



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Cockar, Muli JJ A & Omolo Ag JA)

CIVIL APPEAL NO 71 OF 1989

BETWEEN

KIGEN KANDAGOR.....APPELLANT

AND

ROTICH KANDAGORRESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (Tunoi J), dated 25th July 1988

in

HCCA No 19 of 1987)

JUDGMENT

Briefly the facts are that sometime before 8th February, 1985, a complaint was laid before the District Officer, Kabarnet, by the respondent which claimed that the appellant had trespassed into 3 acres of the adjoining respondent's land in Sacho/Kabarak/293 comprising of 18.4 hectares. This was done in 1968 during the process of surveying which had followed the land adjudication done in 1967. The said 3 acres were thus absorbed into the 7 hectares of the appellant's land being Sacho/Kabarak/392. The respondent wanted a rectification in order to get his 3 acres of land back. The complaint was initiated purportedly under section 9A (1) of the Magistrates' Courts Act (cap 10). The panel of elders duly met and visited the disputed land on 8th February, 1985 and commenced the hearing of the complaint and recording evidence of witnesses on 7th March, 1985, under the chairmanship of the District Officer. After concluding the hearing the panel gave its judgment to the effect that the disputed 3 acres of land belonged to the respondent.

On 18.10.85, that is 7 months after the conclusion of the hearing by the panel, the respondent filed a plaint in the Resident Magistrate's Court at Kabarnet claiming from the appellant the said 3 acres of land. The written record of the decision of the panel of elders together with the proceedings was filed in the Resident Magistrate's Court at Kabarnet on a date which is not ascertainable from the record but the matter came up before the magistrate on 25th March, 1986, (or 1987) and the award was read out in Court on 13th April, 1987. On 12th May, 1987, the appellant objected to the decision. The objection proceedings followed and the Resident Magistrate, Mr Mabele, on 29th May, upheld the objection proceedings initiated by the appellant on the ground that the elders did not have jurisdiction because it

was not in dispute that the appellant was registered as the owner under the Registered Land Act (cap 300) and that his was a first registration, while what the respondent had sought was a rectification of the register and not any of the remedies that had been set out in sub paras (a), (b), (c) and (d) of section 9A(1) of the Magistrates' Courts Act (cap 10).

The decision of the Resident Magistrate did not find favour with the Judge who heard the aggrieved respondent's appeal.

The Judge after finding that the respondent had acquired ownership of the said 3 acres through adverse possession, set aside the Resident Magistrate's ruling and re-instated the award of the panel of elders and made orders declaring acquirement through adverse possession and requiring effect to be given to the declaration whereby the said 3 acres, after a re-survey and excision, were to be transferred to the respondent. This appeal from the judgment of the High Court is based on the following grounds:-

1. The learned Judge erred in law in setting aside the ruling of the Resident Magistrate and confirming the elders' award which they had no jurisdiction to make as this was a matter involving title.
2. The learned Judge erred in law in making orders which were outside the appeal proceedings before him.

The appeal was duly heard and submissions were made. Both the grounds of appeal have substantial merit. The judgment of the High Court cannot be supported. As regards the first ground of appeal we draw attention to this Court's decision in the case of 1986 *Benjamin Khayadi vs Herbert Aganda* [1982-88] 1 KAR 1155 in which the three learned JJ A Hancox (now the Chief Justice), Gachuhi and Masime in their three separate judgments unanimously held that reference to the panel of elders through a direct complaint to a District Officer was not a valid reference at all. Jurisdiction by the panel of elders to deal with matters set out in sub- paras (a) , (b), (c) and (d) of sec 9A (1) of the Magistrates' Courts Act is derived only through a reference to it by a Magistrate's Court. A complaint, that is a plaint, has first to be filed in the Resident or the District Magistrate's Court which shall ascertain whether an issue relating to any matter set out in the sub- paras (a) ,(b), (c) and (d) has been raised before referring it to the panel of elders. In this case, as we stated earlier, a complaint was filed before 8th February, 1985 , with the District Officer, the proceedings were commenced by the panel by 8th February, 1985, and evidence from witnesses was recorded on 7th March, 1985, whereafter the judgment of the panel of elders was delivered. As the plaint had not been filed prior to the commencement of the proceedings before the panel of elders the matter, therefore, had not been referred to the panel by the magistrate. The panel of elders consequently, had no jurisdiction to hear the dispute or give a decision. In consequence the entire proceedings before the panel of elders were a nullity as was its decision.

Apart from the proceedings before the panel of elders being a nullity on the above score the panel, in any case, would not have had jurisdiction to deal with the dispute relating to registered land where the ownership is by first registration. This Court's decision in *Leonida Nekesa vs Musa Wanjala* Civil Appeal No 23 of 1985 where it was held that if the subject of proceedings before a panel of elders is land registered on a first registration then under section 143 of RLA (cap 300) the elders have no jurisdiction to arbitrate, provides a parallel to this appeal.

Finally, again on the question of jurisdiction we would observe that section 159 of the RLA has, barring the disputes coming within the provisions of part IIIA of the Magistrates' Courts Act, specifically limited the jurisdiction in respect of civil suits and proceedings relating to title to the registered land to the High Court and where the value of the subject matter in dispute does not exceed twenty five thousand pounds, to the Resident Magistrate's Court. Under part IIIA of the Magistrate's Courts Act (cap 10) the panel of elders have been granted the exclusive jurisdiction by section 9A(1) over the following matters only of civil nature relating to land:

- (a) the beneficial ownership of land;

- (b) the decisions of, or the determination of boundaries to land, including land held in common;
- (c) a claim to occupy or work land;
- (d) trespass to land.

The Resident Magistrate had very rightly pointed out that the claim in this reference was not related to any of the above matters.

Coming now to the second ground of appeal this, like the first ground, has a lot of merit. The Judge on the 1st appeal found that as the evidence had established that the respondent (appellant therein) had been in continuous and uninterrupted possession of the land since 1940s he, the respondent, had, therefore acquired title by adverse possession. He then went on to make the declaration of acquirement by adverse possession and gave further orders to enable transfer to be registered. With respect the Judge gravely misdirected himself in his reasoning and in his finding. There is a special procedure laid down to prove adverse possession in Court. A right to acquire title by adverse possession is granted by section 38 of the Limitation of Actions Act (cap 22). Order 36-rule 3D (i) of the Civil Procedure Rules, cap 21 has prescribed that an application under section 38 of the Limitation of Actions Act shall be made by Originating Summons. Sub rules (2) and (3) have prescribed the procedure to be followed. O 36 r 1 has prescribed that an Originating Summons is returnable before a Judge sitting in chambers. In view of the above provisions the Judge clearly went completely astray. The judgment of the High Court dated 25th July, 1988 cannot be supported. It is now set aside and the ruling of the Resident Magistrate dated 29th May, 1987, setting aside the decision of the panel of elders is restored. Costs of the appeal are awarded to the appellant against the respondent.

Orders accordingly.

Dated and delivered at Kisumu this 10th day of April, 1992.

A.M COCKAR

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JUDGE OF APPEAL

M.G MULI

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JUDGE OF APPEAL

R.S.C OMOLO

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Ag. JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR