



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA

AT NYAMIRA

ELC APPEAL NO. 1 OF 2021

(Formerly at Environment and Land Court at Kisii Appeal Case No. 11 of 2020)

VINCENT ORINDO NYAMBANE.....1ST APPELLANT

ALFRED MOFFARD OMUNDI MICHIRA.....2ND APPLICANT

-VERSUS-

DANIEL NYANGARESI ORINDO.....1ST RESPONDENT

CHARLES ARASA ORINDO.....2ND RESPONDENT

(Being an Appeal against the Judgment of Honourable B.M. Kimtai Principal Magistrate,

Keroka dated 2nd day of October 2020 and delivered on the 2nd day of October 2020

by Hon. B.M. Kimtai – pm in the original Keroka PMCELC Case No. 21 of 2020)

RULING

The Appeal in court was filed on 07/10/2020 and the same is dated 05/10/2020. The Appeal is from the Judgment/Decree of the Honourable Mr. B.M. Kimtai – Principal Magistrate in Keroka PMELC No. 21 of 2020 dated 02/10/2020. The parties therein were Vincent Orindo Nyambane (Plaintiff) and Daniel Nyangaresi Orindo (Defendant). The prayers sought in the lower court were as follows: -

(a) Permanent injunction against the Defendant either by himself, his agents servants family members or any person acting for or on behalf of the Defendant from entering into, burying, or interring the remains of Jason Orindo Arasa on a portion of and or in any manner interfering with land parcel No. EAST KITUTU/KEBIRICHI.3155.

(b) Costs of the suit.

(c) Any other relief the Honourable Court deems fit and just to grant.

Judgment was entered for the Defendant dismissing the Plaintiff's claim in the following terms: -

1. The registration of parcel **NO. EAST KITUTU/KEBIRICHO/3155, 3156 and 3157** in the names of Vincent Orindo Nyambane, Gedion Kebande were obtained by fraud and therefore this court orders same be cancelled and parties advised to file a succession cause.
2. An order is issued for the green card for the above mentioned parcels i.e. 3155, 3156 and 3157 to revert back to the original format of land parcel No. **EAST KITUTU/KEBIRICHI/794.**
3. That the Defendant herein Daniel Nyangaresi and Charles Arasa Orindo do bury the remains of Jason Orindo Arasa in land parcel No. **EAST KITUTU/KEBIRICHI/794**, since they are claiming beneficial interest in that parcel.
4. The cost of this suit including the mortuary charges be borne by the Plaintiff herein.

The Plaintiff in the lower court filed suit vide Plaint dated 8/8/2020. The Defendant Nyangaresi Orindo was father to the late Jason Orindo Arasa who died on 24/07/2020 and the body was lying at Gucha Hospital Mortuary in Keroka Township. It was claimed that the Defendant wanted to inter the remains of the late Jason Orindo Arasa on a portion of land registered as **L.R. NO. EAST KITUTU/KEBIRICHI/3155** which land was registered in the names of the Plaintiff and that the body was buried being conducted on the land without the consent of the Plaintiff. The suit was finally disposed of on 02/10/2010 dismissing the Plaintiff's case where the court found that **L.R. NO. EAST KITUTU/KEBIRICHI /3155, 3156 and 3157** were registered in the names of the Plaintiff and 2 others fraudulently and the court ordered for the cancellation of the said Titles and the parties were advised to file a Succession Cause. The reasoning of the court was that Title No. **L.R. NO. EAST KITUTU/KEBIRICHI/794** which gave rise to parcel Nos. L.R. NO. EAST KITUTU/KEBIRICHI/3156 and 3157 was an ancestral land registered in the names of Orindo Nyambane (the Plaintiff) to hold it in trust for their family (his belonging to the first wife and Nyaboke Nyaera being the second wife to his father) and that of KEBANDE. Parcel number **L.R. NO. EAST KITUTU/KEBIRICHI/794** was ancestral land. It was first registered in the name of the Plaintiff's father and after his demise the mother to the Plaintiff transferred the land to the Plaintiff and 2 others under Succession Cause No. 475 of 2014 at Kisii High Court. Interestingly, the Plaintiff admitted in court that the parties in the aforesaid Succession Cause were different and even the Estate was that of Earnest Nyambane Abunga and not that of Nyambane Orindo. Consequently, Land Reference Number **L.R. NO. EAST KITUTU/KEBIRICHI/3155** was by necessary implication obtained by fraud.

This is the decision that the Plaintiff intends to impeach and overturn. Invariably, the Respondent would want the same maintained. On 05/05/2021 the ELC Court at Kisii delivered a Ruling in terms of the following orders: -

(a) A temporary injunction is hereby issued against the Respondents herein by themselves, their agents, servants, family members and/or any persons acting for and on their behalf from entering into, cultivating, tilling, cutting down of any trees, erecting any structures or in any manner interfering or dealing with land parcel No. EAST KITUTU/KEBIRICHI/3155.

On 17/01/2022 the Respondent filed a Notice of Preliminary Objection dated 14/01/22 that was worded as follows: -

“Kindly take notice that the Applicants herein shall raise a Preliminary Objection during the hearing of the instant application or at the earliest opportunity and notices hereby intimated.”

The grounds of the appeal are that the Appellants lack locus standi to file the appeal since the Primary suit and the appeal are fruits of fraud perpetuated with the motive of defeating justice and that the 1st Appellant did not succeed the Estate of the late NYAMBANE ORINDO, the original owner of L.R. NO. EAST KITUTU/KEBIRICHI/3155 is non-existent. It is the court that pronounced 3155 non-existent. The Appellant would want a contrary view. He finally concludes by saying that KISII H.C. Succession Cause No. 475 of 2014 relates to the Estate of ERNEST NYAMBANE ABUNGA and not NYAMBANE ORINDO. I have heard the privilege of going through the file from Kisii High Court in Kisii H.C. Succession Cause No. 475 of 2014 which shows that the beneficiaries of the Estate of EARNEST NYAMBANE ABUNGA who died on 03/09/1998 at Ikorucha/Timi are: -

1. Cleophas Obare Nyambane.

2. David Michael Nyambane.

3. Kennedy Nyambane.

4. Cyprian Omenge Nyambane.

all sons of the deceased

Before the hearing of the same Counsel for Respondents asked that the Succession file from Kisii be availed in Court, which was allowed.

I must point out that it was unnecessary to call for this file. The Applicant is advised that in future he ought to attach copies of the pleadings of a file from another station or court but not to call for the file which may end up inconveniencing the court that possesses the file and holding the file since the case may be ongoing or the matter may not be concluded as is the case here.

Having said so, the lower court gave judgment in the Respondents' favour. The Appellant felt aggrieved by that Judgment. Mr. Meroka for the Respondents argues that the substratum of the Appeal is no more since L.R. NO. EAST KITUTU/KEBIRICHI/3155 has already been cancelled. What remains now as an Appeal has been overtaken by events. It is only an academic exercise. Mr. Soire for the Appellants states that if ever any cancellation of the Title in respect of L.R. EAST KITUTU/KEBIRICHI/3155 has been gazetted or carried out, then the same was done against a court order since there has been a stay of the Judgment of 02/10/2020. The Appellants herein were the Plaintiffs in the lower court and had a right of Appeal after feeling dissatisfied with the lower court's decision. He concludes by saying that the Succession Cause in Kisii High Court Cause No. 475 of 2014 has no relevance to the Appeal herein.

Having listened to the oral Submissions in court, I wish to state that an aggrieved party either has an express right to appeal under Order 43 of the Civil Procedure Rules or must seek leave to file the appeal under Section 65 of the Civil Procedure Act. Under Order 42 Rule 31 the Judgment of the lower court may be confirmed, varied or reversed. Under Order 42 Rule 32 the Appellate Court has powers to pass any Decree and make any Order which ought to have been passed or made and to pass or make such further or other Decree or Order as the case may require, which Decree may be exercised in favour of all or any of the Respondents.

Right of Appeal is a Constitutional Right under Article 48 of the Constitution of Kenya, 2010. Article 50 (1) gives a litigant right to fair Hearing

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Under Section 13 (4) (7) (a) of the Environment and Land Court Act, 2012;

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

This right is absolute. It is accorded any party to a suit in the lower court who is dissatisfied with the decision of the lower court. The same cannot be denied or curtailed.

By raising the Preliminary Objection dated 14/ 01/22 the Respondent decided to argue the Appeal before the directions for the same were even given. This is not a Preliminary Objection if the case of ***Mukisa Biscuits*** is anything to go by. *Locus standi* means that one has no legs in the suit. What a stretch of imagination to describe the Appellants. The Preliminary Objection is hereby dismissed and the Respondents will accordingly have to bear the costs of the same since it is nothing more than an abuse of the process of the court.

Accordingly, the file containing Kisii High Court Succession Cause No. 475 of 2014 shall be returned to the Kisii High Court Registry forthwith.

Ruling dated, signed and delivered at Nyamira this 24th Day of March 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Appellants: Mr. Soire

Respondents: Mr. Meroka