



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT IN SIAYA

SIAYA ENVIRONMENT AND LAND CASE NUMBER 10 OF 2021

NEHEMIAH MWANDA ONYANGO.....APPELLANT

VERSUS

MAURICE ODUOR ABUNY.....1ST RESPONDENT

WYCLIFFE OGOLA OCHIENG.....2ND RESPONDENT

WILLIAM OCHIENG OGWANG JUNIOR

(Being sued as administrators of the Estate of

DOLROSA AKINYI OCHIENG).....3RD RESPONDENT

WILLIAM ONYANGO OLOLO.....4TH RESPONDENT

(Being an Appeal to the Ruling Hon. J.O. Ong'ondo delivered on 28th November 2019 in Siaya PM -ELC NO.69 OF 2019)

JUDGEMENT

Introduction

1. Before this court delves into the substance of the appeal, it is important that the appeal is put in context and a brief background on the salient facts are necessary. From the contentions in the court records, the appellant allegedly purchased land parcel number CENTRAL ALEGO/HONO/1560 (**the suit property**) from William Ochieng Ogwang (deceased) for the consideration of Ksh. 300,000/-. However, the deceased died before he could transfer the suit property to the appellant. Upon his death, his estate was administered by his widow Dolrosa Akinyi Ochieng (deceased) vide ***Kisumu CM Succession Cause No.195 of 2016*** who allegedly sold and transferred the suit property to the 4th respondent for the consideration of Ksh. 2,500,000/-. Subsequently, the 4th Respondent allegedly, sold and transferred the suit property to the 1st respondent for the consideration of Ksh. 6,250,000/-. The 2nd and 3rd respondents are purportedly the legal representatives of the estate of Dolrosa Akinyi Ochieng.
2. By a ruling dated 8/10/2017, the appellant's summons for revocation of grant in ***Kisumu CM succession cause no.195 of 2016*** was dismissed by the court. Dissatisfied and aggrieved by this ruling, the appellant vide a memorandum of appeal dated 27/2/2018 lodged an appeal in ***Kisumu HC Succession Appeal No.1 of 2018***. By a notice of withdrawal dated 19/08/2019, the appellant withdrew the appeal. Following withdrawal of the appeal, the appellant filed a suit in the ELC court being ***Siaya PM ELC No.69 of 2019***.
3. Together with an amended plaint dated 6/09/2019, the appellant filed an amended motion of even date seeking injunctive reliefs against the respondents.
4. The parties appointed counsel to represent them as follows: the appellant who had been acting in person, appointed the firm nyamogo & nyamogo advocates who filed a notice of change of advocates on 26/09/2019, the firm of mugoye and associates acting for the 1st respondent filed a notice of appointment of advocates dated 9/09/2019 while the firm of omondi, abande & co. advocates acting for the 4th respondent filed a notice of preliminary objection dated 9/09/2019.
5. The preliminary objection raised the following verbatim reliefs;

a) The honourable court has no jurisdiction to handle the present suit because matters substantially in issue herein are alive in Kisumu succession appeal no.1 of 2018. The suit is sub judice the appeal.

b) The honourable court is called to adjudicate matters already *res judicata* having been dealt conclusively in Kisumu CM-succession cause no.195 of 2016.

6. As per the court directions, the preliminary objection was canvassed by way of written submissions and all the parties including the appellant's counsel participated in the proceedings.

7. By a ruling delivered on 28/11/2019 the court upheld ground 2 of the preliminary objection and struck out the suit with costs on the ground that the suit was *res judicata*. This ruling is the subject of this appeal.

Memorandum of appeal

8. The appellant filed a memorandum of appeal dated 23/12/2019 and a record of appeal dated 20/7/2020. The memorandum of appeal set out 13 grounds of appeal, however in his written submissions dated 16/06/2021, the appellant condensed his grounds into four namely:

a) The trial court misdirected himself by fusing and treating two distinct and separate regimes, that is civil procedure causes and succession as one and the same and arrived at the wrong finding;

b) The trial court misapprehended clear and apparent evidence and submissions that the Kisumu succession appeal no.1 of 2018 had been withdrawn as at the time of filing the impugned suit that was struck out;

c) The trial court erred in law by entertaining a preliminary objection when there was no ground to admit it; and

d) The trial court misdirected itself by failing to appreciate and consider that the appellant operated under an unfavourable legal position being unrepresented by an advocate as opposed to the respondents who were represented.

9. The appellant urged the court to allow the appeal with costs and that the ruling and order of the trial magistrate striking and/or dismissing the suit be set aside and a new trial ordered before a different magistrate with jurisdiction

Appellant's written submissions

10. The appellant filed three sets of written submissions dated; 16/04/2021, 9/07/2021 and 22/10/2021. He contended that a civil land cause can never be held to be *res judicata* to a succession cause because the two are distinct legal regimes one governed by the **Civil Procedure Act** while the other by the **Law of Succession Act**, he placed reliance in the case of **The Estate of Emilia Muchora (deceased) (2013) eKLR**. He submitted that the trial court failed to appreciate that a notice of withdrawal of appeal in **Kisumu HC Succession Appeal No.1 of 2018** had been filed and served on the 4th Respondent. He contended that the preliminary objection was improperly on record because the respondents had never filed a memorandum of appearance in accordance with **Order 6 Rule 1** of the **Civil Procedure Rules** and the notice of appointment of advocates by the 1st respondent's advocates contravened the law and, on that basis, he argued the court ought not to have entertained the preliminary objection. On this contention, he placed reliance on the authority of **Sunrise Properties Limited v Fifty Investment Ltd & Ano (2007) eKLR**. Lastly, he contended that contrary to **Article 159** of the **Constitution** and **Sections 1A, IB and 3A** of the **Civil Procedure Act**, the court in the interests of justice failed to give preferential treatment to an unrepresented party. On this he placed reliance on the case of **JMK v KK & LNK (2019) eKLR**. He stated that in essence what the trial magistrate imputed in his ruling was that a dismissal or striking out of summons for revocation of grant was equivalent and similar to striking out or dismissing a suit or a prayer that a title deed was obtained fraudulently. He averred that trial court in **Kisumu CM succession cause no.195 of 2016** did not have pecuniary jurisdiction to handle the succession cause. He urged the court to expunge the 1st respondent's written submissions for being filed out of time. On this, he placed reliance in the case of **Caroline Mutuku v Amos Kones Mabele & 2 Others (2021) Eklr**.

The 1st Respondent's written submissions

11. The 1st respondent's written submissions dated 21/10/2021 was filed outside the stipulated timelines, but, be that as it may and in the interest of justice, the court shall deem the written submissions as duly filed. The written submissions set out two issues for determination; (i) whether the suit was *res judicata* and, (ii) whether the preliminary objection was properly admitted by the court. On the 1st issue, 1st respondent contended that the suit was *res judicata* and placed reliance on **Section 7** of the **Civil Procedure Act, Page 46** of the **Kuloba J's book on Judicial Hints on Civil Procedure, (1984)** and the authority of **Mary Nyongesa Aloka v Lazarus Sirengo Mukoyani (2018) eKLR**. On second issue, the 1st respondent urged the court to administer justice without undue regard to procedural technicalities. On this, he placed reliance on **Article 159(2)(d)** of the **Constitution, Section 1A** of the **Civil Procedure Act**, the authorities of **Abdirahman Abdi also known as Abdirmahman Mohamed Abdi v Safi Petroleum Product Ltd & 6 others (2011) eKLR, Kamlesh Mansukhal Damji Pattni v Nasir Ibrahim Ali & 2 others (2005) eKLR** among others. He urged the court to dismiss the appeal with costs.

The 4th Respondent's written submissions

12. In response to the substantive appeal, the 4th respondent filed written submissions dated 29/09/2021. The 4th respondent stated he was in concurrence with the lower court's decision on its interpretation of **Section 7** of the **Civil Procedure Act**. He placed reliance on the authority of **Garden Square Ltd v Kogo & Ano (2003) eKLR**. He posited that the only issue for determination is whether the suit is *res judicata*. He urged the court to dismiss the appeal with costs.

Analysis and determination

13. Having considered the lower court record, record of appeal, memorandum of appeal and rival written submissions, this court has

identified two issues for determination; (i) whether the ELC court has jurisdiction to handle the suit and by extend whether the suit was *res judicata* and, (ii) Whether the preliminary objection was properly on record. I will proceed to analyse the legal and jurisprudential framework.

14. The answer to the 1st issue as to whether the ELC court has jurisdiction to handle the suit and by extend whether the suit was *res judicata* lies in establishing the respective jurisdictions of the ELC and probate courts. In the locus *classicus* case of **Owners of the Motor Vessel “Lilian S”, versus Caltex Oil (Kenya) Limited (1989) KLR1**, the court had this to say on the issue of jurisdiction;

“Jurisdiction is everything. Without it, a court has no power to make one more step”.

15. The jurisdiction of this court to hear and determine disputes relating to the environment, use and occupation of and title to land lies with **Article 162(2)(b)** of the **Constitution of Kenya, 2010**, **Section 13** of the **Environment and Land Court Act** and **Section 9** of the **Magistrates Courts Act**. While the probate court’s jurisdiction in intestate or testamentary succession to the estates of deceased persons is derived from

Section 2 of the Law of Succession Act.

16. The distinct and separate legal regimes by these two courts has led to the ELC court declining to enter into the realm of succession disputes and vice versa. These can be found in several authorities including; **Beatrice Wambui Kiarie & 2 others vs Tabitha Wanjiku Ng’ang’a & 9 others (2018) eKLR** and **Isaac Kinyua & 3 Others v Hellen Kaigongi [2018] eKLR**, **Wilson Mthui Mutungu v Beatrice Gathoni & Another (2016) eKLR**. In the case of **Republic v Chief Land Registrar & Another, JR ELC No. 11 of 2010 [2019] eKLR**, the court held as follows on the issue of distinctiveness of jurisdiction of the High Court and courts of equal status as follows: -

“Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of the application before me. A boundary dispute or enforcing an order relating to a boundary dispute falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. The drafters of the Constitution were very clear on the limits of this court’s jurisdiction and the jurisdiction of the courts of equal status.”

17. The **Practice directions on proceedings in the environment and land courts, and on proceedings relating to the environment and the use and occupation of, and title to land and proceedings in other courts** has provided a clear delineation on the jurisdiction of the ELC and probate courts as follows;

“All cases touching on inheritance, succession and distribution of land under the Law of Succession Act, Cap. 160 Laws of Kenya shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction”.

18. The question then that arises is, did the plaintiff’s suit relate to environment, use and occupation of and title to land which is a preserve of this court? The appellant’s amended plaint seeks the following verbatim reliefs:

a) A declaration that the certificate of title to land parcel no. CENTRAL ALEGO/HONO/1560 was issued and obtained fraudulently.

b) Cancellation of the certificate of title to land parcel no. CENTRAL ALEGO/HONO/1560 and subsequently registration of the same in the name of the plaintiff.

c) Upon the prayers above being granted an order of eviction do issue as against the 1st defendant his agents assigns and or employees and/or any such persons or structures on the parcel no. CENTRAL ALEGO/HONO/1560 to be effected by the O.C.S Siaya police station.

d) In the alternative a declaration/order that the defendants do reimburse the plaintiff the purchase price as agreed and interest on it from the year 2011 to the date of payment.

e) Mesne profits earned on the suit property from the year 2011 to the date of judgement.

19. This court will not belabour much because it is quite obvious the reliefs the appellant seeks were on use and occupation of and title to land and therefore the suit squarely falls within the jurisdiction of the ELC. If the environment and land court has jurisdiction, is the suit filed in the lower court *res judicata*? The answer lies in establishing the nature of the proceedings in **Kisumu CM succession cause no.195 of 2016**. The appellant’s application that moved the succession cause has not been proffered by the parties to this court, however, it can be deciphered from the ruling of the court in the succession cause and submissions by the parties that the nature of the application was for summons for revocation of grant which ordinarily is derived from **Section 76** of the **Law of Succession Act** which reads;

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

a) that the proceedings to obtain the grant were defective in substance;

b) *that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case;*

c) *that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently;*

d) *.....” [Emphasis Added]*

20. A look at the ruling in *Kisumu CMCC succession cause no.195 of 2016* shows that the proceedings related to the appellant claiming to be a creditor to the estate of the deceased which is well within the jurisdiction of a probate court, however, the court dismissed the application on the ground he had not adduced sufficient evidence to prove that he was a creditor of the estate. It is the considered view of this court that a determination on the use and occupation of and title to the suit property which is the exclusive jurisdiction of this court was never determined by the probate court. The authorities cited by the 1st respondent on the jurisdiction of the two courts can be distinguishable because the common thread that runs across these authorities is that; they relate to a beneficiary claiming fraud by either an administrator or co-beneficiary or family member in a probate cause but in this suit, the appellant’s claim is on title to the suit property. It is the considered view of this court that a case by case analysis of the facts of each case has to be considered in determining which court has jurisdiction and the predominance principle as elucidated in the case of *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR* has to be applied. The court in this case stated as follows on the issue of jurisdiction of the high court and courts of equal status;

“... When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test...”

21. It is the finding of this court that the ELC and the probate court are governed by two legal regimes that are separate with their respective distinct legal framework and the pleadings and prayers sought by the appellant in ELC and the probate court are distinct. It therefore follows that the preliminary objection raised by 4th respondent that the suit is *res judicata* obviously did not meet the ambit of **Section 7** of the **Civil Procedure Act**.

22. The 2nd issue is whether the preliminary objection was properly on record. From the court records, there is no evidence that summons to enter appearance were issued and served upon the 1st to 4th respondents in accordance with **Order 5** of the **Civil Procedure Rules**, therefore, there was no basis for the 1st to 4th respondent to enter appearance. Consequently, the contention by the appellant that the 1st and 4th respondents failed to enter appearance does not suffice.

23. To my understanding, the notice of appointment of advocates by the 1st respondent and the notice of preliminary objection by the 4th respondent albeit erroneously indicating it was filed by the 1st and 4th respondent were filed under the auspices of **Order 9 Rule 1** of the **Civil Procedure Rules** which reads;

“any application to or appearance or act in any court required or authorized by the law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by an advocate duly appointed to act on his behalf.”

24. Looking at this provision of law, it is the considered view of this court that except under the provisions of **Order 9 Rule 7** of the **Civil Procedure Rules** where a party appoints an advocate having previously acted in person or having sued or defended in person, a notice of appointment of advocates is not a mandatory requirement. What is important is that a party, his agent or advocate provides their particulars of address of service such as; her names, postal addresses, email address, telephone contacts, physical contacts and so forth. This position has been upheld by the courts in the several authorities including; *Iway Africa Limited v Infonet Africa Limited & another [2019] eKLR* and *Anti-Counterfeit Agency v Peter Mugucia & another [2020] eKLR*. Consequently, the ground of appeal on this issue fails.

25. Ultimately, this court finds that the appeal is partially merited and makes the following disposal orders:

a) *The decision of the Honorable Magistrate delivered on 28/11/2019 in Siaya PM ELC NO. 69 OF 2019, is hereby set aside and the suit is reinstated.*

b) *The lower court file is to be remitted back to the trial court for determination on merits.*

c) *Case to be mentioned before the deputy registrar for directions on 15/12/2021*

d) *As the appellant was partly successful in his appeal, each party will bear their own costs of the appeal herein.*

JUDGEMENT DELIVERED IN VIRTUAL COURT.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF NOVEMBER 2021

HON. A. Y. KOROSS

JUDGE

In the Presence of:

Ms. Mugoye for 1st respondent.

Ms. Otieno h/b for Mr. Abande for 4th respondent.

Court assistant: Sarah Ooro.

HON. A. Y. KOROSS

JUDGE

2/11/2021