



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT

AT SIAYA

ENVIRONMENT AND LAND COURT APPEAL NUMBER 28 OF 2021

NASHON ONYANGO OTIENO.....APPELLANT

VERSUS

GEORGE ONYANGO OTIENO....RESPONDENT

(Being an appeal from the judgment of Senior Resident Magistrate Hon. T.M.Olando on 19th June 2019 in Siaya Principal Magistrates ELC Number 177 of 2018)

JUDGEMENT

Introduction

1. By a Plaint dated 6/07/2018, the appellant who is the registered proprietor of land parcel Central Alego/Ojuando B2/338 (*the suit property*) filed the instant suit against the respondent for trespass. He sought orders of eviction and permanent injunction against the respondent. The respondent filed a defence dated 29/10/2018 and denied the appellant's assertions and averred that the appellant's title was acquired by means of fraud on the ground that the suit property was ancestral land and he had been in occupation even prior to the appellant acquiring title to the suit property .
2. It is common ground amongst the parties that the suit property belonged to one Oloo Oloo (deceased) who died without leaving behind a child, wife or parents to succeed him in title. The appellant and respondent are Oloo Oloo's extended family members. The appellant and respondent both claim to be the owners of the suit property one by waving a title while the other by customary trust, possession and occupation.
3. In his evidence, the appellant contended he acquired title to the suit property on 27/2/2018 vide **Siaya PM-Succession Cause No.128 of 2017** which was after the respondent had allegedly occupied the suit property.
4. In his evidence, the respondent contended he had been gifted the suit property by one Ogola Obara who had himself inherited it from Oloo Oloo. Ogola Obara who was a defence witness elaborated the nature of the relationship between the parties to the suit: the appellant was his (Ogola Obara's) nephew, while the respondent was either his brother or nephew. He contended Oloo Oloo gifted him the suit property and he had been in occupation from the year 1977.
5. Upon hearing the parties, the court by its judgment dated 19/06/2019, dismissed the appellant's suit and directed the suit property to be divided between the appellant, respondent and Thomas Ogola Obara whom the court found were beneficiaries of the estate of Oloo Oloo.
6. Aggrieved and dissatisfied by the decision of the court, the appellant filed a memorandum of appeal dated 12/07/2019 and a record of appeal dated 16/07/2019. The appeal is the subject of this judgement.

Memorandum of appeal

7. The memorandum of appeal sets out 6 grounds of appeal which all revolve around one ground: the trial court erred in making a probate determination in an Environment and Land Court case. The appellant prayed for the appeal to be allowed with costs and for the judgement, findings, decisions and orders of the trial court to be set aside and in their place an order be issued allowing the plaintiff's suit as prayed in the plaint with costs.
8. The respondent who was then acting in person filed a reply to grounds of appeal dated 18/09/2019. This document is a strange in law and is hereby expunged from the court record.

The Appellant's submissions

9. The appellant filed written submissions dated 13/10/2021. He contended that in making its determination, a court is only guided by matters presented before it. On this he placed reliance on a line of authorities including **Civil Appeal No. 154 of 1992 Charles C. Sande v Kenya Co-operative Creameries Limited**.

10. He contended that the court proceeded as if it was conducting an objection to a succession proceeding as opposed to a land dispute. He further submitted that against settled law, the respondent did not particularise fraud and in any case, fraud was not proved. On this he placed reliance on several authorities including **Emfil Ltd v Registrar of Titles Mombasa & 2 others (2014) eKLR** and **Davy v Garrett (1878) 7ch.D 473 at 489**.

11. The appellant set out the following issues four for determination: (i) what were the issues for determination in the lower court? (ii) was the decision of the trial court based on issues it was called upon to decide? (iii) Has the appellant made out a case on the basis of which this appeal can be allowed? And, (iv) who shall bear the costs of the appeal?

The Respondent's submissions

12. The respondent filed written submissions dated 29/10/2021. He contended that the trial court in consonance with **Section 39 of The Law of Succession Act**, made a proper finding that as relatives of Oloo Oloo he and Thomas Ogola Obara were entitled to his estate as beneficiaries.

13. He submitted that the trial court made a proper finding on fraud and on this he placed reliance on **Section 26 of the Land Registration Act** and the cases of **Joseph Marubu vs Kahindi Clinton Baya (2014)eKLR** and **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR**.

14. He submitted that customary trust was an overriding interest and based on this trust, the appellant's title was impeachable. He contended that as a registered owner of suit property, the appellant held it in trust for other beneficiaries. On this he placed reliance on the case of **Isack M'inanga Kiebia v Isaya Theuri M'lintari & another [2018] eKLR**.

Analysis and determination

15. Having considered the original lower court record, record of appeal, memorandum of appeal and rival written submissions, this court has identified four falling issues for determination; (i) whether the trial court as an Environment and Land Court had jurisdiction to delve into probate matters, (ii) whether the respondent has an indefeasible title to the suit property, (iii) whether the appellant could sustain a claim for trespass to land and, (iv) who shall bear the costs of the appeal?

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

16. This being a 1st 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 1st 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..."

17. The answer to the first issue of whether the trial court as an Environment and Land Court had jurisdiction to delve into probate matters lies in understanding the respective jurisdictions of the ELC and probate courts.

18. In the locus *classicus* case of **Owners of the Motor Vehicle M.V. Lillians versus Caltex Oil (Kenya) Limited (1989) KLR1**, the court had this to say on the issue of jurisdiction;

"Jurisdiction is everything. Without it, a court has no power to make one more step".

19. The jurisdiction of this court to hear and determine disputes relating to the environment, use and occupation of and title to land lies with **Article 162(2)(b) of the Constitution of Kenya, 2010, Section 13 of the Environment and Land Court Act** and **Section 9 of the Magistrates Courts Act**. While the probate court's jurisdiction in intestate or testamentary succession to the estates of deceased persons is derived from **Section 2 of the Law of Succession Act**.

20. The distinct and separate legal regimes of these two courts has led to the ELC court declining to enter into the realm of succession disputes and vice versa. These can be found in several authorities including; **Beatrice Wambui Kiarie & 2 others vs Tabitha Wanjiku Ng'ang'a & 9 others (2018) eKLR** and **Isaac Kinyua & 3 Others v Hellen Kaigongi [2018] eKLR**, **Wilson Mthui Mutungu v Beatrice Gathoni & Another (2016) eKLR**. In the case of **Republic v Chief Land Registrar & Another, JR ELC No. 11 of 2010 [2019] eKLR**, the court held as follows on the issue of distinctiveness of jurisdiction of the High Court and courts of equal status as follows: -

"Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface

appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! ...The drafters of the Constitution were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status."

21. The **Practice directions on proceedings in the environment and land courts, and on proceedings relating to the environment and the use and occupation of, and title to land and proceedings in other courts** has provided a clear delineation on the jurisdiction of the ELC and probate courts as follows;

"All cases touching on inheritance, succession and distribution of land under the Law of Succession Act, Cap. 160 Laws of Kenya shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction".

22. From the pleadings, it is quite obvious the suit related to environment, use and occupation of and title to land. The court in dismissing the appellant's suit ordered thus;

a. **The land CENTRAL ALEGO/OJUANDO B2/338 be subdivided into three between the three beneficiaries to the estate of the late Oloo Oloo namely Nashon Onyango Otieno the plaintiff herein, George Onyango Otieno the defendant herein and DW2 Thomas Ogola Obara.**

23. It is the considered view of this court that a case by case analysis of the facts of each case has to be considered in determining which court has jurisdiction and the predominance principle as elucidated in the case of **Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] Eklr** has to be applied. The court in this case stated as follows on the issue of concurrent jurisdiction of the high court and courts of equal status;

"...When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test..."

24. In view of the constitutional and legal delineation between the ELC and probate court, the order by the trial court distributing the estate of a deceased person in an Environment and Land Court is strange and legally untenable. This court concurs with the appellant that the trial court dealt with the suit as if it was a Succession matter which is ordinarily is derived from **Section 76** of the **Law of Succession Act**. Consequently, it is the finding of this court that the trial court erred in redistributing the estate of Oloo Oloo in an Environmental and Land Court case.

25. The 2nd issue is whether the respondent has an indefeasible title to the suit property. The appellant was issued with a certificate of confirmation of grant on 22/02/2018 in **Siaya PM-Succession Cause No.128 of 2017**. Although this court has noted some discrepancies in the succession process, this court shall refrain from delving into the forbidden arena of probate.

26. The appellant waved a title in the trial court which he had obtained through a confirmation of grant. Was his title impeachable? The answer to this lies with **Section 62(1)** of the **Land Registration Act** which reads;

"Subject to any restriction on a person's power of disposing of any land, lease or charge contained in an appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, as the case may be, shall hold the land, lease or charge subject to any liabilities, rights or interests that are unregistered but enforceable and subject to which the deceased proprietor held the land, lease or charge..."

27. From the evidence adduced from the trial court, the appellant, respondent and Thomas Ogola Obara are all relatives of Oloo Oloo. They all claimed ownership to the suit property. The appellant by virtue of the title deed and the respondent by virtue of possession, customary rights and gifting from Thomas Ogola Obara.

28. Section 28 of the **Land Registration Act** recognises customary trusts, limitation of actions and prescription as overriding rights to land. If read together with **Section 62(1)** of the **Land Registration Act** it construes that the appellant's title is not absolute. It is therefore my finding that he holds the suit property subject to the overriding interests of the respondent or any other person claiming overriding interests over the suit property.

29. The 3rd issue is whether the appellant could sustain a claim of trespass against the respondent. **Paragraph 576, Volume 97** of the Halsbury's Laws of England reads thus:

"Trespass is an injury to possessory right, and therefore the proper claimant in a claim of trespass to land is the person who was or is deemed to have been in possession at the time of trespass...the owner has no right to sue in trespass if any other person was lawfully in possession of the land at the time of trespass, since a mere right of property without possession is not sufficient to support the claim..."

30. It is evident from the record that the respondent took lawful possession of the suit property on or before May 2016 which was way before the appellant obtained a confirmation of grant and title to the suit property. The appellant's claims against the respondent is a tortious action which is only sustainable if one is in possession and has been injured by virtue of such possession and consequently, it is the finding of this court that the appellant's claim for trespass against the respondent is not sustainable and his prayers for eviction and injunction fail.

31. The 4th issue is on costs. It is trite law that costs follow the event. Because the appellant was partly successful in his appeal, each party shall bear their costs of the appeal.

Conclusion and disposal

The upshot of the foregoing is that the appeal is partially successful. Accordingly, the court makes the following disposal orders

a. The judgement of the trial court is hereby set aside and substituted with an order dismissing the appellant's suit with costs to the respondent.

b. Each party shall bear their own costs of this appeal.

It is so ordered.

Judgment delivered in open court

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF DECEMBER, 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

2/12/2021