



REPUBLIC OF KENYA



KENYA LAW
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**Ombui & 2 others v Ombui (Civil Appeal 41 of 2019)
[2023] KECA 903 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KECA 903 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 41 OF 2019
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JULY 21, 2023**

BETWEEN

YOBESH OGWANGI OMBUI 1ST APPELLANT

EVANS NYAOSI OMBUI 2ND APPELLANT

GEORGE OMBUI 3RD APPELLANT

AND

DENNIS ONG'ANYO OMBUI RESPONDENT

*(Being an appeal from a ruling of the Environment and Land Court at Kisii
(Mutungi J.) dated 16th November, 2018 in ELC Case No. 431 of 2014)*

JUDGMENT

Judgment of Mumbi Ngugi JA

1. The appellants are the respondent's half-siblings, all sons of one Gerishon Ombui Kemaisa (deceased). The deceased had two wives, both of whom are also deceased. The first wife was the mother of the appellants while the second wife was the mother of the respondent.
2. In the plaint dated November 10, 2014, the respondent sought a permanent injunction restraining the appellants either by themselves their agents or servants from, inter alia, entering, encroaching and or dealing with the properties known as Majoge/Bokimonge/2808 and Gesima Settlement Scheme/886. He also sought the costs of the suit.
3. The respondent's case before the trial court was that the deceased had subdivided his two parcels of land, Majoge/Bokimonge/616 and Gesima Settlement Scheme/117 between his two houses in his lifetime. Majoge/Bokimonge/2808 and Gesima Settlement Scheme/886 were registered in the name of his deceased mother, while the remaining parcels, Majoge/Bokimonge/2807 and Gesima Settlement Scheme/887, were left for the deceased's first house. After the demise of the respondent's mother,



- however, the appellants interfered with the land parcels registered in the respondent's mother's name and stopped the respondent and his siblings from picking tea from the said land.
4. In their defence and counter-claim dated July 22, 2016, the appellants denied that their deceased father had subdivided the land parcels between his two houses. They contended that their deceased father was incapable of making a rational decision with respect to his property, and that the alleged subdivision of the land parcels was a fraudulent scheme instigated by the respondent, his deceased mother and corrupt land officials. They counter-claimed for a declaration that the subdivision of the deceased's land was null and void and sought cancellation of the subdivisions and reversion of the titles to their original status.
 5. The record of the trial court indicates that upon considering the nature of the dispute, the trial court referred it to the Land Registrars, Kisii and Nyamira respectively, and their respective surveyors, to inspect the suit properties and file reports in court. In the report dated December 7, 2016, the surveyor, Kisii, stated that there was a clear boundary separating land parcel number Majoge/Bokimonge/2807 and 2808 which were a result of subdivision of land parcel number Majoge/Bokimonge/616.
 6. In their report dated 7th December 2016 with respect to land parcel numbers Gesima Settlement Scheme/886 and 887, the Land Registrar and County Surveyor, Nyamira, stated that there were clear boundary marks separating the two parcels of land, save for a small portion on the lower part abutting the road measuring approximately 0.042 hectares, which was not claimed by any party. They therefore named this portion 'no man's land', and the Land Registrar sought guidance from the court on how to deal with it.
 7. Initially, the trial court set the dispute with respect to this portion for hearing. However, on 26th September 2017, Mr. Soire, appearing for the appellants, observed that the matter was a family dispute and proposed that the local administration could 'arbitrate'. There was no objection to the proposal from Mr. Ogari, then appearing for the respondent. Accordingly, the court referred the matter to alternative dispute resolution under article 159(2)(c) of *the Constitution*. The dispute was to be arbitrated by the Deputy County Commissioner, Borabu, assisted by two elders nominated by each of the parties.
 8. In accordance with the referral by the court, the dispute was heard and a report dated March 16, 2018 was filed in court on June 11, 2018. The parties were furnished with copies of the report and invited to make comments thereon by the court. The appellants filed observations whose date is not clear but which were filed in court on October 24, 2018. They observed that the report was vague and inconclusive and did not resolve the issue in controversy in the suit. They submitted that the report be ignored and the matter proceeds to hearing.
 9. In the observations dated July 30, 2018, the respondent noted that the report of the Deputy County Commissioner had concluded that the deceased had subdivided his land into two parcels, and that there exists no real dispute other than the portion that the Land Registrar referred to as 'no man's land' between Gesima Settlement Scheme/886 and 887.
 10. In its ruling dated 16th November 2018, the trial court noted that from the report, there is no dispute that the father of the parties, Gerishon Ombui, was the registered owner of the land parcels in contention, Majoge/Bokimonge/616 and Gesima Settlement Scheme/117, and that he had subdivided them into two equal portions. He had transferred Majoge/Bokimonge/2808 and Gesima Settlement Scheme/ 886 during his lifetime to his second wife Elmelda Ariri Ombui. The first house to which the appellants belonged therefore had no claim to these parcels of land.



11. The trial court further found that there was incontestable evidence that on the ground, the deceased had physically subdivided the parcels of land into two portions which had clear boundaries.
12. The court further found that the two parcels of land were subdivided equally between the houses of the deceased. While the appellants complained that they had not been involved in the subdivision and had alleged fraud, there was no basis for the allegation of fraud and fraud had not been established to the required standard. Parcel numbers Majoge/ Bokimonge/2808 and Gesima Settlement Scheme/886 registered in the name Elmelda Ariri Ombui were validly registered in her name and the appellants/ defendants ought not to interfere with them.
13. The trial court therefore adopted the report of the Deputy County Commissioner but varied it in one respect by ordering that the portion identified by the Land registrars and surveyor as 'no man's land' be shared equally between Gesima/Settlement Scheme/886 and 887. It further entered judgment for the respondent in terms of prayer (a) of the plaint, restraining the appellants from interfering or encroaching upon land parcel numbers Majoge/Bokimonge/2808 and Gesima Settlement Scheme/886. The trial court further held that the award of the Deputy County Commissioner had resolved all the issues between the parties, and there was therefore nothing to go to trial.
14. The appellants were dissatisfied with the ruling of the court. In their memorandum of appeal dated March 13, 2019, the appellants raise two grounds of appeal. First, that the trial court erred in law in holding that the award by the Deputy County Commissioner was conclusive and that it had resolved all the issues in controversy between the parties. Secondly, that the trial court had misdirected itself in varying, amending and modifying the award by the Deputy County Commissioner in a manner not in conformity with the parameters set out in order 46 rule 14 of the [Civil Procedure Rules](#) 2010. The appellants prayed that the ruling of the trial court be set aside and the case be remitted to the trial court for re-hearing.
15. In their submissions dated March 1, 2023, the appellants reiterate their contention that the trial court erred in finding that the Deputy County Commissioner's award was conclusive and that it resolved all the issues in controversy between the parties. They submit that what prompted the arbitration was the dispute on ownership of the 0.042 hectares which had been christened as 'no man's land', and which the trial court was of opinion that it could be solved amicably. They observe that the Deputy County Commissioner had failed to address the issue in controversy in the suit, and the award was inconclusive. They further submit that the adoption of the award with amendments was a misdirection.
16. With respect to their second ground of appeal, the appellants submit that the trial court amended the award in a manner that was inconsistent with order 46 rule 14 of the [Civil Procedure Code](#).
17. At the hearing of the appeal, learned counsel, Mr. Soire, appeared for the appellants. He submitted that the learned judge is faulted only for varying the award of the Deputy County Commissioner outside the parameters set out in order 46 rule 14 of the [Civil Procedure Rules](#). It was his submission further that in adopting the award, the parties were invited to make comments on the award and whether it was capable of being adopted as a judgment of the court. They had made comments and the court proceeded to enter judgment without giving the parties an opportunity to file a formal application challenging the award.
18. There was no appearance for the respondent at the hearing, despite service, nor were submissions filed on his behalf.
19. The matter before this Court did not proceed to hearing on the facts which, from the proceedings before the trial court, were mostly not in contention. As children of the deceased, Gerishon Ombui



Kimaisa, the appellants and the respondent were beneficiaries of his estate. From the reports of the Land Registrars and Surveyor, Kisii and Nyamira, which the appellants did not contest, the deceased had subdivided his two parcels of land. Two of the resultant sub-divisions, Majoge/Bokimonge/2808 and Gesima Settlement Scheme/886, had been registered in the name of the respondent's mother prior to the demise of the deceased and his second wife, the mother of the respondent.

20. I say that the reports were not contested by the appellants because it is their counsel, Mr. Soire, who, on 26th September 2017, requested that the outstanding issue, relating to the area comprising a small portion on the lower part abutting the road between parcel number Gesima Settlement Scheme/886 and 887 measuring approximately 0.042 hectares, which was not claimed by any party, be referred to arbitration as the disputants were members of one family.
21. The gist of the appellants' appeal before us is that the trial court amended the award of the Deputy County Commissioner on a basis other than provided under order 46 rule 14. I observe, first, that the referral of the matter to the Deputy County Commissioner for 'arbitration' was at the application of the appellants. In his application, Mr. Soire did not request for arbitration under the provisions of order 46, which provides that:
 1. Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.
 2. Appointment of arbitrator [order 46, rule 2.] The arbitrator shall be appointed in such manner as may be agreed upon between the parties.
 3.
 - (1) The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.
22. Further, in referring the dispute, involving members of one family, to 'arbitration' with the assistance of elders selected by the parties, the trial court did so in accordance with the provisions of article 159(2) (c) of *the Constitution* which allows courts to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.
23. I am satisfied that in the circumstances of this case, the trial court properly amended the 'award' of the Deputy County Commissioner in directing that the portion measuring 0.042 hectares designated 'no man's land' be divided equally between the appellants and the respondent and his siblings. The referral to 'arbitration' under article 159(2)(c) was not, in my view, a referral to an arbitral tribunal or an arbitrator as contemplated under Order 46, nor was it subject to the strictures with respect to variation or setting aside of the award that would ordinarily attend an award under order 46 or the *Arbitration Act*.
24. Since the only issue in contention, if one can call it that in light of the fact that the Land Registrar and Surveyor had noted that the portion designated as 'no man's land' was not claimed by either party, there was no real dispute for the trial court to expend valuable judicial time on. An adoption of the award, which recognised that the deceased had subdivided his land between his houses in his lifetime and that only a small portion, which none of the parties was claiming and was therefore not much in dispute remained, and a slight variation thereof that would put an end to the minor outstanding issue of the 0.042 ha, was well within the jurisdiction of the trial court.



25. I accordingly find no merit in this appeal, and I would dismiss it. I would, however, make no order as to costs in view of the fact that the respondent did not appear at the hearing of the appeal and, in any event, the appeal involves family members.

Judgment of Kiage, JA

26. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA. I entirely agree with her reasoning and conclusions, and have nothing useful to add.

27. As Tuiyott, JA is also in agreement, the final orders in the appeal are as proposed by Mumbi Ngugi, JA.

Judgment of Tuiyott, JA

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

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY, 2023.

MUMBI NGUGI

.....
JUDGE OF APPEAL

P. O. KIAGE

.....
JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

