



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJ.A.)

CIVIL APPEAL NO. 5 OF 2016

BETWEEN

KENNEDY NYAMUMBO SESE APPELLANT

AND

SETTLEMENT FUND TRUSTEES1ST RESPONDENT

PETER NYANGOKA2ND RESPONDENT

SHADRACK MOTURI NYANGOKA3RD RESPONDENT

(Being an appeal from the Judgment given in the High Court of Kenya in Kisii, (Hon. D. K. Musinga, J) dated 16th September 2010

in

HCCC NO. 31 OF 2002)

JUDGMENT OF THE COURT

[1] The appellant **Kennedy Nyamumbo Sese** is the legal representative of the estate of **Lawrence Sese Mosigisi** (*hereinafter referred to as Lawrence*). He has lodged this appeal against the judgment of the High Court (**Musinga J**) in which the High Court dismissed a suit that was brought by Lawrence. The suit was against **The Settlement Fund Trustees (SFT)** and **Daniel Nyagoka Moturi (Daniel)**, but the High Court gave judgment in favour of Daniel on the counterclaim permanently restraining Lawrence from interfering with or trespassing onto Daniel's land.

[2] In the suit in the High Court Lawrence had sought to be declared the rightful owner of the entire parcel number **KISII/GESIMA SETTLEMENT/60** measuring 187 acres which included 4.5 acres that had a tea plantation as per Registry Index Map No. TPA/77/168 drawn in the year 1964, on the premise that the aforementioned 4.5 acres (*herein the disputed portion*), was fraudulently and erroneously appropriated to Daniel's title when Registry Index Map No. 4/13/6 was drawn in the year 1985.

[3] Lawrence who testified through his son Richard Osebe Sese by virtue of a power of Attorney, claimed to have purchased land from SFT in 1965. The land known as plot No.60 which was a consolidation of

several plots that were later registered as land parcel number **KISII/GESIMA SETTLEMENT/60** measuring 187 from SFT in 1965; and that he had been harvesting tea from the disputed portion from the time he took possession of **KISII/GESIMA SETTLEMENT/60**. Daniel who was subsequently substituted by Peter Nyangoka and Shadrack Moturi Nyangoka (*the 2nd and 3rd respondents respectively*), owned a parcel of land adjoining **KISII/GESIMA SETTLEMENT SCHEME/60**. Daniel's land was **GESIMA SETTLEMENT SCHEME/61** (*hereinafter referred to as the adjoining property*), which among other things comprised of 5 acres of tea plantation. Both properties were issued and represented as per the registry index map number TPA/77/168 dated 22.12.1964.

[4] Lawrence's evidence was that in 1985 SFT purported to cause the amendment of the Registry Index Map by drawing another registry index map number 4/13/3/6, which erroneously appropriated the disputed portion as part of the adjoining property. That on or about 1996 after paying off the loan to the 1st respondent, Lawrence subdivided **GESIMA SETTLEMENT SCHEME/60** into parcel numbers **KISII/GESIMA SETTLEMENT SCHEME/362, 363 and 364** with the intention of dividing the land amongst his family members. It was during this subdivision that Lawrence discovered the erroneous appropriation of the disputed portion to the benefit of Daniel. Meanwhile, Daniel had after satisfying his loan went ahead and obtained title to the adjoining property which title included the disputed portion. Daniel was laying claim to the disputed portion, despite the fact that Lawrence had been in possession of the same since 1965.

[5] Lawrence had therefore sought judgment, *inter alia*, for a declaration that the Registry Index Map No. 4/13/6 drawn in the year 1985 was erroneous; that the 1985 registry index map be rectified to reflect the true boundary marks on the ground between Parcel Nos. Kisii/Gesima Settlement Scheme/362,363 and 364 and Daniel's parcel No. Kisii/Gesima Settlement Scheme/61 as per the registry Index Map No. TPA/77/168 dated 22/12/1964; that the disputed portion be transferred to Lawrence; and that a permanent injunction be issued restraining Daniel his agents, servants and/or employees from interfering with Lawrence's land in any manner.

[6] Daniel filed a defence to Lawrence's claim and a counterclaim in which he denied the appellant's allegations, and maintained that he was the proprietor of the adjoining property measuring 18¾ acres including the disputed portion; that he had fully paid for the land and was in occupation; and that it was Lawrence who had severally trespassed into Daniel's property. Daniel therefore prayed for dismissal of Lawrence's suit and judgment in his favour on the counterclaim.

[7] SFT also filed a defence to Lawrence's claim and adduced evidence in support of the defence. It was contended that **GESIMA SETTLEMENT/60** comprised of land that was allocated to Lawrence subject to his certifying a loan advanced to him for the purpose of buying the land; that there was a charge over the land and Lawrence was not allowed to make any developments on the land before the discharge of the charge; that the index map number TPA/77/168 dated 22.12.1964 was a sketch map not a registry index map as alleged by Lawrence; and that Gesima Settlement Scheme was registered after the year 1980 and the registry index map could not have come into existence before registration.

[8] It was asserted that the registry index map prepared in 1985 was the final map approved by the Director of survey; that this map clearly indicates that the disputed portion belongs to Daniel's parcel; that the title deed issued to Daniel was legally and properly issued as Daniel had certified the loan and the charge on his land was discharged; that the title issued to Daniel included the disputed portion; and Lawrence's claim on the dispute portion cannot stand as the disputed portion was part of the adjoining land; and that the land allocated to Lawrence was in any case still in the name of SFT as Lawrence had not certified the loan.

[9] The trial judge having heard the evidence adduced and the rival arguments by the parties delivered a judgment in which he held that the area-map No. **TPA/77/168** prepared in 1964 which showed that the disputed portion was part of parcel No. 60 allocated to Lawrence, was a provisional map that only showed provisional boundaries; that the final registry index map drawn in 1985 showed that the disputed portion was part of parcel No.61 which belonged to Daniel. That Lawrence did not produce any evidence to substantiate his allegation that he had repaid the loan given to him for purchasing parcel No 60; that when

the final area list was drawn and title deeds issued, parcel No.60 was registered in the name of 1st respondent;

[10] In addition, the learned judge found that on 24th July, 1996 the title for parcel No. 60 was closed upon subdivision of the land to create **Kisii/Gesima Settlement Scheme/362, 363 and 364** all of which were registered in the name of the 1st respondent; that at the time Lawrence filed the suit, there was no parcel of land known as **Kisii/Gesima Settlement Scheme/60**, nor was such property ever registered in Lawrence's name; that land parcel No. **Kisii/Gesima Settlement Scheme/61** measuring 7.5 hectares is registered in the name of Daniel; that although the plaintiff has since 1965 been in occupation of the disputed portion believing it to be a portion of the land formerly known as parcel No. 60, that was not the correct position;

[11] The learned judge concluded that Lawrence, had failed to prove that he repaid the loan advanced to him by SFT for the purchase of parcel No. 60, and that it was evident that parcel No. 60 had been subdivided into 3 parcels that are registered in the name of 1st respondent, and therefore Lawrence had no capacity to claim the disputed portion of land and his claim could not succeed. Conversely that there was sufficient evidence that the disputed portion lawfully belonged to Daniel, as it was a portion of parcel No. 61, which is registered in the name of Daniel, and consequently Daniel is entitled to the prayer of a permanent injunction to restrain Lawrence his servants and/or agents from trespassing onto his parcel of land.

[12] Being aggrieved by the Judgment of the High Court, the appellants filed the appeal raising seven grounds contending that the learned judge erred in law and fact: in not holding that the appellant lawfully occupied the suit land and exercised both acts of ownership openly and undisturbed from the date of acquiring the same; condoning and giving a stamp of approval to professional ineptitude and deception that resulted in the mistake in the final map; accepting that the delineations of the suit land appearing on the registry index map No. 4/13/6 drawn in the year 1985 as an anchor to solve the dispute in disregard to the original sketch map and the reality on the ground; not holding that the 2nd respondent's counter-claim is statute time barred; not holding that it was the duty of each party to check the acreage and ascertain the physical boundary on the ground at the time of purchase of their respective portions; holding that the appellant had not cleared his debt with SFT when the same had been cleared and the appellant issued with a discharge and allowed to subdivide his land unto three portions; and giving judgment against the weight of the evidence on record.

[13] Hearing of the appeal proceeded on 7th June 2017, when Mr. Bosire Gichana, counsel for the appellant and Mr. Zablun Mokua, counsel for the 2nd and 3rd respondents, gave oral submissions. There was no counsel representing the Attorney General who was appearing for SFT despite a hearing notice having been duly served.

[14] Learned counsel for the appellant submitted that the evidence of the District Land Adjudication Settlement Officer who testified on the process of identification, survey and demarcation, was that the appellant was allocated plot No. 60, and therefore, the learned judge erred in finding that plot 60 belonged to SFT; that SFT being a statutory body it is bound to procedurally recover debt as laid down by the law, which includes a requirement to inform the defaulter of the non-payment; and that SFT did not have the capacity to take away the land allocated to Lawrence and re-allocate it to another individual for the alleged lack of payment.

[15] In addition, counsel argued that the appellant applied for sub-division of the land but SFT rejected this; that the rejection of the payment did not affect the amount of land that had been allocated since the curving out of the land was done by the surveyor in 1964; that the map prepared in 1985 should have corresponded with the earlier map; that since it did not correspond, the subsequent map was either fraudulent or illegal, more so noting that the only mistake highlighted in the said 1985 map was the allocation of the disputed portion.

[16] As regards the counterclaim, counsel pointed out that Daniel only raised his claim in 1995 and

therefore the claim was statutorily barred; and that in any case Daniel's evidence did not support the counterclaim. Counsel submitted that Lawrence was initially allocated 187 acres not 182 acres, that the acreage was reduced illegally when Daniel's land was increased by 4.5 acres on the ground and on the title. Counsel for the appellant therefore urged the court to allow the appeal.

[17] Counsel for the 2nd and 3rd respondents urged the Court to uphold the judgment of the High Court. He submitted that the surveyor clearly distinguished the 1964 map, which was a sketch map giving provisional guidelines, and the 1985 registry index map, which was the final map. Counsel pointed out the uncontroverted evidence that was adduced by the Land Adjudication Officer, Borabu District that Lawrence was allocated plot number 60 while Daniel was allocated plot number 61; that the acreage on the ground corresponded with the details on the respective title deeds; and that if the disputed portion is removed from Daniel's land the acreage on his title will be less by 4.5 acres.

[18] Counsel argued that Parcel 60 still belongs to SFT, as Lawrence had not completed the repayment of the loan prior to his demise; that contrary to Lawrence's claim it is not only parcel No. 60 that was affected by the final map, but also all the plots within the area were affected.

[19] We have considered this appeal and the submissions made by counsel. This being a first appeal we are mindful that we have the responsibility to reconsider and re evaluate the evidence and come to our own conclusion bearing in mind that the learned Judge had the advantage of seeing and assessing the demeanor of the witnesses (*Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212*).

[20] The main issues during the trial were whether Lawrence was the lawful owner of Parcel No. **KISII/GESIMA SETTLEMENT SCHEME/60**; and if so whether the disputed portion of 4.5 acres was part of **KISII/GESIMA SETTLEMENT SCHEME/60**; if so whether Daniel had encroached or trespassed onto Lawrence's land; and if the disputed portion is not part of Lawrence's land, whether Lawrence had encroached or trespassed onto Daniel's land.

[21] Under **section 109** of the **Evidence Act**, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless any law provides expressly that proof of that fact shall lie on any particular person. Therefore, since Lawrence was the one who initiated the suit asserting that the disputed portion was part of **KISII/GESIMA SETTLEMENT SCHEME/60** and that he was rightful and legal owner of this property, Lawrence had the onus of proving this fact.

[22] In this regard Lawrence relied solely on the evidence of his son Osebe. The evidence of this witness to the extent that Lawrence occupied land allocated to him by SFT in 1965 was not in dispute. What was disputed was whether the ownership in the land passed onto Lawrence, and whether the disputed portion was part of that land. Although Osebe claimed that Lawrence had fully repaid the loan given to him for the purchase of the land, he did not produce any evidence to confirm the full repayment, nor did he produce evidence to show that the charge registered against the land towards the loan given to Lawrence for the purchase of the land had been discharged, or that **KISII/GESIMA SETTLEMENT SCHEME/60** was ever registered in the deceased's name.

[23] Secondly, although Lawrence claimed that SFT and Daniel erroneously and fraudulently altered the index registry map and unlawfully deprived him of the disputed portion, the evidence adduced by Lawrence's witness in this regard was inadequate. The allotment letter produced in evidence did not describe the acreage of the property that were consolidated i.e. 814, 87, 86, 84, 91 and 60 but only gave the numbers of the several plots. This lent credence to the respondents position that the map produced in 1964 was only a provisional map, and that the correct position of the acreage and position of the land was as reflected in the 1985 registry index map that was approved as the final map by the surveyor and the title for Kisii/Gesima Settlement/60 issued.

[24] On the other hand, the respondents called the District Land Settlement Adjudication Officer, the Land Registrar Nyamira, and the District Surveyor Nyamira who were the professional people who dealt with the survey and registration of land in the area where the disputed suit was situated. The evidence of these witnesses was in our opinion independent and impartial. They produced the official area lists and

sketch map drawn in 1964, the final area list drawn in 1985, and the registry index map drawn in 1985.

[25] The respondent's witness explained that the 1964 map was a sketch, a mere guideline before the final measurements were taken so that a final map can be prepared. The evidence of these witnesses was consistent with the evidence of Osebe and that of Daniel who conceded that Lawrence had been in occupation of the disputed portion since 1964 when he was allocated plot 60. The evidence of the witnesses was also consistent with Daniel's evidence that he only discovered when he received his title for plot 61 that was registered as **KISII/GESIMA SETTLEMENT SCHEME/61** that the disputed portion was in fact within his land.

[26] It is evident that Daniel did not fraudulently alter the maps to include the disputed portion in his land. Nor was there any evidence that the officials of the 1st respondent did so. The confusion in the location of the disputed portion arose as a result of a genuine mistake that occurred when Lawrence and Daniel were given possession of their respective parcels during the initial allotment, and the two were made to believe that the disputed portion was within Lawrence's land in accordance with the provisional area map.

[27] We come to the conclusion that the disputed portion was actually part of Daniel's property and that Lawrence failed to prove the alleged fraudulent alteration of the registry index map. Similarly Lawrence failed to prove that he was the registered proprietor or lawful owner of **KISII/GESIMA SETTLEMENT SCHEME/60** as against SFT. Indeed, the clear evidence is that this land parcel has been closed on subdivision, and that the subdivisions **Kisii/Gesima Settlement Scheme/362, 363 and 364** are all registered in the name of the 1st respondent.

[28] It is the right to ownership of **KISII/GESIMA SETTLEMENT SCHEME/60** that could have given Lawrence the right to sue Daniel. Without proof of the ownership of the land where the disputed portion lies, the appellant had no cause of action upon which he could anchor his claim for the declarations and order of injunction that he sought against Daniel, and his suit was therefore properly dismissed.

[29] As for the counterclaim, it is apparent from the evidence as already stated that the disputed portion is in Daniel's land. Although Lawrence was in occupation from 1965, the disputed portion belonged to SFT, until it was transferred to Daniel in May 1995. In *Gitu v Ndungu & 2 others [2001] eKLR*, this Court in a 5 Bench decision, departed from its decision in *Eliud Nyongesa Lusenaka and Another vs Nathan Wekesa Omocha* Civil Appeal No 134 of 1993 in which the Court had decided that the plaintiff after 12 years of exclusive possession of the suit property in regard to which the Settlement Fund Trustees had title, acquired title to it and the SFT became his trustee. The 5 Judge Bench reiterated its earlier holding in *Boniface Oredo vs Wabomba Mukile* Civil Appeal No 170 of 1989 (unreported) delivered in 1992, that the interest of SFT in the suit property is not extinguishable under the **Limitation of Actions Act, Cap 22** of the Laws of Kenya in view of **section 175** of the **Agriculture Act Cap 318** that provides that a suit by SFT cannot be defeated by the defence of limitation.

[30] The defence of limitation was therefore not available to Lawrence in regard to the counterclaim, nor could Lawrence sustain a claim for adverse possession in regard to the disputed portion. In the circumstances, we find that the learned Judge cannot be faulted in finding in favour of Daniel on the counterclaim. The learned Judge disallowed the claim for general damages and *mesne* profits, and since there is no cross appeal that has been lodged in this regard, we do not find it necessary to address the issue.

[31] The upshot of the above is that this appeal has no merit. It is accordingly dismissed. As there was no appearance for 1st respondent during the hearing of the appeal, we award costs to 2nd & 3rd respondents only.

Dated and delivered at Eldoret this 7th day of December, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.