



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: (OKWENGU, MAKHANDIA & SICHALE, J.J.A.)

CIVIL APPEAL NO. 34 OF 2013

BETWEEN

1. VENANCE MWASHIGADI

2. JASPER MWASHENA.....APPELLANTS

AND

HASSAN HURI.....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Mombasa (Kasango, J.) dated 26th July, 2012

in

H.C.C.C. No. 384 of 2009)

JUDGMENT OF THE COURT

This is an appeal arising from the judgment and decree of **Kasango, J.** delivered on 26th July, 2012 in Mombasa **High Court Civil Suit No. 384 of 2009.**

Briefly the facts of the case are that the respondent Hassan Huri filed a suit against **Venance Mwashigadi** and **Jasper Mwashena** vide a plaint dated 30th October, 2009. The respondent sought the following prayers:

- (a) *Vacant possession of the said land and premises to wit C.R 36423 – L.R. 1956/348 and C.R. 34087 – L.R. 1966/347.*
- (b) *An order that the defendants and their agents be evicted from the said parcel of land and that any structure illegally erected on the said premises be demolished.*
- (c) *A permanent injunction to restrain the defendants by themselves, their agents, servants or otherwise however from remaining on or continuing in occupation of the C.R. 36423 – L.R. 1956/348 and C.R. 34087 – L.R. 1956/347.*

(d) *Costs and interest.*

The gist of the respondent's case was that the appellants were trespassers on his parcels of land namely plot **L.R. No. 1956/347** and **L.R. No. 1956/348**. The appellants filed a statement of defence dated 10th December, 2009 and denied the allegations of trespass made against them.

The hearing proceeded before Kasango, J. who in a judgment delivered on 26th July, 2012 found in favour of the respondent. The appellants were dissatisfied with the said judgment hence this appeal.

In their memorandum of appeal dated 31st July, 2013 the appellants listed 7 grounds of appeal.

These were:

- “1. The Learned Judge erred in Law and fact in finding that the Respondent herein was the rightful owner of parcel L.R. No.1956/343 and No. 1956/347 and not the Appellants herein.***
- 2. The Learned Judge erred in Law and fact for not granting the Appellants an opportunity to cause an amendment to their defense to enable the Court converse and determine the issues fairly without technicalities.***
- 3. The Learned Judge erred for not allowing and considering the fact that no such lapse of time had passed when disallowing the Appellant time and leave to conduct (sic) amendment to their defense.***
- 4. The Learned Judge erred in Law and fact by refusing the Appellants a chance to call more witnesses by granting an adjournment as requested to invite an expert and an officer from the Municipal Council of Voi to testify on the behalf of the Appellants.***
- 5. The Learned Judge erred by refusing to grant an adjournment even after realizing that it was not unreasonable or an apparent miscarriage of Justice on the part of the Respondent.***
- 6. The Learned Judge erred in Law and fact in failing to recognize that the Appellants' application was genuine, and the refusal to grant adjournment would cause an injustice to the Appellants.***
- 7. The Learned Judge failed to appreciate the fact that failure of the Appellants to produce the relevant documents that the Court sought was not deliberate and that the Appellants gave reasonable grounds hence their prayer for adjournment to enable production of Evidence”.***

As the first appellate court it bears mention to remind ourselves of our mandate. In ***Mahira Housing Co. Ltd vs Mama Ngina Kenyatta & Another KLR 2008 P. 31*** the Court of Appeal quoting ***Sir Clement De Lestang, V.P. in Selle v. Associated Motor Boat Company [1968] E.A. 123*** at p.126 stated as follows:

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

We are therefore obligated to reconsider and re-evaluate the evidence adduced during the trial in the superior court being cognisant that we did not have the benefit to hear and observe the witnesses.

During the hearing of the appeal on 13th March, 2013 **Mr. Okemwa**, learned counsel for the appellants faulted the trial court for failing to grant the appellants an adjournment to enable the appellants call their witnesses and tender documents in support of their case. In his view in refusing to grant the adjournment, the trial court failed to exercise its discretion properly in favour of the appellant and bearing in mind as well that no prejudice could have been occasioned to the respondent by such an adjournment. In the premises the appellant was denied a fair hearing and the principles of natural justice were violated. He relied on the following authorities.

- i) *Abdulrehman v Almaery [1985] KLR 287*
- ii) *Dorcas Indombi Wasike v Bension Wamalwa Khisa [2000] eKLR*
- iii) *Mwanasokoni v Kenya Bus Services Ltd [1985] KLR 931*
- iv) *Hahn vs Singh [1985] KLR 716*

Mr. Omondi, learned counsel for the respondent opposed the appeal and pointed out that whereas the appeal is against the judgment of Kasango, J., there is no notice of appeal as regards refusal to grant an adjournment. He further contended that the appellants had not provided witness statements nor documents to be relied on and concluded that the Judge was right in the exercise of her discretion in refusing an adjournment.

On our part we have considered the rival arguments. The appellant's bone of contention was that the court refused to grant them an adjournment so as to put forth its case. The appellants' counsel dwelt at length on this issue.

In our view and as postulated by Mr. Omondi for the respondent, the notice of appeal is against the judgment of Kasango, J. "*delivered on the 26th July, 2012*" and not against the order of refusal to grant an adjournment in the course of the hearing. It goes without saying that these are two separate and distinct matters. Having failed to file an appeal against the order refusing an adjournment, the appellants cannot now argue the same in an appeal against the judgment. The authorities cited on adjournments cannot aid the appellant.

We also find that all the grounds of appeal addressed the failure to grant an adjournment save for grounds I above. In her judgment Kasango J. states:

"... such titles are taken by the court as conclusive evidence that the person named therein is the proprietor. There is no question therefore who is the proprietor of both parcels of land. The defendants by their defence stated that they had been in open, continuous and uninterrupted occupation of the suit premises since 1979 and 1982 respectively. They however did not make a counter-claim in their defence seeking orders of adverse possession. The defence raised by the defendants therefore does not suffice to challenge the plaintiff's titles. They did not prove that the plaintiff had perpetrated fraud or misrepresentation in obtaining the titles."

We could not agree more with the findings of the learned Judge.

For the foregoing reasons, we dismiss this appeal with costs.

Dated and delivered at Mombasa this 8th day of April, 2014

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR