



**Kibuye v Odhiambo (Environment and Land Appeal E008 of 2021)
[2023] KEELC 16870 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E008 OF 2021**

**SO OKONG'O, J
APRIL 20, 2023**

BETWEEN

ELISHA ONYANGO KIBUYE APPELLANT

AND

ANDREW NANGA ODHIAMBO RESPONDENT

(Being an Appeal from the judgment and decree of Hon. P.K. RUGUT (PM) delivered on 4th February 2021 in Tamu Principal Magistrate's Court ELC CASE NO. 3 OF 2018)

JUDGMENT

1. This appeal is against the judgment and decree of Hon. P.K. Rugut P.M delivered on February 4, 2021 in Tamu Principal Magistrate's Court ELCC No. 3 OF 2018(hereinafter referred to as "the lower court"). In the lower court, the respondent had sought judgment against the appellant for;
 - a) A permanent injunction or an order restraining the appellant by himself, his servants, agents, kin or whomsoever from encroaching on the Land Parcel Number Kisumu/Wang'aya1 /965(hereinafter referred to as "the suit property") or interfering with the Respondent's peaceful enjoyment of the same.
 - b) Costs of the suit plus interest.
 - c) Any other relief the court deemed fit and expedient to grant in the given circumstances.
2. In his plaint in the lower court, the respondent averred that he was the registered owner of the suit property which he acquired from his deceased grandfather, Nanga Okungu. The respondent averred that he inherited the suit property from his said grandfather through succession proceedings that were undertaken in the High Court of Kenya at Kisumu in High Court Succession Cause No. 148 of 2014(hereinafter referred to as "the succession case"). The respondent averred that he was issued with a confirmed Grant of Letters of Administration in the succession case that enabled him to transfer the suit property to his name from that of his deceased grandfather.



3. The respondent averred that for a period of about four years prior to the filing of the suit, the appellant had illegally and without his consent encroached on the suit property and undertaken farming activities and erection of unauthorized structures thereon with the full knowledge that the suit property did not belong to him. The respondent averred that the appellant ignored all the requests that were made to him to stop his unlawful activities on the suit property and to vacate the same.
4. In his defence in the lower court, the appellant averred that the suit property was owned by his uncle Nanga Okungu (deceased) (hereinafter referred to only as “Nanga”). The appellant averred that Nanga was a brother to his (the appellant’s) father, Kibuye Okungu. The appellant averred that the respondent had fraudulently without the consent of the family of Nanga filed the succession case in respect of his estate that enable him to have the suit property registered in his name.
5. The appellant averred that the respondent was a fraudster and that the respondent filed the lower court suit with the intention of denying the beneficiaries of the estate of Nanga their shares in the estate. The appellant averred that the lawful beneficiaries of the estate of Nanga were Pitalis Aringo and Thomas Ngeso Obudho. The Appellant averred that the Respondent had no right to inherit the estate of Nanga. The Appellant averred that Nanga gave him the suit property in 1979 and that he had occupied the same and was also carrying out agricultural activities thereon. The appellant urged the court to dismiss the respondent’s suit with costs.
6. The suit was heard by the lower court which entered judgment in favour of the respondent on February 4, 2021. The lower court ordered the appellant to vacate and hand over possession of the suit property to the respondent within 90 days in default of which the respondent was at liberty to apply for the appellant’s forceful eviction from the suit property. The Appellant was also restrained through a permanent injunction from encroaching on the suit property or interfering with the respondent’s enjoyment of the same.
7. In the judgment, the lower court made a finding that the respondent was the lawful owner of the suit property. The lower court found that the appellant had no lawful claim over the suit property. The lower court held that the appellant’s claim over the suit property had been laid to rest in the Succession case in which the High Court dismissed the objection by the appellant and others to the Grant of Letters of Administration in respect of the estate of Nanga being issued to the respondent. The lower court observed further that the High Court made a finding in the Succession case that the suit property lawfully devolved upon the respondent who was the grandson of Nanga and his closest relative. The lower court held that it had no jurisdiction to review the High Court judgment in the Succession case and that the issues that were raised by the Appellant at the trial in the lower court could only be determined in the Succession case.
8. The appellant was aggrieved with the said decision and lodged the present appeal. In his Memorandum of Appeal dated February 12, 2021, the appellant challenged the lower court’s judgment on the following grounds;
 1. The trial Magistrate erred in fact and in law by granting injunction orders to the respondent regardless of the balance of probabilities being against him.
 2. The trial Magistrate erred in fact and in law by failing to consider submissions by the appellant and in failing to consider and apply the case law cited by the Appellant which was binding upon the court and hence arriving at a wrong decision.
 3. The trial Magistrate erred in fact and in law by basing his judgment on a trivial issue that had been raised on a without prejudice basis.



4. That the trial Magistrate erred in fact and in law by failing to analyze and determine the suit based on the principles settled by precedent but rather dealt with non-issues.
9. The appeal was heard on February 21, 2023 when the appellant who appeared in person relied entirely on the record of appeal and his memorandum of appeal. The appellant submitted that the lower court decision was wrong because the suit property belonged to his father and as such the respondent was not supposed to initiate succession proceedings in respect thereof. The appellant submitted that he had filed an appeal against the decision that was made against him in the succession case. The appellant submitted that the respondent had taken all their land. In her submissions in reply, the respondent's advocate submitted that this appeal is an abuse of the process of the court and urged the court to dismiss the same.

Analysis and determination:

10. I have considered the pleadings and the proceedings of the lower court, the judgment of that court, and the memorandum of appeal by the appellant. I find no merit in all the grounds of appeal put forward by the appellant against the lower court judgment. The lower court found on the evidence that was placed before it by the respondent that the respondent was the lawful proprietor of the suit property. That evidence was not challenged by the appellant. The respondent proved that he inherited the suit property from Nanga. He produced in evidence a Grant of Letters of Administration in respect of the estate of Nanga that was issued in his favour and a Certificate of Confirmation of that Grant. The respondent also placed before the court a copy of the title deed for the suit property in his name and a copy of an official search showing that the suit property was registered in his name. The appellant on the other hand did not place any evidence before the lower court in proof of his claim to the suit property. He did not dispute the fact that his claim over the suit property had been raised before the High Court in the Succession case by way of an objection to the Grant that was issued to the respondent and the same was rejected. The High Court sitting as a succession court having rejected the appellant's claim over the suit property, the lower court was right in its finding that the issue had been settled. In the absence of evidence that the appellant had a lawful cause for occupying the suit property, the lower court did not err in ordering him to vacate the property and hand over the same to the respondent. The lower court did not also err in restraining the appellant from encroaching on the suit property or interfering with the respondent's enjoyment of the same.

Conclusion

11. In conclusion, I find no merit in the appeal before the court. The appeal is dismissed with costs to the respondent.

DELIVERED AND DATED AT KISUMU ON THIS 20TH DAY OF APRIL 2023

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

The Appellant in person

The Respondent in person

Mr. Kevin-Court Assistant

