**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC APPEAL NO. 20 OF 2015**

**JAMES MWANGI KURIA…….APPELLANT**

**VERSUS**

**FRANCIS MURIITHI SAMSON……...……..RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 13TH APRIL, 2015 BY HON. D. NYABOKE – R.M AT WANG'URU PRINCIPAL MAGISTRATE'S COURT CIVIL CASE NO. 140 OF 2011)***

**JUDGMENT**

The parties herein are step-brothers being the children of the late **SAMSON KURIA GATWE.** The subject of their dispute is a plot known as Plot No. 127 situated at Wanguru Market (the suit plot) which originally belonged to the Respondent, their late father and one **GAITHO NJOROGE** who withdrew from the membership of the suit plot leaving the Respondent and his late father as the joint owners thereof. After the death of their late father on 6th June 2003, the County Council of Kirinyaga which was sued as the 2nd defendant in the subordinate Court, added the Appellant who was the 1st defendant as a partner in the suit plot.

It was that decision by the Kirinyaga County Council that provoked the Respondent to file this a suit in the subordinate Court alleging that the Appellant had fraudulently added himself as a partner in the suit plot which was then sub-divided into three portions and was shared out as follows:

**Plot 127 A - Samson Kuria Gatwe**

**Plot 127 B - Respondent**

**Plot 127 C - Appellant**

It was therefore the Respondent's claim in the subordinate Court that the addition of the Appellant as a partner in the suit plot be declared to have been unlawful and that the same do revert into his names and the names of their late father.

The Appellant filed a defence and counter-claim in which he stated that the Respondent and their late father had on 1st December 1986 signed an application form adding the Appellant as a partner to the suit plot. He therefore denied the allegations of fraud and instead made a counter-claim for rent from four (4) rooms on the suit plot which he alleged that the Respondent and one **TERRY GATURI** and another **JACINTA WANGECHI MWANGI** had conspired to defraud him.

The case was heard by **D. NYABOKE** (Resident Magistrate) who by a judgment delivered on 13 April

2015 found that the suit plot had been the subject of **KERUGOYA SENIOR RESIDENT MAGISTRATE'S SUCCESSION CAUSE No. 44 of 2005** which had on 22nd August 2008 made orders sharing the suit plot between the three houses of the deceased **SAMSON KURIA GATWE**. The trial magistrate therefore refused to grant the Respondent the orders sought as to do so would have amounted to reversing the decision of the Court in the Succession Cause No. 44 of 2005. The trial magistrate also found no merit in the Appellant's counter-claim. The Respondent was given costs of both the main suit and the dismissed counter-claim.

The Appellant filed this appeal seeking to set aside that judgment and has raised the following grounds of appeal:

> ***1. That the trial magistrate erred in law and fact in pronouncing a verdict dismissing the counter-claim despite the weight of evidence in favour of the Appellant.***
>
> ***2. That the trial magistrate erred in law and fact by failing to appreciate that the Appellant has proven his case on a balance of probabilities.***
>
> ***3. That the trial magistrate erred in law and fact by failing to consider that plot was for (3) Samson Kuria, Francis Muriithi and James Mwangi Kuria which application forms for sub-division for the year 2007 is still pending at Kirinyaga County Council.***
>
> ***4. That the trial magistrate erred in law and fact in failing to appreciate that the Appellant's testimony after producing the minutes instead prefer applications forms which the Appellant has never endorsed signature and concluded that there was no fraudulently.***
>
> ***5. That the trial magistrate erred in law and fact by making order and adopting the decision of the Kirinyaga County Council that the 2nd Defendant to amend its record so as to read among three houses.***
>
> ***6. That the trial magistrate erred in law and fact by failing to appreciate that the Appellant's testimony was un-challenged by the Respondent.***
>
> ***7. That the trial magistrate erred in law in proceeding with the hearing and final determination of the matter while the same was not related to the application of SAMSON KURIA.***
>
> ***8. That the trial magistrate erred in law and fact pronouncing a verdict dismissing the counter-claim despite the fact that the Respondent never gave enough evidence in Court,***

As the Appellant is acting in person, the appeal was canvassed by way of oral submissions as directed by this Court on 16th March 2017. **MS MUNENE** advocate appeared for the Respondent.

I have considered the record herein, the grounds of appeal and the oral submissions by the Appellant and by **MS MUNENE** advocate for the Respondent.

The Appellant filed this appeal in person and that explains the not so elegant manner in which it was drafted.

This being a first appeal, it is my duty to re-evaluate the evidence, assess it and make my own conclusions remembering however that I neither saw nor heard the witnesses hence I must make due allowance for that – ***SELLE VS ASSOCIATED MOTOR BOAT COMPANY LTD 1968 E.A 123***. An appellate Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the trial Court is shown to have acted on wrong principles in arriving at the decision subject of the appeal.

It is clear from the record herein that the trial magistrate based her decision solely on the fact that the Court in **KERUGOYA SENIOR RESIDENT MAGISTRATE'S SUCCESSION CAUSE No. 44 of**

**2005** had made a decision to have the suit plot shared between the three houses of the late **SAMSON KURIA GATWE.** The trial magistrate, while agreeing with the Respondent that the Appellant's names had fraudulently been inserted as an owner of the suit plot, she nonetheless refused to grant the orders sought in the plaint. She also refused to grant the Appellant the orders sought in the counter-claim on the basis that the Appellant had not shown that he was the one who had constructed the four rooms from which he was demanding rent. At page five (5) of the judgment, the trial magistrate makes the following findings which, in my view, was the basis of the decision subject of this appeal:

> "***I would therefore agree, in part, with the defendant, that to allow prayer 1 in the plaint I would be usurping the powers of appeal conferred to the High Court. I note that the plaintiff has conceded to this fact in their submission"***

The trial magistrate then proceeds to state as follows at page six (6) of the judgment:

> ***"Now, since the plaintiff has invited this Court to issue any other relevant relief, I will reiterate the decision of A.K. ITHUKU (Senior Resident Magistrate in Kerugoya Succession Cause No. 44 of 2005 and hereby order that:***
>
> > ***(i) Plot No. 127 in Wanguru be shared equally among the 3 houses of SAMSON KURIA GATWE (deceased) as follows:***
> >
> > > ***(a) Francis Muriithi Kuria to represent his mother's house.***
> > >
> > > ***(b) Zachary Githinji to represent the house of the late Dorcas Ngendo Kuria.***
> > >
> > > ***(c) Janet Muthoni to represent the third house***
> >
> > ***(ii) That the 2nd defendant to amend its record to reflect the above position.***
> >
> > ***(iii) If the stated persons in (i) (a), (b) and (c) are for reasons not able to represent their houses, beneficiaries to file for substitution in Kerugoya Succession Cause No. 44 of 2005.***
> >
> > ***(iv) The plaintiff shall have the costs of the suit".***

What I understand the trial magistrate to be saying in those many words is that since the dispute concerning the suit plot had already been determined in **KERUGOYA SENIOR RESIDENT MAGISTRATE'S SUCCESSION CAUSE No. 44 of 2005** where it was ordered that it be shared between the three houses of the late **SAMSON KURIA GATWE,** and since no appeal had been preferred from those orders, it would not be proper for the trial magistrate to contradict those orders. The trial magistrate was actually invoking the principle of res-judicata although that was rather late in the trial. That explains why she only chose to adopt the orders made in the Succession Cause. I think that was the right thing to do in the circumstances otherwise the trial magistrate would have been sitting on appeal over a decision of another magistrate.

The Appellant takes issue with the trial magistrate for dismissing his counter-claim. In ground 8 of his memorandum of appeal, the Appellant states as follows:

> "***The trial magistrate erred in law and fact pronouncing a verdict dismissing the counter-claim despite the fact that Respondent never gave enough evidence in Court on that matter"***

The counter-claim was pleaded by the Appellant and he sought the following orders:

> (a) "***The plaintiff do pay to the defendant all rent for the 4 rear rooms not paid for since year 2004 to me and general damages for none user"***
>
> ***(b) "Costs of this suit and the counter-claim be ordered against the plaintiff"***

Since it was the Appellant (as defendant in the subordinate Court) who was seeking the above orders in his counter-claim, it was his duty, under ***Section 107 of the Evidence Act***, to lead evidence and prove that he was entitled to the rent and general damages. ***Section 107 (1) and (2) of the Evidence Act*** provides that:

> (1) "***Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"***
>
> ***(2) "When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person"***

It was therefore the duty of the Appellant to lead evidence in proof of the rent and general damages payable to him. It was not for the other party to lead evidence to that effect. In any case, the claim for rent being a special damage claim had to be specifically pleaded and proved through cogent evidence. That is the law. In ***PROVINCIAL CO EAST AFRICA LTD VS NANDWA 1995-1998 2 E.A 288,*** the Court of Appeal stated that:

> "***It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead".***

It is clear from the counter-claim filed in the subordinate Court that the Appellant did not specifically plead the amount that he was seeking in special damages as required. The trial magistrate could not therefore, so to speak, ***"pick a figure from the air***" and award him as special damage. Even in his evidence in chief during the trial, no mention was made by him as to what he was seeking as special damages. That claim was therefore not available to the Appellant.

And with regard to general damages, the trial magistrate made a finding that the Appellant did not prove that he was the one who constructed the four (4) rooms from which he felt he was entitled to a claim for general damages for non-user. That was a finding of fact by the trial magistrate and it has not been demonstrated that it was not founded on sound evidence and this Court, as an appellate Court, must always bear in mind that the trial magistrate had the advantage of hearing and seeing the witnesses and its findings on facts must be respected unless for good reasons. In ***PETERS VS SUNDAY POST 1958 E.A 424*** **O'CONNOR P** stated as follows at ***Page 429:***

> ***"It is a strong thing for a appellate Court to differ from the finding, on a question of fact, of the Judge who tried the case, and who has 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 that 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".***

Therefore, the trial magistrate having made the finding that the Appellant had not proved that he had constructed the rooms, there was no basis upon which she could have awarded the Appellant general damages for non-user thereof as sought in the counter-claim.

From the evidence available to the trial Court, the trial magistrate was correct in declining to grant the Respondent the order that the Appellant was not a partner in the suit plot as another competent Court had already determined that issue and to do so would have amounted to sitting on appeal over a decision of a Court of concurrent jurisdiction. The trial Court was also right in dismissing the Appellant's counter-claim for special damages (rent) as that had not been specifically pleaded or proved, and also the claim for general damages as the Appellant had not proved that he had constructed the four (4) rooms on the suit plot.

The only issue that the trial magistrate can be faulted on is the order on costs. The trial magistrate having found that the prayer sought by the Respondent had already been determined by another Court, there was no basis to award him costs of the case in the lower Court. Secondly, the parties are siblings and in my

view, an order that each party meet their own costs would serve the interest of justice. I must therefore interfere with the trial magistrate's order as to costs.

The up-shot of the above is that the appeal lacks merit. It is dismissed but with an order that each party meets their costs both of this appeal and in the Court below.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**14TH JULY, 2017**

Judgment delivered, dated and signed in open Court this 14th day of July 2017

Mr. Ngigi for Ms Wangechi Munene for Respondent present

Appellant present

Respondent also present

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**14TH JULY, 2017**