REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. APPEAL NO. 6 OF 2018

JOHN KIRORIA UVORO.....1ST APPELLANT

JUDITH NGINYA KIRORIA.....2ND APPELLANT

VERSUS

ROSEMARY MUCOGO MBUI.....RESPONDENT

(An appeal from the Judgement and decree of Honourable J. Omwange (Senior Resident Magistrate) dated 2nd November 2017 in Siakago SPMCC No. 13 of 2015)

JUDGEMENT

1. This appeal arises from the judgement and decree of Hon. J. Omwange (SRM) dated 2nd November 2017 in *Siakago SPMCC No. 13 of 2015*. By the said judgement, the trial court allowed the Respondent's suit for an order for removal of a caution which the 2nd Appellant had lodged against *Title No. Embu/Gangara/155* (hereafter *the suit property*) and an order for the 1st Appellant to sub-divide and transfer a portion of 3 acres out of the suit property to her. The Respondent was also awarded costs of the suit as against the Appellants.

2. By his plaint dated 27th March 2015 the Respondent pleaded that she had bought a portion of 3 acres out of the suit property which was registered in the name of the 1st Appellant at an agreed consideration of Kshs.150,000/-. It was pleaded that despite having paid the entire purchase price, the suit property could not be sub-divided due to a caution lodged by the 2nd Appellant. It was contended that the 2nd Appellant had cautioned the suit property without lawful justification.

3. The 1st Appellant filed an undated statement of defence on 9th April 2015 in which he admitted having sold 3 acres out of the suit property to the Respondent. He further stated that he was ready and willing to sub-divide the suit property and transfer 3 acres to the Respondent as long as she agreed to an alteration of a certain boundary and the provision of a he-goat, she-goat, heavy coat, blanket and a dress.

4. The 2nd Appellant, who appears to be the 1st Appellant's wife, filed a defence dated 9th April 2015. She denied knowledge of the sale of 3 acres out of the suit property to the Respondent. She pleaded that she cautioned the suit property because she was not informed about it and did not understand why it was being sold.

5. The record shows that upon a full hearing of the suit, the trial court delivered its judgement on 2nd November 2017 allowing the Respondent's suit with costs. The trial court held that the Respondent had proved her case against the Appellants on a balance of probabilities. The court found as a fact that the purchase price had been paid in full and that there was no outstanding balance. The court also found that the Mbeere traditional requirements of a he-goat, she-goat, coat, dress and blanket were not part of the agreement for sale between the 1st Appellant and the Respondent.

6. Being aggrieved by the said judgement, the Appellants filed a memorandum of appeal dated 14th March 2018 raising the following 5 grounds of appeal:

a. The trial magistrate erred in law and fact in delivering the judgement against the Appellants despite the weight of evidence against the Plaintiff's claim.

b. The trial magistrate erred in law and fact in condemning the Appellants to pay the costs of the suit to the Respondent.

c. The trial magistrate erred in law and fact by finding that the Plaintiff had filed a suit for transfer of the Land parcel No.

Embu/Gangara/155 measuring 3 acres and removal of a caution whereas no evidence was produced for payment of the whole purchase price.

d. The trial magistrate erred in law and fact in failing to consider that the Respondent did not clear the purchase price of a portion measuring 3 acres of Land parcel Nol Embu/Gangara/155 and that the traditional liquor, honey, coat and dress etc was part of the agreement between the parties and therefore delivered the judgement without ordering for payment of the whole purchase price.

e. The trial magistrate erred in law and fact in dismissing the defendant's case against the Plaintiff to the fact that the evidence produced was water tight.

7. When the appeal was listed for directions on 25th July 2019 the advocates for the parties agreed to canvass it through written submissions. Consequently, the Appellants were given 30 days within which to file their submissions whereas the Respondent was given 30 days upon the lapse of the period granted to the Appellants to file his. The record shows that the Appellants filed their submissions on 1st August 2019 whereas the Respondent filed his on 2nd October 2019.

8. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court in a first appeal were summarized in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows;

> **"…Briefly put they are that 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 nor 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 on the demeanor of a witness is inconsistent with the evidence in the case generally."**

9. Similarly, in the case of **Peters Vs Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P.** rendered the applicable principles as follows;

> **"…It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion…"**

10. In the same case, **Sir Kenneth O'Connor** quoted **Viscount Simon, L.C in Watt Vs Thomas [1947] A.C 424** at page 429-430 as follows;

> **"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."**

11. The court shall consider the grounds of appeal as they appear in the memorandum of appeal. However, the court shall consider the 1st and 5th grounds together since they deal with the trial court's evaluation of the evidence before it. Similarly, the 3rd and 4th grounds shall be dealt together since they both deal with the question of whether or not the Respondent had paid the entire purchase price.

12. The 1st and 5th grounds of appeal faulted the trial court for having decided the suit against the weight of evidence. The Appellant's submission was that the trial court erred in finding that the Respondent had proved her case on a balance of probabilities. The Appellants were of the view that there was no evidence on record to support the findings of the trial court and the resultant judgment.

13. The court has analyzed the pleadings of the parties and re-evaluated the entire evidence tendered at the trail. The court is fully satisfied that the evidence on record supports the findings and the judgement of the trial court. It could not be said that the trial court misdirected itself either in fact or law in its judgment. It could not be said that no reasonable tribunal properly directing itself to the evidence and the law could have reached the verdict that the trial court reached. The court is of the opinion that any tribunal properly directing itself to the evidence and the law would have inevitably reached the same verdict as the trial court.

14. The 2nd ground of appeal faulted the trial court for condemning the Appellants to pay the Respondent's costs of the suit. It is not clear from the Appellants' submissions why and how the trial court erred in awarding the successful party costs of the action. The court is aware that costs of an action are at the discretion of the court and that the general rule is that costs shall follow the event.

15. **Section 27 of the Civil Procedure Act (Cap. 21)** stipulates as follows on costs of an action:

> **(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.**

16. In the case of **Janmohammed & Sons Ltd Vs Twentsche Overseas Trading Co. Ltd [1967] E.A. 287,** it was held that a successful party should normally be awarded costs of the suit and that he should not be deprived of costs except for good cause. The Appellants have not demonstrated any good reason why the Respondent, as the successful party, should have been deprived of costs of the suit. The court is of the view that the trial court exercised its discretion to award costs properly and on well settled principles of law. As was held in **Fazal Dhirani V Mohamed Ibrahim (1946) 13 EACA 69** and **Sheikh Jama Vs Dubat Farah [1959] EA 789,** an appellate court should not interfere with the exercise of judicial discretion by the lower court unless such discretion has been exercised unjudicially or on wrong principles. Accordingly, the court finds no merit in this ground of appeal.

17. The 3rd and 4th grounds of appeal faulted the trial court for failing to find and hold that the Respondent had not paid the entire purchase price. The Appellants contended that there was a balance of Kshs.100,000/- and some items under Mbeere custom. The court has considered the pleadings and the evidence on record on this issue. First, neither of the Appellants pleaded in their respective defences before the trial court that there was an outstanding balance of Kshs.100,000/- The Appellant only pleaded the five items under Mbeere customs as outstanding.

18. During the hearing of the suit, the 1st Appellant admitted in his evidence that the entire purchase price had been paid. He only took issue with the items alleged to be pending under Mbeere custom such as the he-goat, she-goat, coat, blanket and dress for his wife. He also conceded at the trial that he never informed the Respondent of the traditional requirements at the time of purchase. The court is of the view that the trial court correctly held that the items under Mbeere customary law were not part of the agreement for sale and that the Respondent was not informed about them. The court, therefore, finds no merit whatsoever in the 3rd and 4th grounds of appeal.

19. The upshot of the foregoing is that the court finds no merit whatsoever in the grounds of appeal set forth in the memorandum of appeal. The court is of the view that the appeal is mischievous and was filed merely to delay the course of justice. Accordingy, the Appellants' appeal is hereby dismissed with costs to the Respondent. Costs shall be on the higher scale.

20. It is so decided.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **28TH DAY** of **NOVEMBER, 2019**

In the presence of Mr. Were holding brief for Ms. Muthoni for the Respondent and in the absence of the Appellants.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

28.11.19