



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C.A. NO. 31 OF 2014

PETER NDEGE KIRIBA.....APPELLANT

VERSUS

WILFRED CHUMA GUAMA.....RESPONDENT

(Being an appeal from the judgement and decree of Hon S.K. Mutai (SRM) dated 4th November 2014 in Embu CM's CC Case No.138 of 2006)

JUDGEMENT

1. This is an appeal against the judgement and decree of Hon S.K. Mutai (then Ag P.M) dated 4th November 2014 in *Embu CMCC 138 of 2006*. By the said judgement the trial court allowed the suit by the Respondent, who was the Plaintiff, and consequently ordered the eviction of the Appellant, who was the Defendant, in the said proceedings.
2. The brief facts of the said proceedings are as hereunder. By a plaint dated 27th July 2006, the Respondent pleaded that he was the registered owner of a plot known as Lock-up No. 19 Kiamwathi Market (hereinafter the *suit property*) and that the Appellant was in unlawful occupation thereof and without the former's consent. It was further pleaded that the Appellant had ignored the Respondent's request to vacate the suit property in consequence of which the Respondent sought an eviction order against the Appellant together with costs of the suit.
3. The Respondent entered an appearance to the suit and by a statement of defence dated 18th September 2006, denied the Respondent's claim in its entirety. The Appellant pleaded that he was in lawful occupation of the suit property and that there was another pending suit being *Embu SPMCC No. 4 of 2004 Ciriba Mbogo Vs Kirinyaga County Council* over the suit property. It was further pleaded that *Embu High Court Misc Application No. 115 of 2006* was also pending over the same subject matter.
4. The record 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 in his favour in terms of prayer (a) and (b) of the plaint dated 27th July 2006.
5. The Appellant, being aggrieved by the said judgement, filed a memorandum of appeal dated 3rd December 2014 raising the following eight (8) grounds of appeal namely;
 - a) *The learned magistrate erred in law and fact by failing to consider that the Appellant was given Lock-up No. 19 Kiamwathi together with his brother by their father.*
 - b) *That the learned magistrate erred in law and fact by failing to consider that the Respondent did not involve the vendor of Lock-up No. 19 Kiamwathi during proceedings of the case as a witness.*
 - c) *That the learned magistrate erred in law and fact after failing to consider that the Appellant together with his brothers have extensively developed the plot.*
 - d) *That the learned magistrate erred in law by failing to consider that the Respondent did not involve the county council during proceedings as witness.*
 - e) *That the learned magistrate erred in law and fact by failing to consider the evidence adduced by the defence witness 2.*
 - f) *That the learned magistrate erred in law and fact by relying only on the evidence adduced by the Respondent.*
 - g) *That the learned magistrate erred in law and fact after ignoring the minutes produced by the Appellant.*

h) That the learned magistrate erred in law and fact after failing to consider that the Respondent was supposed to sue the Appellant together with his brothers.

6. The Appellant consequently prayed for the following orders;

a) That the judgement delivered on 4th November 2014 be set aside.

b) That the Respondents suit in Embu CMCC No. 138 of 2006 be dismissed.

c) That the costs of the appeal be provided for.

7. When the appeal was listed for directions on 19th September 2018, it was directed that the appeal shall be canvassed through written submissions. The Appellant was directed to file and serve his written submissions and authorities, if any, within 30 days whereas the Respondent was to file and serve his submissions within a similar period upon service. The record shows that the firm of Wachira Kirigo & Co Advocates filed written submissions on behalf of the Appellant on 19th October 2018 but there were no submissions on behalf of the Respondent by the time of preparation of this judgement.

8. The court is aware that as a first appellate court, it has an obligation to re-look at the entire evidence before the trial court, conduct its own evaluation thereof and draw its own conclusions thereon. The principles guiding a first appellate court were summarized in the case of **Selle Vs Associated Motor Bank 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.”

9. The court has noted that the Appellant’s written submissions have raised matters which were not raised in the memorandum of appeal. The Appellant has also raised some issues which were not before the trial court such as the refusal of the *Magistrate’s court in Embu SPMCC No. 4 of 2004* to admit the Appellant’s brothers as interested parties. The court shall only consider the grounds set out in the memorandum of appeal dated 3rd December 2014.

10. The 1st ground faults the trial magistrate for failing to consider and hold that the Appellant and his siblings were gifted the suit property by their father. The court has carefully considered the entire evidence on record and the judgement of the trial court. The trial court fully considered the Appellant’s evidence on the matter and rejected it. The trial court found that the Appellant had not tendered any documents to demonstrate his ownership of the suit property.

11. This court finds no fault with the finding of the trial magistrate on this issue. There is abundant evidence on record to demonstrate that it is the Appellant’s father, Ciriba Mbogo, who actually sold the suit property to the Respondent at Kshs 75,000/-. It is the Appellant’s said father who applied to the County Council of Kirinyaga (hereinafter the *Council*) to transfer the suit property to the Respondent. That application was duly approved by the Council.

12. There is evidence on record that upon learning of the sale and transfer of the suit property to the Respondent, the Appellant and his brothers complained to the Council which purported to make a resolution to the effect that the Appellant and his brothers be registered as proprietors of the suit property. That resolution was successfully challenged by the Appellant’s father in *Embu CMCC No. 4 of 2004*. In those circumstances, the Appellant could not demonstrate any proprietary interest over the suit property. Accordingly, the court finds no merit in the 1st ground of appeal.

13. The 2nd and 4th grounds of appeal are inter-related hence they shall be considered together. The trial court was faulted for failing to consider that the Respondent had failed to call Ciriba Mbogo and the Council as witnesses. The court is of the opinion that in an adversarial system of dispute settlement such as ours, a litigant is entitled to prosecute or defend a case in whatever manner he deems fit. A litigant is at liberty to assemble and call witnesses of his choice. The adverse party has no business delving into the choice of witnesses by his opponent. The court has no such business either. The business of the court is to consider the evidence on record and make a decision on whether or not a party has proved his case or defence to the required standard. The court consequently finds no merit in the 2nd and 4th grounds of appeal.

14. The 3rd ground faulted the trial magistrate for failing to consider that the Appellant and his siblings had extensively developed the suit property. The court finds no merit whatsoever in this ground of appeal. It was not one of the issues for determination in the suit. The main issue in controversy in the suit was ownership of the suit property. The obligation which fell on the Appellant was demonstrate propriety interest in the suit property and not merely developments thereon.

15. The 5th ground faulted the trial magistrate for failing to consider the evidence of the second defence witness (DW 2). There is nothing on record to suggest that the evidence of DW 2 was not considered. On the contrary, the judgement indicates that the court considered the entire evidence on record together with the exhibits produced by the parties. The trial court also considered the respective written submissions of the parties. Whereas the trial court was obligated to consider the entire evidence on record, it was not obligated to wholly accept the evidence on any particular witness. The court finds no merit in this ground of appeal as well.

16. The 6th ground of appeal faults the trial magistrate for relying only on the evidence of the Respondent. There is no material on record to support this allegation. As indicated in the immediately preceding paragraph, the court considered the totality of the evidence tendered by

the disputing parties. The judgement shows that the Appellant's defence was considered and rejected. The trial magistrate even wondered why the purported gift to the Appellant and his siblings was never documented and perfected by their father who was still alive at the time of trial.

17. The 7th ground of appeal faulted the trial court for ignoring the Council minutes produced by the Appellant. The Appellant submitted that the trial court ought to have considered the minutes of the resolution of the Council which directed that the Appellant and his siblings be registered as owners of the suit property. There is adequate evidence on record to demonstrate that the said resolution by the Council was successfully challenged by the Plaintiff's father in *Embu CMCC No. 4 of 2004, Ciriba Mbogo Vs County Council of Kirinyaga*. The evidence on record further shows that the Appellant's attempt to challenge the judgement his father obtained in that suit was not successful. In those circumstances, the trial court could not rely on the council's resolution which had already been nullified in prior judicial proceedings. The court finds no merit in this ground of appeal as well.

18. The 8th ground faults the trial court for failing to consider that the Respondent ought to have joined the Appellant's siblings in the suit. It was submitted that the Appellant and his brothers were tenants in common with respect to the suit property hence they ought to have been sued together. The court finds this submission both legally and contextually faulty. First, it was never demonstrated at the trial that the Appellant and his siblings were owners as tenants in common of the suit property. The resolution of the Council was no longer valid and the Appellant did not tender any alternative evidence of ownership. Second, the Respondent was not seeking to be declared as owner of the suit property. He was simply seeking an eviction order in his capacity as proprietor against the Appellant who was in possession. The rest of the Appellant's brothers were not in possession. The court, therefore, finds no merit in the 8th ground of appeal.

19. The upshot of the foregoing is that the court finds no merit in the appeal. All the grounds of appeal are hereby dismissed. Accordingly the appeal is hereby dismissed with costs to the Respondent.

20. It is so decided.

JUDGEMENT DATED, SIGNED and DELIVERED in open court at **EMBU** this **21ST** day of **FEBRUARY, 2019**.

In the presence of the Appellant in person and Ms Muthama holding brief for Mr Morris Njage for the Respondent.

Court clerk Mr. Muinde.

Y.M. ANGIMA

JUDGE

21.02.19