



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION
CIVIL APPEAL NO 13 OF 2011

(Appeal from the original decree

.....)

STEPHEN WANG'ANG'A NJOROGE.....APPELLANT

V E R S U S

1. STANLEY NGUGI NJOROGE

2. JOHN GITHARA NJOROGE.....RESPONDENTS

J U D G E M E N T

1. This is an appeal against the decree of the lower court passed on 24th November 2010. By that decree the Appellant’s suit against the Respondents was dismissed with no order as to costs. The Appellant had sought the eviction of the Respondents (his brothers) from land parcel L.R. Kiambaa/Karuri/T.240 and damages for trespass. While denying the Appellant’s claim the Respondents counterclaimed for subdivision of the suit land into two parcels, one such parcel to be registered in their names as proprietors thereof.

2. In dismissing the Appellant’s (plaintiff’s) suit the lower court gave the history of the dispute as follows

“I have carefully considered the evidence and taken note of submissions by both sides. I wish to observe at the outset that the parties have had a protracted dispute over the parcel number Kiambaa/Karuri/T.240.

A perusal of the documents tendered in evidence shows that the plaintiff was issued with a certificate of freehold title on 2.5.1960.

I cannot tell how he acquired the land as no documents have been produced in that regard. The dispute was referred to *Kiambu Lands Disputes Tribunal*. The plaintiff herein was the objector whereas Gicheru Nguru his late father was the claimant. It was resolved that the land be sub-divided into two equal halves. The award was read and adopted as a judgment of this court. I did not have the benefit of looking at the relevant files and proceedings but it appears there was an attempt to execute the award as there is an indication that the Executive

Officer signed some forms. The plaintiff herein unsuccessfully appealed to the High Court. He also preferred an appeal to the *Court of Appeal* which was dismissed by an order dated 23rd October 1989. Their father passed on giving rise to *Succession Cause No. 147 of 1990*. Salome Wanjiku Njoroge, their mother, petitioned for a grant of letters of administration. Ownership of Kiambaa/Karuri/T.240 yet again came into question. *Hon. L Muhiu (Mrs) SRM* ordered that half of the land goes to other beneficiaries of the estate of the Deceased whereas the plaintiff herein gets the half as resolved by the panel of elders.

He then filed a constitutional reference in the High Court.

In a ruling delivered on 23rd July 2009 the same was dismissed by *Justice Mbogholi* who observed that he should have appealed against the elder's award within the stipulated period. Without be-labouring the point, I hold the view that this suit is barred by the rules of *res judicata* and is clearly an abuse of the court process."

3. The learned trial magistrate then disposed of the suit in the following words -

"Ownership of the subject-matter was deliberated upon by the land disputes tribunal. The award was read and adopted as an award of this court. There was no appeal against the award. Deliberating on it is tantamount to sitting on appeal against an award that has been made a judgment of the lower court. I have no jurisdiction whatsoever to entertain this matter. Award of the panel of elders and various decisions that followed should be given effect once and for all. Litigation must now come to an end!

In sum I find no merit in this suit and I proceed to dismiss it with no order as to costs."

4. There are only two grounds in the memorandum of appeal herein. They have been rendered as follows -

(i) The learned trial magistrate erred in law and in fact in finding that she (not he!) had no jurisdiction whatsoever to entertain the suit.

(ii) The learned trial magistrate similarly erred "when she gave effect once and for all to the decision of the panel of elders and the various decisions that followed".

5. The constitutional reference referred to by the learned trial magistrate in her judgment was **Nairobi HC Petition No 476 of 2006**. In a ruling dated and delivered on 23rd July 2009 the court (*Mbogholi Msagha, J*) reviewed the long history of this dispute between the three brothers. The court noted and held as follows -

"The applicant herein did not file any appeal against the judgment of the magistrate who adopted the award or the estate. Instead, he filed another case, i.e., Civil Case No. 882 of 1993. That case went to the High Court and in Civil Appeal No 207 of 1996 at Nairobi, *Khamoni J*, dismissed the same with costs to the Respondent.

It would appear that the appellant herein, having found no avenue to address the award and subsequent orders, decided to file this constitutional petition. I note however, that this petition comes 25 years after the award of the elders was confirmed as judgment of the court.

Having lost his opportunity to challenge the said award through the normal appellate system, I consider it an abuse of the court process for the applicant to use a constitutional reference to address a matter he would have addressed by filing the relevant appeals. A judgment of the court can only be challenged through the appellate system as set out in the relevant statutes. This the applicant did not do.

Above all, for him to wake up 25 years after the original orders to justify his right upon the

said property, if any, he is guilty of laches which he cannot justify by any state of reasoning. This litigation must come to an end. The award does not exist because the same has been subjected to proceedings that clearly show that it is not a court judgment. The time allowed to challenge such judgment has also expired. It would be a great injustice to the Respondents to be brought to court over and over again over the same issues which ought to have been settled a long time ago if the applicant had followed the right procedures....”

6. It is clear that the suit before the lower court was not only misconceived but also an abuse of the process of the court given the history of the dispute. The technical point that the trial magistrate, having found that she did not have jurisdiction to hear and determine the suit, should have struck it out instead of dismissing it, does not detract from the fact that the Appellant appeared determined to not let the matter rest, even after exhausting his lawful legal options. The learned trial magistrate was correct in not agreeing to re-open a family dispute that had been dealt with by elders whose decision had not been challenged in the manner provided for by the law. The *High Court* had similarly declined to re-open the dispute in **Nairobi HC Petition No. 475 of 2006**.

7. Having considered the submissions of the learned counsel for the Appellant and those of the Respondents who were in person, and having considered all matters placed before the court, I find no merit in this appeal. It is hereby dismissed with costs to the Respondents. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 24TH DAY OF OCTOBER 2014.

H. P. G. WAWERU

JUDGE.