



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: VISRAM, GATEMBU & ODEK, J.J.A)

CIVIL APPEAL NO. 3 OF 2013

BETWEEN

JEMIMAH CALEB ATIENO.....APPELLANT

AND

MARY ANGA'WA.....1ST RESPONDENT

CHARLES ANGA'WA.....2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisumu

(Ali-Aroni, J.) dated 6th November, 2012 in H. C. C. No. 83 of 2007

as consolidated with H. C. C. No. 124 of 2012)

JUDGMENT OF THE COURT

1. The dispute which escalated to the appeal before us relates to the competing claims of proprietorship and/or interest over land parcel North Gem/Marenyo/1021 (suit property) by the parties. Following the adjudication and consolidation process, Isaac Oyunga (Mzee Oyunga) was registered as the first title holder of the suit property on 28th November, 1967. Of relevance is that during Mzee Oyunga's lifetime, he transferred the same to Dr. James Ang'awa, his eldest son, on 16th January, 1970. As to the capacity in which the suit property was transferred and held by Dr. James is a point in contention between the parties.

2. Mzee Oyunga was polygamous and had two wives *to wit*, Deborah Oyunga (first house) and Jedidah Oyunga (second house) both of who were blessed with children. In point of fact, the disagreement over the suit property originated from the first house. More specifically, between the eldest son, Dr. James and the youngest, Caleb Otieno, which trickled down to their respective families. There were two other sons from the first house that is, Ephraim Odera Oyungo and John Talo Oyungo whose position as pertains to the dispute will become apparent in the latter paragraphs of this judgment.

3. Be that as it may, a few years after the suit property was transferred in his favour, Dr. James died on 8th February, 1970. It is instructive to note that Mzee Oyungo also died about ten months thereafter, in December, 1970. Subsequently, on 14th July, 1980 the title to the suit property was transferred to Dr. James' eldest son, Anthony Omondi Ang'awa by way of transmission. Unfortunately, Anthony passed away and pursuant to succession proceedings the title was passed on to his mother, the widow of Dr. James, Perez Ang'awa.

4. As far as Perez was concerned, the suit property was transferred to her late husband as a gift by Mzee Oyunga thus Dr. James held the title as an absolute proprietor, which title passed to her. It is on the basis of the foregoing that Perez was not amused when Caleb began, according to her, trespassing and committing acts of waste on the suit property sometime in the year 2001. In particular, Caleb erected a mud thatched house and thereafter, in the year 2007 commenced putting up a permanent house in front of Perez's house blocking access thereto. Further, he took down the gate to Perez house and even went ahead to bring cattle to graze on the suit property.

5. All her efforts to have Caleb desist from the said trespass did not bear fruit hence Perez filed a suit in the High Court against him being H.C.C.No. 83 of 2007 seeking *inter alia*:

a) A declaration that the plaintiff is the absolute proprietor of land parcel North Gem/Marenyo/1021.

b) A declaration that the defendant is a trespasser on land parcel North Gem/Marenyo/1021.

c) An order that the defendant, his agents, servants or any other person/s or entity/ies claiming under him be evicted from the plaintiff's land parcel North Gem/Marenyo/1021.

d) A permanent injunction against the defendant, his servants, agents, siblings or any other person/s or entity/ies restraining them from trespassing onto the suit property.

e) General damages for trespass and mense profits to be assessed by the Honourable Court.

She also obtained an interlocutory injunction restraining Caleb from continuing with construction pending the determination of the suit.

6. On his part, Caleb denied the allegations maintaining that not only was the suit property ancestral land but that Dr. James held the same in trust for the members of the Oyunga family. He averred that the suit property was transferred by Mzee Oyunga to Dr. James to enable him obtain a loan for purposes of constructing his house thereon. The subsequent transfers of the suit property to his son and wife were done without the knowledge or consent of the members of the Oyunga family. In his opinion, the aforesaid transactions coupled with the suit filed by Perez were aimed at excluding bonafide members of the Oyunga family from the suit property.

7. He further claimed that he had lived on the suit property since his birth in 1963 and had made extensive developments thereon. As a result and in the alternative, he was entitled to the portion he occupied by virtue of adverse possession. Towards that end, Caleb filed a statement of defence and a counter claim to that effect. In the counter claim he sought:

a) A declaration that the defendant is a co-owner of North Gem/Marenyo/1021.

b) An order of subdivision of the suit premises to enable the defendant acquire a new number for the portion he occupies and possesses.

8. However, before the hearing was concluded in the above suit both Perez and Caleb died on 2nd August, 2010 and 2nd July, 2012 respectively. Apparently, Perez's surviving children, Mary Ang'awa, Ernest Ang'awa, Charles Ang'awa and Hillary Ang'awa became aware of arrangements being made for the burial of Caleb on the suit property. In an effort to stop the intended burial, Mary Ang'awa and Charles Ang'awa instituted a suit against Caleb's widow, Jemimah Caleb Otieno, being H.C.C.C No. 124 of 2012 praying for orders that:

a) A permanent injunction against the defendant, her kin, agents, representatives, assigns or any other person acting through her direction from trespassing upon parcel land parcel North Gem/Marenyo/1021 or burying the remains of the late Caleb Willis Otieno Oyunga on this parcel of land or in any other way interfering with this parcel of land.

In the interim an injunction restraining the burial of Caleb on the suit property was granted at the instance of Mary and her brother.

9. In response, Jemimah took a similar position as her late husband, that is, that the suit property was ancestral land. She averred that her late husband was entitled to be buried as per the Luo customary law on the ancestral land where he had established a home.

10. Ultimately, the two suits were consolidated resulting with Perez being substituted with Mary and Charles as the Plaintiffs while Caleb was substituted by Jemimah as the defendant. At the trial, the plaintiffs called 8 witnesses whereas the defendant had 4 witnesses in support of their respective cases.

11. Upon weighing the evidence adduced as against the law, the learned Judge in a judgment dated 6th November, 2012 found in favour of the respondents in the following terms:

a) A declaration that the plaintiffs' deceased father and thereafter his successors are the absolute proprietors of parcel number North Gem/Marenyo/1021.

b) A declaration that the deceased was a trespasser on the suit property to the extent that he did not have consent of the proprietor(s) to be on the said land.

c) A permanent injunction restraining the defendant, her servants, agents and/or any other person(s) or entity acting under her from trespassing onto the suit property.

d) A permanent injunction against the defendant, her kin, agents, representatives, assigns or any other person acting through her directions from burying the remains of the late Caleb Willis Otieno Oyunga or in any other way interfering with the suit property.

e) In the circumstances of this case each of the parties to meet their legal cost of this suit.

12. The above mentioned decision did not go down well with the appellant who lodged this appeal premised on the grounds that the learned Judge erred by-

i. Failing to weigh the evidential value of the copy of the green card of the suit property produced at the trial and the discrepancy

thereon.

ii. Relying on copies of documents which were not authenticated by their authors.

iii. Disregarding Luo customary law.

iv. Misapprehending the law on trust.

v. Failing to consider the appellant's defence and counter claim.

13. The appeal was disposed of by way of written submissions as well as oral highlights by the parties' respective counsel.

14. Mr. Yogo, learned counsel for the appellant, submitted that the learned Judge did not properly evaluate the evidence before her hence arrived at the wrong conclusion. Expounding on this line of argument, he asserted that the issue herein is how or in what circumstances the title to the suit property was transferred from Oyunga to Dr. James and then to Anthony. He posited there was no evidence of succession proceedings, if any, which enabled the alleged transmission of the suit property to Anthony in 1980 after the demise of Dr. James. Therefore, he contends that the learned Judge erred in concluding that the said Anthony was an administrator of the estate of Dr. James without any evidence to substantiate that position.

15. The learned Judge was also faulted for not addressing her mind on the cancellation of the entry in the green card for the suit property indicating that Dr. James held the suit property as a guardian. The foregoing to the appellant was indicative that the transactions with respect to the suit property's title were suspect. Additionally, the appellant questioned the authenticity of the copy of the green card and/or title produced by the respondents and criticized the learned Judge for placing reliance on the same.

16. It was the appellant's contention that the totality of the evidence tendered by the parties demonstrated the existence of a customary trust. In setting out pieces of the evidence alluded to, it was asserted that the respondents' witnesses acknowledged that not only were other members of the Oyunga family living on the suit property but that others had also been buried thereon. In point of fact, Alfred Madame Oginga (PW8), a brother to Dr. James, who lives on the suit property, testified that despite the same being registered in the name of Dr. James it belonged to their father, Mzee Oyunga. Moreover, Beatrice Nyagaya Okiri (DW3), a sister to both Dr. James and Caleb corroborated the appellant's case that Dr. James held the suit property in trust for the entire Oyunga family.

17. In Mr. Yogo's view, it was quite puzzling why the learned Judge, in light of the overwhelming evidence, found that Dr. James held the suit property in trust for some of the members of the Oyunga family and not Caleb or his family. Be that as it may, it was the appellant's position that having found that Dr. James' title was subject to a trust, the learned Judge issued contradictory final orders to the effect that Dr. James and his successors in title are the absolute proprietors of the suit property.

18. The appellant went on to impute that the aforementioned finding was a clear demonstration of bias on the learned Judge's part against Caleb and his family. According to the appellant, the bias was manifest throughout the impugned judgment wherein the learned Judge out rightly overlooked the appellant's evidence.

19. Counsel further submitted that the learned Judge did not consider the issue of adverse possession in spite of the cogent evidence in support of the same. In conclusion, Mr. Yogo implored upon this Court to rectify the trial court's misdirection and rightly find the existence of customary trust in favour of all members of the Oyunga family without discriminating against Caleb and his family.

20. Opposing the appeal, Mr. Orina, learned counsel for the respondents, contended that it was quite evident from the judgment that the learned Judge extensively analyzed the evidence adduced at the trial and the law. In doing so, she arrived at two major findings *to wit*, that the appellant had not acquired a right over the suit property as an adverse possessor; and there was a customary trust over the suit property which did not operate in favour of the appellant. In counsel's opinion, the above findings were sound in law and incapable of reproach.

21. On the issue of cancellation of entries in the green card, Mr. Orina stated that although the learned Judge found there was no explanation given for such cancellation, there was other ample evidence establishing customary trust. Justifying the exclusion of the appellant from the said trust, counsel reiterated that the appellant's husband had been gifted a separate parcel of land as per the Luo customary law thus could not claim for more. Similarly, the evidence to the effect that the appellant's brother in law, Ephraim, was buried in a separate piece of land other than the suit property negated the appellant's assertion that her husband, Caleb, should be buried on the suit property as per the Luo customs.

22. We have considered the record, submissions by counsel and the law. As the first appellate court, we are cognizant that our role is to appraise the evidence which was adduced at the trial court and make our own conclusions. In doing so, we bear in mind that we did not have the opportunity to see the witnesses as they testified like the trial court. See this Court's decision in ***Kenya Ports Authority vs Kuston (Kenya) Limited [2009] 2EA 212.***

Authority vs Kuston (Kenya) Limited [2009] 2EA 212.

23. The learned Judge appreciated and rightly so that the dispute turned on the following issues:

i) Whether the late Dr. James held the suit property in trust for the entire family of Mzee Oyunga including the deceased Caleb Willis Otieno.

ii) Whether Caleb was a trespasser on the suit property, and if not whether he had acquired adverse possession of the portion of land which he occupied immediately before his death.

iii) Whether the Luo Customary Law on burial required that Caleb to be buried on the suit property.

iv) Who meets the costs of the suit?

24. The *Black's Law Dictionary, 9th Edition* defines a trust as:

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

How is such a trust established? No difficulty is posed where a trust is expressly declared in a title document but what happens when a court is asked to imply the existence of a trust, as the trial court was called to do?

25. Times without number, this Court has outlined the circumstances under which a Court would be prepared to imply a trust. One such case is *Peter Ndungu Njenga vs Sophia Watiri Ndungu [2000] eKLR* wherein the Court succinctly observed:

“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”
[Emphasis added]

26. More recently, in *Isaack M’Inanga Kiebia vs Isaya Theuri M’Lintari & Another [2018] eKLR*, the Supreme Court of Kenya pronounced that:

“Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered Land Act. Under this legal regime, (now repealed), the content of such a trust can take several forms. For example, it may emerge through evidence, that part of the land, now registered, was always reserved for family or clan uses, such as burials, and other traditional rites. It could also be that other parts of the land, depending on the specific group or family setting, were reserved for various future uses, such as construction of houses and other amenities by youths graduating into manhood. The categories of a customary trust are therefore not closed. It is for the court to make a determination, on the basis of evidence, as to which category of such a trust subsists as to bind the registered proprietor. Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust”.

27. Did the appellant establish a customary trust within the aforementioned definition? The answer lies with the evidence before the trial court. With regard to that contention, the appellant led evidence on two fronts. The first was to the effect that Dr. James obtained the title for purposes of obtaining a loan and that subsequently, Perez took custody of the said title on the pretence of securing the loan. Our perusal of the green card for the suit property does not reveal any entry of a charge thereon as security for the alleged loan. In addition, save for the appellant’s word there was no evidence to substantiate the same.

28. On the second front, the appellant’s claim was based on the fact that since other members of the Oyunga family were living on the suit land the same depicted the existence of a customary trust. Granted there is evidence that some members of Mzee Oyunga family reside on different portions of the suit land. Isaac Oyunga Talo (PW3), a nephew to both Dr. James and Caleb, Jedidah Oyunga (PW6) and her only surviving son, Alfred Madame Oginga (PW8) gave uncontroverted evidence to that effect. The plaintiffs also admitted as much.

29. However, we cannot help but note that there was also evidence explaining the basis of such occupation by those members of the family. To begin with Perez before her demise gave evidence to the effect that at the request of Mzee Oyunga, Dr. James purchased a parcel of land from Ambogo Ogumbo for a consideration of Kshs.1,500. The said land was subdivided into two portions, that is, North Gem/Marenyo/1015 and North Gem/Marenyo/1016 which were allocated to Caleb and Ephraim.

30. Her evidence in that respect was corroborated by Dan Odera Otieno (PW7), a cousin to Mzee Oyunga. In his testimony, he indicated that on 28th October, 1970 before his demise, Mzee Oyunga called him to the suit property and informed him how he had apportioned the same amongst his sons. He stated that the eastern side of the suit property would be given to Jedidah and her sons while he had allocated the other part to Dr. James. Mzee Oyunga disclosed that the property purchased from Ogumbo had been subdivided amongst Caleb and Ephraim. Finally, he had given Dr. James charge over his other son, John, from the first house who was mentally challenged. As per Dan, Ephraim and Caleb having been allocated North Gem/Marenyo/1015 & 1016 could not lay any claim to the suit property. Similarly, Jedidah also reiterated the foregoing.

31. On her part, the appellant urged that North Gem/Marenyo/1015 was not gifted to Caleb rather he purchased the same from Ogumbo. To that extent, her evidence was at variance with that of her witness, Jennifer Anyango Odera (DW2). Jennifer is the widow of Ephraim who is since deceased and Ogumbo’s sister. She testified that parcels in question were gifted to Caleb and Ephraim by her brother. Accordingly, we see no reason to fault the learned Judge for accepting the respondents’ account as opposed to the appellant.

32. In our view, the totality of the above evidence did establish that Dr. James held the suit property in trust. As to the extent of the trust, we concur with the findings of the trial court:

“Having considered the above, I find as a matter of fact, indeed Dr. James Anga’awa is the absolute proprietor of the suit property having been gifted the same by his father Mzee Oyunga on the 16th of January, 1970. I also find as a fact that the deceased and Ephraim Odera are owners of Parcels No 1015 and 1016 respectively. I find further that Dr. Anga’awa held the

property in trust for other members of the family who had no land of their own namely, Deborah, Mzee Isaac Oyunga's first wife, Jedidah his second wife and her three sons Benjamin Talo, Stephen Odoul and William Onduso as well as John Talo his own brother who was mentally incapacitated and was under his care. Some of those persons have since died and their remains buried on the said land and not for the entire family of Mzee Oyunga."

33. On the issues of whether Anthony had taken out succession proceedings prior to the suit property being transferred to him and the veracity of the copies of green cards or titles produced by the respondents, we find that they were never raised at the trial court. It is clear from the record, that the appellant's then advocate, Mr. Ong'ete acceded to copies of the said documents being produced.

34. As the first appellate Court our mandate, as we set out in the preceding paragraph, is to reappraise issues brought before a trial court. Where an issue has not been raised in the trial court, such as the foregoing issues, how then can an appellant allege that the trial court erred yet it was not given the benefit to consider the same? In our view, delving into those issues is beyond our jurisdiction and we decline to do so. Our position is fortified by this Court's decision in ***Mary Kitsao Ngowa & 36 Others vs Krystalline Limited [2015] eKLR***.

35. During cross examination, Perez was questioned on the cancellation made on the copy of the green card of the suit property she produced as evidence. The cancellation related to an entry indicating that Dr. James was a guardian of Benjamin Talo, Stephen Odoul and William Wellington Onduso all of who happen to be sons of the second house. Her response was that the said entry was indicated in the green card was an error. From the record, it is clear that the learned Judge considered that issue and rendered herself as follows:

"There was at first an entry that Dr. Anga'awa held the same in trust for a number of persons, which information was later deleted from the lands office records. The plaintiffs state this is an error...I must say that the circumstances of this change although explained by the 1st plaintiff were not very clear to (sic) court. In any event this was not in issue before court and one of the beneficiaries of the trust Benjamin Talo and indeed his mother PW6 appeared comfortable with the correction."

On our part, we find that nothing turns on the said cancellation since the persons named therein were Jedidah's sons and all of whom both the trial court and this Court found are beneficiaries of the trust.

36. Moving on, the appellant also laid claim to the suit property through adverse possession. Circumstances under which a claim for ownership of property by virtue of adverse possession can lie were succinctly set out by this Court in ***Peter Kamau Njau vs Emmanuel Charo Tinga - Civil Appeal No. 29 of 2016 (unreported)*** as follows:

"A registered owner of land, may not, by the provisions of section 7 of the Limitation of Actions Act bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. At the expiration of that period the owner's title will be extinguished by operation of the law. Section 38 of the Act permits the person in peaceful possession, without the land owner's permission, for a continuous and uninterrupted period of 12 years, but who has also done acts on the land which are inconsistent with the registered owner's enjoyment of the soil for the purpose for which he intended to use it, to apply to be registered as its owner."

37. A party relying on the doctrine of adverse possession bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in ***Wambugu vs Njuguna [1983] KLR 173***. Did the appellant discharge this burden?

38. It is common ground that in computing the time frame in question, the date on which a party entered possession without consent of title holder is of significance. It is from that date that the requisite time frame begins to run. In this case, we cannot help but note that there is no cogent evidence with regard to the date that the appellant alleges to have taken possession.

39. It was her evidence that her husband had been living on the suit property since his birth in the year 1939 and that after their marriage in the year 1967 they established their matrimonial home therein. However, during cross examination she admitted that when she got married to Caleb he was employed by the Postal Corporation of Kenya and they would move from place to place subject to his posting. There is also the evidence of Isaac, who at one point lived with both the appellant and Caleb. He stated that when he moved in with them Caleb was posted in Kisii where he lived with his entire family and upon his retirement in 1992 he moved to Kisumu. So when did time begin to run? Without such evidence, it would be impossible to determine whether the appellant could establish a claim of adverse possession. See this Court's decision in ***Mombasa Teachers Co-operative Savings & Credit Society Limited vs Robert Muhambi Katana & 15 Others [2018] eKLR***.

40. Even if we were to take that he moved to the suit property after his retirement, there is ample evidence that his possession was not uninterrupted as the learned Judge correctly observed:

"... He may have built a Simba as traditionally required but there was no proof that he established a home on the suit property, save in 2007 when he moved to build a stone house but was injuncted from doing so pending hearing and determination of this suit. Even then, it cannot be said that his stay was uninterrupted as there was suit filed in 1996 by Anthony Anga'awa and Perez Anga'awa against the deceased..."

Consequently, we find that the appellant had not discharged her burden.

41. The appellant contended that despite her late husband being the registered proprietor of North Gem/Marenyo/1015, he was precluded by Luo customary law from building a house or being buried thereon. The reason being that the same initially belonged to one Ogumbo Ochuka, who happened to be Ogumbo and Jennifer's father. By virtue of Jennifer's marriage to his brother Ephraim the said Ogumbo Ochuko was his father in law. Furthermore, the said father in law had been buried on the land in question. Therefore, under the Luo customary he could not build or be buried in that land.

42. Likewise, we find that the appellant did not establish the existence of such custom and/or whether it was applicable in this case. We say so because, it is not in dispute that the land which ultimately was divided into North Gem/Marenyo/1015 & 1016 belonged to Ogumbo Ochuko who was buried in Caleb's Portion. It is also common ground that Caleb's brother, Ephraim after his demise was buried on his portion of the said land. If the alleged custom applied why was Ephraim buried in the land in question and not the suit property? As the adage goes what is good for the goose is surely good for the gander.

43. All in all, we find that the appellant failed to establish her case against the respondents. It goes without saying that a court can only make a decision based on the evidence before it. In our view, we are satisfied that the learned Judge made the right decision based on the evidence that was placed before her. Equally, we find that the appellant has not proved bias on the part of the learned Judge. The fact that the learned Judge's decision was contrary to what the appellant expected by itself does not give rise to the apprehension of bias against the trial court.

44. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed. This being a family dispute we are of the view that each party should bear his/her own costs. Orders accordingly.

Dated and delivered at Nairobi this 19th day of July, 2019.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

.....

JUDGE OF APPEAL

J. OTIENO ODEK

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR