REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAKURU
CORAM: KWACH, SHAH & O'KUBASU, JJ.A.
CIVIL APPEAL NO. 179 OF 1999
BETWEEN

NYANDUNDO PRIMARY SCHOOL ..... 1ST APPELLANT
THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT ..... 2ND APPELLANT
AND
STEPHEN WAWERU ..... RESPONDENT

(An appeal from the Judgment & Decree of (Hon. Mr. Justice D. Rimita) dated 13th April, 1999 in H.C.C.C. NO. 391 OF 1994)
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JUDGMENT OF KWACH, J.A.

Stephen Waweru (the plaintiff) filed a suit in the Principal Magistrate's Court at Nakuru against Nyandundo Primary School (the first defendant) and the Director of Land Adjudication & Settlement (the second defendant) in October 1987 and sought the following, among other, reliefs -

> "(a)a declaration that the second defendant sold the suit premises to the plaintiff in 1965 and by virtue of the said sale the second defendant no longer has any rights over the said premises passable to a third party;
>
> (b)a declaration that the sale of the suit premises to the first defendant by the second defendant in 1989 and subsequent issue of a title deed to the first defendant is null and void;
>
> (c)an order cancelling the title deed issued to the first defendant;
>
> (d)a permanent injunction restraining the defendant from entering, remaining or in any way interfering with the suit premises."

In the original plaint the suit premises was stated to be Plot No 852. The plaint was later amended and the suit premises became Plots Nos NYA/SABUGO/122 and 151 . A joint defence was filed on behalf of both defendants by the Attorney-General denying the plaintiff's claim in its entirety. They also raised a counterclaim against the plaintiff in respect of the suit premises.

It has to be borne in mind that the titles in dispute were issued under the Registered Land Act (Cap 300). The plaintiff's case was that the suit premises were sold to him by the second defendant way back in 1965 and he paid the full consideration. He was then issued with a letter of allotment.

The plaintiff took no further steps to get registered as proprietor and obtain a title deed. Then 24 years

later in 1987 he learnt that the second defendant had allotted the suit premises to the first defendant and the latter had obtained registration as proprietor. It is at this point that the plaintiff went to court to assert his claim to the suit premises. The second defendant did not deny all this and added for good measure that the first defendant needed the land for the purposes of a school.

The case was then placed before Mr C. M. Rinjeu, SRM for hearing. The plaintiff gave evidence and called three witnesses. After the close of the plaintiff's case, the defendant called one witness but before his evidence was concluded, the plaintiff's Advocates made an application to the High Court at Nakuru under section 18 of the Civil Procedure Act (Cap 21) to have the suit transferred to the High Court for trial. It must have occurred to the plaintiff and his Advocates that the Senior Resident Magistrate had no jurisdiction to grant the prayers sought in the plaint. The order for transfer was made by Mr G. H. Ombongi, Resident Magistrate, on 8th June, 1994.

When the case came before Rimita J on 13th October, 1995, a consent order was recorded in the following terms -

> ***"By consent evidence given in th e lower court shall be adopted as evidence."***

Paul Kanyingi Muiru (DW1) whose evidence was interrupted by the application for transfer was recalled for crossexamination and he was re-examined by counsel for the defendants. The defence then called 3 more witnesses before closing its case on 1st March 1999. It is shameful that this simple case took nearly 10 years before it was heard and concluded in the lower courts.

In his judgment the learned Judge made a number of findings of fact and gave judgment for the plaintiff. He dismissed the counterclaim. He declared the allocation of the suit premises by the second defendant to the first defendant as null and void. He ordered the cancellation of the registration in favour of the first defendant and ordered that the titles be registered in the name of the plaintiff. He held that the first defendant could not hold a title to land because it is not a legal entity. Quite frankly I do not understand or appreciate the basis of this draconian finding.

Happily, I do not have to determine its correctness because I am going to decide this appeal on an entirely different point.

There are 11 grounds of appeal but for the purpose of this judgment I will confine myself to only grounds 1 and 2 which are -

> "(1)The learned trial Judge erred in law and in fact by proceeding to hear and adjudicate on the proceedings/matter from the subordinate magistrate's court which were a nullity and void for lack of jurisdiction.
>
> (2)The learned trial Judge erred in law and fact in that he failed to give directions on how the matter was to proceed in the superior court." It is provided by ***section 159*** of the Registered Act that - "Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act ..... shall be tried by the High Court ....."

The dispute in this case related to title to land and therefore fell outside the jurisdiction of both the Resident Magistrate's Court or the infamous outfit known as the Land Disputes Tribunal. The order of transfer was apparently made by consent, but had the application by the plaintiff been contested the learned Judge would have had to decide whether the suit sought to be transferred was incompetent or not for lack of jurisdiction. If the competency of the suit had been questioned, it would have become obvious to the learned Judge that the suit before the Resident Magistrate's Court was incompetent and he would most probably have declined to make the order for transfer. But since the order was made by consent and without the benefit of argument, I am satisfied that the Judge had power to transfer the suit to the High Court this latent defect notwithstanding.

The question I have to decide is whether having transferred the case to the High Court the learned

Judge correctly exercised his discretion by proceeding to hear the case from the point where Mr Rinjeu had left off. As an appeal Court we are obviously reluctant to interfere with a trial Judge's exercise of discretion unless, of course, it fails the test laid down in the case of ***Mbogo & Anor v Shah [***1968] EA 93, which states that a court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice. For starters, an incompetent suit was transferred by the same Judge to the High Court albeit by consent. With a minimal amount of vigilance the suit should have been struck out as incompetent instead of being transferred. Secondly, the Judge took over the case after the plaintiff's case had been concluded by the Senior Resident Magistrate. The only witnesses he actually ***saw and heard*** were the witnesses called by the defendants. He would have no difficulty in determining the credibility of these witnesses (defence witnes ses) because he heard them and saw them in court and observed their demeanour. As regards the witnesses called by the plaintiff, and who did not testify before him, he would have genuine difficulty in assessing the weight to be placed on their testimony. In declining, therefore, to believe the plaintiff's witnesses whom he had neither seen nor heard, I am inclined to think that the learned Judge erred in accepting their evidence and consequently rejecting the evidence called on behalf of the defendants. The learned Judge plainly exercised his discretion wrongly. In my judgment, the correct way he should have proceeded after transferring the case from the subordinate court, would have been to ***hear the case de novo*** (right from the beginning). He fell into grave error by failing to proceed in this manner.

For these reasons, I would allow this appeal, set aside the judgment and decree of Rimita J dated 13th April, 1999, and substitute therefor an order dismissing the plaintiff's suit with no order as to costs. I would make no order for costs in this appeal.

And as Shah and O'Kubasu JJA also agree, it is so ordered.

Dated and delivered at Nakuru this 16th day of March, 2001.

R. O. KWACH
.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR