REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC. CIVIL APPEAL NO. 4 OF 2016

JOSEPH AYIRO MANGO.....APPELLANT

VERSUS

ANDREW NAKITARE.....RESPONDENT

RULING

1. The appeal before me was filed on 5/4/2016 by the Appellant – **JOSEPH AYORO MANGO** – against the Respondent – **ANDREW NAKITARE.** The appeal is against the ruling of the Lower Court at Busia (M/S C. I. AGUTU, Resident Magistrate) delivered on 14/3/2016. That ruling itself arose from an application dated 27/3/2015 in which, *interalia*, the Respondent herein had sought interim injunctive orders against the Respondent regarding land parcels Nos. LR. BUNYALA/BUKOMA/1938, 1939 and 1940.

2. The three Land parcels were created from the original land parcel No. BUNYALA/BUKOMA/1490. This larger parcel had been the subject of a dispute before the then Budalangi Land Disputes Tribunal between one MATILDA NERIMA MUGANDA, as claimant, and AUGUSTINE OYUMBIRI MUGANDA, the objector. The Respondent herein, though not a party to the dispute, was found to be a purchaser of a portion of the land and the tribunal ordered that he get his portion.

3. The decision of the tribunal was then filed in Court here at Busia where it was registered as Land Dispute No. 35/2009. The Court adopted the decision of the tribunal as its judgement on 6/9/2009. It is clear that Matilda lost the case at the tribunal and tried to appeal before then Provincial Appeals Committee. At some point too, the parties who litigated before the tribunal died.

4. It is clear though that the original land parcel No. 1490 was subdivided and the interests of the Respondent in this appeal had been left out in the subdivision. The Respondent attributed the subdivision to machinations of the Appellant herein. He then rushed to court and filed the application whose ruling gave rise to this appeal.

5. The Appellant's ground of appeal are as follows:

i. That the Learned Magistrate erred in law in entertaining an application for injunction in a suit that had abated.

ii. That the Learned Magistrate erred in law in entertaining an application in a suit that had abated

without joining the personal representative of the deceased parties to the suit.

iii. That the Learned Resident Magistrate erred in law in allowing the Respondent herein to be a party to the suit exparte.

iv. That the Learned Resident Magistrate erred in law in entertaining the application without the Appellant being formally made a party to the suit.

v. The Learned Resident Magistrate erred in law in giving orders concerning land parcels No. BUNYALA/BUKOMA/1938, 1939 and 1940, which parcels of land were not a subject before Budalangi Land Dispute's Tribunal.

vi. That the Learned Magistrate erred in law in giving orders concerning land parcels No. BUNYALA/BUKOMA/1938, 1939 and 1940 without hearing evidence as to how the said land parcels came to be registered.

vii. That the Learned Resident Magistrate erred in law in ordering that the order of Budalangi Land Tribunal which had been adopted by the Court be effected in absence of the parties to the suit or their personal representatives and when such order was illegal, null, and void.

viii. That the Learned Resident Magistrate erred in law in ordering the County Land Surveyor and County Land Registrar to excise portions of land parcels BUNYALA/BUKOMA/1938, 1939 and 1940 and that the excised portions be in the names of ANDREW NAKITARE, the Respondent herein, when there was no such application before her.

ix. That the Learned Magistrate erred in law in granting the orders she gave when she had no power or jurisdiction to do so.

6. The Appellant wants the appeal allowed. He also wants the Lower Court orders to be set aside or declared null and void. Lastly, he claims costs of this appeal and costs of the proceedings in the Lower court.

7. The appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 13/11/2017 while the Respondent filed his own on 12/4/2017. The Appellant submitted that by the time the Respondent filed his application in the Lower Court, the suit had abated, the original parties having died more than a year before the filing of the application. The Appellant's submissions indicated that as no extension of time had been sought before filing the application, the suit must be deemed to have abated. It was also pointed out that the parties herein were not the legal representatives of the deceased parties.

8. The other focus of the submissions of the Appellant concerned the manner in which the present parties were enjoined in the suit. The Respondent was made a party exparte. The Respondent became a party without Leave of Court. All this, Appellant submitted was contrary to Law.

9. The thrust of the Appellant's submissions then shifted to the description of the land parcels. Here, the Appellant argued that the deceased parties were litigating over land parcel No. 1490. Parcels Nos 1938, 1930 and 1940 were not part of the dispute yet the orders issued were essentially about them. This was wrong and/or unlawful according to the Appellant. Issue was also taken with some of the orders given. Some, like the one directing implementation of the decision of the tribunal, had not been asked for in the application. Besides, the original parties were dead and their personal representatives had not been brought on board.

10. The Respondent submitted, *interalia,* that the suit had not abated as the cause of action had survived the deceased parties. It would appear from this that according to the Respondent, it was proper to institute the application and get the orders he was granted. The Respondent submitted that he had met the threshold for getting injunctive relief as set out in the case of **GIELA vs CASSMAN BROWN & CO.**

LTD [1973] EA 358.

11. I have considered the appeal as filed, and the rival submissions. The Respondent has not responded to some of the crucial issues raised in the appeal. For instance, he has not responded to the issue of enjoining parties to the suit in unprocedural or unlawful way. The Lower Court was faulted for enjoining the Respondent as a party exparte. True, the Appellant and other relevant parties needed to be informed and/or served in order to have their say. The leave of Court also needed to be sought to enjoin the Appellant as a party in the Lower Court given that he was not a party right from the start. It is obvious that the Lower Court misdirected itself in the way it handled the issue and I agree with the Appellant on this.

12. Then there is the issue of the abatement of suit and Locus of the parties given that they are not legal representatives of the original deceased parties. The Respondent response to this issue was that the suit survived the death of the deceased parties and he was therefore in order to approach the Court the way he did. Well, the Respondent was wrong; dead wrong on this. It is precisely such suits that abate one year after a dead party has not been substituted. But does this apply here?

13. I do not entirely agree with the Appellant concerning the abatement of this suit. To me, the suit between the deceased parties was a concluded suit, judgement already having been given. Abatement generally concerns itself with untried suit, not suits where judgement have been given. The suit was in execution stage. The Respondent only needed to concern himself with execution so that he could realise his interest. It appears clear that he did not move with speed after judgement. His dithering gave room for other things to happen and the original parcel of land was subdivided.

14. But he attributes the subdivision to someone, the Appellant, who was not a party to the original suit. In my view, the Respondent needed to understand the proper steps to take. The Appellant was not demonstrated to be a legal representative of any of the deceased party. It was therefore wrong to enjoin him in a suit where he was not a party. It seems to me that the only option open to the Respondent was to sue the Appellant in a fresh suit and possibly use the proceedings of the tribunal as evidence in that suit. It was bad stratagem and/or tactical blunder to enjoin the Appellant to the suit yet he is not shown as a legal representative of any of the deceased party.

15. It was also wrong for the Respondent to graft his application onto the concluded suit knowing well that the original parties were deceased yet he was not a legal representative of any of them. He had not also bothered to include the legal representatives of any such party.

16. I have also had a look at the application in the Lower Court and the extracted order arising from the ruling that the Lower Court delivered. The application essentially sought to enjoin the Respondent as a party and also sought an injunctive relief against the Appellant. The application was allowed, meaning that at that stage the injunctive relief was granted. The Respondent had already been made a party earlier.

17. But the extracted order shows the Lower Court ordering that the decision of the tribunal be effected and directing further that the relevant land offices do implement the decision. These orders had not been prayed for in the application and one is bound to wonder how the Lower Court could touch on them. It is therefore clear that the Appellant is generally right on this issue.

18. The Appellant alleged too that the order issued by the Lower Court related to land parcels other than the one litigated upon by the deceased parties. In my view, it would be wrong to agree with the Appellant. It is plain to me that the Appellant is merely being legalistic while ignoring the prevailing reality. And the reality is that it is the original land parcel that had been sub-divided and the resultant portions are merely different descriptions of what used to be the same land. If we agree with the Appellant on this, this could possibly give room to crooked characters to perpetrate illegal schemes concerning land with the aim of invoking the law thereafter to legitimize their schemes. Facts and law should go together. Law cannot speak without facts.

19. The issue of the jurisdiction of the Lower Court was raised. I do not wish to dwell much on this

issue. There are undecided cases pending in the Superior Court's concerning this issues. In simple terms, the issue is not yet settled. I will say no more on this.

20. I would also wish to comment on the way the application was conceptualized. I have alluded to this earlier when I mentioned about the approach taken by the Respondent to handle his problem. The application brought is seeking interim relief. This presupposes that the relief given is only temporary pending further action. That envisaged further action is lacking. Infact the injunctive relief given is not one that anticipates further action. Such relief is normally given after interparties hearing pending the outcome in a given suit. What was the outcome awaited in this suit? Was it not a concluded suit? In my view, the Lower Court should have appreciated that the application was misplaced and ill-conceived. That should have led it to reject the application.

21. I have concentrated much on what the Appellant presented because the Respondents submissions fail to address most of the issues. Infact, the submissions seem to have lost focus. The upshot is that save for the grounds upon which I have not agreed with the Appellant, the appeal in general is one that has a lot of merits. It is for this reason that I allow the appeal (Prayer 1) and declare (which is prayer 2) that the order of the learned magistrate given on 14/3/2014 is null and void. I also award (which is prayer 3) costs of this appeal and costs of the proceedings initiated in the Lower Court to the Appellant.

Dated, signed and delivered at Busia this 19th day of July, 2017.

A. K. KANIARU

JUDGE

<u>In the Presence of</u>:

Appellant: ……

Respondent: ……

J. V. Juma & Co. Advocates for Appellant: ……..……..

Ashioya & Co. Advocates for Respondent: ……..