IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, KARANJA & KIAGE, JJ.A)

CIVIL APPEAL NO. 12 OF 2014

BETWEEN

STANLEY N. MURIITHI.....1ST APPELLANT

JOSEPH M. STANLEY.....2ND APPELLANT

AND

BERNARD MUNENE ITHIGA.....RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Embu (Ong'udi, J.) dated 29th May, 2013

in

H.C.C.A. No. 116 of 2007)

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JUDGMENT OF THE COURT

In this second appeal, the appellants **Stanley N. Muriithi** and **Joseph M. Stanley** have challenged the judgment of the High Court at Embu **(Ong'udi, J)** dated 29th May, 2013 in **Embu H.C.C.A. No. 116 of 2007**. The appellants vide the memorandum of appeal dated 25th March, 2014 seek that the appeal be allowed and the judgment be set aside with costs. The appeal is premised on four grounds as follows;

1. ***That the learned Judge erred in law in failing to fairly and/or properly analyze the evidence adduced in the subordinate Courts.***
2. ***That the learned Judge erred in law in disregarding the submissions made on behalf of the appellants.***
3. ***That the learned Judge erred in law in disregarding the exhibits produced by the appellants.***
4. ***That the learned Judge erred in law in disregarding the fact that the appellant's claim was in regard to Plot No. 19, Kibingo village whereas the Respondent's plot was Plot No. 19B Kibingo Village."***

The appeal before the High Court arose from the Senior Resident Magistrate's Court, **Civil Case No. 35 of 1999** in which the appellants by an amended plaint dated 2nd July 1999 *inter-alia* prayed for;

"(a) ***A declaration that plot No. 19 Kibingo belonged to the 2nd Respondent who had got it from the 1st Respondent.***

(b) That the allocation of plot No. 19B to the appellant by Kirinyaga County Council was illegal and unsustainable."

In the said plaint, the 1st and 2nd appellants averred that the first appellant was allocated Plot No. 19 Kibingo Market in Kirinyaga District in 1959 following the demarcation exercise. He later transferred it to the second appellant. They claimed that the Kirinyaga County Council, which was named in the suit as the 2nd defendant, later purported to transfer plot No.19B Kibingo to the respondent while there was no plot known as No. 19B in the Kibingo Town Plan. They also averred that plot No. 19 belongs to the 2nd appellant who obtained it legally from the 1st appellant. They stated that the respondent, who is a stranger to the property, was interfering with their quiet possession of the property and was threatening to evict the 2nd appellant from plot No. 19. The respondent filed a defence denying the claims, and so did the Kirinyaga County Council. In its defence, the Council averred that it had allocated plot No. 19 to the respondent, and reconfirmed the allocation later vide minutes No. TPM & H 33/98. It also averred that it had heard a dispute lodged by the 1st appellant in respect of the ownership of the plot in question, whereby the dispute was resolved in favour of the respondent.

A brief summary of the evidence adduced before the two Courts below is that **Stanley Ngari Muriithi,** the 1st appellant, claimed ownership and possession of Plot No. 19 Kibingo since 1959. His main complaint before the court was that the respondent interfered with his possession and claimed ownership of his **plot No. 19 Kibingo**, which the respondent reassigned a new number, **19B Kibingo**. It was the appellant's contention that his plot No. 19 Kibingo had never been subdivided.

The 1st appellant explained that he acquired the property through an allocation in 1959 from his clan known as Aithe Kahuno clan. He produced a map and Council minutes, marked as **PEXB1**, as evidence in support of the allocation. He stated that he transferred the said plot No. 19 to his son **Joseph M. Stanley,** the 2nd appellant, on 10th February, 1992. On cross examination he stated that he did not have any evidence showing the approval by the council to the purported allocation by the clan. Further, he stated that the dispute over the ownership of plot. 19 Kibingo, between himself and the respondent had been heard by the Kirinyaga County Council but he did not know what the decision was. After the Council ruled in favour of the respondent, the 1st appellant filed a case before the magistrate's Court in Embu under CMCC No. 186 of 1994 which was however dismissed. The 2nd appellant explained that the respondent claimed ownership of a plot No. 19B and had cited their plot No.19 Kibingo as the said plot. He reiterated the 1st appellant's averment that the plot No.19 Kibingo had never been subdivided. On cross examination he confirmed to the court that the Council had decided that plot No. 19 Kibingo belonged to the respondent. On re-examination he stated that he was not aware of a letter dated 19.9.92, referred to him in court, asking him to remove his fence.

On his part, **Munene Ithiga** (the respondent), who initially claimed ownership of plot No. 19B Kibingo village, testified that he had purchased the plot from one **Patrick Munene** vide an agreement of sale dated 3rd May, 1975 at a purchase price of Kshs. 870/=. He produced as exhibits the sale agreement and the receipt issued to him in acknowledgement of the consideration. He also produced the proceedings of the Council approval dated 2nd March, 1978 and the Council approval of the allocation dated 3rd April, 1980. He claimed that he took possession of the suit property in 1975. It was in 1992 that he realized that his plot had been fenced. He later came to find out that the 1st appellant, with the approval of the Council, had transferred the plot to the 2nd appellant. The respondent complained to the Council and the Council reversed the transfer of the property to the 2nd appellant. He produced in evidence, copies of the complaint and the Council's findings on the dispute. He later confirmed to the court that the plot in dispute was plot No. 19 Kibingo and that he was not aware of plot No. 19B in Kibingo market. He confirmed to the court that on 16th December, 1993 the 2nd appellant was notified of the Council's cancellation of his transfer as the letter was copied to him. He further confirmed that the plot was not

occupied.

On cross examination, the respondent confirmed that the proceedings of the Council approvals to have the plot transferred to him referred to plot No. 19B. He also confirmed that there were no minutes showing that he was allocated plot No19. After considering this evidence, the learned magistrate rendered a judgment allowing prayer (a) and dismissing prayer (b) of the amended plaint. In his judgment the learned magistrate stated that:

"The whole suit revolves around ownership of plot No. 19 or is it 19B?

……..

A question arises that if this plot was given to the said Patrick by the Council why was it hard to produce the documents. The only evidence as to the origin of the plot is the map marked P. exhibit No.1. This map was not discredited in any way. I find it authentic. As I have said it is the only evidence. The other minutes produced cast doubt as to whether the council was dealing with the same plot."

Being dissatisfied with the judgment, the respondent filed an appeal at the High Court in Embu. The High Court reconsidered and re-evaluated the evidence and came to its own conclusion to the effect that it was erroneous for the learned trial magistrate to overlook the "massive evidence" and only rely on an improperly admitted map to make the finding that he did. The learned Judge, therefore, allowed the appeal and set aside the judgment of the learned trial magistrate. She substituted the order by dismissing the respondent's case with costs to the appellant. In allowing the appeal the learned Judge held that:-

"It was clear from the evidence that there was no plot No. 19B in Kibingo as the original No. 19 had not been subdivided. In as much as the 1st Respondent alleged having been allotted the plot he produced no evidence to confirm that.

….The minutes PEXB3 is what shows plot 19B (which was a typing error) as belonging to Munene Ithiga while plot 52 belongs to Stanley Ngari Muriithi. PEXB2 are minutes which transferred plot No. 19 from Stanley Ngari to Joseph N. Stanley. Further the minutes of 17th August 1993 DEXB6 nullified the transfer dated 10/12/1992. And that is the last action the Council had on plot No. 19 Kibingo Market. That decision has never been set aside.

It was therefore erroneous for the learned trial magistrate to ignore all this massive evidence and rely on an improperly admitted map to make the finding that he did."

When this appeal came up for hearing the parties agreed to proceed by way of written submissions. Learned counsel for the appellant, **Magee Wa Magee**, filed submissions on 29th June, 2015. It was his contention that the learned Judge failed to fairly or properly analyse the evidence adduced before the subordinate court. Counsel contended that from the proceedings before the subordinate court, both parties collectively produced ten (10) documentary exhibits. On the other hand, it was also clear that from the amended index to the record of appeal before the High Court, that only 2 documentary exhibits were availed to the Court. It was learned counsel's contention therefore, that the Judge did not peruse the bulk of the documentary exhibits that were produced before the subordinate court, and did not even mention their absence from the record. Counsel contended that the Judge made reference to only one exhibit, the map which was not even availed to her. She also failed to consider the appellants' exhibit 2 & 3, that is, the transfer of plot No. 19 Kibingo and the records from Kirinyaga County Council respectively which indicated that the respondent was allocated plot No. 19B and not Plot No. 19 Kibingo. He further contended that the Judge made reference to the respondent's exhibits 1,2,5,6, and 7 yet only exhibit 6 was availed to her, as can be seen from the amended index of the record of appeal in the High Court.

Learned Counsel also urged that the learned Judge disregarded the submissions made in the High Court and exhibits produced in the lower court. Counsel argued that the Judge did not make reference to the appellants' submissions before her and therefore did not hear the appellants, contrary to the rules of

natural justice. Counsel urged further that the learned Judge made a finding on a map that she had not even seen. In addition, he argued that the Judge's need for the map to be produced by the maker was unlawful since the respondent had not objected to the production of the map and the original map was in the custody of the 2nd defendant, the Kirinyaga County Council, who had been ordered to avail the said document, but had failed to do so.

Lastly, counsel contended that the learned Judge had no legal basis to conclude that plot No. 19B as typed on PEXB3 was a typing error. He further contended that no pleading or evidence before the lower court or the learned Judge demonstrated that the "B" was a typing error. The appellants therefore entreated the Court to allow this appeal.

On his part, learned Counsel for the respondent, in reply by written submissions dated 9th March, 2015 submitted that the appellants failed to discharge the burden of proof for ownership of the suit plot as placed on them by dint of **Section 108** of the **Evidence Act**. There was no proof of ownership by the appellants, or evidence in place to counter the respondent's transfer made by the Kirinyaga County Council and allocation letter dated 3rd September, 1980 to enable the Court to rule otherwise. In support of the learned Judge's finding, counsel further contended that the map produced in Court by the appellants, did not indicate the source, author, or maker, it was undated and unsigned and was not the certified copy of the original. He further contended that the map did not indicate any specific area or market that it represented.

He further urged that the learned Judge gave due regard and considered the exhibits produced. He stated that the learned Judge correctly found that the map relied on should not have been admitted as evidence. Secondly, that the alleged transfer by the 1st appellant to the 2nd appellant had been made after the suit plot had been allocated to the respondent vide minute No. TPM & H 33/78 and the allotment letter dated 2nd September, 1980 had been issued. The respondent contended that the decision by the Kirinyaga County Council to allot the suit property to the respondent and the cancellation of the transfer from the 1st appellant to the 2nd appellant has not been challenged by the appellants.

Finally, counsel submitted that the learned Judge was correct to find that the plot suit No. 19B was nonexistent as the only document that makes reference to plot No. 19B is the County Council Minutes dated 2nd March 1978, and hence a clear typographical error.

We have anxiously considered the record, the grounds in support of the appeal, the rival submissions of counsel, and the law. We are conscious of our limited jurisdiction when dealing with a second appeal. Our reading of **Section 72(1)** of the **Civil Procedure Act**, **Chapter 21, Laws of Kenya,** which provides for the circumstances when a second appeal shall lie from the appellate decrees of the High Court, indicates that the appeal must be on matters of law.

In **Kenya Breweries Limited v Godfrey Odoyo [2010] eKLR (Civil Appeal No. 127 of 2007)** Onyango Otieno, J.A. put it succinctly in the following words:

"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

We hasten to observe, however, that failure on the part of the first appellate court to re-evaluate the evidence tendered before the trial court and as a result, arriving at the wrong conclusion is a point of law. We note that indeed, learned counsel for the appellants did submit that the learned Judge failed to consider most of the documents that were produced in evidence, and therefore arrived at the wrong conclusion. That is actually the gist of this appeal, as can be deciphered from the four grounds of appeal which we have reproduced elsewhere in this judgment. The question we must therefore answer is

whether indeed the learned Judge in her duty to re-evaluate the evidence before her did reconsider all the evidence adduced before the trial court , or let some of the important evidence slip away and be left by the wayside. If we find that some evidence was indeed disregarded, then the next issue for our determination will be whether the evidence in question would have affected the outcome of the appeal

Let us start with the map, which the trial court placed heavy reliance on, but which the learned Judge faulted and ruled that it should not have been admitted in evidence. Was this map admissible in evidence?

The village map is a public document within the provisions of **Section 79 (1)** of the **Evidence Act, Cap 80, Laws of Kenya**. **Section 80** of the **Evidence Act** provides that only a certified copy of the public document is admissible. In this case it was not in dispute that the map in question was in the custody of the 2nd defendant. A notice to produce the original was served on the 2nd defendant but it refused to avail it. Having seen the copy, we can only surmise that the production of the original was not in the interest of the 2nd defendant.

We have perused the Court file and found that indeed the map is undated, unsigned and not certified. It is nonetheless clearly headed "KIBINGO TOWN PLAN". However, in view of the notice issued by the appellants under **Section 68 (1) (a) of the Evidence Act** we find that the map is admissible, and the learned magistrate was therefore in order to admit it and also rely on it. The learned Judge in our respectful view disregarded a crucial bit of the evidence to the effect that a notice to produce the map had been served on the 2nd defendant who refused to produce the original or certified copy.

Having looked at the said map, we are convinced that plot No.19 was originally allocated to Stanley Muriithi, (1st appellant) and the Ithekahuno Clan. It is that clan that gave the same to the 1st appellant. That map did therefore corroborate his evidence in Court. That evidence is also corroborated by the council minutes of 10th December 1992 which endorsed the transfer of the said plot from the 1st appellant to his son, the 2nd appellant. Apparently, all this evidence was before the learned Judge, but it was not re-evaluated.

There was also the issue of the respondent claiming to have purchased the plot from another person. A sale agreement was produced in evidence. There was however no document annexed to the said sale agreement to support the claim of ownership of the plot by the said seller. The purported seller had not testified before the trial court to avail documentation to support his claim of ownership/title to the land which he could pass to the respondent. There was also the lingering question as to why if indeed the respondent had bought the said plot from the said Patrick Munene in 1975, why did he have to apply to the Council for allocation of the same plot in 1980? Could he not have applied for a transfer of the property like the 1st appellant did when he transferred the plot to the 2nd appellant?

These were some of the germane issues which had been raised and considered before the trial court but which the learned Judge failed to re- consider. We need not say more.

It is clear from the foregoing that had the learned Judge properly and critically re-evaluated the evidence before the trial court, then she might have arrived at a different conclusion and upheld the trial court's decision.

We are satisfied that this appeal has merit. Accordingly, we allow the same and set aside the judgment of the High Court, and reinstate the judgment of the trial court dated 16th day of November 2007. We also award the costs of this appeal and before the High Court to the appellants.

Dated and delivered at Nyeri this 3rd day of February, 2016.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

…….

JUDGE OF APPEAL

P. O. KIAGE

…….

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR