



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: OUKO, (P), NAMBUYE & KARANJA, J.J.A.)**

**CIVIL APPEAL NO. 4 OF 2018**

**BETWEEN**

**SHADRACK BUNGEI** (*Suing as Administrator*

*of the Estate of Joseph Kipkering- Deceased*).....**APPELLANT**

**AND**

**SELINA JEROTICH** (*Sued as the administrator*

*of the Estate of Mary Jepkosgei Kiswai- Deceased*).....**RESPONDENT**

*(An appeal against the judgment of the Environment and Land Court of Kenya at Kitale (Obaga, J.) delivered 29<sup>th</sup> May, 2017*

*in*

*ELC Case No. 103 of 2006)*

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**JUDGMENT OF THE COURT**

By an Originating Summons, the appellant asked the Environment and Land Court (ELC) to determine; whether Chepsiro/Kibuswa Block 1/ Tuigoin 226 (the suit land) formed part of the Estate of Joseph Kipkering (Joseph) or the Estate of Mary Jepkosgei Kiswai (Mary).

According to the appellant, who is the son of Joseph and the administrator of his Estate, his late father, as a member of Tuigoin Estate Limited, a land buying company, obtained Plot No. 162 measuring 24.5 acres in 1968; that unfortunately his father passed away on 27<sup>th</sup> April, 1985 before the said plot could be registered; that thereafter, under the guise of mourning his late father, Mary, his aunt, moved onto the said plot; that it was upon applying for letters of administration in 2004 that he discovered that his aunt and his older brother, Kiptarbei Arap Kering (Kiptarbei), had fraudulently subdivided the plot into two and transferred the same to themselves; that is, Chepsiro/Kibuswa Block 1/ Tuigoin 226 measuring 8 acres and Chepsiro/Kibuswa Block 1/ Tuigoin 162 measuring 16.5 acres were registered in favour of his aunt and brother respectively.

Later on, his brother had a change of heart and surrendered his title to Chepsiro/Kibuswa Block 1/ Tuigoin 162 by an agreement dated 8<sup>th</sup> March, 2005 to him as the administrator of their late father's Estate. However, upon the demise of his aunt, the respondent took out letters of administration over her Estate in what the appellant believed was an effort to obtain the suit land fraudulently through transmission. It is in light of those circumstances that the appellant sought the determination of the issues set out in his Originating Summons.

On the other hand, the respondent maintained that owing to Mary's inability to bear children, they both entered into a woman to woman marriage under Nandi customary law in 1986; that the suit land was a portion of a larger parcel acquired by Joseph and Mary's father, the late Kimutwo Arap Maritim, in 1968; that Mary had been in occupation of the parcel since its acquisition; that in 1987 the late

Kimutwo Arap Maritim subdivided the parcel between Joseph and Mary; that since Joseph had passed away his portion was vested in his elder son, Kiptarbei while Mary was granted the suit land which was registered in her favour; that she has been living on the suit land since her marriage to Mary; that after the demise of Mary, the family of the late Kimutwo Arap Maritim met on 20<sup>th</sup> January, 2004 and agreed that she was the rightful heir of the suit land; and that it was the appellant who was colluding with Kiptarbei to disinherit her.

Obaga, J. in a judgment which was delivered on 29<sup>th</sup> May, 2017 by Njoroge, J., found that the nature of the appellant's cause of action could not be addressed by way of an Originating Summons as contemplated under **Order 37** of the Civil Procedure Rules. Further, the learned Judge held that the appellant was simply trying to go around the issue of limitation of actions in filing the summons. As such, the summons was dismissed with costs.

Aggrieved with that decision the appellant lodged this appeal faulting the learned Judge for, dealing with a matter which had not been transferred by a formal order from the High Court to the ELC; failing to find that he lacked jurisdiction to deal with the matter; proceeding with the matter without directions being given under **Order 37 rule 16** of the Civil Procedure Rules; failing to find that the appellant's father was entitled to the suit land; and finding that the Originating Summons was not well suited.

At the hearing, Mr. Kisuya appeared for the appellant while Mr. Ingosi appeared for the respondent. Although Mr. Kisuya indicated that he would rely on the written submissions filed on behalf of the appellant, we note that the submissions which were filed electronically related to the application dated 21<sup>st</sup> March, 2019 for amendment of the memorandum of appeal. On his part, Mr. Ingosi relied on the written submission filed in the ELC on behalf of the respondent.

Our duty as a first appellate court entails re-evaluation of evidence and drawing our own independent conclusions whilst bearing in mind that unlike the trial court we did not have the benefit of observing witnesses while they gave their evidence. See **Selle vs. Associated Motor Boat Co.** [1968] EA 123.

Despite the issue of jurisdiction having been raised for the first time in this appeal, we have the requisite mandate to address the same since jurisdiction cannot be acquiesced through the parties' consent, conduct or be obtained through judicial craft. It either exists or it does not. In any case the question of jurisdiction can be raised at any stage of the proceedings, though ideally it should be raised at the earliest opportunity. See **Kenya Ports Authority vs. Modern Holdings [E.A] Limited** [2017] eKLR.

The appellant's contention was that the ELC had no jurisdiction to entertain the dispute since it related to ownership of assets of a deceased person and administration of his Estate. It is quite clear to us from the pleadings that though the appellant filed the suit as an administrator of his late father's Estate, he sought the determination of the ownership of the suit land and not administration of the deceased's Estate, which was already a concluded issue. The question of who between the parties was entitled to the suit property, without a doubt, fell within the mandate of the ELC. See **Article 162(2)(b)** of the Constitution and **Section 13** of the ELC Act.

As for the complaint that the action was irregularly transferred to the ELC, we find nothing wrong with that, since by **Section 30(1)** of the ELC Act, such transfer, once the court was established and operational is prescribed.

We stated earlier that the appellant's suit was founded on fraud; that Mary obtained the title to the suit land fraudulently. Where fraud is pleaded, the onus lay with the party pleading it to, not only set out the particulars of fraud but to also strictly prove the same. See **Vijay Morjaria vs. Nansingh Madhusingh Darbar & Another** [2000] eKLR.

Upon our re-appraisal of the evidence on record, we cannot find any proof that Mary obtained the suit property by fraud. Similarly, there was no evidence that the suit land was acquired by appellant's late father through Tuigoin Estate Limited, a land buying company in which he was a member. To begin with, the list of members and shareholders of the said company presented to court by the appellant was not signed or stamped by the company or verified as a true copy of its records.

The list did not also specify the actual parcels or portions that were purchased by the members of the company. What is more, the appellant's own witness, PW3, Philip Rotich Kemei, who claimed to be a director of the company, disowned the list as a fabrication since his name did not appear on it as a director. Based on the foregoing, the probative value of the list and its integrity was in doubt and could not by itself establish the appellant's claim.

It is common ground that Mary was registered as the proprietor of the suit land and title thereto issued on 5<sup>th</sup> February, 1992, according to the certificate of search produced by the appellant. It follows that by **Section 143** of the Registered Land Act (repealed), which was in force at the time relevant to this dispute, Mary's title was proof of ownership and the same could not be defeated by the appellant's unsubstantiated allegations of fraud.

The only issue, we respectfully disagree with the learned Judge, is his finding that an Originating Summons was an unsuitable vehicle to take the dispute to court, since in his view, the dispute was not one envisaged under **Order 37** of the Civil Procedure Rules. The truth is that by virtue of that very **Order 37 Rule 19** the summons can be converted into a plaint if the circumstances allow. See **Kenya Hotels Ltd vs. Oriental Commercial Bank Ltd (Formerly known as The Delphis Bank Limited)** [2019] eKLR. In any case, by consent of the parties on 28<sup>th</sup> March, 2012 the matter was heard through *viva voce* evidence. The circumstances, it would appear allowed the conversion.

In the end, we find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.

W. OUKO, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

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

*Signed*

**DEPUTY REGISTRAR**