Ochieng & 2 others v Onyango (Civil Appeal 158 of 2019) [2024] KECA 201 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KECA 201 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 158 OF 2019

F SICHALE, FA OCHIENG & WK KORIR, JJA

FEBRUARY 23, 2024

BETWEEN

FLORENCE M OCHIENG .... 1ST APPELLANT

BENARD OSORE .... 2ND APPELLANT

BENJAMIN OSENGO .... 3RD APPELLANT

AND

NAHASHON OCHIENG ONYANGO .... RESPONDENT

(Being an appeal from the Ruling of the Environment and Land Court at Kitale (M. Njoroge, J.) dated 24th August 2017 in ELC Cause No. 31 of 2009)

JUDGMENT

1. The respondent sued the appellants and 9 other defendants vide a plaint dated 26th February 2009, seeking a permanent injunction to restrain them from trespassing onto land parcel No. IR 13623, hereinafter, "the suit land".

2. A brief background of the application is that the 1st appellant is the respondent's 3rd wife while the 2nd and 3rd appellants are the respondent's sons. The 1st appellant had leased part of the suit properties to third parties without the respondent's consent. The appellants also prevented the respondent from subdividing, cultivating, and using the suit properties.

3. In their defence dated 19th March 2009, the appellants accused the respondent of material non-disclosure. They claimed that in 1996 the respondent subdivided the suit properties into 11 equal portions measuring 17.28 acres amongst his sons. The subdivision was consented to by the Land Control Board, and approved by the DO and the area Chief.

4. They claimed that the respondent had remained with 30 acres of the suit properties which remained unoccupied. They denied the respondent's allegations.

5. The court issued a temporary injunction against the appellants on 30th March 2009. Aggrieved, the appellants appealed against the order.

6. In the judgment dated 18th September 2012, the court partially allowed the appeal to the extent that the appellants were allowed to continue residing on and using the suit properties for growing their subsistence crops only pending the determination of the main suit.

7. The main suit was disposed of by the consent of the parties dated 25th November 2013 to the effect that:

> " a) The respondent's suit was marked as withdrawn with no order as to costs.
>
> b. The suit land be surveyed and distributed among the respondent's children and wives.
>
> c. The 1st appellant be allocated 7 acres forming part of the suit land.
>
> d. The parties to be allocated the land to enjoy without any interference."

8. Thereafter, the respondent filed an application dated 7th April 2017 seeking orders inter alia:

> " a) A declaration that the respondent has complied with the consent order dated 25th November 2013.
>
> b. An injunction compelling the appellants to remain, occupy, and use the land known as L.R. No. 30726/5 measuring 7.723 ha or 19.099 acres represented by deed plan No. 404041 and not any other part of the land.
>
> c. A declaration that the respondent was entitled to the exclusive and unimpeded right of possession, use, and occupation of land parcels known as L.R. Nos. 30726/2 and 30726/7 - 30726/47, hereinafter, "the suit properties."
>
> d. A declaration that the appellants were in wrongful occupation of the suit properties and therefore they were trespassers.
>
> e. A declaration that the appellants were not entitled to remain on the suit properties and the court to grant an order that those who had already entered the suit properties vacate the same or be forcefully evicted by the OCS Kitale police station.
>
> b. A permanent injunction restraining the appellants from re-entering the suit properties.
>
> c. A permanent injunction restraining the appellants from interfering with the process of replacing beacons, and from interfering with the replaced beacons and the boundaries created thereto.
>
> h) An order of vacant possession of the suit properties.
>
> i) Costs of the application."

9. The respondent claimed in his application that he had complied with the consent order and each of his wives and children could identify the suit properties allocated to them with precision. The application

was filed to compel the appellants to move to their identified portions, as they were farming on the entire suit land in complete disregard to the respondent and other family members. The appellants had interfered with and uprooted the beacons and also allowed third parties to enter into the suit properties.

10. The appellants did not respond to the application or file written submissions to that effect.

11. The learned Judge held that the 19.09 acres had been reserved for the appellants with the intention that the 1st appellant would receive 7 acres from therein in compliance with the consent order and that the rest of the land would be reserved for her children. The court took judicial notice that it is the norm in succession proceedings to group a widow and her children under the same share when distributing the deceased's estate, therefore, it should not be strange when a husband who is alive groups his wife together with her children when sharing out property.

12. The learned Judge held that no good reason had been presented to show why the 1st appellant and her children should not be given a consolidated parcel of land. If the 1st appellant so desired to have the land subdivided so that she may have the 7 acres to herself, then the appellants could make that decision as a family without the input of the respondent.

13. The learned Judge found the conduct by the appellants of failing to attend meetings with the chief to resolve the dispute, to be aimed at delaying justice and not to be in the spirit of Article 159(2) of *the Constitution*. Subsequently, the respondent's application was allowed.

14. Dissatisfied with the ruling, the appellants lodged the present appeal and raised the following grounds:

> "a) The learned Judge erred by proceeding with the hearing in the absence of evidence of compliance with the order dated 10th April 2017.
>
> b. The learned Judge erred by basing his findings on irrelevant, immaterial, and wrong considerations.
>
> c. The learned Judge erred by entertaining the application when the suit had been determined.
>
> d. The learned Judge erred by finding that the consent order had been complied with when the appellant gave a consolidated parcel to the appellants.
>
> e. The learned Judge erred by making and issuing final and mandatory orders in an application without a substantive hearing."

15. When the appeal came up for hearing on 14th November 2023, Mr. Ingosi, learned counsel appeared for the appellants. There was no appearance by the respondent. Counsel relied on his written submissions which he briefly highlighted.

16. Mr. Ingosi pointed out that at the time the application dated 7th April 2017 was filed; the main suit had been withdrawn hence there was no suit.

17. Counsel submitted that the orders made were final and mandatory, and they could not be granted in an interlocutory application. In this instance, the respondent was given a declaration of ownership of various parcels of land yet no evidence was tendered to prove ownership.

18. Counsel argued that there was no evidence of compliance with the consent order, or that the appellants failed to attend meetings. That there was no basis for allowing the application.

19. The appellants faulted the learned Judge for determining the application without evidence that the consent order had been complied with. They submitted that the terms of the consent order were never

implemented, as the 1st appellant was to be allocated 7 acres irrespective of whether or not she was a wife but the same was not done.

20. The appellants submitted that they were never invited to the meetings by the chief and as such it was wrong for the learned Judge to hold that they had thwarted efforts at a resolution.

21. The appellants submitted that the court was functus officio and had no jurisdiction to entertain the respondent's application, the suit having been withdrawn. The appellants pointed out that if the consent order had been complied with, it could not be determined in an application, the respondent ought to have filed a fresh suit.

22. This being a first appeal, rule 31(1) of the *Court of Appeal Rules*, 2022 provides that:

> "On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power —
>
> a. to re-appraise the evidence and to draw inferences of fact; and
>
> b. in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court."

23. It follows that the primary role of this Court as a first appellate court is to re-analyse and re-evaluate the evidence that was placed before the learned trial Judge and draw its own conclusions on matters of fact. In the case of *Peters v Sunday Post Ltd* [1958] EA 424, at P 429 O'Connor P. stated thus:

> "An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand."

24. We have carefully considered the appeal, submissions by counsel, the authorities cited, and the law. The main issue for determination is whether or not the respondent's application was properly before the trial court.

25. It is common ground that the main suit before the trial court was withdrawn by consent of all the parties vide the consent dated 23rd November 2013. It is also common ground that the consent order was never reviewed or set aside. The question that arises then, is whether the court could entertain an application without a substantive suit where the main suit had been withdrawn.

26. At common law, a plaintiff has an unconditional right to withdraw their lawsuit at any point during the legal proceedings before a verdict or judgment is reached. This right has been deemed significant by Chief Justice Taft in the matter of Skinner and Eddy Corporation (1924) 68 Law Ed 912 at p. 914, where he stated that it is a substantial right. In the case of Beijing Industrial Designing & Research Institute v Lagoon Development Ltd [2015] eKLR, this Court held that:

> "As a general proposition, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in Abayomi Babatunde v pan Atlantic Shipping & Transport Agencies Ltd & others, SC 154/2002 identified those circumstances to include where:
>
> i. a plaintiff realizes the weakness of his claim in the light of the defence put up by the defendant,

ii. a plaintiff's vital witnesses are not available at the material time and will not be so at any certain future date,

iii. whereby abandoning the prosecution of the case, the plaintiff could substantially reduce the high costs that would have otherwise followed after a full-scale but unsuccessful litigation, or

iv. a plaintiff may possibly retain the right to re- litigate the claim at a more auspicious time if necessary."

27. Similarly, in the case of *Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others*, SC App. No. 16 of 2014, the court held that:

> " A party's right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate."

28. It follows therefore that once a suit is discontinued in whichever manner howsoever, it ceases to exist. In *Smt Raisa Sultana Begam & Others v Abdul Qadir & Others AIR* [1966] ALL 318 the court stated thus:

> " It stands to reason that when on withdrawal the plaintiff ceased to be a party and the court ceased to have jurisdiction over his suit and thus becomes fuctus officio nothing but can invest the court with jurisdiction over it."

29. In any event, the only recourse an individual who was a party to a withdrawn or discontinued suit has is to file a fresh suit if the law permits him or her. In the case of *Priscilla Nyambura Njue v Geovhem Middle East Ltd; Kenya Bureau of Standards (Interested Party)* [2021] eKLR, the court held that:

> "Withdrawal of a suit is itself its end. The right of a plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal. So long as he remains the plaintiff, he may do any act which he may do in that capacity; he cannot, after withdrawal of the suit resulting in the loss of the capacity, do an act which can be done only in that capacity. Put differently, there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal. ...The withdrawal took effect immediately the court permitted it and as observed earlier, Order 25 has no provision permitting reinstatement of a suit once the withdrawal has taken effect."

30. It follows therefore that, if there is no suit there cannot be a plaintiff and any person purporting to act as such cannot do so. Therefore, once the suit before the trial court was withdrawn, the law did not permit the respondent to take any step in the matter as the suit had come to an end. In *Nguruman Limited v Shompole Group Ranch & Another* [2014] eKLR the court stated that:

> " I think the court had no jurisdiction to grant the orders it did and to that extent such orders were void."

31. Moreover, the court became functus officio after it recorded the consent and thus ceased to have jurisdiction to entertain further proceedings in the file except in a situation where its life must be applied to remind the parties of the finality of the consent of withdrawal of the suit. The consent

recorded still stands to date. It has never been challenged, set aside, varied, or appealed against by any party before the Court of Appeal. Therefore, the respondent had no locus standi to file the application as he did and the court had no jurisdiction to determine the application. In *Macjoy v United African Limited* [1961] 3 All E.R 1169 at 1172, Lord Denning L.J stated that:

> " If any act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so."

32. For the foregoing reasons, we find that the court ought to have downed its tools once it recorded the withdrawal as it had no part to play thereafter as it did not have jurisdiction to proceed further with the matter. It had become functus officio.

33. The orders made on 24th August 2017 were made in a vacuum.

    They are null and void.

34. In the result, we find that the appeal succeeds as the trial court did not have jurisdiction to entertain the respondent's application.

35. In considering that this is a matter involving family members, we find that each party bear their own costs.

    Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 23RD DAY OF FEBRUARY, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR