Owino & another v Khadudu & 2 others (Civil Appeal 16 of 2016) [2023] KECA 568 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 568 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 16 OF 2016

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MAY 12, 2023

BETWEEN

GABRIEL OWINO ..... 1ST APPELLANT

MORRIS OUMA OMONDI ..... 2ND APPELLANT

AND

ODONGO ONDWAKO KHADUDU ..... 1ST RESPONDENT

ODUORI ONDWAKO KHADUDU ALIAS NYAGWESO ..... 2ND RESPONDENT

OWINO ODWAKO ..... 3RD RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Busia (S. M. Kibunja, J.) dated 11th June, 2013 in Civil Suit No. 36 of 2001)

JUDGMENT

Judgment of Kiage, J.A

1. By way of originating summons, the appellants filed suit at the High Court against the respondents claiming to be in adverse possession of parcel No Marachi/Bumala/331 (suit land) since 1939. They sought determination of the following issues;

    a. Whether the applicants have lived openly on the suit land No Marachi/Bumala/331 since 1939.

    b. Whether the applicants herein are entitled to be registered as proprietors of the suit land having acquired the title by adverse.

    c. Whether the suit land is registered in the name of the respondents/defendants herein.

d. Whether the registration of the respondents/defendants as absolute proprietors of the suit land should be cancelled and instead the applicants' names substituted on the register.

e. Whether the permanent injunction should issue against the respondents, their agents, servants and/or workers from interfering with the said portion of land.

f. Whether costs of this application should be awarded to the applicant.

2. The summons was supported by an affidavit sworn by the 1st appellant on November 2, 2001. Therein the 1st appellant averred that he was born on the suit land in the year1939 and had lived there since then. Prior to the year 1939, he claimed, his father was in actual possession of the land and continued being in actual possession till his death in the year 1989. He further stated that before and after his father's death, he had been cultivating and using the suit land peacefully, openly and uninterruptedly for a period exceeding 12 years and thus he regarded the said land as his personal property. Consequently, he contended, he had acquired title to the suit land.

3. In answer, the 1st respondent lodged a replying affidavit sworn on his behalf and that of the 2nd respondent. In it he dismissed the 1st appellant's claim that his deceased father had been in possession of the suit land and that he was born in the year 1939. He contended that his brothers and he were registered as first owners of the suit land in 1971 upon adjudication, and neither the appellants nor their father raised any objection. The 1st respondent further denied that the appellants had been using the suit land continuously and uninterrupted.

4. He continued that the appellants' father had instituted criminal proceedings against them in BSA/RM/CR/No 2878/85 claiming that they had trespassed on the suit land but the court had decided in their favour. Further, the appellants' brother had sought to evict them *vide* Kakamega RMCC No 771 of 1973 but that case was dismissed by the court. The 1st respondent argued that this case was now *res judicata* in view of the cases that he referred to. He maintained that they had been using the suit land exclusively without interference from the appellants.

5. Subsequently, another replying affidavit sworn on July 3, 2008 by one Odongo Odwako was filed. The deponent averred that the 1st respondent, a step-brother of his, passed away on November 3, 2005. The 2nd respondent, who was also his step- brother and a brother to the 1st respondent, migrated to Uganda in the early 1970s and had not come back to Kenya at the time of swearing the affidavit. The deponent further indicated that the 3rd respondent who was his brother is deceased.

6. Several judges handled the matter ending with S. M Kibunja, J. who came in at the judgment writing stage. The learned judge considered the suit and delivered a judgment on June 11, 2013, wherein he dismissed the appellants' case with costs. It would seem that in considering the suit, the learned judge relied on an order by Kimaru, J. (as he then was) made on July 23, 2012 stating:-

> " The proceedings to be typed so the court can determine whether it can enter the judgment on the basis of the proceedings on record..."

7. Kimaru, J made that order despite prior directions by W. Karanja, J (as she then was) made on July 3, 2007, that the suit proceeds by way of *viva voce* evidence thus:-

> " Directions given to the effect that the under section (sic) and supporting affidavit be treated or a plaint (sic).The replying affidavit be treated as a defenceParties to call *viva voce* evidence
>
> Main suit to proceed on December 4, 2007 in open court. Status quo be maintained".

8. As elucidated later in this judgment, this apparent oversight is a core issue in this appeal.

9. Dissatisfied with the judgment of S. M. Kibunja, J. the appellants preferred the current appeal to this court. The memorandum of appeal contains nine (9) grounds which, condensed, are that the learned judge erred in law and in fact by:-

    a. Failing to consider the appellants' case on its specific merits.

    b. Failing to find that the appellants had lived openly and continuously on Marachi/Bumala/331 since 1939.

    c. Holding that the respondents must have been residing on the suit land because the appellants had brought criminal proceedings for trespass against them in criminal caseNo 2878 of 1985 when, in fact, it was the respondents who initiated those proceedings.

    d. Failing to find that the very act of instituting criminal proceedings for trespass against the appellants confirmed the appellants' evidence that they had been residing on the suit land before land adjudication in 1971.

    e. Failing to find that even after 1971 the appellants continued to live on the suit land.

    f. Holding that the appellants could not have been in exclusive occupation of the suit land because the respondents were also in occupation of the same land.

    g. Failing to find that criminal case No 2878 of 1985 recommended that the Land Registrar, Busia, liases with the Survey office, Busia/Teso Districts, measure the land and resolve the dispute.

10. During the hearing of the appeal, learned counsel Mr Nyamweya appeared for the appellants while Ms Masakwe holding brief for Mr Fwaya appeared for the 2nd respondent, who is the only respondent alive in the matter. Initially Ms Masakwe informed the court that her client was deceased, only to recant that statement later. Counsel for the appellants had filed written submissions which he highlighted before us. There were no submissions on record for the 2nd respondent and neither did counsel make oral submissions, probably because she was under the impression that her client was deceased. I also note that when the matter was before the High Court, the respondents' counsel Mr Fwaya applied to cease acting for all the respondents and that application was granted on December 4, 2007.

11. Mr Nyamweya submitted that the major issue in the matter is the finding by the trial court that the appellants had filed a case of trespass against the respondents when, in actual fact, it was the respondents who had filed that case against the appellants. To counsel, the learned judge arrived at this wrong conclusion by exclusively relying on the affidavits of the parties without appreciating the facts therein and the annexed documents. Counsel further contended that for purposes of the appellants' claim of adverse possession, time started running against the respondents in the year 1971 when they were registered as owners of the suit land, yet it was not only until the year 1985 that they lodged a private prosecution case against the appellants for trespass in criminal case No 2878 of 1985. That was a period of 15 years later.

12. Mr Nyamweya further faulted the learned judge for relying on the order of Kimaru, J. who had directed that proceedings in the matter be typed so that he could determine whether judgment could be entered. Counsel complained that the learned judge erred in that respect because no evidence had been adduced at that point and thus he could not possibly appreciate the full facts of the case. More critically, the order that had been made earlier by W. Karanja, J. for the originating summons to be heard by way of *viva voce* evidence had not been vacated. In the end counsel urged that the appeal be allowed with costs.

13. As the first appellate court, we are aware of our duty as was spelt out in Selle v Associated Motor Boat Co [1968] EA 123;

> " An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

14. From the onset of this judgment I pointed out one apparent oversight by the learned judge which is now a vexing issue to the appellants, and rightly so. While one judge ordered for the suit to proceed by way of viva voce evidence, the learned judge who eventually wrote the judgment proceeded by way of affidavit evidence, and the appellants' complaint is that in so proceeding, the trial court failed to appreciate the full facts of the case, a pitfall that could have been avoided by hearing the evidence from witnesses.

15. This argument persuades me. Proceeding by way of oral evidence was ideal in this matter particularly because the facts herein were highly contested. It was important to call viva voce evidence so that the strength of that evidence could be tested through cross-examining witnesses in the court's endeavour to unravel the contentious issues. I am therefore of the respectful view that the learned judge erred in proceeding to write judgment on the basis of affidavit evidence when there existed an order that had not been vacated, ordering for oral evidence to be taken. In the result, I find that the failure of the learned judge to conduct the hearing by way of *viva voce* as hitherto ordered by the court, and without giving reasons, was prejudicial to the appellants and, to my way of thinking, vitiated the entire trial.

16. I further note the appellants' contention that the learned judge erred in concluding that they were the ones who complained against the respondents in a complaint of trespass in criminal case No 2878/1985 whereas in actual sense it is the respondents who were the complainants. Indeed, a perusal of the charge sheet in that matter evidently indicates that the respondents were the complainants in the case, and so the learned judge fell into error in his finding on the same. This, too, calls for reversal.

17. Ultimately, I would allow this appeal and set aside the judgment and decree appealed from. I would order that the suit be remitted to the High Court for full trial before a judge of that court other than Kibunja, J. The parties should each bear their own costs.

18. As Tuiyott and Joel Ngugi, JJ.A agree, it is so ordered.

Judgment of Tuiyott, JA

19. I have had the advantage of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.

Judgment of Joel Ngugi, J.a

20. I have had the benefit of reading the judgment of Hon Kiage,J.A in draft. I entirely concur with his findings and I have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

F.TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR