



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 17 OF 2017

SAKAYO MWIMBI.....APPELLANT

VERSUS

KITHOME KATUMI.....RESPONDENT

JUDGMENT

1. In his Memorandum of Appeal against the Judgment of the learned Magistrate in Senior Principal Magistrate's Court, Mutomo Civil Suit No. 84 of 2015, the Appellant averred that the learned Magistrate erred in law when he entertained a suit in which he did not have jurisdiction; that the learned Magistrate erred when he relied on exhibits, which were not admissible in law and that the learned Magistrate erred when he refused the Respondent to call his witness.
2. The Appeal proceeded by way of submissions. In his submissions, the Appellant's advocate submitted that the Respondent did not adduce any evidence to establish that he possessed absolute proprietary interest in the suit land and that the learned Magistrate did not establish the veracity of the documentary evidence that was presented before him.
3. It was the submissions of the Appellant's advocate that the letter of 21st August, 1994 purportedly by the Chief, was not admissible for want of official stamp of the Chief, and that in any event, the said letter did not state that the Respondent is the absolute proprietor of the suit land.
4. The Respondent's advocate submitted that the learned Magistrate correctly and properly addressed himself on the issue of ownership of the suit land and that the decision of the court was in line with the provisions of Article 159 of the Constitution.
5. The Respondent's advocate submitted that the value of the suit land was not shown to exceed Kshs. 20 million and that the court had the jurisdiction to deal with land matters. The Respondent's advocate finally submitted that the Appellant has not pointed out the exhibit that should not have been admitted in evidence and that the Appellant was allowed to call all his witnesses.
6. The Respondent herein sued the Appellant vide a Plaint dated 4th December, 2015. In the Plaint, the Respondent alleged that the Appellant had been ordered out of the land after the decision of the elders and that on 18th August, 2015, after both the Appellant and the Respondent took an oath, it was ascertained that the suit land belonged to the Respondent's father, Katumi Ivuti. The Respondent sought for the orders of eviction and damages to the tune of Kshs. 73,900.
7. In his Defence, the Appellant stated that he was never ordered out of the suit land by the elders; that he was never called for the traditional oath as alleged in the Plaint and that the suit land belonged to his late father, Mwimbi Makau.
8. The record shows that the hearing of the suit in the lower court commenced on 7th March, 2017. On the said date, the Respondent (PW1) informed the trial court that the Appellant is his neighbour; that he had a dispute with him in 1994 and that on 21st August, 1992, the suit land was allocated to him by the elders. The Respondent produced in evidence the letters from the Chief dated 21st August, 1994, 22nd June, 1995 and 13th November, 2010.
9. The Respondent's version of the facts of the dispute between the Respondent and the Appellant were repeated by his neighbour, PW2.
10. On his part, the Appellant, DW1, informed the court that the suit land belonged to his late father. The Appellant called his neighbour, DW1, as his witness. According to DW2, he never witnessed any dispute between the Appellant's father and the Respondent's father.
11. The Appellant's other witness, DW3, informed the court that the Appellant and the Respondent are neighbours. DW3 did not mention the issue of the previous disputes.

12. The Appellant called two more witnesses, DW4 and DW5. DW4 stated that he was in the meetings that happened before the Chief in 1994. The record shows that after calling four (4) witnesses, the Appellant closed his case on 20th June, 2017.

13. In his Judgment, and after quoting the provisions of Article 159 of the Constitution, the learned Magistrate held as follows:

“The court holds that as per the letter of the Chief dated 13th November, 2015, the elders gave a decision on the matter.... In line with the decision of the elders, the court holds that the disputed land within Simisi sub-location, Kanziko location is the property of Katumi Ivuti the father of the Plaintiff.”

14. Indeed, by the time the learned Magistrate heard the Appellant and the Respondent, the Magistrate’s Court Act giving Magistrates jurisdiction to hear land matters, in conformity with their pecuniary jurisdiction, had come in force. In the absence of evidence to show that the value of the suit land was more than the pecuniary jurisdiction of Hon. Zacharia Joseph Nyakundi, I find and hold that the learned Magistrate had jurisdiction to deal with the dispute.

15. The Appellant in this matter never raised an objection when the letter dated 21st August, 1994 was produced in evidence. According to that letter, the Chief informed the District Officer that the dispute between the Appellant and the Respondent had been settled by the elders. That letter, together with a diagram depicting the position of the suit land is what the learned Magistrate relied on to give Judgment in favour of the Respondent.

16. Indeed, and as correctly held by the learned Magistrate, Article 159(2) (c) of the Constitution allows courts and tribunals to be guided by, *inter alia*, alternative forms of dispute resolution, including traditional dispute resolution mechanisms, as long as such dispute resolution mechanism is not used in away that contravenes the Bill of Rights; is repugnant to justice and morality; or is inconsistent with the Constitution or any written law.

17. The elders having resolved the dispute between the Appellant and the Respondent, and in the absence of evidence to show that the elders were out rightly wrong or that they contravened the Bill of Rights, I am satisfied that the learned Magistrate was entitled to rely on the letter by the Chief dated 21st August, 1994 to arrive at his decision. Indeed, most of the disputes concerning land are best handled by the elders or clan members who, more often than not, are vast with the historical background of such disputes.

18. For those reasons, I dismiss the Appellant’s Appeal with costs to the Respondent.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 29TH DAY OF MARCH, 2019.

O.A. ANGOTE

JUDGE