



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 66 OF 2014

MOSES OMOLO ATIENO 1ST APPELLANT

GRADUS ATIENO OTHIM 2ND APPELLANT

VERSUS

JOHN NJONG OSINGO RESPONDENT

RULING

1. At all material times the parcel of land known as LR No. Kamagambo/Kamwango/195 (“hereinafter referred to as “the suit property”) was registered in the name of one, Othim Njong, deceased (hereinafter only referred to as “the deceased”). The deceased died on 12th August 1983. The relationship between the deceased and the parties herein is contentious. Whereas the 1st and 2nd appellants have contended that the deceased was their grandfather and father respectively, the respondent has contended that the deceased was his uncle. Sometimes in the year 2011, the respondent lodged a claim against the appellants before the Rongo District Land Disputes Tribunal (“the tribunal”). In the said claim, the respondent contended that the appellants had trespassed on the suit property which he claimed was owned by him, on 13th February 2011. The 1st appellant contended before the tribunal that the suit property belonged to the deceased who was his grandfather and as such he had a right to enter the suit property and put up his homestead thereon. The 2nd appellant on the other hand contended that the deceased was his father and as such he had a right to enter the suit property. The tribunal after hearing the parties and their witnesses made an award on 5th July 2011 in favour of the respondent.
2. In its award, the tribunal found that the respondent is the next of kin to the deceased and declared the 1st appellant a trespasser on the suit property. The tribunal ordered that the 1st appellant be evicted from the suit property and possession thereof be handed over to the respondent. The appellants did not appeal against the decision of the tribunal to the Provincial Appeals Committee under section 8 of the Land Disputes Tribunals Act, 1990 (now repealed). The tribunal’s award was filed at the Senior Resident Magistrate’s court at Rongo on 19th July 2011 in Land Misc. Application No. 19 of 2011 for adoption as a judgment of the court and the same was adopted as such on 26th September 2011 pursuant to the provisions of section 7 of the Land Disputes Tribunal Act, 1990 aforesaid.
3. After the tribunal’s award was adopted as a judgment of the court as aforesaid, the respondent caused the suit property to be transferred to one, Siprosa Oluoch Onyango on 8th June 2012 in circumstances which are not clear from the record before me. It is not clear whether the respondent obtained a Grant of Letters of Administration in respect of the estate of the deceased before he transferred the suit property to the said Siprosa Oluoch Onyango.
4. Despite the fact that the respondent had already transferred the suit property to a third party, the

respondent still moved the Senior Resident Magistrate's Court at Rongo in Land Misc. Application No. 19 of 2011 aforesaid on 23rd September 2013 seeking an order for the eviction of the appellants from the suit property. The application that was dated 19th September 2013 was brought ex parte. It is not clear why it was so brought. As I have stated above, the tribunal's award was adopted as a judgment of the court on 26th September 2011 and the decree of the court was issued on the same day. The respondent's application for the eviction of the appellants from the suit property amounted to an application for execution of the said decree which should have been brought through a normal application for execution under Order 22, rule 7 (2) of the Civil Procedure Rules. Since the decree had been issued on 26th September 2011 which was more than a year as at the date when the eviction of the appellants was sought, the respondent was under a duty to comply with Order 22 rule 18 of the Civil Procedure Rules that required a notice to be sent to the appellants to appear before the court and show cause why the decree should not be executed against them. Order 22 rule 18 of the Civil Procedure Rules was not complied with because the respondent obtained his orders of eviction ex parte on 23rd September 2013; the same day he filed the eviction application and warrants were issued to M/s Odongo Investment Auctioneers also on the same day for the eviction of the appellants from the suit property. Once again, it is not clear why the eviction order was sought and obtained against both appellants while the decree of the court was directed against the 1st appellant only. The 1st appellant was nevertheless evicted from the suit property pursuant to the said warrant. It is not clear from the record when this eviction was carried out. The respondent's attempt to evict the 2nd appellant was however resisted and was abandoned.

5. Following the 1st appellant's eviction from the suit property, the appellants filed a memorandum of appeal in this court on 6th June 2014 challenging the decree of the Senior Resident Magistrate's Court at Rongo, in Rongo Misc. Civil Application No. 19 of 2011 (Z. J Nyakundi, SRM) through which the decision of the tribunal was adopted as a judgment of the court. The appellants challenged the said decision on several grounds. Together with the memorandum of appeal aforesaid, the appellants brought an application by way of Notice of Motion dated 4th June 2014 in which they sought a stay of execution of the said decree of the Rongo Senior Resident Magistrates Court. The appellants application for stay of execution came up for hearing ex parte in the first instance on 6th June 2014 when it was certified as urgent and the appellants directed to set it down for hearing at the registry on a priority basis. The application was thereafter set down for hearing at the registry on 22nd July 2014. When the application came up for hearing on 22nd July 2014 only the appellants advocates attended court. There was no appearance for the respondent. The appellants' advocates informed the court that he had served the application upon the respondent directly and that he was ready to proceed with the same.
6. Upon perusing the court file, the court noted that the respondent was represented by the firm of Ms. Oguttu Mboya & Co. Advocates before the Senior Resident Magistrates Court at Rongo (lower court) whose decision is being appealed herein and for all intents and purposes, the said firm was deemed to be still on record for the respondent in the appeal before this court pursuant to the provisions of Order 9 rule 5 of the Civil Procedure Rules. In the circumstances, the court adjourned the application to 30th July 2014 and directed the appellants' advocates to serve the application upon the firm of Oguttu Mboya & Co. Advocates. On 30th July 2014, again, only the appellants' advocates attended court. The said advocate informed the court that the appellants had served the application upon the firm of Oguttu Mboya & Co. Advocates and upon the respondent. Since the application was not opposed, he urged the court to grant the orders sought as prayed. The court granted a stay of execution to last for period of twelve (12) months from the date of the order. The said order was extracted and served upon the respondent on 11th September 2014.
7. What is now before me is an application dated 7th October 2014 that was filed by the respondent on 13th October 2014. In the application, the respondent has sought the following orders:-
 - i. That the application be certified as urgent and the same be heard on a priority basis.
 - ii. That the court be pleased to review, rescind, vary and/or set aside the order that was granted on 30th July 2014.

- iii. That consequent to prayer (ii) above being granted, the court be pleased to strike out and/or order to be struck out the appellants Notice of Motion application dated 4th June 2014 together with the instant appeal.

Prayer (ii) of the application was sought on the grounds that the order issued herein on 30th July 2014 was issued without notice to the respondent and as such the same was made in contravention of the rules of natural justice. The respondent contended that the affidavit of service that was relied upon by the court in allowing the application dated 4th June 2014 to proceed ex parte is fraught with falsehoods. As concerns prayer (iii) of the application, the respondent has contended that the appeal herein has been filed out of time contrary to section 79 (G) of the Civil Procedure Act, Cap 21 Laws of Kenya and that it has also been brought contrary to the provisions of section 8 of the Land Disputes Tribunal Act, 1990 (now repealed).

8. The application was supported by the affidavits of the respondent and one, Joshua Otieno both sworn on 7th October 2014. In his affidavit, the respondent gave the history of the dispute herein from the time he lodged a claim against the appellants at the tribunal upto the time they were evicted from the suit property. The respondent denied that he was served with the Memorandum of Appeal and the application dated 4th June 2014. He termed the affidavit of service by William Morara Ogwara sworn on 22nd June 2014 as misleading and erroneous. Joshua Otieno is a clerk in the firm of Oguttu-Mboya & Co. Advocates. In his affidavit, he has challenged the contents of the affidavit of service by William Morara Ogwara sworn on 30th June 2014 in which he had stated that he visited the firm of Oguttu-Mboya & Co. Advocates on 23rd July 2014 for the purposes of serving the same firm of advocates with a memorandum of appeal and a hearing notice for the appellants' application dated 4th June 2014. Joshua Otieno denied that he met the said process server on 23rd July 2014 and that he informed him that the firm had no instructions to act for the respondent herein.
9. The respondent's application was opposed by the appellants through a replying affidavit sworn by the 2nd appellant on 11th February 2014. The 2nd appellant denied that he was served with the application that sought his eviction from the suit property and the order of eviction. The 2nd appellant contended that the tribunal's award was illegal in that it was not signed by the Chairman and Secretary of the tribunal and also on the ground that the tribunal had no jurisdiction to determine a dispute over a property of a deceased person. The 2nd appellant contended that the appeal herein has merit. He termed the respondent's application as premature and intended to defeat the cause of justice. The 2nd appellant claimed that the appellants application dated 4th June 2014 is still pending hearing inter partes.
10. On 2nd December 2014 the court directed that the respondent's application be heard by way of written submissions. The parties filed their respective submissions and the same are on record. I have considered the respondent's application together with the affidavit filed in support thereof. I have also considered the appellants replying affidavit in opposition to the application. Finally, I have considered the written submissions by the parties' respective advocates and the authorities cited in support thereof. The respondent's application has two limbs. The first limb seeks the setting aside of the order made herein on 30th July 2014 on the appellants' application dated 4th June 2014. The second limb seeks the striking out of the application dated 4th June 2014 together with the appeal herein. I will consider the two limbs of the application one, after the other.
11. The order of 30th July 2014 was made in the absence of the respondent. Order 51 rule 15 of the Civil Procedure Rules gives this court power to set aside an order made ex parte. It is not very clear to me why the respondent chose to bring the application under order 45 instead of Order 51 rule 15 aforesaid. Since the relief sought is the same, I would consider the application both under order 51 rule 15 of the Civil Procedure Rules and also under order 45 of the Civil Procedure Rules. The respondent has contended that he was not served with the appellants' application dated 4th June 2014 and as such the order of 30th July 2014 was made without affording him an opportunity to be heard. The respondent has termed the affidavits of service that were filed in court by the appellants on the basis of which they were allowed to proceed within the said

- application ex parte as full of falsehoods. According to the affidavits of service on record, the respondent and his advocates on record were duly served with the applicant's application dated 4th June 2014 and a notice of the date when it was to be heard. The first affidavit of service was sworn by one, William Morara Ogwara on 22nd July 2014. In this affidavit of service the said William Morara Ogwara who is a process server of this court deposed that he served the respondent with the Notice of Motion application dated 4th June 2014 on 24th June, 2014.
12. On this occasion, the respondent's advocate on record was not served. When the said application came up for hearing on 22nd July 2014, the court found the service improper. Under Order 9 rule 5 of the Civil Procedure Rules, 2010 mentioned herein earlier, once a party has appointed an advocate to act for him/her in a matter, unless he/she changes advocates or the advocate has died or become bankrupt or has failed to take out a practicing certificate or is unable to act as an advocate for any reason or has withdrawn from acting for the party, such advocate is deemed to be the advocate of such party until the final conclusion of the case including any review or appeal arising from the case or matter. In this case, the firm of Oguttu-Mboya & Co. Advocates was on record for the respondent in the lower court (Senior Resident Magistrate's Court at Rongo). The said firm was deemed to be still acting for the respondent in the appeal herein that arose from the decision of the lower court. The appellants' application for stay of execution that was filed herein ought therefore to have been served upon the said firm and not upon the respondent directly. It is for this reason that this court found the service that was effected upon the respondent directly improper and directed that the application be served upon the respondent's advocates on record. The said application was adjourned to 30th July 2014 to give the appellants' time to effect service as aforesaid.
13. When the matter came up on 30th July 2014, the appellants' advocate notified the court that they had effected service in accordance with the order that was made by the court on 22nd July 2014. This is the reason why the court allowed the application to proceed to hearing the absence of the respondent notwithstanding. The respondent's advocates have now contended that they were not served with the application and have termed the affidavit of service that was sworn by William Morara Ogwara on 30th July 2014 as false. I have had a second look at the said affidavit. As I have stated above, I had directed the appellants' advocates on 22nd July 2014 to serve the application dated 4th June 2014 upon the respondent's advocates on record. According to paragraph 2 and 4 of the said affidavit, what the process server purportedly attempted to serve upon the respondent's advocates on 23rd July 2014 was "a memorandum of appeal and annexures and a hearing notice". As I have stated above, the respondent's advocates had not been served with the appellant's application dated 4th June 2014 and this is why an order was made that the same be served upon them. It is clear from the affidavit of William Morara Ogwara sworn on 30th July 2014 that the said application was not served upon the said advocates as had been ordered by the court. It is not clear why the appellants purported to serve a hearing notice upon the said advocates of an application that had not been served upon them. I also find the conduct of the process server of carrying away the documents that he was to serve upon the said firm of advocates for the reason that they had refused service rather strange.
14. According to order 5 rule 14 (see the marginal notes), when a party refuses service, the document that was supposed to be served is supposed to be left at his/her premises. The process server is not supposed to take back the document from the party that he is supposed to serve or carry it away if service is refused. When the document is not left with the person who was to be served, there is no service. For the foregoing reasons, I am in agreement with the submission by the respondent's advocates that they were not served with the respondent's application dated 4th June 2014 that came up for hearing on 30th July 2014 or with a hearing notice for the said application. The purported service of a hearing notice for the said application upon the respondent directly on 24th July 2014 was inconsequential. This is because the respondent had an advocate on record that the court had ordered to be served.
15. Where a party demonstrates that he was not served with an application that was heard by the court in his absence or that no notice was given to him of the date when the application was to be heard, on an application to set aside an order made ex parte in such application, the court has no discretion in the matter. Such order is irregular and the aggrieved party is entitled to have it set

aside *ex debito justitiae*. The respondent is therefore entitled as of right to have the order made herein on 30th July 2014 set aside for want of service of the application aforesaid. I am also satisfied that lack of service is a sufficient ground under order 45 rule 1 (1) of the Civil Procedure Rules to review an order or a decree. The respondent's application that was brought under order 45 of the Civil Procedure Rules instead of Order 51 rule 15 of the Civil Procedure Rules is therefore properly before the court. The respondent is entitled to the review and setting aside of the order that was made by this court on 30th June 2014 for the reasons that I have given above.

16. I now move to the second limb of the respondent's application that seeks the striking out of the appeal herein on the ground that it is not legally tenable. I am of the view that this limb of the application is pre-mature. The appeal herein has not been admitted by the court under section 79B of the Civil Procedure Act, Cap 21 Laws of Kenya. The Memorandum of Appeal has therefore not been served upon the respondent formally or at all (the respondent has denied that he was so served). Under Order 42 rule 12 of the Civil Procedure Rules, a Memorandum of Appeal is supposed to be served only after the judge has considered the appeal under section 79B and has refused to reject the same summarily. The judge would not determine the fate of an appeal under section 79B of the Civil Procedure Act, Cap 21 Laws of Kenya until it is seized of the entire record of the lower court. Under order 42 rule 15 of the Civil Procedure Rules, such record is supposed to be furnished by the lower court on notice as soon as the Memorandum of Appeal is lodged. In this case, no such record has been availed to this court. This court is not seized of the proceedings of the lower court or a certified copy of the decree which is the subject of the appeal herein.

17. I am of the view that it would be premature for this court to determine at this stage whether the appeal has been filed out of time and whether or not it is seized of the jurisdiction to hear or entertain the appeal. Of course the court can consider these issues when determining an interlocutory application like the one that was brought herein by the appellants. It should be noted however that the determination of those issues made in an interlocutory application is not final. What I have been called upon to do herein is to make a final determination of the appellants appeal. This I cannot do before the appeal has been admitted and a memorandum of appeal served upon the respondent. The respondent cannot seek the striking out of an appeal that has not been served upon him. In my view, the issues raised in the respondent's application as grounds for striking out the appeal herein would be considered by the court when determining whether to admit the appeal or not under section 79B of the Civil Procedure Act Cap 21 Laws of Kenya. This the court will do so once it is seized of the record of the lower court as I have stated above. The respondent would be at liberty to move the court to strike out the appeal herein if it passes the admission test and the memorandum of appeal is served upon him. As for now, it is my finding that the limb of the respondent's application that is seeking the striking of this appeal has been brought prematurely and is not for granting.

18. In conclusion, I hereby allow the respondent's application dated 7th October 2014 in terms of prayer 3 thereof. The orders issued herein on 30th July 2014 are hereby set aside. The appellants shall set down their application dated 4th June 2014 for hearing inter partes at the registry on a priority basis. In the meantime the status quo shall be maintained for a period of sixty (60) days from the date hereof. The respondent shall have the cost of the application.

Delivered, Dated and Signed at Kisii this 10th day of July, 2015.

S.OKONG'O

JUDGE

In the presence of:

Mr. Nyariki h/b for Sagwe for the appellants

Mr. Ochwang'i for the respondent

Milcent Court Assistant

S.OKONG'O

JUDGE