



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, M'INOTI & SICHALE, J.J.A

CIVIL APPEAL NO. 193 OF 2016

BETWEEN

EDWARD MUROKI MBIYU.....APPELLANT

AND

JOSEPH MBIYU NJENGA.....RESPONDENT

(An appeal from the Ruling of the Environment and Land Court at Nairobi (Nyambura Gacheru, J.) dated 24th June, 2016

in

ELC No. 837 of 2015)

JUDGMENT OF THE COURT

1. This matter pits brother against brother over a modest portion of land which they inherited from their mother who had earlier inherited the same from their grandfather and distributed it to her children, among them the parties herein. Following the said subdivision and distribution, some structures belonging to the appellant crossed to the respondent's portion.

2. Efforts to have the respondent move to his portion, as the other siblings had done was rebuffed, with the result that Joseph Mbiyu Njenga (the respondent) moved to the Environment and Land Court (ELC) at Nairobi vide **ELC No. 837 of 2015**; by a plaint dated 31st August, 2015 seeking orders *inter alia* that:-

“(a) Declaration that the suit land Title No. Dagoretti/Riruta/5239 belongs to the plaintiff;

(b) An order for eviction of the defendant from the suit land, his agent, servants or any other persons in occupation thereof by virtue of consent or authority of the defendant and for demolition of any structures erected on the suit property without the consent of the plaintiff;

(c) A permanent injunction to restrain the defendant by himself or his agents or servants from henceforth interfering in any manner with the plaintiff's enjoyment, use and enjoyment of the suit land.”

3. Contemporaneous with the plaint, the respondent filed a Notice of Motion seeking orders similar to those in the plaint. In his affidavit in support of the notice of motion, the respondent herein deposed that he was the registered owner of the suit property and that there were no undetermined issues in the succession cause following which he and the appellant were allocated the plots in question. He annexed to his affidavit the Certificate of Grant through which the property was distributed; the Title Deed to the suit property; an order by Kubo, J. directing the appellant herein to remove a caution he had registered on the suit property among other annexures.

4. The appellant opposed the application and also filed a statement of defence to the plaint. The gist of his replying affidavit sworn on 30th November, 2015 is that the respondent herein had acquired the suit property irregularly and that the property was supposed to be registered in his mother's name to hold in trust for all her children and not grandchildren. He filed an application before Muchelule J. praying that the respondent, who was the administrator to their late grandfather's Estate be ordered to file accounts in respect of the entire Estate. The application was heard and the learned Judge directed the respondent herein to file accounts within 30 days from the date of the Ruling. It would appear that those orders were not complied with and the respondent moved the court for orders that the respondent be held in

contempt of court. The fate of that application is not clear from the record before us but it appears to have been abandoned.

5. The Notice of Motion dated 31st August, 2015 was heard by Gacheru, J. who in the Ruling now impugned dated 24th June, 2016, held that the appellant's complaint was not on the mode of distribution but on the claim that the respondent herein had failed to render accounts of the assets of the deceased. According to the learned Judge, the order by Muchelule, J was not a bar to the distribution of the Estate in the manner specified in the certificate of confirmation of Grant. The learned Judge found in favour of the respondent herein, allowing the application in its entirety and gave the appellant 45 days within which to vacate and demolish any structures belonging to him that fall within the suit property; and in default, eviction to proceed against the respondent.

6. That is the Ruling challenged before us in this appeal; which the appellant wants us to set aside, based on some six grounds enumerated in the Memorandum of Appeal; dated 8th August, 2016.

7. The appellant faults the learned Judge for *inter alia*; directing that the appellant be evicted from the suit property while the same is subject of an ongoing **Succession Cause No. 780 of 1988**; issuing a final order before the main suit was heard; failing to consider the appellant's replying affidavit and submissions and misdirecting herself on the law governing eviction and demolition of properties.

8. Ondabu & Co. Advocates on record for the appellant filed submissions in support of the memorandum of appeal following directions from this Court. There are however no submissions filed by the respondent. We note from the record of appeal before us that the appellant was granted orders of stay of execution of the impugned ruling. We note further that at some point, when the appeal came up for hearing, parties requested for time to try and resolve the dispute amicably. We note however, that there is no indication as to whether the parties resolved the matter or not. What is clear is that this appeal is still pending and hearing notices were served on both counsel on record but there was no appearance from either party.

9. We will consequently, consider and determine the appeal on the basis of the record before us and the submissions of the appellant. We have considered the record along with the said submissions. The only issue for determination is whether the learned Judge erred in issuing the orders she did at an interlocutory stage which orders determined the matter with finality. In other words, were the said orders justified.

10. It is not disputed that both parties are blood brothers and they inherited equal portions of land from their late grandfather, through their mother in Succession Cause No. 780 of 1988. From the certificate of confirmation of Grant which forms part of the record, both parties herein and their two other brothers were supposed to inherit the property in equal shares. That Grant has to date never been challenged in court and so the mode of distribution therein stands. The other beneficiaries have also complied and settled in their respective portions.

11. According to the appellant, the succession cause is still pending. In our view however, the learned Judge was correct in saying that the Grant and mode of distribution has never been challenged. We also agree with the learned Judge that the contempt of court application has nothing to do with the distribution of the suit property; but with accounting for some money. That has nothing to do with the appellant occupying part of land that does not belong to him. The appellant is the applicant in that case. He has not demonstrated why he has not pursued the application to ensure that it is disposed of. Vacating the suit property has no impact whatsoever on the said application for contempt of court. It is evident that the appellant just wants to perpetuate a succession cause which was filed over three decades ago; and there is no justification for that.

12. Having reconsidered the said application afresh as expected of us on first appeal, we are persuaded that the same was properly allowed. The learned Judge exercised her discretion properly and within the applicable law after taking into account all the material before her. We have no basis for interfering with the learned Judge's judicious exercise of discretion. The appellant is not destitute and all he needs to do is move his structures/houses from the portion that does not belong to him to his own portion. Our ultimate finding is that this appeal is devoid of merit. We dismiss it with no order as to costs as the respondent never defended the appeal.

Dated and delivered at Nairobi this 20th day of November, 2020.

W. KARANJA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR