



REPUBLIC OF KENYA

High Court of Kisii

Civil Appeal 62 of 2010

JEFF SULEIMAN.....APPELLANT

AND

DUNCAN OTIENO OGWAN'G.....RESPONDENT

(Being an Appeal from the Ruling and Order of Hon. C. Yalwala (RM)

dated 23rd February 2010 in the original Oyugis PMCC NO.3 of 2010)

JUDGMENT

1. This is an appeal against the ruling and orders made by Hon. C. Yalwala, Resident Magistrate, dated 23rd day of March 2010, in PMCC No 3 of 2010 at Oyugis. The appeal is against the outcome of a preliminary objection dated 29th January 2010 by the appellant which objection was overruled.
2. Being dissatisfied with the said ruling the appellant filed the present appeal premised on the following grounds:-
 1. *The learned trial magistrate erred in law and in fact in failing to appreciate that the suit before him was claim for trespass to Land and the Jurisdiction of his Court was expressly ousted by the Mandatory Provisions of Section 3 (9) of the Land Dispute Tribunal Acts, (Act No.18 of 1990).*
 2. *The learned trial magistrate erred in law and in fact by failing to appreciate that the Land Sale Contract [s]dated the 19th November 1986 and 13th October 1986, were subject of Controlled Transaction and the same had been rendered null and void for all intent and purposes pursuant to section 6 of the Land Control Act, Cap 302 and the said transaction had been prohibited by section 22 of Cap 302, thus incapable of forming the basis of any Legal process as the same constitutes illegalities not capable of being given effect by a Court of Law.*
 3. *The learned trial magistrate erred in Law and in fact by failing to strike out the chamber summons Application dated the 20th day of January 2010, insofar as the same was premised on instruments contravening the mandatory Provisions of Section 19 of the Stamp Duty Act and that the Land Sale Agreements, marked as Exhibits DO3 and DO4, respectively, were such document that would attract payment of stamp duty.*
 4. *The learned trial Magistrate erred in law and in fact by failing to appreciate that the suit property, LR. CENTRAL KASIPUL/KAMUMA/*

1492, was a property of one **Onyango Omiti**, Deceased and the Respondent herein had no **Locus-standi** to originate any suit touching on the same without obtaining grant of Administration, in respect of the same and in view of the **Provision of Section 45 of the Succession Act, Cap 160 Laws of Kenya**.

5. The learned trial Magistrate erred in law and in fact, in failing to appreciate that the suit before him was statute time barred since the Agreements of Sale sought to be enforced were executed in the year **1986**.

6. The learned trial Magistrate erred in law and in fact in failing to appreciate that an alleged claim for adverse possession could not form a basis for grant of injunctive orders and neither did his court have jurisdiction to entertain any claim based on allegation of adverse possession.

7. That the learned trial magistrate erred in law and fact in failing to strike out the suit and the interlocutory application seeking for injunction and/or declining to sustain the Preliminary Objection canvassed before him.

3. The appellant therefore asks this court for orders that the ruling and order of the Learned Trial Magistrate dated 23rd day of March 2010 be set aside and the same be substituted by an order striking out the Chamber Summons dated the 20th day of January 2010, and the entire suit as originated vide the plaint dated the 20th day of January, 2010.

4. Briefly, the facts of this case are that by a plaint dated 20th January 2010, the Respondent herein sued the appellant (as Defendant) praying for judgment in the following terms:-

a) *An order of permanent injunction restraining the defendant by himself, servants and/or any other person claiming under him from entering upon, cultivating upon, disposing of and/or in any other manner interfering with the plaintiff's peaceful occupation and possession of all that land measuring 100ft by 100ft being land parcel NO. Kasipul/Kamuma/1429.*

b) *Costs of this suit.*

c) *Interest on costs awarded under (b) above at court rates.*

d) *Any other relief this honourable court may deem fit and just to grant.*

5. The appellant entered appearance and also filed defence. The thrust of the appellant's defence was that the trial court had no jurisdiction to hear and determine the matter before it and secondly that since the suit land was registered in the name of a deceased person, the respondent was not competent to originate the suit in the lower court in the absence of evidence that the respondent was the administrator of the estate of Onyango Omiti, deceased, in whose name the suit land is registered.

6. The Respondent had averred in the plaint that he was the sole surviving administrator of the estate of Joseph Ogwang Zablon (also deceased) who had bought the suit land from one Onyango Omiti (deceased) in or about 1986. The Respondent's case was that the deceased (meaning Joseph Ogwang Zablon) had acquired proprietary rights over the suit land and taken possession of the same upon payment of the full purchase price to Onyango Omiti. It was on the basis of the above that the Respondent sought to halt the appellant's intrusion into the suit land.

7. Together with the plaint, the Respondent filed a Chamber Summons dated 20th January 2010, under Certificate of Urgency seeking temporary injunctive orders against the appellant in respect of the suit land. The Respondent also asked the court to condemn the appellant with the costs of the application.

8. On the 29th January 2010, the appellant filed a Notice of Preliminary Objection under the provisions of the repealed **Order VI Rule 7** of the **Civil Procedure Rules** on the grounds:-

1) *That the suit herein, is fatally defective, incompetent and bad in law and the same ought to be struck out **Ex-Debito Justitiae**.*

2) *That the **Plaint** dated the **20th day of January 2010** is legally untenable and incurably defective and no amount of amendment can cure the defect.*

3) *That the jurisdiction to entertain both the Application and entire suit is expressly ousted by the mandatory and express provision of section 3 (8) of the Land Dispute Tribunals Act.*

4) *The claim herein is prohibited by the express provision of **Section 22 of the Land Control Act, Cap 302, Laws of Kenya** and **Section 45 of the Succession Act, Cap 160 Laws of Kenya**.*

5) *That the property the subject of claim is still registered in the name of a Deceased person, one **Onyango Omiti**, and the Plaintiff/Applicant being not the Administrator, the same is benefit of the requisite **Locus standi**, to purport to lodge any claim touching on or relating to **LR: CENTRAL KASIPUL/KAMUMA/1429**.*

6) *That the application dated the **4th December 2009**, is fatally defective insofar as the same are premised on agreements and documents which are in contravention of the **Mandatory Provisions of the Stamp Duty Act, Cap 480, Laws of Kenya**.*

7) *That the entire suit and the subject application are otherwise an abuse of the due process of Court.*

9. The trial court heard submissions by counsel on the Preliminary Objection and delivered its ruling on the 29th January 2010, dismissing the Preliminary Objection, which decision triggered the instant appeal.

10. When this appeal came up for hearing on 13th February 2013, counsel for the Respondent did not appear, though there was an affidavit of service on the record showing that service was effected on 31st January 2013 upon a Secretary at the Chambers of Neto Otieno & Company Advocates situated at Centre Sacco House within Kisumu Town. The appeal therefore proceeded ex parte.

11. This is a first appeal, and on a first appeal, this court is under a duty to reconsider and evaluate the proceedings before the trial court with a view to reaching its conclusion in the matter. As the decision of the trial court arose out of an interlocutory application, this court is only required in the circumstances to consider the law upon which the Preliminary Objection was premised. I have carefully considered that record and the submissions made.

12. I heard submissions from Mr. O.M. Otieno, counsel for the appellant. Counsel condensed the 7 grounds of appeal into 2 main grounds. In ground 1, it was submitted that the subordinate court was devoid of jurisdiction to determine the matter before it in so far as the claim before the court was trespass to land. It was submitted further that the dispute before the court could best be adjudicated upon by the Land Disputes Tribunal pursuant to the provision of the Land Disputes Tribunals Act (now repealed). Counsel urged the court to carefully look at paragraphs 5, 7, 8 and 10 of the plaint and to find that the issue in dispute was one of trespass and not anything else. For clarity and their full import, the Respondent pleaded thus in the above stated paragraphs:-

“5. The deceased thus acquired proprietary rights over the said parcel of land and immediately took possession thereof upon full payment of the purchase price and started cultivating the same which possession had been and was continued by the plaintiff up to and including 1991 when the deceased passed on herein to date.

7. In the alternative and without prejudice to the averments in the foregoing paragraphs, the plaintiff avers that as the administrator of the deceased’s estate, he has acquired proprietary rights over the said parcel of land by adverse possession by the continued active occupation of the same for a period well over 20 years freely, openly and without any interruptions from the defendant

and/or members of the vendor's family.

8. On or about 7/11/2009, the defendant without any colour of right, or claim fenced off the said parcel of land claiming ownership thereof.

10. The defendants thus intends unless restrained by orders of this honourable court to divest the plaintiff's and the deceased's estate, the right of ownership and possession of the said land to the plaintiff's deceased's estate's detriment."

13. It was counsel's submission that **section 3 (9)** of the **Land Disputes Tribunals Act, 1990** completely ousted the jurisdiction of the trial court as the averments of the Respondent in the above stated paragraphs of the plaint point to acts of trespass which could only be determined by the **Land Dispute Tribunal**.

14. To support the argument that the trial court had no jurisdiction to deal with the matter before it, counsel placed reliance on **Meru High Court Misc. Application NO.74 of 2006 – M'Nkanata M'Kerigia –vs- Geoffrey Weru Kirimania**. In that case, the dispute centred around the actions of the Defendant as averred in the plaint, namely that on 17th June 2003, the Defendant dug a trench across the plaintiff's land and damaged crops as he did so. After filing defence, the defendant raised a Preliminary Objection on the ground that the dispute was one of trespass and should have been heard by a Land Disputes Tribunal under **section 3 (1)** of the **Land Disputes Tribunals Act No.18 of 1990**. The trial court struck out the suit after hearing arguments.

15. Apparently, the applicant did not file appeal on time on grounds that the proceedings of the lower court were not supplied to him on time. The application for leave to appeal was refused on the ground that the applicant should have gone to the Land Disputes Tribunal for the resolution of his dispute in accordance with the law. In my humble view, the said decision by my learned brother, is distinguishable from the facts presented by the averments in the instant plaint in that what seems to be at stake in the instant case is the issue of ownership of the suit land by both parties. The tussle in this case is not merely one of trespass. Paragraph 6 of the plaint is talking about transfer of the suit land to the plaintiff and in paragraph 10 of the plaint, the Respondent is complaining that unless the appellant was restrained by an order of the court, he intended to divest the Respondent and the deceased's estate of the right to ownership and possession of the suit land. An issue on ownership cannot be said to be one of trespass. In **Collins Thesaurus A-Z Discovery Dictionary**, the word ownership has the following synonyms:-

-Possession, Occupation, Tenure, Dominion, Occupancy,

Proprietorship, Proprietary rights, right of possession."

16. In my humble view therefore, counsel's argument that the dispute between the parties in the lower court was merely one of trespass cannot be correct. I therefore do not accept it. The first ground of appeal thus fails and I uphold the finding of the trial court that the matter before the court was not one for the Land Disputes Tribunal.

17. On ground 2, counsel submitted that the suit before it was untenable in so far as the transaction sought to be enforced by the suit was null and void by dint of **section 6** of the **Land Control Act, Cap 302** as read with **section 22** of the said Act. The argument was that the transaction being a controlled transaction meant that Land Control Board consent was a prerequisite and same had to be obtained within 6 months of the transaction. Reliance was placed on the case of **Kariuki –vs- Kariuki – Court of Appeal at Nairobi** being **Civil Appeal No.26 of 1979 [1983] KLR 225**. Counsel contended that since admittedly consent for the transaction was not obtained then the transactions which were entered into on 9th November 1986 and 13th December 1986 were null and void for all purposes and could therefore not form a basis for a claim before the trial court. It was also contended that the Respondent's claim was time barred and was also incompetent because the agreements were not duly stamped. Reliance was placed on **Nairobi Milimani HCCC No.283 of 2006 – Weetabix Limited –vs- Healthy U Two Thousand Limited [2006] e KLR** and **Court of Appeal Civil Application No.NAI 286 OF 1999 – Githurai Ting'ang'a Co. Ltd. –vs- Moki Savings Co-operative Society Ltd & another**.

18. I have carefully considered the submissions and the authorities cited by counsel in support of ground 2 of the appeal. My view of the matter is that the issues raised by counsel are issues that can only be effectively determined after hearing parties during full hearing of the case. In any event **section 6** of the **Land Control Act** does not make it mandatory for Land Control Board Consent to be obtained within 6 months. Further, **section 22** of the said **Act** prescribes a penalty where a controlled transaction is avoided by **section 6**.

19. Regarding the failure by the Respondent to comply with **section 19** of the **Stamp Duty Act**, again this is an issue that should be raised at the full hearing of the suit before the trial court.

20. Finally, it is my humble view that the decision to strike out a suit, especially where the subject matter is land should be taken with much circumspection and not flippantly. Under **Article 159** of the **Constitution**, and in furtherance of the overriding objective of the civil Procedure Act, the primary duty of the court is to do substantive justice to the parties to a dispute. Unlike the **M'Nkanata case** (above) this is not a case in which the court can say under summary procedure, that it is going nowhere. The respondent ought to have his day in court, and the appellant will not have a similar opportunity to tear the Respondent's case apart during the full hearing.

21. In the premises and for the reasons stated above, I have reached the conclusion that this appeal lacks merit. The same is accordingly dismissed with costs to the Respondent.

22. It is so ordered.

DATED and delivered at Kisii this 12th day of April, 2013

RUTH NEKOYE SITATI
JUDGE.

In the presence of

Miss Kusa (present) for Appellant

M/s Neto & Co. (absent) for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI
JUDGE.