



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A.)**

**CIVIL APPEAL NO. 297 OF 2010**

**BETWEEN**

**STANLEY GITONGA.....APPELLANT**

**AND**

**GERALD MWITHIA .....RESPONDENT**

*(An appeal from the Decision and Decree of the High Court of Kenya at Meru (Kasango, J.)  
dated 6<sup>th</sup> day of November, 2009*

in

H.C.C.A. No. 62 of 1998)

\*\*\*\*\*

**JUDGMENT OF THE COURT**

Stanley Gitonga (*appellant*) and Gerald Mwithia (*respondent*) are brothers. They have been embroiled in a long standing dispute over a parcel of land described in the original suit as Plot 498 Kianjai Adjudication Section. This is a second appeal, the matter started before the Chief Magistrate’s Court in Meru, by the respondent who was the plaintiff. The respondent’s claim was that in March, 1958, he was allocated a piece of land measuring 19.93 acres at Kianjai Location by “*the Mwiriga*” and Consolidation Committee of Kianjai Location.

The respondent contended that he took possession and occupied the suit premises but the appellant trespassed upon a portion thereto measuring 5 acres and was cultivating maize. Despite demand, the appellant refused to vacate the suit premises. On 23rd January, 1993, the respondent obtained consent from the Land Adjudication Officer under **Section 30** of the **Land Adjudication Act**, to file a suit against the respondent.

The suit was filed before the Chief Magistrate’s Court; the respondent gave evidence regarding his claim of ownership. His case was supported by his mother Ruth Kaliuntu M’Itimitu, PW 1 and John M’Etaiva, PW 3 while the appellant gave evidence in support of his defence and relied on the evidence of his brother, Charles Muchene, DW 1. The learned trial magistrate considered the evidence and dismissed the respondent’s claim albeit on technicality. This is what he concluded:

***“Having considered the entire evidence, I do find the plaintiff filed this suit before he***

***had exhausted the machinery provided in the Land Adjudication Act, with regard to rival claims on the suit land.***

***I, therefore, do hold that the plaintiff's suit was filed prematurely and is dismissed....”***

Being aggrieved by that order, the respondent appealed before the High Court. These grounds of appeal are relevant in the analysis of the present appeal and we therefore deem it necessary to restate them verbatim:

1. ***The learned trial Magistrate erred in law in relying on matters not pleaded to dismiss the Appellant's case.***
2. ***The learned trial Magistrate erred in holding that the appellant had not exhausted the machinery laid down by the Land Adjudication Act Cap. 284 yet the land in dispute at the material time was grounded by the Land Consolidation Act Cap. 283 Laws of Kenya, where a decision of the Committee and/or Board is final.***
3. ***The learned trial magistrate erred in law and fact in failing to find for the plaintiff even on the face of overwhelming evidence and even on the admission by the respondent that his parcel No.2557 was not excised from the Appellant's land parcel No. 498.***
4. ***The learned trial magistrate's judgment offends the mandatory provisions of O.XX r. 4 of the Civil Procedure Rules.***
5. ***The learned trial magistrate's judgment is against the weight of evidence.***

Reasons wherefore:

- (a) ***The learned trial magistrate's judgment be set aside.***
- (b) ***This honourable court do order that the Appellant is the lawful owner of Plot No. 498 Kianjai Adjudication Section as originally demarcated.***
- c. ***An order that the respondent do vacate the Appellant's land Parcel No. 498 Kianjai.***
- (d) ***An order that the respondent do pay costs of this appeal and the court below.***

The appeal was admitted for hearing and directions given that the appeal be heard by way of written submissions. Both counsel for the appellant and respondent filed written submissions, which were considered by Kasango J., in the judgment of 6th November, 2009, the subject matter of this appeal.

The Judge found fault with the Magistrate's conclusion that the respondent could not file a suit in Court after he was given the requisite consent under **Section 30(1)** of the **Land Adjudication Act**. Upon subjecting the evidence to a fresh analysis, the Judge observed that the respondent proved that the land was his and the respondent failed to prove he was entitled to 7 acres of the suit land. This is what the Judge observed in some pertinent parts of the Judgment:

***“I cannot inquire the fact that the respondent stated that since the 7 acres was excised from the suit property he had been allocated plot Number 447. Therefore, as I reach this conclusion of this Judgment, in my view, the interest of Justice would require that the land be restored back to the original number and into the appellant's name.”***

As regards the findings by the trial magistrate that the respondent had not exhausted the procedure of appeals as provided for under the Law Adjudication Act, the Judge stated in part of the Judgment as follows:

***“I too, do fault the learned magistrate for having not taken into consideration the consent given by the District Land Adjudication Officer prior to the filing of the Court action in the Lower Court. Once that consent has been given, the court was mandated to proceed with the suit. Having found the appellant had a right to file the suit, and having found as I have stated before, that the appellant proved his case on a balance of probabilities, the following is the judgment of this Court:***

- 1. The learned trial magistrate's judgment delivered on 15th July, 1998, in PMCC Meru 120 of 1993, is hereby set aside.***
- 2. This Court does hereby declare the appellant as the lawful owner of Plot Number 498 Kianjai Adjudication Section and in that regard, this Court issues an order of cancellation of Plot Number 447, Kianjai Adjudication Section and on that cancellation being undertaken, the land represented by that number 447 should be returned to plot number 498.***
- 3. The Court orders the respondent to hereby vacate the appellant's parcel Number 498 Adjudication Section forthwith and in default an eviction order is hereby issued against him.***
- 4. The appellant is awarded the costs of the Lower Court's suit and of this appeal.***

This is the gravamen of this appeal; the appellant has proffered a total of 12 grounds of appeal; they were all argued together by Mr. Gomba, learned counsel for the appellant during his address to us. We can, therefore safely summarize the grounds so as to avoid repetition to the following:-

- v. Whether the Judge addressed issues that were not pleaded and made orders that were prejudicial to the appellant especially the cancellation of Plot No. 447 which existed independently.***
- v. Whether consent issued under Section 30(1) of the Land Consolidation Act, ousted the appeal process that are envisaged under Section 29 of the Land Adjudication Act.***
- v. Did the Judge err by making a finding of fraud regarding the excision of Plot No. 447 from 498?***
- v. Whether the Judge failed to subject the entire evidence to fresh analysis and evaluation.***

In his brief address, Mr. Gomba emphasized the above grounds especially the fact that the Judge addressed issues that were not pleaded especially the allegations of fraud ; failure to consider the suit premises was within an adjudication area and therefore, the provisions of **Section 29** of **Cap 284** were applicable and failure to consider the appellant's defence that he was allocated 7 acres of the suit land by the Adjudication Committee.

On behalf of the respondent, this appeal was opposed. Mr. Kaburu, learned counsel, submitted that **Section 30** of the repealed **Land Adjudication Act** was clear, a party cannot institute a suit within an adjudication area without the consent of the Adjudication Officer, therefore, the learned magistrate misapprehended the law and dismissed the suit on a technicality. Once a party is given consent to file suit, it is not necessary to follow the appeal process. The Judge reviewed the evidence and was satisfied that the appellant was a trespasser and since Plot 447 was hived from 498, it was consequential that an order of cancellation of Plot No. 447 was made. On matters pleaded; counsel for the respondent was of the view that a Court is not restricted to pleadings but also the evidence adduced at the hearing is relevant. In this case at the time of filing the suit, parcel No. 447 had not been given a number. The plaintiff sought for orders of declaration but when it transpired at the hearing that the respondent had been given 7 acres, the Judge could not close her eyes to this fact borne out of evidence. Mr. Kaburu urged us to dismiss the appeal.

This is a second appeal; that being so, only issues of law fall for consideration. **Section 72(1)** of the **Civil**

**Procedure Act**, provides the circumstances under which a second appeal shall lie from the decrees of the High Court. A careful reading of the section shows that such appeals are as a general rule confined to issues of law. In this appeal however, we must point out that both courts were not concurrent in their findings. The trial magistrate dismissed the respondent's claim on legal technicality, while the Judge of the High Court, allowed the appeal by faulting the magistrate on his conclusion that the claim did not lie before the respondent exhausted the appeal mechanisms provided for under the Land Adjudication Act. The Judge also reviewed the evidence which was recorded by the trial magistrate, and held that the respondent had proved his case to the required standard and issued the orders stated here above.

In the circumstances of this appeal, we have to address ourselves to three pertinent issues;-

- *Was the respondent supposed to exhaust the appeal mechanisms provided for under the Land Adjudication Act.*
- *Did the Judge subject the entire evidence to fresh evaluation and analysis?*
- *Were the conclusions legally sound; were they founded in the pleadings*

We pointed out at the outset that the dispute here involves two brothers. It is over a piece of land described as plot 498 Kianjai Adjudication Area (*suit land*). It has been said many times, and it bears repeating that land in this country is an emotive subject, it touches on the core of the society, as it is a source of livelihood to some communities and at the same time a symbol of identity. The suit land was originally clan land that was for sometimes in the 1950's acquired by the colonial government through the Ministry of Agriculture and Animal Husbandary. In 1957, the respondent applied to be allocated the suit land from the Department. He was however informed that the land was returned to "**Mwiriga**" elders who had given the land to the government as a demonstration farm. He was advised to apply for the allocation of the suit land from the elders. The respondent contends that he was allocated the land and issued with a boundary certificate that was signed by John M'Itaara who testified as PW3 during the trial. PW3 testified that he signed the boundary certificate for the respondent over the suit land. It was the respondents' case that the land belonged to him and the appellant trespassed on the land by cultivating a portion of 5 acres thereto.

The respondent was supported by his mother Ruth Kaliuntu M'Itimitu PW2. She testified that the suit land was not part of the family land; it was given to the respondent by the Ministry of Agriculture. She was residing on the suit land with the respondent who was taking care of her. She contended that the appellant was the one left to inherit the family parcels of land at a place called **Nkirithia** therefore he was not entitled to the suit land.

The appellant gave evidence and was supported by his brother Charles Muchena. They insisted the suit land was family land; the claim by the appellant was subject of deliberations before the various committees dealing with issues of land identification and gathering various fragments of land in Kianjai Adjudication area. They particularly referred to a report compiled on the investigations on complaints over the adjudication exercise in the area. The respondent was named as one of the powerful people using his influence as chairman of **KANU** to influence or manipulate the adjudication officers. It was also pointed out that there were clan divisions, therefore the interests of the clans could not be effectively represented at the adjudication committees. According to the appellant, he was shortchanged by the respondent, but he was allocated 7 acres where he has been cultivating and denied being a trespasser.

From the above scenario, it is indisputable the suit land is in Kianjai that was declared an adjudication section in 1966. Sadly this process has never been completed; it was marred with disputes mainly over what land was owned by a clan, family, individual or sometime by the government. The provisions of the Land Adjudication Act set out an elaborate procedure for dispute settlement. The disputes were supposed to be settled by the Adjudication Committees complete with objection proceedings and even an appeals mechanism. The dispute over the suit land seems to have gone back and forth before the committees and the respondent sought the requisite consent of the Land Adjudication Officer which was granted pursuant to the provisions of **Section 30** of the **Act**.

We agree with the Judge that after the consent to file suit was given, that shifted the jurisdiction to court to determine the dispute. The trial magistrate had jurisdiction to determine the suit and thus far we agree with the Judge, where we part company is the manner in which the evidence was analyzed leaving out pertinent matters and the fact that the defence evidence was not at all considered and this led to a wrong conclusion.

The dispute is between brothers and it is undisputed that the suit land originally belonged to “*Mwiriga*” elders which basically mean clan land. Clan land denotes that the land so described is held communally by members of the same family. When the respondent applied to the colonial government for allocation of the suit land, the response he got was that the allocation was not possible, because the suit land was returned to the clan elders, and he was requested to make his application before the clan. There is no application or minutes attached to show that the respondent applied for the allocation of this land from the clan elders. What there is before the court is a boundary certificate that was signed by on PW3 who said he was chief of the area between 1953 to 1965. This is what he told the trial magistrate:-

***“During that time, Gerald came to me so that I could sign for him for a piece of land which belonged to the Agriculture Department”***

If we may pose here; there is nothing to show that the clan deliberated over the suit land, by summoning all the interested parties or stakeholders who were going to be affected, and made a determination that the land be allocated to the respondent because he asked for it from the colonial government. The boundary certificate that was signed by PW2 does not indicate the plot Number. There are no minutes to show that PW3 was signing a boundary certificate in execution of a decision of the “*Mwiriga*”.

The evidence of PW2, the mother of the respondent that was believed by the Judge, also contended that the suit land was given to the respondent by the Ministry of Agriculture. This was factually and legally incorrect; the Ministry of Agriculture did not give the suit land to the respondent. He was supposed to seek it from the clan. Had the Judge directed herself properly to the letter written to the respond by the Department of Agriculture which she reproduced in her judgment, she would have arrived at a different conclusion that the land did not belong to the Ministry of Agriculture and that there was no evidence the clan deliberated on the respondent’s application for allocation.

Another aspect that has equally disturbed us is the fact that the defence evidence was given a wide berth by the Judge. The appellant and his brother testified that the suit land belonged to their family and the respondent was taking undue advantage of the appellant, although DW2 said he was not interested in this particular parcel of land, the fact that the appellant was occupying a portion of 7 acres was an important aspect of the evidence that required consideration. In particular the issue of occupation of the appellant and his mother, did it have any bearing to the fact that this was clan land?

The appellant has also taken issue with the orders issued which were not pleaded; we however do not wish to belabor this aspect as we have come to the conclusion as pointed out that the Judge erred by failing to consider that the suit land was not allocated to the respondent by the Ministry of Agriculture, and the purported boundary certificate apart from being vague, was not issued pursuant to the resolution of the “*Mwiriga*” Elders who owned the land. In the circumstances of the above the respondent could not have proved his case on a balance of probability.

In the upshot of the above, this appeal is allowed, the judgment of the High Court is set aside, and the respondent's suit before the trial magistrate is dismissed. The appellant shall have the costs of this appeal.

***Dated and delivered at Nyeri this 18<sup>th</sup> day of July, 2013.***

***ALNASHIR VISRAM***

.....

***JUDGE OF APPEAL***

***M. K. KOOME***

.....

***JUDGE OF APPEAL***

***J. OTIENO – ODEK***

.....

***JUDGE OF APPEAL***

I certify that this is a  
true copy to the original.

**DEPUTY REGISTRAR**