REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

APPEAL NO. 96 OF 2008

JUSTUS ONGERA ORINA.....APPELLANT

VERSUS

NYAMIRA COUNTY COUNCIL.....1ST RESPONDENT

SOSPETER NYAKUNDI.....2ND RESPONDENT

J U D G M E N T

(Being an appeal from the Judgment/Decree of Hon. E. Olwande, RM issued in Kisii CMCC No. 465 of 2000 dated on 30th May 2008)

1. This is an appeal arising from the Judgment and decree of **Hon. W. Olwande,** Resident Magistrate in Kisii CMCC No. 465 of 2000 delivered on 30th May 2008. By the judgment the learned trial magistrate struck out the Plaintiff's case on the basis that there had been a previous suit namely Nyamira Civil Case No. 12 of 2000 concerning the same Plot No. 4A Gesima Market which was the subject matter before him where an order had been issued directing the 2nd Respondent to be registered as the owner thereof. The learned trial magistrate held that he could not sit on appeal on the decision of the Nyamira Magistrate's Court and neither could he set it aside in the matter that was before him.

2. The Plaintiff who is the appellant in the instant appeal being aggrieved by the decision of the learned trial magistrate appealed to this court as per the Memorandum of Appeal dated 26th June 2008 and filed in court on the same date. The Appellant has set out 5 grounds of appeal as hereunder;-

> **1. The learned trial magistrate erred and misdirected herself in law as far as the dispute between the Appellant and the Respondents in vice versa the decision in Nyamira SRMCC No. 12 of 2000 between the Respondents.**
>
> **2. The learned trial magistrate having erred and misdirected herself on the law failed to address herself to the issues in dispute between the parties in the suit.**
>
> **3. The learned trial magistrate erred in holding that the Appellant ought to have sought to set aside the judgment in Nyamira SRMCC No. 12 of 2000 or be joined as a party in the matter where the Appellant was not a party and had no notice of the same.**
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> **4. The learned trial magistrate failed to decide the suit on the evidence on record.**
>
> **5. The learned trial magistrate erred in holding that this matter had been filed in court without jurisdiction.**

3. With the leave of the Court the Appellant field a supplementary record of appeal on 13th March 2019 to introduce various documents that had been omitted in the original record of appeal filed on 15th June 2015.

4. The appeal was argued by way of written submissions. The Appellant's submissions were filed on 24th April 2018 while the 1st Respondent filed their submissions on 19th March 2019.

5. The Appellant in his submissions acknowledged there was Nyamira Civil Case No. 12 of 2000 which was between the 2nd Respondent and the 1st Respondent. The Appellant however stated he was not a party to the said suit and had no notice of the same until it was completed.

The Appellant argued that the decision in the earlier case where he was not a party could not affect or bind him. The Appellant placed reliance on the case of **Johana Nyokwoyo Buti -vs- Walter Rasugu Omariba & Others, Kisumu Civil Appeal No. 182 of 2006** where the Court of Appeal held that a party who was not a party to a dispute adjudicated before the Land Disputes Tribunal and had no notice of the same could not be precluded from initiating a fresh action on the ground that the matter was *res judicata* or that he had not initiated the appropriate judicial review proceedings. The Appellant referred the Court to the following excerpt from the Court of Appeal judgment:-

> **"In the present case, the 1st Respondent sought a declaration in essence that the decision of the Tribunal was unlawful as it was made without jurisdiction. If such a declaration is granted, the result will be that the decision of the tribunal would be a nullity.**
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> **The 1st Respondent was not a party to the tribunal proceedings. The decision of the tribunal came to his notice long after the 30 days stipulated by Section 8(1) of the Land Disputes Tribunal Act for appealing to the Provincial Appeals Committee had lapsed, and also long after the six months stipulated for seeking a judicial review remedy of order of certiorari had expired. It is true that the 1st Respondent filed a judicial review application but the same was dismissed on ground that the application for leave was made outside the stipulated six months. Since the application for judicial review was not determined on the merits, the doctrine of res judicata does not apply.**
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> **Moreover, although the Resident Magistrate's court entered judgment in accordance with the decisions of the tribunal, such a judgment could be challenged in fresh proceedings if obtained by fraud or mistake etc - See paragraph 1210 of Harlsbury's Laws of England, 4th Edition - Re-Issue page 353). In Jonesco vs Beard [1930 AC 293 the House of Lords held that the proper method of impeaching a complete judgment on the ground of fraud is by action which decision was followed in Kuwait Airways Corporation vs Araque Airways Co. & Another (No.2) [2001] 1ELR 429. The decision of the Tribunal has of course been merged in the judgment of the Magistrate's Court.**
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> **It seems to us that the 1st Respondent had no other remedy. Since the superior court had jurisdiction to entertain both a declaratory suit and an ordinary suit impeaching the judgment on the Magistrate's Court the preliminary objection was not maintainable. It is after the hearing of the suit that the superior court can determine whether or not to grant a declaration in the circumstances of the case."**

6. The Appellant relied on the Court of Appeal decision and argued that it disposed of grounds 1, 2 and 3 of the Memorandum of Appeal. It is noteworth however that the appeal decided by the Court of Appeal arose from the dismissal by the High Court of a preliminary objection taken before the High Court by the Appellant's advocate, that the suit instituted in the High Court by the 1st Respondent in the appeal seeking declaratory orders that the Land Disputes Tribunal lacked the jurisdiction to adjudicate title to land and thus the tribunal's decision and the consequent adoption of the decision by the Magistrates Court were nullities; was *res judicata* by virtue of Section 7 of the Civil Procedure Act and further that the Tribunal's decision could not be impeached otherwise than by way of judicial review if no appeal was preferred to the Provincial Appeals Committee. The application for judicial review made by the 1st Respondent was found to be defective as the requisite leave was not obtained within the prescribed period.

7. Further the Appellant submitted that the learned trial Magistrate did not determine the suit before him on the merits and that had he done so he would have found the Appellant was the lawful allottee and owner of the plot in dispute. Finally, the Appellant submitted that although the 2nd Respondent had raised the issue of the Magistrate's jurisdiction in his defence, the issue was not canvassed and that all the parties ventilated their cases before the court and the court ought to have made a determination on the basis of the evidence that had been presented.

8. The 1st Respondent submitted that the trial Magistrate properly evaluated the evidence and the law and arrived at a correct determination that in view of the decision/determination in Nyamira SRMCC No. 12 of 2000 the court could not have properly entertained the Appellant's suit. The learned trial Magistrate found that in the earlier suit the court had ordered the suit property to be transferred to the 2nd Defendant herein and that order had not been set aside and/or vacated. The 1st Respondent further submitted that in the suit before the trial Magistrate, the Appellant inter alia sought a declaration that Plot **4A Gesima** belonged to him which if granted would have had the effect of negating the earlier order made by Nyamira Court in SRMCC No. 12 of 2000. The 1st Respondent thus submitted that unless the decision/order in the earlier case had been reviewed, varied or set aside, the learned trial Magistrate's court could not make a determination whose effect would have been to invalidate the order made by the earlier court. The 1st Respondent argued that the trial Magistrate could not constitute himself an appellate court over a court in regard to which it had similar and/or concurrent jurisdiction.

9. This is a first appeal and the court is thus under a duty and indeed under an obligation to reevaluate the evidence adduced before the trial court in order to determine whether the trial court arrived at the correct findings on the facts and the law and to determine whether the decision reached was justifiable. The court on its evaluation of the evidence, the facts and the law can reach its own conclusions but has to exercise caution if it has to reach a different findings of fact and should only do so if it is plainly clear that the trial Magistrate was wrong in his evaluation and appreciation of the evidence and/or application of the law. Where it is evident a trial court applied the wrong principles in the evaluation of the evidence and the law the appellate court will be entitled to reach different findings in order to obviate injustice being occasioned.

10. In the instant appeal both parties are agreed that indeed there was a previous suit namely Nyamira SRMCC No. 12 of 2000 where the 2nd Respondent and the 1st Respondent were the parties. In the suit the 1st Respondent herein was ordered pursuant to an order issued on 19th July 2000 to register and issue a plot card in respect of Plot number Gesima Market 4A to the 2nd Respondent herein. The 1st Respondent complied with this order and registered and issued the 2nd Respondent with the plot card. The Appellant however was not party to Nyamira SRMCC No. 12 of 2000 and consequently the orders/decision made therein could not bind him. The order in Nyamira SRMCC No. 12 of 2000 merely directed the 2nd Respondent to be registered and to be issued with a plot card for Plot No. 4A Gesima Market. In my view that did not constitute a determination of ownership of the plot. The Appellant in my view was entitled to challenge the registration of the 2nd Respondent as owner of the suit property. I therefore hold Nyamira SRMCC No. 12 of 2000 was not a bar to the institution of the suit Kisii

CMCC No. 465 of 2000 which gave rise to the instant appeal. The trial magistrate therefore erred in holding that the said previous suit was such a bar and consequently erred in failing to determine the suit on the merits having regard to the evidence adduced by the parties.

11. Having held that the suit was properly instituted before the trial court, it is necessary to deal with the issue of jurisdiction submitted on by the 1st Respondent and adverted to by the learned trial magistrate in his judgment. The Chief Magistrate's court has jurisdiction throughout the Country. However, under Sections 12 and 13 of the Civil Procedure Act, Cap 21 Laws of Kenya a suit for immovable property should be instituted in the court within the locality that has jurisdiction or in other words where the property is situate in Kenya. The law provides that in cases involving immovable property such suit should be instituted in the Court within the local limits of whose jurisdiction the property is situate. Section 15 of the Act further provides that in all other cases a suit should be instituted where the Defendant resides or the cause of action arises.

12. In the suit before the subordinate court, the 1st Respondent did not raise any objection to the jurisdiction of the Chief Magistrate's Court Kisii. Though the 2nd Respondent had in the subordinate court raised the issue of territorial jurisdiction of the Chief Magistrate's Court, Kisii to hear the matter, the issue was not canvassed during the hearing and the case proceeded to full hearing without objection. To the extent that the issue of place of filing of the suit was not taken up by the parties before the suit was heard before the trial magistrate, my view is that the issue of territorial jurisdiction of the Magistrate's Court cannot by virtue of Section 16 of the Civil Procedure Act be raised before this court. Section 16 of the Civil Procedure Act provides as follows:-

> **16. No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice.**

13. The suit before the subordinate court was fully heard and each of the parties was afforded the opportunity of being heard. There is no demonstrated failure of justice and the learned trial magistrate therefore erred in not making a determination on the merits of the case. Thus, this court as the first appellate must reconsider and reevaluate the evidence and come to its own conclusions. The Magistrate in his judgment clearly stated he would not be able to make the determination on merits as he had held (erroneously) that the same issue had been determined in a previous suit (Nyamira CMCC No. 12 of 2000) and he feared if he made a different decision there could be embarrassment to the Court. I have earlier in this judgment held the previous suit was not between the same parties as the Appellant was not a party and neither was the same a dispute relating to ownership. The court in the earlier suit was not called upon to determine the ownership of Plot No. 4A Gesima Market. In the suit before the subordinate court which gave rise to the present appeal, the court under prayer (a) of the plaint was called upon to determine the ownership of the plot. The trial Magistrate did not render a decision touching on the ownership for the reasons that I have stated above.

14. The East African Court of Appeal in **Selle -vs- Associated Motor Limited Company [1968] E. A 123** articulated the role of the first appellate court as follows:

> **"…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 or 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 based on the demeanor of the witness is inconsistent with the case generally."**

15. On the evaluation of the evidence adduced before the learned trial magistrate, there is no dispute that Plot 4 Gesima Market belonged to Onwonga Getuno who was the 1st Plaintiff in the Subordinate Court and who is now deceased and was not substituted. At the time the Appellant testified as PW1 on 7th June 2007 the 1st Plaintiff had already died. It was the evidence of PW1 that the deceased had sold Plot No. 4 to 5 people including himself. According to PW1 Plot No. 4 was subdivided into 5 sub plots and he (PW1) purchased Plot No. 4A. He gave the numbers of the other plots variously as 4A, 43, 34, 33, 34, 35, 4B and 4C though he affirmed he had no document which could illustrate how the plots were distributed. The Appellant (PW1) acknowledged the normal size of the Council Plots was 50feet by 100feet and asserted that his Plot 4A was 25feet by 100feet as it was a subdivision. The Appellant relied on an agreement dated 14th February 1996 **"PEx.1"** between himself and Onwonga Getuno (deceased). The Appellant stated they lodged an application form for transfer dated 24th April 1997 but the same was not acted upon by the council as he stated he was informed it had been misplaced. He stated he learnt later that the 2nd Respondent had been registered as the owner of Plot 4A Gesima which prompted him to make a complaint to the Chairman of the Council who caused an investigation to be undertaken. He stated after the investigations the decision was that Plot 4A belonged to him but by then the 2nd Respondent had already been issued a plot card by the County Council which made it necessary to file the suit.

16. The Appellant and the witnesses he called were all in agreement a Council Plot could only be subdivided into two (2) Plots and not 4 or 5 as the deceased was said to have done.

17. Isaiah Mecha Moegi an administrative officer of the 1st Respondent testified as DW1 before the learned trial magistrate. He affirmed that Onwonga Getuno (deceased) was the owner of Plot No. 4 Gesima Market as per the records of the Council (**"DEx.3"**). He stated the plot was subdivided into two plots 4A and 4B and the approval for subdivision and transfer of plots 4A and 4B was given by the Council on 9th February 1996 as per Minute 07 of 1996 items, 1 and 2 under Gesima Division (**"DEx.4"**). The Council approved the transfer of Plot 4A to Sospeter Nyakundi, the 2nd Respondent. The witness testified that a Plot card was issued in the name of the 2nd Respondent but was not released to him because the Appellant lodged a complaint claiming the plot belonged to him. He further stated the 2nd Respondent sued the Council in Nyamira Court and the Court directed the card to be released to the 2nd Respondent. The Council obeyed the order (**"DEx.1"**).

18. DW1 further affirmed that Council plots could only be subdivided into two Plots of 25ft by 100ft as the normal full plot is normally 50ft by 100ft. He stated Plot 4A was 25ft by 100ft. He denied he was the one who called the meeting that allegedly discussed settlement of the dispute and stated the signature on (**"PEx.7"**) was not his stating that such a meeting could only have been called by the County Clerk. He

denied he was at the meeting where the issue of Plot 4A was allegedly discussed.

19. The 2nd Respondent testified before the learned trial magistrate as DW2. He testified that he bought Plot No. 4A from Onwonga Getuno (deceased) on 15th July 1994 as per agreement dated 15th July 1994 (**"DEx.5"**) interpretated on 23rd October 2007 (**"DEx.6"**) and he stated that he followed due process in purchasing the plot. He stated his Plot was Plot No. 4A measuring 25ft by 100ft and that he was issued a plot card for the same (**"DEx.2"**). He stated the transfer to him was duly approved and was minuted by the Council on 9th February 1996. The 2nd Respondent affirmed he sued the 1st Respondent in Nyamira Court and he was issued an order for them to issue the Plot Card to him. He affirmed he bought a portion of Plot 4 which was subdivided to create Plot Nos. 4A and 4B.

20. On evaluation of the evidence, I am not satisfied that the Appellant had discharged his burden of proof to entitle him to the orders he sought before the subordinate Court. The evidence clearly pointed to the 2nd Respondent having purchased the suit property from the deceased in 1994 as evidenced by the agreement exhibited as (**"DEx.5"**). The deceased and the 2nd Respondent must have applied to the 1st Respondent for approval of the transaction and it is in that context that the Minutes of the **Works Markets Towns and Planning Committee meeting of 9th February 1996** (**"DEx.2"**) are to be viewed. Under Minute 7/96 Part **'C'** - Gesima Division item (2); the Committee recorded as follows:-

> **2. Onwonga Getuno being the owner of Plot No. 4A Gesima Market in Gesima Location wish to transfer his plot to Sospeter Nyakundi of the same Location.**

Under the same Minute item (1) approval for transfer of Plot 4B was given in favour of Benson Momanyi Mwaniki. It was consequent to this approval that a plot card for Plot No. 4A was prepared in favour of the 2nd Respondent but remained unissued to him owing to a complaint by the Appellant until the 2nd Respondent obtained a court order for its release to him from the Nyamira Magistrates Court vide Civil Case No. 12 of 2000.

21. The Appellant for his part entered an agreement with the deceased on 14th February 1996 for the purchase of the same suit property when he made a partial payment of the purchase price. An endorsement on the same agreement shows the Appellant made a further payment in the sum of kshs.7,040/= on 6th February 1999. It is therefore evident that the sale of the suit property to the 2nd Respondent was earlier in time and further that even as at the time the Appellant entered into the sale agreement with the deceased, the 1st Respondent had already approved the sale and transfer of the suit property to the 2nd Respondent. The deceased therefore had no interest in the suit property that he could then have sold to the Appellant. The deceased had effectively transferred his interest in the suit property to the 2nd Respondent.

22. In the premises, it is my determination that even if the learned trial magistrate had considered the merits of the case before him the result would not have been different. The Appellant's case before the subordinate court lacked any merit. In the circumstances, I would substitute an order dismissing the Appellant's suit before the subordinate court, in place of the order striking out the Appellant's case made by the learned trial magistrate.

23. In the result, I dismiss the Appellant's appeal with costs to the 1st Respondent.

JUDGMENT DATED AND SIGNED AT **NAKURU** THIS **27TH DAY** OF **SEPTEMBER 2019.**

J. M. MUTUNGI

JUDGE

JUDGMENT DELIVERED AT **KISII THIS 8th DAY** OF **OCTOBER 2019**.

J ONYANGO

JUDGE