Omboga v Bosire (Civil Appeal 38 of 2019) [2023] KECA 790 (KLR) (23 June 2023) (Judgment)

Neutral citation: [2023] KECA 790 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 38 OF 2019

PO KIAGE, M NGUGI & F TUIYOTT, JJA

JUNE 23, 2023

BETWEEN

ISAAC OMBOGA ..... APPELLANT

AND

JUSTINE MAGARE BOSIRE ..... RESPONDENT

(Appeal from the judgment of the Environment and Land Court at Kisii (Mutungi, J.) dated 14th December, 2018 in Case No. 1037 of 2016)

JUDGMENT

1. This appeal emanates from the judgment of the Environment and Land Court (Mutungi, J) delivered on December 14, 2018 in which the learned judge decreed as follows;

    1) That the plaintiff is the lawful owner of LR No Kisii/Wanjare/Bokeire/4414.

    2) The defendant is hereby ordered to vacate and deliver vacant possession of LR No Kisii Wanjare/Bokeire/4414 to the plaintiff within 60 days from the date of this judgment failing which an order for his forcible eviction to issue upon application by the plaintiff.

    3) An order of permanent injunction to issue restraining the defendant, his agents and/or servants from re-entering, cultivating and/or in any manner whatsoever interfering with the suit property LR No Kisii/Wanjare/Bokeire/4414.

    4) An award of Kshs 30,000 to the plaintiff being general damages for trespass together with interest at court rates from the date of judgment until payment in full.

    5) The costs of the suit are awarded to the plaintiff.

2. The plaintiff, now the respondent, claimed before that court that he was the registered owner of the parcel of land known as Kisii/Wanjare/Bokeire/4414 (the suit land) measuring 0.04 hectares. He complained that the appellant had since the year 2010 unlawfully and without any justifiable cause

trespassed onto the suit land by cultivating, erecting a temporary structure thereon, chasing away his workers, destroying his fence and stealing his fencing materials. As a consequence, the respondent alleged, he suffered loss and damage. He thus prayed for judgment against the appellant for various orders including the ones granted.

3. The appellant opposed the respondent's claim arguing that the respondent obtained title to the suit land by fraud and with notice that he was in occupation of the land with an over-riding interest. He denied trespassing on the suit land, contending that he had been in occupation since the year 1995 and if the respondent had been sold a special portion of the land called 'emonga', the same was situated at a different location. During the hearing of this appeal, it was clarified that the term 'emonga' refers to that piece of land left for the father after he has allocated land to his children. It was asserted in the court below that the dispute over the suit land had been before the Land Disputes Tribunal at Suneka whose award was filed in the Chief Magistrate's Court at Kisii vide Misc Appl No 119 of 2009. The award was, however, not adopted as a judgment of the court. Instead, it was remitted to the tribunal, which never dealt with the matter because it had been disbanded. The appellant denied liability, insisting that the respondent was not entitled to the reliefs of eviction, injunction or damages as pleaded.

4. The suit proceeded with the respondent testifying and calling two witnesses in proof of his case. The appellant also testified in his defence but did not call any witness. It is then that the learned Judge rendered the judgment as expressed in the decree I have referred to.

5. Dissatisfied with the judgment, the appellant preferred the current appeal to this Court. The memorandum of appeal contains six (6) grounds which, condensed, are that the learned judge erred in law by;

    a) Holding that the respondent herein who had admitted that he purchased the suit land while the appellant was in occupation acquired good and absolute title.

    b) Holding that the appellant had failed to establish that he had any overriding interest on the suit land.

    c) Not considering the totality of the evidence, in particular the uncontroverted evidence on record that the necessary land control board consent was not obtained, and if it was, it was not free from irregularities.

    d) Failing to consider that the father of the appellant who sold the respondent the suit land did not testify in support of the respondent's case.

    e) Awarding the respondent nominal damages of Kshs 30,000 when there was no evidence on record in support of the same.

    f) Deciding the case against the weight of evidence in favour of the appellant.

6. The appellant prayed that the appeal be allowed and the decision of the court below be set aside.

7. During the hearing of the appeal, learned counsel Mr Soire appeared for the appellant while Mr Anyona appeared for the respondent. Mr Soire had filed written submissions which he briefly highlighted while Mr Anyona chose to make oral submissions.

8. Mr Soire faulted the learned judge for failing to consider that the appellant had an overriding interest over the suit land. Section 28(b) of the *Land Registration Act, 2012*, that enumerates 'trusts including customary trusts' as an overriding interest was referred to for the contention that the appellant's claim over the suit land was that of a customary trust. The basis for such a proposition was that the

father of the appellant, who was the vendor of the suit land, held the land on behalf of the appellant. Consequently, it was asserted, the disposal of the suit land was subject to the customary trust.

9. Mr Soire submitted that the suit land was agricultural land whose transactions were subject to the consent of the local Land Control Board, and failure to obtain that consent rendered its sale to the respondent null and void. Moreover, it was argued, the award of nominal damages was not supported by the record. Mr Soire beseeched us to re-evaluate the evidence adduced in the trial court and find that the learned judge decided the case against the weight thereof.

10. In a short reply, Mr Anyona submitted that the original owner of the suit land, the appellant's father, had already sub- divided his land among his children and what he sold was his own piece.

11. I am aware of our duty as a first appellate court as was expressed, for instance, in *Robin Angus Paul & 2 others v Miriam Hemed Kale* [2019] eKLR;

> " As stated earlier, on first appeal this Court is enjoined to re-evaluate, re-assess and re-analyze the entire evidence adduced before the trial court and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way."

12. Having appraised myself of the facts and the evidence tendered before the trial court, I think the twin issues for consideration in this appeal are whether the appellant had an overriding interest over the suit land in the nature of a customary trust, and whether the respondent was entitled to the award of nominal damages.

13. In considering whether the appellant had an overriding interest on the suit land, the learned judge reckoned;

> " 14...As observed above, the defendant did not plead any particulars of fraud and no fraud was established. The plaintiff properly dealt with the defendant's father who was the registered owner of the suit property. I find that the Defendant has no overriding interest as claimed as his father (defendant's) had distributed his property to his family and had left himself an "emonga" which was within his rights to dispose of to whomever he desired. The defendant's father had allocated land to the defendant's mother and to the co-wife which was to cater for the siblings of each of the households".

14. I concur with the learned judge's finding. In his testimony, the appellant expressly stated that his father allotted both of his wives, one of them being the appellant's mother, their respective share of the land. This fact was corroborated by both the respondent and the appellant's step-brother, PW2. It would appear then that even though there had been a customary trust, the same was extinguished upon the appellant's father sharing out his land, and remaining with his own share, the emonga.

15. Accordingly, I see no reason to interfere with the learned judge's decision.

16. As to whether the learned judge properly exercised his discretion in awarding the respondent Kshs 30,000 nominal damages, I note the learned judge took into account the fact that since it had been established that the appellant had trespassed on the respondent's land, the respondent was deserving of such general damages as would reasonably recompense him. It is not denied that the appellant was in occupation of the suit land as at the time the matter was in court, and without the respondent's permission. In the circumstances, I am of the considered view that the damages awarded by the learned judge were fair. In finding so I am persuaded by this Court's decision in *Nyamogo & Nyamogo*

Advocates v Barclays Bank of Kenya [2015] eKLR, where we held that nominal damages can be awarded where, though there may be no real damage, there is an infraction of a legal right. We reasoned thus;

> "Grabbe, JA in the case of Kanji Naran Patel v Noor Essa and another [1965] EA 484 at page 487 paragraph G-I had this to say:-
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> > " Nominal damage is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damage does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages but may also be represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances and it certainly does not in the smallest degree suggest that because they are small, they are necessarily nominal damages.
> >
> > In the earlier case of Beumont v Great head [1846] 2C.B.494,Maule, J. [1846] 2C.B. at P.499) spoke of nominal damages as a sum that may be spoken of but that has not existence in point of quantity" and as a "mere peg on which to hang costs.'"
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> In Kimakia Co-Operative Society v Green Hotel [1988] KLR 242, this Court held *inter alia* that where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and he did not, he cannot have more than nominal damages."

17. That is the law as I understand it.

18. The upshot is that I find the appeal to be without merit and I would dismiss it with costs.

19. As Mumbi Ngugi and Tuiyott, JJA agree, it is so ordered.

JUDGMENT OF MUMBI NGUGI JA

I have read in draft the judgment of my learned brother Kiage, JA. with which I am in full agreement and there would be no utility in my adding anything thereto.

JUDGMENT OF TUIYOTT, JA

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.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF JUNE, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR