



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**E.L.C. APPEAL NO. 1A OF 2017**

**CHARLES MUTHIUTUKU SEKENDU.....1<sup>ST</sup> APPELLANT**

**JOSIAH MUGENDI NJAGI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**JAMES NJERU JOEL.....RESPONDENT**

***(Being an appeal against the Judgement and decree of Hon. M.N. Gicheru (Chief Magistrate) dated 30<sup>th</sup> January 2017 in Embu CMCC Case No. 277C of 2012)***

**JUDGEMENT**

**A. INTRODUCTION AND BACKGROUND**

1. This is an appeal from the judgement and decree of Hon. M.N Gicheru (CM) dated 30<sup>th</sup> January 2017 in *Embu CMCC No. 277C of 2012 – James Njeru Joel Vs Charles M. Sekundu & Josiah Mugendi Nyaga*. By the said judgement the trial court allowed the Respondent’s suit for the eviction of the 1<sup>st</sup> Appellant from *Title No. Gaturi/Githimu/6849 (parcel 6849)*. The trial court also decreed that the 2<sup>nd</sup> Defendant and any other third parties who may have dealt with the 1<sup>st</sup> Appellant shall be entitled to a refund of the purchase price paid.
2. The material on record indicates that by a plaint dated 18<sup>th</sup> October 2012 the Respondent sought an eviction order against the 1<sup>st</sup> Appellant from *parcel 6849*, costs of the suit, interest and any further relief the court may deem fit to grant.
3. The Respondent pleaded that he and the 1<sup>st</sup> Appellant were the joint owners of *Title No. Gaturi/Githimu/6591 (parcel 6591)* out of which he obtained 0.31 ha as absolute owner which was then registered as *parcel 6849*. It was further pleaded that the 1<sup>st</sup> Appellant had unlawfully trespassed and committed waste upon *parcel 6849* without lawful justification or excuse hence the suit.
4. The 1<sup>st</sup> Respondent filed a written statement of defence dated 26<sup>th</sup> March 2013 whereby he pleaded that the Respondent had obtained registration of *parcel 6849* through dubious means without giving any particulars of such impropriety. He further denied any trespass upon the said parcel.
5. The 1<sup>st</sup> Appellant further pleaded that all he owed the Respondent was a sum of Kshs. 33,000/- only which he was ready and willing to refund in exchange for *parcel 6849* which he considered to be legitimately his. He, therefore, counterclaimed for an order for the Respondent to be compelled to re-transfer *parcel 6849* back to him and for costs of the suit and counterclaim.
6. The 2<sup>nd</sup> Appellant filed a statement of defence dated 17<sup>th</sup> October 2016 by which he admitted that the 1<sup>st</sup> Appellant and the Respondent were once joint owners of *parcel 6591*. He pleaded, however, that he was a purchaser for value of the remainder measuring 0.13 ha which was subsequently registered as *Title No. Gaturi/Githimu/6850 (parcel 6850)*. He pleaded that he had bought the said portion from the 1<sup>st</sup> Appellant. The 2<sup>nd</sup> Appellant further disclosed that he had since sold *parcel 6850* to a third party to whom he had already transferred it.
7. The material on record indicates that when the suit was listed for **mention** on 16<sup>th</sup> January 2017 the Respondent informed the court that his claim was per the documents filed. The 1<sup>st</sup> Appellant informed the court he had already given the Respondent his land whereas the 2<sup>nd</sup> Appellant informed the court that he had already sold *parcel 6850* to a third party. The trial court directed that judgement shall be delivered on 30<sup>th</sup> January 2017.
8. By its judgement dated and delivered on 30<sup>th</sup> January 2017 the trial court allowed the Respondent’s suit and granted an eviction order against the 1<sup>st</sup> Appellant. The court further held that the 2<sup>nd</sup> Appellant’s remedy lay in a refund of the purchaser price paid to the 1<sup>st</sup>

Appellant or any other arrangement he may find suitable. The Respondent was awarded costs of the suit. Since nothing was said of the 1<sup>st</sup> Appellant's counterclaim it is presumed to have been declined under the **Civil Procedure Act (Cap. 21)**.

## **B. THE APPELLANTS' GROUNDS OF APPEAL**

9. Aggrieved by the said judgement the Appellants filed a memorandum of appeal dated 15<sup>th</sup> February 2017 raising the following five (5) grounds of appeal:

- i. That the learned Chief Magistrate erred in law and seriously misdirected himself when he considered the evidence of the Respondent in the judgement yet the Respondent did not call any witness and or evidence.*
- ii. That the learned Chief Magistrate erred in law and seriously misdirected himself when he concluded in Respondent's favour.*
- iii. The learned Chief Magistrate erred in law and seriously misdirected himself by misinterpreting the report by the land registrar.*
- iv. The learned Chief Magistrate erred in law and fact when he failed to realize that the 2<sup>nd</sup> Appellant was a purchaser for value of land Parcel No. Gaturi/Githimu/6850 and the same was transferred to him by the 2<sup>nd</sup> Appellant and he could not and had not trespassed and or encroached into the Respondents parcel of land No. Gaturi/Githimu/6849 as alleged by the Respondent.*
- v. The learned Chief Magistrate's judgement was against the weight of the evidence and that he considered extraneous matters in arriving at his judgement.*

## **C. DIRECTIONS ON THE HEARING OF THE APPEAL**

10. When the appeal was listed for directions on 1<sup>st</sup> July 2020 it was directed that the appeal shall be canvassed through written submissions. The Appellants were granted 30 days to file and serve their submissions whereas the Respondent was granted 30 days upon the lapse of the Appellants' period to file and serve his. By the time of preparation of the judgement, however, none of the parties had filed submissions.

## **D. THE ISSUES FOR DETERMINATION**

11. The court has perused the grounds of appeal set out in the Appellants' memorandum of appeal as well as the material on record. Although the Appellants raised 5 grounds of appeal the court is of the opinion that the following 3 grounds shall effectively determine the appeal:

- a) Whether the trial court erred in law in considering evidence which was not tendered at the trial.*
- b) Whether the trial court erred in finding that the Respondent had proved his case to the required standard.*
- c) Who shall bear the costs of the appeal.*

## **E. THE APPLICABLE PRINCIPLES**

12. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows:

**“...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”**

13. Similarly, in the case of **Peters Vs Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P.** rendered the applicable principles as follows:

**“...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”**

14. In the same case, **Sir Kenneth O'Connor** quoted **Viscount Simon, L.C in Watt Vs Thomas [1947] A.C 424** at page 429-430 as follows:

**“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For**

convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

## F. ANALYSIS AND DETERMINATIONS

### a) Whether the trial court erred in law in considering evidence which was not tendered at the trial

15. It was contended by the Appellants that the trial court erred in law in taking into account the Respondents’ ‘evidence’ when in fact he did not testify or tender any evidence at the trial. The court has perused the record of proceedings before the trial court. There is absolutely no indication of the Respondent or even the Appellants having testified or tendered evidence at the trial.

16. The record shows that on 16<sup>th</sup> January 2017 when the ‘hearing’ was concluded and the suit fixed for judgement on 30<sup>th</sup> January 2017 the suit was actually coming for **mention** and no hearing actually took place. The relevant proceedings indicate that on 14<sup>th</sup> November 2016 the parties fixed the suit for **mention** on 16<sup>th</sup> January 2017. The proceedings of 16<sup>th</sup> January 2017 (as shown on page 58 of the record of appeal) state as follows:

“16/1/17

**Before: M.N. Gicheru, CM**

**C/Clerk: Grace**

**Plaintiff – present**

**Defendant – absent**

**Plaintiff – I pray that I be given my land as per the papers that I have filed.**

**1<sup>st</sup> defendant – I have already given the plaintiff land. I have no more documents to file.**

**2<sup>nd</sup> defendant – my case is as per my documents. I sold the land that I bought from the first defendant.**

**Plaintiff – I filed the case in court because my land is less than I bought.**

**COURT: Judgement on 30/1/17**

**M.N. GICHERU**

**CHIEF MAGISTRATE”**

17. It is thus clear that no hearing took place on 16<sup>th</sup> January 2017 as contemplated under the **Civil Procedure Rules**. Moreover, on that date the suit was merely coming for mention and not for hearing. The court is of the opinion that there are only two legitimate ways of dispensing with a customary hearing under the **Civil Procedure Rules**. The first is where the parties by consent dispense with an oral hearing in favour of admission of documents and witness statements without calling any witnesses. The second is where the court invokes the provisions of **Order 11 Rule 3 (2) (c)** of the **Rules** to direct the admission of witness statements without calling the witnesses and the production of documents without calling the makers or authors thereof.

18. It is evident in the instant matter that none of the said options were adopted before the trial court. The parties did not consent to dispense with a hearing and the court did not invoke the relevant provisions of the law to dispense with such hearing. The court is of the opinion that all the parties were denied an opportunity to tender their oral evidence, to produce documentary evidence, and to cross-examine witnesses without due process. The fact that the Land Registrar and District Surveyor had filed their report in court touching on the matters in question could not be used to deny the parties their right to a fair hearing. Accordingly, the court finds that the trial court erred in law in failing to accord the parties a chance of being heard and in taking into account witness statements and documents which were not part of evidence tendered at the trial. The only documentary evidence on record was the Land Registrar’s report.

### b) Whether the trial court erred in law in finding that the Respondent had proved his case to the required standard

19. The Appellants contended that the trial court erred in finding and holding that the Respondent had proved his case against them. They contended that the trial court had failed to recognize that the 2<sup>nd</sup> Appellant was a purchaser of *parcel 6850* for value and that the trial court had decided the suit against the weight of evidence without going into a detailed analysis.

20. The court is of the opinion that this ground of appeal is bound to succeed for at least two reasons. First, there being no proper evidence on record tendered by the parties and their witnesses it could not be said that the Respondent had adequately proved his case against the Appellants to the required standard. The Land Registrar's report by itself could not be sufficient to dispose of the suit without the evidence of the parties.

21. The second reason is that the registered proprietor of *parcel 6850* was not joined in the suit yet the judgement affected his legal interest in the property. When the 2<sup>nd</sup> Appellant filed his defence and documents on 17<sup>th</sup> October 2016 it became apparent that he had already sold *parcel 6850* to one David Muriithi Mbeti. He also informed the trial court during the mention of 16<sup>th</sup> January 2017 that he had already sold it to someone else.

22. In spite of the such disclosure the trial court did not direct that the said proprietor be joined as a party to accord him an opportunity of being heard before any adverse order or decree affecting his property could be made. There was clearly a violation of the right to a fair hearing hence the Respondent could not be said to have proved his case against the proprietor of *parcel 6850* who was not a party to the suit before the trial court.

***c) Who shall bear costs of the appeal***

23. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **section 27 of the Civil Procedure Act (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court is of the opinion, however, since the trial was defective and it may have to be done afresh it would be punitive to penalize any of the parties in costs. Accordingly, the court is of the opinion that each party should bear his own costs of the appeal.

**G. CONCLUSION AND DISPOSAL ORDER**

24. The upshot of the foregoing is that the court finds merit in the Appellants' appeal and the same shall be allowed. Consequently, the court makes the following orders for disposal of the appeal:

- a. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants' appeal be and is hereby allowed.
- b. The judgement and decree of the trial court dated 30<sup>th</sup> January 2017 be and is hereby set aside together with all consequential orders.
- c. The matter is hereby remitted to the Chief Magistrate's court for hearing *de novo* before any magistrate on priority basis.
- d. The Respondent shall take steps to join the current registered proprietor of *Title No. Gaturi/Githimu/6850* as party to the suit before its heard *de novo*.
- e. Each party shall bear his own costs of the appeal.

**JUDGEMENT DATED** and **SIGNED** in Chambers at **EMBU** this **22<sup>ND</sup> DAY** of **OCTOBER 2020** and delivered in chambers in the presence of the 2<sup>nd</sup> Appellant in person, Respondent in person and in the absence of the 1<sup>st</sup> Appellant.

**Y.M. ANGIMA**

**JUDGE**

**22.10.2020**