Masoin & 2 others v Lagat & another (Civil Appeal 99 of 2018)
[2022] KECA 1031 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KECA 1031 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 99 OF 2018

PO KIAGE, M NGUGI & F TUIYOTT, JJA

SEPTEMBER 23, 2022

BETWEEN

MARIA JEBET ARAP MASOIN ..... 1ST APPELLANT

EMMANUEL KIPTANUI TOROITICH ..... 2ND APPELLANT

RICHARD KIPROTICH ..... 3RD APPELLANT

AND

KIPKOECH LAGAT ..... 1ST RESPONDENT

TOROITICH CHELAGAT BUSIENI ..... 2ND RESPONDENT

(Being an appeal against the judgment of the Environment and Land Court in Eldoret (A. Ombwayo J) dated 19th March, 2018in ELC Petition No. 16 of 2016)

JUDGMENT

JUDGMENT OF MUMBI NGUGI JA

1. The appellants filed a petition dated 27th October, 2016 before the Environment and Land Court in Eldoret alleging violation of their right to property guaranteed under article 40 of the Constitution by the respondents. In its decision dated 19th March 2018, the trial court (Ombwayo J.) dismissed the petition, holding that the appellants' use and occupation of the suit property, Cheptiret/Cheplaskei/Block 1 (Kipchamo) 58, had not crystalised into the rights envisaged under article 40. Further, that the appellants are not the personal representatives of the estate of the deceased and had not obtained any grant to or confirmation of grant to bestow on them the right to the property of the deceased.

2. Dissatisfied with the dismissal of their petition, the appellants have filed the present appeal. In the memorandum of appeal dated 6th August, 2018, the appellants raise fourteen grounds of appeal, the essence of which is that the trial court erred in finding that the dispute in the matter was one that was

subject to adjudication by private as opposed to public law. They further contended that the trial court erred in finding that their occupation and use of the property had not crystallised into rights envisaged under Article 40 of the Constitution; and it failed to appreciate that they had both occupational and inheritance interests in the suit land guaranteed and protected by the Constitution.

3. The 1st appellant is the sister in law of the respondents. The 2nd and 3rd appellants, her children, are the paternal nephews of the respondents. The 1st appellant's deceased husband, one Kili Arap Masoin and the respondents were brothers, sons of Chelagat Chebasa Ribison alias Chelagat Chebasa (deceased), the registered owner of the suit property.

4. The 1st appellant's claim before the trial court was that she was entitled to 30 acres out of the suit land. That she was so entitled by virtue of being the widow of the son of the registered owner, who predeceased the registered owner, having died in 1971. She was also entitled to the said land as the deceased, who died in 1995, had given it to her inter vivos.

5. According to the appellants, the 1st respondent, Kipkoech Lagat, resides at Kamolo area, Kaptagat on over 100 acres of land which he had been given by the deceased, and he had established his homestead on the said land. The 1st appellant claimed that on or about 9th September 2016, the respondents had, jointly and severally, maliciously, illegally, unlawfully and without any colour of right demolished her newly constructed house. They had also threatened to evict the 2nd and 3rd appellants from the suit land. The appellants were distressed and tormented and had suffered damage. They therefore sought, inter alia, a declaration that the respondents had violated their constitutional right to property as guaranteed under article 40. They also prayed for special and general damages against the respondents.

6. It appears from the record of the trial court that the respondents did not file affidavits in reply to the petition. Their case as contained in the written submissions, however, was that the appellants were seeking a declaration that the respondents had violated their right to property enshrined in article 40 of the Constitution; that for one to invoke the said article and seek the protection of the court, one had to demonstrate that indeed he has acquired and owns the property.

7. The respondents argued that the proceedings in this case relate to property known as Cheptiret/Cheplaskei/Block 1 (Kipchamo) 58, and it was not in dispute that the property forms part of the estate of the late Chelagat Chebasa Ribison who died intestate on 12th November, 1998. No probate and administration proceedings had been conducted in respect of his estate, and so the estate of the deceased was not yet under administration. The appellants did not therefore have any instrument recognized in law that would confer on them the proprietary rights over the assets of the deceased.

8. The trial court agreed with the position advanced by the respondents and dismissed the petition, leading to the present appeal.

9. In their written submissions dated 2nd June, 2021, the appellants contend that the trial judge had observed that their right to use and occupy the land had not yet crystalised and that they could only acquire the property through a succession cause. They submitted, however, that the right to property under article 40 as read with article 260 is not only defined to mean acquisition and ownership of property but also vested interests which would entail a beneficial interest in respect of the inheritance. It was also their submission that article 23 of the Constitution allows any person to seek redress for the protection of any fundamental right that is threatened.

10. According to the appellants, they had demonstrated that they were in occupation of the suit land; that their houses were demolished for no apparent reason; and that they are beneficiaries of the deceased's estate comprised in the suit land. Since they were in occupation of the suit land where they had built their homesteads, they had legitimate expectation of inheriting it, and their rights were crystallised for

protection by the Constitution pending succession. The appellants relied on the decisions in *Joseph Letuya & 21 others v Attorney General & 5 others* (2014) eKLR and *Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri* [2014] eKLR.

11. I pause for a moment to observe that the case of Joseph Letuya & 21 others was a claim by members of the Ogiek community following their eviction from the Mau forest in violation of their protection against discrimination contained in section 82 of the former constitution and article 27 and 56 of the current Constitution. Macharia Mwangi Maina dealt with the question whether lack of land control board consent rendered an agreement for sale pursuant to which the appellants had been given possession of the subject land null and void for all purposes. None of these cases is applicable in the case before us.

12. The appellants impugned the finding of the trial court that the dispute before it was a private claim that could be resolved by private law as opposed to public law; and that the issues raised by the petitioners could be resolved under the Law of Succession Act. They contended that the learned judge failed to note that they had tried to obtain a limited grant in relation to the deceased's estate in vain.

13. The trial court had also, according to the appellants, failed to appreciate the fact that by dint of the provisions of section 37 of the Law of Succession Act, the appellants, being a daughter in law and grandsons of the deceased respectively, were not prioritized by order of consanguinity in taking out letters of administration against the respondents who are the sons of the deceased to whose estate the suit land relates. The only avenue open to them was to take out the said letters of administration after issuing a citation, which they had done vide Eldoret (Probate and Administration) Citation No. 22 of 2016.

14. The appellants contended that their newly constructed house valued at Kshs. 88,700 as evidenced in a valuation report exhibited in the petition was demolished. It was in the interests of justice that the respondents are ordered to compensate them for the damage and loss suffered. They further submitted that since the respondents did not oppose their petition in compliance with Rule 15(2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga Rules), the trial court should have allowed it.

15. The respondents did not file submissions on the appeal, nor did they appear at the hearing.

16. Under Rule 31(1)(a) of the Court of Appeal Rules 2022, this Court is granted the jurisdiction, on a first appeal from a decision of a superior court acting in exercise of its original jurisdiction, to re-appraise the evidence and to draw inferences of fact.

17. The facts placed before the court in the matter are not in dispute. The appellants and the respondents are all beneficiaries of the estate of the deceased, Chelagat Chebasa Ribison alias Chelagat Chebasa and the suit property, land parcel number Cheptiret/Cheplaskei/Block 1 (Kipchamo) 58 measuring 17.816 Ha (44 acres) is part of this estate. The appellants claim to be entitled to 30 acres out of the said land by virtue of being the deceased's daughter in law and grandsons respectively.

18. The question before this Court is whether the claim that the appellants had in the suit land could be properly adjudicated as a constitutional petition alleging violation of fundamental rights.

19. In its decision in the well-known case of *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR this Court held that:

> "In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed."

20. This principle has been followed and emphasised in many decisions over the years. In his persuasive decision in *Godfrey Paul Okutoyi & others -vs- Habil Olaka & Another* (2018) eKLR Chacha Mwita J observed as follows:

> "It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a Court of law in the manner allowed by that particular statute or in an ordinary suit as provided for by procedure. It is not every failure to act in accordance with a statutory provision or where an action is taken in breach of a statutory provision that should give rise to a constitutional petition. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a rights or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure."

21. Similarly, in *Bernard Murage v Fine Serve Africa Ltd & others* (2015) eKLR the Court stated:

> "...not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first".

22. As beneficiaries of the estate of the deceased, the appellants have a right to claim a share of it. From their written submissions and the highlights before us by their learned Counsel, Mr. Nabasenge, they are aware that they needed to have letters of administration in order to deal with the estate of the deceased. They submit that they were not able to obtain grant of letters of administration ad litem. The respondents ranked in priority to them under section 37 of the Law of Succession Act, but they had taken out citations and served the respondents.

23. I observe that the appellants were not bringing a claim on behalf of the estate. Their claim was that they were entitled to 30 acres out of the suit land: the 1st appellant as a daughter in law of the deceased to whom he had given the land inter vivos, and the 2nd and 3rd appellants as the deceased's grandsons. Their claims, then, were as beneficiaries to the estate of a deceased person. Such claims could only properly be made under the specific statutory provisions for dealing with the property of a deceased person, the Law of Succession Act, Cap 160 Laws of Kenya. Even had they obtained letters of administration intestate to the estate of the deceased, their claims as against the respondents, their fellow claimants as beneficiaries to the estate of the deceased, could only have been litigated under the provisions of the said Act.

24. While the Constitution recognizes both horizontal and vertical application of the Bill of Rights (see, for instance, *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and *Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & another* [2017] eKLR), it must be recognized that certain claims can only be adjudicated under the private law regime

through statutory provisions enacted to deal with a specific area. In Baobab Beach Resort and Spa Limited v Duncan Muriuki Kaguuru & another cited above, this Court observed that:

> " if a civil or criminal matter can be decided on the basis of existing legislation or an alternative remedy without invoking the constitutional provisions as the foundation of the suit, then such alternative course of action should in such cases be adopted instead."

25. In this case, a deprivation of a share of property to which a party is entitled as a beneficiary of the estate of a deceased person can only be addressed through the statutory provisions in the Law of Succession Act. It is my finding, therefore, that the trial court properly addressed itself to the issue before it and correctly dismissed the claim lodged under article 40.

26. I would therefore dismiss this appeal. Noting, however, that it is a family matter and the respondents did not file submissions in opposition to the appeal, I would direct that the parties bear their respective costs of the appeal.

JUDGMENT OF KIAGE, JA

1. I have the benefit of reading in draft the judgment of my learned sister Mumbi Ngugi, J.A with which I am in full agreement.

2. It seems to me that it is sheer adventurism for counsel and parties to attempt to constitutionalize ordinary disputes by merely citing provisions of the Constitution that they claim have been violated. Such attempts must be seen for what they are and rebuffed. If courts do not reject them, then common place matters of contract, tort or, as in this case, succession, will burden the courts in ways that are intolerable.

3. The law has been stated times beyond reckoning that where statutes and ordinary laws exist for settling disputes, these must be strictly followed and exhausted. Artful legal craftsmanship must not be allowed to invest such undeserving issues with the hallowed nomenclature of constitutional questions.

4. Only truly weighty matters torching on the interpretation, enforcement or redress of constitutional provisions should be the subject of constitutional petitions. Everything else falls for determination by the usual ways of dealing with ordinary claims.

5. Like my sister Judge, I find no reasons for distributing the decision of Ombwayo, J.

6. As Tuiyott, J.A also agrees, the appeal be and is hereby dismissed with no order as to costs as proposed by Mumbi Ngugi, J.A.

JUDGMENT OF TUIYOTT, JA

1. 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 ELDORET THIS 23RD DAY OF SEPTEMBER., 2022.

MUMBI NGUGI

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR