IN THE COURT OF APPEAL

AT NAIROBI

(CORAM:NYARANGI, GACHUHI & APALOO JJ A)

CIVIL APPEAL NO 117 OF 1985

CYRUS NYAGA KABUTE …….APPELLANTS

VERSUS

KIRINYAGA COUNTY COUNCIL……..……RESPONDENT

JUDGMENT

October 23, 1987, **Nyarangi, Gachuhi & Apaloo JJ A** delivered the following Judgment.

This is a second appeal regarding a land dispute. The suit commenced before the District Magistrate of the second class at Uaani District Magistrate's Court of Machakos District.

In paragraph 3 of the plaint the respondent (plaintiff claimed that the appellant (defendant) entered his land in 1972 and built a house on it but being ordered several times to vacate, the appellant refused. He prayed for eviction from the land. The defendant in his defence admitted paragraph 3 of the plaint and went on further to state that the land was an inheritance which he inherited from his father. The trial magistrate after hearing the evidence visited the land and drew a sketch plan and made some notes of what he found there during his visit. He then delivered judgment in favour of the plaintiff. The appellant appealed to the High Court (Chesoni J) which appeal was dismissed. He now appeals to this court against the said dismissal.

The points of law raised in this appeal are on limitation the interpretation of the issues and the procedure adopted by the trial magistrate when he visited the *Locus quo.*On the point of limitation and adverse possession there was evidence on facts to support the plaintiffs case which disapproved the appellant's claim of limitation resulting to adverse possession. There was misinterpretation of the issues because the only issue for determination was the boundary so as to grant prayer for eviction. To do so, there must be evidence of ownership and the extent of the rent finding of the lower courts on facts that the appellant trespassed on the respondents land built his house and carried out fresh development.

On the point of law in this appeal which attacked the wrong procedure adopted by the trial magistrate, it is established law that when magistrate or judge visits land and makes notes, the parties should be given chance to agree or deny or contradict the notes on oath, if those notes were to be relied upon in judgment. In *Fernandes v Noronha [*1969] EA 506 at page 508, duffus V P as he then was stated.

> " ….. the judge although reluctantly, did the *Locus in quo*, but unfortunately there is no report of his visit, on the record although this is mentioned in his judgment.
>
> The judge does not in this case appear to have relied on any of his own observations, but in cases where the court finds it expedient to visit a *Locus in quo,* the court should make a note of what took place during the visit in its record and this note should be either agreed to by the advocates or at least read out to them, and if a witness points out any place or demonstrates any movement to the court then this witness should be recalled by the court and give evidence of what occurred."

This decision has been followed in subsequent cases. But the learned judge on appeal dealt with this portion and ignored those notes. He found that even without relying on those notes, it would not affect the

result of the case nor does it in any way result to injustice to any of the parties. We hold the same view. We also do not find any ground of upsetting the High Court decision. There is no merit in this appeal. We order it to be dismissed with costs.

October 23, 1987

NYARANGI, GACHUHI & APALOO JJ A

Cases

1. *Fernandes v Noronha* [1969] EA 506 at p 508