



No. 270

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 244 OF 2003

MONICA NYABOKE MAROKO.....1<sup>ST</sup> APPELLANT

DORCA MORAA MAROKO.....2<sup>ND</sup> APPELLANT

CHARLES ABUGA.....3<sup>RD</sup> APPELLANT

BENARD MAROKO.....4<sup>TH</sup> APPELLANT

VERSUS

JUDSON NYABOGA OGWORA.....RESPONDENT

JUDGMENT

*(Being an appeal from the Judgment and Decree of the Chief Magistrate's Court*

*at Kisii, Hon. S.M Soita (PM) in CMCC No. 598 of 2000 dated 21<sup>st</sup> May 2003)*

1. By an amended plaint dated 7<sup>th</sup> November 2002 the respondent herein Judson Nyaboga Ogwora (hereinafter referred to only as “**the respondent**”) brought a suit in the Chief Magistrate’s Court at Kisii against the appellants, namely, **Civil Case No. 598 of 2000, Judson Nyaboga Ogwora –vs- Monica Nyaboکه Maroko & 3 Others** (hereinafter referred to as “**the lower court case**”) claiming; damages for loss of user, mental agony and suffering, an order for the eviction of the appellants from all that parcel of land known as **LR. No. West Mugirango/Bosamaro/1802** (hereinafter referred to as “**the suit property**”), a permanent injunction restraining the appellants from trespassing on the suit property and the cost of the suit. In the amended plaint, the respondent averred that he is the registered proprietor of the suit property and that on or around June 2000, the 1<sup>st</sup> and 2<sup>nd</sup> appellants herein unlawfully trespassed into the suit property and while thereon cultivated and planted sweet potatoes and finger millets which they eventually harvested.

2. The respondent averred further that on 28<sup>th</sup> July 2002, the 3<sup>rd</sup> and 4<sup>th</sup> appellants herein also unlawfully trespassed into the suit property and cultivated and planted maize which as at the time of filing suit was ready for harvesting. The respondent averred that as a result of the appellants’ illegal and forceful entry into the suit property, the respondent had suffered loss of user of the suit property, mental agony, pain and suffering. It is on account of the foregoing that the respondent sought an order for the eviction of the

appellants herein from the suit property and a permanent injunction to restrain them, their agents and servants from ever trespassing once again on the suit property. The respondent also sought damages for loss of user of the suit property and for mental torture and suffering. The appellants entered appearance and filed a joint statement of defence on 26<sup>th</sup> November 2002. In their statement of defence the appellants denied that they have trespassed onto the suit property as claimed by the respondent. The appellants contended further that the respondent's suit in the lower court was incurably defective, bad in law and should be struck out. The appellants contended further that the respondent was not entitled to any general damages as claimed or at all.

3. On the merits of the respondents claim in the lower court, the appellants contended that the lower court suit was brought in bad faith since the same had been arbitrated in Kisii High Court Succession Cause No. 285 of 1995, Nyamira Criminal Case No. 47 of 1999, Republic –vs- Benard Maroko and Another, Nyamira Criminal Case No. 305 of 2002 Republic –vs- Monica Maroko and 2 Others. The appellants contended that the respondent herein had acquired the suit property fraudulently through collusion with the 1<sup>st</sup> and 2<sup>nd</sup> appellants' husband one, Madson Maroko and that through that fraud and collusion, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellants had been deprived of their only ancestral land. The appellants urged the lower court to dismiss the respondent's suit in the lower court with costs.

4. On 13<sup>th</sup> February 2002, the lower court case was listed for hearing on 16<sup>th</sup> April 2003 by the respondent's advocates. The appellants advocates were duly served with a hearing notice which they received under protest contending that they had prior engagements in other courts. When the case came up for hearing on 16<sup>th</sup> April 2003 before S. M Soita PM, the appellants did not appear together with their advocates. Only the respondent and his advocate appeared in court. After satisfying himself that the appellants' advocates were duly served with a hearing notice, the court allowed the respondent's advocate to proceed with the hearing. The respondent gave evidence and closed his case. In a reserved judgment that was delivered on 21<sup>st</sup> May 2003, the lower court entered judgment for the respondent against the appellants. The court awarded the respondent a sum of Kshs. 80,000.00 as general damages and also gave an order for the eviction of the appellants from the suit property. In addition, the court issued a permanent injunction to restrain the appellants from trespassing on the suit property and also awarded the respondents the costs of the suit.

5. On 25<sup>th</sup> July 2003, the appellants filed an application by way of Chamber Summons under Order IX (b) Rule 8 and Order XXI Rule 22 of the repealed Civil Procedure Rules and Section 3 of the Civil Procedure Act, seeking an order to set aside the proceedings of 16<sup>th</sup> April 2003, the judgment that was made in favour of the respondent on 21<sup>st</sup> May 2003 and all consequential orders. In the same application the appellants also sought an order of stay of execution and the reinstatement of the suit for hearing inter-partes. The appellants' application before the lower court was brought on the ground that the hearing notice was served upon the appellants advocates but they received the same under protest as they had other cases fixed for hearing before other courts on the material day. The appellants had contended also that they had a good defence to the respondent's claim which raised triable issues which they should be given an opportunity to put forward. The appellants contended further that they were not aware of the hearing date and that the respondent would not suffer any prejudice or any injustice if the orders sought were granted.

6. Finally, the appellants contended that their failure to attend court on 16<sup>th</sup> April 2003 was not deliberate but was as a result of an excusable reason. They urged the court not to make them suffer an injustice as a result of the mistake of their advocate. The appellants' application before the lower court was opposed by the respondent who filed two (2) affidavits in reply thereto. The respondent contended that the appellants were well aware of the hearing date and chose for reasons only known to them not to appear before court for the hearing. The respondent contended further that even if the appellants' advocate was engaged elsewhere that did not excuse the appellants from appearing before the court for the hearing. The respondent contended further that the suit property is registered in the name of the respondent and as such the appellants had no good defence to put forward against the respondent's claim. Finally, the respondent contended that the application was brought after unreasonable delay of more than two (2) months after the date of judgment that was sought to be set aside and that the same was frivolous, vexatious and an

abuse of the process of the court.

7. The appellants' application was heard on 29<sup>th</sup> October 2003 by S.M Soita PM and in a reserved ruling that was delivered on 19<sup>th</sup> November 2003, the court allowed the application conditionally. The judgment that was entered on 21<sup>st</sup> May 2003 was set aside on condition that the appellants deposit a sum of Kshs. 80,000.00 in an interest generating account in the names of the advocates for the parties within 30 days. The appellants were aggrieved by the said decision and have now preferred an appeal to this court against the same. The appellants have put forward eight (8) grounds of appeal against the decision of S. M Soita PM made on 19<sup>th</sup> November 2003 aforesaid. The said decision has been challenged on the following grounds:-

**1. That the learned senior resident magistrate erred in law and fact in failing to take into account that the hearing date was taken ex parte in total disregard of Order IXB rule 1 of the Civil Procedure Rules.**

**2. That the learned senior resident magistrate erred in law and fact having set aside the ex parte proceedings to give stiff conditions which were not prayed for nor pleaded for hence taking into consideration extraneous matters to the detriment of the appellants.**

**3. That the learned senior resident magistrate erred in law and fact having found that the appellants were not aware of the hearing date proceeded to visit counsel's mistake on the appellants in total disregard of the law.**

**4. That the learned senior resident magistrate erred in law and fact in acting on wrong principles of the law.**

**5. That the learned senior resident magistrate erred in law and fact in failing to appreciate that the matter before him was res judicata.**

**6. That the learned senior resident magistrate erred on matter of law and fact and misdirected himself in ordering the appellants to deposit a sum of Kshs. 80,000.00 without any basis of the law thereby condemning the appellants contrary to the rules of natural justice.**

**7. That the learned senior resident magistrate erred in law and fact in failing to appreciate that despite the respondent having obtained an ex parte judgment, the respondent's pleadings were incurably defective and bad in law as the defence raised triable issues on matters concerning ancestral land.**

**8. That the learned trial senior resident erred in law and fact and failed to appreciate that all the averments by the appellant through their respective affidavits were unchallenged by the respondent.**

8. On the basis of the said grounds of appeal, the appellants have urged the court to allow their appeal with costs by setting aside and/or varying the said decision of the lower court. On 22<sup>nd</sup> May 2013, the parties agreed to argue the appeal by way of written submissions. Both parties have filed their submissions and the same are on record. I have considered the pleadings that were filed in the lower court, the proceedings of the lower court, the application that was filed by the appellants in the lower court, the decision of the learned principal magistrate, the grounds of appeal put forward by the appellants and the parties respective submissions filed before me. The appellants' application before the lower court called for the exercise of the court's discretion. In the case of, **Mbogo & Another –vs- Shah [1968] E. A 93**, it was held that: **“An appellate court should not interfere with the exercise of the discretion of the lower court unless it is satisfied that the lower court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the lower court was clearly wrong in the exercise of its discretion and as a result there has been a misjustice.”**

9. I am not satisfied on the material before me that the lower court herein misdirected itself in any matter that was raised before it or that it arrived at a wrong decision. The lower court considered in great detail the appellants application that was seeking to set aside judgment that was entered ex parte, the arguments that were put by the appellants and the opposition by the respondent and reached a conclusion that it was necessary to set aside the said judgment but conditionally. The court therefore exercised its discretion by allowing the appellants application. The lower court set aside the judgment that had been entered ex parte but imposed a condition that the appellants do deposit in an interest earning account in the joint names of the advocates for the parties a sum of Kshs. 80,000.00 within thirty (30) days.

10. In imposing the said condition, the lower court noted that the judgment that was entered was regular in that the appellants' advocates were duly notified of the hearing date. The court observed that the fact that the appellants' advocates had engagements elsewhere was not an excuse for failing to notify the appellants of the hearing date and appearing in court for the hearing on the day when the case was heard. I am of the opinion that the lower court cannot be faulted for setting aside judgment that was entered regularly conditionally. I have not been persuaded by the appellants that the condition that was imposed by the lower court was onerous or that the appellants would have any difficulty in complying with the same.

11. Due to the foregoing, I find no merit in the appeal before me. The same is accordingly dismissed with costs to the respondent. I would however extend the time within which the appellants were to comply with the condition that was imposed by the lower court by thirty (30) days from the date hereof. In the event that the appellants fail to comply by depositing the said amount that was ordered by the lower court within the time stated herein, the judgment that was entered by the lower court shall be reinstated automatically and the respondent shall be at liberty to proceed with the execution thereof.

12. Orders accordingly.

**Delivered, dated and signed at Kisii this 6<sup>th</sup> day of June 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Oguttu h/b for Abisai            for the appellants

Mr. Okenye h/b for G. Masese    for the respondent

Mr. Mobisa                            Court Clerk

**S. OKONG'O**

**JUDGE**