



**IN THE COURT OF APPEAL**

**AT ELDORET**

**(CORAM: AZANGALALA, GATEMBU, MURGOR JJ, A)**

**CIVIL APPEAL NO. 359 OF 2012**

**BETWEEN**

**BEATRICE MAKOKHA CHINA.....APPELLANT**

**AND**

**STANLEY KACHEMULO.....RESPONDENT**

*(Appeal from the judgment and decree and order of the High Court at Busia, Onyancha, J.) dated 25<sup>th</sup> August 2011*

**in**

**H.C.C.C. NO. 2 of 2005)**

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**JUDGMENT OF THE COURT**

This is an appeal from the judgment of Onyancha, J, where *the appellant, Beatrice Mokakha China (herein referred to as “Beatrice”)* seeks to set aside or vary the judgment of the High Court which cancelled her ownership of *Title Number Bukhayo/ Buyofu/85 (herein referred to as “the subject land”)* and instead ordered that it reverts to the names of the original three proprietors.

The brief facts of the case are that, Juma Okomolote, *(herein referred to as “Okomolote”)* Dickson Omokoli *(herein referred to as “Dickson”)* and the respondent, Stanley Kachemulo *(herein referred to as “Stanley”)* were registered as the proprietors in common of the subject land on 26<sup>th</sup> November, 1971. When Okomolote died in 1997, Beatrice, obtained Letters of Administration of his estate in *Succession Cause No. 103 of 1995*, and by virtue of being the administrator, subsequently transferred the entire subject land into her name. It was contended that Beatrice was not an heir of Okomolote’s estate and under Luhya customary law was not entitled to inherit Okomolote’s portion. Stanley therefore sought a declaration that Beatrice holds the subject land in trust for him; that the registration of Beatrice as proprietor of the subject land be cancelled and the land be transferred into Stanley’s name as the sole proprietor.

Beatrice denied that Stanley was a brother of Dickson and Okomolote and stated that as the sole heir to Okomolote’s estate, she was entitled to have the subject land transferred into her name.

In its judgment the trial court found that Stanley had established a claim against Beatrice, and ordered the cancellation of the title registered in Beatrice's name as the sole proprietor. The court further ordered that the title reverts to the names of the original proprietors.

Beatrice was aggrieved by the decision of the trial court and appealed to the High Court which dismissed her appeal and upheld the trial court's decision.

Beatrice now appeals to this Court on the grounds that the courts below accepted that Stanley held an interest in the subject land without proof, and failed to appreciate the inconsistencies in Stanley's evidence. As a result according to Beatrice, they wrongly ordered that the title of the subject land reverts to the names of the three proprietors; that the trial court unprocedurally entertained issues that related to a succession cause of Okomolote's estate and finally, that the suit was based on Luhya customary law which was inapplicable to the circumstances of the case.

**Mr. Okara**, learned counsel for the appellant, submitted that the courts below wrongly determined that the subject land belonged to the three proprietors Dickson, Okomolote and Stanley, as the latter's case was replete with contradictions. On the one hand, he claimed to be the brother of Dickson and Okomolote and on the other, claimed that Okomolote was his uncle and that the subject land was to be shared between them. He also sought to be declared as the sole proprietor of the land, whilst at the same time in his evidence; he prayed that the subject land be shared between himself and Dickson, who was not a party to the suit.

Counsel further submitted that the plaint did not state that the three proprietors were jointly registered on 26<sup>th</sup> November, 1971 as proprietors of the subject land. It was counsel's further contention that the only exhibit that was produced was a copy of a certificate of search which did not show that Okomolote was one of the proprietors. Counsel argued that the only names appearing were that of Dickson and Stanley. Counsel further faulted the courts below for admitting a photocopy of the certificate of search, rather than the original document, despite the appellant having objected to its production. Counsel posited that the land register ought to have been produced to verify ownership.

It was counsel's further submission that the succession cause showed that the subject land was in the sole name of Beatrice, and that she was the sole beneficiary of Okomolote Odinyo. Counsel argued that no objection had been filed in respect of the Grant of Letters of Administration, which declared her to be the sole beneficiary. In addition, counsel further argued that Luhya customary law was inapplicable to the circumstances of this case since both parties were Tesos.

Counsel concluded by stating that Stanley was a stranger to the estate as he was not related to the Ndinyo family and therefore nothing linked him to the estate, as a result of which, the court had no basis upon which to decide that the subject land be registered in the names of the three proprietors.

**Mr. Jumba**, learned counsel for the respondent, opposed the appeal and submitted that **section 72** of the **Civil Procedure Code** specified that only issues of law could be raised on a second appeal. It was his argument that the appellant had only raised matters of fact. Counsel argued that the issue in the main was whether the subject land was registered in the names of the three proprietors in common, which was a matter of fact, and so did not fall within this Court's premise to determine. Counsel further stated that the issue of the authenticity of the certificate of search was not raised in the High Court and that though the objection to its production was overruled in the trial court, that ruling had not been appealed and therefore it remained an order of the court.

Having considered the evidence and the submissions of counsel, we are of the view that the issues for our consideration are whether Stanley held any interest in the subject land and if so what; whether the trial court rightly entertained a suit filed against a succession cause; whether the suit was based on Luhya customary law; and finally whether the courts below rightly ordered that the title of the subject land reverts to the names of the three proprietors.

In **Kenya Breweries Ltd. -v-s Godfrey Odoyo**, - Civil Appeal No. 127 of 2007, this Court as per

Onyango- Otieno, J.A, held:

***“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, on 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.”***

On the question of whether Stanley held any interest in the subject land, it is evident to us that the answer to this turns on whether there was any evidence proving ownership of the subject land.

It was Stanley’s testimony that the subject land was initially registered in the names of Okomolote, Dickson and himself, and he produced a certificate of search in support of this contention. He stated that Okomolote was his uncle and that Dickson and himself were like sons to Okomolote. When Okomolote died in 1997, Beatrice went ahead to obtain letters of administration in respect of his estate, and subsequently registered the entire subject land in her name. It was his evidence that Okomolote had no wife and died without issue, and that Dickson and himself were his only remaining relatives.

According to Stanley, Beatrice was a grandchild of the family, whose father was not living on the subject land.

Having considered Stanley’s evidence, as we turned next to consider the testimony of the other witnesses referred to in the judgments of the courts below, it transpired that all the subsequent proceedings of the trial court were not included in the record. This being the case we were constrained to consider only the evidence available on the record and the findings in the judgments of the lower courts.

According to the trial Court’s judgment, Beatrice testified that she acquired title to the subject land after obtaining a Grant of Letters of Administration in *Succession Cause No. 103 of 1995*. She also produced the proceedings. She denied that the subject land belonged to Stanley, or that Stanley was related her. She also denied that Dickson was her brother.

When she was cross examined, she said that her father’s name was Odinyo who had two wives. The subject land belongs to Odinyo family. She nevertheless admitted that Stanley occupied the subject land and had planted cane on it.

***Michael Wasike, DW2*** testified that he knew Beatrice as a daughter of Okomolote who died and was buried on the subject land. He stated that though he knew Stanley, he did not know his parents.

From the evidence, Stanley contended that he was one of the three proprietors of the subject land. He produced a certificate of search showing that Okomolote, Dickson and himself were registered as common proprietors. Okomolote, one of the other proprietors was since deceased, and though Dickson was said to be still living, he was not joined as a party to the suit. Inversely, save for the title document alleged to have been produced by Beatrice, following the registration of the entire property in her name, there is nothing to show that prior to this, the subject land was registered in the sole name of Okomolote.

In their concurrent findings, both the trial court and the High Court came to the conclusion that the subject land belonged to the three proprietors, as specified on the certificate of search.

**Section 72(1)** of the Civil Procedure Act stipulates:

***“72(1) Except where otherwise expressly provided in this Act or any other law for the time being in force, an appeal shall lie to the Court of Appeal from every decree passed in appeal by the High Court on any of the following grounds namely,***

***a) the decision being contrary to law or to some usage having the force of law;***

**b) the decision having failed to determine some material issue of law or usage having the force of law;**

**c) a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force which may possibly have produced error or defect in the decision of the case upon the merits.”**

This Court has severally upheld these provisions as in the case of *Naomi Kemunto -V- Total (K) Limited and Kisii Total Service Station (Kisumu Civil Appeal No. 211 of 2008 (UR)* where it was stated thus,

**“This being a second appeal, we remind ourselves that Section 72 of the Civil Procedure Act applies and that only issues of law fall for consideration (See *Kitivo - v - Kitivo (2008) KLR 119.*)”**

This being a second appeal, questions of facts do not ordinarily fall for the consideration of this Court. There are concurrent finding of fact by the courts below that the three proprietors were the owners of the subject land. These findings are supported by evidence. We have no basis for interfering with the findings.

As to the next issue of whether the lower courts were correct to order that the subject land reverts into the names of the three proprietors, the trial court stated thus;

**“The evidence adduced before court clearly indicates that Dickson Omukoli and Stanley Kachemulo are still living hence no Succession could be done in respect to their estate. If indeed Okomolote is the one who died and the defendant wanted to take her share, she should have only restricted herself to the equivalent share. But on the contrary, she acquired absolute ownership of the 6.6 Ha which was registered in the joint names”.**

The High Court on its part had this to say;

**“I have carefully considered the evidence. Subject to the official search being accurate, I find the decision of the trial magistrate proper and correct. If indeed the title was as at the time of succession registered in three names, then, the court that carried out succession acted in error to allow the appellant to take over the interests of the other living proprietors.”**

**Section 103 of the Registered Land Act (repealed)** which is the law applicable to the instant case, required that;

**“(1) Where any land, lease or charge is owned in common, each proprietor shall be entitled to an undivided share in the whole, and on the death of a proprietor his share shall be administered as part of his estate.**

It is therefore apparent that when the transfer of the subject land was registered in Beatrice’s name, this provision was not complied with. From the evidence, the subject land was at all times registered in the names of three persons as proprietors in common in equal shares. If Beatrice was entitled to any portion of the subject land, the only portion that ought to have been transferred to her was the one third portion belonging to Okolomote. The other two portions were not the subject of Okolomote’s estate, but belonged to the other proprietors, namely, Dickson and Stanley. Yet Beatrice registered the entire subject land in her name. By ordering that the subject land reverts to the initial names of the proprietors, the courts below merely sought to restore the register to the original status.

As such we agree that the courts below rightly ordered that the subject land revert to the names of the original owners and we see no reason to interfere with those decisions.

Having found as we have, we find that without a complete record we are not in a position to address

either the issue of whether the trial court rightly entertained a suit filed against a succession cause or whether the suit was determined on the basis of Luhya customary law. We are however, in no doubt that the two courts below correctly determined the issues of ownership of the subject piece of land.

The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed with costs to the respondent.

***It is so ordered.***

***Dated and delivered at Kisumu this 29<sup>th</sup> day of July, 2016.***

**F. AZANGALALA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**