



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 22 OF 2016 (FORMERLY 98 OF 2002)

JARED OMONDI LANDO as Legal

Representative of the estate of

TITO OLANDO WANGA.....APPELLANT

-VERSUS-

MICHAEL OPONDO OWUOR as

Legal Representative of the estate of

JUSTO OWUOR MUSEWE.....RESPONDENT

(Being an appeal from the Judgement in Siaya Tribunal

Land Case No. 811 of 2001 as adopted by F.M Omenta Senior

Resident Magistrate in Siaya SRM Misc. Civil Case number 6 of 2002)

BETWEEN

JARED OMONDI LANDO as Legal

Representative of the estate of

TITO OLANDO WANGA.....CLAIMANT

-VERSUS-

MICHAEL OPONDO OWUOR

as Legal Representative of the estate of

JUSTO OWUOR MUSEWE.....OBJECTOR

JUDGMENT

The appeal is against the decision of the Siaya Tribunal Land case number 811 of 2001 made on 12/09/2001 in respect of land parcel number **S. UGENYA/YIRO/215** in which the tribunal dismissed the claimant's case. From the proceedings before the tribunal attached to the supplementary record of appeal (see pages 1-5 of the supplementary record of appeal), this Court is able to tell that in the case before the tribunal, the claimant Tito Olando Wanga claimed that the land in dispute belonged to his father, Barnaba Wanga and that they were born and raised thereon. That the objector, Justo Owuor had come to the land asking for a place to stay while doing his tailoring business and when the claimant's father died, the said Justo Owuor took care of the property as a trustee. However, during demarcation, the said Justo Owuor registered himself as the proprietor of the property to the exclusion of the late Barnaba Wanga's sons, the claimant included. That the registration was effected on 1/12/1971 and a title deed was issued on 15/7/74.

The objector's case was that he was the son of the late mzee Musewe and that he was born, grew up and has lived on the suit property all his life. That Barnaba Wanga (claimant's father) initially lived in Mudhiero, got married in 1917 and left for Nakuru for work with his new

wife. That when Barnaba returned home for his father's burial, he moved from Mudhiero to Masanga catechist centre and thereafter approached the objector for accommodation. The objector referred him to Mzee Musewe (objector's father) who allowed the claimant's father to stay with the objector in his home and they stayed together until around 1936 when the claimant's father died and was buried in the objector's first home.

The claimant wanted the Court to find that the property rightfully belonged to his father. However, the tribunal did not accept the claimant's assertions that the property belonged to his late father, Barnaba Wanga. The decision was adopted as a judgement of the Court in Siaya SRM Misc. Civil Case number 6 of 2002 on 16/5/2002. The claimant was aggrieved by the said decision which is subject of this appeal

The original claimant and the objector in the tribunal case have since died and were substituted by their legal representatives being Jared Omondi Lando and Michael Opondo Owuor respectively who are now the appellant and respondent in this appeal.

GROUND OF APPEAL

The Appellant's petition of appeal at page 1 of 2 of the Record of Appeal contains reasons for appeal which can be summarized as follows:

- a) The tribunal did not take note that the defendant took the case to Court (Ukwala African Court Land Case No. 102 of 1965) and abandoned mid-way.
- b) The tribunal did not take note that the dispute started in 1952, when the sons of Wanga were just attaining the age of majority, with the appellant being twenty years, his elder brother Gershon Mulal being twenty-four years and their other brother Nashon Muchimbi was 22 years.
- c) The tribunal did not consider the evidence of Gershon Mulal and the late Erasto Wakar that the defendant Justo Owuor lived in Banaba Wanga's boma and that Justo Owuor was left in the boma when Wanga's sons were still young.
- d) That the evidence of the defendant of when he built his first boma is contradictory. In the tribunal, he stated that he built his boma in 1921 whereas in the Ukwala African Court, he stated that he built it in 1923.
- e) That there was also contradictory evidence on how the respondent allegedly came into possession of the suit property in that the evidence of Wilson Watere states that Musewe (Justo Owuor's father) and others lived in his father's land, yet George Onyango claimed that the land was theirs and they gave it to the defendant. But on cross examination, he admitted that Justo (the defendant), came from Lolwe the other side of the river and that Musewe (Justo Owuor's father) never came to the suit land. That the said Onyango also stated on cross examination that Banaba Wanga (Appellant's father) did not build a home and lived in the home of one Isaaka Ndonyo.
- f) That the tribunal did not evaluate the defendant's claim that the appellant's father asked the defendant for accommodation when he came from Nakuru.
- g) That when the tribunal visited the land, they refused to go and see the site where the appellant's late father was buried and where his late grandfather, Mulal was buried, but instead camped at the defendant's home and refused to hear from the few elders who wanted to testify for the appellant.

The appellant therefore prays that this Court evaluates in total the land case number 102 of 1965 (in the Ukwala African Court) and the tribunal case being SYA/811/2000 and prays that he gets back the land of his forefathers and his father.

When the appeal came up for hearing on 14/12/20, both parties appeared in person. The appellant prayed for judgement stating that he has been on the land and that his people were born and buried thereon. The respondent on the other hand stated that the suit land belonged to his father and that the tribunal court had already made a decision on the same.

ANALYSIS AND DETERMINATION

Being a first appeal, the role to be played by the court is set out in in ***Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123 (referred to in *David Oteba Ooko v Peter Joe Emongor* [2020] eKLR)**:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”

It was also held in ***Mwangi v Wambugu* [1984] KLR 453** that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

The Court has looked at the proceedings and findings of the tribunal in SYA/811/2001 contained at pages 1 to 5 of the supplementary record of appeal as well as the proceedings at the Ukwala African Court land case number 102 of 1965 at pages 6 to 13 of the supplementary record of appeal. The Court has noted that the Ukwala African Court did not make any determination as regards the suit property as the case was adjourned indefinitely until a date is arranged for the Court to visit the land and take the evidence of the clan elders. It is therefore not true as

was stated by the claimant in the tribunal case that the defendant (who was the claimant in the Ukwala African Court) was defeated.

The appellant has stated in his reasons for appeal that the tribunal did not consider the evidence of the late Gershon Mulal and the late Erasto Wakar. The appellant has also stated that the evidence of the defendant/respondent as to when he built his first home are contradictory in that in the tribunal, he stated that he built his boma in 1921 whereas in the Ukwala African Court, he stated that he built it in 1923. He has also stated that the evidence of George Onyango was contradictory in that he stated that the land was theirs and they gave it to the defendant whereas on cross examination he stated that the defendant came from Lolwe and that Musewe (defendant's father) never went to that land. On the contrary, Wilson Watere Waringa stated that Musewe used to live on the property with others, including Justo and Wanga

The Court has noted that the witnesses referred to in the petition of appeal, being the late Gershon Mulal, the late Erasto Wakar and George Onyango were witnesses in the Ukwala African Court land case number 102 of 1965 and not in SYA/811/2001 tribunal case which is the subject of this appeal. The only witnesses that gave evidence in the tribunal case were Tito Olando Wanga (claimant), Justo Owuor Musewe (Objector) and Wilson Watere Waringa who was the objector's witness. There is therefore no way the tribunal would have considered evidence that was not presented before it and the Court therefore finds that the appellant is mistaken to state as a ground of appeal that the tribunal failed to consider evidence that was not placed before it. This reason of appeal must therefore fail. In any event and as stated above, the Ukwala African Court did not make any final determination as regards the suit property on the basis of the evidence that was presented before it.

As to the applicant's assertion that the evidence of the defendant as to when he built his first boma is contradictory because he stated in the tribunal that he built his boma in 1921 whereas in the Ukwala African Court, he stated that he built it in 1923, as stated above, this Court finds that the tribunal could only consider the evidence placed before it and not that which was placed before the Ukwala African Court.

The Court also finds that the age of Wanga's sons, the appellant included when the dispute started is immaterial and in any event, they had all attained the age of majority at the time as they were all above 18 years of age.

The appellant has also stated that the tribunal did not evaluate the defendant's claim that the appellant's father asked the defendant for accommodation when he came from Nakuru. The Court has noted that the claimant was given the opportunity to cross examine the objector but did not cross examine him on the said issue and nothing was placed before the tribunal to contradict the defendant's claim. On the above basis, the ground of appeal fails.

It is not in dispute that registration of the suit property was procured in 1971 in favour of Justo Owuor Musewe (now deceased) and that since the date of that registration, it is only 30 years later that the complainants filed a suit in the tribunal challenging the said registration. It was the objector's case that he moved into the suit property and established his upper boma around 1921 upon being commissioned by his father, Musewe, and the tribunal concurred with that position as it was supported by the village elders present on 24th August 2001 during the tribunal court visit. This Court finds no compelling reason to depart from the said finding by the tribunal.

It was also the evidence of both the objector (Justo Owuor Musewe) and Wilson Watere Waringa that all the late Barnabas Wanga's sons, Gerison and Nahason have their land parcels on their grandfather Mlal's ancestral land while Tito Olando has his parcel below the objector's parcel. This evidence was not challenged in cross examination.

On the above basis, this Court finds no compelling reason to interfere with the findings and the judgement of the tribunal court and therefore the appeal lacks merit and is dismissed. Each party to bear their own costs of the appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF JULY, 2021

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE