



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**ELC CASE (APPEAL) CASE NO. 40 OF 2021**

**BENARD OKINYO ONGOR.....APPELLANT**

**VERSUS**

**NICHOLAS OTIENO OYOO.....RESPONDENT**

**(Being an Appeal to the Judgement of Hon.T.M. Olando delivered**

**on 28<sup>th</sup> November 2019 in Siaya PM-ELC NO.69 OF 2019)**

**JUDGEMENT**

**Introduction**

1. Before we delve into the gravamen of the appeal, a detailed background on the dispute is of import. The respondent and the appellant are 1<sup>st</sup> cousins and by a plaint dated 27/06/2014, the respondent alleged that the appellant had trespassed on his parcel of land known CENTRAL ALEGO/OJUANDO B2/57(**the 1<sup>st</sup> suit property**) thus usurping his interests as the 1<sup>st</sup> registered proprietor of the 1<sup>st</sup> suit property. He alluded that there had been a dispute over the suit property between him and the appellant's father before the defunct Siaya Land Disputes Tribunal and an appeal had been preferred to the defunct Land Disputes Appeals Committee. He prayed for a permanent injunction restraining the appellant, his agents, servants and persons acting through him from cultivating, grazing, constructing, building or trespassing onto the suit property. He also sought damages for trespass and costs of the suit.

2. In response, the appellant filed a defence dated 15/7/2021 which was subsequently amended by way of an amended defence and counterclaim dated 14/12/2017. In his amended defence, the appellant denied the averments in the plaint and asserted that the matter had previously been litigated in Siaya Land Disputes Tribunal and the tribunal's award had been adopted as a judgement of the court in **Siaya Misc Civil Suit No.14 of 2002**. In his counterclaim, the appellant contended that he was in lawful and legal occupation of the suit property and another property known as land parcel number **CENTRAL ALEGO/OJUANDO B2/56 (the 2<sup>nd</sup> suit property)**. He contended that the respondent had encroached on the 2<sup>nd</sup> suit property which is his [the appellant's] parcel of land. He claimed to be an adverse possessor to the 1<sup>st</sup> and 2<sup>nd</sup> suit properties. He prayed to be declared the legal owner of the 2<sup>nd</sup> suit property and for the respondent to be compelled to transfer the 2<sup>nd</sup> suit property to him. He also prayed that a declaration be made that the respondent was holding a portion of the 2<sup>nd</sup> suit property in trust for him and consequently, the respondent should be compelled to transfer that portion to him.

3. Upon hearing the parties, the court by its judgment dated 22/05/2019 entered judgement in favour of the respondent by issuing permanent injunctive orders against the appellant on the 1<sup>st</sup> suit property. Aggrieved and dissatisfied by the decision of the court, the appellant filed a memorandum of appeal dated 4/05/2019, the dating of the memorandum seems to be erroneous because it is not plausible that the memorandum of appeal was dated prior to the court rendering its judgement but be that as it may, it was filed in court on 4/06/2019. A record of appeal dated 19/12/2019 was subsequently filed and the appeal is the subject of this judgement.

**Memorandum of appeal**

4. The appellant's memorandum of appeal sets out 7 grounds of appeal however, in his written submissions dated 18/05/2021, the appellant condensed the grounds into one main ground; the honourable magistrate failed to consider the wealth of evidence that had been tabled before him.

5. He prays (i) the appeal be allowed, (ii) the judgement and consequential decree entered in the subordinate court be set aside and the appellant's counterclaim be allowed, and, (iii) the respondent pays the costs of this appeal and the application in the lower court.

### The appellant's submissions

6. The appellant filed written submissions dated 18/05/2021. He contends that the case had been heard and determined by the defunct Siaya Land Disputes Tribunal and portions of the 1<sup>st</sup> and 2<sup>nd</sup> suit properties were awarded by the tribunal to the appellant and by a judgement of the court in **Siaya PM-Misc. Civil Suit No.14 of 2002**, the decision of the tribunal was adopted. He contends that the respondent was given 30 days leave to appeal by the court but he did not do so until 2007 when he was granted leave to appeal out of time. He submits that the status of the appeal is unknown to him. He contends that the survey report dated 4/5/2016 and filed in court is a true reflection of the occupancy status of the 1<sup>st</sup> and 2<sup>nd</sup> suit properties by the parties. He contends that 1<sup>st</sup> and 2<sup>nd</sup> suit properties were ancestral parcels of land and that they were held in trust for him by the respondent. The appellant placed reliance on **Sections 27, 28 and 30 of the Registered Land Act** and the case of **Alan Kiama v Ndia Mathuya & Others C.A. 42 of 1978**.

7. The appellant set out two issues for determination; (i) whether the respondent proved his case on a balance of probability and, (ii) whether the appellant is in occupation of 1<sup>st</sup> and 2<sup>nd</sup> suit properties.

### The respondent's submissions

8. The respondent filed his written submissions dated 7/7/2021. He consolidated all the grounds into a singular ground however, the nature of the singular ground was not posited. He submits that the surveyors report was a true reflection of the occupancy of the suit properties. He contends that parties' fathers were siblings and their father (the appellant and respondent's grandfather) never disinherited any of his sons from the ancestral land. He avers that the appellant had failed establish a claim of adverse possession and in equal measure failed to discharge proof that the respondent held the suit land in trust for him. On this, he placed reliance on **Section 107 (1) of the Evidence Act** and **Isca Adhiambo Okayo v Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 (2016) eKLR** among others. He submits that by virtue of **Section 26 of the Land Registration Act**, he had an absolute and indefeasible title. In urging the court to dismiss the appeal with costs, the respondent raised one issue for determination: Whether the respondent was registered as proprietor of the 1<sup>st</sup> suit property in trust for the appellant.

### Analysis and determination

9. Having considered the original lower court record, record of appeal, memorandum of appeal and rival written submissions, this court has identified three issues for determination; (i) whether the suit is *res judicata*, and if the answer to the issue (i) is in the negative, (ii) whether the appellant is an adverse possessor to the 1<sup>st</sup> suit property and, (iii) whether the respondent held the 1<sup>st</sup> suit property in customary trust for the appellant.

I will proceed to analyse the legal and jurisprudential framework.

10. This being a 1<sup>st</sup> appeal, it is the duty of this court to review the evidence adduced before the lower 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 by 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..."**

11. Was the suit filed *res judicata* as enunciated in the 1<sup>st</sup> issue? The answer to this lies in understanding the elaborate legal framework provided for within the repealed **Land Disputes Tribunals Act**. The jurisdiction of the tribunals was set out in **Section 3** of the Land Dispute Tribunals Act (repealed) Act as thus:

**" (1) Subject to this Act, all cases of a civil nature involving a dispute as to—**

**a. the division of, or the determination of boundaries to land, including land held in common;**

**b. a claim to occupy or work land; or**

**c. trespass to land, shall be heard and determined by a Tribunal [Emphasis added]**

12. **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. (1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.**

**(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.**

13. My understanding of these provisions of law is that once the 30-day window for appeal to the Land Disputes Appeals Committee 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 execution. In the case of **John Mungai Tama v Anjelica Muthoni Tama [2005] eKLR**, the court was of a similar view and held thus;

**“...In law once a decision of a Land Disputes Tribunal has been adopted by a court of law as a judgment of that court, it is unsound for a party thereof to ignore that judgment of the court ...”**

**14. 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.

15. In the case of **Florence Nyaboke Machani Vs Mogere Amosi Ombui & 2 Others (2014) eKLR**, the Court of Appeal had this to say on decisions made by the Land Disputes Tribunal.

**“.....The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act.....as the learned Judge found in the judgement appealed from ...it is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable...”**

16. Having laid out the legal and jurisprudential framework, I now turn the facts of the case. During the hearing of this suit by the trial court, the respondent led evidence that the appellant had encroached and or trespassed on his land. He testified that he had instituted a suit before the “land tribunal” against the appellant’s father and the tribunal entered judgment in favour of the appellant’s father. He alluded that he then filed an appeal in the “appeal tribunal” which referred the suit to Kisumu High Court. Though, the title deed to the 1<sup>st</sup> suit property was produced by the respondent as evidence, the respondent neither proffered documentary evidence that the decision of the land disputes tribunal had been set aside by the land disputes appeals committee nor had the high court overturned the decision of **Siaya PM-Misc. Civil Suit No.14 of 2002**.

17. During the hearing, the appellant produced documentary evidence of: (i) proceedings of the tribunal, (ii) letters of administration on the estate of ongor ajiwayi who was his father and the objector in the proceedings in Siaya Land Disputes Tribunal and, (iii) an adoption of the decision of the tribunal as a judgement of the court dated 23/11/2006. What was this judgement that was adopted by the court? I quote the judgement of the tribunal as follows:

**“The tribunal court awards the entire land above the road comprising the top of land parcels Nos. 56 and 57 to ongor rajwayi herein the objector leaving entire lower sections of L/parcels Nos. 56 and 57 to the claimant and his younger brother”**

18. The surveyor’s report filed in court confirms that the judgment of the court was executed at one point or the other.

19. Having looked at legal framework and facts of the suit, is the suit *res judicata*? The answer to lies with **Section 7 of the Civil Procedure Act** which reads: -

**“No Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”**

20. The Court of Appeal in the case of **Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR** set out the following principles in establishing *res judicata*: there must be; (i) a previous suit in which the matter was in issue, (ii) the parties were the same or litigating under the same title, (iii) a competent court heard the matter in issue, and, (iv) the issue has been raised once again in a fresh suit.

21. It is quite evident that the dispute in siaya land disputes tribunal involved the respondent herein as a claimant against the appellant’s father who has since been succeeded by the appellant in **Siaya PM- Succession cause No. 51 of 2011**. The issue in dispute in the tribunal and this suit revolved around the same subject matter that is the 1<sup>st</sup> and 2<sup>nd</sup> suit properties and, the previous dispute between the parties was heard and determined by a competent tribunal and adopted as a judgement of the court. The judgement of the court has never been overturned on appeal or otherwise.

22. Consequently, it is my finding that the suit is *res judicata*. Issue one being found in the affirmative, I need not say more on issue numbers (ii) and (iii).

23. Ultimately, the appeal is merited and the appellant and respondent being relatives, the court makes the following disposal orders: -

**a. The judgement delivered by the learned magistrate on 22/05/2019 and the resultant decree issued on 5/08/2019 in Siaya PM-ELC No. 3 of 2019 are hereby set aside.**

**b. Each party to bear their own costs.**

**Judgment delivered in open virtual court.**

**DATED, SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2021**

**In the Presence of:**

Mr. Otieno Obwanda for the respondent

N/A for the appellant

Court assistant: Sarah Ooro

**HON. A. Y. KOROSS**

**JUDGE**

**25/11/2021**