by the Respondent on the Appellants and basing the judgment on the wrong ratio decidendi. [Ground 4 and 5]

iv. That the learned trial Magistrate erred in law and fact by condemning the Appellants pay the costs of the case in contravention of the law, fact and equity.[Ground 7].

b) During the hearing of the appeal, the 1st Appellant submitted as follows;

i. That the advocate who represented the Respondent during the trial court proceedings did not have a practicing certificate.
ii. That the learned trial Magistrate who delivered the judgment was not the one who had heard the witnesses.
iii. That the suit property was Bukhayo/Bugengi/5198 but the trial court erred to say it did not exist while they had documentary evidence issued by Lands office showing the contrary.
iv. That the Appellant had adduced sufficient evidence to get the judgment in their favour.
v. That the Appellants had availed other witnesses who were not accorded the opportunity to testify by the trial court.
vi. That the Appellants have no dispute with the person who sold the suit land to them.
vii. That the Appellants had applied for execution of costs to be stopped but the execution took place nevertheless.
viii. That the Appellants should be allowed to call further evidence of two witnesses and to produce additional documentary evidence.
ix. That the Lower courts orders of 30th August, 2012 should be set aside and judgment in favour of the Appellants entered.
x. That the advocate who represented the parties in the lower court case and this appeal operated from the same offices and that the advocates played around with them as they knew the details of the documentary evidence in their possession.

c) The counsel for the Respondent submitted as follows;

i. That the appeal was filed out of time and without leave. He submitted that the appeal was filed on 5th November, 2012 over the judgment delivered on 30th August, 2012.
ii. That the appeal as filed is not competent as no decree has been extracted and annexed which contravenes Order 42 Rule 1 (2) of the CPR.
iii. That there was no issue raised and decided on the capacity of the counsel representing the Respondent in the Lower court proceedings and therefore the issue of counsel's capacity cannot be a ground of appeal.
iv. That the law allows a Magistrate who has not heard the evidence to prepare and deliver judgment on the evidence on record. That the Appellants did not raise any objection to the Magistrate who had not heard the evidence preparing and delivering the judgment.
v. That the Lower court record shows that the Appellants were allowed to reopen their case and the claim that their witnesses were locked out cannot be true.
vi. That the learned trial Magistrate was right to find that the Appellants had been duped by their witness ,(PW 2) into buying a non-existent suit and their appeal should be dismissed with costs.

3. That having considered the pleadings and submissions by the 1st Appellant and counsel for the Respondent, the court finds the following issues are for determination in this appeal.

a) Whether the capacity of the counsel representing the Respondent in the trial court was raised and if so whether the learned trial Magistrate's decision on the matter was erroneous.

b) Whether a Magistrate who has not heard the witnesses is allowed by the law to

prepare and deliver judgment on the evidence on record, and if so, whether the judgment of 30th August, 2012 was over a parcel of land that was not in the pleadings and against a person who was not a party in the proceedings.

c) Whether the learned trial Magistrate based the judgment of 30th August, 2012 on the wrong ratio decidendi and whether the learned trial Magistrate shifted or attempted to shift the burden of proof on allegations raised by the Respondent to the Appellants.

d) Whether the learned trial Magistrate erred in ordering the Appellants to pay half the costs of the suit to the Respondent.

**4. ANALYSIS OF THE APPEAL.**

This court is obliged to re-evaluate the evidence adduced before the trial court bearing in mind that it did not see or hear the witnesses testify and draw its own conclusion on the evidence as this is a first appeal. [see ***Seller –v- Associated Motor Sport Company Limited*** 1968 E.A 128]. The court will go through the process of re-evaluating the evidence as it addresses the grounds of appeal put forth by the Appellants.

a. The a court has perused the lower court file and noted that the Appellants filed the plaint dated 27th November, 2008 through M/S. Maloba and company advocates. The Respondent filed the defence dated 8th January, 2009 in person. Then on 8th September, 2009, M/S. Ipapu Jakaa & company advocates filed a notice of appointment of advocate coming on record for the Defendant. Then M/S. Gacheche Wa Miano filed a notice of change of advocate dated 10th December, 2009 coming on record for the Appellants, (Plaintiffs), in place of M/S. Maloba & company advocates. Then on 17th December, 2009 M/S. Ipapu P. Jackah & company advocates, filed a notice of appointment for the Defendant, (Respondent). The court has further noted that the Appellants filed a notice of motion dated 9th August, 2011 under ***Order 2 Rule 15, Order 51 Rule 1 of the Civil Procedure Rules and section 3A of Civil Procedure Act*** seeking to have the defence and pleadings ***''filed and argued on behalf of the Defendant/Respondent in this matter be dismissed and/or be stuck out with costs….''*** In the supporting affidavit sworn by Gacheche Wa Miano on 9th August, 2011, the deponent indicated that Ipapu Jackah advocate had no valid practicing certificate for the year 2011 and that he had not obtained one since 2009. There is however no evidence to show whether the application was ever served on the Respondent's counsel. When the case came up in court on the first date following the filing of the application dated 9th August, 2011, it was for hearing of another application by the Appellants dated 26th July, 2011seeking to recall the District Land Registrar to produce some documents. This was on 26th April, 2012 before Honourable B.A. Ojoo, Principal Magistrate. The court record shows Mr. Miano for the Appellants was present and he told the court the matter was for directions. The court rescheduled the mention to 17th May, 2012 as counsel for the Respondent was absent. The matter was again rescheduled by Appellants' counsel to 26th June, 2012. On that day both counsel were present and each addressed the court after which the trial court made the order that application dated 26th July, 2011 was marked withdrawn and that submissions would be on 12th July, 2012. The counsel for the Appellants did not mention or address the court on the application dated 9th August, 2011 challenging the Respondent's counsel capacity and the trial court did not at any one time pronounce itself on the issues raised in that application. The next court appearance was on 12th July, 2012 when counsel indicated that they had filed written submissions and Honorable B.A. Ojoo, Principal Magistrate fixed the case for judgment on 16th August, 2012. The judgment was eventually delivered on 30th August, 2012. There is no indication as to what happened on the earlier date of 16th August, 2012. The law does not allow a person who is not qualified to act as an advocate. ***Section 2 of the Advocates Act, Chapter 16 of the Laws of Kenya*** defines unqualified person as ***''a person not qualified under section 9 to act as an advocate.'' Section 9 of the Advocates Act*** provides that no person shall be qualified

to act as an advocate unless, he has been admitted as an advocate, his name is for the time being on the roll in addition to having in force a practicing certificate and is not suspended under sections 27 or by an order under section 60 (4) of the said Act. The filing of the application dated 9th August, 2011 by the Appellants' counsel in the trial court was raising an allegation which appear not to have been brought to the attention of the Respondent and his counsel through service. The Appellants also did not call the court's attention to the application and the trial court therefore never addressed itself to that application. The trial court did not also pronounce itself on the matter of the Respondent's counsel's capacity one way or the other. The court therefore agrees with the Respondent's counsel submissions that the Appellants cannot raise the issue of capacity of Respondent's counsel on appeal as it was never an issue raised and determined during the proceedings before the trial court. In the case of ***Salim Kazungu –v- Kenya Ports Authority [2001]*** eKLR, the learned judge declined to invalidated the pleadings drawn by an advocate who had no current practicing certificate in a case where judgment had been entered. In that case Mulwa J stated;

> ***''……I do not wish the Plaintiff should suffer by invalidating the pleadings and proceedings just because the persons who acted for him had not, during the period taken out his annual practicing certificate. Rather , l would have the penalties prescribed under section 30 be visited on the advocate…….. Annulling the proceedings on the grounds that the advocate did not have an annual practicing certificate cannot be said to be one of the ways of enhancing access to justice.''***

The court agrees with the position taken by the learned judge in instances of proceedings that have been concluded. But in instances where the capacity of the person acting as an advocate is raised early in the proceedings, the court agrees with the position taken by the court in ***Kingsway Tyres & Auto Mart Ltd. –v- Abon Retreading and Company ltd & others.*** HCCC NO. 56 of 1999 (unreported) which was cited in the earlier case by Mulwa J, where the court struck out the plaint filed by an advocate who did not have a practising certificate at the material time. This court therefore finds no merit on ground one of the appeal.

b) That on the issue touching on grounds 2, 3 and 6 of the appeal, the lower court record shows that all the evidence was heard by Honourable E.H. Keago, SRM, between 17th December, 2009 and14th July, 2011. The record does not disclose why the said Honourable Magistrate did not proceed with the matter beyond that point as the judgment was prepared and delivered by Honourable B.A. Ojoo, Principal Magistrate. The Appellants have taken issue with this fact but the court finds no merit on that ground for the following reasons; First, both parties were represented by counsel during the lower court proceedings and therefore are taken to have received the relevant legal guidance. When the matter came before Honourable B.A. Ojoo on 28th June, 2012 , the counsel for the Appellants informed the court that the matter was partly heard and asked the court to issue directions. The counsel for the Respondent proposed that the matter do proceed from where it had reached. Then the court directed counsel to file submissions and fixed the matter for mention on 12th July, 2012. This clearly shows that the Appellants were aware that the hearing was to proceed from where the previous trial Magistrate had reached and there was no application to start the hearing de novo. Secondly, the law allows the taking over of partly heard cases as can be seen in ***Order 18 Rule 8 (1) of Civil Procedure Rules*** which states;

> ***'' 8 (1) Where a judge is prevented by death, transfer or other cause from concluding trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and stage at which his predecessor left it.''***

This is exactly what Honourable B.A. Ojoo did with the concurrence of the parties counsel and there was no prejudice suffered by the Appellants. Thirdly, on the issue of the subject matter of the suit, the plaint dated 27th November, 2008 clearly shows that it was land parcel Bukhayo/Bugengi/5198 which the Appellants alleged that they had bought from Harold Lungaho Navodera, who testified as PW 2, before the learned trial Magistrate. The court also notes that the Respondent in the defence dated 8th January,

2009 pleaded that he is the registered proprietor of Bukhayo/Bugengi/5163 and disputed the Appellants' claim that they were the registered proprietors of parcel Bukhayo/Bugengi/5198. During the hearing before the trial court, PW 2 testified that the land Parcel Bukhayo.Bugengi/5198, which he sold to the Appellants, had come from Bukhayo/Bugengi/5163 and that he had bought it from the Respondent. The Respondent testified as DW 1, and told the court that he owned Bukhayo/Bugengi/5163 which he later subdivided into parcels Bukhayo/Bugengi/8231 and 8232. He further testified that Bukhayo/Bugengi/5198, which the Appellants were suing on, did not exist, and denied selling it to PW 2. The learned trial Magistrate analysed the evidence adduced before the Lower court in her judgment of 30th August, 2012 and held as follows;

***'' In my view, it was incumbent upon the Plaintiffs to demonstrate the nexus between their land No. 5198 and the original land No.5163 to establish a cause of action. In his regard, the evidence of PW 2 and PW 4 were key to establish a case. Whereas it has been shown that PW 2 may have purchased the suit land from the Defendant, there was no cogent evidence led to support this allegations. It is trite law that he who alleges must prove,……I sympathize with the Plaintiffs but it is clear they could have purchased a non-existent parcel of land and or the location of the suit parcel was deliberately switched perhaps by collusion with the Lands office personnel…….. their redress would best lie with the person who purported to sell them the land in terms of a refund. I dismiss the plaintiffs suit against the defendant.''***

The provision of section 116 of the Evidence Act Chapter 80 of Laws of Kenya requires the person challenging ownership of something in possession of another to offer proof. The evidence adduced before the trial court shows that the land the Appellants alleges is Bukhayo/Bugengi/5198, but which Respondent alleged was Bukhayo/Bugengi/8231, is occupied by the Respondent . It was therefore the duty of the Appellants to offer evidence that the land the Respondent occupied was parcel Bukhayo/Bugengi/5198 and not Bukhayo/Ebusibwabo/8231. The trial court did not shift the burden of proof as alleged. Though the Land Registrar, who testified as PW 4, indicated that the title documents issued for parcels Bukhayo/Bugengi/8231 and 5198 were all genuine and that they were both subdivisions from Bukhayo/Bugengi/5163, the mutations creating Bukhayo/Bugengi/5198 were not availed to the trial court. The documents allegedly used to transfer Bukhayo/Bugengi/5198 from the Respondent to PW 2 and from PW 2 to 2nd Appellant were also not availed before the trial court. The responsibility to ensure those documents were produced lay with the Appellants. The court also notes that land parcel Bukhayo/Bugengi/5198 did not exist in the 2010 survey map that was produced as exhibit by PW 4. The Respondent's defence was that he never subdivided his land parcel Bukhayo/Bugengi/5163 to create parcel Bukhayo/Ebusibwabo/5198. He further denied the existence of Bukhayo/Bugengi/5198 or selling it to PW 2. It was also not clarified whether PW 2 had taken possession of the land described as Bukhayo/Bugengi/5198 after buying it from Respondent, and whether he placed the 2nd Appellant in possession by showing him the parcel's physical position on the ground. For the reasons set out above, the court concurs with the finding of the learned trial Magistrate that the Appellants failed to prove that land parcel Bukhayo/Bugengi/5198 was a subdivision from Bukhayo/Bugengi/5163 and that it exists on the ground for the court to issue the injunction order sought. The learned trial Magistrate was therefore correct in view of the decision of the Court of Appeal in ***Munyu Maina –v- Hiram Gathina Maina [2013]*** eKLR where the court held;

***'' We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.''***

The Respondent had in his filed defence challenged the Appellants title to the land parcel Bukhayo/Bugengi/5198. Was the learned trial Magistrate's judgment of 30th August, 2012 against a non-party and did it relate to a subject matter that Appellants had not pleaded for ?.In the excerpt of the learned trial Magistrate judgment set out above, it is apparent the Appellants case was dismissed. The trial court's reference to other parcels of land like Bukhayo/Bugengi/5163, 8231 and 8232 was necessary in the analysis of the evidence tendered by both parties with a view of resolving whether the land that the

Respondent was in occupation of was the same one that the Appellants claimed as theirs. The judgment was therefore not over any other subject matter but Bukhayo/Bugengi/5198. The judgment was also not against PW 2 as the learned trial magistrate was only offering unsolicitated advice to the Appellants on a possible recourse. The foregoing shows that there is no merit on grounds 2, 3 and 6 of the appeal.

c) That in relation to ground 5 of the appeal, the court finds that the learned trial Magistrate clearly captured the applicable rule of law that the one who alleges bears the burden of proof. The Appellants were the ones alleging that the land the Respondent was in possession of was their land and that he should be injuncted from interfering with their use. The Appellants therefore had the duty to offer evidence to support their case beyond claiming that they bought it from PW 2 and that the 2nd Appellant was registered with the title. [***See Shan Deshpal Wadhwa –v- Habib Abu Mohammed & 5 others [2015]*** eKLR ***and Munyu Maina –vs- Hiram Gathiha Maina (Supra)].*** The learned trial Magistrate did not at all mislead herself on the party who had responsibility to prove the material facts.The learned trial Magistrate did not also mislead or misapprehend the ratio decidendi applicable in this case as alleged and grounds 4 and 5 of the appeal fails as well.

d) That on ground 7 on who pays costs of the suit, the applicable provision is section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya. Ordinarily, costs follow the event unless the trial court for good reasons orders otherwise.This clearly shows that the trial court has discretion on the issue of costs but that discretion must be exercised judiciously. In the judgment subject matter of this appeal, the learned trial Magistrate order on the costs was as follows;

***'' The plaintiffs shall pay only half costs of the suit to the defendants as they were also victims of misrepresentation by 3rd party.''***

The trial court having dismissed the Appellants case could have made an order of costs that follows the event. In that case the Appellants would have been ordered to pay the full costs but the learned trial Magistrate exercised her discretion under ***section 27 of the Civil Procedure Act*** and ordered half the costs.The learned trial Magistrate had earlier in her judgment expressed her sympathy to the Appellants and in the final party of the judgment gave her reason for ordering half the costs to be the appreciation that the Appellants had suffered due to a 3rd party's action. This court do not find any basis to interfere with the learned trial Magistrate's exercise of discretion as it was properly exercised. The Appellants therefore fails on ground 7 also.

e) That as the Memorandum of appeal dated 27th September, 2012 was filed on 28th September, 2012, the appeal was filed within time. The appeal is also not defective as alleged as the judgment of 30th August, 2012 that is the subject matter of this appeal was among the documents in the record of appeal.

f) That the Lower court record does not contain any record of Appellants request to avail witnesses or produce documentary evidence being declined. The Appellants withdrew their application dated 26th July, 2011 for the recalling of the Land Registrar on 26th June, 2012. The Appellants cannot therefore blame the trial court for their failure to call the alleged two witnesses or produce any documents.The Appellants have also not moved this court under ***Order 42 Rule 27 of the Civil Procedure Rules*** to adduce further evidence in the appeal.

5. The court therefore finds no merit in the appeal filed by the Appellants against the Respondent. The appeal is accordingly dismissed with costs and the Lower court judgment of 30th August, 2012 upheld.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE,**

**DATED AND DELIVERED ON… 13th …….DAY OF JULY, 2015.**

**IN THE PRESENCE OF;**

**1ST APPELLANT……PRESENT……**

**2ND APPELLANT……MOSES KAMAU - SECRETARY……..**

**RESPONDENT…… ABSENT…..……**

**COUNSEL……MR. IPAPU FOR RESPONDENT……..**

**JUDGE**