



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & MOHAMED, JJ.A.)

CIVIL APPEAL NO. 234 OF 2014

BETWEEN

EPAINUTO FURUKHA SUMBA APPELLANT

AND

SAMUEL OWUOR OUMA FIRST RESPONDENT

MARY ANYANGO OUMA SECOND RESPONDENT

THOMAS OSIR OUMA THIRD RESPONDENT

GERALD OLUOCH OUMA FOURTH RESPONDENT

(Appeal arising from the judgment/ruling/order and/or the decision of the High Court of Kenya at Bungoma, (Omollo, J.) dated 26th June, 2014 in HCC NO. 53 OF 2002 (O.S))

JUDGMENT OF THE COURT

This is an appeal against the judgment and decree of the High Court of Kenya at Bungoma, (**A. Omollo, J.**) whereby the High Court declared the four respondents herein to be owners of two parcels of land by adverse possession; ordered the titles for the two parcels of land to be cancelled and the respondents be registered as proprietors thereof.

The appellant appealed against the judgment.

During the pendency of the appeal, one Benedict Masinde Wawire who claimed to be the registered proprietor of one of the parcels of land was, on application, joined in the appeal as an interested party.

At the hearing of the appeal, **Mr. Murunga**, the learned counsel for the appellant intimated that upon survey done of suit parcels of land during the pendency of this appeal, it was ascertained that the two suit parcels of land **L.R. BUKUSU/S.KANDUYI/9275** and **9276** are occupied by Benedict Maside Wawire, the interested party herein, and Joel Agutu Mutoka who is not a party to the appeal and, that, the survey confirmed that the respondents therein are occupying a different parcel of land.

Counsel further informed us that as a result, the respondents' counsel has conceded the appeal.

Mr. Were, learned counsel for respondents confirmed that the surveyor established the facts as stated by the appellants counsel and stated that the respondents are conceding the appeal.

Both the appellant’s counsel and the respondents’ counsel agree that no costs should be awarded to either party.

Mr. Osango, learned counsel for the interested party also confirmed the facts stated by the appellants counsel regarding the result of the survey but prayed for costs of the appeal and the application for joinder of the interested party in the appeal.

Costs are sought on the grounds that the costs of the application were ordered to be costs in the appeal; and that the interested party has prepared a supplementary record of appeal and has also prepared for hearing of the appeal.

Mr. Were for the respondent objects to the award of costs to the interested party on the main ground that the interested party was registered as proprietor of one of the suit properties during the pendency of the suit in the High Court.

In this appeal, the respective counsel for the parties are all in agreement that the judgment of the High Court appealed from was based on fundamental errors of fact concerning the ownership of the suit properties which errors were only discovered through survey of the disputed parcels of land during the pendency of the appeal.

The respondents on whose favour the judgment was entered have conceded the appeal.

In the premises, as the judgment appealed from was based on an erroneous factual foundation relating to the ownership of the two suit properties and, as the appeal has been quite properly conceded, the appeal is allowed with the result that the judgment of the High Court appealed from is set aside save for the order of costs.

We have considered the issue of costs of the appeal as between the interested party and make a finding that the interested party is entitled to half of the costs of the application and the appeal and we so order.

As agreed, the appellant on one part and the respondents on the other part shall bear their respective costs of the appeal.

Dated and Delivered at Eldoret this 25th day of April, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

H. OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.