REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 157 OF 2010

(An Appeal arising from the Ruling/Order of Honourable P. N. ARERI,

Resident Magistrate Delivered on 19/11/2010 in Kakamega

CM Misc. Award No. 198 of 2008)

1. JOASH MATATI ..... APPELLANTS

2. DOUGLAS SHIRAHO

VERSUS

1. OKWARO BETI .....RESPONDENTS

2. ELPHAS ASWANI

JUDGMENT

1. This appeal arises from the ruling and order of the learned Resident Magistrate P. N. Areri, dated 19/11/2010. In that ruling, the learned Resident Magistrate allowed an application by Okwaro Beti and Elphas Aswani (the respondents) which was seeking the eviction of Joash Matati and Douglas Shiraho (the appellants) from parcel of land known as Butsotso/Shibeye/527; in execution of an award given in their favour by the Lurambi Land Disputes Tribunal and adopted as a judgment of the court.

2. The brief facts of the case giving rise to this appeal are that the respondents who are sons of the late Eria Beti Aswani who was the registered proprietor of parcel of land known as Butsotso/Shibeye/527, lodged a claim before the Lurambi Land Disputes Tribunal alleging that the appellant's father Joash Nyikuli and Douglas Matati had encroached on their father's parcel of land. The appellants' father was the registered owner of parcel of land No. Butsotso/Shibeye/525 which neighbours the respondents' parcel.

3. The Tribunal heard the dispute and made a decision that since both the appellants and respondents did not know the common boundary for the two parcels of land, it was recommended that the Land Registrar and the District Surveyor visit the two parcels of land and establish their common boundary. The tribunal held further that since the area in dispute (encroached) had a homestead constructed by the appellants father an equivalent amount in acreage of the developed land be hived off from the appellants father's land parcel No. Butsotso/Shibeye/525 and given to the respondents' father's land.

4. That award was adopted as a judgment of the court on 9/2/2009. The Land Registrar and District

Surveyor visited the parcels of land and in their report dated 24/3/2010 and filed in court, on 25/3/2010, they established that the appellants' family had encroached onto the respondent's parcel of land to the extent of 0.48 Ha. or 1.18 acres. They also established as a fact that the homestead of Douglas Shiraho was within parcel No. Butsotso/Shibeye/527.

5. On 17/9/2010, the respondents took out a Chamber Summons application filed in court on the same day, seeking an order of eviction against Douglas Shiraho from parcel of land No. Butsotso/Shibeye/527. Douglas Shiraho, the 2nd respondent in that application, opposed the application and after arguments by the parties' respective counsel, the court granted the application on 19/11/2010, provoking this appeal.

6. The appellants have faulted the learned magistrate's decision and have preferred seven (7) grounds of appeal as follows:-

1. THAT the learned magistrate erred in law and fact in

allowing the respondent's application for eviction of the appellants from parcel of land known as BUTSOTSO/SHIBEYE/527 when he was not moved to make the said orders by way of a substantive suit.

2. THAT the learned magistrate erred in law and fact in allowing the respondent's application without giving any reasons for the same.

3. THAT the learned magistrate erred in law and fact in making an order for the eviction of the respondent when there was no basis for it.

4. THAT the learned magistrate made a ruling that no reasons were given in support thereof.

5. THAT the learned magistrate erred in law and fact in not considering the issues raised by the applicants while making his Ruling.

6. THAT the learned magistrate erred in law and fact in failing to exercise his discretional powers judiciously.

7. THAT the learned magistrate erred in law and fact by failing to analyze the issues before him critically wholly or properly and his ruling was evidently pre-determined, biased, flawed and indefensible and was arrived at in a cursory and perfunctory and is devoid of sense and justification and occasioned a serious miscarriage of justice.

7. The appellant sought to have the impugned decision set aside with costs.

8. Parties agreed to dispose of this appeal by way of written submissions which are on record.

9. The appellant's counsel has attacked the decision of the learned magistrate arguing that there was no substantive suit before the court seeking to evict the appellants from the disputed parcel of land. Counsel submitted that the orders made by the Lurambi Land Disputes Tribunal and later adopted by the court as a judgment of the court were specific and therefore the application before court was seeking orders that were not in tandem with the judgment.

10. Counsel further submitted that eviction orders can only be issued in a substantive suit filed in the manner prescribed by Rules, and a Chamber Summons was not a prescribed form of instituting suits. On this, counsel relied on the case of ***Gilbert Maina –vs- Purshotam Singh [2007] eKLR*** where it was held that substantive suits/appeals cannot be disposed of by way of an interlocutory application, or that the court cannot grant a prayer or order whose effect is to dispose of the substantive suit/appeal through interlocutory applications. Counsel relied on other decisions with

similar propositions to the above decision to buttress his argument.

11. Counsel also took issue with the learned magistrate's decision submitting that no reasons were assigned to that ruling and that the learned magistrate failed to consider issues raised by the Appellants in their responses to the application, arguing, as he did, that the learned magistrate had no basis for exercising his discretion in the manner he did.

12. Lastly, counsel raised another issue saying that the appellants have been on the disputed portion since 1963 and have established their homestead on the portion of land and the respondent's title has been extinguished by operation of the law. Counsel also argued that the respondents had failed to demonstrate that they had ***locus standi*** to deal with the suit land in question.

13. On behalf of the respondent, it was submitted that the award recommended that the Land Registrar and District Surveyor visit the two parcels of land Butsotso/Shibeye/525 and 527 and establish their common boundary which was done on 2/3/2010 and a report dated 24/3/2010 filed in court. Counsel submitted that since the adoption of the award as a judgment of the court and the filing of the report, no appeal was preferred against the said judgment and report by the Land Registrar and Surveyor.

14. Counsel took issue with the appellants' submissions saying that they were introducing new matters that were not before the learned magistrate, and those new issues were not canvassed during the hearing of the application for eviction. He argued that the appellants should have appealed directly after the award had been adopted if they had lived on the land for more than 12 years. According to counsel, a claim for adverse possession was inappropriate at this stage.

15. Regarding the surveyor's Report, counsel submitted that since no appeal was preferred, the report is conclusive that the appellants illegally occupy the respondents' land. Counsel submitted further that the Tribunal's award and the surveyor's report confirm that appellants' are in illegal occupation of parcel No. Butsotso/Shibeye/527 and urged that the best the court can do is to order the appellants to move out of the respondents' land which the appellants occupy and continue to construct new structures on. He asked that the appeal be dismissed with costs.

16. I have considered this appeal, submissions by counsel and authorities cited. I have also perused the record of appeal and the documents contained therein. The appellants have attacked the learned magistrate's decision ordering the eviction of the appellants from the parcel of land known as Butsotso/Shibeye/527 when he was not moved to do so by way of a substantive suit

17. The respondents had filed an application before the learned magistrate to have the appellants evicted from the suit land. In doing so, the respondents purported to execute the award made by Lurambi Land Disputes Tribunal made on 19/11/2008 and adopted as a judgment of the court on 9/2/2009.

18. In its award, the Tribunal had recommended that the Land Registrar and Surveyor do establish the boundary of parcels Nos. Butsotso/Shibeye/525 and 527 and that since the appellants had encroached onto parcel land No. Butsotso/Shibeye 527 and established their homestead thereon, an equivalent parcel of land in acreage be excised from the appellants' parcel of land No. Butsotso/ Shibeye/ 525 and annexed to parcel No. Butsotso/ Shibeye 527. However, the Land Registrar and Surveyor did not do so and I think they were right.

19. The Tribunal's mandate was to determine the issue of trespass and should have ordered that once the Land Registrar and Surveyor had found that the appellants had trespassed onto the respondents' parcel of land, they were to move out of that land but not order for compensation. The Tribunal's decision is thus correct upto the point of establishing that the appellants have trespassed onto the respondents' parcel of land.

20. As the Tribunal did not give an award for eviction, the learned magistrate should not have

allowed the application for eviction. By doing so, the learned magistrate allowed execution of an order or decision that had not been made or a decision that was non-existent. And as complained of, in ground 3 of the appeal, there was no basis for making the order the learned magistrate made, that is, the order evicting the appellants from the parcel of land Butsotso/Shibeye/527.

21. The appellants have also complained that the learned magistrate did not assign any reasons when allowing the respondents' application for eviction. From the record, after hearing submissions from both counsel, the learned magistrate reserved his ruling to 30/12/2010 but when counsel for the appellant indicated that he would not be available on that day, the record shows the learned magistrate to have stated;

> ***"Court – I will exercise the powers given to me under Section 3A and 1A of the Civil Procedure Act and allow the application dated 17/9/2010 with costs."***

It is clear that the learned magistrate never assigned any reasons for deciding as he did.

22. The learned magistrate's ruling however short, should have captured the facts of the application, arguments by counsel or parties, the decision arrived at and reasons for that decision. In short, the decision should have been concise, clear and understandable. Without reasons, one is unable to understand why the court arrived at that decision.

23. Although the word "Ruling" is not defined in the Civil Procedure Act, a ruling being a pronouncement of a court, should take the form of a judgment. Under **Order 21 rule 4** of the Civil Procedure Rules, **"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision."** Deciding on a similar point, in ***Machira t/a Machira & Co. Advocates –vs- Wangethi Mwangi & Another – Civil Appeal No. 179 of 1997***, *Akiwumi, JA.* said;

> ***"I think as required by Order XX rule 4 (now Order 21 rule 4) of the Civil Procedure Rules in respect of judgments, a ruling in an application which is opposed such as the one made by the appellant and opposed by the respondents, must be self contained and should contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision..."***

24. The above decision was quoted with approval in the case of ***Godffrey Gatere Kamau –vs- Peter Mwangi Njuguna [2008] eKLR*** in which the Court of Appeal allowed an appeal against an Order by *Ombija, J.* because it did not contain reasons.

25. In the appeal before me, the learned magistrate did not give any reasons for his decision leading to improper exercise of discretion and was therefore in error.

26. Having found that the learned magistrate was in error for not giving reasons for his order, this covers the rest of the grounds of appeal because the learned magistrate should have summed up the parties respective positions, analyse their arguments for and against the application, make the decision and give reasons for that decision. It will be imprudent to go over the rest of the grounds of appeal without repeating myself.

27. For the above reasons, the appellants appeal succeeds and the Order of the learned magistrate made on 19/11/2010 evicting the appellants from parcel of land No. Butsotso/Shibeye/527 set aside. For avoidance of doubt, this judgment does not affect the finding of fact that the appellants have trespassed onto the Respondents' parcel of land.

28. Costs of the appeal to the appellants.

Dated and delivered at Kakamega this 17th day of February, 2015

E. C. MWITA

J U D G E