



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 12 of 1995

ROBERT MAKALI KITHOME1ST APPELLANT

JOSEPHINE C. KITHOME 2ND APPELLANT

VERSUS

JULIUS JAMES MALUVA I..... RESPONDENT

**(From Original Civil Suit no. 35 of 1993 of the Senior Resident Magistrate's Court at
Kitui: N.A.K. Njeru Esq. of 31st January 1995)**

Coram: A.G.A. Etyang J.

Mr. Kibanga Advocate for Appellant Mr. Kinyua Advocate for Respondent Court Clerk Muli

JUDGEMENT

Mr. Dauti Kibanga Advocate, acting for Robert Makali Kithome (to be referred to in this judgment as "the 1st Appellant") and Josephine C. Kithome (the 2nd Appellant) filed this appeal on 17th February 1995 through a memorandum of appeal dated the same day against the ruling and or judgment of the Senior Resident Magistrate Kitui Mr. Njeru in his Kitui Civil Suit No. 35 of 1993. That ruling and or judgment was delivered on the 31st January 1995.

There were seven grounds of appeal listed in the Memorandum of Appeal. Mr. Kibanga abandoned ground 5 and argued the rest as ground one.

Mr. Kinyua Musyoka Advocate represented Julius James Maluva (the Respondent) and opposed the appeal.

Kitui Senior Resident Magistrate's Civil Suit No. 35 of 1993 was instituted through a plaint dated and filed on 27th April 1993 in which the Respondent had pleaded at paragraphs 3, 4, 5, 6 and 7 as follows, and I quote:

"3. At all material times, the plaintiff was the registered owner of Plot no. 25 measuring 30' x 100' situated at Mui location within the Kitui County Council, having purchased the same from one KATHUKU MBIA in 1986.

4. After the said purchase the Plaintiff was shown the site of the said plot and he subsequently obtained a lay out plan of the same from the Kitui County Council.
5. The Plaintiff subsequently heaped concrete stones at the site in readiness for development of the same.
6. In or about April 1993 the Defendant who owns Plot No. 30 at the same market Started clearing the bush at the site of Plot No. 25 arguing that .the same was the actual ground lay out of Ms Plot No. 30. The said Defendant continued to clear the said bush and has threatened to develop his plot no. 30 at the site of Plot 25 and the Plaintiff is consequently aggrieved.
7. The Plaintiffs claim against the Defendant is therefore for a declaration that the Defendant is encroaching onto his Plot No. 25 situated at Mui Market and that he should be permanently restrained by an order of this court from further such encroachment".

On the same date of filing the suit the Respondent filed an interlocutory application for a temporary injunction to issue under Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules. The Respondent appeared before Kitui Resident Magistrate Mr. Ogolla on the same date and got interim orders as prayed on the same date (27.4.93).

The summons to enter appearance and defence were actually served upon the Appellant on 26th May 1993 (a month after the interim orders of injunction had been issued on 27th April 1993 against him). The Appellant then engaged the services of Messrs Kinyua Musyoki & Company Advocates on 30th June 1993 who went ahead and filed his written statement of defence on the 1st July 1993. The Appellant in that defence, denied paragraphs 3, 4, 5, 6 and 7 of the plaint and put the Plaintiff to strict proof thereof. On 15th July 1993 the firm of Messrs Dauti Kibanga & Co. Advocates took over the defence of the Appellants from Kinyua Musyoka & Co. Advocates.

On the 23rd August 1993 an amended plaint was filed by the addition of the 2nd Appellant as the 2nd Plaintiff and the addition of two other paragraphs 9 and 10 which read:

"9. The issue for the court to determine is the proper site of Plots Nos. 25 and 30 at Mui Market, Kitui District.

10. As a result of the Defendants action the Plaintiff is aggrieved and stands to suffer if the Defendants develop their plot on the site that is meant for Plaintiff s plot".

This amended plaint was served upon the Appellants on 25th August 1993. No amended defence was ever filed but on the 29th October 1993 the defence of the 2nd Appellant was filed and in which she denied paragraphs 3, 4, 5, 7 and 8. She admitted paragraph 6 of the plaint. As for paragraph 9 of the plaint, the 2nd Appellant pleaded the following at paragraph 5 of her defence:

"5. Paragraph 9 of the plaint talk short of what should be included and/or contained in the plaint, and in as far as it purports to draw issues which is the work of the court, the same ought to be struck out".

Before the case was listed for hearing the Kitui County- Council Surveyor was summoned by the court to appear before it on 14th December 1993. with all the maps of Mui Market, which he did, so as to point out the Respondent's Plot No. 25. That plot was nowhere on that map but Plot 30 of the Appellants was there. In fact, according to the court record, the Respondent could not be shown his plot No. 25 even on the ground as directed by the magistrate on 14th December

1993. The Appellants who were there, were shown their Plot 30. That exercise was undertaken

On the 14th January 1994.

That was the state of the pleadings before the case was heard.

It is instructive that, upto the 14th January 1994, when the Kitui County Council Surveyor took parties to Mui Market and showed the Appellant his Plot no. 30 on the ground, but failed to find where plot No. 25 on the ground was, the size of the Plot no. 25 had not been amended, neither in the plaint nor in the amended plaint from its pleaded size of 30' x 100'. The County Council Surveyor of Kitui was unable to locate this Plot no. 25 on the ground so as to show it to the Respondent. That Surveyor, having failed to locate plot No. 25 on the ground, could not have been expected to say whether or not the Appellants were actually encroaching on Plot 25. At the end of that exercise of 14th January 1994, Plot no. 25 had not been shown to be in the map or on the ground at Mui Market.

However, the magistrate fixed the case for hearing for determination of the issues raised in this case: the site of plots 25 and 30 on the ground.

The hearing started on the 30th September 1994 when the 1st Appellant appeared but the 2nd Appellant did not due to sickness. The Respondent and his advocate were. An application for adjournment by Mr. Kibanga was rejected by the magistrate.

The Respondent was called and gave evidence. He told, the court that he had bought Plot

no. 25 at Mui Market for Sh.3,000/- in 1982 from one Kathuku Mbia. He said the plot was measuring 50' x 100'. He produced an allotment letter Ex.I, building plan Ex.2 and application for transfer of that plot to him Ex.3.

10 .1 have perused these exhibits. The letter of allotment to Mr. Mbia Ex.I is dated 29th

April 1968. The Plot No. 25 in question is not described in size. It has no dimensions in this letter. The building plan Ex2. true, is drawn on an area measuring 50' x 100' and was approved by the Kitui County Council, the Public Health Officer and the District Commissioner, all on 5th April 1973. Mr. Kathuku's application to transfer the Plot 25 to the Respondent was indeed approved through a letter of approval dated 4th August 1982 signed by the Clerk to the County Council of Kitui (Exh.3). The size of that plot is not, again, shown in this exhibit.

Mr. Kathuku Mbia (PW2) gave evidence and told the court that he got this Plot No. 25 from the Kitui County Council in 1968. It was then measuring 30' x 100'. He said in 1973 the plot was "increased" when he was added 20ft to make 50' x 100'. He produced a receipt No. C460007 Ex.4 dated 4th April 1973 for Sh.10/- on account of "ALTERATION AND BUILDING PLAN". There is then an endorsement on the said receipt Ex.4 of "50' x 100' corner to the left. 4/4/73".

The person who issued that receipt and entered the said endorsement was not called to give evidence. But it is clear from it that the person who wrote out the receipt details and signed is not the same person who endorsed on it "50' x 100'" and signed. There are two signatories to this receipt. This is admitted by the Respondent in cross-examination when he said, I quote:

"When the extension of the plot was made I was not given any other document. The receipt Exh. No. 4 has two signatures.

None of those two signatories to this important receipt was called.

The case was adjourned for further hearing on 5th December 1994 but the 2nd Appellant did not turn up. The magistrate, upon application by Mr. Kalili entered judgement against her and marked the case against the 1st Appellant withdrawn. The trial magistrate when ordered the matter to proceed by way of formal proof against the 2nd Defendant/ Appellant whereupon Mr. Kalili adopted, as his evidence, the evidence already adduced by the Plaintiff Respondent. He then closed the Respondent's case. Judgement was then reserved and was to be delivered on 20th December 1994 but it was not.

It is unclear how the court proceeded with this trial after the 5th December 1994. The record shows a

complete muddle up and it is absolutely incredible that the trial magistrate allowed himself to be misled and confused by Mr. Kalili.

It is true that the case had been listed for hearing on 5th December 1994 and the Respondent appeared in the company of Mr. Kalili. The 1st Appellant appeared in the company of Mr. Kibanga but the 2nd Appellant did not turn up. Mr. Kalili then applied for judgement to be entered for the Respondent against the 2nd Appellant for non-appearance, knowing fully well that the Respondent had already given and concluded his evidence and had called his witness Mr. Kathuku Mbia *in* the presence of both the 2nd Appellant and his advocate who had cross-examined them at length and had challenged their evidence and, more particularly, that the Kitui County Council Surveyor had been unable to point out the Plot 25 both in the County Council map and on the ground at Mui Market. It was absolutely ridiculous for a counsel to ask the court to enter judgement, and for the court to accede to the request, in those circumstances. Yet judgement was entered by the trial magistrate.

Mr. Kalili did not stop there. He then asked the court to fix the case for formal proof and the magistrate did so and ordered Mr. Kalili to proceed to prove his case by formal proof. Mr. Kalili did so but did so in a very- strange manner. He did not call the Respondent (Plaintiff). The reason for this was that the Respondent had already given evidence. So Mr. Kalili told the magistrate that he was adopting the evidence of the Respondent and that of his witness, and closed his case. The magistrate reserved his judgement, and when he delivered it on 31st January 1995. he held that the Respondent had proved that Plot No. 25 at Mui Market was his. I will come to that later. But what evidence did Mr. Kalili adopt in the strange process of formal proof? He adopted the Respondent's evidence in chief, the evidence adduced in cross-examination and evidence adduced in re-examination. The same went for the evidence of Mr. Kathuku Mbia. The totality of that evidence was that Plot no. 25 was not in the map, not on the ground and its dimensions were not concluded.

After closing his case Mr. Kalili withdrew the case against the 1st Appellant, who was the husband of the 2nd Appellant and proceeded against the 2nd Appellant alone. And yet the 1st Appellant is said to be the one, as per the pleadings, who had been clearing the bushes and putting materials on the said plot, ready for development. If I may say so, the trial magistrate 10 completely abused the process of his court and I quite agree with the observations made in this appeal by Mr. Kibanga. for The Appellants, and I will say no more.

The judgement, appearing in the last paragraph of a ruling dated 31st January 1995, and which substantially is the basis of this appeal, reads, and I quote:

"I proceed and make the ruling on the judgement dated the 15.12.94. After perusing the evidence of the Plaintiff and that of his witness. I declare plot No. 24 Mui Market is the property of the Plaintiff and the 2nd Defendant is restrained from encroaching it".

With the greatest respect the magistrate, having decided to hear this case ought to have allowed the Appellants to defend it. He was in error when he failed to do so.

Secondly, and most importantly, the trial magistrate seems to have got the issues involved in the case all wrong. The issue was not whether Plot No. 25 at Mui Market did or did not belong to the Respondent. The Respondent's case all along was that he was the owner of Plot No. 25 at Mui Market and that the Appellants had encroached on it, by clearing bushes on it in readiness to develop it and that the Appellants had to be stopped. The Respondent's basis for this was that the Appellants were maintaining that the site of Plot No. 25 was in fact the site of Plot No. 30. The issue for the court to determine was the correct site of Plot 25 and Plot 30 and not ownership of Plot 25.

The issue, therefore, in this appeal is whether, on evidence adduced, the site for Plots 25 and 30 had been established and if so, whether the Appellants had been shown to be encroaching on Plot No. 25.

This is a first appeal. This court is therefore mandated to review all evidence on record and to arrive at its own conclusions.

First, the Respondent withdrew his claims against the 1st Appellant. The case against the 1st Appellant therefore ended upon that withdrawal.

Judgement, in fact two judgements, were entered against the 2nd Appellant. The 1st prayer in the plaint was for a declaration that the 2nd Appellant was encroaching on the Respondent's plot 25. Was there any evidence of that encroachment? There was none. The evidence on record only proved that the Respondent is the owner of Plot No. 25 at Mui Market measuring only 30' x 100'. The evidence also established that the 2nd Appellant is the owner of Plot No. 30. But what has not been established, on a balance of probabilities, is the extent, on the ground of Plot 25 and Plot 30, whether the two are overlapping. The size of Plot 30 is not shown anywhere at all. The size of Plot 25 on the ground was not established although Plot 30 does exist on the ground. The Respondent had to show, on a balance, that the 2nd Appellant had encroached on his plot on the ground. But unfortunately no evidence was forthcoming on this important point. The Surveyor of the Kitui County Council was absolutely of no assistance to the court. The Respondent's entire suit was therefore for dismissal. .

This appeal is therefore allowed. The judgement of the trial magistrate is hereby set aside, the consequential orders of injunction issued are hereby vacated.

The Respondent is to pay the Appellants costs, in this appeal and in the lower court.

It is so ordered.

Dated and delivered this 17th June 1998.

A.G.A. ETYANG

JUDGE