



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL APPEAL NO. 3 OF 2017

EDWARD RASHID MAKORE

MONICA MAKORE

(Suing on behalf of the estate of the Late **RAPHAEL LUKINDO**).....**APPELLANTS**

VERSUS

CHINA CONSTRUCTION COMPANY.....**RESPONDENT**

(An appeal from the Judgment of the Resident Magistrate at Taveta delivered on 1/3/2017 by Hon. G. K. Kimang'a)

J U D G E M E N T

1. This appeal was preferred by the original plaintiffs, Edward Rashid Makore and Monica Makore against the decision of Hon. Kimanga RM delivered on 1st March 2017 in Civil Suit No. 22 of 2014. The Appellants listed the following as their grounds of appeal:

- a) That the learned magistrate erred in law and in fact by failing to consider the evidence before him in support of the Appellants' case.
- b) That the learned trial magistrate erred in law and in fact in failing to find that the Respondents were liable for mesne profits as prayed for in prayer (c) of the Appellants' plaint dated 2nd September 2014.
- c) That the learned trial magistrate erred in law and in fact for not awarding damages for trespass opining validity on the title deed was a non-issue.
- d) That the learned trial magistrate erred in law and in fact in finding that each party bears its own costs even after allowing the Appellants' prayer (b) of the Plaint.
- e) The learned trial magistrate erred in law and in fact in failing to analyse the evidence vis a vis the pleadings and arriving at the conclusion that the agreement allowing the Respondent to work on the property of a deceased person was a nullity and therefore illegal ab initio.
- f) That the learned trial magistrate erred in law and in fact by failing to find that whatever happened in regard to the suit property amounted to tampering with the deceased's estate which was an illegality.
- g) That the trial magistrate's decision was not based on evidence before the court which evidence if properly analysed was in favour of the Plaintiff's case.

2. The appellants filed a record of appeal dated 19th March 2018. Thereafter, parties elected to dispose the appeal by way of written submissions. The appellants' submissions were filed on 13th July 2018 and the respondent's were filed on 24th April 2019. From a reading of the parties' pleadings, submissions the trial magistrate set the following issues for his determination:

- (i) **Whether the Respondents intermeddled in the suit property.**
- (ii) **Whether the Respondent's entry and activities on the suit property amounted to trespass.**

(iii) **Whether the Appellants' were entitled to mesne profits**

(iv) **Who bears the costs of the original suit and of the appeal?**

3. The appellants argued that the agreement for use of **Plot No. Jipe Scheme/786** was null and void as it was entered into by the Respondent and persons who had no authority to deal in it since the property was still registered in the name of Raphael Makore Lukindo-deceased. The Appellant submitted that the deceased proprietor died on 1st June 2010 yet the lease agreement entered into by the Respondent was dated 24th April 2014. Consequently, any dealings with the suit property amounted to intermeddling prohibited by Section 45(1) of the Law of Succession Act. The Appellants cited High Court succession cases of *The Estate of Veronica Njoki Wakagoto (2013) eKLR* and *The Estate of M'Mugambi M'guoko (2011) eKLR* in support. In both cases, the suit properties were sold to 3rd parties.

4. The narrative that emerges from the trial magistrate's judgment is that the three persons that signed the impugned agreement with the Respondent were a section of the deceased proprietor's heirs cum brothers to the Appellants. The agreement was for excavation of road construction materials from the suit property Jipe Scheme/786. From PW1 and PW2's testimony and that of DW1 in the counterclaim, it was revealed that the Appellants were aware of the existence of the agreement as well as its terms. The only problem was the consideration of Kshs.70,000 which they deemed was too little for the area of land excavated.

5. The family then held a meeting and resolved to file suit for trespass using the two heirs designated as administrators and who were not involved in the lease transaction. All this time, the Respondent was unaware of the trouble brewing and the Kshs. 35,000 being part payment per the agreement pocketed by the three was not refunded. The learned magistrate dubbed this arrangement as "mischief."

6. Notably, the Appellants produced limited grants ad litem obtained solely for the purpose of filing this suit. At the time of the transaction no party held letters of administration to the property. The trial court held that the contract between the respondents and the three beneficiaries did not transfer any interest in the property.

7. The trial magistrate stated that the Appellants were seeking the Court's intervention to try and get a better deal or back out of a bad one. That the justification made that they were duped thinking it would be 1.0ha to be excavated instead of 10ha did not help their case. The trial court agreed with the holding in *Fina Bank Limited vs Spares & Industries Limited (2000) 1EA52* cited by the Respondent where the Court held as follows:

"It is clear beyond peradventure that save for special cases where equity might be prepared to relieve a party for a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

8. The trial Court further observed that the validity of the title was suspect, having been registered in the proprietor's name 3 years and 2 months after his demise yet it forms the substratum of this suit. The title deed produced in evidence showed it was opened and issued to Raphael Makore Lukindo-deceased on **8th August 2013**. The death certificate gives **date of death** of the said Raphael as **1st June 2010**. Besides the copy of this title, no additional document was produced to show that the suit property belonged to the deceased prior to his death. The magistrate found that the Appellants were seemingly using a title document not yet proved to comprise the estate of the deceased to get out of the agreement. That they had indeed approached the Court with unclean hands.

9. The trial court adopted the definition of trespass set out in *Clark and Lindsell on Torts, 18th Edition at page 923* that "**trespass is any unjustifiable intrusion by one person upon the land in possession of another.**" Was there unjustifiable intrusion in this case? Did the magistrate come to a wrong conclusion? From the aforestated analysis, it is clear that the Respondent's initial entry upon the property was with permission of the parties sued as 3rd to 5th Defendants in the Counter-claim which parties are siblings of the Appellants herein. The Appellants never brought a claim against the 3rd to 5th Defendants in the counterclaim who were joined by the respondent herein.

10. In their response to the counter-claim, the Appellants pleaded that the Respondent induced the 3rd - 5th Defendants to sign the agreement despite them knowing that the land belonged to the deceased. If the land belonged to the deceased as alleged then it is the 3rd - 5th Defendants should have been sued alongside this respondent for intermeddling with the estate for executing the leasing over Jipe Scheme/786. The Appellants claim against China City Construction Ltd could not succeed in my view until they first proved that the parties who granted permission for the excavations had no such authority. That evidence was lacking by virtue of absence of proof of registration of the suit title in the name of the deceased prior to his demise. Secondly, there was no proof of inducement of 3 - 5th defendants shown as PW1 clearly stated in his evidence thus, "*the defendant talked to my brothers and agreed on excavation of one acre but they excavated over 10 acres.*" This statement seems to me as accusation for breach of the terms of the lease and not made in support of a claim for trespass. Yet in the plaint, there was no prayer made for damages for breach of the lease.

11. The Appellants extensively submitted on the issue of mesne profits faulting the trial magistrate for not awarding the same at the rate of Kshs.20,000 per day from 22nd July 2014. Based on a valuation report prepared and produced by a valuer, the Appellants estimated that they were entitled to mesne profits of about Kshs.1,000,000. They however claimed mesne profits of Kshs.156,086,545.75 which they opined was due to them as a result of the Respondent's 'wrongful possession of the property.' They adopted the definition of mesne profits as per **Black's Law Dictionary** that, "*the profits of an estate received by a tenant in wrongful possession between two dates.*" The initial date they relied on was that of the demand notice.

12. The Respondent on the other hand submitted that the claim was unsustainable as the excavation ceased in September 2014 in compliance with the injunctive orders issued by the trial court. The Respondent quoted the case of *Rajan Shah T/A Rajan S. Shah & Partners vs Bipin P. Shah (2016) eKLR* which defined mesne profits as *damages for trespass due to a landlord from the date that the defendant ceases to hold property as a tenant and becomes a trespasser*. In this case an order of temporary injunction was issued on 4th Sept 2014. The lease agreement was dated 24th April 2014 while the demand letter is dated 22nd July 2014. The date of trespass if at all would run from the date of service of the demand letter and ceased when excavation stopped once the Respondent was served with court orders.

13. The valuation report presented was in respect to the quantity of soil excavated and not when the excavation was done. Given that the excavation was made pursuant to the consent granted to the Respondent, a claim for mesne profit can only accrue from the date when the demand was made on 22nd July and not earlier. I find that no evidence was led on the quantity of the soil excavated if at all from 22nd July to 4th September 2019. The trial magistrate was right in declining to make such an award as the claim which is in the nature of special damages was not established.

14. Usually, costs follow the event however Section 27(1) of the Civil Procedure Act leaves it to the discretion of the trial Court to award costs. The trial magistrate stated that he was guided by the circumstances of this case in directing that each party bears its own costs. I see no reason to interfere in the manner the trial magistrate exercised his discretion not to award the costs to the Appellants because the appellants did not sue their brothers who had initiated the process that led to this suit. Consequently, I will not interfere with the finding on costs.

15. In the end, I find no merit in this appeal. I proceed to dismiss it with costs to the Respondent.

Dated and signed at BUSIA this 16th day of October 2019.

A.OMOLLO

JUDGE

Delivered at MOMBASA this 31st Day of October, 2019

C. YANO

JUDGE