



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL APPEAL NO. 51 OF 2010**

**NYIRO PANDE NGALA.....APPELLANT**

**=VERSUS=**

**THOMAS JOSEPH BAYA.....RESPONDENT**

**J U D G M E N T**

1. This Appeal emanates from the decision of Honourable J. M. Gandani which was delivered on 21<sup>st</sup> April 2010. in the said Judgment the learned Magistrate dismissed the Appellant's Plaint.
2. The Appellant has raised twelve grounds in his Memorandum of Appeal. The grounds of appeal can be summarised as follows: that the learned Magistrate erred in law and fact in not considering the fact that the Appellant had in fact paid to the seller all the costs of his cash crops in Land Award No. 17 of 2009; that the Magistrate failed to notice that the Plaintiff was the owner of the land and that the Magistrate erred in law and fact in not issuing an order to have the plot in dispute surveyed to ascertain the current boundary of the Plaintiff's plot.
3. The Appeal proceed for hearing by way of written submissions.
4. In his submissions the Appellant's advocate submitted that the Appellant proved in the lower court that the Ngerenye Scheme/131 did not belong to Juma Saidi Kombo and therefore the Respondent could not have legally purchased the land from the said Juma Saidi Kombo.
5. The Appellant's counsel submitted that Mr. Juma Saidi Kombo sued the Appellant at the Tribunal in respect to a boundary; that the Tribunal decided the case in favuor of the Appellant and that the said Jumaa Said Kombo could not lawfully sell the suit property to the Respondent.
6. The Respondent's counsel submitted that the trial magistrate took into consideration the pleadings of the Appellant and found that indeed the Appellant had admitted in paragraph 5 of the Plaint that he was invited to witness the sale between the Respondent and Mr. Juma but he refused.
7. Counsel submitted that the Appellant is estopped from challenging the transaction that led to Respondent from owning the suit property; that the Appellant was unable to explain how he came to own the land and that the burden of prove was with the Appellant.
8. The Respondent's counsel submitted that the evidence of DW2 was never challenged. Counsel submitted that if indeed the suit property belonged to the Appellant, he had no basis of purchasing trees from the father of DW2.

**Analysis and findings:**

9. This being a first appeal, the court is obliged to look at the pleadings and the evidence that was arrived at in the lower court.
10. In his Amended Plaint, the Appellant averred that he is the owner of Plot No. 132, Ngerenya Settlement Scheme (the suit property); that sometimes in June 2008, the Respondent met Juma

- Said Chula who purported to be the owner of the suit property and that he purported to sell to him 2 acres.
11. According to the Plaintiff, when the Respondent approached the Appellant to be his witness in the transaction, he refused because the land did not belong to Mr. Juma.
  12. In the Plaintiff, the Plaintiff averred that before the transaction between the Respondent and Mr. Juma, he had had a boundary dispute with the said Mr. Juma, which dispute was decided in his favour.
  13. The Appellant sought for the eviction of the Respondent from the 2 acres that he had purchased from Mr. Juma.
  14. In his Defence, the Respondent stated that he purchased the three (3) acres that belonged to Mr. Juma and paid him Kshs.210,000 and that although the 2 acres that he bought belonged to Mr. Juma, the same were made to be part of the suit property during the adjudication process.
  15. In his evidence, the Appellant informed the court that the suit property belonged to him; that he refused to witness the transaction between the Defendant and Mr. Juma because the land was his and that he had paid a Mr. Chula for the trees that were on the land.
  16. The Appellant informed the trial Magistrate that Mr. Chula had planted trees on his land before the survey showed the land belonged to him (the Appellant).
  17. PW1 further informed the court that he was sued by the son of Mr. Chula at the Tribunal and that the Tribunal ruled in his favour.
  18. The evidence of PW2, a neighbour of the Plaintiff, was that Mr. Juma invaded the suit land and sold it to the Respondent.
  19. According to PW2, Mr. Chula was allowed by the Appellant to farm on the suit property temporarily because the Appellant owed him money and that the Appellant later on paid Mr. Chula his money.
  20. On the other hand, the Respondent, DW1, informed the court that he was shown the suit property by Mr. Juma Said Chula.
  21. According to the evidence of the Respondent, he requested the Appellant to be his witness in the transaction but the Appellant informed him that he was going to the mosque. DW1 informed the trial court that the Appellant gave the Respondent the green light to purchase the suit property from Mr. Juma.
  22. The person who sold the land to the Respondent, Juma Said Chula, informed the court that he sold to the Respondent the suit land in the presence of the sub-chief.
  23. DW2 informed the court that he sued the Plaintiff at the Tribunal over the suit property.
  24. According to DW2, the Tribunal ordered the Appellant to pay to DW2 the difference of Kshs.12,000 having paid to DW2's father Kshs.4,000 for the trees on the disputed land. He never paid the money as ordered.
  25. According to DW2, the portion of land that he sold to the Respondent is not the same land that had trees that the tribunal had ordered the Appellant to compensate him.
  26. In cross examination, DW2 stated that he received Kshs.12,000 whereafter he gave to the Appellant a portion of the land that was equivalent to the said amount. However, it was the evidence of DW2 that the Appellant had the entire land registered in his favour.
  27. According to the evidence of the Assistant chief, DW3, he witnessed the agreement that was entered into between the Respondent and the Chula family.
  28. DW3, informed the court that after investigations, he realised that the disputed land belonged to Mr. Chula who had inherited it from his late father.
  29. In his Judgment, the learned magistrate held that by refusing to witness the agreement and not raising any objection to the sale transaction between Mr. Juma and the Respondent, it was a testimony that the Appellant had no claim to the land.
  30. The learned Magistrate also found in favour of the Respondent because the Appellant had admitted that the said Juma had trees on the disputed farm. The learned Magistrate proceeded to dismiss the suit.
  31. I have gone through the Record of Appeal to ascertain the documents that were produced in the trial court.
  32. According to the Record of Appeal, the exhibits that were produced are only two, that is the agreement between the Respondent and Juma Said Chula in respect of "3 acres plot Majaoni Block 5A" and a sketch plan by a surveyor.

33. From the sketch plan, it would appear that an area measuring 1.65 ha and abutting the road and plot number 132 is the one that was sold to the Defendant by Mr. Juma Chula.
34. Other than the two documents, I have not come across documents to show that indeed the disputed piece of land is part and parcel of land known as 132/Ngerenya settlement, or that the said land was adjudicated in favour of the Plaintiff.
35. Other than alleging that there was a boundary dispute between himself and Mr. Chula before the Tribunal, the Plaintiff did not produce in evidence the proceedings of the Tribunal to enable the trial court or this court to ascertain the extent of the claim in that case and the decision thereof.
36. It was upon the Appellant to prove that the portion that was sold to the Defendant by Mr. Chula was his and that indeed the Land Disputes Tribunal had held as much.
37. Having failed to avail that evidence, and in the absence of an independent witness who could vouch for the fact that the disputed parcel of land belonged to the Appellant, this court does not have a basis to find that the lower court erred when it dismissed the Plaintiff's claim.
38. Having failed to prove to the required standards that the land that the Respondent purchased belonged to him, I find that the Appellant's Appeal is unmeritorious.
39. Consequently, I dismiss the Appeal with costs.

Dated and delivered in Malindi this **20<sup>th</sup>** day of **November** 2015.

**O. A. Angote**

**Judge**