



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC APPEAL CASE NO.185 OF 2009**

**JOHNTSONE OKINDAS**  
.....**APPELLANT**

**VERSUS**

**MARY JANE**  
**MALANGA** .....**RESPONDENT**

**[APPEAL FROM THE RULING AND ORDER OF THE CHIEF MAGISTRATE AT KISUMU**

**DELIVERED BY( HON. MALOBA RM) ON THE 11<sup>TH</sup> NOVEMBER 2009 IN MISCELLANEOUS**

**APPLICATION NO.8 OF 2009.]**

**RULING**

1. Johnstone Okinda, the Appellant, filed this appeal vide the memorandum of appeal dated 10<sup>th</sup> December 2009 on the following five grounds:

- a) “The learned magistrate erred in law in ignoring the replying affidavit of the Applicant.”
- b) “The learned magistrate erred in law by not considering the fact that there were two cases in the same court numbers 262 of 2009 and 31 of 2002 in which the two parcels was the subject.”
- c) “The learned magistrate erred in law by failing to consider the fact that there was a clear dispute between the Appellant and Respondent.”
- d) “That the learned magistrate erred in law by not considering what was stated in the Respondent’s supporting affidavit which justify the applicants position”.
- e) “The learned magistrate erred in law by failing to observe that the Respondent did not certify that there was no other case pending between the parties and not the absence of the second respondent.”

The Appellant prays for the lower court order to be set aside with costs.

2. The appeal came up for hearing on 29<sup>th</sup> September 2016 when Mr. Odeny and M/S Odoyo, learned counsel for the Appellant and Respondent respectively, made their oral rival submissions. The counsel for the Appellant reiterated the five grounds of appeal and the Appellant’s submissions before the lower

court. The counsel emphasized on grounds 4 of the appeal that the learned trial magistrate did not consider the contents of the Respondent's supporting affidavit and failure to find that the procedure set out under **Section 133** of the Registration of Land Act **Chapter 300** of Laws of Kenya (Repealed) in lifting the caution was not followed. That the Respondent's filing of the application to remove the caution in court amounted to usurping the powers of the Land registrar. That the Appellant's replying affidavit at page 17 of the record of appeal was one of the documents before the lower court which the trial learned magistrate did not consider. In opposition to the appeal, the learned counsel for the Respondent, submitted that the Respondent, as the registered proprietor of the two parcels of land, had followed the due process in filing the application for removal of the caution. She referred to the letter annexed to the supporting affidavit as evidence of the reference of the matter to the Land Registrar and that after the failure of that office to lift the caution, she came to court. That the Appellant had not filed any replying affidavit with the lower court and therefore the inclusion of one in the record of appeal contravenes **Order 42 Rule 13 (4)** of the Civil Procedure Rules that sets out the documents to be in the record of appeal. That the police abstract had also not been filed in the lower court and that together with the replying affidavit they should be struck out from the record of appeal. The learned counsel added that the hearing of the application before the lower court took place on 11<sup>th</sup> November 2009 while the police abstract at page 16 is dated 24<sup>th</sup> November 2009 and could not have been availed before the lower court.

3. That this being a first appeal the court is required to consider the evidence presented before the lower court and come to its own conclusion. The appeal emanates from Kisumu C.M. MISC. Civil Application No.8 of 2009 which was through a notice of motion dated 20<sup>th</sup> August 2009 filed by the Respondent against the Appellant and the Land Registrar Kisumu. The application seeks for an order to lift the cautions registered on land parcels **Kisumu/Marera/2149 and 2399** and costs. The application was based on seven grounds and the Respondent's supporting affidavit sworn on 20<sup>th</sup> August 2009 to which is annexed a certificate of confirmation of Grant issued in Nairobi H.C. Succession Cause No.33 of 2008 in respect of the estate of **Joseph Habwe Owange** indicating that the Respondent was to inherit the two parcels of land. The copies of title deed for land **parcels Kisumu/ Marera/2149 and 2399** issued in the Respondent's names on 15<sup>th</sup> January 2009 are also annexed. Also annexed to the supporting affidavit are certificates of official searches over the two parcels of lands showing that he Appellant had filed caution against parcels 2149 on 13<sup>th</sup> July 2009, and against parcel 2399 on 13<sup>th</sup> January 2009. A letter dated 26<sup>th</sup> January 2009 by M/S Olel Onyango, Ingutiah & Company Advocates addressed to the Land Registrar Kisumu on the issue of the caution on parcel 2149, among others, is also annexed. The proceeding before the lower court clearly shows that the learned trial magistrate recorded the parties submissions during the hearing of the notice of motion. The parties submission have been properly analyzed in the judgment. However, the learned trail magistrate appears not to have seen the replying affidavit sworn and filed by the Appellant on the 5<sup>th</sup> October 2009. The Appellant had in the replying affidavit deponed about a pending court case he had with the Respondent's husband which he stated was still pending. He also referred to case No. 5 of 2009 with the Appellant and another 262 of 2009 before the Chief Magistrate court Kisumu. Would the depositions in the replying affidavit have led to a different decision by the trial court? The court has taken note of the court order in Kisumu C.M. Land case No.5 of 2009 dated 27<sup>th</sup> March 2009 annexed to the supporting affidavit as annexure" **M J M 9**" which was extracted after the Nyanza Provincial Appeals Committee award/decision in claim number 239 of 2002 was adopted by the court. It clearly confirms the Respondent's submission that she was successful in the Land Disputes Tribunal matter. The Appellant had in his submission before the lower court admitted that he has not filed an appeal on the Provincial Appeals Committee decision but added that "..... I am still looking for money to take the case to the High Court." Though the Appellant had mentioned **Civil Suit No.262 of 2009** in the replying affidavit in which he deponed had similar prayers to the miscellaneous application, he did not annex any pleadings or orders issued in that matter to support his deposition. The upshot of the foregoing is that even if the learned trail magistrate had considered the contents of the Applicant's replying affidavit, it is highly unlikely that the deposition thereon would have led to a different decision. That the failure to consider the replying affidavit by the learned trial magistrate did not occasion any prejudice to the Appellant case as his submission which had addressed the issues in that affidavit were captured and addressed in the learned trial Magistrate's ruling. The allegation that the learned trial magistrate had not considered the contents of the supporting affidavit cannot be correct as it is clearly

considered especially in the third paragraph of the ruling which states as follows;

“ The application was supported by a supporting affidavit sworn by the Applicant on 20.8.2009. She annexed .....” This court has no difficulty in coming to a finding that the Respondent had first approached the office of the Land Registrar to have the caution, especially on parcel **No.2149** removed, but on that office failing to take the steps as set out in **Section 133** of the Registered Land Act **Chapter 300** Laws of Kenya (repealed) which is in more or less similar terms with **Section 78** of Land Registration Act No.3 of 2012, filed this application. The Respondent had approached the court properly. The Respondent had filed a Succession Cause through which she inherited the two parcels of land and should the Appellant have had any claim over the two parcels of land, it was for him to file the appropriate suit to pursue the same. The Respondent had obligations against those who had purchased portions of the estate she had been appointed the administrator of and to discharge the obligations, she had to have the cautions lodged lawfully removed.

4. That police abstract issued on 24<sup>th</sup> November 2009 on loss of an agreement of sale was not part of the record presented before the trial court during the hearing of the notice of motion on 7<sup>th</sup> October 2009 and the learned trial magistrate could not have considered it in the ruling of 11<sup>th</sup> November 2009. The inclusion of the police abstract in the record of appeal therefore contravenes **Order 42 rule 13 (4)** of Civil Procedure Rules . That the leave of the court to allow production of new evidence on appeal in accordance with **Rule 27** of the said Order has not been applied for, and obtained and accordingly, the police abstract is hereby struck out from the record of appeal.

5. That the court therefore finds that the appeal has no merit and is dismissed with costs.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF DECEMBER 2016

In presence of;

Appellant                      Absent

Respondent                      Absent

Counsel                        M/S Onsongo for Odoyo for Respondent

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/12/2016

14/12/2016

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

M/S Onsongo for M/

S Odoyo for Respondent

Court: Judgment dated and delivered in open court in presence of M/S Onsongo for Odoyo for Respondent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**14/12/2016**