REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 137 OF 2011

SELINA ROP.....APPELLANT

-VERSUS-

PAUL NG'ARNG'AR.....RESPONDENT

(Being an appeal from the judgment delivered by Senior Resident Magistrate A. Lorot H.R on 4th July 2011 in Kapsabet Civil Case No. 211/2011 Paul Ng'arng'ar Vs. Selina Rop)

JUDGMENT

1. The respondent **(PAUL NG'ARNG'AR)** had sought orders in the lower court for a permanent injunction restraining **SELINA ROP** (the appellant) from interfering with his peaceful occupation of **NANDI/KOIBARAK 'B'/841** which he claimed to have purchased from one **WELLINGTON AMUKATE on 9th August 2005.** It was his contention that the appellant without any colour of right or authority stopped him from carrying out any further construction on the said parcel

2. The trial magistrate granted the injunction and allowed the respondent to quietly possess the property, vacating all orders made and restoring his rights on the parcel of land.

3. The appellant being dissatisfied with the judgment appealed on the following grounds:

i. The trial magistrate erred in law and fact in delivering judgment based on wrong principals of law.

ii. The trial magistrate erred in law and fact in hearing and determining a suit in respect of an Estate of a deceased person namely **DAVID ARAP TITI**

iii. The trial magistrate erred by failing to appreciate appellant's submissions on a point of law that the plaintiff in **Kapsabet Civil Suit 210/2011 – Paul Ng'ang'ar** had no capacity to sue in the respect of the said estate of **DAVID ARAP TITI** (deceased).

iv. The trial magistrate erred in law and fact in failing to appreciate the fact that there was already a pending **succession cause No. 40/2010** in the High Court, so the subordinate court had no jurisdiction to distribute the estate by way of a civil suit.

4. The appellant's counsel submitted that the trial court had no jurisdiction to hear and determine the dispute as there was already another suit filed at the High Court vide **Eldoret High Court Succession Cause No.40 of 2010** which is pending hearing and determination and this much was brought to the attention of the trial court as a preliminary point of law. In this regard reference was made to **section 6 of the Civil Procedure Act** which provides that:

> **"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed"**

5. It is argued that the prudent thing for the trial court to have done was to stay the matter before it and await the decision by the High Court. That although the issue of jurisdiction was raised before the trial court as a preliminary point, the same was not addressed at all in the judgment.

6. Further the court failed to make a determination as to whether the respondent had the locus standi to sue on behalf of the deceased **DAVID ARAP TITI.**

7. Alongside the matter of the Respondent's legal standing was the aspect of whether the Respondent could be sued in the first place; not having obtained the Letters of Administration in respect of the estate. On this point it is submitted that the respondent lacked capacity to institute the suit as

a. The parcel of land in question was in the name of the afore-mentioned deceased and letters of administration had not been obtained to enable filing or defending the suit. The court was urged to be guided by the decision in **TESSIE MARGARET MUTHOKA KARIUKI vs NATIONAL BANK OF KENYA LTD HCCC NO 4 OF 2003** where the court held that the plaintiff in the suit lacked the locus standi to for having filed the suit before being granted letters of administration, thus making the suit incompetent and leading to it being struck out.

b. Suing the appellant amounted to a misjoinder of parties as the respondent should have sued the representatives of the estate of the deceased and/or lodged an objection in the succession proceedings. Counsel pointed out that there was no reasonable cause of action disclosed against the appellant since it was an undisputed fact even at the trial, that there was no privity of contract existing between the Respondent and the appellant, and this offended the provisions of **Order 2 Rule 15 (1) of the Civil Procedure Rules**. Further, that the appellant was wrongly sued for ulterior motives, as the proper party who ought to have been sued is one **ELISHA KIPKEMBOI** who is still alive.

8. The appellants added in their submissions that in any event the Respondents produced the sale agreements but never produced any consents from the Land Control Board (LCB) and/or Transfer of Land form to prove the sanctity of the alleged transactions. It is the Appellant's contention that if consent was not obtained from the LCB within 6 months and the Transfer form not duly executed then the transaction was null and void and unenforceable in law.

9. The respondent in opposing the appeal states that the same lacks merit due to the fact that an order of the High court was made on 28th July 2015 staying any further proceedings in **Kapsabet Magistrate Court PMCC 211 of 2010** until confirmation of a new grant.

10. They argue that there was a proviso to **section 8 of the Land Control Board** which remained available to the respondent and to any other person to apply to the High Court to extend time within which consent of the relevant control board would be sought. It is further submitted that there was nothing wrong in entering into the sale agreement before consent was granted, as the same could be obtained subsequently. In this regard reference is made to the case of **RUSSEL vs PRINCIPAL REGISTRAR OF TITLES (1972) IEA 2499** where the court stated that:

> **"…the consent required under the Land Control Board is aimed at far. Only the initial steps in the transaction had been taken and consent would have been obtained before completion of the transaction"**

11. The respondent insists that there is no appeal as it was filed out of time and without leave of court or any order extending the time of filing the appeal.

12. The respondent contends that the appellant was not sued as the legal representative of the estate of the deceased but as a trespasser in respect to the suit land. In view of this then he rightfully sued the appellant and there was locus standi in existence.

ISSUES FOR DETERMINATION

i. Whether the trial court had the jurisdiction to handle the case in view of the fact that a succession case was pending and awaiting decision and conclusion of the court.

ii. Whether the respondent had the locus standi to sue on behalf of the deceased and whether the appellant was rightly sued not having been privy to the contracts which were produced by the respondent before the court.

iii. Whether the trial magistrate erred in law and in fact in arriving upon his decision and whether the instant appeal has merit.

13. The first appellate Court, has a duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that there was no opportunity to see and hear the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***SELLE & ANOTHER –VS- ASSOCIATED MOTOR BOAT CO. LTD.& OTHERS (1968) EA 123*** in the following terms:

> **"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).*"**

14. A similar position had been taken by the Court of Appeal for East Africa in **PETERS –VS- SUNDAY POST LIMITED [1958] EA 424** where Sir Kenneth O'Connor stated as follows:-

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case,**

and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

15. The matter of jurisdiction was addressed in the case of **DHIRAJLAL J. SHAH & ANOTHER V VIJAY AMRITLAL SHETHIA CIVIL APPEAL NO. 218 OF 2015** the learned judges at appeal stated as follows:

> **"Turning to jurisdiction, it is now trite that issues touching on the jurisdiction of a court of law to determine any matter before it are fundamental issues of law and may be raised at any stage of the proceedings. Once raised, a determination thereon should be made before a Court can proceed further with the final disposal of any matter before it. Also that where want of jurisdiction is demonstrated in law to exist, the court has no option but to down its tools and proceed no further."**

16. The aforementioned case outlines what does or does not amount to want of jurisdiction. This was expounded upon by Nyarangi, JA in the **OWNERS OF THE MOTOR VESSEL 'LILLIAN "(S) V CALTEX OIL (KENYA) LTD [1989] KLR1,** as follows:

> **"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction…"**

> **"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court had cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristic. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."**

From the afore-going there is no doubt in my mind that before taking any further step in the matter, the trial court ought to have determined whether it had jurisdiction to deal with the matter in light of the stay orders made by Kimondo J, on 28/07/2015 in HCP&A No 40 of 2011 which order is not annexed, and which does not relate to the present file being HCP&A No 137 of 2011. I take note that the contested judgment was entered on 04/07/2011. Whatever the case, the order by the High court came years after the fact, and there was no way in which the trial court could have addressed its mind to the same.

17. On the question of whether the respondent had locus standi to institute the suit against the appellant, I take note that the claim was not against any acts of the deceased, but against the appellant in her personal capacity for acts committed by her against the respondent. I am alive to the case of **CHRISTINE ACHIENG OGESA & ANOTHER VS BRITISH AMERICAN MANAGERS LIMITED; H.C SUCCESSION CAUSE NO. 2511 OF 2011**. In this case, it was held that ***"without a grant of representation or a special limited grant ad colligenda bona, the Applicants have no legal capacity to sue the Respondent as yet for payment to them of the money the deceased's estate is entitled to."***

However in the present case the orders sought were not to recover anything from the estate of the deceased or to restrain the estate of the deceased from certain acts, it was against the appellant as a trespasser and the issue of locus standi does not hold. The upshot is that the appeal lacks merit and is dismissed with costs to the respondent.

DATED, SIGNED and **DELIVERED** at **ELDORET** this **5th** day of **September 2018.**

H. A. OMONDI

JUDGE