REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIVIL APPEAL 210 OF 1995

SHELDON SHADORA…….....……APPELLANT

AND

STANLEY S. SHADORA.....……RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kakamega (Tanui, J.) dated 16th August, 1995

IN

H.C.C.C. NO. 384 OF 1990)

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JUDGMENT OF THE COURT

The appellant Sheldon Shadora appeals to this court from the judgment and decree of the High Court at Kakamega (Tanui, J.) dated the 16th August, 1995. The appellant is locked in a dispute with his eldest brother Stanley Shadora, which is over two pieces of land known as Kakemega/Shikulu/1423 and Kakamega/Shikulu/509 both of which are and have always been registered in the name of the respondent. In respect of both pieces of land, the respondent's registration is a first one. The appellant's claim before the High Court was that these pieces of land were part of their family land, which the respondent had inherited from their late father Luka Mukhobi. According to the appellant, Luka had bought these pieces of land and several others. The others not in dispute had been left to their other two brothers while those in dispute had been left to the respondent who was Luka's first son, to share with the appellant who is the last son of Luka.

The respondent, for his part, contended that he bought the pieces of land himself and that while he was in Uganda, it was the appellant himself, who had had the pieces of land registered in his (respondent's) name. The Judge having heard the appellant. The respondent and their witnesses came to the conclusion that the respondent had bought the pieces of land as he had stated and the Judge rejected the appellant's contention that these pieces of land were part of the family inheritance from their late father.

The learned Judge accordingly rejected the appellant's claim that he was entitled to share the pieces of land equally with the respondent. The appellant appeal against the Judge's decision and he has listed five grounds of appeal all of which he argued together before us.

The issues raised before us by the appellant are purely ones of facts and it was for the appellant to satisfy us that the learned Judge's findings of facts cannot be supported on the evidence which was before him. It

is true this is a first appeal to us and we are as it were, entitled to rehear the dispute but we must remember that the learned trial Judge had the advantage of hearing and seeing the witnesses testify before him; we have not had that advantage - see PETERS V. SUNDAY POST LIMITED [1958] E.A. 424. In his judgment in the case of BUNDI, MARUBE V JOSEPH ONKOBA NYAMURO (1982-88) 1 KAR 108, Hancos Ag. J.A.(as he then was) had this to say on that point:

"However, a court on appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. ……"

And in RAHIMA TAYAB & ANOTHER V. ANNA MARY KINANU (an infant suing by her next friend) (1982-88) 1 KAR 90, at page 93, LAW, J.A. also stated:-

"……An appellate court will be slow to interfere with a judge's findings of fact based o his assessment of the credibility and demeanour of witness who has given evidence before him……",

We respectfully agree and those must be the principles upon which this appeal is to be determined.

The appellant was certainly a very young man when these pieces of land were acquired. He could only rely on the evidence of others that his late father inherited them and bought others. The respondent swore he bought the pieces of land and the appellant could not himself directly contradict that assertion by the respondent. The other two brothers of the appellant did not claim the pieces of land as we would have expected them to do if they had been family inheritance as the appellant claimed. As we have said, the pieces of land were and have always been registered in the names of the respondent. The titles were issued as far back as 1975 and the first time the appellant mounted the challenge against the titles was in 1988 when he took the dispute before their local Chief and his elders. Those elders decided, that the pieces of land were family land and should be shared equally but the respondent must have rejected that conclusion and that must be what caused the appellant, to go to the High Court in 1990. As we understand the matter and as the appellant himself conceded before us, the learned Judge was not bout to agree with the decision of the elders. After anxious and careful reading and consideration of the recorded evidence, we are unable to find that the factual findings of the learned trial Judge cannot be supported by the evidence before him. We are satisfied on our own consideration and re-evaluation of the material on record that the learned trial Judge came to the correct decision on the dispute before him and the appellant has not convinced us that we should disturb the decision of the Judge. That being the view we take of the matter, our order must be, and is, that this appeal is dismissed with costs to the respondent.

Dated and delivered at Kisumu this 21st day of March, 1996

R.S.C. OMOLO

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JUDGE OF APPEAL

A.M. AKIWUMI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.