



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 282 OF 2015

STEPHEN WANG'ANG'A NJOROGE.....APPELLANT

AND

STANLEY NGUGI NJOROGE.....1ST RESPONDENT

JOHN GATHARA NJOROGE.....2ND RESPONDENT

*(Appeal from the judgment and decree of the High Court at Nairobi, (Waweru, J.) dated 24<sup>th</sup> October 2014*

in

**HCCA NO.13 OF 2011)**

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**JUDGMENT OF THE COURT**

This appeal is yet another sad illustration of how the quest for land in Kenya easily trumps family love and harmony. It pits the appellant, **Stephen Wang'ang'a Njoroge** against his two younger brothers, **Stanley Ngugi Njoroge** (1<sup>st</sup> respondent) and **John Gathara Njoroge** (2<sup>nd</sup> respondent). The 2<sup>nd</sup> respondent died on 10<sup>th</sup> December 2015 and was not substituted as provided by **rule 99 (1)** of the **Court of Appeal Rules** and therefore the appeal against him has abated. The subject of the protracted dispute in this appeal, which dates back to the 1980s is the parcel of land known as **Kiambaa/Karuri/T 240**, measuring a mere 100 by 100 feet (the suit property). The dispute has been before a panel of elders, and more than once, before the Senior Principal Magistrates Court, the Chief Magistrates Court, the High Court, and this Court.

The appellant is the registered owner of the suit property, of which his father and subsequently the respondents successfully claimed half share, contending that the appellant held the same in trust for them. Since then the appellant has spared no effort to overturn the award in favour of his brothers and to evict them from the suit property.

Before we consider the merits of the appeal, it is necessary to outline the history of the dispute for the necessary background and context. The dispute over the suit property was initially between the appellant and his father, **Ephantus Njoroge Njuguna** who is now deceased. In or about 1984, the father filed **Kiambu Senior Resident Magistrates Court Case No.18 of 1984** against the appellant, claiming part of

the suit property. The case was referred to the **Kiambu Land Disputes Tribunal** before which the father contended that in 1957 he and the appellant's mother gave the appellant Kshs.200 to purchase for them a plot, but after purchasing the suit property, the appellant refused to allow them into the plot. On the other hand the appellant claimed that he bought the suit property for Kshs.300, which he raised by himself. While admitting receipt of Kshs.200 from his parents to buy a plot, he claimed to have utilized that money to pay school fees for his sisters. By their award dated 7<sup>th</sup> April 1984, the Panel decided that the suit property be divided into half and shared between the appellant and his father.

The award was filed in the Senior Resident Magistrate's Court, Kiambu for adoption as an order of the court. The appellant filed an objection which was dismissed and the award adopted as an order of the court. In the meantime the respondents moved into the suit property and occupied one half, in which they constructed their homes and have lived since. In a ruling dated 4<sup>th</sup> February 1998 in **High Court Civil Appeal No.207 of 1996, Khamoni, J.** emphasized that the appellant did not file any appeal against the order for subdivision of the suit property and subsequent orders that had reinforced that position.

The father died in May 1990 before transfer of half of the suit property as ordered, and **Succession Cause No.147 of 1990** was filed in the Senior Principal Magistrates Court at Kiambu, leading to the appointment of **Salome Wanjiku Njoroge**, the widow of the deceased and mother to the parties to this appeal, as the administratrix of the estate. A barrage of applications and protests was filed in the cause on, among other things, whether the suit property was part of the estate of the deceased, an issue that had already been settled. On 26<sup>th</sup> June 1992 the Chief Magistrate, Kiambu ruled that the suit property was part of the estate. Instead of appealing against that ruling, the appellant filed in the subordinate court a fresh suit, **Civil Suit No. 882 of 1993** and when it was dismissed, he filed the appeal adverted to above, which was dismissed by Khamoni, J.

It is important to quote the pertinent part of the judgment by Khamoni, J. that vividly captures the real issue that the appellant has adamantly refused to come to terms with:

***“Those are court orders and were founded on another court order made in land case No.18 of 1984. They all do exist to date. They cannot be ignored if our civil procedure law has to continue having consistency. I should not sit in the High Court making orders inconsistent with orders in Magistrate's Courts from which the appellant has not bothered to appeal even if the appellant is the registered proprietor and holds a title he thinks is indefeasible and claims no fraud has been proved... The lower court's decision may be wrong. But so long as it remains intact, it is not proper for an affected party to by pass it and go to a higher court to obtain an inconsistent order.”***

The administratrix then died and was substituted by the 1<sup>st</sup> respondent. When it came to distribution of the estate, the old tag-of-war was revived with the respondents claiming that one half of the suit property belonged to them while the appellant contended that the entire suit property did not belong to the estate of the deceased. By a ruling dated 5<sup>th</sup> October 2005 the Senior

Resident Magistrate ruled that the respondents were entitled to half share of the suit property, which belonged to their father, but surprisingly declined to grant the application for confirmation of grant, purportedly because the suit property was still registered in the name of the appellant and the respondents would find it difficult to enforce an order of subdivision of the suit property.

Next the appellant proceeded to High Court and filed **Constitutional Petition No. 476 of 2006** challenging the award of the panel of elders, which he had otherwise failed to appeal against. **Msagha, J.** found the petition to be an abuse of the process of court and dismissed it on 23<sup>rd</sup> July 2009. The learned judge expressed himself thus:

***“This litigation must come to an end. The award does not exist because the same has been subjected to proceedings that clearly show that it is now a court judgment. The time allowed to challenge such judgment has also expired. It would be a great injustice to the respondents to be***

***brought to court over and over again over the same issues which ought to have been settled a long time ago if the applicant had followed the right procedures.”***

Totally ignoring the above judgment, the appellant went back to the Chief Magistrate’s Court, Kiambu and filed ***Civil Suit No. 255 of 2009*** claiming that he was the registered proprietor of the suit property and that in August 1986 the respondents had wrongfully trespassed thereon and taken possession of one half of the suit property. He accordingly prayed for their eviction and *mesne* profits of Kshs.4,000 per month from 22<sup>nd</sup> September 1986 until delivery of possession. By a judgment dated 24<sup>th</sup> November 2010, the Senior Resident Magistrate held that the suit was *res judicata* and an abuse of the court process. She reiterated that ownership of the suit property was settled by an award, which was made an order of the court and from which the appellant had not preferred an appeal.

Undeterred, the appellant lodged an appeal in the High Court, being ***Civil Appeal No. 13 of 2011***, contending, on the main that the subordinate court erred when it held that it had no jurisdiction to re-open the matter. In a judgment dated 24<sup>th</sup> October 2014, ***Waweru, J.*** like the other judicial officers before him, had no problem dismissing the appeal for lack of merit. This is how he expressed himself:

***“It is clear that the suit before the lower court was not only misconceived but also an abuse of the process of the court given the history of the dispute. The technical point that the trial magistrate, having found that she did not have jurisdiction to hear and determine the suit, should have struck it out instead of dismissing it, does not detract from the fact that the appellant appeared determined to not let the matter rest, even after exhausting his lawful legal options. The learned magistrate was correct in not agreeing to re-open a family dispute that had been dealt with by elders whose decision had not been challenged in the manner provided by the law. The High Court had similarly declined to re-open the dispute in Nairobi HC Petition No. 475 of 2006.”***

That is the judgment that has finally led to this appeal. Urging the appeal on behalf of the appellant, ***Mr. Nyaga, learned counsel***, submitted that the first appellate court erred by failing to hold that there were no valid orders for subdivision of the suit property. In his view the orders by the panel were made without jurisdiction, were a nullity and no court can adopt an award made by a body that did not have jurisdiction. Accordingly we were urged to find that there was no valid decree emanating from a competent court.

Next, counsel submitted that by dint of ***section 4*** of the ***Limitation of Actions Act***, the decree in favour of the respondents cannot be enforced after 12 years; that the suit property was in any case too small to be subdivided; that because the suit property was registered in the name of the appellant for over 50 years, it belonged to him exclusively and neither his deceased father nor the respondents had any claim over it; and that all the previous judgments constituted a violation of the appellant’s constitutional right to property. Accordingly he urged us to allow the appeal with costs and to order the eviction of the respondents from the suit property.

The 1<sup>st</sup> respondent appeared in person. In a brief address, he urged that the dispute has been in court for far too long at the instance of the appellant; that the issues raised by the appellant in this appeal were *res judicata* having previously been heard and determined on merit by competent courts; that the respondents were in occupation of half of the suit property and had been in occupation for more than 30 years; and lastly that there was no impediment to subdivision of the suit property to give effect to consistent decisions of the courts. He urged us to dismiss the appeal with costs.

This is the appellant’s second appeal and accordingly, it is confined to considerations of law only. The approach of the court in such an appeal was aptly stated in ***Kenya Breweries Ltd v Godfrey Odoyo, CA No. 127 of 2007*** as follows, by ***Onyango Otieno, J.A:***

***“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is***

*perverse.”*

It is instantly crystal clear that several of the issues that the appellant has raised in this appeal are issues of fact, which we cannot delve into. There are consistent findings of fact that the appellant's father contributed to the purchase of the suit property and by reason thereof, he is entitled to a half of it. Upon his death, two of his sons, namely the respondents, were found to be entitled to that half share. There are also consistent findings of fact that the appellant did not appeal against the award by the panel of elders and the ruling in the succession cause, which concluded that the suit property was part of the estate of the deceased.

In our estimation, there are only two issues of law in this appeal, namely whether the appellant's suit leading to this appeal was *res judicata* and whether the award of the panel is a nullity because it was allegedly made without jurisdiction. The other issue relating to execution of the decree and limitation of time was never raised as an issue before the High Court. The appellant has rather surreptitiously introduced it in this appeal and we do not find any justification why the issue should be raised so late in the day. In *George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015*, this Court reasoned as follows regarding new issues that are raised before it for the first time:

***“In general a litigant is precluded from taking a completely new point of law for the first time on appeal. The jurisdiction of this Court is not to decide a point, which has not been the subject of argument and decision of the lower court unless the proceedings and resultant decision were illegal or made without jurisdiction. (See Nyangau v. Nyakwara [1986] KLR 712)”***

And in *North Staffordshire Railway Company v. Edge [1920] A.C. 254, Lord Birkenhead, L.C.* explained the reason why an appellate Court is reluctant to entertain new points on appeal:

***“The appellate system in this country is conducted in relation to certain well-known principles and by familiar methods...The efficiency and the authority of a Court of Appeal, are increased and strengthened by the opinions of the learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decision which may be of the highest importance without having received any assistance at all from the Judges in the courts below.”***

We respectfully agree with those views and decline to consider the issue that the appellant has raised before us for the first time.

In the background to this appeal, we have endeavoured to show the number of cases that the appellant has filed both in the High Court and the subordinate courts on the same question, namely whether the suit property belongs to him or whether half of it belongs to the estate of the deceased and therefore to the respondents. We have no hesitation in holding, just like the courts below, that the issue raised by the appellant before the trial court was *res judicata*.

In *Uhuru Highway Development Ltd v. Central Bank of Kenya Ltd & Others, CA. No. 36 of 1996* this Court stated that in order to rely on the defence of *res judicata*, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit. The philosophical underpinning of the principle of *res judicata* were considered and explained as follows by the Supreme Court of India in *M. Nagabhushana v. State of Karnataka, Civil Appeal No 1215 of 2000*:

***“The principles of Res Judicata are of universal application as it is based on two age old principles, namely, ‘interestrepublicae ut sit finis litium’ which means that it is in the interest of the State that there should be an end to litigation and the other principle is ‘nemo debet bis vexari, si constet curiae quod sit pro un aet eadem cause’ meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final***

***and conclusive determination of the questions litigated and should for ever set the controversy at rest.”***

The appellant however contends that his suit was not *res judicata* because the panel of elders did not have jurisdiction to determine the issue.

With respect, the appellant has misapprehended the law as it stood in 1984 when the panel of elders made its determination. It must be recalled that the ***Magistrates’ Courts Act, cap 10*** was amended by the ***Magistrates’ Jurisdiction (Amendment) Act, 1981 (No. 14 of 1981)***, which took away the jurisdiction of magistrates’ courts over specified claims involving land and vested it in a panel of elders. The concerned cases were those involving:

***(a) beneficial ownership of land;***

***(b) the division of, or the determination of boundaries to land, including land held in common;***

***(c) a claim to occupy or work land;***

***(d) trespass to land.***

As regards, for example beneficial ownership of land or trespass to land, the 1981 Act did not have a provision that barred the panel of elders from determining the question of title to land. That provision was introduced by the ***Statute Law (Miscellaneous Amendments) (No2) Act, 1984, No. 19 of 1984***, which in the pertinent part provided:

***“...nothing in that subsection shall be construed as conferring jurisdiction or powers on a panel of elders to determine title to land.”***

The 1984 Act came into effect on ***28<sup>th</sup> December 1984***. By that time, the panel of elders in this appeal had made its award on 7<sup>th</sup> April 1984 and the same had been adopted as an order of the court. To the extent that the 1984 amendment did not have retrospective application, there is no substance in the contention that the panel did not have jurisdiction. For completeness of this history, it is important to bear in mind that the Magistrates’ Jurisdiction (Amendment) Act 1981, was repealed and replaced by the ***Land Disputes Tribunal Act, (No 18 of 1990)***, which in turn was repealed by ***section 31*** of the ***Environment and Land Court Act, 2011***.

But even if it were established that indeed the panel did not have jurisdiction to make the determination it did, we still would not have accepted the appellant’s contention in the circumstances of this appeal for the following reasons. As has been consistently stated by the courts below, the appellant had an opportunity to appeal against the award of the panel and the order that found half of the suit property to belong to the estate of his deceased father.

Having failed to do so, he cannot be heard to claim, more than half a century later and after the respondents have settled on their share of the suit property and constructed their homes, that the panel did not have jurisdiction to make the award which was adopted as an order of the court. In addition, several decisions of the High Court have refused to interfere with the award, in particular by Khamoni, Msagha and Waweru, JJ. The decisions by Khamoni and Msagha, JJ., to the best of our knowledge, were not appealed. All those decisions found that the actions instituted by the appellant to bein abuse of the process of the court and the appellant to have been guilty of inordinate delay in raising the issue that he has once again raised before us. To accede to the appellant’s arguments would be tantamount to irregularly nullifying the consistent findings in those decisions.

We therefore have no hesitation in finding that this appeal has no merit. We reiterate what we stated recently in ***Kivanga Estates v. National Bank of Kenya, CA No 217 of 2015***, an appeal that had more than fleeting similarity to this appeal:

***“We entertain no doubt whatsoever that by engaging nearly all levels of the court system for the last 27 years, filing one suit in one court after the other, moving from Embu, Meru, to Nairobi, amounts to gross abuse of the process of the court.***

***The learned judge properly balanced the two competing interests: the public interest in ensuring that there is finality in litigation (and that a party should not be „stung? twice in the same matter), and the private interest of a party guaranteed by the Constitution to access the courts. He kept in mind the fact that in all the circumstances, the appellant was misusing or abusing the court process by seeking to raise before it the issue which it had raised before in previous suits, some of which may still be pending. The court will look closely at the conduct of the partybringing subsequent proceedings in respect of the same matter in order to prevent abuse of its process and it has the power, in case of abuse of its process to ex debito justitiae prevent it. There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations.”***

We hope it is not too late for the appellant to now change course and focus his attention, resources and energies in more productive undertakings. He engaged his father, mother, and one of hisbrothersin ceaseless and ill-advised litigation during their lifetime on this earth until they were gathered to their ancestors. The remaining brother, the 1<sup>st</sup> respondent earnestly begs to be allowed to spend the rest of his days in peace, away from the corridors of these courts, a luxury that the appellant denied the father and the brother. From the history of this appeal, we agree he is entitled to his wish. This appeal is dismissed with costs to the 1<sup>st</sup> respondent. It is so ordered.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of May, 2017.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M’INOTI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

**DEPUTY REGISTRAR**