



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 71 OF 2015

BETWEEN

DAVID OGUTU ONDA.....APPELLANT

AND

WALTER NDEDE OWINO.....RESPONDENT

(Appeal from the judgment/decree of the High Court of Kenya Okongo, J) dated 31st October 2014

in

Kisii H.C.ELC No. 295 of 2012))

JUDGMENT OF THE COURT

In this appeal, the appellant seeks to set aside the judgment of the High Court which found that, he had failed to establish his claim of ownership over the entire property known as Parcel No. **East Karachuonyo/Kobuya/1494**, being the subdivided portion of Parcel No. 542 measuring 0.35 hectares (***“the disputed land”***).

The appellant’s complaint was that sometime in January 2012 the respondent entered upon, and proceeded to cultivate the disputed land without his authority or consent. As a result, he claimed that he was deprived of the use and enjoyment of his land, which had occasioned him loss and suffering. He therefore sought a declaration that he was the lawful and registered owner of the disputed land, and a permanent injunction to restrain the respondent from entering or trespassing on the disputed land to cultivate plant or build structures on it in or on any portion. He also sought general damages for trespass.

The respondent denied the appellant’s claims and instead contended that the appellant had acquired the title to the disputed land illegally and fraudulently, and as such, did not hold a valid title over the disputed land. It was his case that he had been in occupation of a portion of the disputed land for more than 12 years, having acquired his portion of the land much earlier. He stated that the title to the disputed land ought to have been subdivided into two portions, one of which was to be registered in his name. Instead, the appellant had transferred and registered the entire disputed land in his own name.

In his judgment the learned judge found that the respondent had purchased a distinct portion of the disputed land, which upon subdivision should have been registered in his name; that instead the appellant amalgamated the respondent’s portion with his, and caused the title to be issued in his name as the

registered proprietor of the entire disputed land. The learned judge concluded that the respondent was at all times in possession of his portion, which created an overriding interest to which the appellant's title was subject upon registration. The court concluded that the respondent's occupation of the portion he occupied did not amount to trespass.

Being dissatisfied with the judgment of the High Court, the appellant appealed to this Court raising 11 grounds of appeal which in the main were that, though the learned judge arrived at the conclusion that the disputed land was not fraudulently acquired, he wrongly found that an overriding interest existed against the appellant's title which was neither pleaded, canvassed nor proved by the respondent; that the learned judge wrongly found that the appellant was responsible for the subdivision of the disputed land, yet he was neither the proprietor or owner of the land in question, and further wrongly drew an adverse inference when it was observed that the appellant failed to produce the documents of transfer; that the learned judge fell into error when he found that the respondent had not trespassed on the appellant's property.

Counsel finally submitted that the learned judge failed to appreciate that the respondent's evidence comprised of contradictions and to properly analyse and evaluate the evidence thereby arriving at the wrong conclusion.

In his submissions, **Mr. P. Ochwang**, learned counsel for the appellant relied on his written submissions which were that, the learned judge wrongly found that an overriding interest existed on the disputed land which was neither pleaded, canvassed nor proved by the respondent and further wrongly concluded that the respondent had not trespassed on the appellant's property. Counsel took the view that since the respondent's case was based on the fraudulent amalgamation of the respondent's portion, the learned judge went beyond the pleadings to arrive at the conclusion that an overriding interest existed which was neither pleaded nor proved, and so was not an issue for determination. He relied on the case of the **Independent Electoral & Boundaries Commission & another vs Stephen Mutinda Mule & 3 others [2014] eKLR** for the proposition that parties are bound by their pleadings.

Counsel complained that the learned judge concluded that the appellant was responsible for the subdivision of the disputed land, yet there was no evidence to support this finding, and further wrongly drew an adverse inference when it was observed that the appellant failed to produce the documents of transfer. Counsel argued that the transfer documents were available at the Lands Registry, and the onus was upon the respondent to summon the Land Registrar to produce them.

Counsel concluded by submitting that the learned judge failed to appreciate that the respondent's evidence comprised of contradictions and to properly analyse and evaluate the evidence thereby arriving at the wrong conclusion.

In reply, **Mr. Sagwe** learned counsel for the respondent, submitted that an overriding interest under **section 28** of the **Land Registration Act, 2012** was created on account of the respondent's occupation of a portion of the disputed land. Timon Anyiengo, the seller, confirmed having sold and demarcated portions of the disputed land to the appellant and the respondent; that it was the appellant who carried out the subdivision and transfer of the titles, which resulted in the fraudulent registration of the entire disputed land in his name thereby depriving the respondent of his portion.

We have considered the pleadings, the evidence and the submissions of counsel and consider that the issues for our consideration are whether the learned judge, having found that the appellant was the sole registered proprietor of the disputed land, rightly subjected his rights and title to the existence of the respondent's overriding interest; whether the learned judge rightly concluded that the appellant was responsible for the subdivision, transfer and registration of the title of the disputed land in both his name and the respondent's name; and whether there were contradictions in the respondent's evidence that negated the existence of an overriding interest which was based on possession.

As a first appellate court, our mandate is to reexamine and reevaluate the evidence and material tendered before the High Court and draw our own conclusions, but we should be slow in interfering with the

decision of the trial court, bearing in mind that we have not seen or heard the witnesses so as to be able to ascertain their credibility, see *Selle vs Associated Motor Boat Company Limited [1968] EA 123*, and *Williamson Diamonds Ltd. vs Brown [1970] EA 1*. Bearing these principles in mind, we will begin by disposing of the issue that the parties did not plead the finding by the learned judge of an overriding interest.

It is true that the respondent's pleadings did not disclose a claim of the existence of an overriding interest. The respondent's case was that he had been in possession of a portion of the disputed land for more than 12 years; that the disputed land ought to have been subdivided into two portions, one of which should have been transferred to him; but that the appellant had fraudulently transferred the entire disputed land into his name without his knowledge, and had not disclosed that he, (the respondent) was in occupation of his portion.

That notwithstanding, the judgment shows that the parties framed 8 issues for determination by the court, where issue No. (v) read as follows;

“Whether the defendant has any rights and/or interest over the suit property?”

And Issue No. (vii) was;

“Whether the plaintiff's title to the suit property is liable to be revoked on account of the defendant's alleged interest therein?”

While it is trite that a party is bound by their pleadings, in the case of *Odd Jobs vs Mubia [1970] EA 476*, in dealing with the matter of unpleaded issues which are left for the court to determine, *Law, J.A.* (as he then was) had this to say:-

“In East Africa the position is that a Court may allow evidence to be called and may base its decision on an unpleaded issue if it appears from the cause followed at the trial that the unpleaded issue has in fact been left to the court for decision...”

We take the view that though the issue of an overriding interest was not specifically pleaded, the issues as framed by the parties unequivocally left it to the court to determine whether or not the respondent had any rights or interest in the disputed land.

Indeed the court answered this question in the affirmative, and went on to specifically define the interest held by the respondent as being, an overriding interest. Under **section 30 (g)** of the ***Registered Land Act, Cap 300, Laws of Kenya (now repealed)*** now **section 28** of the ***Land Registration Act***, provision was made for overriding interests as will be seen later. We therefore find that, though the claim of the existence of an overriding interest was not specifically pleaded, the learned judge was right in finding that the respondent held an overriding interest against the appellant's title, which was an issue framed by the parties for the court's determination.

This leads us into the next issue which was whether the appellant's rights as the sole registered proprietor of the disputed land were rightly subjected to an overriding interest. In this regard the learned judge stated thus;

“I have already held hereinabove that both the defendant and the plaintiff purchased distinct portions of Plot No. 542. On the sub-division of Plot No. 542 both the plaintiff and the defendant were supposed to obtain titles for their respective portions of Plot No. 542. This did not happen. The evidence before me shows that during the subdivision, the defendant's portion of Plot No 542 was amalgamated with that of the plaintiff and a title issued in the name of the plaintiff as the owner of the hitherto distinct portions of land. There is evidence on the record which I have accepted that when Timon Obuya Anyiengo (DW3) sold to the plaintiff a portion of Plot No. 542 he had already sold a portion of the said plot to the defendant and the defendant was in possession thereof. It follows therefore that when the plaintiff acquired a title to the suit property

the defendant was in possession thereof. The plaintiff's title was subject to the defendant's right of possession thereof which was an overriding interest on the title of that was acquired by the plaintiff under the provisions of section 30 (g) of the Registered Land Act, Cap 300, Laws of Kenya (now repealed).

Given the circumstances of the case, could an overriding interest be held to exist in the face of the appellant's registered proprietary interest?

Section 28 of the **Land Registration Act** which replaced **section 30 (g)** of the **Registered Land Act, Cap 300, Laws of Kenya** (now repealed) stipulated that;

“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted on the register –

(a)...

(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or prescription.

(g) the rights of a person in possession or actual occupation of land to which he is entitled in rights only of such possession or occupation save where an enquiry is made of such person and the rights are not disclosed”.

This Court has variously stated that possession and occupation of land can create an overriding interest to which the proprietor's rights and interest were subject. In ***Obiero vs Opiyo [1972] EA 227*** it was stated thus;

“The Respondent has rights against the appellant stemming from possession and occupation of part of the land, which amounted to an overriding interest not required to be noted on the register and the appellants' proprietorship was subject to it, section 30 (g).”

The respondent's case was that he had purchased a portion of the disputed land from ***Timon Obuya Anyiengo (DW3)***, sometime in 2000, and that following its purchase, he had taken possession of his portion where he had been cultivating maize and cassava ever since. Timon Anyiengo testified that he had sold a portion of the disputed land to the respondent in 2000 and that since then, the respondent had remained in possession. ***Enos Ayal (DW2)***, the respondent's father who was a witness to the sale agreement corroborated this evidence.

The appellant on the other hand stated that he purchased the disputed land in 2002. He produced a title deed and certificates showing that he was registered as proprietor of the disputed land on 22nd June 2011. He claimed that in 2012 he had found the respondent cultivating cassava on a portion of the disputed land. He did not state whether he had been in possession of the entire disputed land since 2002, or as observed by the learned judge, ***“... the nature of the crops that he used to grow on the disputed portion of the suit property neither did he furnish evidence of such cultivation,...”*** only stating that the respondent had ended up taking a portion of his land.

Our evaluation of the evidence points to the occupation and possession by the respondent of a portion of the original Plot No. 542 which the appellant later subdivided into two portions. It was one of the two portions, that is, Parcel No. East Karachuonyo/Kobuya/1494, the disputed land, that was to have been subdivided between the appellant and the respondent.

When the appellant registered the entire disputed land as his own, that registration failed to take cognisance of the existence of the respondent's portion of the disputed land, where he was in occupation. As a consequence, the appellant's title became subject to the respondent's overriding interest in respect of the portion he occupied, notwithstanding that it was not noted on the register. This being the position, we

find that the learned judge rightly concluded that, the respondent held an overriding interest against the appellant's title, and in so doing, we further find that the question of trespass could not be said to arise.

We disagree with the appellant's complaint that the learned judge placed the responsibility of subdivision, transfer and registration of the disputed land on the respondent. The learned judge merely observed that from the Land Control Board consent dated 18th April 2012, following his application of the same date addressed to the respondent, the certificate of title and the search that was produced, showed that it was the appellant who caused the initial subdivision and transfer that created the title to the disputed land, registered in his name, which was in total disregard of the respondent's rights and interest. We find that on this basis, the learned judge cannot be faulted for reaching this conclusion.

On these facts, we consider that the learned judge analysed the evidence, and arrived at the correct conclusion that an overriding interest existed. We find that the evidence in support of the respondent's case did not portray any significant contradictions of discrepancies as to discredit his case.

Having arrived at this conclusion, we find no reason to disturb this decision, and we dismiss the appeal with costs to the respondent.

It is so ordered.

Dated and delivered at Kisumu this 23rd day of September, 2016.

D. K. MUSINGA

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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