



**REPUBLIC OF KENYA**

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

**E.L.C.A CASE NO. 1B OF 2017**

**EPHANTUS MWANGI KIMANI.....APPELLANT**

**VERSUS**

**NYAGA MUCHIRI MBOGO.....RESPONDENT**

***(Being an appeal from the judgement and decree in Siakago RMCC No. 82 of 1994 delivered on 27<sup>th</sup> November 1995 by Hon N.H. Oundo – Resident Magistrate)***

**JUDGEMENT**

1. This is an appeal against the judgement and decree of Hon N.H. Oundo (then serving as RM) dated 27<sup>th</sup> November 1995 in Siakago RMCC No. 82 of 1994. By the said judgement the trial court allowed the suit by the Respondent (who was the Plaintiff) against the Appellant (who was the 2<sup>nd</sup> Defendant) in the said proceedings. The case against the 1<sup>st</sup> Defendant in that suit was dismissed.
2. The brief facts of the said proceedings are as stated hereinafter. By a plaint dated 16<sup>th</sup> November 1994 the Respondent sued the Appellant and one Mate Thabari (hereinafter *Mate*) for colluding to deprive him of the parcel of land known as Nthawa/Riandu/599 (hereinafter *parcel* 599). The Respondent pleaded that the said parcel was his allocation or share of clan land. His clan was disclosed as Yonga clan. It was further pleaded that the Appellant was at all material times working at the relevant Land Adjudication Office and had caused parcel No. 599 to be registered in his name by “pretending” that Mate, who was a member of Kere clan, had sold it to him.
3. The Appellant filed a defence dated 7<sup>th</sup> December 1994 in which he denied the Respondent’s claim. He pleaded that he bought part of the suit property from Mati and another portion thereof from one Ita Mutugo (hereinafter *Ita*) and that those two portions were consolidated during the process of land adjudication and registered as parcel No. 599. He denied having conducted any adjudication in Riandu Adjudication Section where the said parcel is situated.
4. The record shows that on or about 8<sup>th</sup> December 1994 a mutation was registered by the Land Registrar whereby parcel No. 599 was sub-divided into eight (8) parcels ranging from 2467 – 2474. The Respondent does not appear to have known of the said sub-division until the following year when he filed a chamber summons dated 3<sup>rd</sup> November 1995 seeking amendment of the plaint to introduce the new parcels into the suit. Leave to amend was eventually granted on 15<sup>th</sup> November 1995.
5. The record further shows that upon a full hearing of the suit the learned trial magistrate found that the Respondent had proved his case to the required standard and consequently entered judgement for the Respondent granting him *parcel Nos. Nthawa/Riandu/2467, 2468 and 2469* (hereinafter the *suit properties*). The trial court also made 2 other consequential orders to facilitate the registration of the Respondent as proprietor of the aforesaid 3 parcels.
6. The Appellant, being aggrieved by the said judgement, filed a memorandum of appeal dated 22<sup>nd</sup> April 1997 raising ten (10) grounds of appeal. The said memorandum was amended on 29<sup>th</sup> November 2017 by deleting all the previous grounds and introducing the following seven (7) grounds of appeal;
  - a. *The learned magistrate erred in law and in fact in failing to examine all the oral and documentary evidence presented by the Appellant and therefore made the wrong decision.*
  - b. *The learned magistrate erred in law and in fact in finding that the Respondent (Plaintiff then) had proved his case on a balance of probabilities, whereas the Appellant had adduced enough oral and documentary evidence to rebut the Respondent’s claim and hence made the wrong decision.*
  - c. *The learned magistrate erred in law and in fact in failing to appreciate that one of the parties to the transaction, one Ita Mitugo, had died and that the Respondent had not claimed anything from him (the deceased) during his lifetime and therefore made the*

wrong decision.

d. *The learned magistrate erred in law and in fact in solely relying on hearsay evidence in allowing the Respondent's claim and therefore made the wrong decision.*

e. *The learned magistrate erred in law and in fact in failing to put weight on the decision by the District Officer during the arbitration in establishing the genuine clan elders and therefore made the wrong decision.*

f. *The learned magistrate erred in law and in fact in granting the Respondent orders that he had not claimed for which clear evidence of is bias and therefore made the wrong decision.*

g. *The learned magistrate erred in law and in fact in allowing the Plaintiff's claim whereas the whole evidence pointed to the contrary and therefore made the wrong decision.*

7. The Appellant consequently sought the following reliefs in the amended memorandum of appeal;

a. *This appeal be allowed and the judgement in the lower court be set aside.*

b. *The Respondent's case in the lower court be dismissed with costs.*

c. *Any subsequent titles made (if any) on the basis of the lower court judgment be cancelled and the suit land do revert back into the names of the Appellant.*

8. When the appeal was listed for directions on 18<sup>th</sup> June 2018, the Respondent's advocate was not present despite service. In fact, the record shows that the Respondent has never participated in the proceedings since 2012. The court, nevertheless, gave directions for the disposal of the appeal. It was directed that the appeal shall be canvassed through written submissions and the parties were granted 42 days to file and exchange their respective submissions. The matter was thereupon fixed for mention on 26<sup>th</sup> September 2018 to confirm compliance and fix a date for judgement.

9. When the appeal was mentioned on 26<sup>th</sup> September 2018, only the Appellant's advocate was present. The Respondent's advocate had not filed any submissions and neither did he send an advocate to hold his brief. The court, therefore, fixed the appeal for judgement on 28<sup>th</sup> February 2019.

10. Before considering the merits of the appeal, there is one aspect of this appeal which is not clear from the record. Although the judgement of the trial court was delivered on 27<sup>th</sup> November 1995, the memo of appeal was not filed until 22<sup>nd</sup> April 2017. That was clearly way out of the period stipulated under **section 79G of the Civil Procedure Act (Cap 21)** for the filing of an appeal against a decree of the Magistrate's court. The said section provides as follows

**“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.” (Emphasis added).**

11. There is no citation on the face of either the original or amended memorandum of appeal of any leave having been granted to lodge the appeal out of time. No copy of an order for extension of time was filed with the memorandum of appeal or at any other period. This issue was not raised by the Respondent since he never participated in the proceedings. The court shall, nevertheless, consider the merits of the appeal in the absence of any objection by the Respondent.

12. This court is aware of its obligation as a first appellate court. The principles guiding 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. In the case of **Peters Vs Sunday Post Ltd [1958] EA 424 Sir Kenneth O. Connor, P.** described that jurisdiction at page 429 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 484 at page 485** 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 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.”**

15. The Environment and Land Court at Eldoret in **ELC Appeal Case No. 8 of 2016 Kapsiran Clan Vs Kasagur Clan [2018] eKLR**, the **Hon Justice A. Obwayo** summarized the applicable principles as follows;

**“The appropriate standard of review established in the cases can be stated in three complementary principles;**

- a) First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;**
- b) In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and**
- c) It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”**

16. Bearing the above guiding principles in mind, the court shall now consider the Appellant’s grounds of appeal. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, and 7<sup>th</sup> grounds essentially challenge the trial court’s evaluation of the evidence tendered at the trial and the conclusions made in the judgement. It was submitted that as a result of wrongful evaluation of evidence the trial magistrate arrived at a wrong decision which resulted into the entry of judgement in favour of the Respondent. These grounds shall be considered and determined together

17. The gist of the Appellant’s case is that the Respondent did not adduce sufficient evidence to prove his case on a balance of probabilities and that, in any event, there was sufficient defence evidence which effectively rebutted the Respondent’s case before the trial court. The court has examined the entire record of proceedings, the oral and documentary evidence tendered at the trial as well as the judgement of the learned magistrate. The learned magistrate actually analyzed the evidence tendered by all the parties before him. He analyzed the evidence of the Appellant and that of his witnesses. He rejected the Appellant’s defence for reasons which are clearly stated in the judgement.

18. The trial court was entitled upon hearing and observing the witnesses to believe the Respondent’s case. There was adequate evidence on record to demonstrate that parcel No. 599 was initially clan land belonging to Yonga clan. There was adequate evidence to demonstrate that the Respondent was allocated the portion of parcel No. 599 which he was claiming from the Appellant. The secretary of Yonga clan testified that he was the one recording the clan allocations to individual members and that the Respondent was, indeed, allocated the land he was claiming.

19. The court has noted from the record of proceedings that after the conclusion of the Respondent’s examination in-chief, Ita (1<sup>st</sup> Defendant) was given an opportunity to ask him questions in cross-examination. Ita was recorded as having stated as follows;

*“I have no questions for this witness. What he has told the court is true.”*

20. The trial court was faulted for failing to give due weight to a decision by the District Officer (D.O.) during a previous attempted arbitration between the disputing parties. The record shows that the said D.O. was not called as a witness at the trial hereof. The alleged decision was also not tendered as an exhibit. In those circumstances, the learned trial magistrate could not be faulted for failing to accord weight to the alleged decision whose maker was not called as a witness. In any event, such a decision could not be binding upon the trial court. The trial court still had a legal obligation to consider all other evidence tendered at the trial before making a decision on the dispute.

21. The Appellant’s allegation that the trial court relied solely on hearsay evidence in allowing the Respondent’s claim is not supported by the record of proceedings. The trial court’s observation that the Appellant may have used his position as a Land Adjudication Officer to improperly acquire parcel No. 599 was not based on hearsay evidence. It was merely a conclusion to be drawn from the evidence on record. The Appellant could not satisfactorily explain his acquisition of parcel 599 which measured over 30 acres whereas Mate had allegedly sold him only two (2) acres. There was no credible evidence to demonstrate what acreage the Appellant may have bought from Ita who was long deceased at the time of trial.

22. The court’s own re-consideration and re-evaluation of the evidence on record leads to the conclusion that the findings and conclusions of the trial court were well founded. It could not be said that they were not based on the evidence on record. There is no basis for faulting the trial court’s assessment of the credibility of the various witnesses who testified. The decision of the trial court was entirely consistent with the evidence on record. In the case of **Hahn Vs Singh [1985] KLR 716**, it was held, *inter alia*, that where there is a conflict of primary facts

between witnesses and where the credibility of the witnesses is crucial, an appellate court will hardly interfere with the conclusion of the trial court after weighing the credibility of those witnesses.

23. The 3<sup>rd</sup> ground faulted the learned trial magistrate for failing to appreciate that one of the parties to the sale transaction (Ita) was deceased and that the Respondent had not claimed anything from him during his lifetime. This ground has really no merit for two reasons. First, there is evidence on record to the effect that the Respondent and his clan discovered the loss of their clan land in 1993 whereas the said Ita died way back in 1986. Second, the trial court found the evidence of the alleged sale transaction totally unreliable. The trial court found that the Appellant's documents in support of the transaction were fabricated and falsified. In fact, one of the Appellant's own witness denied having signed 2 out of the 3 documents tendered by the Appellant. One may also wonder why the said Ita never put the Appellant in possession between 1972 when the transaction allegedly took place and 1986 when he died.

24. The 6<sup>th</sup> ground faulted the trial court for granting the Respondent orders which were not claimed in the plaint. It was submitted by the Appellant that whereas the Respondent had sued in respect of parcel No. 599 he was granted prayers in respect of *Title Nos Nthawa/Riandu/2467, 2468 and 2469*. As indicated elsewhere in the judgement, the record shows that the Respondent's application for substitution of parcel No. 599 with the resultant sub-divisions was allowed by the trial court on 15<sup>th</sup> November 1995. The court appears to have done the substitution even though the Respondent did not subsequently file an amended plaint.

25. The court finds that the Appellant did not suffer any prejudice from any irregularity in the pleadings which may have taken place. The Appellant was able to fully participate in the proceedings. He was able to mount his defence by calling four witnesses. The court finds that there was no miscarriage of justice in the circumstances.

26. The Appellant also faulted the trial court for granting two additional prayers which were not specifically sought in the plaint. The first was an order for the Appellant to execute all necessary documents to facilitate the transfer of the suit properties to the Respondent in default of which the court would sign and execute them on his behalf. The 2<sup>nd</sup> was an order for the Defendant to deliver the title deeds for the suit properties to the Land Registrar, Embu for cancellation.

27. As can be seen, those two orders were not substantive reliefs but merely orders to facilitate the Respondent's enjoyment of the fruits of his judgement. The practice in some cases is that parties apply for those orders after judgement, that is, during execution of the decree. However, in some instances, some litigants elect to include them as prayers in the main suit. The court is of the opinion that it does not really matter whether such orders are granted as part of the decree or during execution through an application under **Order 22 of the Civil Procedure Rules**. Even if the trial court had not granted them, the Respondent would have sought the same orders during execution.

28. The court is not inclined to allow that ground of appeal for two reasons. First, it is merely a technical or procedural objection which cannot stand in view of the clear provisions of **Article 159 (2) (d) of the Constitution of Kenya** and **section 19 (1) of the Environment and Land Court Act, 2011** which obligate this court to dispense justice without undue regard to procedural technicalities. Second, the Appellant did not suffer any prejudice as a result of the inclusion of the two orders for execution of the decree. The Appellant knew, or ought to have known, the consequences of losing the suit in the Magistrate's court. He could not lose the suit and still retain the titles for the suit properties. The court, therefore, finds that no miscarriage of justice was occasioned by the inclusion of the two orders in the judgement.

29. The upshot of the foregoing is that the court finds no merit in the Appellant's grounds of appeal contained in his amended memorandum of appeal amended on 29<sup>th</sup> November 2017. The Appellant's appeal is consequently dismissed in its entirety. There shall be no order as to costs since the Respondent did not participate in the appeal.

30. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED** in open court at **EMBU** this **28<sup>th</sup>** day of **FEBRUARY, 2019**.

In the presence of Ms. Muthama holding brief for Mr. Jessee Kariuki for the Appellant and in the absence of the Respondent.

Court clerk Leadys.

**Y.M. ANGIMA**

**JUDGE**

**28.02.19**