REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII
Civil Appeal 262 of 2009
AGNES NAIGU ENE NANGEYA

TORONKEI PANYANKOO.....APPELLANTS

-VERSUS-

CAROLINE KINAMPU.....RESPONDENT

JUDGMENT

(Appeal from the ruling and Order of Hon. R. Oganyo(PM) dated 27th day of November, 2009

in the original Kilgoris SRMCC no. 20 of 2006

The appellants jointly on 3rd October, 2006 filed a suit in the Resident Magistrate's court at Kilgoris being RMCC No. 20 of 2006. In the said suit the appellants claimed as against the Respondent, a permanent injunction, General damages, costs and interest. The suit was necessitated by the alleged acts of the respondent who had unlawfully interfered with land parcel numbers **Transmara/Nkararo/860** and **875** ***"the suit premises"*** registered in the names of the 1st and 2nd appellants respectively. According to the appellants the respondent had intermeddled with the suit premises by planting maize, beans, Bananas, construction of structures and cutting of indigenous trees.

On 13th October, 2006, the appellants filed an application by way of Chamber summons under order XXXIX rule 2 of the **Civil Procedure rules** seeking in the main two prayers, temporary injunction to restrain the respondent, her servants, or agents from interfering whatsoever with the suit premises pending the hearing and determination of the application interpartes and thereafter a similar injunction to last until the hearing and final determination of the suit.

The application was anchored on the grounds that the appellants had a prima facie case against the respondent with probability of success, they were the respective registered proprietors of the suit premises, the respondent had no

registered proprietory right whatsoever on the same and that they would suffer irreparable loss and damage that cannot be compensated for by and award of damages if the injunction is denied. In support of the application the 2nd appellant swore an affidavit. That affidavit merely helped to expound and elaborate on the grounds aforesaid.

Apparently the suit premises are situate in area still under Land Adjudication, the appellants sought and obtained consent of the District Land Adjudication and settlement officer before they commenced the court action as required by section 30 of Land Adjudication Act.

On being served with the application, the respondent on 13th November, 2006 filed Notice of Preliminary Objection to the effect that the suit was incompetent and fatally defective. That the suit defied trite law and mandatory procedure and was in fact an abuse of the process of the court as the appellants were completely non-suited as against her.

On 18th November, 2006 the respondent filed grounds of opposition to the application in which she stated that the application was devoid of merits, was bad in law, incompetent and fatally defective. That the respondent was a stranger to the allegations of proprietorship of the suit premises by the appellants, and finally that the respondent was completely non-suited. It is noteworthy that though the Notice of Preliminary Objection and Grounds of Opposition were not included in the record of appeal, nonetheless they are found in the original record of the trial magistrate.

The application came up for interpartes hearing on 4th November, 2006. However, with the consent of the parties, the court made the following order:-

> ***"I direct the District Land Adjudication Officer Transmara District and the District surveyor to visit land parcel numbers Transmara/Nkararo/204, 850,860 and do fix the respective boundaries. They should thereafter file report on any encroachment if any and by whom. Mention on the 30/11/2006"***

The duo in compliance with the aforesaid order visited the suit premises and filed a report . The said report stated in the penultimate paragraphs, in part as follows:-

- ***"There was no boundary dispute in the area until recently when the plaintiffs moved in to develop their land.***
- ***The defendant (Caroline Kinampu) had leased the land (P.No. 304) from the recorded owners who are close family members and who apparently were not aware of the existence of the plaintiffs' parcels of land.***
- ***The insertion of the two numbers (860 and 875) was done on the map but was not reflected on the ground.***
- ***Owing to the tension observed during the visit, fixing of the boundaries will require proper security***

arrangements. This was not anticipated and the time limit was short. Liaison (sic) with the provincial administration will be undertaken if it may be necessary to re-visit the ground."

After reading the report, the learned magistrate ordered the OCS, Kilgoris police station to provide the District surveyor with security to enable him fix boundaries for land parcels 304,860 and 875 **Nkararo** Adjudication section. This was done. A report to that effect dated 12th June, 2007 was subsequently filed in court. In part the report stated:-

"The boundaries have been fixed and the ownership has also been confirmed and therefore it is imperative that the defendant be restrained from any further interference with parcel nos. 860 and 875 which belongs to the plaintiffs and stick to parcel 304 if she has leased the same from the registered owners who are:-

1. **KISA OLE NAKURO(Deceased)**
2. **PAUL NTUNA OLE TELEU**
3. **LEMASHON OLE TELEU.**

The sketch depicting the three parcels is attached herewith for your perusal and retention. This should now be deemed as the full and final report.

It would appear that **Mr. Kaberia,** learned trial magistrate who had hitherto dealt with the matter was transferred from the station and **Mrs. Oganyo** Senior Resident Magistrate took over the conduct of the suit thereafter.

Although parties thought that the dispute had been resolved by the determination aforesaid and moved the court to read the report so that it may be adopted as judgment of the court, **Mrs Oganyo** was of the contrary view. In her opinion:-

"…….I find that the reports filed will summarily conclude this matter and as my predecessor had previously noted, this is a land matter which is emotive to all parties concerned. In any event, it is my considered view that the best way forward in this case to have the application dated the 3rd October, 29006 heard and determined on its own merit so as to afford each party a chance to be heard before arriving to a conclusion which the report to be read (sic) seems to have gone to"

As a result of the above direction, the application was canvassed interpartes on 28th October, 2009 culminating in a ruling dated and delivered on 27th November, 2009 which is the subject of this appeal. The learned magistrate refused to grant the appellants the temporary injunction sought on the grounds that the appellants had not made out a prima face

case with probability of success nor had they established that they would suffer irreparable loss incapable of being compensated by an award of damages. Finally she found that the court did not have jurisdiction to entertain the suit herein pursuant to section 3(1) of the Land Dispute Tribunal Act.

Those conclusions triggered this appeal. The appellants faulted the decision on four grounds to wit:

> ***"1. The learned trial magistrate erred in fact and law in dismissing the appellants chamber summons application dated the 3rd day of October, 2006.***
>
> ***2. The learned trial magistrate erred in law and in fact in failing to appreciate that the court had jurisdiction to entertain the claim and grant the orders sought in view of the fact that the suit land had been exempted from the applicability of the Land Dispute Tribunal Act (Act No. 18 of 1990) by definition of Land as contained in section 2 of the Land Dispute Tribunal Act as read together with section 2 of the Land Control Act.***
>
> ***3. The learned trial magistrate erred in law by holding that there remains no proper suit for her Court to entertain whereas the suit before her was legally sound with overwhelming chances of success.***
>
> ***4. The learned trial magistrate grossly misdirected herself and/or erred in law by failing to exercise her discretion judiciously and by declining to appreciate the submissions advanced by the appellants counsel thereby reaching erroneous decision bereft any sound legal backing."***

When the appeal came up for directions on 10th March, 2010 **Mr. Otieno** and **Mr.Mbunde** learned counsel for the appellants and respondent respectively agreed to convass the same by way of written submissions. Subsequently they filed and exchanged the written submissions which I have carefully read and considered.

On the issue of jurisdiction, I do not agree with the conclusion reached by the learned magistrate. I am of the view that the Honourable court had jurisdiction to entertain the suit as the provisions of the land dispute tribunals Act do not apply to the suit premises as they are still under Land Adjudication process. The appellants had letters of confirmation of ownership from the Land Adjudication and settlement officer that the suit premises were still undergoing adjudication process but the suit premises all the same belonged to them respectively. The definition of land under the Land Dispute Tribunals Act does not include land which is still under Land Adjudication process and such parcels of land

are expressly exempted from the applicability of the said Act in it entirety.

Land is defined in section 2 of the Land Dispute Tribunals Act as follows:-

> ***"Land means "agricultural land" as defined in section 2 of***
>
> ***the Land Control Act, whether or not registered under the registered Land Act, but does not include land situated within an adjudication section declared under the land adjudication Act or land Consolidation or land which is the subject of determination by the Land Registration court under the Land Titles Act."***

The suit premises are still under adjudication and therefore expressly exempted from the applicability of the Land Dispute Tribunal Act . It was therefore erroneous for the trial magistrate to invoke section 3(1) of the Land Dispute Tribunal Act and purport that the Court's jurisdiction to entertain the dispute was ousted. What was required of the Appellants to originate the suit was consent from the Land Adjudication officer as stipulated in section 30(1) of the Land Adjudication Act . That section provides Interalia:-

> ***"30.(1) Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication Section until the adjudication register for that adjudication has become final in all respects under section 29(3) of this Act."***

The above provisions of Law conferred Jurisdiction over the learned magistrate to determine dispute subject to an adjudication officer granting such consent. The Appellants duly obtained the said consent.

From the foregoing, it is apparent that the trial court had jurisdiction to entertain the suit, thus the learned trial magistrate misapprehended the applicability of the provisions of the land Disputes Tribunals Act as correctly submitted by counsel for the appellants.

No doubt the learned magistrate was alive to the conditions for granting of interlocutory injunctions as spelt out in the Celebrated case of **Geth .v. Cassman Brown and Company (1973) E.A.358**. However in holding that the appellants had not established a prima facie case with probability of success, the learned magistrate relied on issues which were never canvassed before her. The learned magistrate brought in the issue of exhibits having not been paid for and proceeded to disregard the same on account of nonpayment of court fees.

Nowhere however in the record did the respondent canvass the issue. The respondent's submissions were limited to her demand that the 1st appellant be present in court even if she had relocated to the United States and also that

the suit premises had encroached into the land belonging to **Teleo** family that she occupied.

Besides, it is evident that the Appellants duly paid for the annextures as can be verified from a copy of the application on record. It clearly discloses the assessment of the fee payable on the application and which fee included that for annextures which was duly paid going by the court receipt in the court file.

This is a court of record and I am unable to discern from which source the learned trial magistrate came up with the issue of nonpayment of court fees on annextures and who in particular raised the same. It was therefore improper for the learned trial magistrate to come up with a ground which was never canvassed before her and to cling on the same as a basis for dismissing the application. It is trite law that a court should only decide issues on record. I would refer the learned magistrate to the words of **Scrutton, LJ** in the case of **Blay .V. Pollard and Morris (1930) 1 KB 682:-** ***"Cases must be decided on the issues on record: and if it desired to raise other issues they must be placed on record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleading, and in my opinion, he was not entitled to take such a course….."*** This passage was cited with approval in **Captain Harry Candy .V. Caspair air Charters Limited (1956) 23 EACA 139.** The same situation obtains here. The learned magistrate, with respect, was clearly wrong in holding that the annextures were not paid for when infact they were and when the issue was neither raised nor canvassed before her by the respondent or any of the parties to the application.

The respondent only filed grounds of opposition. No replying affidavit(s) was subsequently filed. As such, the contents of the supporting affidavit to the application remained uncontroverted. They are therefore deemed as admitted and even if for a moment it was found that the learned trial magistrate was right in disregarding the annextures which were letters confirming ownership of the suit premises by the appellants from the Lands Adjudication officer, the depositions contained in the said Affidavit which were never challenged were adequate to establish a prima facie case since the Appellants had deposed that they are the registered owners of the suit premises under the adjudication register. Further there was even reports on record by District land Adjudication and settlement officer and District surveyor, confirming the appellants' ownership of the suit premises and the respondents' trespass thereon. On this score again the trial magistrate was wrong to hold that the appellants had not established a prima facie case.

The upshot of all the foregoing is that the learned magistrate erred in law and in fact by failing to exercise her discretion in favour of the Appellants in view of the overwhelming evidence on record which established that the suit premises belonged to the Appellants. Over and above, that the learned trial magistrate too misapprehended the applicability of the provisions of the Land Disputes Tribunals Act. Accordingly, I allow the appeal, set aside the order of the learned magistrate dated 27th November, 2009 dismissing the application and substitute therefor with an order

allowing the application dated 3rd October, 2009 in terms that the defendant, her servants or agents are hereby restrained by an order of temporary injunction from interfering in any way whatsoever with parcels of land known as **Transmara/Nkarora/875** and **Transmara/Nkararo/860** pending the hearing and final determination of the suit. The appellants too shall have the costs of the application in the subordinate court as well as this appeal.

Judgment dated, signed and delivered at Kisii this 31st Day of May, 2010.

ASIKE-MAKHANDIA

JUDGE