



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

CIVIL APPEAL NO. 39 OF 2013

GRACE OKUMU)

IRENE OKUMU).....APPELLANTS

VERSUS

PAUL FUNDI ARAP BOSS.....RESPONDENT

**(An appeal arising from the ruling of Hon. P. W. Wasike, Resident
Magistrate in Kitale Chief Magistrate Civil Case No. 352 of 2013)**

J U D G M E N T

BACKGROUND

1. The appellants are widows of the late Peter Okumu Odito who died on or about 15/10/2013 (deceased). Sometimes in March, 1992 the respondent entered in an exchange agreement with the deceased whereby the respondent took over the deceased land **Parcel No. 307 (originally 124)** at **Chekata Sigaon Farm** in Uasin Gishu County. The deceased also took over the respondent's land **Parcel No. Kakamega/Mabusi/18-104** at Lugari in Kakamega County. After the deceased and the respondent had settled on the exchanged parcels, the respondent in this appeal filed a suit at the High Court in Kitale being Kitale **HCCC No. 162** of **2001** against the deceased in which the respondent sought among other orders nullification of the exchange agreement. The respondent argued in that case that he had realized that the land he had taken over was less than what he had thought it to be. This case was fully heard and a judgment was delivered on 23/4/2013 by Justice J.R. Karanja. The exchange agreement between the respondent and the deceased was declared null and void mainly on the ground that there was no consent of the land control board obtained in respect of the exchange. The Judge however declined to grant the respondent's prayer for eviction of the deceased from the land in Kakamega County. The Judge also declined to grant the prayer that the respondent and the deceased do return to their respective parcels.

2. On or around 15/10/2013, the deceased died. As the deceased's kin were preparing to inter his remains on L.R. No. Kakamega/Mabusi/18-104, the respondent moved to Kitale Chief Magistrates Court and filed a suit against the appellants in which he sought of permanent injunction restraining the appellants their relatives from burying the deceased on L.R.No. Kakamega/Mabusi/18-104. The respondent contemporaneously filed an application for injunction restraining the appellants from burying the deceased on L.R. No. Kakamega/Mabusi/18-104. The respondent's counsel appeared before J.M. Nangea SPM where he obtained a temporary injunction ex-parte. The application was set down for inter-partes hearing on 22/10/2013. On 22/10/2013, the appellant's counsel intimated to court that she had filed a

Notice of Preliminary Objection. The Preliminary Objection was finally argued on 28/10/2013. The trial magistrate delivered a ruling on the Preliminary Objection the following day that is on 29/10/2013. This is the ruling which provoked the appeal herein.

APPELLANTS CASE

3. The appellants raised five grounds of appeal against the ruling of the trial magistrate as follows:-

- (i) That the learned magistrate erred in law and in fact when he held that the issue in the case before him was not a burial dispute.
- (ii) That the learned magistrate erred in law and fact when he held that the matter of the suit was land.
- (iii) That the learned magistrate erred in law when he held that what was before court was a “ legal injury” to be protected.
- (iv) That the learned magistrate erred in law when he held that he was enforcing a judgment of the court when there was nothing to execute.
- (v) The the learned magistrate erred in law when he held that he had no jurisdiction to deal with burial disputes yet went ahead to dismiss the objection.

APPELLANTS SUBMISSIONS

4. The counsel for the parties agreed to dispose of the appeal by way of written submissions. The appellants counsel M/s. Arunga argued ground 1 and 2 together. She argued that the trial magistrate erred in law when he led that what was before him was not a burial dispute but an issue relating to land. She further argued that there was no prayer in the plaint relating to the issue of ownership of land as the issue of land had been heard and resolved by the High Court in Kitale HCCC No. 162 of 2001.

5. Ground 3, 4 and 5 were argued together. M/s. Arunga argued that the learned magistrate grossly misdirected himself when he held that there was a “legal injury” to be protected and that he was bound to enforce a judgment of the High Court. She argued that there was no legal injury to be protected and further that there was no order issued by the High Court which required enforcement. On the issue of jurisdiction M/s. Arunga argued that the learned magistrate had appreciated that indeed he had no jurisdiction to entertain a burial dispute yet he went ahead to dismiss the preliminary objection.

RESPONDENT'S SUBMISSIONS

6. Counsel for the respondent Mr. Njuguna submitted that the trial magistrate correctly made a finding that what was before him was not a burial dispute but rather a dispute premised on the appellants intention to bury the deceased on the respondent's land based on an exchange agreement which had been declared null and void by the High Court in Kitale HCCC No. 162 of 2001. Mr. Njuguna further argued that the trial magistrate made a correct finding that whereas he had no jurisdiction in burial disputes of a customary nature by virtue of the Provision of Section 3(2) of the Judicature Act as read with Section 2 of the Magistrates Court Act, the dispute as to whether the deceased could be buried on L.R. No. Kakamega/Mabusi/18-104 could not be said to be a burial dispute of a customary nature.

7. Mr. Njuguna further argued that the trial magistrate made a correct finding that what was sought to be protected in the application and the suit was legal injury if burial was to take place on the said land. He further argued that the trial magistrate made a correct finding that the High Court judgment in Kitale HCCC No. 162 of 2001 was conclusive in as far as the exchange agreement was concerned and he was therefore bound to look at it and enforce it. Mr. Njuguna also argued that the trial magistrate judiciously applied the Provisions of Order 40 Rule 2(1) and that the respondent had no claim over the body of the deceased or the estate of the deceased as his only interest was to protect his proprietary interest over the

suit land and that the respondent's claim that he was bound to suffer injury loss and damage in the event that the deceased was buried on the suit land was a sound finding.

ANALYSIS OF SUBMISSIONS, THE LAW AND ISSUES FOR DETERMINATION

8. This is a first appeal to this court and as a first appellate court, I am bound to look at the entire submissions before the trial court on the issues touching on this appeal and evaluate the same and reach my own conclusions. The preliminary objection before the trial court was raised and argued on two grounds namely that the trial magistrate had no jurisdiction to entertain the matters in issue and that the suit and application were an abuse of the process of the court. These two grounds form the basis of the issues for determination namely whether the trial magistrate had jurisdiction to entertain the suit and whether the application and the suit were an abuse of the process of the court.

9. M/s. Arunga contends that what was in contention was a burial dispute and as such the trial magistrate had no jurisdiction to entertain the matter and that therefore his rejection of the preliminary objection on this ground was wrong. M/s. Arunga argued that the trial magistrate had conceded that he had no jurisdiction to entertain a customary burial dispute yet he went ahead to dismiss the preliminary objection. With respect to M/s Arunga I do not find any merit in this ground. The magistrate had indeed found as a matter of law that under Section 3(2) of the Judicature Act and Section 2 of the Magistrates Court Act, he had no jurisdiction to entertain a customary burial dispute but he then went on to correctly make a finding that what was before him was not a customary burial dispute but a matter relating to land. This is why he went ahead to make a finding that what the respondent had placed before the court was seeking to protect a legal injury. The trial magistrate never found the dispute before him to be a burial dispute as to be faulted for contradicting himself when he went ahead to dismiss the preliminary objection.

10. The respondent had filed a suit in which he sought to prevent the appellants from burying the deceased on L.R. No. Kakamega/Mabusi/18-104. That suit was premised on the finding of the High Court in Kitale HCCC No. 162 of 2001 in which the High Court had nullified the exchange agreement between the respondent and the deceased. It is the exchange agreement which had given the deceased the right to remain on L.R. No. Kakamega/Mabusi/18-104. As the agreement had been nullified by the court there was no basis upon which the deceased could remain on the said land and after his demise, the respondent moved to court to prevent his burial on the suit land for to do so would have been a legal injury against the respondent. By filing the suit against the appellants seeking to prevent the appellants from burying the deceased on the suit land, the respondent was only intent or preventing a legal injury against him. The respondent was not litigating on who had the right to bury the deceased or where the deceased was to be buried. The respondent's only concern was to see that the deceased was not buried on his land as already the High Court had nullified the exchange agreement which had led the deceased and his family to occupy L.R. No. Kakamega/Mabusi/18- 104. The trial magistrate was therefore correct in holding that what was before him was not a customary burial dispute but a matter relating to land.

11. Legal injury is defined in Black's Law Dictionary as violation of a legal right. In the matter before the trial magistrate, the respondent's legal right to L.R. No. Kakamega/Mabusi/18-104 had been determined after the court nullified the exchange agreement whose import was that the deceased had no right of remaining on the said land. The respondent moved to court to arrest the intended burial of the deceased on land which had legally reverted to him upon nullification of the exchange agreement. The trial magistrate was therefore correct in holding that the respondent was properly before him for protection of a legal injury which was about to be committed by the intended burial of the deceased on land which belonged to him.

12. There was an argument by M/s. Arunga that the trial magistrate erred in holding that there was a judgment to be enforced. She argued that there was nothing to be enforced as no warrant, eviction order or notice to show cause had been issued in the said judgment. I have looked at page 4 of the magistrate's ruling where he stated as follows:-

“ To my understanding, the subject matter of the suit, as filed herein and even the application is

not the burial of the deceased but the land which is sought to be protected from legal injury if the burial was to take place thereon. There is nothing customary about the subject matter or the remedy sought in the nature of customary law remedy or process to such remedy. The judgment therefore being concussive (conclusive) adjudication of the matter, then this court is bound to look at it and to enforce it. Order 40 Rule 2 and Section 63 of the Civil Procedure Act and even the Constitution, all envisage this with the aim of protecting any alleged infringement of rights or interests of any party. This cannot be said to be an abuse of the court process by any reason”.

13. Of course there was nothing to be enforced in the High Court judgment but the context in which the trial magistrate used the word “enforce” clearly shows that he was alive to the fact that the High Court had nullified the exchange agreement and that judgment being conclusive as regards the exchange agreement, he could not overlook that aspect and find that the filing of an injunction to protect that aspect was an abuse of the process of the court. The magistrate can only be faulted for going beyond the plain meaning of the High Court judgment and purporting to “enforce it”. There was nothing to be enforced. However be that as it may, this did not affect the correct find of the trial magistrate that what was before him was not a customary burial dispute and hence he had jurisdiction to entertain the application as well as the suit. There was no abuse of the process of court in the respondent seeking to prevent a legal injury against him. I find that the appeal herein has no merits. The same is dismissed with costs to the respondent.

Dated, signed and delivered at Kitale on this 28th day of May, 2015.

E. OBAGA

JUDGE

In the presence of Mr. Ngigi for Mr. Njuguna for Respondent and Mr. Wafula for M/s. Arunga for Appellant.

Court clerk – Isabellah.

E. OBAGA

JUDGE

28/5/2015