



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL CASE NO. 17 OF 2016

ISAYA ONDIEK KANDIRA.....APPELLANT

VERSUS

ALEX OGONY MIGUNA.....RESPONDENT

(Being an appeal from the Ruling of the Hon. M.S. Kimani R.M delivered on 13th May, 2015 at SIAYA in SIAYA SPM COURT, MISC. CIVIL APPLICATION NO. 35 OF 2000)

Arising from

SIAYA MISC. CIVIL APPLICATION NO. 35 OF 2005

ALEX OGONY MIGUNA.....PLAINTIFF

VERSUS

ISAYA ONDIEK KANDIRA.....DEFENDANT

JUDGMENT

1. Isaya Ondiek Kandira, the Appellant, “being *aggrieved and dissatisfied with the finding, decision, ruling and orders of the Learned Magistrate M.S. Kimani, R.M. in Siaya S.P.M Court Misc. Civil Application No. 35 of 2000, Alex Agony Miguna V Isaya Ondiek Kandira, dated and delivered on the 13th May 2015*” prepared this appeal against Alex Ogony Miguna, the Respondent, raising the following seven (7) grounds.

1. “The Learned trial magistrate had neither constitutional nor statutory jurisdiction to entertain, hear and determine the issues before him.
2. The Learned trial magistrate erred in law and fact in failing to appreciate that the claim in respect of which the learned trial magistrate purported to deal with was statutorily time barred and hence no orders could issue.
3. The trial court erred in both fact and law in failing to appreciate that Respondent/Appellant herein was not a party to the original suit and hence no orders could issue against him in Siaya SPMCC No. 35 of 2000.
4. The application dated 11/11/2014 in respect of which the ruling dated 13/5/2015 was delivered did not fall within the provisions of Order 24 Rule 3 of the Civil Procedure Rules (2010).
5. The learned trial magistrate failed both in law and fact in failing to appreciate that the suit to which the ruling relates, i.e. Siaya SPMCC No. 35 of 2000, Alex Ogony Miguna vs Isaya Ondiek Kandira was filed long after the parcel of land in question i.e. EAST GEM/URANGA/264 had been transferred into the name of the Respondent/Appellant herein.
6. The learned trial magistrate erred both in law and fact in failing to notice that the said land in question i.e. EAST GEM/URANGA/264 is not named as part and parcel of the estate of the deceased, ALEX OGONY MIGUNA.
7. The decision of the trial court is against the weight of the evidence on record.”

The appellant has in their written submissions dated the 30th January 2018 summarized the seven (7) grounds into three (3) as follows;

- a) “Whether the learned trial magistrate had the constitutional and or statutory jurisdiction to hear and determine the issues that were canvassed before him.
- b) Whether the Appellant was a party in the original suit that gave rise to the decision of the trial court so as to have orders made against him without his participation as such a party.
- c) Was all that parcel of land known as EAST GEM/URANGA/264 part of the estate of the late ALEX OGO NY MIGUNA so as to be the subject matter in Siaya PMCC No. 35 of 2000?”

The Appellant has submitted through his learned counsel that **Section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990** (repealed) did not give the Land Disputes Tribunal power or jurisdiction to entertain a claim to land ownership and a proprietorship. That **Section 13 (3)** of the said Act specifically provided that the tribunal did not have jurisdiction to entertain claims that are statutory time barred or already determined by any court. The learned counsel referred to the Court of Appeal decision in **Esther Gachambi Mwangi Vs Samwel Mwangi Miri [2013] eKLR** where it was held that -

“9.16.As we stated in the Owners of Motor Vessel “Lilian S” – v – Caltex Oil (Kenya) Ltd 1989 KLR 1, Jurisdiction is everything without it, a court has no power to take one more step. In the Matter of Advisory Opinions of the Supreme Court under Article 163 (3) of the Constitution, Constitutional Application No. 2 of 2011; the Supreme Court noted that the Lilian ‘S’ Case [1989] KLR 1 established that “Jurisdiction flows from the law, and the recipient Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intention of Parliament, where the wording of Legislation is clear and there is no ambiguity....”

The Appellant also submitted that though he become the registered proprietor of East Gem/Uranga/264 in 1997, he was not made a party in Siaya P.M.C.C No. 35 of 2000, and was therefore condemned unheard contravening his rights under **Article 50 (1) of the Constitution**. That the said land was not part of the estate of the late Alex Ogony Miguna, and the Respondent had no right to include it in the Succession proceedings. That the Siaya Land Disputes Tribunal had no Jurisdiction to make the decision that it did, and that the court erred in adapting a nullity and further that the court should not issue orders in vain. That the application leading to the impugned ruling lacks merit and should be dismissed with costs to the Appellant. The learned counsel referred to the decision of the Court in **Margaret Nyawira Kariuki –v- Senior Principal Magistrate Siakago & Another [2014] eKLR** on the issue that out of nothing comes nothing (ex nihilo fit).

2. The Respondent opposed the appeal through their written submission, filed through their Learned Counsel, dated the 19th July 2018. The learned counsel submitted that as the order subject matter of the appeal is not one of those provided for under **Section 75 of the Civil Procedure Act**, the Appellant needed to seek and obtain leave to appeal and did not. That the failure to obtain the leave to appeal is fatal to the appeal and it should be struck out or dismissed as a nullity. That the application dated 11th November 2014, that gave rise to the ruling of the 13th May 2015, was part of the execution process provided for under **Section 7 (2) of the Land Disputes Tribunal Act** that allowed the use of Civil Procedure Act. The Respondent further submitted that the tribunal award in case No. 571 of 1999, was adopted in Siaya Principal Magistrate Misc. Application No. 35 of 2000 on the 8th July 2000, and no appeal was filed against it. That the attempt by the Appellant in Kisumu H. C. Civil Application No. 17 of 2004 to challenge it through Judicial Review proceedings failed after the Court declined to grant leave. That the initial claimant, named Alex Ogony Miguna, passed on the 6th February 2009 before the execution was complete and the Respondent moved the court vide the motion dated the 11th November 2014 to reinstate the abated suit and substitute the late Claimant/Applicant. That the learned trial Magistrate had Jurisdiction to entertain the application and grant the prayers sought to enable the execution be continued to completion. That the Appellant is using this appeal, which is over the ruling made on the 13th May 2015, to challenge the Tribunal award which was never appealed against in accordance with the law.

3. The following are the issues for the Court’s determination;

- a) **Whether this appeal is about the tribunal award.**
- b) **Whether the lower court had Jurisdiction to issue the orders of 13th May 2015.**
- c) **Whether the Appellant was a party in Siaya SPMCC No. 35 of 2000, and if so, whether he was accorded an opportunity to be heard.**
- d) **Who pays the costs.**

4. The Court has carefully considered the grounds on the record of appeal, the lower court record, the written submissions and come to the following conclusions;

a) That this being a first appeal from the ruling of the 13th May 2015, on the motion dated the 11th November 2014, that was dealt with through affidavit evidence and written submissions, this court is obligated to evaluate the evidence tendered, proceedings and ruling and see whether it could have come to different findings on any of the matters. That prayers (a) and (b) of the said motion were for reviving the suit, and substituting Maurice Omollo Ogony for the late Alex Ogony Miguna. That prayer (c) was for the Executive Officer to be authorized to sign the document on behalf of the Appellant to give effect to the order of 2nd November 2010. The court has perused the lower court’s original record, proceedings and ruling of the 13th May 2015 which are part of the record and discerned the following;

- That the Appellant was the objector in Siaya Land Case No. 517 of 1999 and participated in the proceedings. That unless the

contrary is shown, which has not been the case herein, the court takes it that the Appellant and the Respondent were informed by the tribunal when the award was made and forwarded to the court for adoption in accordance with **Section 7 (1) of the land Disputes Tribunal Act** (repealed).

- That the lower court record shows that Siaya Senior Resident Magistrates Misc. Application No. 35 of 2000 was opened with Alex Ogony Miguna and Isaya Ondiek Kandira, as the Plaintiff/Applicant and Defendant/Respondent respectively. That the award was read and adopted on the 18th July 2000 in the presence of the Plaintiff and absence of the Defendant. That the Defendant, who is the current Appellant, started participating in the proceedings in Siaya S.R.M Misc. Application No. 35 of 2000 on the 7th August 2013 through Counsel named Mr. Owiti.
- That the Appellant filed Kisumu Misc. Appl. No. 1 of 2004 seeking for leave to appeal the adoption of the Tribunal award of the 18th July 2000 after he reportedly received a letter for the subdivision. The application was heard on the 2nd March 2004 and declined by Tanui J, as follows;

“As there was an inordinate delay in bringing this application, the prayer is rejected.”

b) That the Appellant having participated in the hearing of the Respondent’s claim from the initial stages before the Siaya Land Disputes Tribunal, which made the award in favour of the Respondent, and before the Siaya Magistrates Courts, where the adoption and execution proceedings had been commenced, and all the way to the High Court, cannot be allowed to turn around this late in the litigation and allege as he does on ground 3, that he ***“was not a party in the original suit and hence no orders could issue against him in Siaya SPMCC No. 35 of 200 (sic)”***.

c) That the application dated the 11th November 2014 that was subject matter of the ruling of 13th May 2015 was not about the merits or demerits of the Siaya Land Disputes Tribunal award or the adoption proceedings thereof. That award had been left intact after the attempts by the Appellant in Kisumu H.C. Misc. Appl. No. 17 of 2004 for leave to challenge it failed. That as this appeal is about the ruling of the 13th May 2015, the attempt by the Appellant to seek to attack the tribunal award, and the adoption proceedings thereof is to say the least irregular and not supported by the law.

d) That orders made by the learned trial magistrate in the ruling of the 13th May 2015 were summed up in the following words:-

“In sum, the following orders are made:-

a) This suit is ordered revived and Maurice Omollo Ogony made a party herein to continue the suit on behalf of the deceased man applicant’s estate,

b) The Respondent is hereby given forty five (45) (days) from the date of ruling within which to execute the document in question failing which this courts Executive Officer shall sign the same (as) if s(he) was the respondent.

c) Each party shall bear his costs.”

That learned trial magistrate ruling clearly shows that he considered the affidavit evidence and grounds proffered by both sides before coming up to this decision. The honourable trial magistrate made reference to **Section 7 (2) of the Land Disputes Tribunal Act** through which the **Civil Procedure Act** provisions on execution of decrees is brought into pray. The learned trial magistrate also referred to **Order 22 Rule 29 (1) of Civil Procedure Rules** that provides for possession of immovable property to be delivered to the party to whom it has been adjudged or to such person as he may appoint to receive delivery on his behalf before concluding that. ***“...this application is just about house- keeping by the administrator of the estate of the deceased main applicant to ensure continuity and conclusion of this matter.”*** This court do not find any grounds having been established to fault that finding. The court also finds that the lower court had, and still has Jurisdiction to hear and determine application for reviving of abated suits and substitution of deceased parties under **Order 24 of the Civil Procedure Rules**. The Learned trial magistrate was within Jurisdiction to issue the orders he issued in the ruling of 13th May 2015 including the one for the Executive Officer to sign the document should Appellant decline to do so within the time of 45 days given.

e) That the application dated the 11th November 2014, that was decided in the ruling of the 13th May 2015, did not deal with the issue of whether land parcel East Gem/Uranga/264 was part of the estate of the late Alex Ogony Miguna. That further, the learned trial magistrate did not make such a determination in the said ruling and the issue cannot be a ground of appeal in this matter. That **Siaya SPMCC No. 35 of 2000**, which is the case from which this appeal arises, did not deal with the administration and distribution of the estate of the late Alex Ogony Miguna. The copy of the certificate of confirmation of grant in the record of appeal shows it was issued in succession cause No. 90 of 2010 at Siaya law courts. The Appellant may consider moving the Succession Court for the desired orders.

5. That for reasons set out above, the court finds no merit in the appeal preferred against the ruling of 13th May 2015 in Siaya SPM Misc. Appl. No. 35 of 2000. The appeal is therefore dismissed with costs to the Respondent.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 13TH DAY OF FEBRUARY 2019

In the presence of:

Appellant Absent

Respondent Absent

Counsel Mr. Amule for Nyanga for Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE