REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Appeal 24 of 2000

LUKE BIRITHU M'CHOKERA ……...……. APPELLANT

AND

JACOB GITONGA ……. RESPONDENT

(Being an appeal from the order of the Honourable Maxwell N. Gicheru, Snr Resident Magistrate,

Maua in SRMCC No. 84 of 1997 delivered on the 17th day of November 1999)

JUDGMENT OF THE COURT

The appellant herein was the objector in Maua SRMCC No. 84 of 1997 in which the respondent herein was the plaintiff. The plaintiff had sued the defendant, one Samuel Gitonga on allegations that the defendant had assaulted the plaintiff on the 17th June 1995, causing the plaintiff the following injuries:-

(a) Serious cut on the head

(b) Injuries on the shoulders

(c) Injuries on both legs

(d) Injuries on fingers

The plaintiff averred that as a result of the said assault, the defendant was apprehended and charged in Criminal Case No. 786 of 1995 (at Maua) and on conviction was sentenced to 10,000/= fine or in default to serve six (6) months imprisonment. That the defendant never appealed against the conviction and sentence.

The plaintiff also averred that during the assault, the defendant stole from the plaintiff a sum of Kshs. 2,500/= and further that the plaintiff spent money following up the criminal case against the defendant and thus prayed for judgment against the defendant for the following:-

(a) Special and general damages

(b) Costs of the suit and interest

The defendant neither entered appearance nor filed defence and the case against him proceeded ex-parte. By his judgment dated 2.12.1998, the learned trial magistrate awarded Kshs. 150,000/= general damages

for the injures sustained by the plaintiff. The plaintiff was also awarded costs and interest.

The plaintiff then proceeded to execute the decree and attached property which was said to belong to the appellant herein. Consequently, on 16.7.1999, the appellant filed his notice of objection under Order 21 rule 53 of the Civil Procedure Rules (CPR) which provides as follows:-

"53(1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to the decree holder of his objection to the attachment of such property.

(2) Such notice shall contain the objector's address for service and shall set out shortly the nature of the claim which such objector or person makes to the whole or portion of the property attached."

Consequent upon the giving of the notice by the objector/appellant he filed his application dated 9.8.99 under Order 21 Rule 56 of the Civil Procedure Rules, seeking to establish his claim over miraa trees growing on land parcel No. NJIA-CIA-MWENDWA Adjudication Section 1605. The appellant prayed for an order declaring that the attached miraa growing on the objector's land parcel No. 1605 NJIA-CIA-MWENDWA Adjudication section was the objector's property.

The grounds upon which the application was based were that (a) The miraa attached by the attaching creditor is on the objector's land and the same belongs to him (b) The attaching creditor has intimated to court of his intention to proceed with attachment herein and therefore if the objector is not heard in these proceedings, attachment herein attachment and shall (sic) take place at his detriment.

In the affidavit supporting that application, the appellant averred that the attachment creditor attached his (appellant's) miraa which stands on land parcel No. NJIA-CIA-MWENDWA land adjudication section No. 1605. The appellant annexed to the affidavit marked "LBMI" a copy of a letter from the District Land Adjudication and Settlement Officer evidencing the fact of ownership of the land. The said annexture which is found at page 5 of the Record of Appeal confirms that land parcel No. 1605 at NJIA-CIA-MWENDWA Adjudication section belongs to the appellant though title deeds were yet to be issued.

The application was opposed through the replying affidavit sworn by Ayub K. Anampiu advocate for the plaintiff. He contended that the applicant had not established that he had an arguable appeal, nor had he established that the parcel of land in question belonged to him. It was also contended on behalf of the respondent that the appellant had brought the application in collusion with the defendant.

The plaintiff/respondent also swore a replying affidavit dated 17.8.1999 and filed in court on 18.8.1999. The plaintiff averred that the appellant had no claim over the miraa which was the subject matter of the attachment. He contended that the miraa belonged to the defendant. He also contended that the objector/appellant had brought the application in collusion with the defendant in order to defeat the ends of justice. The plaintiff, though acknowledging annexture marked "LBMI" stated that the said letter was no proof that the miraa attached to the objector's land belonged to the objector. The plaintiff stated further that there was need to prove ownership of the miraa and not merely ownership of the land on which the miraa stood.

On the 17.11.1999, the learned trial magistrate delivered his ruling on the objection proceedings. His conclusion was that the attached miraa was not on the objector's land. The learned trial magistrate however acknowledged that the objector/appellant had annexed a certificate from the District Land Adjudication Officer to prove that he owned the land.

It is against that ruling that the objector/appellant has now appealed. The Memorandum of Appeal, filed in court on 15.4.2000 sets out three grounds of appeal, namely that:-

1. The learned senior resident magistrate erred in law and fact in dismissing the appellant's objection,

even after finding that the objector/applicant had documents in support of his proprietary rights over the land, where the attached miraa was growing.

2. The learned senior resident magistrate erred in law and fact in arriving at his decision in that he does not state why he believes in the truth of the respondent's replying affidavit.

3. The learned senior resident magistrate's order is against the weight of evidence adduced.

During the hearing of the appeal, Mr. Mwanzia contended on behalf of the appellant that the appellant had proved that the land on which the attached miraa stood belonged to him and consequently, and in light of the provisions of section 3 of the Registered Land Act, the miraa also belonged to the appellant. Section 3 of the Registered Land Act (the R.L.A.) Cap 300 Laws of Kenya defines land as follows:-

"Land" includes land covered with water, all things growing on land and buildings and other things permanently affixed to land."

It was further contended on behalf of the appellant that the respondent gave no tangible evidence that the attached miraa was not standing on the appellant's land.

On the respondent's behalf, Mr. Anampiu contended that the letter from the land adjudication officer – annexture "BMI" only shows that the appellant is the owner of the land but that the same does not say that the appellant owns the land where the miraa stands. It was further contended for the respondent that the letter is not conclusive evidence that the miraa was on the appellant's land.

The issues that arise for determination by this court are whether it is true that the miraa that was attached stood on the appellant's parcel of land number 1605 of Njia-Cia-Mwendwa Adjudication Section. There is no dispute that the appellant adduced evidence to show that he is the recorded owner of the land parcel on which the attached miraa stood. A careful look at the various applications and the supporting affidavits and especially the appellant's affidavit in support of the application which gave rise to the ruling appealed from clearly shows that the miraa that was attached by the respondent herein stood on the same parcel of land owned by the appellant. Section 3 of Cap 300 is clear as to what constitutes land. Contrary to Mr. Anampiu's views, the definition of land is universal and is not therefore limited to land registered under the Registered Land Act. Similarly, under Order 6 Rule 4(3) of the Civil Procedure Rules, land is defined as follows:-

"*(3) In this rule, "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land."*

In view of these definitions, the learned trial magistrate should have found that the attached miraa formed part of the appellant's land. The appellant's objection should therefore have been upheld.

I have also carefully considered the learned trial magistrate's ruling in which he acknowledges the fact that the land in question belongs to the appellant. There is no other evidence on record to show that the attached miraa stood on another person's parcel of land. The argument put forward by the respondent is that the fact that the land belongs to the appellant is not conclusive proof that the miraa also belongs to the appellant. This line of argument has no legs to stand on in light of the definitions both under section 3 of the Registered Land Act and Order 6 Rule 4(3) of the Civil procedure Rules.

In light of the above findings, I am satisfied that this appeal has merit.6 The same is allowed. Accordingly, the ruling of the learned trial magistrate dated 17.11.99 is hereby set aside. In lieu thereof, I allow the appellant's objection application dated 9.8.99 and find that the appellant is the owner of the attached miraa growing on land parcel No. 1605 Njia-Cia-Mwendwa Adjudication section and therefore not liable to be attached in satisfaction of the decree in Maua SRMCC No. 84 of 1997.

Costs of this appeal and costs of the objection proceedings in the court below shall be paid to the appellant.

Orders accordingly.

Dated and delivered at Meru this …… day of …….. 2006.

RUTH N. SITATI

J U D G E