



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC APPEAL NO. 9 OF 2017**

**TABITHA MUIA.....APPELLANT**

**=VERSUS=**

**BEATRICE NYAMBURA KARIUKI.....1ST RESPONDENT**

**GEORGE MURIUKI KABUNWA.....2ND RESPONDENT**

**(Being an Appeal from the Judgment by Honourable C Obulutsa (Mr) – SPM**

**in Nairobi CMCC Number 4140 of 2010 delivered on 30th April 2015)**

**JUDGMENT**

**Background**

1. This appeal was filed as Nairobi **HCCA Number 249 of 2015; Beatrice Nyambura Kariuki & another v Tabitha Muia**. On 24/2/2017, Jaden J made an order transferring the appeal to this court. The transfer was effected and the appeal was assigned the current number. When the appeal came before me on 30/5/2017, Mr Chigiti, learned counsel for the appellant, indicated that parties had agreed to dispose the appeal through written submissions. Consequently, directions were issued and parties filed their respective submissions. However, while preparing judgment, the court noticed that the memorandum of appeal named Beatrice Nyambura Kariuki and George Muriuki Kabunwa as appellants and Tabitha Muia as respondent yet the impugned judgment was in favour of the parties named as appellants.

2. Arising from this apparent error in the memorandum of appeal, the court did not render a judgment. It instead rendered directions dated 6/4/2018 requiring the party or parties who presented the appeal to take steps to remedy the apparent error within 60 days. Consequently, on 16/5/2018, M/s Chigiti & Chigiti Advocates brought an application seeking leave of the court to amend the memorandum of appeal and interchange the parties to the appeal. By consent, the application was allowed on 18/7/2018 and an amended memorandum of appeal was filed on 30/7/2018. The appeal was set down for fresh directions on 13/11/2018. There being no additional materials by the parties, the court gave a judgment date. The above chronology of events is necessary because it explains why the judgment was not rendered on the day it was to be read.

3. The appeal arises from the judgment of the Senior Principal Magistrate Court (Hon C Obulutsa) delivered on 30/4/2015, declaring the respondents the lawful owners of Plot No. MA 143(C2609) situated in Ruai within the Embakasi Ranching Company Limited Scheme, Nairobi. The Learned Magistrate found that the rival parties held share certificates from Embakasi Ranching Company Limited and they were supposed to be shown their respective plots by Embakasi Ranching Company Limited and have their certificates signed and stamped at the back to confirm that their respective plots had been pointed out to them. He noted that whereas the respondents' share certificate bore endorsement to the effect that their plot had been pointed out to them on 31/7/2008, there was no evidence that the appellant had been shown her plot. The trial court also noted that whereas the respondents had presented a beacon certificate, the defendant had not presented any. Lastly, the trial court observed that one of the appellant's documents bore hand written alterations introducing Plot Number P 928. Aggrieved by the judgment, the appellant brought this appeal and sought the following orders:

***a) The appeal be allowed***

***b) The entire judgment of the lower court at Nairobi by Honourable Senior Principal Magistrate C Obulutsa be set aside.***

***c) The appellant is the legitimate owner of the suit property(sic)***

*d) The appellant be awarded the costs of this appeal and in the Chief Magistrates Court.*

## **Grounds of Appeal**

4. The appellant raised the following five grounds of appeal:

*1. That the learned trial magistrate erred in law and made a fundamental mistake in making a final finding that the respondents are the lawful exclusive owners of Plot No. MA 143(C2609) situate in Ruai within the Embakasi Ranching Scheme.*

*2. That the learned trial magistrate erred in law and fact by granting an injunction against the appellant.*

*3. That the learned trial magistrate erred in law and fact by not finding that the respondents are liable for the counter claim.*

*4. That the learned trial magistrate erred in law and fact by failing to find that the appellant is the legitimate owner of the suit property as per the evidence adduced in court.*

*5. That the learned trial magistrate made a fundamental error of law and fact by finding that the lack of beacon certificate was proof that the appellant did not own the Plot Number MA 143(C 2609).*

## **Submissions**

5. Parties presented written submissions. The appellant filed her submissions on 14/6/2017. She submitted that the learned magistrate did not go to the root and or history of the ownership of the property. It was submitted that the suit property originally belonged to Embakasi Ranching Company Limited before it was transferred to Kawethei Investments Ltd. Through a resolution passed on 26/2/1999 by the chairman, secretary and director of Kawethei Investments Ltd, it was agreed that P 928(C2609) be sold and transferred to the appellant at a consideration. On 24/2/1999, Kawethei Investments Limited transferred its two shares in Embakasi Ranching Company Limited to one Veronica Muema and to the appellant who were allocated Plot Numbers P 927(C 2609) and P 928 (C 2608), respectively, for a consideration of Ksh.90, 000. The transfer was duly executed and stamp duty duly paid. Kawethei Investments made payments for survey fees, engineer's fees and registration fees. It was further submitted that Embakasi Ranching Company Limited issued the appellant with a non member certificate of ownership in respect of Plot Number P 928(C 2609). On 1/3/1999, the appellant paid transfer fees of Kshs. 8,000 to Embakasi Ranching Company Limited. It was contended that the respondents claim the same property as the appellant and they obtained ownership documents much later as non-members of Embakasi Ranching Company Limited. It was further submitted that the appellant had demonstrated her claim to the property. It was argued that the court disregarded the appellant's evidence and that of DW2 who was the Chairman of Kawethei Investments Limited. It was further submitted that the court disregarded the payments made by the appellant and the transfer form that was executed in favour of the appellant.

6. The respondents filed their submissions on 23/6/2017. They submitted that they purchased the suit property from Embakasi Ranching Company Ltd in 1993 and took possession immediately. It was the respondents' case that the appellant purchased land from Kawethei Company Ltd in 1999 and only came to the suit property in 2008 when she found the respondents had fenced the land. It was further submitted that the appellant in her evidence confirmed that she visited the suit property in 2008 in the company of a surveyor from Embakasi Ranching Company who refused to sign her share certificate as allocated. The respondents further submitted that the dispute between the appellant and the respondents is purely on allocation. It was argued that the appellant in her counter-claim did not join Embakasi Ranching Company Limited as a defendant despite contending that it allocated the appellant the suit property and issued her with a letter showing she was the allottee of the suit property. The respondents submitted that they had proved their case and the trial magistrate properly held that their share certificate was signed whereas the appellant's certificate was not signed. The respondents further submitted that they had obtained a beacon certificate while the appellant did not have any. Further, it was submitted that during hearing, DW 1 testified that they sold a share to the appellant but no details of allocation were given. Finally, it was submitted that Embakasi Ranching Company Limited was the only entity which could point out where the appellant's land was located and that it should have been joined in the counter- claim.

## **Determination**

7. I have perused the lower court's record and the impugned judgment. I have also considered the grounds of appeal and the submissions of counsel. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified in the lower court. (See the case of **Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd [2004] 2 KLR 269** on the duty of the first appellate court). It is also settled law that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were not based on evidence at all, or they were based on a misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. (See, **Peter v. Sunday Post Ltd. [1958] E.A 424** and **Makube v. Nyamuro[1983] KLR 403**). It is on the foregoing principles that this appeal falls for consideration.

8. The totality of the five grounds of appeal is that the trial court erred in coming to the finding that the respondents were the legitimate owners of the suit property.

9. The dispute before the trial court related to the ownership of an unsurveyed piece of land within Embakasi Ranching Company Limited Scheme. The allocating entity and custodian of records of ownership and physical location was Embakasi Ranching Company Limited. Before the court was a claim of ownership by the respondents and a defence plus a rival counter-claim of ownership by the appellant. Absent from the proceedings was Embakasi Ranching Company Limited which held key records on ownership and physical location of the various plots in the their unsurveyed scheme. Neither of the rival parties called a witness from Embakasi Ranching Company Limited to testify as to the ownership and physical location of the plot(s) appearing in the rival share certificates. In my view, failure by both parties to either join Embakasi Ranching Company Limited as a party to the suit or call credible witness from Embakasi Ranching Company Limited left the key

question of ownership and physical location of the suit property unanswered. The trial court too failed to appreciate this important aspect.

**10.** The respondents produced a non-member share certificate dated 19/7/2000 in their name in which the suit property is designated as Plot MA 143. On her part, the appellant similarly produced a non-member share certificate dated 23/6/2000 in which the suit property is designated as P 928. In my view, to fully and effectually adjudicate and settle a land dispute of this nature, it was necessary to join the allocating entity as a party, or at the very least, get independent evidence from the allocating entity as to the ownership and physical location of the property(properties) in the rival share certificates. The parties to this appeal failed to see this important aspect.

**11.** Secondly, it is noted from the impugned judgment that the judgment is silent on the appellant's counterclaim. In my view, the trial magistrate was obligated to make a categorical pronouncement on the appellant's counterclaim. As the record stands, it is not clear if the counterclaim was dismissed.

**12.** Having evaluated the evidence before the trial court, I have come to the conclusion that the trial court did not have sufficient evidence upon which it came to the conclusion that the respondents herein were the legitimate owners of the suit property. In light of that, and in tandem with the powers conferred upon this court under Section 78 of the Civil Procedure Act, I allow this appeal in the following terms:

***a) The judgment of the trial court rendered on 30/4/2015 in Milimani CMCC Number 249/2015 is set aside in its entirety and the suit is remanded back to the Chief Magistrate Court for a fresh trial.***

***b) The respondents herein shall amend the plaint to join Embakasi Ranching Company Limited as a 2nd defendant and the appellant shall be at liberty to bring any claim it may deem necessary against the said Embakasi Ranching Company Limited.***

***c) There shall be fresh trial before a different magistrate to resolve the issue of ownership of the suit property.***

***d) Each party shall bear their respective costs of this appeal***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF FEBRUARY 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Ms Azenga holding brief for Mr Chigiti for the Appellant

Mr Kimaru holding brief for Mr Kamau Mwangi for the Respondents

June Nafula - Court Clerk