IN THE COURT OF APPEAL,

AT NAKURU

(CORAM: NYARANGI, PLATT AND GACHUHI JJA)

CIVIL APPEAL NO. 82 OF 1986

MESHACK MATHENGE ……..…….APPELANT

VERSUS

GICHURU…….…….RESPONDENT

JUDGMENT

Nyarangi JA In the latter part of 1984 a panel of elders heard and resolved an issue referred to them under section 9A(1) and (2) of the Magistrate's Jurisdiction (Amendment) Act, 1981 (The Act) relating to land the subject matter of this appeal. The written record of the decision of the panel of elders contains details of the members of the panel, the land about which there was a dispute, the issues raised and the unanimous decision of the elders. Each member of the panel signed the record. The decision of the panel is as follows:

> 1. The panel of elders unanimously reached at a decision that the plot is number 162 and not 181 because the serial number shows it hence the plots belongs to Njeri Gacheru.
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> 2. The panel was impressed by the evidence given by defence witness II that is Elic Joh Mbure who truthfully gave the detail of how he assisted the defendant to ballot and how he asked for assistant to get plot at Njoro instead of Mau Narok plot number 1081.
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> 3. The ballot produced by Mathenge was tampered with trying to remove a number. The argument that the ballot is 181 cannot be accepted as the distance between 1 and 8 shows clearly that there was a number in between.

We accept that the plot given by chairman was given to Mathenge after provincial police officer requested chairman to give Mathenge a plot at Njoro. Hence Mathenge should move to the plot given.

On April 25, 1985, the advocates for the parties appeared before Resident Magistrate Nakuru. Prior to that date the chairman of the panel had caused the material record to be filed in the resident magistrate's court and notice of the filing had been given by the resident magistrate's court to the parties. On May 9, 1985 plaintiff's advocates requested the court, under section 9E (1) of the Act, to enter judgment. The defendant's advocate had nothing to say and so judgment was entered for the plaintiff in accordance with the decision of the panel. The resident magistrate's court did not act under sub-section (1) or (2) or (3) before entering judgment of its own motion to modify or correct the record filed. There was no application by the appellant within thirty days of receipt by the appellant of notice of filing of the record

for the resident magistrate's court to modify or correct, or remit the record of the panel of elders for reconsideration of that panel or to set aside the record of the panel of elders. I pause there. The appellant Meshack Mathenge is aggrieved by the decision of the High Court, Nakuru (Omolo, Ag J) which was delivered on March 11, 1986 and in this second appeal on issues of law relies on the following grounds, briefly stated: the trial and first appellate court erred in law in upholding the award of the panel of elders failed to give sufficient consideration to the appellant's case that he had proper ballot papers for allocation of the parcel of land that it was not proved that the papers were forged and in failing to take into account the costly development the appellant had made and that the respondent could have been adequately compensated by payment of money and by allocation to her of an alternative parcel of land. The appellant's last ground of appeal seeks leave to adduce fresh evidence.

The appellant's advocate Mr Mirugi Kariuki, argued that under section 9D (4), the resident magistrate's court could on its own motion examine the record of the panel of elders and if necessary remit it for consideration of that panel. It was urged that the elders overlooked the fact that the appellant had put up a permanent building on the land and that the award of the panel of elders is silent on appropriate compensation. Counsel conceded that there was no evidence before the panel of elders on permanent costly development on the land but that the issue was raised before the resident magistrate after the decision of the panel of elders.

There was no evidence adduced before the panel of elders as to when the stone building was constructed. Mr Mirugi Kariuki contended that notwithstanding the lack of such evidence, the resident magistrate should have enquired in the exercise of his discretion about the alleged construction or existence of the permanent structure.

Mr Mirugi Kariuki's application for leave to argue the fourth ground of the appellant's memorandum of appeal was unsuccessful.

Replying on behalf of the respondent, Mr Maragia submitted that there was no application for the resident magistrate to modify or correct, no evidence before the panel of elders about permanent improvements on the land and no application was made to the High Court for fresh evidence to be adduced. The panel of elders decided the dispute on the evidence before it. The resident magistrate's judgment does not exceed the decision of the panel of elders. Mr Maragia said the land certificate which is part of the record of appeal should be ignored because no such document was produced before the panel of elders or before the first appellate court.

The primary question of law with which I am concerned is whether the judge misapprehended the evidence and consequently made incorrect conclusion. If the judge has, I will upset him. If he has not, I will uphold his decision. The other question is whether the resident magistrate misdirected himself in not invoking sub-sections (1) (2) of section 9D of the Act, on his own motion, to make enquiries relating to stone house which according to the appellant had been constructed and was situate on the material parcel of land.

There was total lack of evidence before the panel of elders about a stone house. The decision of the panel of elders was based on the evidence of the parties and that decision could not be challenged with any success at this stage.

The appellant was represented by an advocate when the respondent applied to the resident magistrate to enter judgment according to the decision and also on May 9, 1985 when judgment was entered. There was no reason offered for the apparent failure of the appellant's advocate to urge the resident magistrate to modify or correct or remit the record. The resident magistrate was entitled to the view that as no objection had been raised with regard to the record all was well.

The discretion under section 9D has to be exercised judicially. That is to say that there must exist a proper basis before the resident magistrate's court can modify or correct. It would be a misdirection for a court, even on its motion, to act under sub-section (1) and (2) of section 9D in the absence of reasonable ground for doing so. In this case, the resident magistrate can be deemed to have perused the record before

entering judgment in terms of the decision of the panel of elders. Because there was no reference to a stone house in the record, the resident magistrate could not properly imagine, consider and find that there was a stone building and then proceed to suggest compensation. That, unfortunately, is not the end of my difficulties. The appellant adduced no evidence before the judge in support of his claim and that he had a house on the land.

There was no evidence before this court when the claimed stone house was constructed. For my part, I would hold that the appellant's claim that there was a stone house on the land when the panel of elders heard and considered the evidence is a fabrication. If indeed there was a stone house on the land, the appellant would simply not have omitted to mention it, any more, to point it out to all persons who were present during the proceedings before the panel of elders and thereafter to make heavy weather of that issue and rely on its as substantial ground why he should not be ordered to vacate the land. It is no small thing to construct and move into a stone house, irrespective of its size and irrespective of the economic status of the person(s) involved in such construction. If a stone house does or did exist as stated it is a thing of wonder that no effort was made before this court for direction that additional evidence be taken by the trial court. I, therefore, conclude that the rival contention of the existence of a stone house is untrue and must fail.

The fourth ground constitutes a new point of law not argued before the High Court. In *Overseas Finance Corporation v Administration General* (1942) 8 EACA 1, it was held that the practice of courts is to deal with the legal consequences of pleaded facts although the particular legal result alleged is not in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of the new and disputed facts which have not been investigated at the trial. In this case, the validity of the legal result of the decision of the panel of elders does not require any further investigation and therefore there can be question of adducing new evidence to dispute that decision. Fresh evidence might be admitted if some fundamental assumption, affecting both parties, has been falsified by subsequent events. It might be expected that fresh evidence would be allowed when to refuse it would affront common sense or a sense of justice. These would be exceptional circumstances. There are no such circumstances in this case to justify reception of fresh evidence: see *Dick v Koinange*, [1973] EA 165 and *Muholland v Mitchell*, [1971] AC 666.

I would dismiss the appeal with costs of this court and in the High Court and as Platt and Gachuhi JJA agree, it is so ordered.

Platt JA. This is a second appeal from the decision of the resident magistrate, Nakuru who gave judgment in terms of an award of a panel of elders, on May 9, 1985. There was a first appeal to the High Court, which declared that appeal to be incompetent on March 11, 1986. The appellant appeals a second time.

Mr Mirugi Kariuki's main concern was to find a way to open up arbitration proceedings, and in some way to order additional evidence to be taken, so that the result would be that the resident magistrate would be entitled to act under Section 9D of the Magistrate Courts Act (cap 10) as amended by the Magistrates Jurisdiction Amendment Act 1981. Section 9D permits the resident magistrate's court to modify or correct a record filed under section 9C. Section 9C relates to the situation where a panel of elders has heard an issue arising under Section 9A, and having determined the issue, has filed the record in the resident magistrate's court. Having thus received the record, which contains the decision given, the resident magistrate may modify or correct the record if it contains a clerical mistake or error, arising from an accidental slip or omission; if the record is imperfect in form or contains an obvious error which can be amended without affecting the decision; or separate a part concerning an issue or a matter upon which the panel was not asked to make a decision. Alternatively, it may remit a record to the panel for reconsideration within a stated time. In the further alternative the court may set aside the record of a panel of elders, for corruption, misconduct or fraudulent concealment. Then comes the subsection with which Mr Mirugi has to contend very seriously.

> "(4). The court may act under subsection (1), (2) or (3) at any time, before entry of judgment, of its own motion, on application by any party to the issue or issues before the panel of elders within

thirty days of receipt by the applicant of notice of the filing of the record under section 9C."

Mr Mirugi Kariuki lamented that judgment had been delivered on May 9, 1985 and that his client made his appeal in June 1985, in which he claimed that the panel had decided the issues on inadmissible evidence; that he had failed to note that the land had been developed by a stone house having been built upon it; and that the judgment was unreasonable and not supported by the evidence. It is not at first sight easy to see how these matters came within the provisions of section 9C. It would appear that the merits of the claims to the land were being disputed with the addition to talk about a stone house having been built. It was only after judgment was given, that any discussion arose about the stone house. So this is the matter at which Mr Mirugi Kariuki was aiming. It may safely be asserted that section 9D does not permit fresh matters to be reconsidered by the court exercising its supervisory jurisdiction under that section. If the stone house had been the burning issue it now appears to be, surely it would have been raised as an issue, upon which the panel was to decide, within the terms of section 9A.

Alternatively, if some account could be taken of the stone house (a matter which is problematic) at least application should have been made to the court under section 9D, before judgment was entered. Of course, as Mr Mirugi Kariuki pointed out, the court may act *suo moto*; but that was not practically possible in this case, because the record discloses no mention of the stone house. So it was for the appellant to have applied within the terms of section 9D(4) set out above, before judgment was entered, or within 30 days.

The appellant took none of these steps. His advocate received the court's letter dated April 10, 1985. As the learned judge pointed out correctly that letter should not have called for judgment to be entered on April 25, 1985. The period of 30 days was to be given the parties. But, as the learned judge also pointed out, no harm was done because time was extended until May 9. Now the 30 days period extends not from the date of the court's notice, but from the date of the receipt by the applicant of the notice. So it would mean that the resident magistrate should have enquired when the appellant had received the notice and arrange for the judgment to be entered no sooner than 30 days after receipt, unless both parties agreed that judgment could be entered earlier. The resident magistrate cut the period down by a day or so as was noted in argument, if April 10, 1985 is taken as the starting point; he would have cut it down further if the appellant had received the notice after April 10, 1985. But in the event of May 9, 1985, the appellant took no objection to judgment being entered on that day, and raised no query as to the 30 day period, or that he needed more time within which to apply to vary or set aside the award. Having taken no steps, he cannot now complain that judgment, against which he had "nothing to say", was entered in terms of the award of the panel of elders. It followed that if he had no application to make, judgment could be pronounced under section 9E (1) (a) of the Act. Once that was done Mr Maraga for the respondent comes into his full glory with section 9E (2) which provides as follows:

> (2)Upon judgment being entered a decree shall follow and no appeal shall lie from that decree except in so far as the decree is in excess of, or not in accordance with, the decision of the panel of elders."

No dispute has been referred to us under this provision. The appellant's fate was sealed when his advocate accepted that there was nothing to be said for the appellant against judgment being entered on May 9, 1985. Consequently the learned judge was quite right to hold that the appeal to him was incompetent. He should then have struck it out rather than dismiss it.

That answers the legal issues arising on the appeal. There were other matters urged, but what has since happened in another context is no concern of this appeal, in the sense that new evidence should be adduced to alter the result of this appeal. There is no procedure or provision allowed by section 9A to E of the Act by which this can be done. The parties must deal with the new events as such. The proceedings in court in this matter were finalised on May 9, 1985, and on first appeal by March 11, 1986, and those court proceedings end there. The new factors must be considered afresh outside this appeal.

The appeal is dismissed with costs.

Gachuhi JA. I agree with the judgment prepared by Nyarangi JA. However, I would stress that to entertain the application to produce fresh evidence in the second appeal which was available at the time the matters in dispute were pondered by the elders and decided upon, is a cunning way of re-opening the matter which has been already concluded. If the application would be entertained, it would amount to a retrial. In that case, there will be no end to litigation.

The parties to this appeal are very cautious of their rights pertaining to the ownership and the use of land. No one can say that they do no know of the implication in land matters. It is unbelievable, that one would develop a piece of land and forget or overlook to press for its determination before the elders when the dispute is adjudicated. There was no reference of such development before the elders. Better still, there is no evidence as to when the construction started and completed or whether the construction went on ignoring the protest. It may be that the development claimed does not exist. Moreover, the certificate of title purported to have been issued to the appellant was only issued this year, long after the matter was finalized by the elders. There is no merit in this appeal.

I would also dismiss this appeal with costs.

Dated and Delivered at Nakuru this 28th Day of November, 1986

J.O NYARANGI

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JUDGE OF APPEAL

H.G PLATT

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JUDGE OF APPEAL

J.M GACHUHI

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JUDGE OF APPEAL