



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, GATEMBU & MURGOR JJ.A)

CIVIL APPEAL NO. 88 OF 2012

BETWEEN

SAMWEL ODOYO OPANY.....APPELLANT

AND

FENA OMONDI OMOLO The Legal Representative of

MUSA OMOLO GEORGE.....RESPONDENT

(An Appeal from a Judgment of the High Court of Kenya at Kisii,
(Sitati, J.) dated 28th October, 2011

in

CIVIL SUIT NO. 56 OF 2006 (O.S))

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of Sitati, J. delivered on 28th October, 2011 in Kisii HCC No. 56 of 2006 (OS) in which the learned Judge dismissed the appellant's suit with costs. This appeal is against that decision. .

2. Relying on the seven grounds in the appellant's memorandum of appeal which he argued together, Mr. G. S. Okoth, learned counsel for the appellant submitted that in his OS, the appellant did not seek to challenge the decision of the South Nyanza District Adjudication Objection Board (the Objection Board) or that of the Minister. All that the appellant sought was the interpretation of those decisions and thereafter declaration that, as the Objection Board found, which decision the Minister for Lands and Settlement (the Minister) confirmed, the appellant's father sold to the respondent only two acres of the land. He also submitted that the matter is not *res judicata* as no title deeds have been issued in the area. He therefore urged us to allow this appeal with costs.

3. In response to those submissions, Mr. O. Kisera, learned counsel for the respondent, submitted that this appeal is a clever attempt by the appellant to challenge the decisions of the Objection Board and the Minister without following the laid down procedure. **If the appellant's father was aggrieved by either of those decisions, he should have challenged the same by way of a Judicial Review Application.** He said that the Objection Board never held that the appellant's father sold to the

respondent only two acres. The appellant's father said the land he sold to the respondent was never surveyed. The respondent on his part stated that he bought the land shown to him which, after the adjudication process was over was allocated to him and named **Plot No. 7**. When the appellant complained, the Land Adjudication Officer who chaired the Objection Board chopped off a portion of about 2.5 acres, gave it **Plot No. 2633**, and allocated it to the appellant's father. The rest of plot No. 7 which comprised of 14.6 acres remained in the respondent's name. The Minister confirmed that decision and there was no need to seek any interpretation of the same. He urged us to dismiss this appeal with costs.

4. We have considered these rival submissions and carefully read the record of appeal. Contrary to Mr. Okoth's submissions, the record of the proceedings before the Adjudication Board clearly shows that the appellant's father did not know the size of the land he sold to the respondent. Neither did the respondent.

5. In those proceedings, the respondent claimed that the appellant's father walked him round the perimeter of the land that he was selling which stretched from the Homa-Bay/Rongo road to River Akele. He further claimed that he continued using that piece of land whilst also employing the services of the appellant and his mother without any dispute for a period of twenty six years.

6. Both the Objection Board and the Minister rejected that claim for the single reason that the appellant's father could not have sold the entire piece of land including the portion that had his first wife's grave. With that finding, the Objection Board gave the appellant's father the portion from the road upto his Ganjo and the remainder to the respondent.

7. In the appeal before the Minister, the appellant claimed that his father sold more land to the respondent. If he had done so, he would have told him and his siblings as well as their mother but he did not.

8. The Minister, quite correctly in our view, dismissed that argument and confirmed the Objection Board's said decision. As the appellant said he was not challenging either the Objection Board's decision or that of the Minister, we find that, although the learned Judge went off tangent, by referring to the provisions of **Sections 143(1)** of the Registered Land Act which had no application in the matter, she was however right in dismissing the appellant's father's OS. Consequently we find no merit in this appeal and we also dismiss it with costs.

DATED and delivered at Kisumu this 19th day of June, 2015.

D.K.MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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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