



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

Civil Appeal 178 of 1995

ELEKIA OCHIENG OUMA

JOSEPH ONGUS AGAN APPELLANTS

AND

SAMUEL ODHIAMBO..... RESPONDENTS

(Appeal from the Judgment and decree of the High Court of Kenya at Kisii (The Hon.

Justice Tom Mbaluto) dated on 14th July, 1995.

IN

H.C.C.C. NO. 22 OF 1995)

JUDGMENT OF THE COURT

By the plaint dated 20th December, 1994 the respondent (Plaintiff) instituted suit against the appellants (defendants) for annexing a portion of his land and causing it to be incorporated and registered as part of the appellants' land parcels numbers SUNA EAST/WASWETA/9532 and 9533. The respondent sought, amongst others, orders for a declaration that the appellants jointly and severally hold 4.5 acres of the said parcels of land in trust for him and an injunction to restrain the appellants from entering or using the said parcels of land. In their written statement of defence the appellants traversed all the allegations contained in the plaint.

On 12th April, 1995 the parties by consent referred the dispute to the District Surveyor, Migori, to visit the disputed parcels of land and establish where the boundary lay before the head title was sub-divided giving rise to the suit lands. The award was duly filed and read out to the parties by the learned judge (Mbaluto, J). None of the parties took steps to have the award set aside; and precisely, a month afterwards on 14th July, 1995 the learned judge in the presence of both parties entered judgment in terms of the award whose effect was to extract portions of land from the appellants' parcels and to incorporate them in the respondent's title.

The appellants, who are represented by counsel, have put forward four grounds of appeal which in the main challenge the entering of judgment in terms of the award.

This appellants, who are represented by counsel, have put forward four grounds of appeal which in the main challenge the entering of judgement in terms of the award.

This appeal is misconceived as it does not lie at all Under Order 45 rule 17(2) of the Civil Procedure rules upon judgment being entered according to the award a decree except in so far as the decree is in excess of, or not in accordance with, the award.

This appeal is struck out with costs to the respondent.

Dated and delivered at Kisumu this 23rd day of November, 1995.

A. M. AKIWUMI

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.