



**REPUBLIC OF KENYA**

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

**E.L.C APPEAL NO. 460 OF 2017**

**(Formerly Kisii Elc Appeal No. 159 of 2012)**

**1. MARGARET WASONGA SAMWEL CHACHA**

**2. BOKE SAMWEL CHACHA**

**3. NYAMBOGA SAMWEL CHACHA** (Suing as administrators of  
the estate of Samwel Chacha Mango –Deceased).....**APPELLANTS**

**-VERSUS-**

**1. MOKAMI MATIKO** (Suing as an administrator of

the estate of YUNUS MATIKO BOKE Deceased).....**RESPONDENT**

**(Being an appeal from the judgment of Hon. Aloyce. Peter Ndege, Senior Resident Magistrate in Kehancha Senior Resident Magistrate's Court Civil Case No. 10 of 2004 delivered on 4<sup>th</sup> December 2012).**

**JUDGMENT**

**BACKGROUND:**

1. The genesis of this appeal is the Judgment of the trial court (Honourable Aloyce Peter Ndege, Senior Resident Magistrate, as he then was ) in Kehancha Senior Resident Magistrate's Court Civil Case No. 10 of 2014 delivered on 4<sup>th</sup> December 2012. The learned trial Magistrate ordered the dismissal of the appellants' case and decreed in favour of the respondent. The original appellant namely Edward Chacha Mango who was the plaintiff before trial court, was aggrieved by the trial court's decision hence preferred the instant appeal.

2. This being the first appeal from the trial court's decision, the duty of this court is to analyse and evaluate the evidence afresh and reach its own independent and conclusion; see the case of **Selle and another –v- Associated Motor Boat Company Ltd (1968) EA 123.**

3. In the case of **Kenya Power and Lighting Company Limited- vs EKO and another (2018) eKLR** Joel Ngugi J based his judgment on various authorities including **Mary Wanjiku Gachigi –v- Ruth Muthoni Kamau** Court of Appeal Civil Appeal No. 172 of 2000 and **Anne Wambui Nderitu –v- Joseph Kiprono Ropkoi and Another** Court of Appeal Civil Appeal no. 345 of 2000. The court set out the appropriate standard of review on matters on first appeal in the following terms:-

**a. On first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusion.**

**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 the trial court.**

**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.**

4. The appellants are represented by learned counsel Mr. Agure Odero. The respondents are represented by learned counsel, Mr. R. Abisai.

5. The appellants claim before the trial court was by a Plaint dated 13<sup>th</sup> May 2004 and amended on 27<sup>th</sup> September 2010, wherein the

appellants) sued the respondent in the trial Court for the following Orders:

- a) Permanent injunction restraining the respondent by himself, agents, servants and or anyone claiming vide the Defendant from entering and or in any manner whatsoever dealing with land reference No. Bugumbe/Mabera/59, (herein referred to as the suit land).**
- b) That the respondent be condemned to pay the costs of the suit**
- c) Any relief which the Honourable Court may deem fit and just to grant in the circumstances.**
- d) A declaration that the appellants are the registered owners of the suit land.**
- e) General Damages for trespass and Mesne profits**

6. Initially, by an amended by plaint dated 31<sup>st</sup> August, 2009 the original appellant one Edward Chacha Mango sued as a legal administrator of the estate of Samwel Chacha mango. However, on 11<sup>th</sup> December 2012, the said original appellant was substituted with present appellants.

7. The respondent's reply to the appellants claim before the trial court, was by her amended written statement of defence dated 22<sup>nd</sup> September 2009. The respondent stated that the late Samwel Chacha Mango has never been the registered proprietor of either LR NO. Bugembe/Mabera/57 or the suit land. She sought to have the suit struck out and dismissed with costs. She denied the appellants' claim.

8. The suit was first heard by Honourable J.R Ndururi, Senior Resident Magistrate (as he then was), to the point where the appellants closed their case. A total of two (2) witnesses namely; Margaret Chacha Mango (PW1) who was the wife of the alleged land owner, Samuel Chacha Mango (deceased) and Chacha Gasper Mango (PW2), a daughter of one of the wives of the said, deceased Samuel Chacha Mango, testified in support of the appellants' case.

9. After the close of the appellants' case and after one and a half years the learned trial Magistrate namely Honourable A.P Ndege, SRM heard the respondent's case. The deceased respondent Yunus Matiko Boke (DW1) and Elias Wambura (DW2), a neighbour of the respondent gave evidence in support of the respondent's case.

10. After the trial court's findings, parties filed their respective submissions and judgment was delivered on 4<sup>th</sup> December 2012. The learned trial magistrate dismissed the appellants' case in totality based on the fact that the suit land was registered in the name of Simeon Chacha Mangera, Michael Mangera Chacha and Paulo Nchagwa Chacha. The trial Magistrate held that neither the appellants nor the respondent were entitled to the suit land. That the appellants had no rights to the land which is still registered in the name of persons who are all deceased.

11. The trial court further held that proof of ownership or any other interest in a registered land such as the present suit land must be by the production of the entries in the title and any other registrable interest therein. The trial court's decision was pegged on DExhibit 2 (Certificate of Official Search) showing the title number of the suit land. According to the trial court, the said exhibits strongly point to the fact that the registered owner of the suit land was neither the appellants nor the respondents. The trial court also held that anyone claiming ownership or currently in possession of the suit land was committing a criminal offence of intermeddling with the land estate as prohibited by **section 45 of the Law of Succession Act (Cap 160)**

12. Dissatisfied with the trial Court's decision, the appellants preferred the present appeal premised on their Memorandum of Appeal. The grounds of appeal are that the Honourable Trial Magistrate erred in law and fact by;

- a) Overlooking the certificate of succession used as it was then before the Law of Succession Act Cap came into force.**
- b) Holding that the appellants in suit were wrongly enjoined;**
- c) Ignoring the fact that the Evidence of the respondent was a sham and full of lies;**
- d) Not considering that the respondent claimed the whole portion of the Appellants parcel instead of Respondent claiming a part of the portion measuring 50ft by 325ft.**
- e) Failing to underscore the fact that the Defendant claimed LR/No. Bugumbe/Mabera/58 instead of the suit land which was the subject matter in court.**
- f) Exercising his discretion on wrong principles of the law therefore reaching the wrong judgment.**

13. On 17<sup>th</sup> September 2018, the appellants' filed an application for substitution of the original respondent (deceased) with the instant respondent. The application was allowed by the court on 20<sup>th</sup> September 2018.

14. The Appellants contend in their written submissions that the learned trial Magistrate failed to consider that the one Edward Chacha Mango, an appellant at one time in the proceedings had been substituted to enjoin three other appellants who by virtue of certificate of grant dated 20/11/1980 were entitled to be the administrators of the estate of Samwel Chacha. That irrespective of whether the land was registered

or not, the court should grant them a permanent injunction restraining the respondent from entering and or in any manner dealing with the suit land. The Appellants further contend that the exclusion of the other Appellants in the suit resulted in violation of *Audi Alteram Partem* a principle of natural justice which requires that a decision maker must provide adequate opportunities for those affected to present their case and respond to the evidence and arguments being advanced by other participants or in the knowledge of the decision maker.

15. The appellants relied on the case of **Pashito Holdings and Another V- Ndugu and 2 others, Civil Appeal No. 138/1997. Giella –v- Casman Brown and Co. Ltd (1973) EA 358** to buttress the said principle of natural justice. The appellants urged this honourable court to grant permanent injunction as sought in prayer (a) of the plaint.

16. The respondent opposed the Appeal on the ground that the original appellant lodged the case without Letters of Administration and therefore could not confer life to a suit that was defective from the onset. The Respondent further argues that since the Appellants did not present the Letters of Administration to the Court, they could not have inherited the matter rightfully at the trial court. In a nutshell, the Respondent argues that the Appellants do not have *locus standi* in the case.

17. The Respondent also opposed the appeal by arguing that the suit was time barred. That it was filed in 2004 while the cause of action arose on 13<sup>th</sup> June 1975 and the trespass occurred in 1990. It is her argument, the suit was filed two (2) years after the lapse of the stipulated time as provided for under **section 7 of the Limitation of Actions Act (Cap 22)**.

18. The crux of the dispute is the ownership of suit land. Both the Appellants and the Respondent claim that they bought it *from* one Paulo Nchagwa Chacha. I have noted the Certificate of Official Search, the Sale Agreement between Samwel Chacha Mango and Paul Nchagwa, (the first sale agreement) the Certificate of Succession and the Sale Agreement between Paul Nchagua Chacha the deceased respondent and Yunus Matiko Boke. (the second sale agreement).

19. The first Sale Agreement took place on **13<sup>th</sup> June 1975**. According to the Agreement the purchase price of KShs.775 was paid in three separate instalments and the agreement was witnessed by the chief, David Maroa and two other different witnesses. The subject of the agreement was **Land Parcel Number Mabera/57 measuring 100 by 100 feet** in area.

20. On the other hand, second sale agreement took place on **26<sup>th</sup> March 1972**. The purchase price of the land was KShs. 700/=. By the sale agreement, the purchase **price was paid in one instalment**. The agreement was also witnessed by the said chief and two other witnesses. The subject of the agreement was **Land parcel No. 58 measuring 50 by 325 feet**.

21. The Respondent (DW1) testified that the agreement was made by the chief, David Maroa and he affixed his thumb impression thereon. He further testified that the original document got lost. DW2 also testified that the chief drew the agreement. On cross examination, DW1 testified that they affixed their ID Numbers on the agreement long after they had signed it. On Cross-Examination, DW2 contradicted the testimony of DW1 that the agreement had been made a long time ago. In his own words DW 2 stated that “**this agreement was made the other day (juzi).**”

22. The second agreement appears to have been drawn by deceased respondent Yunus Matiko Boke. The handwriting in the said agreement is not consistent with that of the Chief David Maroa as evidenced in the first Sale agreement form filled by the said Chief in the transaction. This therefore casts doubt on the authenticity of the Respondents transaction and the resultant ownership of the suit land. It dents the probative value of the hand written Sale Agreement.

23. The minutes of the meeting held on 20<sup>th</sup> July 2000 before the chief Mr. J. O. M. Ogora reveal that the Appellants reported the dispute to the area chief with a view to resolving the ownership of the land. The Chief requested that everyone claiming ownership of the suit land to attend to the meeting with documentary evidence in form of title. According to the minutes the appellants showed up at the meeting with the Sale agreement while the Respondent did not show up with any document. This further casts doubt on the ownership of the suit of land by the respondent and how he came into possession of the same.

24. From the foregoing there are two different parcels of land in dispute. There is Bugumbe/Mabera/57 which is 100 by 100ft that mutated into the suit land claimed by the Appellants. There is also land parcel Number Bugumbe/ Mabera/58 to which the Respondent claims ownership. The Respondent clearly testified that what they are claiming LR number 58 measuring 50 by 325 feet and not the suit land. It is evident that the Appellants are not interested in LR NO. Bugumbe/Mabera/ 58 parcel of land measuring 50 by 325 feet but in the suit land. The two parcels of land are different. To my mind, it appears that the Respondent has been trespassing unto the suit land since he occupies the neighbouring piece of land. This Court will not delve into the legal ownership of the parcel of Land Bugema/Mabera/58 since it is not in issue and was not pleaded in the Plaint.

25. Based on documentary evidence placed before the trial court, I am of the considered view that Plot Number **Bugema/Mabera 59** is legally owned by the Appellants. They have demonstrated through a chain of documents that trace the property back to the original owner Paul Nchagwa, and that they bought it from him. The Appellants produced before the court the original Sale agreement signed by the vendor and the original buyer and witnessed by the area chief on the **agreement form for Sale of Land**. Their evidence remained unchallenged throughout the trial.

26. Regarding mesne profits, **section 2 of the Civil Procedure Act (Cap 21 of the Laws of Kenya)** defines the term “**mesne profits**” as follows:-

**“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;**

27. The Appellants did not tender any evidence to guide the court on what should be awarded based on the Respondents unlawful trespass on the land. Mesne profits must not only be specifically pleaded but must be strictly proved. I approve the dicta of justice J. M Onyango in the case of **Vincent Koskei –v- Benard Koskei [2018] eKLR** where the Judge held that :-

**“in the instant case, the Plaintiff needed to plead the amount that he has lost as result of the Defendant’s unlawful use of his land. Without such evidence, it is not possible for the court to determine the claim on Mesne profits.”**

28. On general damages, it is the duty of this court to assess the damages awardable depending on the unique circumstances of the case. In view of the evidence of witnesses and the production of exhibits before the trial court proof of damage is not a necessary ingredient for the successful award of general damages in the circumstances. I am guided by the case of **Duncan Nderitu Ndegwa v Kenya Power & Lighting Compant Limited & Another [2013] eKLR**, where P. Nyamweya J held thus;

**“Once trespass in land is established, it is actionable per se and indeed no proof of damage is necessary.”**

29. In conclusion I find that the Appellants have established their case against the respondent on a balance of probability. Accordingly I allow this appeal and make the following final orders:

- a. The trial’s court judgement delivered on 4<sup>th</sup> December 2012 and subsequent decree be and are hereby set aside.
- b. Judgment be and is hereby entered for the appellants against the respondent in terms that:
  - i. **A permanent injunction against the respondent for trespass to issue but only confined to the suit land LR Bugumbe/Mabera/59 as sought in prayers (a) of the amended plaint dated 27<sup>th</sup> September 2010.**
  - ii. **A declaration be and is hereby issued that the suit land, Bugumbe/Mabera/59 is legally owned by the appellants.**
  - iii. **Prayer for Mesne profit is disallowed.**
  - iv. **An award of Kshs. 100,000/= as general damages for trespass**
- c. That the costs of this appeal and the suit before trial court be borne by the respondents.

**DELIVERED, DATE and SIGNED at MIGORI this 6<sup>th</sup> day of FEBRUARY 2019.**

**G.M.A ONGONDO**

**JUDGE**

**In the presence:-**

Mr. Agure Odero learned counsel for the Appellants

Ms. Okota learned counsel for the Respondent

Court Assistant – Tom Maurice