



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC APPEAL CASE NO. 18 OF 2017**

**(Formerly Kisii HCC APPEAL NO. 56 OF 2016)**

**NYANGWESO OJWANG PETER.....PLAINTIFF**

**Versus**

**NICHOLAS NYAGILO MATUNGA.....RESPONDENT**

**(An appeal from the judgment and decree of Hon. B.K. Kipyegon , R.M NDHIWA RMCC No. 166 of 2016 delivered on the 19/09/2016)**

**JUDGMENT**

1. This is an appeal from the Judgment and decree of Honorable **B.R. Kipyegon**, Resident Magistrate, Ndhiwa Law courts in Ndhiwa SRM CC No. 166 of 2016 delivered and issued on 19<sup>th</sup> September 2016 and 2<sup>nd</sup> November 2016 respectively. The learned trial Magistrate held that the plaintiff (hereinafter referred to as the appellant) had not met the legal threshold for permanent injunctive orders against the defendant (the respondent) in respect of the suit land parcel no. 6846 East Kubia Adjudication section. The suit was dismissed with costs to the defendant. Being aggrieved by the decision of the trial court, the appellant preferred the instant appeal.
2. This appeal being the first one from the trial court's decision on the matter, it is duty of this court to revisit the evidence on record, evaluate it and reach its conclusion. However, it must be appreciated that an appellant court will not ordinarily interfere with the findings of fact by the trial court unless they are based on no evidence at all or an misapprehension of evidence, or the court is shown demonstrably to have acted on wrong principles in reaching the decision, see **Mwanasokoni –v- Keya Bus Services Ltd (1982-88) I KAR 278.**
3. Briefly, the appellant's claim before the trial court as per plaint dated 4<sup>th</sup> April 2016 and filed on 5<sup>th</sup> April 2016, is that he is the proprietor of the suit land, parcel number 6846 East Kubia Adjudication section measuring approximately two decimal five (2.5) acres in area. That he bought the suit land from the respondent and his wife, Mary Adoyo Nyangilo on 5<sup>th</sup> October 2007. That the appellant thereafter took possession of the suit land, cultivated it, constructed their family home on the land and even buried his late wife Lilian Anyango Muo thereon.
4. The appellant further claimed that on 8<sup>th</sup> February 2016, the respondent unlawfully entered into the suit land, cut down trees and plantations and chased away the appellant together with his children. That the appellant's right and title to the suit were restricted thus sued the respondent for a permanent prohibitory injunction and costs of the suit.
5. The respondents denied the appellant's claim and sought dismissal of the suit with costs according to his statement of defence dated 15<sup>th</sup> April 2016. They stated that they only know parcel No. 6446 at Kubia Adjudication section and not the suit land.
6. In his reply to statement of defence dated 19<sup>th</sup> April 2016, the appellant reiterated the contents of his plaint. That the respondent referred to land parcel number 6446 East Kubia Adjudication section which is not the land in dispute.
7. The appellant testified that he bought the suit land from the respondent at kshs. 40,000/= paid in three instalments as shown on land sale agreement dated 5<sup>th</sup> October 2007 (PExhibit 1). That he lost his wife in year 2015 and buried her on the said land as revealed in burial permit (PExhibit 2) and death certificate (PExhibit 3). That the respondent did not object to the burial of the appellant's wife on the land.
8. The appellant further testified that the respondent cut down trees, removed fence which demarcates the land and demolished a pit latrine on the land. The appellant reported the matter at Magunga police station. The area Chief also summoned the respondent by a letter dated 10<sup>th</sup> February 2016.
9. The appellant also stated, inter alia,

**“I have lost my trees fence and latrine. I have lost peace and do not even live in the land anymore.”**

10. The trial court held that the respondent did not participate in the trial of the suit before the court. The court noted from the pleading on record, that the respondent appreciated that the appellant ought to utilize the suit land peacefully and without intrusion.

11. The trial court further held thus:-

**“ Either party may as well be in proper occupation of respective land parcels, evidence put on record still do not confirm whether there is encroachment into subject land”**

12. I observe that at the origin of this appeal, the appellant filed record of appeal dated 7<sup>th</sup> November 2016 through Veronichah Migai and Company Advocates. Currently, the appellants appears in person on further to notice dated 18<sup>th</sup> April 2018.

13. In his grounds of appeal dated 19<sup>th</sup> October 2018, the appellant sought that :-

i. This appeal be allowed by overturning lower court’s decision to the effect that an order of permanent prohibitory injunction be directed at the defendant restraining him from entering into occupying, cutting trees and planting alienating, constructing on or in any way dealing and /or interfering with land parcels No. 6846 of East Kulia adjudication section and the Judgment earlier delivered in the lower court be vacated with costs.

ii. Also the costs of appeal be determined.

iii. Any other/further relief than this honourable court may deem fit ad proper to grant in his appellate jurisdiction.

14. By his replying affidavit sworn on 17<sup>th</sup> April 2018, the respondent who also acts in person, averred inter alia, that the suit land belongs to other people. That the appellant’s claim is incompetent, baseless and defective.

15. The appellant and the respondent filed submission dated 10<sup>th</sup> December 2018 and 20<sup>th</sup> November 2018 respectively. Whereas the appellant relied on PExhibits 1 to 5 produced before the trial court and urged this court to allow the appeal to meet the ends of justice, the respondent submitted that the appellant had no defence to offer and the appeal be dismissed with costs.

16. It was the testimony of the appellant that the land adjudication officer Suba confirmed that the land belonged to him. He testified in part that:-

**“I also went to land adjudication office Suba and they confirmed the said land is mine. This is the letter dated 31/03/2016 and I produce it as Pexhibit -5”.**

17. According to PExhibit 5, the appellant is the sole owner of the suit land. However, PExhibit 5 further shows that East Kulia Adjudication section where the suit land is situated was yet to undergo land adjudication. I am of the considered view that the import of PExhibit 5 is that the adjudication process was considered to be incomplete. Therefore **Sections 26 and 26A of the Land Adjudication Act (Cap 284)** are applicable in the circumstances.

18. Under **section 29 of the Land Adjudication Act (Cap 284)**, any person who is aggrieved by the determination of objection under Section 26 of the Act may within sixty days of the determination, appeal against the determination to the Minister in writing. The decision of the Minister shall be final.

19. Moreover **Section 30 of the Land Adjudication Act (Cap 284)** provides for staying of land suits as follows :-

**“ Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.”** (Emphasis laid)

20. In the case of **Lepore Ole Maito –V- Letwat Kortom and 2 others (2016) eKLR**, John Mutungi J rendered himself thus:-

**“The land Adjudication Act sets an elaborate procedure through which the rights and interests of all persons is to be established and once the process and procedures is followed and completed the determination of such rights and interests is final. The Act provides an appropriate mechanism for resolution of any disputes”** (Emphasis supplied)

21. In the instant matter, the trial court correctly observed that the suit land was still under the process of adjudication. The learned trial Magistrate held that

**“The suit land is still under the process if adjudication/registration. The dispute relates to ownership of piece of land within an adjudication Scheme.”** (Emphasis laid)

22. It is noted that there is no consent in writing of the adjudication officer in respect of the suit land. Furthermore, PExhibit 5 can not be

termed to be such a consent. Therefore the trial court as well as this court can not entertain the instant claim by dint of **section 30 of the Act (supra)**.

23. In **Kirugi and another –v- Kabiya and 3 others (1987) KLR 347**, the court of Appeal stated that the burden was always on the plaintiff to prove his case on the balance of probabilities. That such burden is not lessened even if the case was heard by way of formal proof.

24. The trial court arrived at a decision that the appellant did not participate at the trial and that the said appellant failed to meet the legal threshold for a permanent injunctive relief against the respondent. The court correctly applied its mind to the facts and the law when it dismissed the suit with costs. I find no fault in the finding of the trial court. Clearly, there is no basis to disturb the decision of the learned trial magistrate.

25. Accordingly, the appeal be and is hereby dismissed with costs to the respondent both here and below.

It is so ordered.

**DELIVERED, DATED and SIGNED at MIGORI this 27th day of February 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Appellants present in person

Responded – Present in person

Tom Maurice – Court Assistant.