



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 277 OF 2012

BETWEEN

JOKOBUNGA RANCHING GROUP APPELLANT

AND

JOKAETE RANCHING GROUP 1ST RESPONDENT

JOKODHUL RANCHING GROUP.....2ND RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisii (Makhandia, J.) dated 29th October 2010 in H.C.C. NO. 102 OF 2003 (O.S))

JUDGMENT OF THE COURT

1. The dispute giving rise to this appeal has had a chequered history. It started before 1972 and pitted members of the same family against each other. The last person to handle the matter before it came to this Court was Makhandia, J. (as he then was) in Kisii HCCC No. 102 of 2003 (OS).
2. In his decision in that case, the learned Judge restored the original subdivision of the piece of land known as **Title No. Kanyamwa/Kabonyo -Kwandiku/475** (the suit land) into three portions, that is the suit land itself (hereinafter referred to as parcel No. 475), **Title No. Kanyamwa/Kabonyo-Kwandiku/1940**(Parcel No.1940) and **Title No.Kanyamwa/Kabonyo-Kwandiku/1941** (Parcel No. 1941) and awarded Parcel No. 475 to the appellant and Parcel Nos. 1940 and 1941 to the 1st and 2nd respondents respectively.
3. A brief statement of the facts of the case is as follows. The members of the three Group Ranches which are the combatants in this appeal are great grandchildren of one **Owanga Lando**(the deceased) who had seven sons:Obunga, Ayete, Aduogi, Matunga,Odhul, Chandre and Ojenge. It would appear that before 1972 a dispute arose amongst the children and grandchildren of Obunga, Ayete and Odhul over the sharing of the deceased's piece of land. In 1972, the District Commissioner for the then South Nyanza District visited the disputed piece of land and discovered that what he had thought was a simple matter was a long drawn and complicated land dispute. As land adjudication in the area was about to commence, he left the dispute to be resolved by the Land Adjudication process.
4. Both the Adjudication Committee and the Adjudication Board, respectively operating under

Sections 20 and 22 of the now repealed Land Adjudication Act (the Act), awarded the suit land to the Obunga family. The Obunga family got the suit land registered in the name of their group ranch known as Jokobunga Ranching Group (the appellant). The Ayete and Odhul families successfully disputed that award. After hearing the dispute, pursuant to **Section 26** of the Act, the Land Adjudication Objection Board, (the Objection Board) under the Chairmanship of the Land Adjudication Officer for the area, shared the land among the families of the three brothers.

5. Pursuant to the Objection Board's said decision, the suit land was subdivided into three portions. The Ayete family got Parcel No. 1940 which they registered in the name of their group ranch known as Jokaete Ranching Group (the 1st respondent), the Odhul family got Parcel No. 1941 which they also registered in the name of their group ranch known as Jokodhul Ranching Group (the 2nd respondent) and Parcel No. 475 was allocated to the Appellant.
6. Aggrieved by that decision, the appellant appealed under the Act to the Minister for Lands and Settlement. Under the authority delegated to him by the Minister, the District Commissioner of the then Homa Bay District heard the appeal, reversed the Objection Board's decision and restored the entire suit land to the appellant.
7. This time round it was the respondents who were aggrieved. In Kisii HC Misc. Application No. 57 of 2000 they obtained a judicial review order of certiorari which quashed the Minister's said decision. The appellant, however refused to surrender to the Land Registrar the Title Deed to the suit land for cancellation and subsequent re-issue of Title Deed for Parcel Nos. 1940 and 1941. That prompted the respondents to file the said Kisii HC Misc. Application No. 102 of 2003 (OS) which as we have stated Makhandia, J. (as he then was) decided in favour of the respondents thus provoking this appeal.
8. We should at this stage point out that when the matter went before Justice Makhandia for defence hearing, an application for adjournment was made on behalf of the appellant on the ground that its major witness was unwell and therefore unable to go to court on that day to testify. In the absence of any medical evidence that the intended witness was unwell, Makhandia, J. dismissed that application for adjournment whereupon counsel for the appellant informed him that he had no evidence to offer. So the Originating Summons was determined on the evidence adduced by the respondents.
9. In its 15 prolix grounds of appeal, the appellant mainly faulted the learned Judge for and accused him of bias and recrimination in dismissing its application for adjournment; in failing to find that the suit brought by an unincorporated entity by way of originating summons was fatally incompetent; and that despite glaring contradictions in the respondents' case, the learned Judge erred in shifting the burden of proof to the appellant and holding that the case before him had been proved to the required standard.
10. At the hearing before us, counsel for the appellant filed written submissions which he entirely relied on while counsel for the respondents presented his submissions orally. We shall consider those rival submissions as we deal with each ground of appeal as summarized above.
11. In ground one, the appellant accused the learned Judge of bias and recrimination in relying on extraneous matters as the basis for dismissing its application for adjournment. Counsel for the appellant submitted that despite the clear record of the court proceedings that the hearing of the case had, at the instance of the respondents, previously been adjourned five times, the learned Judge erred in attributing, without any basis at all, the delay in the finalization of the case to the appellant. Counsel also faulted the learned Judge for accepting submissions from counsel for the respondents that the appellants' proposed witness had been seen fit as a fiddle the previous day and ignored the fact that the witness could have been taken ill the previous night leaving him with no time to get a medical certificate that he was unwell and that is why he sent his brother to say he was sick.

12. In response, Mr. Okoth, learned counsel for the respondents, dismissed this ground as a non-starter. He argued that the application for adjournment having been dismissed on 15th July 2010, the appellant should have lodged a notice of appeal and appealed against that dismissal within 60 days or obtained leave to appeal out of time. Having done neither, this ground cannot avail the appellant.
13. The trial court has unfettered discretion to grant or refuse applications for adjournment. An appellate court cannot overturn the trial court's exercise of discretion unless it is satisfied that the trial court misdirected itself and came to a wrong conclusion or unless it is manifest from the whole judgment that the Judge was clearly wrong in the exercise of his discretion. See **Shah v. Mbogo [1968] EA 93**.
14. In this case the trial Judge had a seriously contested application for adjournment. While on behalf of the appellant it was claimed that the witness it wished to call was sick, on behalf of the respondents it was contended that the witness had been seen the previous day going about his usual business, all these being submissions from the bar. In our view the learned Judge cannot be faulted for having accepted the submissions on behalf of the respondents. There is no extraneous matter as claimed by the appellant that the learned Judge took into account. In the circumstances the accusation against the learned Judge of being biased has no basis. We shall, later in this judgment advert to another aspect of this ground of appeal.
15. On the second ground the appellant contended that the respondents being unincorporated bodies, they were not legal persons who could sue or be sued. The appellant also contended that the nature of the claim did not fall within the purview of matters that can be brought by way of originating summons.
16. We cannot accept either of these arguments for the simple reason that they were not pleaded in the appellant's replying affidavit. Those contentious issues were raised for the first time in the final submissions made on behalf of the appellant. It is trite law that a court cannot grant reliefs that are not sought unless the matter has, without any objection, been canvassed at the hearing and left to the court to decide - **Vyas Industries v. Diocese of Meru [1982] KLR 114**.
17. Furthermore, we do not know if the respondents would have adduced evidence to prove their legal personality had the matter been pleaded or canvassed at the hearing. At any rate, group representatives which were incorporated under **Section 7** of the Land (Group Representatives) Act Cap 287 of the Laws of Kenya (now repealed) were body corporates with perpetual succession. In this case it is the appellant which claimed that the respondents were unincorporated bodies with no legal capacity to sue. Under **Section 107** of the Evidence Act, the burden was therefore on it to establish that allegation but it failed. That ground therefore fails.
18. The other argument on this ground was that the appellant was registered as proprietor of the suit land on a first registration which was, under **Section 143** of the Registered Land Act (now repealed), unassailable least of all by way of originating summons. Counsel for the appellant argued that the procedure of originating summons should not be used in litigating contested disputes. He cited this Court's decision in the cases of **Kenya Commercial Bank Ltd v. James Osebe [1982 – 88] 1KAR 48** and **John Wepukhulu v. Secretary, BOG Buruburu Secondary School, C.A. No. 310 of 2002** (unreported) as authority in support of that argument.
19. As was stated by Sir Ralph Windham in **Kulsumbai v. Abdulhussein [1957] EA at 70**, a decision that was cited with approval in the **Kenya Commercial Bank case** (supra), the procedure of originating summons was primarily designed for resolution of simple points of law and fact “*without the expense of bringing an action in the usual way.*” It was not meant for determination of disputed questions of fact.
20. In this case we reject counsel for the appellant's submission that the appeal to the Minister still remains pending for hearing. When, in HC Misc. Application No. 57 of 2000, the High Court

quashed the Minister's said decision, with no appeal therefrom, the Objection Board's decision was, as it were, affirmed and the ownership of Parcel Nos. 1940 and 1941 reverted to the respondents. So the declaration the respondents sought in the originating summons that they were the owners of Parcel Nos.1940 and 1941 was not a disputed issue any more. There was therefore nothing wrong in employing the originating summons procedure.

21. Even if we are wrong in holding that the issue in the originating summons was not in dispute, we have no doubt that the proceedings in the matter cannot be faulted. Pursuant to the appellant's notice of motion dated 25th July 2011, on 9th October 2003 the High Court converted the originating summons into a plaint and the replying affidavit into a defence and thereafter the matter was determined on *viva voce* evidence. From the foregoing, it follows that the second ground of this appeal must also fail.

22. The last ground of appeal is that there was no sufficient and credible evidence to support the learned Judge's decision. With respect, that submission has also no basis. As stated, the Objection Board had subdivided the suit land into three portions and that decision and as stated, as it were, was affirmed by the High Court when it quashed the Minister's decision that had reversed it. The originating summons giving rise to this appeal sought to enforce the Objection Board's said decision. In the circumstances, the learned Judge did not require any further material to grant the impugned declaration. This ground of appeal also fails.

23. For these reasons, we find no merit in this appeal and we accordingly dismiss it with costs.

DATED and delivered at Kisumu this 23rd day of April, 2015.

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR