

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 59 OF 2007

IBRAHIM WAKANYANGA 1ST APPELLANT

ABDALLA W.MELE 2ND APPELLANT

HUSSEIN MUNYENDO 3RD APPELLANT

V E R S U S

PETER NAMBIRO MUBATSI RESPONDENT

J U D G M E N T

This is an appeal from the ruling of E.O. Obaga, SRM Kakamega delivered on the 22.5.2007. The grounds of appeal are that the trial court erred in law by relying on section 91 of the Civil Act, that the application by the respondents dated 31.10.2006 that led to the ruling amounted to new reliefs being sought different from what the appellants had sought in their plaint, that the appellants' application dated 27.7.2005 was not in any way res judicata, that the reliefs granted in the ruling were not sought by the appellants, that the issues that had been deliberated by the High Court and the Court of Appeal were totally different and that the court did not consider all the issues before it.

Counsels for both parties agreed to determine the appeal by way of written submissions. Counsel for the appellants contends that the provisions of **section 91** of the Civil Procedure Act were not taken into consideration by the trial court. The application by the respondents dated 31.10.2006 amounted to new reliefs different from the appellants' plaint. The appellants did not annex the decree when they applied for the review and that was fatal and that the High Court had dealt with an issue of adverse possession. The same issue of adverse possession had been dealt with by the Court of Appeal but the application sought different issues.

On his part counsel for the 2nd respondent contends that the appellants obtained orders without serving the respondents. The issues had been deliberated in various court cases including Kakamega CMCC No. 626 of 1990 (originally Nakuru HCCC No. 136 of 1987 transferred to Kakamega and became No. HCCC 22 of 1989), Misc. Application No. 59 of 1991, Court of Appeal Civil appeal No. 10 of 1993, Kakamega High Court Civil Appeal No. 12 of 1996 and Kakamega High Court Civil Case No. 136 of 1997 (OS). Counsel maintains that in all the disputes the appellants had lost. The appellants obtained ex-parte orders and the trial after realizing the truth reviewed its own earlier orders.

I have gone through the ruling of the trial magistrate that is the subject of this appeal. The trial magistrate gave a detailed background of the dispute herein. The dispute relates to original plot number **N.WANGA/KOYONZO/1065** that belonged to the appellants' father. During his lifetime the appellants' father subdivided the land into two, namely plot numbers **N.WANGA/KOYONZO/1225** and **1226** respectively. He sold plot number 1226 to Michael Alumasa Ongalo and remained with plot number 1225. The two plots were created in 1972. Michael Ongalo transferred his plot to the 2nd respondent herein. Upon the death of their father the appellants filed succession proceedings but referred to the deceased's estate as plot number 1065 instead of the new number 1225. When the appellants went to effect the grant they noted that plot number 1065 was not existing. This triggered the lityany of litigation. They filed Nakuru HCCC No. 136 of 1987 alleging that plot number 1065 had been fraudulently subdivided. The suit was transferred to Kakamega and became number 222 of 1989. It was transferred to the Principal Magistrate's Court and became number 626 of 1990. When the case was fully

heard it was dismissed. The appellants then filed Kakamega Misc. Application No.55 of 1991 seeking leave to appeal but the same was dismissed. There was also Civil Appeal No. 12 of 1996 before the High Court and there was preliminary objection by the respondent and it was upheld. The appellants then filed Kakamega HCCC. No.136 of 1997 (OS) seeking adverse possession in relation to plot number 1226 against the respondent. There was preliminary objection that was upheld.

The appellants then filed an application dated 27.7.2005 before the subordinate court seeking to have the Land Registrar Kakamega to nullify plot number 1226 and have the land revert to its plot number 1065. The application was heard ex-parte and the orders were granted. The respondent filed an application dated 31.10.2006 seeking to review the court's orders that cancelled plot number 1226. The application was heard and the court reviewed its earlier orders. Section 91 of the Civil Procedures Rules relates to application for restitution. The trial court used the section and ordered that the land be restituted to the earlier position before title number 1226 had been cancelled. The court noted that the section had not been cited by the applicants. I do not find any error in relation to the reliance of that section by the trial court.

It is noted in the ruling that the orders cancelling the title deed were granted ex-parte. The court at that time was convinced that the respondents had been served. When the application for review was made it was discovered that whereas the process server alleged to have served the 1st respondent with the application in September 2005, it was discovered that the 1st respondent **CLEMENT KWENA ONGALO** had died on the 8.2.2005. The trial court found that there was no service upon the respondents and decided to review its earlier orders. The court also analyzed all the previous suits and their decisions. It was of the view that since the orders cancelling the title were irregularly obtained the status quo obtaining before 13.9.2005 be restored. The effect of the ruling was that the 2nd respondent retained his title to plot number 1226.

It is clear from the ruling that the trial court exercised its discretion to review its own orders. I am satisfied that when the application to restore the suit land to plot number 1065 was made, the appellants did not reveal to the court the earlier decisions of the court. Further, it was thought that the respondents had been served yet that was not the case. The ruling by the court explained all the circumstances under which it decided to review its own earlier orders and I do entirely agree with its decision. The application to review the orders did not amount to new reliefs. All what the court did was to review and set aside its earlier orders. Whether the application by the appellants that had granted them the orders cancelling plot number 1226 was res judicata or not can still be litigated by having the application heard inter parties. There is no error on the part of the trial court and I do find that this appeal is misplaced. The parties had litigated in various cases and the appellants thought that they had now finally succeeded.

In the end I do find that none of the grounds of appeal is merited. There are no substantive issues being raised in the appeal. New information was given to the trial court by the respondents which information included the fact that the respondents had not been served. The appeal lacks merit and is hereby dismissed with costs.

Delivered, dated and signed at Kakamega this 17th day of October 2014

SAID J. CHITEMBWE

J U D G E