



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT SIAYA**

**CIVIL APPEAL NO. 26 OF 2018**

**NICHOLAS ODUOR OWUOR.....APPELLANT**

**VERSUS**

**MAURICE ODUOR NYATAYA.....RESPONDENT**

**(Appeal from the Proceedings, Ruling and order made by Hon T. M. Olando, SRM**

**in Siaya PM's Court Succession Cause No. 183 of 2017 on 19/9/2018)**

**JUDGMENT**

**Introduction**

1. The appeal herein is in respect to a ruling delivered by Hon. T.M. Olando in the Principal Magistrate's Court at Siaya in Succession Cause No. 183 of 2017. The appellant herein filed a petition for grant of letters of administration intestate of the estate of one Okelo Malal. In rejoinder, the respondent filed grounds of objection stating that the suit Land Parcel No704 belonged to one Syrilus Okelo Malal.
2. In his ruling, the trial court found that the appellant's petition was wrought with fraud and deceit from the start and as such dismissed the application for confirmation of grant and upheld the respondent's objection. He also set aside the grant which was issued in favour of the appellant.
3. Dissatisfied with the trial court's decision, the appellant filed his memorandum of appeal dated 2<sup>nd</sup> October 2018 which set out the following grounds of appeal;
  - a. That the learned magistrate erred in law and fact in determining the question of ownership of land parcel numbers SIAYA/KADENGE/473 and SIAYA/KADENGE/704(hereinafter referred to as the suit parcels of land) in a succession cause instead of referring the question of ownership to a land court.
  - b. That without prejudice to ground (a) above, the learned magistrate erred in law and/or in fact by finding that the suit parcels of land belonged to SYRILUS OKELLO MALAL (hereinafter referred to as the 2<sup>nd</sup> deceased) and his estate of opposed to OKELLO MALAL (hereinafter referred to as the 1<sup>st</sup> deceased) and his estate.
  - c. That the learned trial magistrate erred in law and in fact by imposing upon the appellant the burden of proving that the suit parcels of land did not belong to the 2<sup>nd</sup> deceased instead of imposing upon the respondent the burden of proving that the suit parcels of land belonging to the 2<sup>nd</sup> deceased.
  - d. That the learned trial magistrate erred in law and fact by finding that the respondent and his family had lived and/or actually occupied the suit parcels of land for over 50 years
  - e. That the learned magistrate erred in law and/or in fact taking judicial notice that the 2<sup>nd</sup> deceased got his Christian name, SYRILUS, when he was baptised as an adult and so that explained why his said Christian name did not appear on the title deed.
  - f. That the learned trial magistrate erred in law and fact by the unfair and inquisitorial procedure of hearing and determining the respondent's objection dated 6th December 2017.

- g. That the learned magistrate erred in law and/or in fact by upholding the respondent's objection dated 6<sup>th</sup> December 2017.
- h. That the learned magistrate erred in law and/or in fact by finding that the appellant's action to sell the suit parcels of land to a 3<sup>rd</sup> party was illegal and amount to fraud.
- i. That the learned magistrate erred in law and/or in fact by finding that the appellant's petition was brought with fraud and deceit ab initio.
- j. That the learned magistrate erred in law and/or by dismissing the appellant's application for confirmation of grant and annulling and setting aside the grant issued to the appellant.
- k. That the learned magistrate erred in law and/or in fact by ignoring the evidence and submissions of the appellant.

4. The appellant made an application moving the court to take additional evidence, which application was allowed and additional evidence taken on site of the subject land parcel. The issue raised in the said evidence was whether the respondent's family had been living on or were in physical occupation of the subject land parcel for a period of fifty years and as at the time of hearing of the objection proceedings and the appeal herein.

5. The parties agreed to canvass the appeal through written submissions though only the appellant filed their submissions.

#### **Appellant's Submissions**

6. It was submitted by the appellant's counsel, Mr Okello that the trial court erred in failing to appreciate that Okello Malal, his grandfather and Syrilus Okello Malal, the respondent's uncle were two different people with separate estates and heirs. He further submitted that two different certificates of death were issued by the Siaya District Registrar.

7. The appellant further submitted that contrary to the allegations by the respondent in the trial court that they lived in suit parcel number 704 for over 50 years, the site visit carried out by this court revealed that there was no occupation of land parcel number 704.

8. Relying on the case of **In Re Estate of Mbai Wainaina (Deceased) [2015] eKLR**, the appellant submitted that the trial court sitting as a probate court had limited mandate in determining issues of ownership of property.

#### **Respondent's Submissions**

9. It was submitted by the respondent that the suit property belonged to the Respondent's Uncle Syrilus Okelo Malal who inherited the land from his late father Francis Malal Mutuga and as the respondent was being maintained by his uncle prior to his death, he had a claim to the estate vide Section 29 of the Laws of Succession Act.

10. The respondent further submitted that the occupation of the suit property by his family for over 50 years was enough evidence to conclude that the suit properties must belong to the family by virtue of possession and utilization for over 50 years uninterrupted and undisturbed.

11. It was further submitted that there was no evidence that the Appellant or his grandfather or any of their numerous relatives had ever set foot on the suit property and that apart from the similarity of the names, the appellant and his family had no connection whatsoever with the suit property.

12. The respondent further submitted that the appellant offered no other evidence apart from the fact that the Respondent's uncle had the Christian name Syrilus in addition to the names Okelo Malal and that he was a minor at the time of adjudication to prove that he was the rightful heir of the suit parcels.

13. The respondent submitted that based on the overwhelming evidence he had presented the lower court did not err in drawing the conclusion that the properties belonged to the Respondent's family and that it would be unreasonable for the court to allow orders for grant to the appellant as the same would disinherit the Respondent's family of their ancestral land.

#### **Analysis & Determination**

14. As the first appellate Court, my role is to revisit the evidence on record, evaluate it and reach my own conclusion in the matter. (See the case of **In re Estate of Joash Arende (Deceased) [2019] eKLR**). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in **Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278** and **Kiruga –versus- Kiruga & Another (1988) KLR 348**).

15. The evidence adduced in the trial court was as follows; The respondent filed objection proceedings against the petition for letter of grant intestate filed by the appellant. The respondent testified as PW1 stating that the deceased Syrilus Okelo Malal was his uncle, a brother to his late father Charles Nyataya Malal. He stated that his uncle Syrilus left behind a number of people including his wife whom the appellant failed to include in his petition for grant. He thus wanted the initial grant issued to the appellant revoked as it was obtained unlawfully as the deceased's heirs were not informed. The respondent further testified that they were born on the suit land and had been living in it. The respondent admitted knowing the appellant whom he claimed was a distant relative.

16. In cross-examination, the respondent stated that his father, Charles Matayo Malal died in 2002. He reiterated that the appellant was a distant relative from Koyeyo. He stated that the suit land was SIAYA/KADENGE/473 & 704 was owned by Okelo Malal. He further stated that SIAYA/KADENGE/704 was registered on 7/8/1980 whereas Syrilus was born in 1972. He stated that the land was adjudicated to Okelo Malal in 1980 when Syrilus was 8. He reiterated that he had never leased land from the appellant and that he did not know William Onyango.

17. PW2, Rita Owuor Malal testified that she was married to Francis Malal in 1955 and that she had 2 other co-wives one who had since died. She stated that her husband had land which she and her co-wives used. She testified that the respondent was her grandson and that he came to know the appellant in the year 2017. It was her statement that the land was left to her son Syrilus Okelo Malal who had since died leaving behind two wives and a son.

18. In cross-examination she stated that she was blind and could not read or write. She stated that she was familiar with the appellant's grandfather one Okelo Malal who was her son in law. She stated that her husband left her land whose number she could not remember. She stated that the land was registered in the name of the youngest son. She stated that the land belonged to Syrilus.

19. PW3 Bonaventure Omondi Malal testified that he lives in Kadenge and that he lived in the suit land SIAYA/KADENGE/704 and that the said land belonged to Syrilus Okelo Malal. In cross-examination he reiterated that Syrilus owned the suit land SIAYA/KADENGE/704.

20. DW1 Aggrey Omollo Ogola the County Land Adjudication and Settlement Officer of Siaya and Busia County testified that Siaya/Kadenge registration took 22 years from 10/5/1979 to 22/3/2011. He testified that Siaya/Kadenge/473 was demarcated and recorded on 7/2/1980 to Okeyo Malal and Siaya/Kadenge/704 was demarcated and recorded on 4/8/1980 to Okelo Malal. He stated that publication to both pieces was done on 19/8/1992 and a legal notice issued. It was his testimony that Okelo Malal was not an adult at the time of registration and did not have a Christian name.

21. In cross-examination he admitted that from the records one could not identify which Okelo Malal was registered as the owner of the land and further that the manual records were misplaced and could not be obtained.

22. DW2 George Omondi Ochieng the assistant chief of Koyeyo sub-location testified that someone by the name Okelo Malal lived in Koyeyo, died and was buried there. DW3,4 & 5 corroborated this testimony. DW6, the petitioner testified that he was a grandson to Okelo Malal the owner of the suit parcel and that he was a beneficiary to the estate.

### **Determination**

23. Having carefully considered the evidence tendered in the lower court objection proceedings and after conducting a site visit coupled with the rival submissions by both counsel for the parties, in my humble view, the issues for determination in this appeal are:

**a. Whether the trial court had jurisdiction to entertain the objection proceedings before it, as the issues that arose concerned ownership of, title to and long occupation of land subject of the succession proceedings;**

**b. If in the affirmative, Whether the trial court erred in revoking the grant issued to the appellant**

24. The first question is whether the objection by the respondent before the trial court introduced issues which were beyond the court's jurisdiction as a probate court. The issue of jurisdiction needs to be dealt with first and right away for the simple reason that without jurisdiction, the court lacks the mandate to adjudicate on the matter. This point on jurisdiction is buttressed in the celebrated case of **The Motor Vessel Lilian 'S' [1989] KLR** in which Nyarangi JA famously had this to say on jurisdiction:

**“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

25. It is notable in this regard that disputes primarily concerning ownership of land, title to and occupation of land fall within the jurisdiction of the Environment and Land Court as provided for under Article 162 (2)(b) of the Constitution and Section 13(1) and (2) of the Environment and Land Court Act. (See the case of **In re Estate of Njagi Njeru (Deceased) [2018] eKLR**)

26. From the record of appeal herein, I do note firstly that there are two distinguishable deceased's persons who the parties herein allege to want to inherit. The said deceased persons shared two names of Okello Malal save that one of the deceased persons had a first name as Syrilus.

27. The appellant herein asserts that he is a grandson of the deceased Okello Malal who is registered as the owner of suit land in question both Siaya/Kadenge/423 & Siaya/Kadenge/704. The appellant produced Death Certificate No. 496454 showing that the deceased passed on the 8/9/1999 aged 78 years old. The Appellant insists that it is more likely that his grandfather is the rightful owner because at the time of adjudication his grandfather was 59 years old while the Respondent's uncle Syrilus Malal was only aged 8 years, having been born in 1972 and adjudication of the suit land done in 1980.

28. On his part, the respondent who filed an objection contended that he was the grandson of one Syrilus Okello Malal who is the owner of the suit parcels mentioned above and was thus a beneficiary, ignored among other beneficiaries by the appellant in his petition of grant and as such submitted that the grant issued therein should be revoked. The respondent produced a Death Certificate No. 465848 for one Syrilus Okello Malal showing the date of death as 10/5/2002.

29. The Certificate of Search for both suit parcels provide for Okelo Malal as the proprietor of the said parcel. The same was admitted by the respondent. DW1, the County Land Adjudication and Settlement Officer of Siaya and Busia County who testified that the suit parcels were registered in the name of Okelo Malal. He further testified that the person registered did not have a Christian name as alleged by the respondent.

30. Section 26 of the Land Registration Act, Act No. 3 of 2012 provides:

**“Certificate of title to be held as conclusive evidence of proprietorship.**

**26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”**

31. From the trial court evidence adduced, it is noteworthy that the respondent contended that the suit land was registered in his Uncle’s name, Syrilus Okelo Malal, when he was 8 years old. PW2, Rita Owuor Malal, the respondent’s grandmother testified that she was married to Francis Malal in 1955 who had land which she and her co-wives used and that the land was left by her husband to her youngest son Syrilus Okelo Malal. She however did not say how young or old the said Syrilus Malal was.

32. The evidence adduced by DW1 Aggrey Omollo Ogola the County Land Adjudication and Settlement Officer of Siaya and Busia County was to the effect that when the suit land No Siaya/Kadenge/473 was being demarcated on 7/2/1980 it was given to Okelo Malal who presented himself and was registered as the proprietor thereof. He also testified that on 4/8/1980, parcel No. Siaya/Kadenge/704 was demarcated and given to Okelo Malal who became registered owner thereof.

33. He stated that they usually register adults but when the minor presents the claim they enter in the register and record it in part 8 such status of a minor. He stated that the person registered for the parcels stated was an adult and did not have a Christian name. (I however note that the handwritten proceedings have an overwriting with the words ‘an’ ‘adult’ first written then overwritten with ‘not’ ‘adult’ without any signature to indicate that the trial court was correcting the proceedings. What that means clearly is that there must have been interference with court proceedings and therefore this court cannot tell whether the witness stated that the person in the name of Okelo Malal who presented himself during adjudication of the suit land was an adult or a minor. It was in cross examination that the Land Adjudication Officer stated that he did not know which Okello Malal was registered as the owner of the land.

34. This court visited the land in question upon request by the appellant and found that there was no evidence of any of the parties living on the said land as there was no house or crop.

35. Both the appellant and the respondent assert that the suit land was registered in the name of their grandfather and uncle respectively. That being the case, the issue of ownership could not and cannot be heard and determined by a succession court. In **Re: Estate of Mbai Wainaina (deceased), 2015, eKLR** Musyoka J. stated and I concur:

**“Even if there was material establishing that there was such a trust, I doubt that that would be a matter for the probate court. The mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. A party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court.”**

36. It is trite law that the mandate of the probate court under the Law of Succession Act is limited. It does not extend to determine issues of ownership of property and declarations of trusts. It is not a matter of the probate court being incompetent to deal with such issues but rather that the provisions of the Law of Succession Act and the relevant subsidiary legislation do not provide a convenient mechanism for determination of such issues. Therefore, a party who wishes to have such matters resolved ought to file a substantive suit to be determined by the Environment and Land Court first before lodging a claim over land whose ownership is already determined by a court of competent jurisdiction.

37. This is the spirit of Rule 41(3) of the Probate and Administration Rules which provides that:

**“Where a question arises as to identify, share or estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to such share or estate which cannot at that stage be conveniently determined, the court may prior to confirming the grant... by order appropriate and set aside the particular share or estate or property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules ...”**

38. The issue of ownership of land can only be handled by the Environment and Land Court in accordance with the provisions of **Article 165 (2) (b) of the Constitution of Kenya**. Accordingly, it is my most considered view that the trial court similarly had no jurisdiction in its sitting as a probate court to establish the ownership of the suit parcels with either of the parties herein claiming that the land belonged to either Syrilus Okelo Malal or Okelo Malal

39. It is for that reason alone that I must determine this appeal in limine and hold that the trial court had no jurisdiction to determine the question of ownership of the suit parcel in the succession proceedings, and in addition, and by extension, this Court being a High Court and first appellate court in matters succession, has no jurisdiction to hear and determine matters on appeal concerning ownership, title to and occupation of the land in issue.

40. In view of the above findings and holding, the order that is deserved in these proceedings is to allow this appeal on account of want of jurisdiction, set aside the Ruling of the trial magistrate and substitute it with an order directing that the grant issued to the appellant by the trial court and which was not confirmed shall remain stayed until the parties lodge proceedings before the Environment and Land Court to determine on the merits, whether the suit parcel belonged to the 8 year old Syrilus Okelo Malal the uncle to the Respondent or Okelo Malal the grandfather to the appellant.

41. Having stayed the grant issued in favour of the appellant, I further order that no administration or transaction shall take place on the said parcel of land No. Siaya/Kadenge/704 until the issue of ownership of the said land is fully determined and appropriate succession proceedings concluded in respect of the estate of the deceased person named and properly identified as Okelo Malal and who was the registered owner of the suit parcel of Land No. Siaya/Kadenge/704 whom the competent court shall determine to have legally owned the suit land. To do otherwise shall amount to intermeddling with the property of a deceased person prohibited in section 45 of the Law of Succession Act.

42. As the dispute is between relatives and the court is yet to conclude on the question of ownership of the land subject of the succession proceedings, I order that each party bear their own costs of this appeal and of the objection proceedings conducted in the lower court Succession Cause No. 183 of 2017 which has been stayed by this court.

43. Orders accordingly.

**Dated, Signed and Delivered at Siaya this 26<sup>th</sup> Day of January 2021 via Microsoft Teams**

**R. E. ABURILI**

**JUDGE**