



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT HOMA BAY

ELC APPEAL NO. 25 OF 2021

(FORMERLY MIGORI ELC APPEAL NO 23 OF 2019)

JOSEPH ODHIAMBO GORI (Suing as the administrator (ad litem)

of estate of Awino Gori-Deceased).....APPELLANT

VERSUS

FULL GOSPEL CHURCHES OF KENYA.....RESPONDENT

(Being an appeal from the judgment of Hon. J.P Nandi (Principal Magistrate) delivered on 27th September 2019 in Oyugis Principal Magistrate's Court Land Case Number 8 of 2018)

JUDGMENT

1. This is an appeal from the judgment of Hon. J.P Nandi (Principal Magistrate) delivered on 27th September 2019 in Oyugis Principal Magistrate's Court Land Case Number 8 of 2018 where the learned trial magistrate reasoned in part;

“....I find that indeed the plaintiff sold the suit land to the defendant.....

.....the plaintiff's suit is time barred in terms of section 7 of the Limitation of Actions Act.....

.....I find that the plaintiff has not been able to prove his case on balance of probability and dismiss his case with costs to the defendant.”

2. The appellant, Joseph Odhiambo Gori is represented by the firm of Nyauke and Company Advocates.

3. The respondent, Full Gospel Churches of Kenya is represented by the firm of Kisia and Company Advocates.

4. The appellant was dissatisfied with the trial court's decision as captured in paragraph 1 hereinabove hence, lodged the present appeal being the first one from the trial court in this matter. Therefore, I have to consider and evaluate the evidence on record afresh and come to my own conclusion and inferences bearing in mind that I neither saw nor heard the witnesses as noted in the case of **Williamson Diamonds Ltd-vs-Brown (1970) EA 1**.

5. It must be appreciated that in doing so, the appellate court will not ordinarily interfere with the findings of fact by the trial court unless they are based on no evidence at all or a misapprehension of evidence or the court is shown demonstrably to have acted on wrong principles in reaching the findings; see **Mwanasokoni-vs-Kenya Bus Services Limited (1982-88) 1 KAR 278**.

6. The appellant was the plaintiff before the trial court. The gist of the plaintiff's claim before the trial court was commenced by way of a plaint dated 23rd January 2019 and filed in court on 25th January 2019 seeking an order of injunction against the defendant in respect of the suit land, LR No. Kabondo/Kakangutu West/209 and costs of the suit. The appellant (PW1) testified and called Hassan Otiro (PW2), Cosmas AkowaAroto (PW3), Mary ArotoAnyango (PW3) and John OdhiamboObudho (PW5) in support of the claim.

7. The respondent was the defendant before the trial court. The gist of the defendant's case before the trial court is as captured in the statement of defence dated 13th February 2019 and filed in court on even date claiming, inter alia, that the appellant sold the suit land to the

respondent on 1st October 2004. In the suit, the respondent called Vitalis Mbago (DW1) alongside Richard Angir (DW2) and prayed that the appellant's suit be dismissed with costs.

8. The learned trial magistrate relied on the parties' respective pleadings, the evidence on record and cited the case of **Attorney General of Belize et al-vs-Belize Telecom Ltd and Another (2009) 1 WLR 1980 at 1993** and the case of **Curtis-vs-Chemical Cleaning and Dyeing Co.Ltd (1951) ALLER 631** in reaching the findings, inter alia, as stated in paragraph 1 hereinabove.

9. The instant appeal was originated by way of a memorandum of appeal dated 4th October 2019 and lodged in court on 7th October 2019 based on grounds on the grounds infra;

a) THAT the learned Magistrate erred in law and fact in finding and holding that the Respondent did not trespass on the suit land Title Number KABONDO/KAKANGUTU/209.

b) THAT the learned Magistrate erred in law by arriving at a determination that the suit land was donated to the Respondent without any evidence to support the same contrary to the clear provisions of the law on gift *inter vivos* involving land.

c) THAT the learned Magistrate erred in law and fact in relying on a sale agreement signed by a party who is not the owner of the suit parcel of land nor an administrator, to find that the Appellant sold to the Respondent the suit land.

d) THAT the learned Magistrate misdirected himself in law by ignoring the law and the evidence presented on the issue of intermeddling as clearly spelt out under section 45 of the law of Succession Act.

e) THAT the learned Magistrate erred in law and fact by misapplying the provisions of the law on limitation of action touching on land by holding that the Appellant's suit was time barred when the evidence clearly showed that the Respondent was merely a licensee on the suit parcel of land and therefore the Appellant was still the owner of that land who could at any time of his discretion, ask the Respondent to vacate the same.

f) THAT the learned Magistrate erred in law and fact when he contradicted himself by finding that the suit land was donated to the Respondent and at that time purchased the same when the law and the evidence presented shows otherwise.

10. Wherefore, the appellant has sought that;

a) This appeal be allowed and the orders of Hon. J. P. NANDI be set aside and/or quashed.

b) The costs of this appeal and the costs of the main suit in the trial court be awarded to the Appellant.

11. Initially, the appeal was lodged at Migori Environment and Land Court and admitted herein on 8th December 2020. It was transferred to this court on 22nd September 2021. The same was heard by way of written submissions further to this Honourable court's orders and directions made on 18th March 2021.

12. By the submissions dated 7th February 2022 and duly filed in court on 8th February 2022 with the list of authority of even date and annexed thereto, learned counsel for the appellant relied on the case of **Re Estate of Chepkwony Arap Rotich (2018) eKLR** on gift *inter vivos*. Counsel further cited **sections 45 (1) and 82 (b) (ii) of the Law of Succession Act (Cap 160)**, **Re Estate of John Gakunga Njoroge (2015) eKLR** and **Macalus Kiranga Nimrod and another-vs-Nessy Kitui Justus and another (2019) eKLR** regarding estate of a deceased person, to reinforce the submissions.

13. In the submissions dated 4th February 2022, the 1st respondent's counsel made reference to the grounds of appeal, the pleadings before the trial court. Counsel cited **section 7 of the Limitation of Actions Act (Cap 22 Laws of Kenya)** to buttress the submissions.

14. In the foregone, I am attracted to the issues framed in the applicant's submissions and endorse them accordingly. The issues arise from the grounds of this appeal which boil down to whether;

a) The agreement made between the appellant and the respondent (Exhibit-D1) is valid.

b) The respondent trespassed onto the suit land.

c) The suit before the trial court was time barred.

15. On the issue of Exhibit-D1, the appellant's counsel submitted that the same was signed by a party who was neither the owner of the suit land nor an administrator thereof. In cross examination, PW1 stated that he signed Exhibit-D1 and that he was not forced to sign it.

16. The testimony of PW1 was affirmed by his son (PW2) who during cross examination, stated;

"...I am aware of the sale agreement herein.....my father was involved in the sale agreement herein. My father is called JOSEPH ODHIAMBO GORI.....He signed the agreement....."

17. The existence of Exhibit-D1 was confirmed by DW1 who stated that the sale agreement was reduced into writing. It was further confirmed by DW2 who during examination in chief stated that;

“...I signed the agreement. The plaintiff also signed the agreement...”

18. I bear in mind validity of contracts in sale of land as provided for under sections 38 and 39 of the Land Act, 2016 (2012). I also note sections 36, 37, 40 and 42 of the Land Registration Act, 2016 (2012) on the general principles of disposition affecting registered land.

19. The appellant alleged that Exhibit-D1 was an illegal contract. I am guided by the decision of Lindley L.J in the case of **Scott-vs-Brown Doering MCNab and Co. (3) (1892) 2 QB 734 at 728** that no court ought to enforce an illegal contract (Ex turpi causa non oritur action) whether the illegality has been pleaded or not.

20. In paragraph 10 of the judgment, the learned trial magistrate examined the evidence of DW2, a pastor at the respondent church. That DW2 stated that the church was started in the year 1955. That the appellant approached the respondent for the sale of the suit land and that the former sold it to the latter as revealed in Exhibit-D1.

21. Additionally, PW1 told the trial court that he obtained PExhibit 1 being a grant in respect of the estate of his deceased mother, Awino Gori. Indeed, at paragraph 4 of the judgment, the learned trial magistrate observed thus;

“The plaintiff.....said that Awino Gori is her (meant his) mother and produced limited grant as exhibit.....”

22. It is important to note that in the case of **Rajesh Pranjivan Chudasama-vs-Sailesh Pranjivan Chudasama (2014) eKLR**, the Court of Appeal remarked; *“...A litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in cases of intestate succession....”*

23. No doubt the estate of the deceased is vested in the legal representative; see **Trouistik Union International and another –vs-Jane Mbeyu and another (1993) eKLR and section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya**.

24. It is common ground that the appellant’s deceased mother was the registered proprietor of the suit land with effect from 5th February 1973 as disclosed in PExhibit 2. A certificate of title thereof was issued to her on 12th January 2015 as shown therein. DW1 did affirm that position.

25. By PExhibit 1, the appellant had the legal capacity to enter into the contract (Exhibit D-1 as stipulated in section 82 of the Law of Succession Act Chapter 160 Laws of Kenya. Therefore, the same was not a gift inter vivos as recognized in **Chepkwony case** (supra) and the appellant did not intermeddle with the estate of his deceased mother as envisaged under **section 45 of the same Act** and as held in **Gakunga Njoroge and Karanga Nimrod cases (supra)**.

26. As regards trespass, the appellant alleged at paragraph 4 of the plaint that the respondent is a trespasser on the suit land. However, PW2, PW3, PW4, PW5, DW1 and DW2 testified that the respondent has been thereon since the year 1955. In particular, during cross examination PW5 stated;

“...The church has never trespassed on the suit land.....”

27. In **Black’s Law Dictionary 10th Edition at page 1733**, the term “Trespass” means;

“An unlawful act committed against the person or property of another.”

28. Having noted the said definition weighed against the testimonies of PW2, PW3, PW4, PW5, DW1 and DW2, the natural consequence is that the respondent is lawfully in possession and occupation of the suit land. PExhibits 1 and 2 as well as Exhibit-D1 reinforce that position.

29. Concerning time limitation in lodging the suit, Exhibit-D1 was made on 1st October 2004 while the appellant filed the suit on 25th January 2019 claiming the suit land. Plainly, the issue of time limitation appeared in the course of the trial of the suit as held in **Odd Jobs-vs-Mubia (1970) EA 476** hence, it informed the learned trial magistrate in arriving at his faultless finding that the suit was statute barred as noted in paragraph 1 hereinabove.

30. So, it is the finding of this court that the trial court’s findings were founded on evidence and correct application of legal principles. I proceed to affirm the decision of the learned trial magistrate rendered on 27th September 2019 in the instant dispute.

31. Accordingly, this appeal mounted by way of a memorandum of appeal dated 4th October 2019, be and is hereby dismissed.

32. By dint of the proviso to **section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya**, costs of the appeal and the costs of the suit in the trial court shall be borne by the appellant.

33. It is so ordered.

DELIVERED, DATED and SIGNED at Homa Bay this 1st March 2022.

G M A ONGONDO

JUDGE

PRESENT;

- a) Odera learned counsel for the appellant
- b) Kisia learned counsel for the respondent
- c) Okello, Court assistant

G M A ONGONDO

JUDGE