



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC APPEAL NO. 33 OF 2019

JOHN OMAMBIA OGENDI.....APPELLANT

VERSUS

CHARLES MURUMBI ARANI

JAMES ONDUKO NYABERIRESPONDENTS

NYANGWESO MOSONGO ARANI

FRANCIS ONYARI NYABERI

(Being an appeal from the judgment of M.O Wambani, Chief Magistrate dated 8th October 2019 in Nyamira CMELC Case No. 46 of 2018)

JUDGMENT

INTRODUCTION

1. This appeal arises from the Judgment of M.O Wambani - Chief Magistrate dated 8th October 2019 in Nyamira CMELC case No. 46 of 2018. In the lower court the Appellant John Omambia Ogendi who was the Plaintiff filed suit against the Respondents seeking a permanent injunction to restrain the Respondents from burying the remains of Mary Kemunto Arani- deceased on the Plaintiff's property known as Land Parcel No. **NORTH MUGIRANGO/MOKOMONI/650** or interfering with the Appellant's quiet possession thereof. Contemporaneously with the Plaintiff, the Plaintiff filed an application for injunction to restrain the Defendants from burying the remains of the deceased on the suit property. The application was granted pending the hearing and determination of the suit. The suit was then fixed for hearing.

BACKGROUND

2. At the hearing, the Plaintiff who testified as the sole witness for the Plaintiff's case stated that the Defendants were his cousins. He said he did not know the deceased. He told the court that he was the registered owner of Land Parcel No. **NORTH MUGIRANGO/MOKOMONI/650**. He produced a title deed in his name. The land was given to him by his late father Ogendi Masogo. He stated that the Defendants had constructed a house on his land and they were living in it. They had also planted maize and they had cut down his avocado trees and bananas. In cross-examination, he stated that he was issued with a title deed on 4.8.2017. He stated that his father died on 5.10.1988.

3. The Defendants called two witnesses. DW1 Wesley Atuya Ogari who is a retired sub-chief, Nyaramba sub-location testified that the suit property belonged to the late Masogo Ogendi. He told the court that the late Masogo Ogendi had three wives and Mary Kemunto Arani-deceased was one of them. He stated that Masogo Ogendi divided the suit property between his two wives- Agnes and Mary. It was his testimony that Mary constructed a grass-thatched house on the suit property where she used to live, but when she fell sick she moved to Nyaramba market and leased out her land. He told the court that the Plaintiff moved to Mary Kemunto's land when she was away and destroyed her house. Mary's sons however built another house in 2018 and they were living on the suit property. He said he did not know if the family of the late Masogo Ogendi had filed succession proceedings after his death.

4. Charles Murumbi Arani the 1st Defendant testified as DW2. He stated that the Plaintiff was his step brother. He testified that his late father Ogendi Arani Masogo had three wives. His mother was the first wife while the Plaintiff's mother was the third wife. It was his testimony that the suit property originally belonged to his late father. He told the court that his father divided the suit property between his second and third wives and the boundary is still in place. He stated that the Plaintiff had chased their step-mother Mary away from her land and destroyed her house. He confirmed that at the time of her demise she was living at Nyaramba market. It was his testimony that Mary should be buried on the land she was given by her late husband. He alluded to a letter addressed to the Plaintiff from the Land Registrar Nyamira, for rectification of the register in respect of the suit property. However, the said letter was not produced as an exhibit as the Land Registrar, Nyamira was not

called as a witness.

5. After taking the evidence of both parties, the trial magistrate rendered her judgment in which she held that the Plaintiff had failed to prove his case on a balance of probabilities. She directed that the remains of Mary Kemunto be buried on the portion of Land Parcel No. NORTH MUGIRANGO/MOKOMONI/650 which had been given to her by her late husband Ogendi Masogo.

6. Being dissatisfied with the said judgment, the Appellant lodged this appeal citing the following grounds:

- i. The learned trial magistrate erred in law and fact by failing to appreciate the evidence adduced before her by the Appellant.
- ii. That the learned trial magistrate erred in law and fact by not relying on the evidence adduced by the Appellant
- iii. That the learned trial magistrate erred in law and fact by failing to notice that the Appellant's evidence was uncontroverted and unchallenged
- iv. That the learned trial magistrate erred in law and fact by making a finding that the deceased herein Mary Kemunto Arani is a beneficiary of the estate of Ogendi Masogo
- v. That the trial magistrate erred in law and fact in failing to take into account the pleadings and final submissions tendered by the appellant in response.

7. The appeal was canvassed by way of written submission and both parties filed their submissions which I have carefully considered. This being a first appeal, this court is enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and arrive at its own independent findings and conclusions, but always bearing in mind that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanor and giving allowance for that. See *Selle vs. Associated Motor Boat Company (1968) EA 123*.

ISSUES, ANALYSIS AND DETERMINATION

8. The first and second grounds of appeal relate to the Appellant's evidence regarding the ownership of the suit property. Mr. Moracha learned counsel for the Appellant submitted that the Appellant was the registered proprietor of the suit property and the Respondent's contention that the title had been obtained fraudulently had not been proved. He faulted the unilateral cancellation of the said title by the Land Registrar. He cited Kisii ELC Case No. 11 of 2009 consolidated with ELC Case No. 28 of 2009 for the proposition that a title deed can only be cancelled by the court and the Land Registrar has no power to cancel titles through a gazette notice. He referred to section 79(2) of the Land Registration Act which provides that the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.

9. I have reviewed the judgment of the trial magistrate and I have not seen any finding on the cancellation of the Plaintiff's title. The court made a finding that Mary Kemunto Arani was the third wife of the late Ogendi Masogo and she was entitled to be buried on the land that her late husband had apportioned to her which forms part of Land Parcel No. NORTH MUGIRANGO/MOKOMONI/650. I am therefore constrained to agree with counsel for the Respondent that these two grounds have no basis.

10. With regard to the third ground of appeal counsel submitted that the Appellant's evidence was uncontroverted. Nothing could be further from the truth. In his evidence the Appellant testified that he owned the suit property exclusively and that the suit property had been given to him by his late father Ogendi Masogo. He stated that he did not know the late Mary Kemunto Arani and he denied that she had ever lived on the suit property. However, the DW1 and DW2 testified that the late Mary Kemunto Arani was the third wife of Ogendi Masogo and she was therefore the Plaintiff's step-mother. They also testified Ogendi Masogo had divided the suit property between the second and third wife and that Mary Kemunto who was the third wife of Ogendi Masogo used to live on the suit property before she was chased away by the Plaintiff. After listening to evidence of both parties, the trial magistrate chose to believe the Defendant's version and I cannot fault her for doing so.

11. In the fourth ground of Appeal, the Appellant has faulted the trial magistrate for finding that the late Mary Kemunto Arani was a beneficiary of the estate of Ogendi Masogo (deceased). His reason is that the late Mary Kemunto was not residing on the suit property and that she did not claim her right to the suit property while she was alive. From the evidence on record, it is clear that the late Mary Kemunto was one of the wives of Ogendi Masogo and it therefore follows that she was a beneficiary of Ogendi Masogo's estate. The fact that she did not claim her right to the suit property during her lifetime does not disentitle her to the same. I therefore find no reason to interfere with the trial magistrate's finding on this issue.

12. Finally, the Appellant has complained that the trial magistrate did not take his pleadings and submissions into account. I have reviewed the Judgment of the trial magistrate and she summarized the pleadings, reviewed the evidence on record and considered the submissions of both parties before arriving at her decision. As a matter of fact, she made particular reference to the Appellant's submissions on the question of rectification of title.

13. Accordingly, I find no merit in the appeal and I dismiss it with costs to the Respondent.

Dated, signed and at Kisii this 30th day of November 2020.

J.M ONYANGO

JUDGE