



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, SICHALE & KANTAI, JJ.A)

CIVIL APPEAL NO. 235 OF 2011

BETWEEN

MASIAYA OLE OLOIJE APPELLANT

AND

WILLIUM SIMINTEI 1ST RESPONDENT

SOLITAI OLE KAYANKA (CHAIRMAN)

BEING REPRESENTATIVE OF OLDONYO

OROK GROUP RANCH) 2ND RESPONDENT

LAND REGISTRAR KAJIADO 3RD RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Ang’awa, J) delivered on 31st July, 2007

in

H. C. C. C. NO. 744 OF 2004 O.S)

JUDGMENT OF THE COURT

The suit the subject matter of this appeal was commenced by the filing of an originating summons by the appellant, **MASIAYA OLE OLOIJE** (the then plaintiff/applicant) on 8th July 2004. The originating summons was made pursuant to the then O.XXXVI Rule 3(d) and (f) of the Civil Procedure Rules, Section 38 (1) &

(4) of the Limitations of Actions Act and Section 143 of the Registered Land Act (repealed). In the originating summons the appellant sought

“..... the determination of the following questions:

1. Whether or not the Plaintiff is entitled to parcel of land known as Kajiado/Meto/1021 by

way of allocation and adverse possession.

2. Whether or not the 3rd Defendant should be ordered by this Court to execute a transfer of parcel of land known as Kajiado/Meto/1021 and in default the Deputy Registrar to execute the transfer in favour of the plaintiff and or rectify the record by entering the Plaintiff's name in place of the 1st Defendant's name in the said title documents and or register.

3. Whether or not the 1st Defendant fraudulently, procured the registration of the said parcel of land known as Kajiado/Meto/1021 in his name with connivance by the 2nd defendant and 3rd Defendant in total disregard to the proprietary interests, rights and title of the Plaintiff by way of allocation.

4. Whether or not the Senior Land Registrar at Kajiado should be ordered to rectify the register by directing that the registration of 1st Defendant as the proprietor of parcel known as Kajiado/Meto/1021 be cancelled and in his place the Plaintiff be registered as the proprietor thereof.

5. Whether or not the Defendants should pay to the Plaintiff the costs of this suit.”

In support of the summons, the appellant swore an affidavit dated 7th June, 2004 in which he deposed that vide a beacon certificate dated 20th May, 1993 he was allocated plot No. 53 by Oldonyo Orok Group Ranch, the 2nd respondent herein; that title No. 1021/53 corresponds with beacon certificate No. 53; that the said plot was irregularly registered in the name of **WILLIAM SIMINTEI**, the 1st respondent herein; that the issuance of the title to the 1st respondent by the Land Registrar Kajiado, the 3rd respondent herein was fraudulent, and finally, that he has lived on the suit land from 1993.

Unfortunately the respondents' responses to the appellant's originating summons are not part of the record. We were, therefore, unable to discern their positions in the matter. However, be that as it may, Ang'awa, J in a judgment dated 31st July, 2007 rendered herself as follows:

“7. I find that the plaintiff hold (*sic*) another piece of land Kajiado/Meto/1108 which belongs to him. He is a busy body and has coveted property that does not belong to him but to the 1st defendant. I am satisfied that the 1st defendant is the rightful owner of the parcel of land in question.

8. I further hold that the plaintiff is not entitled to adverse possession. He has indeed misled this court and other *qusai* judicature (*sic*) body that he is the rightful owner.

This court has established that he is not and accordingly dismiss his suit with costs to defendant 1, 2, 3. That the plaintiff be evicted forthwith from the land.”

The appellant was dissatisfied with the outcome of the case and hence this appeal.

In a memorandum of appeal dated 11th November, 2011 the appellant faulted the learned judge of the High Court for finding that the 1st respondent was the owner of plot No. 53 which upon registration became Kajiado/Meto/1021 as opposed to finding that the 1st respondent's parcel of land was Kajiado/Meto/1108; that the trial court erred in finding that LR Kajiado/Meto/1108 belonged to the appellant and finally that the learned judge erred in finding that the 1st respondent lives in plot Kajiado/Meto/1021 and on the same breath issued an order of eviction against the appellant to be evicted from Kajiado/Meto/1021. The appellant sought the following orders:

“(a) The judgment dated 31st July 2007 be set aside.

(b) The Civil Suit No. 744 of 2004 be put for hearing and determination.

(c) The costs for this Appeal be provided for.”

The appeal came before us for plenary hearing on 7th July, 2015. The Land Registrar, Kajiado the 3rd respondent herein, or its representative was absent inspite of service of the hearing notice on 2nd July, 2015. Similarly, there was no representation on behalf of the 2nd respondent. We were informed by Mr. Osoro learned counsel for the appellant that the 2nd respondent had been dissolved. We had no reason to doubt this and we allowed the appeal to proceed to hearing. Mr. Osoro urged us to find that plot No. 53 was allocated to the appellant who was duly issued with a beacon certificate dated 20th May, 1993 allocating him plot No. 53 after he fully paid for the plot and all other attendant charges. He asserted that upon issuance of the said certificate the appellant took possession of plot No. 53 and he is not willing to move to plot No. 108. He concluded his submissions by asking us to order a retrial.

Mr. Owino, the learned counsel for the 1st respondent opposed the appeal. He pointed out that the record of appeal was incomplete; that the replying affidavit in response to the originating summons was missing; that the extract of the title was not annexed to the originating summons; that the 1st respondent's title was a first registration and hence indefeasible in view of Section 143 of the Registered Land Act (now repealed) and finally that although the appellant had been issued with plot No. 53, this allocation was later varied by the issuance of title in respect of plot No. 53 to the 1st respondent.

Neither the appellant's nor the 1st respondent's counsel furnished us with authorities to support their rival submissions.

This is a first appeal before us. The position of the law as regards a first appeal is that we are entitled to re-evaluate and re-analyze the evidence tendered in the trial court and come to our own conclusion whilst bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of the witnesses (see **Selle & Another vs Associated Motor Boats Co. Ltd [1968] EA 123**). In undertaking that obligation we are guided by the principle that a Court of Appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or the judge is shown to have acted on a wrong principle in reaching the findings he did (see **Jabane vs Olenja [1986] KLR 661**).

It is against that backdrop that we have considered the record of appeal, the memorandum of appeal and the rival submissions of counsel.

It is unfortunate that this appeal proceeded to hearing without the benefit of a complete record. As pointed out by the 1st respondent's counsel, the affidavit in response to the originating summons was missing. It is regretted that none of the counsel on record endeavored to have a complete record. Be that as it may, the appellant's originating summons was supported by the appellant's affidavit sworn on 7th June, 2004. In the affidavit the appellant deponed that there was a 'dispute' as he was issued with certificate of title No. 1108 which does not correspond with survey beacon certificate No. 53 issued to him on 20th May, 1993. The appellant further deponed that the title number which corresponds with beacon certificate No. 53 is No 1021 “..... **which was registered irregularly and/or fraudulently**

.....” in the name of the 1st respondent. He accused the 2nd and 3rd respondents of fraudulently issuing the title to the 1st respondent.

On our part, we note that the appellant's suit in the High Court was registered as HCC. No. 744 of 2004 and was titled “originating summons.” The originating summons was brought under order XXXVI Rule 3 D and F of the Civil Procedure Rules, Section 38 (1) & 4 of the Limitation of Actions Act Section 143 of the Registered Land Act. Although therefore the originating summons was registered as a civil case, it was an originating summons for all intents and purposes.

In our view, the procedure of invoking an originating summons is limited to issues that are simple and straight forward. In the appeal before us, it is clear that the issues were not simple. Indeed, the appellant acknowledged that there was a 'dispute'. It is because of this dispute that his prayers in the originating summons were for the determination of "the dispute." He did not seek declaratory orders arising from simple and straight forward matters but wanted the court to determine the "dispute." This Court in **Kenya Commercial Bank –vs- Oisebe [1982] KLR 296** held at page 63 of the judgment as follows:

"It is now well established that the originating summons procedure is available only in a limited number of cases specially provided and the procedure is designed to deal with simple matter which may be decided by the court without the expense of bringing an action and was not intended for determination of matters which involved a serious question on contested facts.

We, therefore, find that there was no jurisdiction to entertain the originating summons as taken out and it ought to have been struck out. See Floriculture International Ltd. –vs-Central Kenya [1995-98]1 EA 61."

Similarly in this appeal we find that the appellant's suit involved serious issues of law and contested facts.

This is because, apart from the appellant acknowledging the dispute between him and the 1st respondent, he accused the 2nd and 3rd respondents of fraud. How was the allegation of fraud to be proved in an originating summons? As has been said time and again by this Court, an allegation of fraud is such a weighty matter and cannot be dealt with in an originating summons. Indeed particulars of the alleged fraud must be pleaded, and general allegations of fraud would not suffice. Further, the standard of proof in an allegation of fraud is much higher than in an ordinary civil case.

In **Mutsonga V. Nyati [1984] K.L.R. 425** this Court stated thus:-

"Allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities, and it is a question for the trial judge to answer."

In the case **Central Bank of Kenya Ltd –vs- Trust Bank Ltd & 4 Others Civil Appeal No. 215 of 1996** this Court in considering the standard of proof required where fraud is alleged had this to say:

"The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case."

It was therefore wrong for the appellant to file an originating summon to determine the issue of fraud which in the event was not proved.

The appellant further contended that he had acquired the suit land by adverse possession. However, according to the appellant he entered into the suit land in 1993. The originating summons was filed on 8th July, 2004. In his further supporting affidavit sworn on 3rd May, 2005 he acknowledges that he had lived on the suit land for over and above 11 years. It is our view that "over and above 11 years" does not amount to 12 years to warrant a claim for adverse possession.

In view of the above, we do not deem it necessary to go into the issue of failure to annex an extract of title to the originating summons and to the issue of indefeasibility of title. We believe we have said enough to show that this appeal is for dismissal. The appeal is dismissed with costs for the 1st respondent as the others did not appear inspite of being served.

Dated and delivered at Nairobi this 9th day of October, 2015.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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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