REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

APPEAL NO. 98 OF 2014

JOSEPHINE MORAA COSMAS.....1ST APPELLANT

COSMAS MOTUKA MULIRA.....2ND APPELLANT

VERSUS

JOHN BOSCO MBOGA.....RESPONDENT

J U D G M E N T

(Being an appeal from the Judgment and Decree of Hon. Njeri Thuku, RM

issued in Kisii CMCC No. 553 of 2009 delivered on 30th June, 2011)

1. The appellants were the original defendants in Kisii CMCC No. 553 of 2009 and have appealed to this court against the judgment of Honourable Njeri Thuku delivered on 30th June 2011. In the suit before the lower court the plaintiff claimed to have purchased in 2005 a portion of Plot No. 25 Mosocho Market measuring 25ft by 100ft from Cosmas Motuka Mulira the 1st defendant and that at the time of filing the suit, the plaintiff alleged the 2nd defendant in collusion with the 1st defendant had started to put up structures on the portion of the plot that he had purchased. The plaintiff sought an order of permanent injunction and eviction of the defendants.

2. The trial magistrate upon hearing the suit delivered her judgment on 30th June 2011 upholding the claim by the plaintiff. The learned trial magistrate granted an order of permanent injunction restraining the defendants from further interfering with the plaintiff's portion of Plot No. 25 Mosocho Market. She further ordered the defendants to vacate the property within 14 days failing which an eviction order was to issue. She awarded the costs of the suit to the plaintiff.

3. Aggrieved by the judgment of the learned trial magistrate, the defendants have jointly appealed to this court and have set out in their Memorandum of Appeal dated 2nd September 2014 and filed in court on 9th September 2014 the following grounds of appeal:-

1. **The appellants were denied an opportunity to fully tender their evidence and call witnesses in support of their case, the trial magistrate erred thereby by locking out crucial evidence which had she allowed to be adduced would have led her to reach a different determination.**

2. **The trial magistrate erred in law and fact in closing the appellants' cases prematurely even**

when indication was given of the presence of more witnesses and thereby entered a finding that was not supported by the appellants' testimony, document and witnesses.

3. **The trial magistrate failed to weigh and find that adjournment of the case then to allow the testimony of more witnesses would have been in the best interest of justice than closing the appellants' cases.**

4. **The appellants were not accorded a fair hearing.**

5. **The trial magistrate erred in law and fact in shutting out evidence of ownership of Plot No. 25 'A' AND 'B' Mosocho Market which evidence was crucial and would have provided a turning point on which the court would have based its decision.**

The appellants pray that the appeal be allowed and the suit before the lower court be re-opened and be heard afresh or the appellants be allowed to adduce evidence on appeal before a determination is made.

4. The totality of all the grounds of appeal is that they impugn the trial magistrate's conduct of the trial. The appellants basically are saying that they were not accorded a fair hearing as the trial magistrate's decision not to grant them an adjournment to enable a crucial witness to be availed was prejudicial to their case. The appeal thus turns on whether the trial magistrate in declining the appellants request for adjournment exercised her discretion judiciously. The appellants' case is that the official from the Gusii County Council whose evidence was not taken was a critical witness for the appellants and that had his evidence been taken the decision of the trial magistrate would perhaps have been different. The appellants state that the witness was available and had infact previously attended court to give evidence when his evidence was not taken. However, on the rescheduled date of hearing on 4th April 2011 the witness was not available as he was stated to have taken his sick mother to Kenyatta National Hospital in Nairobi for treatment. The appellants' application for adjournment was declined by the trial magistrate on the basis that the appellants had been granted the last adjournment on 14th February 2011.

5. The record shows that on 14th February 2011 when the adjournment was granted the matter was refixed for defence hearing on 14th March 2011. On 14th February 2011 a defence witness one, **Jared Ondieki Gwaro** who was the committee clerk of Gusii County Council testified (in part) but the respondent's counsel objected that he not being a senior officer of the Council and not being the maker of the documents he was testifying on he could not produce the documents as exhibits. The trial magistrate upheld the objection prompting the application by the appellants counsel to enable him to have an appropriate witness from County Council to be availed. The court granted what it termed as **"Last adjournment to the defence"** and fixed the defence hearing on 14th March 2011.

6. On 14th March 2011 the same witness who was stood down on 14th February 2011 was again present in court with a written authorization to produce the documents on behalf of the council. The respondent's counsel again objected to the witness producing the documents as he was not a senior officer of the council. The trial magistrate reserved her ruling on the objection which she delivered on 18th March 2011 holding that as the witness had written authorization from the clerk of the council he was eligible to testify on behalf of the County Council. It is then the trial magistrate fixed the case for further defence hearing on 4th April 2011 when the witness was not in court and the appellants counsel sought the adjournment which was declined.

7. The power of the court to grant an adjournment is discretionary which discretion should be exercised judicially. An appellate court will ordinarily not interfere with the exercise of discretion by the trial court unless it is apparent that in the exercise of discretion the learned trial magistrate applied the wrong principles and injustice was occasioned. In applications for adjournment the primary consideration in determining whether to grant or not to grant the request for adjournment ought to be whether or not there are good and reasonable grounds for seeking the adjournment having regard to the facts and circumstances of the matter before the court. Each case will of course defend on its own facts and circumstances and there can be no general rule or **"straight jacket"** set of circumstances under which an

adjournment may be granted. The court's discretion to grant an adjournment is unfettered and is dependent on the grounds and reasons adduced in support of an application.

8. My own view is that there ought to be nothing like **"a last adjournment"** unless it is tied to some set of facts and circumstances which ought not to be used subsequently to justify an application for adjournment. In the instant matter the trial magistrate appears to have considered herself as bound by her order made on 14th February 2011 that **"it wasn't last adjournment to defence"**. This was reflected in her ruling on 4th April 2011 when she rejected the appellants' application for adjournment. The effect of the order of 14th February 2011 was that she fettered the exercise of her discretion and with respect this resulted in her making the order on 4th April 2011 which was an affront to the fundamental right to a fair hearing as enshrined under Article 50 (1) of the Constitution.

9. The witness that the appellants desired to testify had on two previous occasions presented himself to court ready to testify and had infact commenced his testimony save for the objections that were raised and subsequently dealt with paving the way for him to testify. On the 4th April, 2011 when he was to testify the court was informed that he had escorted his sick mother to attend Kenyatta National Hospital for treatment and it was for that reason the appellants applied for adjournment. Given the conduct of this particular witness previously, the court should have found the ground for seeking an adjournment reasonable and should have allowed the same. The magistrate as I have observed earlier was held captive by the earlier order where she stated she had granted last adjournment to the defence. This order acted as a **"Shackle"** to her exercise of discretion resulting in the order declining the request for adjournment which was prejudicial to the appellants. It is not possible to determine what the effect of the evidence of the appellants witness would have been if he had been allowed to testify. Each party to a litigation is entitled to be afforded the opportunity to present their case. I am satisfied the appellants were denied the chance to fully present their case.

10. Accordingly and for the above reasons, I find the appellants appeal has merit. I allow the appeal and I set aside the judgment entered on 30th June 2011 in Kisii CMCC No. 353 of 2009, the decree and all consequent orders emanating therefrom. I order a retrial of the suit afresh before a competent court seized with jurisdiction to hear the matter. Each party to bear their own costs of the appeal.

Judgment dated, signed and **delivered** at **Kisii** this **17th day** of **March, 2017**.

J. M. MUTUNGI

JUDGE

In the presence of:

…… for the 1st and 2nd appellants

…… for the respondent

…….. Court assistant

J. M. MUTUNGI

JUDGE