



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: OMOLO, TUNOI & AGANYANYA, J.J.A.)
CIVIL APPEAL NO. 175 OF 2004

BETWEEN

ELIJAH NYAWIRIAPPELLANT

AND

1. JACKTON OYUNGU

AMBWAYA

2. CHARLES ALINYO OCHUO.....RESPONDENTS

(Appeal from the judgment and decree of High Court of Kenya at Kisumu (Tanui, J.) dated 12th February, 2004

in

H.C.C.A. No. 116 of 2001)

JUDGMENT OF THE COURT

Elijah Nyawiri, the appellant was the plaintiff in *Civil Case No. 139 of 1997* at the Senior Resident Magistrate's Court at Maseno. The dispute related to the ownership of Plot No. 3 at Rabuor Market in Yala Division of Siaya District between the appellant and *Jackton Oyungu* and *Joseph Alinyo Ochuo*, the respondents. In a homemade plaint dated 27th August, 1996 and filed in court, the appellant averred that he was the rightful and registered proprietor of the said property which was then occupied by the 2nd respondent. He prayed for an order to compel the 1st respondent to surrender that plot to him. The respondents filed a joint defence denying that the appellant owned the said property as his and averred that the property was owned by the 1st respondent who had sold it to the 2nd respondent and that a transfer had been effected and confirmed by Siaya County Council in 1995.

The Principal Magistrate at Maseno (*T. M. Miseda, deceased*) heard the testimony of witnesses in the case at the end of which he wrote the judgment which he delivered on 21st July, 1999. He stated in his conclusions thus:-

“above all over (sic) wonders why since the shop was built it is the 1st defendant who has been trading in it, renting it to various people and finally, selling it to the 2nd defendant whom the plaintiff does not want to case with. The possible answer is that he has been trying to execute his fraud against the brother since 1975 but all in vain. He has even tried to intimidate his brother by using threats and arrest by D.C.I.O. Siaya who only desisted when he was served with this Court's ruling on 27.10.97. The plaintiff did not appreciate that having filed this case in court he should not have resorted to criminal action. All this shows that all along he has not acted in good faith in his pursuit of plot No. 3/Rabuor Market. He is indeed bound to lose to the 1st defendant. So all in all I dismiss the

plaintiff's case with full costs against defendants 1 and 2.”

Being dissatisfied with this decision the appellant appealed to the superior court but that court (*Tanui, J. - as he then was*) dismissed the appeal on 12th February, 2004. Still aggrieved, the appellant has appealed against the dismissal to this Court in a memorandum of appeal lodged in the Court's sub-registry at Kisumu on 23rd July, 2004. It has 6 grounds of appeal as hereunder:-

“1. The learned Judge erred in law in not assessing the evidence before him with the anxious attention it deserved.

2. The learned Judge misdirected himself in law in limiting his assessment of the issues and evidence before him simply on the submissions of counsels (sic) of the parties without himself probing the evidence.

3. The learned Judge erred in not finding that the entire trial in the original court was a mistrial.

4. The learned Judge misdirected himself in law in not finding that the 1st Respondent had no property in the land to pass on to the 2nd respondent.

5. The learned Judge should have found in law that the Trial Magistrate had entered the arena in favour of the Respondents' to a very substantial degree and hence had exercised bias against the Appellant which has caused the appellant to lose the land.

6. The learned Judge should have taken notice of the various irregularities in the trial and ordered a retrial at the very least, in the interest of justice.”

The appeal was heard by this Court on 17th March, 2011 when **Mr. Menezes**, learned counsel for the appellant submitted that the learned Judge of the superior court grossly misdirected himself when he failed to re-evaluate and/or reconsider the evidence adduced before the trial court and that if he had done so he would have found that the trial magistrate was biased against the appellant. He also complained that the trial magistrate had no basis in coming to the conclusion that the property belonged to the respondent apart from engaging in speculation and conjecture and that the trial magistrate was wrong in believing the respondent's evidence.

Mr. Odunga, learned counsel for the respondents, opposed the appeal and submitted that there is no basis upon which this Court can interfere with the finding of the 1st appellate court. In his view the evidence adduced at the trial court was re-assessed and that the 1st appellate court did not wholly rely on the submissions.

The concern of the learned counsel for the appellant was mainly the failure by the learned Judge to re-evaluate and/or reassess the evidence adduced before the trial court and to come to his own independent conclusion on it as it is his duty to do, see ***Mwanasokoni v Kenya Bus Services Ltd [1984] KLR 931***. When the superior court wrote and delivered its judgment on 12th February, 2004, it set out the appellant and the respondents' case as placed before the trial court. It then considered the submissions made before it by counsel for the respective parties. Then the court went on to make its findings on the submissions made on either side and concluded:-

“The first ground of appeal advanced by Mr. Ashioya is that the learned Magistrate had erred in law and in fact in disregarding credible evidence of the appellant and his witnesses. The record indicates that the learned Magistrate analysed the evidence of all the witnesses. The claim that PW2 was given a red cow by the applicant so as to testify on his behalf was not controverted. Unfortunately Mr. Ashioya did not give particulars of any piece of evidence which was disregarded by the learned Magistrate in his judgment. As there was no evidence in support of the claim made by the appellant against the 2nd respondent, the Magistrate first examined the evidence relating to that part of the case. When it came to the evidence of the appellant against that of the 1st respondent the learned Magistrate accepted the evidence of the 1st respondent and rejected that of the appellant. Mr. Ashioya has not advanced any ground which would entitle this Court to interfere with the exercise of the discretion by the Magistrate. There was also no law relating to the sale of goods or transfer of property which the Magistrate should have invoked in his judgment.”

That was the basis upon which the learned Judge dismissed the appeal before him. Given the brief and straightforward nature of the case before the trial court and the submissions made by both counsel before the superior court we are of the view that the judgment of the learned Judge properly adopted the principles set out in the case of ***Selle & Another vs Associated Motor Boat Co. Ltd [1968] E.A. 123 at p 126***. We do not accept the submissions of counsel for the appellant that the learned Judge did not re-evaluate or re-assess the evidence recorded by the trial Magistrate; nor do we find any substance in the other grounds set out in the memorandum of appeal. Mr. Menezes did not lay any basis for referring to the entire trial as a mistrial or to say that the 1st respondent had no property in the suit plot to pass to the 2nd respondent when he (*the 1st respondent*) produced all the relevant documentation to the trial court to show the plot was his. No submissions were made to show the trial magistrate was biased. We have no basis for interfering with the concurrent findings of the two courts below. This appeal has no merit and it is dismissed with costs to the respondents.

Dated and delivered at Kisumu this 13th day of April, 2011

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

.....
JUDGE OF APPEAL

D. K. S. AGANYANYA

.....
JUDGE OF APPEAL

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

DEPUTY REGISTRAR