Okiro v Gatatha Farmers; Kaitet Tea Farmers (1977) Limited (Interested Party) (Civil Appeal 92 of 2018) [2022] KECA 748 (KLR) (27 May 2022) (Judgment)

Neutral citation: [2022] KECA 748 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 92 OF 2018

PO KIAGE, M NGUGI & F TUIYOTT, JJA

MAY 27, 2022

BETWEEN

OTIENO OKIRO ..... APPELLANT

AND

GATATHA FARMERS ..... RESPONDENT

AND

KAITET TEA FARMERS (1977) LIMITED ..... INTERESTED PARTY

(n appeal from the judgment and decree of the Environment and Land Court of Kenya at Kitale (M. Njoroge, J), dated 30th May, 2018 in ELC NO. 57 OF 2011)

JUDGMENT

JUDGEMENT OF KIAGE, JA

1. Gatatha Farmers, the respondent, filed a plaint in the High Court at Kitale against Otieno Okiro, the appellant and 2 others, the claims against whom were later withdrawn. The respondent posited itself as the absolute owner of parcels of land known as LR No's 5709, 5710/2, 5711/6137 and 8190 situated at Endebess and measuring 1800 acres or thereabouts. It purchased the said parcels from Endebess Estate Limited (Endebess Limited) sometime in 1977. Guy William D'Olier (Guy) was the director and principal shareholder of Endebess Limited at the time. Subsequently, the respondent took possession of the parcels of land in or about October, 1977.

2. The respondent averred that the late Okiro Okoyo (the deceased), the father to the appellant, was an employee of Endebess Limited. By virtue of his employment he was allowed to occupy 6 acres out of LR. No. 5710/2 (the suit property) for use during his lifetime. The respondent was informed of this arrangement and did not object to it on the understanding that upon his demise, the property would

revert to the respondent, and his family would vacate the suit property. The deceased passed away on 22nd October, 1980 and as such his life interest was determined.

3. However, despite the respondent's pleas, the appellant declined to vacate the suit property and instead lay claim to 36 acres of the suit property. According to the respondent, the appellant became a trespasser and as a result denied it exclusive peaceful enjoyment over the suit property. In the end, the respondent prayed for;

    a. A declaration that the plaintiff is the rightful of LR. No's 5709, 5710/2, 5711/6137 and 8190 all situated at Endebess measuring 1800 acres or thereabouts.

    b. A permanent injunction restraining the respondent, his servants and/or agents or any other person claiming through them from entering into, trespassing into and/or encroaching into the plaintiff's LR. No's 5709, 5710/2, 5711/6137 and 8190 all situated at Endebess measuring 1800 acres or thereabouts.

    c. Costs

    d. Interest.

4. The appellant filed a defence and denied the allegations in the plaint. He claimed that he was in lawful possession of 36 acres and challenged the respondent to prove otherwise. He elucidated that the respondent had initially filed suit in the High Court at Eldoret under HCCC No. 113 of 1987 seeking eviction orders against him. The said suit was subsequently dismissed for want of prosecution. As such the respondent was barred by the *Limitation of Actions Act* from lodging the suit since the cause of action accrued in 1987.

5. In his witness statement, the appellant stated that he inherited part of the suit property from his father. The deceased was allocated 36 acres of the suit property in 1957 by his then employer Edumnd William D'Olier (William) as a reward for exemplary service as an employee. Upon William's demise in 1958, his son Guy took over Endebess Limited. The deceased continued with the quiet enjoyment of the said portion of land until his death in 1980. At the time of his death, Guy had already sold the suit property to the respondent who maintained status quo until 1987 when it filed the initial suit to evict the appellant.

6. It is important to mention that the so called 'interested party' herein, a term not recognised by this Court, and should have been named a respondent, was joined to the proceedings by the court via a ruling delivered on 15th July, 2013. E. Obaga, J held that since it had bought the parcels of land which included the suit property from the respondent, it had an interest in the outcome of the proceedings hence qualified to be joined as an interested party in the matter.

7. At the close of the hearing, Njoroge, J considered the pleadings, testimonies and submissions before the court and delivered a judgment on 30th May, 2018. He found that the appellant was not entitled to the land that was occupied by his father. He granted the prayers sought by the respondent in the plaint.

8. Dissatisfied with the judgment, the appellant filed the instant appeal containing 8 grounds, which, condensed, are that the learned judge erred in law and in fact by;

    a. Failing to find that the appellant's father was given the land by Guy pursuant to deductions from his earnings.

    b. Failing to find that Guy and the respondent had committed fraud by not including the appellant in the transfer of the suit land.

c. Finding that the appellant was not entitled to occupy the deceased's property.

d. Failing to disqualify himself from adjudicating the suit as he was allegedly related to one of the respondent's members namely Samuel Chege Njoroge.

9. During the hearing of the appeal, the appellant appeared in person, learned Counsel Mr. Kiura appeared for the 1st respondent, while learned Counsel Mr. Odoyo appeared for the interested party.

10. The appellant submitted that the suit brought against him by the respondent was statute time-barred and the learned judge ought to have held as such. The appellant argued that the respondent did not produce any evidence to support its claim. Instead, he had overwhelming evidence that was not taken into account by the court. He contended that the affidavit sworn by Guy concerning the suit property should not have been taken into consideration as he was not the one who allocated the portion of land to the appellant's late father. The fact that the respondent was at some point willing to pay him for his portion of land in order for him to vacate, was proof that his father was the absolute owner of the property.

11. The respondent on its part submitted that it demonstrated to the court that it was the absolute proprietor of the suit property having purchased it together with other parcels of land from Endebess Limited in 1977. It further proved that the deceased was allowed to occupy 6 acres of the suit property during his life time. The respondent was amenable to the arrangement on the understanding that once the deceased passed away, his family would vacate and the portion would revert to it. The learned judge correctly found that the deceased's licence was a personal one in appreciation of the services he provided while in employment. On the issue of whether the suit was time-barred, the learned judge also correctly found that the cause of action, trespass, was a continuous one since the appellant was still in occupation of the property hence the suit was not time barred. We were urged to dismiss the appeal with costs.

12. The interested party submitted that the respondent proved its case on a balance of probabilities and discharged its duty as provided in Section 107 and 109 of the *Evidence Act*. The respondent proved that it was the rightful owner of the property having purchased it from Endebess Limited. Further, letters from Guy were produced in evidence of the deceased's interest and the portion he occupied of the suit property. The appellant on the other hand failed to adduce evidence rebutting the overwhelming evidence from the respondent. Once the respondent proved its case, the evidentiary burden shifted to the appellant who failed to discharge it as he did not prove whether the deceased purchased the property or whether it was gifted to him. We were urged to dismiss the appeal with costs.

13. I have considered the record of this appeal and distilled the issues for consideration as; whether the learned judge erred by holding that the appellant was not entitled to the portion of the suit property that was occupied by the deceased; and whether the suit was time barred.

14. I hasten to mention that the rest of the grounds of appeal namely, that the learned judge erred by failing to find, that the appellant's father was given the land by Guy pursuant to deductions from his earnings, that Guy and the respondent had committed fraud by not including the appellant in the transfer of the suit land and, failing to disqualify himself from adjudicating the suit as he was allegedly related to one of the respondent's members namely Samuel Chege Njoroge; were not raised at the superior court and therefore, we shall not metamorphose into a trial court and make first-instance determinations without the benefit of the input of the court from which this appeal arises. (See the dicta of M'inoti, J.A in *Kenya Hotels Limited -vs- Oriental Commercial Bank Limited*[2018] eKLR)

15. As I consider these issues, I keep firmly in mind our mandate as a first appellate court as expressed in the oft cited case of *Selle -vs- Associated Motor Boat Co* [1968] EA 123 that;

> "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 (Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270)."

16. The learned judge held that the respondent had proved that the licence to the deceased was a personal one in appreciation of the services rendered to Endebess Limited. He pointed out that the letters and affidavits sworn by Guy were further proof of this fact and therefore the interest could not survive his demise. He found that the deceased's rights died with him so to speak. Additionally, the said clarification from Guy also proved the fact that the deceased was allocated 6 acres as opposed to the 36 acres as claimed by the appellant.

17. This entire appeal revolves around the issue of whether or not the respondent proved its case on a balance of probability. In *Samuel Ndegwa Waithaka -vs- Agnes Wangui Mathenge & 2 Others* [2017] eKLR this Court captured this standard as follows;

> "12. In Civil cases such as this case, the standard of proof is on the balance of probabilities. This standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. In H (Minors) [1966] AC 563 at pg 586, Lord Nicholls explained that the test on the balance of probabilities was flexible. Said he,
>
> > " When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation, the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury ...
> >
> > ... Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

Similarly, the Evidence Act in Section 107 provides;

> Whoever desires any court to give judgment as to any;

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

18. Therefore, the respondent as the initiator of the suit had the burden to prove that the facts claimed existed. In discharging this duty, the respondent had Peter Mburu Gakwa, its chairman, testify as PW1. He reiterated the narrative as recounted in the plaint. He further stated that the deceased's family did not object to the sale and subsequent transfer of the suit property to the respondent. In support of that assertion, the respondent's evidence included; a certificate of title for the suit property which showed that the same was transferred to it on 28th December, 1981; another entry that showed that the respondent then transferred it to the interested party, the current proprietors of the land; a statutory declaration by Guy dated 28th November, 1985 affirmed the position that the deceased was allowed to occupy 6 acres of the suit property for the rest of his life and an affidavit dated 20th June, 2007 sworn by Guy reiterating the contents of the statutory declarations and states that the deceased agreed to the terms of the occupancy of the deceased on the 6 acres; and a letter dated 26th February, 1981 from Guy to J. M. Wafula & Company Advocates where he categorically states that the concession given to the deceased and others was restricted to their lifetime, after which the land would revert to the owners. Therefore, the appellant did not have any claim against the respondent.

19. Once the respondent had proved its claims, the evidentiary burden shifted to the appellant. He testified that he was in occupation of 36 acres, which he was entitled to, plus an additional 17 acres which was occupied by a public primary school known as Endebess Estate Primary School where he was the chairman. He reiterated his averments as contained in his defence and witness statement. He claimed that the respondent sought to compensate him so that he could leave the property, however he declined. According to him, this was further proof of his entitlement to the portion of the suit property. Elisha Masinde, who worked at Endebess Club, testified as DW2. He claimed that Guy's father gave the deceased a portion of his land though he could not ascertain where it was situated. Jonathan Wafula Mutende, the former chief of Endebess location testified as DW3. He stated that based on the complaint of some squatters, a mzungu (William) stated that he had given the deceased land but never declared that his occupation would end upon his death.

20. In support of his claim, the appellant's evidence included; copies of the petition and the subsequent grant of letters of administration, the suit property was erroneously listed as 5710/2B, as part of the deceased estate; correspondence between himself, the Provincial Administration and the respondent on his complaint concerning ownership of the portion of the suit property; and a letter dated 12th July, 1996 from Guy where he affirmed that he never gave any land to any squatters, but mentioned that three deserving employees were settled therein.

21. After re-evaluating the entirety of the evidence from both parties, I find that the respondent proved its case on a balance of probabilities. The evidence adduced supported the assertion that; the respondent was a *bona fide* purchaser of the suit property; the deceased was only allowed to occupy 6 acres of the suit property; and the licence was on the deceased's personal capacity due to his service. Therefore, the said licence ended upon the death of the deceased. As a result, the appellant did not have any claim to any portion of the suit property.

22. On the other hand, the respondent evidence in rebuttal fell short of the required standard. The numerous letters, the grant of letters of administration and his witnesses all did not give an iota of proof

that the deceased was the lawful owner of any portion of the suit property. Therefore, the deceased had no title to transfer to the appellant through inheritance. The appellant failed to discharge his burden of proof as provided for by Section 109 and 112 of the *Evidence Act* which states;

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

23. I concur with and endorse the conclusion reached by the learned Judge that the appellant was not entitled to the portion of the suit property, which in turn made him a trespasser. Since the appellant has been and still is in occupation of the portion, the trespass was continuous and the learned judge correctly held as such. To buttress this point, I refer to *Clerk & Lindsel on Torts 16th Edition,Sweet and Maxwell, 1994 paragraph 23 - 01* whereof states that;

> Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues".

24. For these reasons and not without sympathy for the appellant I am unable to depart from the finding of the learned judge. I therefore find that this appeal lacks merit and would dismiss it in totality but with no order as costs.

25. As Mumbi Ngugi and Tuiyott, JJA agree, that shall be the order of the Court.

JUDGMENT OF MUMBI NGUGI,JA

1. I have read in draft the judgment of Kiage, JA and I am in full agreement with the findings and conclusions reached and have nothing useful to add.

JUDGMENT OF TUIYOTT, J.A

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

DATED AND DELIVERED AT KISUMU THIS 27TH DAY OF MAY, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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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