



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ELC APPEAL NO.1 OF 2021

**LUCAS ODUOR OTIENO [Suing as the personal
representative and the administrator of the estate
of OTIENO ODERO (Deceased)].....APPELLANT**

VERSUS

DENNIS ODIWUOR TAMREE.....1ST RESPONDENT

VITALIS OTIENO ASEWE.....2ND RESPONDENT

THE DISTRICT LAND REGISTRAR-SIAYA.....3RD RESPONDENT

THE NATIONAL LAND COMMISSION.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGEMENT

(Being an Appeal against the Judgment of the Honourable Senior

Resident Magistrate Honourable T. M. Olando dated 2nd August 2019

from the Siaya Principal Magistrate's Court ELC Case Number 99 of 2018)

Introduction

1. A detailed background on the gravamen of this appeal is of importance. It is common ground that in the 1970's "Kochieng B" area in Siaya County underwent the process of ascertaining rights and interests in land. From the evidence adduced in the lower court, the applicable legal regime that applied in the area was the Land Adjudication Act.

2. At demarcation, a parcel of land herein described as **Siaya/Kochieng "B" 85** was issued in favour of Otieno Odero [appellant's father]. The appellant averred that Tamre Mwande [respondent's father] appealed to the land adjudication committee [hereinafter referred to as "LAC"] against the issuance of **Siaya/Kochieng "B" 85** to Otieno Odero and that upon hearing the parties, the committee divided **Siaya/Kochieng "B" 85** into two parcels of land; **Siaya/Kochieng "B" 85** which was registered in the name of Otieno Odero and **Siaya/Kochieng "B" 1013** which was registered in the name of Tamre Mwande.

3. Aggrieved by the decision of LAC, Otieno Odero in **Arbitration Case Number 11/77-78**, appealed to the arbitration board [hereinafter referred to as "AB"] on land parcel **Siaya/Kochieng "B" 85**. The defendant in this appeal was Tamre Mwande. After hearing the parties, the board held that the land in dispute be "left" to Otieno Odero.

4. Dissatisfied by the decision of the AB, Tamre Mwande, in **Objection Case Number 61/83** filed an objection in the adjudication register. The parcel of land he appealed against was **Siaya/Kochieng "B" 85** and the defendant in this case was one Monica Agango [wife of Otieno Odero] and after hearing the parties, the Land Adjudication Officer [hereinafter referred to as "LAO"], dismissed the objection on 24/2/1984.

5. All went quiet until the appellant by a plaint dated 7/11/2013 sought several orders against the respondents; (i) permanent injunction

against the 1st and 2nd respondent from interfering with **Siaya/Kochieng “B” 1013**, (ii) a declaration that **Siaya/Kochieng “B” 1013** was wrongly registered in the name of Tamre Mwanda and that the property formed part of **Siaya/Kochieng “B” 85** (iii) A cancellation and rectification of the register of **Siaya/Kochieng “B” 1013** or consolidation of **Siaya/Kochieng “B” 1013** with **Siaya/Kochieng “B” 85** and, (iv) eviction of the 2nd respondent and general damages.

6. By a memorandum of appearance dated 23/04/2014, the firm of Ogone Angieda & Co. Advocates entered appearance for the 1st and 2nd respondents and filed a defence and counterclaim dated 31/08/2015 in which they denied the averments in the plaint and contended they were not parties to the disputes between Otieno Odero and Tamre Mwanda and that the proceedings of the AB and Objection did not disclose that **Siaya/Kochieng “B” 1013** was created out of **Siaya/Kochieng “B” 85**. They averred that **Siaya/Kochieng “B” 1013** was duly registered in the name of Tamre Mwanda and they had capacity to transact over the suit property. They averred that the suit was filed 34 years late. They filed a counterclaim in which they contended that the plaintiff had on 3/11/2009 registered a caution over the suit property which had caused the 2nd respondent loss. They sought several orders against the appellant: (i) his case be dismissed with costs and, (ii) a declaration that the caution registered against **Siaya/Kochieng “B” 1013** was not merited, legal and prayed that it be removed. They sought general damages.

7. The 3rd, 4th and 5th respondents filed a defence dated 12/3/2014 in which they denied the appellant’s assertions and raised a preliminary objection that the suit property was statutory barred by virtue of the Public Authorities Limitations Act.

8. By a consent order dated 30/4/2018, the case, which was then **Kisumu ELC No.308 of 2013** was transferred from Kisumu to Siaya Magistrates Court for hearing and determination.

9. After hearing the parties, the court by its judgement dated 2/08/2019, dismissed the appellant’s case and entered judgement for the 1st and 2nd respondents as prayed for in their counterclaim.

10. Aggrieved and dissatisfied by the decision of the court, the appellant filed a memorandum and supplementary memorandum of appeal dated 30/08/2019 and 11/08/2020 respectively and a record and supplementary record of appeal dated 24/04/2020 and 11/08/2020 respectively. The appeal is the subject of this judgement.

Memorandum of appeal

11. The appellant’s memorandum and supplementary memorandum of appeal sets out 8 grounds of appeal as follows;

a) The Learned trial magistrate erred in law and fact by trying to look for evidence on matters which were not issues for determination hence arriving at a wrong conclusion.

b) The Learned trial magistrate erred in law and fact by trying to establish the issue of the law of limitation but failing to appreciate the documentary evidence placed before him hence arriving at a wrong conclusion.

c) The Learned trial magistrate erred in law and fact by failing to appreciate that the appellant is only required to prove his case on a balance of probability and not beyond reasonable doubt hence arriving at a wrong decision.

d) The Learned trial magistrate erred in law and fact to appreciate the mandatory provisions of the Law of Succession.

e) The Learned trial magistrate erred in law and fact by failing to appreciate that the respondents were intermeddlers hence arriving at a wrong decision.

f) The Learned trial magistrate erred in law and fact by failing to appreciate the overwhelming documents [sic] evidence tendered by the appellant hence arriving at a wrong decision.

g) The Learned trial magistrate was influenced by other external other[sic] other than judicial issues.

h) The Hounorable Learned magistrate erred in law and fact by failing to appreciate that parties to the suit were not served when he directed the 1st and 2nd respondents to proceed with the hearing in the absence of other parties.

12. The appellant prayed for; (i) the appeal be allowed and judgement be entered in favour of the appellant as prayed for in the plaint or in the alternative, (ii) the case be remitted for re trial before another magistrate.

The appellant’s submissions

13. The appellant filed his written submissions dated 26/10/2021. On grounds (c) and (f), he submitted that during the hearing of the case, he had proved that **Siaya/Kochieng “B” 1013** was fraudulently acquired and that he had tendered documentary evidence to prove that the 3rd respondent failed to implement the decision of AB. On this he placed reliance on **Section 26** of the **Land Registration Act** and the case of **Gichinga Kibutha vs Caroline Nduku [2018] eKLR**. On ground (d), he submitted that **Siaya/Kochieng “B” 1013** was transferred to the 1st and 2nd respondent fraudulently without carrying out succession proceedings in the estate of the deceased Tamre Mwanda. On this, he placed reliance on **Section 45** of the **Law of Succession** and several authorities including **Re Estate of John Gakunga Njoroge [2015] eKLR**. On ground (h), he contended he was never served with a hearing notice and that a hearing date of 25/09/2019 had earlier on been given. He submitted that he had been denied a right to fair hearing and he placed reliance on **Article 50** of the **Constitution**. He urged the court to

allow the appeal with costs.

1st and 2nd Respondents submissions.

14. The 1st and 2nd respondents filed their written submissions on 1/11/2021. They submitted on several issues they identified for determination.

15. The 1st issue was whether the appellant was served with a hearing notice. They contended that the court record spoke for itself that the appellant was duly served with a hearing notice. They placed reliance on the authority of **Maganjo Joshua Kago vs Rose Njeri Mbuimbwe (as the legal representative of the estate of Nicholas Githuku Waruri) [2019] eKLR** and **Savings and Loans Limited vs Susan Wanjiru Muritu Nairobi Milimani HCCC no 397 of 2002**.

16. The 2nd issue was whether the decision of the court on the subject of limitation of actions was wrong. They contended that 3rd, 4th and 5th defendant raised this issue in their defence and in any case, the suit was filed out of time without leave of the court. They placed reliance on **Section 7 of Limitation of Actions Act** and **Patrick Ngigi Gitau & Another v Margaret Nduta Ngugi & 2 others [2021] eKLR**.

17. On the 3rd issue of whether the trial court was influenced by other external factor other than judicial issues, they submitted that the appellant had failed to submit on this in their submissions hence he was on fishing expedition.

18. On the 4th issue of whether the trial court failed to consider provisions of the **Law of Succession Act**, they submitted that the appellant failed to prove this and they placed reliance on **Sections 107 and 108 of the Evidence Act** and **Kipkebe Limited vs Peterson Ondieki Tai [2016] eKLR**. They urged the court to dismiss the appeal with costs.

3rd, 4th and 5th respondents' submissions

19. Despite service, the 3rd, 4th and 5th respondents failed to file written submissions.

Analysis and determination

20. Having considered the original lower court record, record and supplementary record of appeal, memorandum and supplementary memorandum of appeal, rival written submissions and cited authorities, this court has identified three issues falling for determination; (i) whether the appellant was served with a hearing notice (ii) whether the appellant proved his case on balance of probabilities and, (iii) whether the appellant's suit was statutory barred.

I will proceed to analyse the legal and jurisprudential framework on the issues in a sequential manner.

21. This being a 1st appeal, it is the duty of this court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. The jurisdiction of a 1st appellate was well settled in the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, which was quoted by the case of **Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR** as thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

22. As a 1st appellate court, this court will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judicial officer misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion.

23. The 1st issue is whether the appellant was aware of the hearing date of 26/07/2019. From the evidence in the court record, it is indeed true that the suit had been slotted for hearing on 25/09/2019, however, the 1st and 2nd defendant took a mention date of 10/07/2019 for purposes of taking a date a hearing because the trial court was on transfer. The court proceeded to issue a hearing date of 19/7/2019. On, 19/7/2019 both the appellant and 1st and 2nd respondents advocate attended court and the appellant's advocate Mr. Anyul informed the court that the hearing date had been taken by consent. The parties agreed to take another hearing date and consequently, a hearing date of 26/7/2019 was given. On the said hearing date, the appellant and his advocate failed to attend court and consequently, the court proceeded with the hearing of the 1st and 2nd respondents' case. The defence case was closed on that day.

24. After evaluating the trial court's record, it is quite obvious that the hearing date of 26/7/2019 was taken by consent of the appellant and 1st and 2nd respondents advocates. One cannot fault the trial court and the 1st and 2nd respondents' advocates case for proceeding with the hearing of the case on that day. The failure to attend court on 26/7/2019 squarely fell on the appellant and the appellant's ground of appeal on this issue fails.

25. The 2nd issue is whether the appellant proved his case on a balance of probabilities. There is a well-known adage that states that he who asserts must prove. This adage was enunciated in the Court of Appeal decision in **Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013] eKLR** as follows;

“We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.

26. During his testimony the plaintiff produced as “Pexb 1” and “Pexb 2” which were respectively proceedings of the AB in **Arbitration Case Number 11/77-78** and **Objection Case Number 61/83**. The subject of these proceedings was **Siaya/Kochieng “B” 85**. **Siaya/Kochieng “B” 1013** was neither the subject of appeal nor objection. The proceedings of LAC which according to the appellant referred to **Siaya/Kochieng “B” 1013** were never produced in court. The appellant produced as “Pexh 7” a letter from the Siaya/Busia LAO who affirmed that Otieno Odero appealed against **Siaya/Kochieng “B” 85** and not **Siaya/Kochieng “B” 1013**. I agree with the findings of the trial court that the parcel of land that was the subject of appeal in the AB and objection was **Siaya/Kochieng “B” 85** and not **Siaya/Kochieng “B” 1013**.

27. The 1st and 2nd respondents’ testimony was uncontroverted and the appellant did not adduce evidence that the 1st and 2nd respondents intermeddled with the estate of Tamre Mwanda by transferring **Siaya/Kochieng “B” 1013** to the 1st defendant and subsequently to the 2nd defendant without obtaining grant of letters of administration.

28. Having re-evaluated the evidence myself, I am unable to agree with the appellant that he proved his case to the required standard. It is the finding of this court that the trial court did not err in finding that the appellant did not prove his case on a balance of probabilities.

29. The 3rd issue is whether the appellant’s suit was statutory barred. Within the provisions of **Section 4 (2)** of the **Limitation of Actions Act**, the limitation period for an action of tort is three years while within the provisions of **Section 7** of the **Limitation of Actions Act** the limitation period for an action in land is 12 years.

30. Before determining whether this suit is statute barred by dint of **Section 4** or **7** of the **Limitation of Actions Act** and whether the appellant could have sought refuge in **Section 26** of the same Act which provides that if the action is for a relief from the consequences of a fraud or mistake, then the period of limitation does not begin to run until a plaintiff has discovered the fraud or the mistake or would with reasonable diligence have discovered it. This court has to establish the main cause of action in the suit.

31. In the case of **Edward Moonge Lenguuranga vs James Lanaiyara & another (2019) eKLR**, the court defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. Looking at the plaint, the main course of action was land and consequently, the appellant could seek refuge in **Section 26** of the **Limitation of Actions Act**. The Court of Appeal in the case of **Kenya Ports Authority vs Timberland(K) Ltd [2017] eKLR** upheld the view that where an action is based on fraud the period of limitation prescribed does not begin to run until the plaintiff discovers the fraud.

32. The suit was filed on 8/11/2013 and from the appellant’s witness statement, he stated that he discovered fraud on **Siaya/Kochieng “B” 1013** in the year 2009 meaning that time started running from this period. It therefore follows that the appellant’s suit against the respondents was not filed out of time.

It is the finding of this court that the trial court erred in finding that the appellant’s course of action accrued from 26/09/1990 when **Siaya/Kochieng “B” 1013** was registered instead of 2009 which was the time the appellant discovered the purported fraud.

33. Ultimately, this court finds that the appeal is partially merited and makes the following disposal orders:

- a) The decision of the Honorable Magistrate delivered on 2/08/2019 in Siaya PM ELC NO. 99 OF 2018, is hereby upheld.***
- b) As the appellant was partly successful in his appeal, each party will bear their own costs of the appeal herein.***
- c) The file is marked as closed.***

34. It is so ordered.

RULING DELIVERED VIRTUALLY.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF JANUARY 2022

In the Presence of:

Mr. Kobimbo for 3rd and 5th respondent

Mr. Ooro for the appellant

Court assistant: Olivia Nyumba

HON. A. Y. KOROSS

JUDGE

27/1/2022