



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT HOMA BAY

ELC APPEAL . NO. 9 OF 2021

(Formerly Migori ELC Appeal No. 37 of 2019)

FLORA OMOLO ADOYOAPPELLANT/DEFENDANT

versus

PETER OMONDI ABUYA.....RESPONDENT/PLAINTIFF

JUDGMENT

(Being an appeal from the judgment and decree of Honourable T.Olando (SRM now Principal Magistrate)

Homa Bay dated 20th November, 2019 in Homa Bay Chief Magistrate's Court in

Land case number 34 of 2019)

A. INTRODUCTION

1. This appeal was precipitated by the Judgment and decree of 20th November 2019 and 9th December 2020 respectively of the trial court (Hon. T. Olando, SRM, now PM) in Homa Bay SPM's Court Land Case No. 34 of 2019 where the appellant who was the defendant before the trial court was found to be a trespasser on the suit land, **LR NO. Kanyada/Kanyadier / 3581**. That the appellant had not proved her counter claim thus, it was dismissed. That the respondent who was the plaintiff in the suit had proved his claim for inter alia, an order of eviction from the suit land, on a balance of probabilities against the appellant and judgment entered accordingly.

2. The Respondent was also dissatisfied with the same judgment and decree regarding the award of costs. He complained that the trial court ordered and decreed each party to bear their own costs. Therefore, it provoked the instant cross appeal by the respondent dated 6th December 2019 and filed in court on 17th December, 2019.

3. The appellant is represented by M/s G. S. Okoth and Company Advocates.

4. The Respondent is represented by M/s Nyauke and Company Advocates.

B. THE GIST OF THE PARTIES' RESPECTIVE CASES BEFORE THE TRIAL COURT

5. By a plaint dated 4th July 2019, amended on 30th July 2019 and lodged in Court on 31st July 2019 pursuant to Order 8 Rule 1 of the Civil Procedure Rules, 2010, the respondent claimed that the appellant had unlawfully encroached the suit land by preparation on the same in readiness for burying the remains of James Obwana Opiyo (Deceased) thereon, among other things. On that score, he sought an order of eviction and permanent injunction against the appellant.

6. In her statement of defence and counter claim dated 29th July 2019 and filed in court on 30th July 2019, the appellant denied the Respondent's claim. She claimed that one **Abigael Omollo Abuya**, the defendant to the counterclaim, fraudulently caused the suit land and **LR No. Kanyada / Kanyadier/3515** to be registered in the name of the Respondent. Wherefore, she prayed that the respondent's case be dismissed with costs and judgment be entered as per the counterclaim that:

i. An order of declaration that Land Parcel No. **Kanyada- Kanyadier/3515 and 3581** belongs to **Flora Omolo Adoyo and Denis Otieno Mwaya** respectively.

ii. An order of rectification of register by deleting the name of Peter **Omondi Abuya** in both titles and registering the same in the name of **Flora Adoyo and Denis Otieno Mwaya** respectively.

iii. Costs of the suit together with interest of court rates.

7. The reply to defence and the defence to counterclaim dated 7th July 2019 noted herein. It was the testimony of **PW1, Abigael Omollo Abuya** that she obtained a power of Attorney (PEXH 2) to represent her son, the respondent who was in Nairobi. That the son was given the suit land by the appellant's brother in law, one Ombewa (Deceased) who did not marry or sire children. That the land was adjudicated and registered accordingly in the year 1985 without any objection. That upon the death of Ombewa in the year 1998, the appellant entered and settled on the suit land.

8. According to DW1, Flora Omollo Adoyo (the appellant/ counter claimer), the defendant to counterclaim is her daughter in law. That the Respondent is her grandson. That the body of the deceased, who was her son was yet to be buried.

9. The testimony of DW2 was that he is from the same village with the parties who are from the same family. That the Deceased gave the suit land to the appellant upon completion of adjudication in the year 1985.

10. The decision of the learned trial magistrate was that the respondent herein is the first registered owner of the suit land as well as **LR No. Kanyada/ Kanyadier/3515** after adjudication to which there was no objection. That the appellant lives on the suit land thus, a trespasser thereon and other findings as stated in paragraph 1 hereinabove.

11. In view of that decision, the appellant originated the present appeal by way of a memorandum of appeal dated 26th November 2019 based on grounds 1 to 6 set out on its face. The grounds include; that there was the lawful Power of Attorney issued to PW1 to act on behalf of the respondent, the action for recovery of land was statute barred by dint of Section 7 of the Limitation of Actions Chapter 22 Laws of Kenya and that the appellant's interest and rights were overriding interests over the suit land and **LR NO. Kanyada / Kanyadier / 3515** in accordance with **Section 28(a) (b) and (h) of the Land Registration Act, 2016 (2012), (The LRA herein)**. The appellant urged this Honourable court to quash the trial court's decision, set aside the decree as well as orders made or proceed to allow this appeal with costs.

12. The cross appeal as stated in paragraph 2 hereinabove, is premised on twin grounds namely that the learned trial magistrate erred in fact and in law in ordering that each party to bear its costs of the suit and for failure to award costs to him since he was successful in the suit. As such, he proposed to the court to order that:

“a) The Appeal be dismissed with costs and the Cross appeal be allowed in terms of prayer (d) of the plaint

b) The costs of this appeal be granted to the respondent against the appellant”

13. The appeal and the cross appeal were canvassed by way of written submissions further to the orders and directions of this court given on 26th May, 2021. Learned counsel for the appellant and learned counsel for the respondent filed their respective submissions both dated 22nd July 2021.

14. On the part of the appellant, the six (6) grounds of appeal were urged in three (3) sets; grounds 1 and 2; grounds 3 and 4 and grounds 5 and 6 as her learned counsel implored upon this court to overturn the judgment of the trial court. To fortify the submissions, counsel relied on, inter alia, Section 28(supra), Sections 5 and 19 of the Stamp Duty Act alongside the cases of **Wambugu =vs= Njuguna (1983) KLR 173** on adverse possession, **Nim vs Dm (2018) eKLR** that spousal rights are overriding interests which subsist on all registered land and **Francis Mwangi Mugo –vs-David Kamau Gachago (2017) eKLR** as regards power of attorney, amongst other authorities.

15. On the other hand, learned counsel; for the respondent narrowed down issues for determination to whether the appellant's appeal and the respondent's cross appeal are merited and analysed the same in favour of the latter against the former. To buttress the submissions, counsel cited **Order 9 Rule 2 of the Civil Procedure Rules, 201-0, Section 7 of the Civil Procedure Act Chapter 21 Laws of Kenya** and the Court of Appeal decision in **Urmila W/O Mohendra Shah =vs= Barclays Bank International Ltd and another (1979) eKLR**, among others.

16. In the foregoing, it's the duty of this court to determine as to whether:-

a) The appellant's appeal has merit based on the grounds stated in the memorandum of appeal and

b) The cross appeal is merited in light of the grounds set out on its face.

17. It is important to note and I subscribe to the decision of **Sir Kenneth O'Connor, P** in the case of **Peterson =vs= Sunday Post (1958) EA 424 at 429** that:

“The appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution”

18. By the Court of Appeal holding in **Mwanasokoni =vs=Kenya Bus Services Ltd (1982-88)1 KAR 278**, the appellate court will not ordinarily interfere with the findings of fact by the trial Court unless the same are:

a) Based on no evidence at all, or

b) A misapprehension of evidence or

c) **Arrived at after the trial court is shown demonstrably to have acted on wrong principles.**

19. On the appellant's appeal, it is the assertion of the appellant that PExhibit 2 did not comply with **sections 5 and 9 of the Stamp Duty Act (supra)**, **sections 4 and 9 of the Registration of Documents Act (supra)**, Regulation 18 of the Land Registration (General) Regulations, 2017 and the decision in **Francis Mugo case (supra)**.

20. The Appellant also asserted that PW1 had no locus standi to appear in the suit against him before the trial court. In the case of **Alfred Njau and others =vs= City Council of Nairobi (1982-88) 1 KAR 229**, the Court of Appeal remarked;

“..... Locus standi is the right to appear or to be heard in court or other proceedings...”

21. Clearly, PW1 was the defendant to the counterclaim raised by the appellant who was the counter claimer therein. It was alleged that PW1 fraudulently caused the suit land and LR NO. Kayada/Kanyadier/3515 to be registered in the name of the respondent in this appeal.

22. It was the testimony of PW1 in examination in chief, inter alia;-

...“Peter is in Nairobi and so he cannot come to court. I have been given power of attorney to represent him PEXhibit 2.....”

23. This court is conscious of the meaning of the term **“Power of Attorney “**and the provisions of **Order 9 (supra)**. Both of them are hereby noted accordingly.

24. Actions to recover land under **Section 7 of the Limitation of Actions Act (supra)** as read with **Section 13 of the same Act** came into play. The dictates of adverse possession are well settled as per **Wambugu case (supra)**, **Mbira =vs= Gachuhi (2002) 1 EA LR 137**, **Wilson Kazungu Katana and 101 others =vs= Salim Abdalla Bakshwein and another (2015) eKLR** and **Elijah O.L. Opar =vs= Tobias Odhiambo Abach (2019) e KLR**, among other long line of authoritative pronouncements.

25. The appellant complained that the learned trial magistrate erred in law by taking into account that the appellant had overriding interests over the suit land. Such rights and interests are captured in sections 25 (b) and 28 of the LRA. They do not require noting on the register unless the contrary is expressed in the register.

26. In the case of **Isaack M’Inanga Kiebia =vs= Isaayo Theuri M’ Litari and another (2018) eKLR**, the Supreme Court of the Republic of Kenya held that the rights and interests previously vested in a group, family or individual under Africa customary law are not extinguished upon registration of trust land. The court identified some of the elements that would qualify a claimant as a trustee thus;-

a) **The land in question was before registration, family, clan or group land.**

b) **The claimant belonged to such clan, family or group**

c) **The claim was directed against a registered proprietor who is a member of the family, clan or group.**

27. In **Mumo =vs= Makau (2002) 1EA 170**, it was noted that trust was a question of fact to be proved by evidence. The claimant has to show that the respondent holds the land in question for the family.

28. The appellant raised the issue of spousal rights over the suit land. In examination in chief, PW1 stated that Ombewa (deceased) was his grandfather who neither married nor had children. That the said deceased was a step brother to her grandfather. That the deceased and the appellant were in-laws.

29. During cross-examination, PW1 told the trial court, inter alia, that she is from the family of the deceased who gave the suit land to the respondent. Moreover, during cross examination, DW1 (the appellant) stated in part;-

“.....Ombewa was the eldest and my husband was the last born.....I moved to the land to take care of Ombewa.....”

30. In the appellant's submission reference was made to **Section 28 (a) of the LRA (supra)** to reinforce the appellant's spousal rights over the suit land. However, the said subsection was deleted by 2016 amendment of the said Act. Besides, the testimonies of PW1 and DW1 reveal that the deceased and the appellant lived together as husband and wife under Luo customs, rites and tradition. On that strength, the appellant acquired overriding interests and rights over the suit land by way of spousal rights and prescription as envisaged in section 25(b) and 28 of the LRA, **NM and Kiebia cases (supra)**. Thus grounds 1, 2, 3 and 4 of this appeal succeed.

31. It is this court's finding that grounds 5 and 6 of the appeal cannot hold. Clearly, the issue of burial of the deceased, James Obwana Opiyo was settled by the consent order made on 3rd February 2020 in the following terms;

a) The remains of James Obwana Opiyo be and is hereby released from Homa Bay County Referral Hospital Mortuary to the appellant Flora Omolo Odoyo for burial at a location other than LR. NO. KANYADA/KANYADIER/3581 or any other parcel of land in this matter.

b) Should the appellant defy the terms of this consent order, she be held liable in contempt accordingly.

32. Concerning the cross appeal, the respondent complained that costs of the original suit and this appeal be awarded to him. That the learned trial magistrate failed to award the same. However, the appellant asserted otherwise.

33. This court is conscious of the proviso to **Section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya** in respect of the costs of a suit. The court has absolute and unfettered discretion to award or not award costs. The discretion must be exercised judicially.

34. In **Samwel Kamau Macharia and another –vs-Kenya Commercial Bank and 2-others 2012 eKLR** and **Kamau-vs-Mungai and another (2006) 1 KLR 150**, among other authorities, the Supreme Court of Kenya and the Court of Appeal respectively, exercised discretion and ordered each party to bear their own costs. Given the finding made by the learned trial magistrate in exercise of his absolute and unfettered discretion on the award of costs, the character and circumstances of the case, I find no fault in his informed finding regarding costs of the suit. Therefore, I am not inclined to disturb the said finding.

35. Wherefore, I hereby render final orders thus;

a) The appellant's appeal commenced by way of a memorandum of appeal dated 26th November 2019 is allowed in the terms proposed therein and as set out in paragraph 11 hereinabove.

b) The respondent's cross appeal dated 6th December 2019 and duly lodged in court on 17th December 2019 is dismissed with costs to the appellant.

c) For avoidance of doubt, costs of this appeal and the original suit be borne by the respondent

DELIVERED, DATED AND SIGNED AND READ IN OPEN COURT AT HOMA BAY THIS 28TH DAY OF SEPTEMBER 2021.

G.M.A. ONGONDO

JUDGE

In the presence of:

G. S. Okoth, Learned Counsel for the appellant