



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
Civil Appeal 12 of 2002**

JOHN ODUKA MAKAYA.....APPELLANT

VS

ANZELIMO CALISTO OUMARESPONDENT

J U D G M E N T

In a plaint dated 12th November 2001, filed before the Senior Resident Magistrate's court at Busia, (Kenya), John Oduka Makaya, hereinafter referred to as the appellant sought for the following main prayers against ANZELIMO CALISTO OUMA hereinafter referred to as the Respondent:

- (a) An order of injunction restraining the Respondent from burying the remains of one Philip Patrick Ouma, deceased in L.R. NO. SOUTH TESO/ANGOROMO/5650*
- (b) A further order of injunction to restrain the Respondent and or his agents or servants from interfering with the appellant's quiet enjoyment of L.R. NO. SOUTH TESO/ANGOROMO/5650.*
- (c) Costs of the suit.*

When served with the pleadings the Respondent denied the appellant's claim and counter-claimed against the appellant for an eviction order seeking to remove him from L.R. NO. SOUTH TESO/ANGOROMO/5650 hereinafter referred to as the suit premises. The Respondent also sought in his counter-claim for damages and costs.

The dispute went for hearing before Mr. J.N. MUKUT, District magistrate who finally found the case in favour of the appellant and proceeded to dismiss Respondent's the counterclaim. The appellant was not happy with this part of the Judgment hence this appeal. He listed 15 grounds of appeal but when the same came up for hearing Mr. Wanyama who appeared for the appellant condensed the grounds to three. Before considering each of these grounds I endeavour to set out the brief history of the case leading to this appeal.

The appellant presented the evidence of six witnesses in support of his case before the learned District Magistrate. His adversary testified and called for the evidence of his younger brother.

The appellant testified before the trial court to the effect that he bought L.R. NO. SOUTH TESO / ANGOROMO/5650 from one Philip Ouma in the Month of November 1998. The land he bought measures 1 ½ acres at a consideration of Ksh.48,000 said the vendor, Philip Ouma now deceased inherited the land from his late father Michael Ouma Omadu. The suit premises he said was a subdivision from L.R. NO. South Teso/Angoromo/388. The appellant produced the sale agreement, the title deed and the mutation forms to prove that he acquired the land legally. Samuel Mwaura, who testified as P.W 3 also confirmed he witnessed the transaction between the appellant and Philip Ouma, deceased. The appellant also told the trial District magistrate that he built a semiwww. permanent house in the suit

premises in 1998 upon which the late Philip Ouma gave him vacant possession and moved to reside in Nambale. The appellant's assertion was confirmed by the evidence of his neighbour at the suit premises Mr. Ezekiel Okwara Agieka who testified as P.W4.

The Deputy District Land Registrar, Busia, Mr. Richard Sanya testified as P.W5. He confirmed that L.R. NO. SOUTH TESO/ANGOROMO/388 was subdivided into four portions namely 5570, 5571, 5649 and 5650. He however said these subdivisions were later cancelled when it became apparent to them that the Respondent had applied for subdivision before having the grant of representation issued to him in respect of the estate of Michael Ouma Omadu deceased confirmed. This witness also conceded that titles were issued pursuant to some of the cancelled mutation forms. Joash wafula Simiyu, a government surveyor based at Busia who testified as P.W 6 told the trial court that the defects detected on the subdivisions were corrected with the approval of the Respondent in his capacity as the legal representative of the estate of the late Michael Ouma Omadu.

The appellant also informed the trial court that the Respondent attempted to forcefully enter the remains of Philip Ouma deceased on his parcel of land and that prompted him to seek for redress before the trial court.

The Respondent in his defence denied knowledge of the sale agreement between the appellant and Philip Ouma deceased. He claimed that the appellant obtained title to the suit premises by fraud and forgery. He further alleged that it is because of the alleged forgery and fraud that the Lands Office cancelled the subdivisions. He further told the trial magistrate that Philip Ouma deceased was of unsound mind hence he was not in a position to contract. He however conceded that the appellant constructed a semi-permanent house on the suit premises in 1998 and he has taken no action against him. Upon cross-examination he agreed that the subdivisions were corrected with his approval. The Respondent's brother, Joseph Albert Okumu testified in support of the defence. He said he was aware that Philip Ouma deceased had sold his land each measuring 1½ acres to the appellant and one Duncan Leaving a balance of 1 acre for his burial site. He claimed that is where he and his relatives went to dig Philip Ouma's grave before they were restrained by the court order.

After listening to the evidence and submissions presented before him, the learned District Magistrate came to the conclusion that the only issue that came up for his decision was whether or not the appellant lawfully bought L.R. NO. SOUTH TESO/ANGOROMO/5650 from Philip Ouma deceased. He came to the final conclusion that the appellant lawfully acquired a portion of the suit premises measuring 1 ½ acres.

The trial magistrate also found that the appellant was only entitled to 1 ½ acres comprised in the suit premises and that he was not entitled to any thing above 1 ½ acres as depicted on the ground and by the title deed the appellant possessed. The learned District Magistrate granted the prayers in the plaint and went further to direct the government surveyor to ascertain the actual position on the ground. This latter findings must have stung the appellant who was prompted to prefer this appeal.

The first ground raised on appeal was to the effect that the trial magistrate erred in delivering a Judgment on an issue which was not pleaded. Mr. Wanyama for the appellant complained that the learned District magistrate prejudiced the appellant when he made a decision on an issue which was not prayed for. Mr. Balongo opted not to address this court over this ground. Mr. Wanyama relied on the decision of the court of Appeal in the case of **OLE NGANAI VS ARAP BOR (1983) K.L.R. 233** to buttress his proposition.

Though Mr. Wanyama for the appellant did not come out clear on the issue, I can only discern that the appellant is complaining of the last order made by the trial learned District Magistrate in which he said:

“It is further ordered that the District Lands Registrar and the government surveyor will ascertain the situation on the ground with a view to complying with this Judgment.”

I have perused the plaint dated 12th November 2001 and the defence and counterclaim dated 21st November 2001. It is clear from the above pleadings that neither of the parties pleaded nor prayed before

the trial magistrate for such an order or finding from the learned district magistrate. In the case of **NGANAI VS ARAP BOR** (Supra) the court of appeal held inter alia that it was wrong for the judge to grant an order to the defendant which had not been asked for by the party. In the case before the court of appeal, the defendants had not asked for an order either in their defence or during the trial of the preliminary issue, of the kind made by the judge.

The purpose of course of the pleadings is to give the adversary notice of the case which has to be met at the trial. A litigant is bound to clearly lay bare his case so that his opponent is not taken by surprise. This will also enable the trial court or the parties to pick out the issues which the court will be called upon to determine.

There are instances where a court may allow evidence to be called, and may base its decision, on an unpleaded issue if it appears from the course followed at the trial that the unpleaded issue has in fact been left to the court for decision. The celebrated case over this issue is that of **ODD JOBS VS MUBIA (1974) E.A. 476**. In this case the court of appeal for East Africa held inter alia that a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue was left to the court for decision.

The view I take in this matter is that though the issue was not pleaded by the parties in their pleadings the record shows that the evidence presented before the learned trial District Magistrate left the issue to be decided by the aforesaid court. Furthermore the appellant has not shown that he would suffer hardship or prejudice which may result to a miscarriage of justice. At this juncture I wish to demonstrate from the evidence on record that both the parties left the matter to be determined by the learned District magistrate as follows:

In his evidence in chief, John Oduka Makaya said in part:

“The said Nyongesa took me to one Philip Ouma who wanted to sell his plot. That was in November 1998. I viewed the shamba. It had sisal crop marking its boundaries. I agreed to buy the plot. We consulted Land Surveyors to subdivide and delienate the plot. The said Philip wanted to sell the whole plot but I declined. I wanted to buy a portion of the same. Philip lived on the plot. I bought 1 ½ acres for Ksh.48,000/=. The plot was south Teso/Angoromo /.Angoromo/5650. It was a subdivision.I didn’t know the full acreage of the plot.”

P.W. 5, Richard Sanya, a witness called by the appellant told the trial court in part::

“We have in our original records P No. SOUTH TESO/ANGOROMO/388. The original proprietor thereof was Ouma Omadu. On 30/11/98 the said parcel of land was subdivided. As a result Parcel No. 5570, 5571, 5649 and 5650 were created. These subdivisions were cancelled when we discovered that the owner had died. This was done on 28/12/98. We instructed the surveyor Mr. Simiyu to verify and ascertain the situation on the ground. The surveyor is ascertaining the facts before our further action.”

P.W.6, Joash Wafula Simiyu a witness also summoned by the appellant told in part the trial court:

“It was discovered that some subdivisions were not reflected in the sketch plan on the mutation forms. They were however on the ground. That was why we were sent to correct the anomaly. We have compiled a mutation form showing the correct survey. It is not however complete as yet. The plaintiff’s plot is indicated as “D” on the mutation form. The plot named ”D” is about 2.5 acres or 1.17 ha.”

On the part of the Respondent who testified as D.W1, he said in part:

“My late brother Philip Ouma (deceased) who is alleged to have sold land to the plaintiff was not of sound mind at the time and could not have the ability and capacity to authorize the sale. I object to the size of the plot. The plaintiff’s alleged portion is reflected on exhibit No. 7. the

plaintiff's claims to have bigger portion than was started in his agreement of sale with the deceased."

D.W 2, JOSEPH ALBERT OKUMU on his part said:

" I and my brothers went to dig a grave on a plot of land that the deceased left for himself after selling part of his land. The deceased had sold 1 ½ acres of land to the plaintiff. His land acreage was 4 acres. He had also sold 1 ½ acres to Duncan. We went to dig the grave on the remaining part. The plaintiff bought only 1 ½ acres yet he is actually owning 2 ½ acres. This is what we are disputing."

From the above excerpts it is clear that the parties left to the trial court to make a decision on the actual position of the suit premises on the ground. I am satisfied that the learned trial District magistrate correctly directed his mind and made the correct decision. The appellant's argument on this issue therefore is dismissed.

The second ground raised by the appellant is that the Respondent was estopped from raising issues based on fraud and forgeries whereas he participated in the whole saga. Mr. Balongo for the Respondent was of the view that there was no competent cause of action before trial court by the appellant. He based his argument on the fact that the suit land did not exist for sale because the real owner had died. The learned advocate also pointed out that the land was subdivided, transferred and titles issued without letters of administration. He was of the view that Philip Ouma (deceased) had no capacity to sale the land to the Respondent.

With great respect to the learned advocates, these issues though pleaded were not brought to the attention of the trial District Magistrate. However the record shows that the learned trial magistrate after weighing the evidence presented to him came to the conclusion that the appellant did not commit any forgeries. I have also re-evaluated the evidence and it is clear that the Respondent and his only witness did not present strong evidence to prove fraud and forgeries pleaded in the counter claim. The trial magistrate came to the correct conclusion that the Respondent proceeded to subdivide LR. NO. SOUTH TESO ANGOROMO /388 on a mistaken believe that he had full capacity to do so. I have no reason which can make me disturb the trial magistrate's decision over the matter.

Finally, the appellant complained that he should not have been denied costs of the suit. Mr. Balongo did not address this court over the issue on costs. The trial magistrate opined that since both parties substantially succeeded in their dispositions then he saw no point of awarding costs. A critical look at the decision of trial magistrate, reveals that though he dismissed the counter-claim after he found out that the Respondent had a claim on account of what would remain out of what was sold by Philip Ouma deceased. If some land is found to be over and above 1 ½ acres comprised in L.R no SOUTH TESO/ANGOROMO/5650 then that would definitely revert back to the legal representatives of the estate of Michael Ouma Omadu deceased and that of Philip Ouma deceased. Again I find that the trial magistrate applied the correct principles when he made no order as to costs.

In a nutshell I find that the trial magistrate came to the correct decision in view of the evidence and submissions presented to him. Though he did not analyse the principles applicable in awarding orders of injunctions, I am of the considered view that after reassessing the evidence on record I find that the appellant had in all force proved that he had a prima facie case with a probability of success. He managed to establish in his evidence and those of his witnesses to show that he possessed a title deed and that he was in actual possession of the suit premises. There was no dispute that he is in occupation having constructed a semi permanent structure which still stands up on the suit premises todate. The Respondent has raised issues touching on the validity of the title deed possessed by the appellant. With due respect to the learned counsel for the Respondent I think the issue was correctedly determined by the learned District magistrate.

In the final analysis this appeal is dismissed in its entirety with costs to the Respondent.

DATED AND DELIVERED THIS 8th DAY OF April 2005

J.K. SERGON

JUDGE