



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**

**ENVIRONMENT AND LAND COURT APPEAL NUMBER 43 OF 2021**

**BENEDICT OBAT.....1<sup>ST</sup> APPELLANT**

**LAWRENCE OLOO UDUNY.....2<sup>ND</sup> APPELLANT**

**JACOB OGOS TALO.....3<sup>RD</sup> APPELLANT**

**PETER ODUOR WANDEI.....4<sup>TH</sup> APPELLANT**

**VERSUS**

**PIUS ONYANGO OBAT.....RESPONDENT**

*(Being an appeal from the judgment of Senior Resident Magistrate Hon.C.N. Sindani on 9<sup>th</sup> September 2020 in Ukwala Principal Magistrates ELC Number 70 of 2018)*

**JUDGEMENT**

**Introduction**

1. It is important to put the background of this appeal in context. The subject of this appeal is land parcel title number UHOLO/MAGOYA/221 (**suit property**) that was originally owned as customary land by its then patriarch one Uduny (deceased) who had two wives namely; Achuwra who was the first wife (Achuowra's house) and Adikiny who was the 2<sup>nd</sup> wife (Adikiny's house). From the proceedings of Siaya Land Disputes Tribunal and the lower court, it is unclear if Uduny was the parties' father, grandfather or great grandfather but what is certain is that the parties trace their family tree to their patriarch Uduny and to either of his two wives' houses. During the land adjudication process in the area, Achuwra's house comprising of the respondent, one Magero Osimbo (deceased), Okelo Ohuya(deceased), Onjak Osimbo and Odero Osimbo were registered as tenants in common with each owning a 5<sup>th</sup> of the suit property. Some of the witnesses alluded to the fact that one Oloo Were and Odundo Opondo who were descendants of Achuwra's house had beneficiary interest on the suit property. Members of Adikiny's house were issued with individual parcels of land.

2. From the proceedings and evidence on record, a suit was filed in **Kisumu High Court Civil case number 53 of 1990** by members of Adikiny's house against the respondent and other members of Achuwra's house. The outcome of these proceedings are uncertain and there is no evidence before me to show that the said suit was heard and determined on merit.

3. **Siaya Land Disputes Tribunal case number 103/2005** was filed by Uduny Otieno (the 1<sup>st</sup> defendant) against the respondent herein and one Odero Osimbo. The findings of the tribunal were that; (i) some of the sons of Uduny were not present during the adjudication process and consequently, they were not registered as proprietors of parcels of land belonging to their father, (ii) A family agreement had been reached in 1983 under the supervision of the defunct Provincial Administration, and, (iii) regardless of the houses, the Uduny family (the two houses) utilised all the parcels of land left behind by Uduny regardless of title documents.

The tribunal made the following orders;

***1) The present registration be cancelled and the whole land be re-surveyed and all beneficiaries of Uduny's land be registered in their own parcels using boundaries they agreed upon and fixed by the Provincial Administration.***

***2) These boundaries be identified by the family members and the Chief Uhoho Location.***

***3) Right of Appeal within 30 days to the Provincial Appeals Committee.***

4. The decision of the tribunal was adopted as a judgement of the court on 14/12/2006 in **Siaya PM Land Case No.94 of 2006**. Being

dissatisfied and aggrieved by decision of the tribunal, the respondent and his co-objector filed **appeal numbers 272 of 2006 and 339 of 2007** in the Nyanza Land Disputes Appeal Committee. The co-objector was not keen to prosecute the appeal and consequently, **appeal number 339 of 2007** was dismissed. The fate of **appeal number 272 of 2006** was not proffered by the parties. In 2016, the defunct Provincial Administration implemented the judgment by having a consensus with members of the two houses and proceeded to fix boundaries. All went quiet until the suit that is the subject of this appeal was filed in 2018.

5. By dint of a plaint dated 24/08/2018, the respondent herein claimed that the 1<sup>st</sup> defendant and appellants had in claiming ownership of the suit property, wrongfully entered and trespassed into the respondent's land. He prayed for among other orders; the court to declare him as the lawful owner of the suit property and that a permanent injunction do issue restraining the 1<sup>st</sup> defendant and appellants herein from interfering, erecting barriers, constructing, transferring, alienating, occupying and in any way dealing with the suit property.

6. The 1<sup>st</sup> defendant and appellants filed a defence dated 19/03/2019. In denying the averments in the plaint, they contended on among other grounds that they were the rightful owners of the suit by virtue of succession and previous court decisions and argued that the suit was *res judicata*.

7. During the course of proceedings, the parties (1<sup>st</sup> defendant, appellants and respondent) recorded a consent dated 9/09/2019 which was adopted as an order of the court. The consent excised and sold 12.49 acres of the suit property to a third party.

8. By its judgment dated 9/09/2020, the court, declared the respondent the lawful owner of the suit property and issued a permanent injunction restraining the 1<sup>st</sup> defendant and appellants from interfering with the suit property.

9. Aggrieved and dissatisfied by the decision of the court, the appellants filed a memorandum and a record of appeal both dated 14/09/2020. The appeal is the subject of this judgement.

#### **Memorandum of appeal**

10. The appellants' memorandum of appeal sets out 7 grounds of appeal however, in their written submissions dated 18/05/2021, they condensed them into two main grounds; (i) the suit was *res judicata* and, (ii) the trial court should not have declared the respondent absolute owner of the suit property.

11. He prayed; that the court do allow the appeal, set aside the judgement and make a finding that there was no subject of litigation as at 2/10/2019 and hence no cause of action accruing to the respondent. Consequently, he prayed for the court to dismiss the suit with costs to the appellants.

#### **The Appellants' submissions**

12. The appellants filed written submissions dated 22/09/2021. The Appellants stated that the trial magistrate failed to consider the issue of *res judicata*; they stated that where a statute provided a mechanism for dispute resolution and the same is followed by the parties and a determination is made and adopted by court pursuant to laid down procedures, then the dispute fully determined the rights of the parties. The Appellants placed reliance on the authorities of **Paul Muraya Kaguri vs Simon Mbaria Muchunu [2015] eKLR**, **Independent Electoral and Boundaries Commission v Maina Kiai [2017] eKLR**, and **E.T.V vs Attorney General & Another (2012) eKLR** and referenced **Section 7 of the Civil Procedure Act**.

13. The appellants averred that by dint of the consent order dated 9/9/2019, the subject matter of the suit became extinguished and hence the suit was not available for litigation. In addition, the appellants contended that the suit property was a tenancy in common hence the trial court erred in declaring the respondent as the sole owner of the suit property. On this, they placed on the cases **Muhuri Muchiri vs Hannah Nyamunya (sued as the Administrator of the Estate of Njenga Muchiri also Known as Samuel Njenga Muchiri (deceased) (2015) eKLR**.

#### **The Respondent's submissions**

14. The respondent filed written submissions dated 14/10/2021. The respondent posited three issues for determination;

(i) Whether the suit was *res judicata*,

(ii) Whether the suit property is in existence and,

(iii) Whether the respondent is a lawful owner of the suit property. On the doctrine of *res judicata*, the respondent stated that *res judicata* can only apply if the matter was tried by a court with competent jurisdiction. In addition, he stated that the parties in the tribunal were different than those in the present suit. On this he placed reliance on **Section 7 of the Civil Procedure Act**, **Section 3(1) of the Land Disputes Tribunal Act**, the Supreme Court of Kenya decision in **John Florence Maritime Services Limited & Anor. V Cabinet Secretary Transport and Infrastructure & 3 Others (2021) eKLR** and **David Chemei vs Kanamoi Cheptoo Kimoituk & Another (2021) eKLR** among others.

15. On whether the suit property was in existence, the respondent averred that the court satisfied itself with the certificate of official search dated 27/02/2020 which showed that the suit property had not been transferred to a 3<sup>rd</sup> party and consequently, the appellants' contention that the suit property was not in existence after the consent order dated 9/9/2019 was misplaced. On this, he placed reliance on **Sections 22 and 42 of the Land Registration Act** and **Regulation 43 of the Land Registration (Regulations) Act 2017**. On whether the respondent is

the lawful owner of the suit property, he contended that upon demise of four of the five co-owners of the suit property, the respondent became the registered owner of the suit property by operation of law. On this, he placed reliance **Sections 24(a), 26(1) and 91(4)** of the **Land Registration Act** and the case **Isabel Chelangat vs Samuel Tiro Rotich & 5 Others (2012) eKLR**.

### **Analysis and determination**

16. Having considered the original lower court record, record of appeal, memorandum of appeal and rival written submissions, this court has identified three issues falling for determination; (i) whether the suit was *res judicata*, (ii) If the answer to (i) is in the positive, whether the consent order dated 9/9/2019 is valid and, (iii) whether the respondent is the lawful owner of the suit property.

I will proceed to analyse the legal and jurisprudential framework on the three issues in a sequential manner.

17. This being a 1<sup>st</sup> appeal, it is the duty of this court to review the evidence adduced before the trial court and satisfy itself that the decision was well-founded. The jurisdiction of a 1<sup>st</sup> appellate court was well settled in the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, which was quoted in the case of **Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR** as thus:

*"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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..."*

18. Was the suit filed *res judicata* as enunciated in the 1<sup>st</sup> issue? **Sections 7 and 8** of the **Land Disputes Tribunals Act** provided as follows on the modalities of enforcing the decision of or appealing against the decision of the tribunal;

*"7. (2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.*

*8. (1) Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.*

19. My understanding of these provisions of law is that once the 30-day window period of appeal to the Land Disputes Appeal Committee had lapsed, the tribunal would remit its decision to court which would then adopt the decision as its judgement. It henceforth became a valid court judgement capable of execution.

20. **Section 23(3) (e) of the Interpretation and General Provisions Act** preserves and protects decisions and awards made by the defunct Land Disputes Tribunals. Similarly, it preserves and protects judgments adopted and pronounced by Magistrates' Courts within the framework of the repealed Land Disputes Act.

21. In the case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2015] eKLR** the Supreme Court of Kenya had this to say on adoption of decisions by Land Disputes Tribunals and Land Disputes Appeal Committee as thus;

*"...The High Court held that it indeed had jurisdiction to nullify an award of a tribunal, if such an award was made outside the tribunal's jurisdiction. It set out the mandate of the tribunal thus: to deal with disputes of a civil nature, concerning the division of land, or the determination of boundaries to land, including land held in common; a claim to occupy or utilize land; or trespass to land. However, the Court held that its jurisdiction is only exercisable where such decision of the tribunal has not transmuted into a judicial determination, through adoption as a Judgment of the Court... even if the declaration was to issue with regard to the Tribunal's award, it would have no effect as the decree that emanated from the lower Court's Judgement had not been challenged by the plaintiff. The learned Judge further held that, upon an award becoming a Judgement of a Court of competent jurisdiction, it can only be varied, vacated, set aside or reviewed by the same Court, or by an appellate Court in appropriate proceedings ...the award should have been appealed to the Lands Appeals Committee constituted for the Province, in accordance with Section 8(1) of the Lands Disputes Tribunals Act...Alternatively, the plaintiff could have commenced judicial review proceedings in the nature of certiorari, to quash the award...The Court of Appeal...dismissed the appeal, upholding the High Court's position...the Appellate Court observed..."The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The appellant instead chose to file the suit for declaratory orders and compensation..."...the applicant has not demonstrated that the High Court or Court of Appeal, in this matter, held a view inconsistent with the recognized jurisprudence on this issue". (Emphasis added).*

22. The settled law in the case of **Nyaboke (ibid)** has been upheld in a line of cases including; **Alfred Sagero Omweri v Kennedy Omweri Ondieki [2015] eKLR**, **R v. Chairman Land Disputes Tribunal, Kirinyaga District & Another Ex parte Kariuki (2005) 2 KLR 10**, **Rift Valley Enterprises Ltd v Antony Michael Hughes (Sued as Administrator of the Estate of Alexandra Theresa Hughes (Deceased) & 2 others [2020] eKLR**.

23. The Court has had a chance to look at the recent Court of Appeal decision of **David Kipleting Chemei vs Kanamoi Cheptoo Kimotuk and Another (2021) eKLR** which is distinguishable from the instant appeal. In the **Chemei Case**, the appellant had sought a declaration that the proceedings and award made by the tribunal and the subsequent judgement by the magistrate's court be declared illegal, null and void and without jurisdiction. While in this appeal the respondent had sought injunctive orders and a declaration that he be declared the lawful owner of the suit property. This court would wish to point out that Supreme Court of Kenya's decision in **the Nyaboke Case (supra)**

binds the Court Of Appeal and this Court.

24. The purpose of *res judicata* is to ensure that court decisions are predictable, certain and brings an end to litigation. This position was upheld by the Court of Appeal in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** where the court held as follows;

**“...The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court ...”**

25. The Supreme Court of Kenya in the case of **John Florence Maritim services Limited & Another vs Cabinet Secretary, Transport and Infrastructure & 3 others (2021) eKLR** set out the principles that govern applications of *res judicata* as follows:

**“...a) There is a former Judgment or order which was final;**

**b) The Judgment or order was on merit;**

**c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and**

**d) There must be between the first and the second action identical parties, subject matter and cause of action...”**

26. The addition or subtraction of a party in a subsequent suit does not change the fact that a case has been heard and determined on merits. This was the position held in the case of **Rose Njeri Munoru & 13 others v Hannah Mwihaki Muturi & 4 others [2016] eKLR** which was quoted the case of **Omondi V National Bank of Kenya Ltd & Others [2001] EA 177** as thus:-

**“...Parties cannot evade the doctrine of *Resjudicata* by merely adding other parties or causes of action in a subsequent suit...”**

30. On analysis of the facts and evidence of this appeal, it is apparent that the 1<sup>st</sup> defendant (who has not appealed) was the claimant in the tribunal while the respondent was the 1<sup>st</sup> objector. From evidence on record, the subject matter in the tribunal and trial court was the suit property and in both, the causes of action revolved around ownership and occupation of the suit property. The tribunal heard the parties on merit and it was adopted as a judgement of a competent court. The judgement of the court having not been successfully appealed against, quashed or set aside, it is my finding that the suit was *res judicata*.

31. The 2<sup>nd</sup> issue is whether the consent order dated 9/9/2019 was valid. Having found the lower court suit to be *res judicata*, it therefore follows that all ensuing proceedings and orders including the consent order adopted by the court on 9/9/2019 are invalid. This position was upheld in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others (2007) eKLR** where the court quoted with approval the Indian Supreme Court decision of **Lal Chand vs. Radha Kisham, AIR 1977 SC 789** which held;

**“...The practical effect of *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the Court itself that is debarred by a jurisdictional injunct, from entertaining such suit...”**

32. The 3<sup>rd</sup> issue is whether the respondent is the lawful owner of the suit property. Even if the suit in the lower court was not *res judicata* which it is, it is evident from the testimony of the respondent and evidence on record that the suit property is held as a tenancy in common. The respondent's share was not affected by the death of any of the other four co-owners and the share of the other four co-owners devolved not on the respondent, but to their respective estates. Tenancies in common are determined by union of the various interests, partition or sale. **Paragraphs 222 & 223, VOL 87 of the Halsbury's Law of England** provides as follows: -

**“...A tenancy in common maybe determined by the union of the various interests by acquisition *intervivos* or by testamentary disposition, in the same person, who therefore holds the *entirety* or maybe determined by partition...”**

33. **Section 91 (5) of the Land Registration Act**, provides that if any land, lease or charge is owned in common, each tenant shall be entitled to an undivided share in the whole and upon the death of a tenant, the deceased's share shall be treated as part of his estate while, **Section 96 of the Land Registration Act** recognises that a tenancy in common can be determined by way of sale. It is the finding of this court that the suit property was a tenancy in common which could only be determined by either unity of interests, partition or sale and not otherwise.

34. *In the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012: [2014] eKLR*. The Supreme Court of Kenya settled the law on award of costs: that costs follow the event, and that the Court has the discretion in awarding costs. The 1<sup>st</sup> defendant, appellants and the respondent are close relatives and for this reason, each party shall bear their respective costs of this appeal and lower court.

Ultimately, I make the following disposal orders: -

**a) I allow the appeal and set aside in entirety the judgement and decree in Ukwala Principal Magistrates ELC Number 70 of 2018.**

*b)* Each party to bear their own costs of this appeal and Lower court

**JUDGMENT DELIVERED IN OPEN COURT. DATED, SIGNED AND DELIVERED THIS 30TH DAY OF NOVEMBER, 2021.**

**In the Presence of:**

Ms. Wacheke h/b for Mugoye for the respondent

N/A for the appellant

Court assistant: Sarah Ooro

**HON. A. Y. KOROSS**

**JUDGE**

**30/11/2021**