REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 5 of 2014

(Being an appeal from the judgment of the learned Ag. Principal Magistrate J.W. Gichimu dated and delivered on 11/2/2010 in Tigania Law Court Civil Suit No. 87 of 2010)

PHILIP GITONGA KAIBUNGA.....APPELLANT

VERSUS

JOSEPH KIREMA THIRINJA .....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

The Appellant's Case

1. The appellant commenced this proceedings with a memorandum of appeal dated **3rd March 2014** filed in court on the same date. He cited the following as his grounds of appeal:

> ***(i) THAT the learned Acting Principal magistrate erred in law and in fact in holding that the objection proceedings were not produced in court when the same are clearly marked as Exh 1.***
>
> ***(ii) THAT the learned Acting Principal magistrate erred in law and in fact in holding that the decision of the Adjudication officer could not be challenged in court by dint of Section 29 of the Adjudication Act Cap.284 Laws of Kenya.***
>
> ***(iii) THAT the learned Acting Principal magistrate erred in law and in fact in holding that the proper procedure was for the appellant to invoke judicial review proceedings in the High Court.***
>
> ***(iv) THAT the learned Acting Principal magistrate erred in law and in fact in holding that he had no jurisdiction to entertain this suit.***
>
> ***(v) THAT the learned Acting Principal magistrate erred in law and in fact in ordering the appellant to pay costs to the first respondent who did not defend the suit.***
>
> ***(vi) THAT the judgements and decree of the learned Acting Principal Magistrate are against the weight of the evidence and the law.***

2. The appellant therefore prays for the court to allow the appeal with costs here and below.

3. The background to this appeal is that in the plaint in ***Meru SRMCC 87 of 2010*** the appellant alleged that he has always been the proprietor in occupation of land Parcel No. **1044 Uringu II** adjudication section; that the 1st respondent lodged an objection with the 2nd respondent claiming ownership of the said parcel; that the respondents, acting in collusion, orders the appellant to share his land with the 1st respondent; that the respondent's conduct was fraudulent; that by virtue of that conduct the appellant lost a half share of his land measuring 0.86 acres. he sought that he be declared the rightful owner of the suit land and that the objection proceedings are wrong in law, and the second respondent be ordered to refrain from amending the records to insert the 1st respondent as the owner of **plot no. 1044**, costs of the suit, interest and any other suitable relief.

4. In a defence dated **13/10/2010** the 1st respondent denied the appellant's claim and stated that the consent obtained before the filing of the suit was false, and that the suit should be struck out with costs on a higher scale.

5. In my view the issues that arise for determination in this appeal are as follows:

(a) Whether the objection proceedings were produced in evidence or not;

(b) Whether the decision of the land adjudication officer could be challenged in court and whether the matter was properly commenced by way of a suit;

(c) Whether the decision of the magistrate was against the weight of the evidence and the law;

(d) Whether the magistrate erred in condemning the appellant to pay costs.

6. On the first issue the record will tell whether the proceedings were produced in evidence or not. In my view as the hearing proceeded and during the hearing of the evidence of PW1, the trial magistrate was confronted with an objection raised by counsel for the 1st respondent.

7. The magistrate first recorded as follows:

"These are the objection proceedings-Exhibit 1.

WAMACHE- I object. It is a photocopy.

KARIUKI- the original is with the 2nd defendant.

Proceedings - PMFI-1".

8. It is not difficult to decipher that after Mr. Wamache's objection the proceedings were merely marked for production at a later stage of the trial. However by the time of the close of the plaintiff's case those proceedings had not been revisited or produced as an exhibit.

9. It is therefore not correct that the proceedings were produced as P.Exh 1.

10. Regarding the second issue I refer to the provisions of Section 29(1) of the Land Adjudication Act which provide as follows:

(1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by-

(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and

(b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.

(2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.

(3) When the appeals have been determined, the Director of Land Adjudication shall-

(a) alter the duplicate adjudication register to conform with the determinations; and

(b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.

(4) Notwithstanding the provisions of section 38(2) of the Interpretation and General Provisions Act (Cap. 2) or any other written law, the Minister may delegate, by notice in the *Gazette*, his powers to hear appeals and his duties and functions under this section to any public office by name, or to the person for the time being holding any public office specified in such notice, and the determination, order and acts of any such public officer shall be deemed for all purposes to be that of the Minister.

11. Upon the reading of that section it is clear that an appeal from the decision of the land adjudication officer lies to the Minister. The decision made by the land adjudication officer regarding the suit land determined the substantive rights of the parties in accordance with the evidence before him.

12. The mandate of determining ownership of land in accordance with customary law under the Act. The proper procedure provided for by the statute must be exhausted before one resorts to the court process. See the case of **Speaker of National Assembly -vs- Karume (1992) KLR page 425.** The magistrate was right in observing that the appellant should have lodged an appeal.

13. Judicial review proceedings against the Land Adjudication Officer's decision could only be sustained if there was a procedural lapse in the proceedings, some illegality, and denial of natural justice or "*wednesbury*" unreasonableness. I do not find these evident in the record

and the plaintiff's remedy lay in an ordinary appeal to the minister.

14. As to whether the magistrate's decision was against the weight of the evidence and the law, the appellant submits that the respondents did not call any evidence and the court was thus bound to accept the appellant's evidence as unopposed and grant him judgment based on the averments in the plaint and his evidence.

15. Though this court supports the view that the consequences of a defendant failing to call evidence are that the defence is rendered weak or ineffective, the plaintiff must also endeavor to prove his claim on a balance of probability even in the absence of the defence evidence. See the case of **Moi -vs- Muriithi (Civil Appeal No. 240 of 2011 [eKLR).**

16. The decision cited by the appellant, that is **Nkuene Dairy Farmers Coop Society Ltd. And Another Vs Ngacha Ndeiya (2010) eKLR** is partially applicable to the extent that a plaintiff has called sufficient evidence against the defendant. It can not be a *carte blanche* to plaintiffs to just appear in court and claim judgment on the basis of their pleadings since the defendant did not call evidence. They must prove their claims.

17. In the instant case the backbone of the appellant's case against the respondent in the subordinate court was not produced in evidence. It was just marked for identification. How could the Magistrate even find that proceedings took place before the Land Adjudication Officer as alleged by the appellant? Documents that are marked for identification are as good as not produced. They can not be relied on in evidence. See the case of **Kenneth Nyaga Mwige Vs Austin Kiguta and 2 Others (2015) KLR.**

18. The appellant's counsel attempted to have the appellant produce the proceedings without laying a basis for production of a copy. When the objection was raised that it is only a copy, he shelved the issue and never revisited it.

19. In my view the appellant should have laid a basis for production of the copy of the proceedings and this is provided for in the law. Upon the raising of an objection, the court could have ruled on whether the document was admissible on the basis of the original being in the hands of the respondents. That was not done. There is no merit in the allegation that the magistrate's decision was against the weight of the evidence on record.

20. As to costs, it is trite that costs follow the event. **Section 27** of the **Civil Procedure Act** provides as follows:

> **(1)** ***Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:***
>
> ***Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.***
>
> **(2)** ***The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.***

21. From the above provisions it is clear that the court has discretion in matters of costs. The plaintiff having failed to establish his claim against the defendant by evidence there was no point in condemning the respondents to costs. I find no error on the part of the trial magistrate in ordering that the appellant shall meet the costs of the suit.

22. For the above reasons this appeal is hereby dismissed with costs.

Dated, signed and **delivered** at **Meru** this **1st** day of **March, 2019.**

MWANGI NJOROGE

JUDGE

ENVIRONMENT AND LAND COURT, KITALE