Laboso v Okello & another (Civil Appeal 294 of 2018)
[2022] KECA 1403 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KECA 1403 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 294 OF 2018

PO KIAGE, M NGUGI & F TUIYOTT, JJA

DECEMBER 16, 2022

BETWEEN

ESTHER LABOSO ..... APPELLANT

AND

SOLOMON ODIRA OKELLO ..... 1ST RESPONDENT

FRIDAH BILHA MULWALE SHIROYA ..... 2ND RESPONDENT

(Appeal against the judgment and decree of the Environment and Land Court at Eldoret (Y. M. Angima, J.) dated 24th January, 2019 in Environment and Land Court No. 662 of 2012 Formerly HCCC NO. 161 of 2010)

JUDGMENT

JUDGMENT OF F. TUIYOTT JA

1. This is a first appeal.

2. Land parcel described and registered as Uasin Gishu/ilula/257 (the suit land) measures 5 acres and is currently registered in the name of Fridah Bilha Mulwale Shiroya (Fridah or the 2nd respondent). Fridah bought the suit land from Solomon Odira Okello (Solomon or the 1st respondent) through a sale agreement dated December 6, 2008. The sale agreement indicates the purchase price to be Kenya Shillings 800,000.00

3. The current and erstwhile registered owners of the suit land brought proceedings against Esther Laboso (the appellant or Esther) for three substantive orders; eviction; a permanent injunction restraining her, the proverbial servants, agents and assigns from the suit land; and mesne profits. The case of the respondents before the trial court was that Solomon bought the suit land from Lomekur Loitakono (the deceased) in two transactions. Two (2) acres on or about June 6, 1985 and the remaining three (3) acres on or about February 26, 1986.

4. The respondents averred that after the sale, they allowed the deceased and his wife Tapsolo Loitakono (Tapsolo) to remain on the suit property as the couple were not blessed with children. The stay was until their demise in the years 2005 and 2007 respectively. It is contended that Esther was the 'handmaiden' of Tapsolo hired in the year 2003, but due to certain differences with her employer she was asked to leave in the year 2008. The grievance by the respondent was that, without any colour of right, Esther trespassed onto the suit property in or about the year 2009, destroyed trees, unlawfully harvested stones therefrom and burnt structures.

5. The defence by Esther is that, she was the "adoptive daughter" of the Loitakono couple and the sole beneficiary and/or dependant of the estate of the deceased. Her story is that the Settlement Fund Trustee (SFT) allocated the suit land to the deceased and it was only in the process of her eviction in the year 2015 that she discovered that the respondents had jointly and severally curved out and caused the suit land to be registered in the name of Fridah.

   She contended that the hiving off of the parcel of land and registration of the suit land in favour of Fridah was illegal, procured by fraud and in contravention of the law. In a counterclaim mounted against the two respondents, Esther sets out the particulars of the alleged fraud, breach of statute and illegality on the part of the respondents. She alleges that the suit land was alienated as at July 20, 1988 and was not available for alienation to the 1st respondent; the respondents knew or ought to have known that the suit land was owned by her as the beneficiary to the estate of the deceased; she had never sold, allotted and or otherwise conferred any interest over the suit land to the respondents; no approval or consent was sought and or obtained before the purported alienation; documents used or held by the respondents in acquiring the suit property are a forgery; and the respondents never paid the defendants for the suit land.

6. In the end, Esther sought the following intervention from court;

   a. A declaration that the suit parcel of land, namely: Uasin Gishu/Illulla/297 was not available for alienation to the plaintiffs under the provisions of the *Lands Act* and cap 160 Laws of Kenya, the title deed having been issued over the said parcel of land to the 1st and 2nd plaintiffs on June 18, 2010 and September 27, 2012 respectively.

   b. A declaration that all steps taken and all the documents held by the 1st defendant over land parcel numbers Uasin Gishu/Illulla/297 are null and void ab-initio and do not confer any legal interest on the plaintiffs over the said parcels of land and that the title deed held by the 2nd plaintiff over the same be and is hereby ordered cancelled and expunged from the register forthwith.

   c. An order permanently restraining the plaintiffs, its servants and or agents from trespassing into, constructing upon, selling, transferring, leasing and or in any other manner whatsoever interfering with land parcel number Uasin Gishu/Illulla/297.

   d. Costs of this suit.

   e. Any other or further reliefs as the court may be pleased to grant.

7. At trial, the respondents reiterated the case they had pleaded. Solomon (PW1) produced a handwritten agreement dated February 26, 1986 entitled "Second Land Agreement". It was his testimony that he had misplaced the first agreement. He nevertheless stated that the first agreement was witnessed by one Kiprop Chemoji and a Kipkemei Serem. His further testimony was that, although the land was originally allocated to the deceased, the same and the charge over it was transferred to him once he purchased the land. Produced as exhibits were an application for consent to the Moiben Land Control

Board for transfer of the land from the deceased to Solomon, a letter of consent dated July 12, 1990 and a letter dated July 19, 1990 from the Uasin Gishu Land Adjudication and Settlement office requesting the Director of the Land Adjudication and Settlement to prepare legal documents in respect to the suit land in favour of Solomon.

8. Subsequently, an allotment of the suit land was made in favour of Solomon and accepted by him through signature on August 2, 1991, and on the same date, a charge in favour of STF as against the interest of Solomon was drawn and executed by him. There is further evidence of a discharge of charge dated May 6, 2015. A month or so later, Solomon was registered as proprietor over the suit land.

9. Dan Mbuvi Ndonye (PW3), then the acting Director of land Adjudication and Settlement in Uasin Gishu, gave evidence corroborating that of Solomon. His evidence was that upon the transfer of the suit land from the deceased to Solomon, the latter took over the responsibility of paying off any sums due to the SFT. In addition, once there was a discharge by the SFT, the Trustee played no further role in the matter.

10. The appellant's case comprised four witnesses. The evidence was that she had resided on the suit land since 1990 after the deceased adopted her as a child. The adoption rituals included payment of 3 cows to her biological parents. Other than the deceased and his wife, Solomon resided on part of the suit land and she was informed by the deceased that Solomon had bought 1 acre of it.

    She later learnt that it was 2 acres. This notwithstanding, Solomon told her that he had bought the entire land.

11. On the death of the deceased, she arranged his funeral and he was buried on the suit land. Thereafter, the deceased's wife asked the appellant to continue residing on the land and she did. The wife of the deceased died in 2007. The appellant later learnt that the suit land was transferred to Solomon. Her evidence was that the deceased used to send Solomon to make payments for the land. She is not aware whether the deceased attended a Land Control Board meeting in respect to any transaction regarding the suit land.

12. Jonathan Kibiego (DW2) knew the deceased and his wife. The couple were childless and adopted the appellant. He gave evidence that was similar to that of the appellant. The land belonged to the deceased who sold 2 acres to Solomon. He was present at the funeral of the deceased in which the deceased's wife stated that both the appellant and Solomon were to be treated as children of the family and were to respect one another.

13. The written testimony of James Cheboi and Simon Koech was admitted without calling the makers. Their evidence was substantially similar to that of DW2.

14. After receiving the evidence, the trial court returned a verdict in favour of the respondents. One finding of the trial court was that as there was no evidence that the appellant had taken out letters of administration to the estate of the deceased, then she had no legitimate claim against the plaintiffs. Further, even if she had done so, she would not have a claim against property which the deceased disposed of during his lifetime. The trial court upheld the sale of the land from the deceased to Solomon as lawful and that the appellant had failed to prove that the said acquisition was tainted with fraud, illegality and breach of statutory provisions.

15. Displeased with the decision of the trial court, the appellant brings this appeal with eleven (11) grounds of appeal which the appellant addressed under four (4) headings. Indeed, the entire appeal can be collapsed into four (4) grounds. The learned trial Judge is faulted as erring in fact and law by:

    a. Failing to find that the acquisition of the suit land by Solomon was fraudulent and illegal.

b. Failing to consider that the parties to the suit agreed that the deceased died issueless between 2001 and 2003 hence succession proceedings were necessary before transmission of ownership of the Suit land anytime thereafter notwithstanding the existence of any consent issued prior to his death.

c. failing to take into account the fact that the appellant lived with the deceased since 1990 as an adopted daughter and had acquired justiciable rights to occupation and use of the suit land.

d. failing to act fairly, to take into consideration the provisions of article 159 (2) (d) of the *Constitution* and to exercise his discretion judiciously thereby occasioning a miscarriage of justice.

16. This is a first appeal and the mandate of the court is to re-evaluate the evidence tendered in the trial court, both on points of law and facts and come up with its findings and conclusions (see for example *Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123*)

17. An issue identified by the trial court for determination was framed thus:

(c) Whether the defendant is entitled to the suit property or any part thereof by reason of being an adopted daughter of Lomekur or beneficiary of his estate.

18. This issue is extant in this appeal. The uncontested facts are that the land is currently registered in the name of Fridah who bought and obtained a transfer of it from Solomon. Fridah now seeks eviction of the appellant who occupies part of it. The appellant resists the claim for eviction on the basis that the title obtained by Solomon, and thereafter transferred to Fridah, was obtained though fraud and illegality.

19. Crucial is that the appellant stakes a claim to the suit land as the sole beneficiary and/or dependent of the estate of the late Lomekur Loitakono (see paragraph 12 of her defence). She reiterates this in paragraph 3 (1) of the counterclaim. Elsewhere she characterizes her claim to the land as follows:

> " By a title deed issued to the late Lomekur Loitakono, the Settlement Fund Trustees allocated the said land to the deceased being land that is being used and is still required for use by the defendant who is entitled as the beneficial owner of the estate of the deceased. The land was thereby reserved for and vested in the defendant to hold in trust."

20. Manifest from the pleadings and the evidence before the trial court is that the appellant's resistance to the eviction and claim to the suit land is inextricably founded on her contention that she is the sole beneficiary of the estate of the deceased. Yet in her evidence she states:

> " I am not aware of any succession proceedings in respect of the estate of the later Lomekur."

21. Having to work with this, the trial court held:

> 21. "The court has considered the evidence and submissions on record on this issue. It is not entirely clear whether the defendant was adopted as a daughter by Lomekur or married by Lomekur's wife, Tapsolo under customary law. Equally unclear was the particular customary law under which the defendant was either adopted or married into the family of Lomekur and Tapsolo. The evidence on record shows that Lomekur hailed from the Pokot community. His wife Tapsolo was from the Nandi community whereas the defendant was from the Kipsigis community."

22. Assuming that the defendant was either validly adopted or married into the family of Lomekur, then any claim for a share of the estate of either Lomekur or Tapsolo would fall within the province of the Law of Succession. There is no evidence on record to show that the defendant had taken out letters of administration or taken any steps to vindicate her perceived rights under the *Law of Succession Act*. In those circumstances, the court is not satisfied that the defendant has any legitimate claim against the plaintiffs.

22. The submissions filed by the appellant and highlighted by learned counsel Mr Magut appearing for her did not address this all important question at all and it took the prompting of this court at plenary hearing for him to reflect on it. In response to questions by the court, counsel conceded that the appellant could have done better in her pleadings but urged us to invoke article 159 (c) (b) to arrive at substantive justice and to rescue her claim.

With respect, the issue is not a failing in the pleadings, it is a substantive one. The appellant does not invoke rights as an adverse possessor. Neither does she plead a trust as against the respondents. She defends herself and mounts a counterclaim as a sole beneficiary of the estate of the deceased. I am afraid she cannot successfully do so as letters of administration in respect of the deceased estate have not been taken out. This position of the law is well settled. See *Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another [1987] eKLR*. The overworked provisions of article 159 (2) (d) cannot come to the aid of the appellant. The failure to take out letters of administration is not a procedural dereliction. It is a question of substantive law which cannot find a cure in the provisions of article 159 (2) (d).

23. Being of that firm view, it is not necessary for me to consider the other grounds raised in the appeal. However attractive or forceful they may be, they cannot surmount the difficulty the appellant placed on her path by failing to take out letters of administration to the estate of Lomekur Loitakano.

24. I would propose that the appeal be dismissed with costs to the respondents.

JUDGMENT OF KIAGE, JA

I have had the benefit of reading in draft the judgment of Tuiyott,

JA I entirely agree with it and have nothing useful to add.

As Mumbi Ngugi, JA is in agreement, the appeal shall be disposed of as proposed by Tuiyott, JA.

JUDGMENT OF MUMBI NGUGI JA

I have had the benefit of reading in draft, the judgment of my brother Tuiyott, JA. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF NOVEMBER, 2022.

P O KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEL

F TUIYOTT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR