



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**ELC APPEAL NO. 9 OF 2017**

**NAKURU HCA NO. 107 OF 2013**

**SUPEYO OLE NKAKO.....APPELLANT**

**VERSUS**

**PARMAYIAN OLE NKAKO.....RESPONDENT**

**JUDGEMENT**

This is an Appeal from the Judgement and decree of Narok SPM Court in Civil Case No. 71 of 2011 where the entire suit was dismissed with costs to the Defendant.

The Appellant's had raised 4 grounds of Appeal as below:-

1. The learned Magistrate erred in law and fact by dismissing the Appellant's case and yet there was no hearing to determine the case on its merits.
2. The learned Magistrate erred in law and fact for relying only on the pleadings before the court to make a determination without according the parties a right to be heard.
3. The Learned Judge misdirected herself and based his finding on liability of the Appellant on wrong considerations.
4. The Learned Judge erred in fact and in law by failing to take into account and to consider the evidence adduced on behalf of the Appellant.

Having read the grounds of Appeal I find that grounds 2, 3 and 4 all follow from ground 1 of the Appeal in which the Appellant contends that the suit before the Magistrate court was dismissed without a hearing of the suit taking place to determine it on its own merit.

The Appellant contends that the suit was disposed off by way of filing of submissions and other documents that were filed and no oral evidence that was led to establish the veracity and the credibility of witness. He further states that from the onset of the case that there were no title documents which would have laid basis for proof of ownership of the suit land and that the court erroneously found that there was no proof of ownership.

Lastly the Appellant contended that the suit before the trial court related to a parcel of land which was still subject to adjudication and the evidence of the appeal in form of a register, letters and correspondences were denied by the Appellant.

The Respondent contends that the plaintiff had failed to proof his case as regards the ownership of parcel No. 663 and 392 and it was on the basis that the suit was dismissed. He averred that the appellant had not shown that he had any interest in the suit land.

The Respondent contends that during the hearing of the suit before the Magistrate court witness testimony was taken and evidence produced and the court arrived at its decision.

I have read the record of Appeal and the submissions made by counsel for both parties and the main issue for the court to determine at this stage is whether the trial court prior to the arriving of its judgement heard the suit before it, whether witness testimony was taken and the full ingredients for the purpose of hearing took place.

In answering the above I have perused both the record of appeal and the original file from the trial court and the most relevant of the proceedings is the events that took place in court on 7/11/12, 28/11/12 and 5/12/12 and I will quote the proceedings of those day verbatim as hereunder.

7/11/12

Before me Z.Abdul RM

Cc:Winnie

Plaintiff: Miss Maritim

Defendant:Mr Onduso-present

**ONDUSO**-Not ready to proceed. I have four matters that have been placed aside in court 1.

**MARITIM**-I can indulge my colleague

**COURT**-Hearing on 28/11/12

Defendant to pay Court Adjournment Fee

**Z. Abdul**

**Resident Magistrate**

7/11/12

28/11/12

Before me Z.Abdul RM

Cc:Winnie

Plaintiff: Miss Maritim

Defendant:Mr Onduso-present

**MARITIM**-I have 3 witnesses and ready to proceed

We have filed witness statements and documents

Parties to file statements, list of documents and submissions and the documents be adopted by the court as evidence.

**ONDUSO**-That is so

**COURT**-Mention on 5/12/12

**Z.Abdul**

**Resident Magistrate**

5/12/12

Before me Z.Abdul RM

Cc:Winnie

Plaintiff: Miss Maritim

Defendant:Mr Onduso-present

**MARITIM**-We have both filed submissions

**COURT**-Parties to take a mention date for purposes of taking a judgement date at the registry.

**Z.Abdul**

**Resident Magistrate**

**5/12/12**

From the above its unfortunately clear that the court did entertain a position that for all intent and purpose can't be called a hearing. It seems parties may have consented to have their witness statements and documents filed as evidence and on their part the parties further filed submissions and the court set a date for judgement.

The above position clearly flies in the face of the Respondent's assertion that witness had testified in the suit. From the proceedings I find that is not the position as no testimony of any witness was taken during the hearing.

It is trite law that a party must be accorded the right to be heard in evidence and those of its witnesses, in the instant Appeal though both parties consented to have statements adopted I don't find that as proper and more so in the substantive suit where there are various contentious issues. This suit before the trial court could easily be determined if the Land Adjudication Officers who are the custodian of all the documents in respect of Olosho Lesito Adjudication section could be called to testify either by the parties or the court acting suo moto.

From the above I find that this was a case of the trial court misdirecting itself on the manner in which a hearing ought to be handled and I find that the Appellant has not been accorded an opportunity to be heard.

In view of the above I will allow the Appeal and order that the Narok Civil Suit No. 71 of 2011 be heard a fresh in accordance with the provision of the Civil Procedure Act.

In respect to the cost of the Appeal I order that each party bears its costs.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this **9<sup>th</sup>** day of **August, 2018**

**Mohammed Noor Kullow**

**Judge**

**9/8/18**

In the presence of:-

Langat holding brief for Otieno for the Appellant

N/A for the Respondent

CA:Chuma

**Mohammed Noor Kullow**

**Judge**

**9/8/18**