REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCA NO. 28 OF 2017

JOHN ASUKE ODONGO & 15 OTHERS.....APPELLANTS

VERSUS

MATHEWS ODONGO OGWANG

GILBERT HESBON ODONGO (Suing on

behalf of ODONGO OWAA CLAN).....RESPONDENTS

(Being an Appeal from the judgment and decree of the Honorable B. Kasavuli

the Senior Resident Magistrate delivered on the 30th March, 2016 in WINAM PMCC No. 119 of 2011).

JUDGEMENT

The Appellants, John Asuke Odongo and 15 others have filed this appeal against Mathews Odongo Ogwang and others of Odongo Owaa Clan having been aggrieved by the whole Judgment and decree of Hon. Kasavuli SRM dated 30th March 2015 in Winam P.M.C.C No. 119 of 2011.

The grounds of Appeal are that the learned trial magistrate erred in law and fact in entering judgment for the Respondents while there was no objection which was filed by the Respondents during the process of Land Adjudication as required by law and in upholding the Respondents suit while the respondents suit as instituted was fatally defective. The learned trial magistrate erred in law and fact in entertaining the suit while he had no jurisdiction to do so. The learned trial magistrate erred in law and fact in entering judgment for the Respondents while the evidence in support of their case was based on hearsay. The learned trial magistrate erred in law and fact in finding for the Respondents while the Respondents had failed to prove their case on a balance of probabilities. The learned trial magistrate judgement is against the weight of evidence on record.

The respondents claim in the trial court was that the appellant previously resided on the land but had vacated and moved to Migori District. According to the respondent, the appellants were erroneously registered as owners of the suit property. The parcels of land belonged to the respondents as the appellants had just been accommodated by the respondents when the appellants were sojourning while escaping from the small box epidemics from their homes in Southern Nyanza.

The respondents averred that the appellants had beneficial interest on the land as long as they stayed on the said land but upon vacating the land, their beneficial intent became exhausted.

The respondents sought for an order directing the appellants to transfer the suit properties to the appellants in default, the Land Adjudication Officer Kisumu Adjudication Section to effect the said transfers in favour of the respondents. The executive officer of the court to support the supply the transfer forms.

The appellants filed a joint defence stating that the court had no jurisdiction and that the suit was bad in law as Odongo Owaa clan was not a legal entity. The appellant stated that no objection was ever filed by the respondents and therefore the suit was not maintained in law.

When the matter came for hearing before the trial court, PW1, Mathews Odongo Ogwang, PW2; Gilbert Hezron Odongo Matito PW3; George Oluoch Ogutu clearly stated the history of the parcels of land as held by their fathers. The suit was brought on behalf of the entire clan. That the appellants forefathers were gifted the land by the respondents forefathers due to the suffering the appellants forefathers or great grandfathers had encountered in their homesteads in Migori. On cross examination by Mr. Kowino, PW1 states that his grandfather died before he was born. In 1984 he was 46 years old. That means he was born in the year 1938.

On the date PW1 was born, his grandfather who gave the appellants the land to settle had already died and therefore PW1 cannot purport to

know the agreement between his fore fathers. The implication of the above is that the PW1 did not witness what happened before he was born. The facts stated by PW1 are based on hearsay. PW2, and PW3 were not born when the appellants were allocated on the parcels of land before 1938.

PW3 confirmed that the process of adjudication was done but there was no objection. Peter Onyango Onditi the only defence witness stated that his great grandfather settled on the suit land as a herd's boy and brought up a family and his children do begot children of their own one of them being Asuke, son of Ogecha Oyuke ogache, Oguya Ogeche and Achola Ogenci. Those children also brought children and settled in Keno on the suit land.

Having considered the facts and the submissions of parties, the honorable trial magistrate observed that:

> ***"Having outlined in brief the testimony by both parties, time is now high for consideration of the testimony on record for determination. I must equally mention herein that I have read both the written submissions by the parties and it is my view that from the reading of the same vis-à-vis the evidence on record, the following issues arise for determination:***
>
> ***(i) Whether this court has jurisdiction to hear and determine this matter.***
>
> ***(ii) Whether the plaintiff's failure to obtain a consent to sue on behalf of the OWAA clan renders this suit fatally defective.***
>
> ***(iii) Whether the plaintiffs' failure to raise an objection to the and adjudication process renders their suit incompetent.***
>
> ***(iv) Whether the plaintiffs have made out a case on a balance of probabilities for the grant of the orders sought.***
>
> ***(v) Who should pay costs of the suit?"***

I do find that the honourable trial court properly directed itself on the issues for determination.

In the pleadings by the appellants, the issue of jurisdiction was raised but no evidence was availed to demonstrate that the court lacked jurisdiction to entertain the suit. The appellant appears to have failed to prove that the court lacked the pecuniary jurisdiction to entertain the suit. The trial magistrate partly observed that in the absence of evidence of the value of the property, the case was to be determined on merit.

On the issue as to whether the respondents' failure to obtain consent to sue on behalf of the Owaa clan renders the suit defective, the honourable trial magistrate found that failure to seek/obtain consent by the respondent indicating that they suing on behalf of the Owaa clan can't be fatal. He cited **Articles 159 (2) of the Constitution** and Section **1A and 1B of the Civil Procedure Act.**

I do find that the trial Magistrate properly found that consent to file a representative suit was not mandatory however the honourable magistrate erred on this issue as it was mandatory that the respondent give notice after filing representative suit. The law on representing suit is as follows:

order 1 rule 8 of the civil procedure rules provides as follows:-

> **"One person may sue or defend on behalf of all in same interest.**
>
> ***(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, by or against any one or more of them as representing all or as representing all except one or more of them.***
>
> ***(2) The parties shall in such cases give a notice of the suit to all such persons either by personal service, or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.***
>
> ***(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to Court to be make a party to such suit."***

Order 1 rule 8 is quite clear that for a representative suit there has to be notice to all those affected by either personal service or by way of a public advertisement, as the Court may direct. This requirement is mandatory. No order as required in order 1 rule 8 was obtained and no such notice was issued.

However the respondents also filed the suit on their behalf and therefore the suit can only fail on behalf of the clan whose members were not given notice but can succeed on their behalf. On the issue of failure to file objection, I do find that the honourable trial Magistrate erred in holding that failure to file objection did not render the suit incompetent. I do find that failure to file objection rendered the suit incompetent as the respondents appeared to have gone to sleep only to wake up and find the process of objection had been closed.

On the facts of the case, I do find that the respondents claim was not proved on a balance of probabilities as the probabilities were equal, thus the respondents claimed that the appellants were given the land as a gift as a result of running away from their lands in Migori due to attack from small pox and were to surrender the same on return to Migori whilst the appellants claim that their great grandfather went to the suit land as a herds boy and settled on the suit land and begot the appellants on the land were equal.

I do find that the honourable trial Magistrate erred in law and in fact in finding that the respondents had proved their case on a balance of probabilities and therefore the appeal is allowed with costs. The suit in the lower court is dismissed with costs. Orders accordingly.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 30th DAY OF January, 2020.

In the presence of:

Mr Kowino for appellants

M/s Owiro for respondents

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE