



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND CASE APPEAL NO. 139 OF 1995

JOSEPH ODHIAMBO APPELLANT

VERSUS

NYAKUNDI OMARI RESPONDENT

(An interlocutory appeal arising from the decision/ruling of L. Kaityany (DR) delivered on 25th May, 2015)

JUDGMENT

1. This appeal arises from the decision of the Deputy Registrar delivered on 25th May 2015 dismissing the appellant's application dated 17th January 2014. The appellant by the said application sought to stay execution of the orders given by the Deputy Registrar on 10th January, 2014 on the basis that the orders were irregularly granted, for the reason that the judgment sought to be executed was entered on 16th October 1995 and was therefore over 12 years and could not be legally executed on account of limitation. On the question of the expiry of 12 years from the date the judgment/decree was given, the Deputy Registrar held that the process of execution had begun before the expiry of 12 years from the date of judgment and that eviction orders had been issued way back on 20th September 2008. On the issue of irregularity of the order given on 10th January 2014, the Deputy Registrar held that as at the time the application was made the process of execution had already begun and that the order given on 10th January 2014 merely sought security to be provided during the execution of the eviction order previously granted by the court. The defendant/appellant being dissatisfied with the ruling of the Deputy Registrar delivered on 25th May 2015 has preferred the present appeal and sets out the following grounds of appeal:-

1. The learned Deputy Registrar was wrong in holding that the decree which was sought to be executed did not offend the provisions of section 4 (4) of the Limitations of Actions Act Cap 22 Laws of Kenya.

2. The learned Deputy Registrar did not appreciate the fact this court's judgment was executed on 12th September 2008 while the decree which was sought to be executed is dated 21st March, 1996 contrary to the mandatory provisions of Order 21 Rule 8 (1).

3. The learned Deputy Registrar did not appreciate the fact that the period of 12 years ended or expired on the 16th October, 2007.

4. The learned Deputy Registrar was wrong in holding that the eviction order issued on 20th September 2008 by this court was within the 12 years period.

5. The learned Deputy Registrar was wrong in holding that the defendant/appellant did not annex to his application the National Land Commission's Notice while she was supposed to take judicial notice.

6. The ruling of the learned Deputy Registrar was against the evidence, the record of the court and the facts before her.

The parties argued the appeal by way of written submissions. The appellant filed his submissions dated 12th May 2016 on 13th May 2016 and the respondent filed his submissions dated 22nd June 2016 on 30th June 2016.

2. The appellant in his submissions has argued that judgment in terms of the award by the D.O was entered on 16th October 1995 and hence the period of 12 years ended on 17th October 2007. Equally the appellant has argued the decree in the matter was dated on 21st March 1996 and thus its lifespan of 12 years ended on 22nd March 2008. The appellant therefore submits that as the application for execution was made outside the 12 years limitation period for decrees the Deputy Registrar could not properly give any orders for the execution of the same as there was then no valid decree which could be executed.

3. The appellant further submits that the decree as drawn did not bear the date on which the judgment was entered as required under Order 21 Rule 8 (1) of the Civil Procedure Rules. The appellant additionally argues that the decree dated 21st March 1996 did not conform with provisions of Order 21 Rule 7 of the Civil Procedure Rules in that what was decreed differed with the prayers set out in the plaint. The appellant faulted the decree as it did not specify the property that was affected by the decree yet as per the plaint the plaintiff was claiming a portion of land parcel **No. West Kitutu/Bogusero/1028** and it is out of that parcel of land he sought the eviction of the defendant. The notice to show cause application for execution by the plaintiff dated 5th June 2008 indicated the parcel of land out of which the defendant was to be evicted as **West Kitutu/Bogusero/ 3465** which the appellant submits was at variance with the decree and the plaint. The appellant states that the Deputy Registrar ought not to have sanctioned the execution in the face of the highlighted discrepancies.

4. The respondent in opposition to the appellant's appeal submitted that the appeal was filed out of time without leave and hence the same does not lie in law. The ruling by the Deputy Registrar appealed from was rendered on 25th May 2015 and the appeal was lodged on 2nd June 2015 which was outside the 7 days allowed under Order 49 (8) (3) for appeals against the decision of a registrar or Deputy Registrar. This submission however appears not to have taken account of the provisos of Order 50 rule 4 which provide that where the last day for taking an action e.g filing a pleading falls on a Sunday and/or on non working day when the offices are closed such action may be taken during the next working day. The 1st June 2015 was Madaraka day (a Public Holiday) and consequently offices were closed. The appellant therefore properly filed his memorandum of appeal on 2nd June 2015 which was the next working day when offices were open.

5. The respondent has further submitted that the appeal was made without leave contrary to the provisions of Order 43 (2) of the Civil Procedure Rules arguing that the appeal could only be made with leave. I have considered the application of Order 43 and my view is that Order 43 (2) of the Civil Procedure Rules would be applicable to those appeals that are being preferred to the higher court e.g from Magistrates Court to High Court or from the High Court to the Court of Appeal. Appeals from decisions by Deputy Registrar exercising their special powers under Order 49 of the Civil Procedure Rules would not be subject to the provisions of Order 43 (2) and would in terms of Order 49 (7) (2) of the Civil Procedure Rules lie as of right to a judge.

6. The issue that stands to be determined in this appeal is whether or not the decree that was executed had lapsed and/or was statutorily barred by limitation as argued by the appellant. The respondent asserts that the award by the D.O was endorsed as a judgment of the court on 16th October 1995 and a decree issued on 21st March 1996. The Deputy Registrar in her ruling dealt with the issue as to whether the execution

was statutorily barred and stated thus:-

“The judgment in the instant matter was delivered on 16th October 1995. On 5th June 2008 the respondent applied for eviction orders. A notice to show cause why the applicant should not be evicted was issued and the eviction order was issued and on 20th September 2008. The application for eviction was made after the respondent had subdivided the original title and obtained a title deed on 8th March 2000 in execution of the judgment of 16th October, 1995. The execution process had thus already begun before the expiry of 12 years.”

7. The respondent had in the replying affidavit in opposition to the appellant’s application dated 17th January 2014 before the Deputy Registrar deponed under paragraph 3 of the affidavit as follows:-

3. That I am aware that the decree and judgment herein was implemented in the year 2000 when I was issued with title to the suit land having had the original Title No. West Kitutu/Bogusero/1028 subdivided and my share therein issued to me.

The respondent, it is evident, was on 18th March 2000 issued with title to land parcel **No. West Kitutu/Bogusero/3456** as per copy annexed to respondent’s application dated 22nd May 2012 as **“N03”**. This he stated was in execution of the decree which had awarded a portion of the disputed land to him. How was the respondent issued a title if it was not in execution of the decree? The office of the Land Registrar vide its letter of 18th February 2008 annexed to the respondent’s replying affidavit dated 19th March 2014 as **“N01”** acknowledges it implemented the decree but the appellant had defied the court order by re entering and repossessing the disputed land illegally. It would therefore appear the application for execution by way of eviction dated 5th June 2008 was in furtherance of the execution process that had been kick started by the implementation of the judgment by causing the subdivision of land parcel **West Kitutu/Bogusero/ 1028**.

8. The appellant did not challenge the decree issued on 21st March 1996 before it was implemented and neither did he appeal against the judgment entered by the court on 16th October 1995 in terms of the award. Following the implementation/execution of the decree the land the subject of the suit **West Kitutu/Bogusero/1028** was subdivided and the respondent was given his entitlement pursuant to the award being land parcel **West Kitutu/Bogusero/3456** and issued a title deed on 18th March 2000. The appellant from the record did not challenge the registration of the respondent as the owner of this parcel of land. The respondent could only have become so registered in execution of and implementation of the decree and judgment of the court. The record further shows Hon. G. H Oduor, Deputy Registrar ruled on the notice to show cause dated 5th June, 2008 on 20th September 2010 and granted orders of eviction against the appellant. There was no appeal against this decision/order. The order by the Deputy Registrar on 10th January 2014 was in actual sense not one for eviction but was to facilitate the implementation of the eviction order that had earlier been given by the court.

9. The Deputy Registrar in her ruling of 25th May 2015 held that the order of 10th January 2014 was not one for eviction as eviction had already been granted. She observed as follows:-

“The orders of eviction had already been granted by the court as against the applicant way before the 10th January, 2014 and therefore the execution had already been begun. The orders of 10th January 2014 merely sought security to be provided to the respondent’s auctioneer who was executing the order for eviction already previously granted by the court.”

The Deputy Registrar further held that the order of 10th January, 2014 did not offend the provisions of Section 4 (4) of the Limitation of Actions Act, Cap 22 Laws of Kenya.

10. Having reviewed the record and the ruling by the Deputy Registrar, I find no basis on which I can interfere with her decision. It is a fact that the court’s judgment in terms of the award was implemented

and the respondent was given a portion of the land that he was claiming from the appellant and was issued with a title to the land on 18th March 2000 as per the exhibited copy of the title. This in my view was in execution of the judgment and the decree issued by the court. The decree and the judgment may not have been specific in terms but the appellant did not challenge the same at the time they were issued with the result that the decree was executed in the manner those implementing the decree understood it and interpreted the same.

11. The order of eviction granted by Oduor, Deputy Registrar on 20th September 2010 was consequential to the respondent having acquired his parcel of land **West Kitutu/Bogusero/3456** pursuant to the decree of the court and having been registered as the owner thereof. In my view the process of executing the judgment/decreed commenced when the respondent moved to have the portion of land he was awarded under the decree parceled out of land parcel **West Kitutu/Bogusero/1028** then registered in the appellant's name culminating in him being registered as owner of land parcel **West Kitutu/Bogusero/3456** on 18th March 2000. Thus, when the respondent made the application seeking eviction vide the application dated 5th June 2008 this was in furtherance of the execution of the decree and in my considered view where execution of the decree is commenced within the statutory period of 12 years further application for execution may be made provided a period of 12 years had not elapsed from when the last application for execution was made. The respondent having been registered as the owner of the portion of land decreed to him on 18th March 2000 was entitled to seek the eviction of the applicant from the parcel of land and he could do that before the expiry of 12 years from the date he was registered as owner. Of course the respondent could have chosen to file a completely new suit against the appellant but I opine it was time saving and prudent for the respondent to apply for the appellant to show cause, if any, why he should not be evicted from the respondent's parcel of land in the same suit where he had been granted the land through a judicial process.

12. The net result is that I find no merit in the appellant's appeal filed on 2nd June 2015 against the decision of the Deputy Registrar delivered on 25th May 2015. The same is ordered dismissed with costs to the respondent.

Judgment dated, signed and delivered at Kisii this 14th day of October, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Odero for Momanyi for the appellant

Mr. Soire for the respondent

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE