



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KILGORIS

APPEAL NUMBER 01 OF 2021

(FORMERLY KNOWN AS NAROK ELC APPEAL NUMBER 11 OF 2019)

PHILIP KINGENO MARINDANY.....APPELLANT

-VERSUS-

KIBILO KIPTONUI MATEGET.....RESPONDENT

RULING

The issue before this Court is the Appeal filed on the 24th of July 2019 and dated 23rd July 2019.

The Prayer that the Appellant seeks from this Honourable Court is that the ruling of the Lower Court in KILGORIS ELC NUMBER 25 OF 2018 be set-aside and the Costs of the Appeal be awarded to the Appellant.

The Ruling under Appeal is the one delivered on the 11th of July 2019 stating inter-alia;-

1. The 1st Respondent within 60 days from the date of the ruling do make his own arrangements to exhume the body/remains of the 2nd Respondent from the suit property and bury it elsewhere.
2. In default, the Plaintiff to exhume the body and hand it over to the 1st Respondent for burial elsewhere.
3. The OCS Emurrua Dikirr Police Station to provide security during the process.
4. The main suit to be set down for hearing on priority basis.
5. Costs of this Application be borne by the 1st Respondent.
6. Either party has 30 days right of appeal.

The Memorandum of Appeal has been supported by 8 grounds of Appeal namely;-

- a) That the Trial Court erred in law and in fact in finding that the Defendant/Respondent disobeyed the Court Orders stopping him from interring the remains of the Deceased (2nd Defendant in the lower suit) in the disputed land.
- b) The Trial Court erred in law and in fact in failing to make a finding that the Appellant was never served with the Order.
- c) The Trial Court erred in law and in fact in ordering for exhumation of the remains of the deceased (2nd Defendant in the lower court).
- d) The Trial Court erred in law and in fact in proceeding with hearing and determination of the Application before the substitution of the deceased (2nd Defendant in the lower Court).
- e) The Trial Court erred in law and in fact in solely relying on the Land Registrar's Report dated 8th February 2019 to determine ownership of the disputed land.

- f) The Trial Court erred in law and in fact in making a final determination during the preliminary stage of the case.
- g) The Trial Court erred in law and in fact by disregarding the Appellant's evidence adduced and the oral submissions.
- h) The Trial Court is harsh, excessive and unsafe in the entire circumstances.

A Record of Appeal was filed on the 17th November 2020 and accordingly served on the Respondent through his Counsel.

The Appellant duly filed their submissions on the 14th July 2021 and the Respondent filed their submissions on the 11th August 2021.

ANALYSIS OF FACTS & LAW.

The Brief overview of the facts giving raise to this Appeal are as follows; -

The Respondent (Plaintiff in the Lower Court matter) is the son and administrator of the late KIPTIONY ARAP TESOP (Deceased) who passed away on 10th August 2008.

The Late KIPTIONY ARAP TESOP (Deceased) was the registered owner of the property known as TRANS-MARA/OLOSAKWANA "B"/411 measuring approximately 3.82 Ha.

A Suit was filed at the High Court in Kisii known as Civil Suit 265 of 2011 against the Appellant and the Deceased 2nd Respondent on the 15th of November 2011 who filed a Defence and Counter-Claim on the 2nd of June 2015.

An ex-parte hearing was conducted and judgement in favour of the Respondent (Plaintiff) herein was pronounced on the 4th of October 2017 by Honourable Lady Justice Jane Onyango.

The Appellant (1st Defendant) in this Appeal made an Application dated 9/1/2018 for setting- aside the said Judgement dated 4th October 2017 which was heard by Honourable Mr. Justice J.Mutungu and allowed it with thrown away costs of Kenya Shillings Ten Thousand (KShs 10,000/-) being awarded to the Respondent(1st Defendant).

Thereafter, the suit was transferred to the Kilgoris Principal Court for fresh hearing and determination of the main Plaint dated 15th November 2011.

As the suit was awaiting hearing, the Deceased 2nd Defendant namely DANIEL KIPKOECH NGENO who was the son to the Appellant (1st Defendant) succumbed to an illness on the 4th of December 2018.

Upon decease of the 2nd Defendant, the Appellant (1st Defendant) commenced burial plans of the Deceased 2nd Defendant and identified the disputed property known as TRANS-MARA/OLOSAKWANA "B"/411 to be the burial site of the Deceased 2nd Defendant.

The Respondent (Plaintiff) getting wind of the Appellant's (1st Defendant's) burial plans, filed an Application under a Certificate of Urgency dated 7th December 2018 and obtained Orders restraining the Appellant (1st Defendant) from interring the 2nd Defendant (now deceased) on the disputed property known as TRANS-MARA/OLOSAKWANA "B"/411 on the 10th December 2018.

Unfortunately, the process server who was delegated the duty of effecting service of the Restraining Order issued on the 10th December 2018 assigned the duty to the Area Chief who instead failed to serve the Restraining Order dated 10th December 2018 until after the burial of the Deceased 2nd Defendant had already taken place on the disputed property known as TRANS-MARA/OLOSAKWANA "B"/411.

The Respondent (Plaintiff) feeling aggrieved by the disobedience of the Appellant (1st Defendant) herein towards the Restraining Orders issued on the 10th of December 2018, sought to invoke an alternative prayer in the Application dated 7th December 2018 seeking the exhumation of the Deceased 2nd Defendant body from the disputed property known as TRANS-MARA/OLOSAKWANA "B"/411.

The Application regarding the exhumation of the Deceased 2nd Defendant's body was heard and the Trial Court made its findings on the 11th of July 2019 as already outlined hereinabove.

This Appeal therefore seeks to set-aside the exhumation of the Deceased 2nd Defendant on the suit property known as TRANS-MARA/OLOSAKWANA "B"/411.

This Honourable Court has had an opportunity to look at the pleadings and proceedings in the Trial Court matter and the grounds of Appeal contained in the Memorandum of Appeal dated 23rd July 2019 and makes the following findings; -

GROUND NUMBER 1 & 2.

The Honourable Court finds that these two grounds refer to one and the same issue of whether or not the Restraining orders issued to the

Respondent (Plaintiff) were properly served and/or disobeyed.

There is no dispute that the Trial Court issued restraining Orders against the Appellant (1st Defendant) on the 10th of December 2018 prohibiting the burial of the Deceased 2nd Defendant on the disputed property known as TRANS-MARA/OLOSAKWANA "B"/411.

According to the Appellant's (1st Defendant's) submissions filed on the 14th of June 2021, the Appellant's (1st Defendant's) submits that no Affidavit of Service has been filed by an authorized process server to confirm proper service of the Restraining Orders issued on the 10th December 2019.

The Respondent (Plaintiff) Submissions in reply to this critical submission by the Appellant's (1st Defendant's) Counsel does not touch on this crucial question of proper service of the Orders issued on the 10th December 2018.

I have perused the Trial Court Original File and failed to locate any Affidavit of Service by any authorized process server alluding to the proper service of the Orders issued on the 10th of December 2019 upon the Appellant (1st Defendant) herein.

The allegation that the Restraining Order dated 10th December 2018 was passed to the Area Chief to effect service on the Appellant (1st Defendant) is rather unfortunate.

Service of Court Documents and in particular Orders of such significance as those obtained by the Respondent (Plaintiff) on the 10th December 2018 must be done by a legally authorized person as they affect rights of both parties in the suit.

It is clear from Paragraph 10 of the Replying Affidavit filed by the Appellant (1st Defendant) on the 16th of May 2019 that the Area Chief Mr. Chesimet served the Restraining Orders on the 12th of December 2018 after the burial had taken place on the 11th of December 2018.

The Respondent (Plaintiff) did not file any Affidavit to challenge this particular allegation by the Appellant (1st Defendant) and the same remains unchallenged.

Consequently therefore, this Honourable Court makes a finding that the Appellant (1st Defendant) had not been properly served with the Restraining Orders as at 11th December 2018 when the burial of the Deceased 2nd Defendant happened on the disputed property known as TRANS-MARA/OLOSAKWANA "B"/411 and therefore the Appellant (1st Defendant) is not in disobedience of the Restraining Orders issued on the 10th of December 2018.

GROUND NUMBER 3.

On whether or not exhumation should be done, the beginning point is to establish where the body of the Deceased 2nd Defendant was indeed buried and/or interred.

It is clear from the pleadings that the Deceased 2nd Defendant was buried and/or interred on the disputed property known as TRANS-MARA/OLOSAKWANA "B"/411.

The disputed property known as TRANS-MARA/OLOSAKWANA "B"/411 is registered in the name of the Respondent (Plaintiff) herein.

The legality and/or ownership dispute between the Appellant (1st Defendant) and the Respondent (Plaintiff) can only be canvassed by the Trial court after a proper hearing of both parties.

Nevertheless, it is key to point out that the Appellant (1st Defendant) was aware of the dispute regarding the property known as TRANS-MARA/OLOSAKWANA "B"/411 from way back in year 2011 when the original suit was filed at the High Court in Kisii.

The Appellant's (1st Defendant's) allegation that the Deceased 2nd Defendant did not know any other home apart from the disputed property known as TRANS-MARA/OLOSAKWANA "B"/411 could be a satisfactory answer but it opens up the debate of exhumation because proceedings in a court of law can go either way.

The Deceased 2nd Defendant having been buried on the 11th of December 2018, this Honourable Court finds no reason to issue an exhumation Order at this stage until the hearing and determination of the pending suit in the lower Court.

The Respondent (Plaintiff) has an opportunity to amend its pleadings and add a prayer of exhumation of the Deceased 2nd Defendant from the suit property known as TRANS-MARA/OLOSAKWANA "B"/411 in the event the Respondent (Plaintiff) is successful in the Lower Court matter.

GROUND NUMBER 4.

On whether or not the Trial Court should have proceeded with the matter before substitution of the Deceased 2nd Defendant, this Honourable Court is of the view that having made a determination that the body of the Deceased 2nd Defendant should not be exhumed until the hearing and determination of the Lower case, it is of no significance to rule on this issue.

The estate of the Deceased 2nd Defendant if it so wishes to participate in the Lower Court proceeding are at liberty to do so and especially keeping in mind that the outcome will directly affect the remains of the Deceased 2nd Defendant.

GROUND NUMBER 5.

As regards to the Land Registrar's Report dated 8th February 2019, this Honourable Court has gone through the proceedings and the report in details and make a finding that the Report was strictly for purposes of identifying the property which the Deceased 2nd Defendant was buried.

The Land Registry's report identified that the Deceased 2nd Defendant was buried in the property registered under the Respondent (Plaintiff's) disputed property known as TRANS-MARA/OLOSAKWANA "B"/411, a fact which the Lower Court could not ignore.

This Honourable Court therefore finds no err in law or fact in the Trial Court relying on the report of the Land Registrar dated 8th February 2019.

GROUND NUMBER 6.

On this Ground, this Honourable Court is of the finding that the Trial Court made a determination in accordance to the prayers sought in the Application and therefore carried out its duties by pronouncing its Ruling on the 11th of July 2019.

The Prayer in issue was exhumation of the Deceased 2nd Defendant from the disputed property known as TRANS-MARA/OLOSAKWANA "B"/411 only which is what the Ruling Appealed in this proceeding made a finding on.

This Honourable Court therefore does not find any merit on this ground.

GROUND NUMBER 7 & 8

The Appellant having succeed in terms of the Ground 1, 2 and 3 of this Appeal, this Honourable Court is of the view that Grounds 7 and 8 have been positively answered.

In conclusion therefore, this Appeal succeeds and the following Orders are accordingly made; -

- a) The Trial Court's Ruling dated 11th July 2019 be and is hereby set-aside forthwith.
- b) The proceedings known as KILGORIS PMC ELC NO. 25 OF 2018 be heard on a priority basis and within Six (6) Months from the date of this Ruling.
- c) Each party to bear its own costs of this Appeal.

DATED, SIGNED AND DELIVERED IN KILGORIS ELC COURT ON THIS 18TH DAY OF OCTOBER, 2021.

HON. JUSTICE EMMANUEL.M. WASHE

JUDGE

In the Presence of:-

1. Court Assistant – Matiko
2. Koskey for the Appellant
3. N/A for the Respondent