REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAMIRA

CIVIL APPEAL NO. 35A OF 2019

CHARLES MOGAKA OYUGI.....APPELLANT

VERSUS

1. LAKE VICTORIA SOUTH WATER SERVICES BOARD.....1ST RESPONDENT

2. THE COUNTY GOVERNMENT OF NYAMIRA.....2ND RESPONDENT

(Being an Appeal against the Judgement of Hon. S. K. Arome – SRM Keroka dated and delivered on the 24th February 2019 in the original Keroka Principal Magistrate Court Civil Case No. 119 of 2016}

JUDGEMENT

On or about 14th November 2012 the appellant and one Dennis Matanchi Onyiego entered into what they described as a lease agreement for a portion of one (1) acre of land within Kebirichi Scheme/Mwangera Plot No. 1 which was registered in the name of Mandere Onyiego. The consideration for the said lease was agreed at Kshs. 48,000/= and the period 16 years. Following the said agreement, the appellant took possession of the parcel of land and planted trees whose value amounted to Kshs. 650,218.43 as per a valuation report of the Kenya Forest Service dated 28th July 2014. Shortly afterwards the 1st & 2nd respondents decided to undertake a water project and it soon became evident that this parcel of land would be among those affected. The appellant produced documents that confirmed that the respondents agreed they would compensate all the proprietors of the affected land. According to minutes of a meeting held in the 1st respondent's office on 9th December 2015 **"payment for compensation would be made based on the valuation from the consultant, their own witness accounts and claims presented to LVSWB."**

It was the appellant's case that the trees he planted on the parcel of land were some of those that were destroyed and that he was therefore entitled to compensation and that as no valuation report was forthcoming from the 1st respondent, then the valuation by the Kenya Forest Service should have applied.

However, during the trial, it transpired that the 2nd respondent had in the meantime purchased the portion of land from Dennis Matanchi Onyiego at a consideration of Kshs. 1,700,000/= (this as per a sale agreement dated 16th March 2015). The consideration was said to have been based on a valuation of the District Valuation Officer for Kisii/Nyamira/Migori/HomaBay dated 10th June 2015 (D Exhibit 1(b)). Engineer Daniel Oranje (Dw1) who tendered the valuation report also produced letters from the valuer clarifying that the value represented the land and everything growing on it. In the words of the valuer: -

> ***"The valuation report is inclusive of everything and anything above on or under the subject parcel of land…."***

After considering and evaluating the evidence from the parties, the trial Magistrate came to the conclusion therefore that the value of the trees growing on the land was included in the consideration paid to Dennis Matanchi Onyiego, the "proprietor" of the land, by the 2nd respondent and on that ground dismissed the claim by the appellant.

Being aggrieved, the appellant preferred this appeal. The appeal was filed through the firm of Josiah Abobo & Co. Advocates and is premised on the following grounds: -

> **"1. THAT the learned trial magistrate erred in law and infact in finding for the Respondents against the weight of evidence on record.**
>
> **2. THAT the learned trial magistrate erred in law and infact in failing to evaluate the Appellants evidence, the exhibits produced in court vis-avis the evidence of the Respondents.**

3. THAT the learned trial magistrate erred in law and infact in solely relying on the evidence of the first Respondent when the second Respondent did not attend court to adduce any evidence in respect of payments made as compensation over land parcel EAST KITUTU/MWAMANG'ERA/1.

4. THAT the learned trial magistrate erred in law and infact in failing to concisely evaluate the discrepancies in the valuation report of Kshs. 1,440,000/= and the alleged payment of Kshs. 1.7million even when DW1 did not produce any exhibits in court to confirm that specific payment.

5. THAT the learned trial magistrate failed to evaluate the Appellant exhibits which clearly indicated that the second Respondent only compensated the value of the land in questions except the trees as exemplified by the letter from the Minister of Lands from the second Respondent.

6. THAT the learned trial magistrate was disadvantaged in only writing a judgement without having the chance to hear the case as the case in the court below was heard by 2 other magistrates.

7. THAT the learned trial magistrate erred in law and infact by basing his findings on conjectures, suppositions and on extraneous matters."

Counsel for the parties consented to canvass the appeal through written submissions. This court received submissions from Counsel for the appellant as well as from Counsel for the 2nd respondent. From the record it appears that the registry neither informed Counsel for the 1st respondent to file their submissions nor notified them that judgement would be delivered on 25th June 2020.

Be that as it may and as is expected of this court, I have reconsidered and analysed the evidence in the trial court so as to arrive at my own independent decision while being cognizant that I did not benefit from seeing or hearing the witnesses ***(See Selles Vs. Associated Motor Boat Company Ltd (1968) EA 123).***

It is my finding that the appellant's claim against the respondents was correctly dismissed. Firstly, although the trial Magistrate who dismissed the suit only wrote the judgement yet he did not hear the witnesses, he was entitled to do so under **Order 18 Rule 8 (1) of the Civil Procedure Rules** which states: -

"18. 8. (1) Where a judge is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules, and may proceed with the suit or application from the stage at which his predecessor left it."

On the merits, it is my finding, and on this I agree with the trial court, that the appellant did not have a cause of action against the respondents. This is because in the first place his lease agreement with the said Dennis Matanchi Onyiego was void for want of the consent of the Land Control Board as required by ***Section 6 (1) of the Land Control Act.*** Secondly, the lease not being registered the 2nd respondent was not aware of it when it entered into the sale agreement. It is my finding that consequently the sale of that parcel to the 2nd respondent by Dennis extinguished whatever interest the appellant would have had in the land. The land was sold at a consideration which accorded with the valuation of an officer in the Ministry of Lands and which was accepted by the owner of the land. Moreover, the agreement between the parties was that compensation would be on the basis of a valuation done by a consultant not by the Kenya Forest Service. It is my finding that in the absence of a valuation by the consultant that of the Government valuer sufficed. The meaning attached to land is the land itself and everything growing thereon ***"quic quid planatur solo solo cedit."*** Accordingly, the compensation paid to the Dennis the *"proprietor"* of the land included payment for the trees and as was held by the trial Magistrate, the appellant's recourse was in seeking compensation from Dennis Matanchi Onyiego. The upshot therefore is that this appeal lacks merit. It is dismissed with costs to the respondents. It is so ordered.

Signed, dated and delivered at Nyamira this 25th day of June 2020.

E. N. MAINA

JUDGE

Judgement delivered electronically through E-mail.

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