



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. APPEAL NO. 15 OF 2015

MWASI KITHEKAAPPELLANT

VERSUS

MUNYU KITHEKA1ST RESPONDENT

MWINZA KITHOME2ND RESPONDENT

(Being an appeal from the Judgment of Kyuso Principal Magistrate's

Court in Civil Case No. 13 of 2012 delivered on 5th October, 2015 by

Hon. B.M. Mararo – P.M)

JUDGMENT

1. In the lower court, the Appellant sued the Respondents claiming for a declaration that the Respondents do abide with the decision of family elders and move their portion of land.
2. In the said Complaint, the Appellant averred that the Defendants trespassed on his portion of land in May, 2011; that the issue was arbitrated upon by a panel of family elders and that they should move out.
3. Upon hearing the witnesses, the learned Magistrate found in favour of the Respondents and dismissed the Appellant's claim.
4. In the Memorandum of Appeal, the Appellant has averred that the learned Magistrate erred when he based his decision on extraneous matters that were not in issue; that the Magistrate erred when he shifted the burden of the Defence case to the Appellant and the Appellant had proved his case in the lower court.
5. This being a first appeal, the court is obliged to evaluate the evidence that was tendered in the lower court and arrive at its own conclusion.
6. The Appellant informed the trial court that the 1st Respondent is his step-brother while the 2nd Respondent is the wife of the 1st Respondent's brother.
7. The Appellant described the land in dispute in detail and stated that the suit land was sub-divided between his mother and the Defendants' mother. It was his evidence that he was allocated the upper side of the land while the Defendants had the lower side.
8. When a dispute arose, it was the evidence of the Appellant that the clan held two meetings to settle it;

that the clan passed resolutions and that the 2nd Respondent was supposed to move to the same parcel of land that was occupied by the 1st Respondent.

9. PW2 stated that he is from the same clan as the Appellant and the Respondents; that the Appellant and the 1st Respondent are the children of Kitheka who had two wives (*Syumbua and Thanzu*) and that each house had its own land.

10. According to PW2, the 2nd Respondent was told to move to the piece of land that she had been allocated but she refused and that both parties agreed and even signed a consent before the Chief.

11. Another clan member, PW3, informed the trial court that he was involved in the sub-division of the Kitheka land twice and that the second meeting which constituted more members upheld the decision of the first meeting. According to PW3, the 2nd Defendant should re-locate to the position of land that she was allocated.

12. On his part, the 1st Respondent informed the court that he is a step-brother to the Appellant; that his father had two wives and that the Ausini clan members arbitrated over the dispute between him and the Appellant.

13. According to the 1st Respondent, he was satisfied with how the clan sub-divided the land among the family members of Kitheka.

14. According to the 1st Respondent, the first meeting involved six (6) members of the clan while the second one had 62 members and that it is this second clan meeting that sub-divided the land into two equal portions, a decision he agrees with.

15. The Chief of Mulangoni location, DW2, informed the trial court that they usually use sub-clans and clans to settle disputes amongst family members; that the sub-clan met on 11th May, 2011 and divided the suit land, a decision that the Appellant and the 1st Respondent were satisfied with. However, the 2nd Respondent was unhappy and the dispute was escalated to the larger clan on 11th June, 2011.

16. When the bigger clan met, they made a decision that was not favourable to the Appellant who then filed a suit in court.

17. The 2nd Respondent, DW3, informed the court that she is a sister-in-law to the Plaintiff.

18. According to the 2nd Respondent, her husband died in 1981 and left her on the suit land with six (6) children and that when a dispute arose between her and the Appellant, the Ausini clan made a determination which she was happy with.

19. The Secretary of the clan, DW4, stated that the clan met on 11th June, 2011 and divided the suit land between the two wives of Kitheka Munyu; that the Appellant refused to shift to his position and that the clan sub-divided the land fairly.

20. In his findings, the trial court found as follows:

“I find the decision dated 11th June, 2011 as being more accommodative as it speaks of the litigants’ mothers (Nzasa and Syumbua). I have issues with the decision of 10th September, 2011 as it is not stamped as it stated at the end “they all agreed that they will follow the boundaries which the clan (Kiluu) had already given”

21. Other than the decision of the clan, the learned Magistrate also visited the *locus quo*.

22. Article 60(1) (g) of the Constitution of Kenya provides that one of the principles of the land policy is to encourage communities to settle land disputes through recognized local community initiatives consisted with the Constitution.

23. Articles 159(2) (c) compliments Article 60 (1) (g) by providing that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms should be promoted.

24. I am aware that under the Kamba Customary law, land disputes are usually resolved by a sub-clan, and where one party is aggrieved by the decision of the sub-clan, he can appeal to the larger clan. That is what happened in this case.

25. The evidence before the trial court showed that the Appellant referred the dispute in respect to the suit land to the sub-clan (*family*). The sub-clan had its deliberations on 10th September, 2011, and came up with its decision, which decision the 2nd Respondent was not happy with. The issue was then escalated to the bigger Ausini clan comprising 62 members, who made their decision on 11th June, 2011. This is the decision that the trial court agreed with.

26. Considering that the bigger clan consisted more members than the initial sub-clan, and in view of the fact that the Appellant has not denied that he was heard, I have no reasons to fault the trial court for agreeing with the decision of the bigger clan in apportioning the suit land between the Appellant and the Respondents.

27. Indeed, it will be a fallacy for this court to interfere with a decision of 62 members of a clan who are well versed with the customs of the Kamba and more so who know the history of the suit land.

28. Having not been shown that the Ausini clan's decision of 11th June, 2011 is inconsistent with the provisions of the Constitution, or that the said decision was unfair, I find and hold that the learned Magistrate did not err in upholding the decision for the clan.

29. For those reasons, I dismiss the Appellant's Appeal with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 23RD DAY OF NOVEMBER, 2017.

O. A. ANGOTE

JUDGE