IN THE COURT OF APPEAL

AT ELDORET

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO 79 OF 2017

BETWEEN

ESTATE OF DOMINIC MURIITHI

represented by MARY MURIITH .....APPELLANT

AND

MARGARET WANJIKU KARIUKI ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya, Environment and Land Court at Kitale (E. Obaga, J.) dated 29th May, 2017

in

ELC Case No. 144 of 2006)

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JUDGMENT OF THE COURT

This appeal relates to the property known as **L.R No. Sinyerere/Sitatunga Block 1/Mukuyu/13,** hereinafter ***"the suit land",*** in which the appellant is the administratrix of the estate of the **Dominic Muriithi** hereinafter **"the deceased"** and the respondent was a shareholder of **Mukuyu Farmers Company Limited** hereinafter ***"MFCL".***

The deceased was the registered owner of the suit land by virtue of being a shareholder in MFCL whereas the respondent was allocated 17 acres of the suit land by virtue of being a shareholder of MFCL too. The respondent was attacked in 1976 and relocated to Ol Kalou. She leased the suit land to the deceased for two years. Both the deceased and the appellant claimed that the deceased subsequently bought the respondent's land at Kshs. 13,000/ but did not have any documentary proof of payment or evidence on how he paid the money. When the respondent returned, the deceased had demolished her house and store which prompted her to file Kitale SRMCC No. 24 of 1989 against the deceased and MFCL. The court referred the dispute to a panel of elders who ruled that the deceased gives to the respondent 17 acres out of the suit land. The panel's verdict was subsequently adopted as judgment of the court by the Senior Resident Magistrates' Court at Kitale

Aggrieved with the decision, the deceased preferred an appeal to the High court. During the pendency of the appeal, the respondent moved and executed the decree; the suit land was sub-divided into two portions: Sinyerere/Sitatunga Block 1/Mukuyu/400 in the name of the deceased, and Sinyerere/Sitatunga Block 1/Mukuyu/401 in the name of the respondent, hereafter *"the respondent's land"*. The appeal was subsequently allowed and the decision of the Senior Resident Magistrate Court adopting the award was set aside. The Respondent did not appeal against the ruling and order of the High Court aforesaid. The respondent nonetheless took possession of her land which prompted the deceased to move to the lower court for an injunction and the cancellation of the respondent's title. That application for injunction was dismissed with the trial magistrate observing that she could not order cancellation of title, as had been requested in one of the prayers, for want of jurisdiction.

This prompted the appellant, after the deceased passed on, to file suit in the Environment and Land Court at Kitale the subject of the present appeal, for a declaration regarding the judgment of the High Court setting aside the award by the panel of elders. The appellant's contention was that there having been no appeal against the decision of the High Court quashing the elders' award and setting aside the lower court's order adopting it as a judgment of the court, the respondent had been divested of any interest in the suit land.

The respondent in response relied on the judgment of the lower court adopting the award as a judgment of the court. She claimed that the deceased had fraudulently amalgamated her land with his and obtained a single title being the suit land. That the decision of the High court

was not final; the case was to proceed before the lower court which did not happen. Accordingly, her interest in the land remained intact pending further hearing of the suit in the lower court. The respondent also raised a counter-claim in which she sought mesne profits; a permanent injunction restraining the appellant from interfering with her quiet possession of her land, plus costs and interest.

Following a full trial, the court in a judgment delivered on 29th May, 2017 observed that there was no contention that the elders' award was quashed by the High Court; the sub-division was based on the verdict of the panel of elders and that the parties were therefore asked to proceed with their case in the lower court. That the land allocated to her was next to the one held by the deceased. The panel of elders' award was overturned on appeal on technicalities such as not being filed in court within 60 days required and that MFCL which had been sued as a second defendant had been dissolved at the time the suit was filed hence the elders' award was a nullity. That the merit of the elders' award was not attacked. That when the High Court ordered for the case before the lower court to be re-heard on a priority basis, that in essence did not mean that the High Court dispossessed the respondent of her land.

The Learned Judge further held that it was the deceased who amalgamated his land with the respondent's land and obtained a single title. No evidence was adduced to show how the deceased bought the land. That it would be an injustice to allow the appellant to capitalize on the setting aside of the panel of elders' award to take possession of land which the estate of the deceased did not deserve. That though the order to have the suit re-heard afresh in the lower court was not complied with, that was now water under the bridge, since the matter was now properly before the Environment and Land Court and the respondent had properly raised a counterclaim to the appellant's suit.

Following a full hearing, the respondent's counterclaim was allowed and a permanent injunction granted restraining the appellant from interfering with the respondent's quiet possession of her parcel of land. In essence, the appellant's suit was dismissed with costs hence the appeal.

Displeased with the judgment and decree aforesaid, the appellant lodged the instant appeal in which she raised ten grounds. The grounds were subsequently condensed into three grounds in her written submissions: that the judge erred in law and fact when he failed to find and hold that the judgment in Kitale HCCC Appeal No. 51 of 1997 dispossessed the respondent of the entitlement awarded by the panel of elders and which was adopted as the judgment of the court; that judge failed to appreciate the pleadings on record and the role of pleadings in a suit and that the trial judge reverted to the evidence tendered before the panel of elders, yet the same had not been the subject of pleadings in the suit.

When the appeal came up for hearing, **Mr. Kiarie,** learned counsel appeared for the appellant whereas **Mr. Kuiyaki,** learned counsel was present for the respondent. With the consent of the parties, counsel relied on their written submissions and opted not to highlight.

Mr. Kiarie in his written submissions faulted the Learned Judge for failing to appreciate the legal effect of the judgment dated 18th December, 1997 as upon the appeal being allowed the judgment of the lower court and all consequential orders ceased to exist. That the parties were then restored to the position prior to the elders' award. The lower court case though directed to be re-heard afresh and on priority, this was never to be and the High Court judgment served as a successful appeal against the decision of the lower court.

Counsel submitted that the Learned Judge abandoned his role as an independent and impartial arbiter and descended into the arena of conflict when he unilaterally framed issues for determination which were not pleaded or responded to by the parties. That the evidence called by the respondent was at variance with her pleaded case and was irrelevant. There being no appeal against the decision of the High Court setting aside the decision of the lower court, the suit land should revert back to its original title. Counsel further submitted that the finding by the Learned Judge that the intended hearing in the lower court had finally been achieved through the counter-claim was erroneous. Counsel went on to submit that the Learned Judge's consideration was centered on the proceedings before the panel of elders which did not form part of the respondent's pleaded case in the counterclaim.

Opposing the appeal, Mr. Kuiyaki submitted that the High Court in Kitale HCCA No. 51 of 1997 set aside the award by the elders based on errors attributed to court staff and avoided to delving into the merits and demerits of the elders' award and instead ordered the case to be retried before the lower court on priority basis. That the Learned Judge who heard the appeal in failing to make a determination on the disputed 17 acres which the respondent already had title at the time of judgment rendered the matter live. Counsel concurred with the finding of the Learned Judge that the award of the elders was overturned on appeal on mere technicalities. He was right in considering the evidence tendered at the hearing of the elders' award. Counsel further submitted that the appellant moved the High Court to have the title held by the respondent cancelled thereby reviving the respondent's claim to the land, if at all it had been rendered dead and buried by the High Court decision to set aside the elder's award. That failure in any event to have the matter re-tried was legal in nature as the magistrate courts no longer had jurisdiction to entertain disputes relating to environment and land. That jurisdiction to entertain such disputes was wholly reposed in the Environment and Land Court.

Turning on pleadings, counsel submitted that shareholding in MFCL by the respondent and sale of shares need not have been pleaded as the respondent had already pleaded that she was entitled to the land as a shareholder of MCFL and for her to prove the same she had to produce evidence of her shareholding. Counsel further submitted that when the High Court directed that the case be heard afresh, it was incumbent upon both parties to move the said court and the appellant did so only to be rebuffed for want of jurisdiction hence the observation by the Learned Judge that the re-hearing had finally been achieved before him through the counter-claim.

We have considered the record, the submissions by the respective parties and the law. This is a first appeal. Pursuant to rule **29 (1)** of the Court of Appeal Rules, this Court is bound to re-appraise the evidence tendered and draw its own inferences of fact and law. In the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** this Court stated as follows regarding the duty of first appellate court:

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-**

> ***"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

The issues that appear to us determinative of this appeal are whether the trial court was justified in revisiting the elders' award which had been quashed by the High Court on appeal from the decision of the magistrate's court adopting the elders' award as a judgment of the court, and whether the prayers sought by the appellant the subject of this appeal were merited.

It is not in dispute that the decree of the lower court had already been executed at the time when the appeal in the High court was heard and determined. The appellant despite filing the appeal in 1990, never sought nor obtained an order of stay of execution of the decree. She proceeded to prosecute the appeal in 1997 when she was granted stay of execution long after execution had taken place in 1993 and the respondent had obtained titles to her land. The law is clear that an appeal shall not act as a stay of execution. Order 42 rule 6 of the Civil Procedure Rules states:

> **"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may for sufficient cause order stay of execution of such decree or order…."**

While we are fully cognizant of our primary duty to do justice untrammeled by procedural technicalities, we are nonetheless aware that litigation is a game with clear rules of engagement. It is not open for courts to allow a path for circumventing rules imposed to attain justice. **The** purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory.

In the circumstances of the present case, the appeal was rendered nugatory *ab initio.* Execution had already taken place and not even the "oxygen principle" could have saved the appeal. Courts do not act in vain and the appeal before the High Court despite being successful was rendered nugatory since execution had already ensued. The order for stay of execution of the lower court's judgment pending the hearing and determination of the appeal dated 14th November, 1996 had been overtaken by events and should not have even been granted in the first place.

It is quite unfortunate that the High Court in that instance quashed the decision of the lower court on technicalities without going into its merits and also failing to ascertain the competency of the appeal. She ought to have heard it because if she did, most probably she would have arrived at a totally different conclusion than the one she did. The judgment as delivered was unenforceable execution having taken place.

Having found that the judgment of the High Court in Civil Appeal No. 51 of 1997 had been overtaken by events, it follows that the appellants' prayer for a declaration that the judgment in HCCA No. 51 of 1997 against which no appeal had been preferred, dispossessed the respondent of her land was untenable and so were the other prayers as sought by the appellant in the Environment and Land Court.

We concur with the Learned Judge that indeed the High Court having directed for the re-trial of the case and none of the parties having taken upon themselves to prosecute the same, the appellant cannot be heard or seen to ride on her omission or mischief for her own benefit. The doors to the respondent's claim had not been shut. In any event the subordinate courts having ceased to have jurisdiction over environment and land matters, it was a blessing in disguise for the respondents when the appellant filed the suit in the Environment and Land Court for it accorded her an opportunity to ventilate her claim. The case was appropriately re-heard and determined by the Environment and Land Court through the respondent's counterclaim as correctly held by the trial judge.

The submission by the appellant that the evidence by the respondent was at variance with her pleadings is misplaced. The respondent in her defence had asserted that the deceased had amalgamated his land and hers and then illegally registered them as the suit land, and that she was the sole owner of land parcel L.R No. Sinyerere/Sitatunga Block 1/Mukuyu/401. It was necessary for the court to determine the issue of shareholding in MFCL as it is what gave entitlement to the acquisition of the 17 acres of land that the respondent claimed to belong to her. That fact in any event need not have been specifically pleaded. It should always be remembered that pleadings are a guide and pleadings need not be treated as evidence. The issue of shareholding by the respondent in MFCL, sale of shares by the respondent or any other party need not have been specifically pleaded for the respondent had already pleaded that she was entitled to the 17 acres of land. How else was she to prove this fact if not by evidence on the same?

The appellant contended that the Learned Judge misdirected himself in subjecting the evidence tendered before the panel of elders to scrutiny and making findings thereon despite the same not being the subject of pleadings the verdict of the elders having been quashed. A legal burden is discharged by way of evidence. It was upon the appellant to prove that the deceased had bought the suit land from the respondent in support of his pleadings before the court. The appellant did not adduce any such evidence. Further, it cannot be said that by the mere fact that the elders' award was set aside then the record of proceedings leading to the award was also thrown out of the window. The trial judge was perfectly entitled to revert to them to gauge the truthfulness of the compelling claims to the suit land by both the appellant and the respondent. Therefore, the Learned Judge was right in reverting to the proceedings before the panel of elders in arriving at the decision.

From the foregoing, we find no reason to interfere with the finding by the trial court. Therefore the appeal lacks merit and is accordingly dismissed with costs to the respondent.

Dated and delivered at Eldoret this 6th day of June, 2019.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.