



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

APPEAL NO. 15 OF 2015

**KIMANI MUNGAI JOSEPH (Suing as the Legal Representative of
the Estate of John Gaitho (Deceased).....APPELLANT**

VERSUS

CECILIA M. SPENCER.....RESPONDENT

(Being an appeal from the Judgment of the Chief Magistrate's Court of Kenya, at Mombasa (Hon. M. K. Mwangi Senior Resident Magistrate) delivered on 12 July 2011 in Mombasa CMCC No. 3693 of 2001 CECILIA M. SPENCER VERSUS JOHN GAITHO)

JUDGMENT

(Original suit filed by respondent seeking inter alia to restrain the original defendant from certain properties; respondent as plaintiff testifying and calling a witness; original defendant also giving evidence; record of appeal and hand written proceedings of the evidence of the original defendant not available; original defendant passing on after judgment; court not able to determine the appeal as his evidence is not on record; not possible for his evidence to be taken as he is deceased; court making an order for a retrial; judgment set aside with order that a fresh trial be undertaken with liberty to the respondent to rely on her evidence earlier taken)

1. This is an appeal from the decision of the Honourable Senior Resident Magistrate M.K Mwangi delivered on 12 July 2011. The suit before the Magistrate's Court was commenced by the respondent through a plaint which was filed on 14 September 2001. The respondent pleaded that she is the rightful owner of the land identified as Sub-Plot No. 18 on the Plot No. 27/Section I/Mainland North. She pleaded that in June 1996, the appellant wrongfully entered the said plot and started developing it. In the plaint, she asked for general damages for trespass, a permanent injunction against the appellant to restrain him from the suit land, an order for him to demolish any buildings erected on the land, costs and interest. The appellant filed defence where he inter alia denied that the suit land exists. He pleaded that the only title that exists is the mother title being Plot No. 27/Section I/MN in the name of Hamisi Juma Malee (deceased), and that on this land is the respondent's house, the appellant's house, and over 70 other houses. He stated that the house which is the subject matter of the dispute was purchased from Ephantus Kimani Njoroge, who in turn had purchased it from the deceased on 30 July 1989, and the adjacent land forming the front of the appellant's compound was purchased from the administrator of the estate of the deceased. He also pleaded the presence of a previous suit, Mombasa CMCC No. 2171 of 2001 which he said was struck out.

2. From the record before me, I have seen that the respondent (as plaintiff) gave evidence and called one

witness. The original defendant, John Gaitho, also testified and called one witness. I have seen that he gave his evidence on 9 December 2010. He died on 17 June 2013 and he was substituted on 16 April 2014 after judgment had been delivered. I have gone through the record of appeal but it does not contain the whole of the evidence of Mr. Gaitho. I do not have a large part of his evidence in chief and almost all of his evidence during cross-examination. I have cross-checked with the original hand written record and it is the same. It appears as if the hand written proceedings containing a big chunk of his evidence may have fallen off. I thus cannot tell what sort of evidence he presented before court.

3. I pointed this out to counsel and they have left the issue to court.

4. I have looked up at the Civil Procedure Act, Cap 21, which guides the court on the options to take on appeal. Section 78 of the Civil Procedure Act provides as follows :-

78. Powers of appellate court

(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.

5. I have pondered on the best cause of action to take given that I do not have the evidence of the defendant in the original suit. I certainly cannot determine the appeal on its merits as I do not have his evidence. I therefore cannot tell from the record as to whether or not his appeal is merited. The only options left are either to take, or have his evidence taken, or order a new trial. His evidence cannot now be taken as he is deceased. That leaves me with only one option, and that is to order a new trial.

6. For the above reasons, the judgment of 12 July 2011 is hereby set aside with the order that the case be remitted back to the Chief Magistrate's Court at Mombasa for a fresh trial to be held. Because the evidence of the respondent is intact, if she so opts, she is at liberty, during the retrial, to rely fully on the evidence that she had supplied to the court in the original trial, unless the court that will hear the retrial has an issue to raise with the said evidence, or cannot comprehend the same, such that fresh evidence by the respondent will be required to be tendered. The appellant will of course have to tender evidence afresh, if he is to defend the suit, for it is his evidence which is missing.

7. I make no orders as to the costs of this appeal.

8. Judgment accordingly.

DATED AND DELIVERED THIS 24 DAY OF SEPTEMBER 2020

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JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA