



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

ENVIRONMENT AND LAND COURT

HCCA NO. 8 OF 2010

LINET AJIAMBO OCHIENG.....APPELLANT

VERSUS

HERBERT EHARA

PAUL NYONGESA.....RESPONDENTS

GABRIEL OKUMU

R U L I N G

1. This ruling arises from an appeal against the ruling of the Lower Court (M. W. Njagi RM) in **PMCC No. 7/2009 – LINET AJIAMBO OCHIENG Vs HERBERT AYEBBA, PAUL NYONGESA, and GABRIEL OKUMU**. The lower court ruling had been prompted by a preliminary objection raised by the Defendants, who are now Respondents, objecting to the jurisdiction of the lower court to entertain the suit. The ruling of the lower court upheld the objection and the Plaintiff, who is now Appellant, filed this appeal.

2. The suit in the lower court related to Land Parcel No. **SAMIA/BUTABONA/1589** (“disputed Land” hereafter) onto which the Respondents were alleged to have entered and erected structures. The Appellant wanted the Respondents evicted from the land. As fate would have it, the suit never ran its full mile in the lower court. It was struck off when the preliminary objection was upheld. This appeal is a contestation of the lower court ruling and various grounds were advanced in its support.

3. The grounds are contained in a Memorandum of Appeal dated 11/3/2010. They are as follows:

(1) That the learned trial magistrate erred in law and in fact by allowing the Respondents’ preliminary objection when the same was not specifically pleaded in their defence.

(2) That the learned trial magistrate erred in law and in fact in allowing the Respondents’ preliminary objection when the same was not raised at the beginning of the suit and when the pleading had already been raised.

(3) That the learned trial magistrate erred in law and in fact in allowing the Respondents’ preliminary objection without affording sufficient reasons.

4. Based on the grounds advanced, the Appellant asked that the lower court ruling be set aside and/or that the lower court matter be heard. She also asked to be awarded costs.

5. During the pendency of the appeal here in court, the 1st and 3rd Respondents passed on and on 23/7/2018, Ashioya for the Appellant withdrew the appeal against them. This appeal therefore is now between the Appellant – **LINET AJIAMBO OCHIENG** – and the 2nd Respondent – **PAUL NYONGESA**.

6. The appeal was canvassed by way of written submissions. The Appellant’s submissions were filed on 21/11/2017. The Respondent’s side filed its submissions on 24/11/2017.

7. According to the Appellant, the trial magistrate misled herself regarding the issue at hand. The dispute, Appellant submitted, was not about boundary; it was about ownership. It was further submitted that the Land Disputes Tribunal to which the Respondents thought the matter

should have been taken could not issue eviction orders. Yet these were the orders the Appellant was seeking. The decided case of **R V BUTULA LAND DISPUTES TRIBUNAL & LAWRENCE AINO OSALA & ANOTHER: HCC JR NO. 5 OF 2010, Busia** was availed as a useful guide concerning jurisdiction of the tribunal on the issue of land ownership. The position is clear that the tribunal had no jurisdiction to handle such issue. According to the Appellant the lower court should proceed with her suit to conclusion.

8. The Respondent's submissions focused on the grounds raised in the appeal. Noting that the Appellant had alleged that the issue was not raised in the defence, the Respondent submitted that paragraph 3 of the defence had clearly indicated that the court had no jurisdiction. The Respondent also noted that the Appellant had taken the position that the preliminary objection ought to have been raised at the beginning of the suit. The Respondent submitted that the defence filed in response to the plaint had actually raised the issue. And on the last issue namely: that the trial magistrate had no sufficient reasons to uphold the objection; the Respondent's position is that she had. According to the Respondent the findings of the trial magistrate were correct. She properly dealt with the preliminary objection and found the court could not entertain the claim as it had no jurisdiction.

9. I have had a look at the record of appeal, the lower court file, and the rival submissions of both learned counsel. At the time the trial magistrate made her ruling, she had the benefit of having pleadings from both sides and the evidence of the Appellant. I have myself looked at the pleadings and evidence that was before the trial court. It is clear to me that the Appellant was simply complaining that the Respondents had illegally occupied the disputed land. She wanted them evicted. The issue was not disputed ownership; it was illegal occupation and construction of structures by the Respondents on the disputed land.

10. The Respondent showed she was the registered owner of the disputed land. She alleged that the Respondents were in illegal occupation. And when the preliminary objection was raised, counsel for the Appellant did not come out clearly urging for determination of ownership. He instead focused on other things. The issue of ownership is only belatedly being raised in this appeal obviously with the aim of showing that it was the trial court, not the Land Disputes Tribunal, that could handle it. Overall however, what was before the trial court by way of pleadings and evidence related to illegal occupation of the disputed land and the need to issue an eviction order.

11. The Appellant also approached the appeal in a rather casual way. This is an appeal that was not argued orally before the court. Instead, submissions were filed. There were three grounds advanced by the Appellant as the basis of her appeal. One would have thought that the submissions would give priority to, or focus on, these grounds. But the submissions on record do not dwell on the grounds. The focus, it appears, was on other things. By contrast, a look at the Respondent's submissions readily reveals that the Respondent focused on all the three grounds. It baffles me how the Appellant could omit to canvass the grounds knowing well that as a matter of practice and law, it is the grounds of appeal and the arguments or evidence for or against them that pre-occupies the mind of the appellate court when making its decision.

12. In this matter, it is not true to say that the issue raised as an objection was not in the defence. As pointed out by the Respondent, paragraph 3 of the defence clearly made a denial regarding jurisdiction of the court. When the trial court then saw the need to be addressed on the issue before the trial could proceed, it was doing so properly and within the law. This ground therefore fails.

13. Ground 2 faulted the trial magistrate for entertaining the objection yet it was not raised at the beginning of the suit. The truth is that no law enjoins that an objection should be raised at the beginning of a case. As a matter of procedure and practice an objection can be raised even in the latter stages of a case. It is clear therefore that neither the trial court nor the Respondent's side could be faulted on this score. This ground therefore also fails.

14. The final ground faulted the trial court for making its decision without sufficient reasons. The objection raised was based on jurisdiction. It is not clear what the Appellant thought to be sufficient reasons but when the objection was being argued before the trial court, it came out clearly that the Respondent was saying that jurisdiction was elsewhere, not with the trial court. More specifically, the jurisdiction was with the Land Dispute Tribunal, the issue of occupation of land or trespass being one expressly stated at Section 3(1) of the now repealed Land Disputes Tribunal's Act (Act No. 18 of 1990) as falling for determination by the tribunal set up under that Act. That alone would constitute sufficient reasons in my view.

15. And if, for any reasons, the Respondent felt that the trial court's ruling is not sufficiently reasoned, again that would not be correct. The trial court considered the arguments proffered by both sides and found that the matter before it concerned occupation and/or trespass. It then applied the relevant law and struck off the suit. I am unable to fault the trial court on this score. To me, the trial court appreciated the facts well and correctly applied the law. This third ground must also therefore fail.

16. The end result, in light of the foregoing, is that the appeal filed by the Appellant is without merits. The same is hereby dismissed with costs.

Dated, signed and delivered at Busia this 6th day of February, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Appellant: Absent

2nd Respondent: Absent

Counsel for Appellant: Absent

Counsel for 2nd Respondent: Present

Court Assistant: Nelson Odame