



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 11 OF 2009

BETWEEN

JOHN OBWOGE NYABWARI ..... APPELLANT

AND

ANDREW ONDITI OBWOGE )

JOSHUA NYAKERIGA )

SUSAN OERI OBWOGE )..... RESPONDENTS

HEZEKIA JOHN MAKORI )

*(An appeal from the Ruling and Orders of the High Court of Kenya at Kisii (Kaburu Bauni, J.) dated 29th September 2005*

in

CC NO. 131 OF 1997)

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JUDGEMENT OF THE COURT

The appellant is aggrieved by the ruling and order of the High Court, Kaburu Bauni J, dated 29th September, 2005 cancelling the subdivision of title number **Manga Settlement Scheme/55** (hereinafter the “**subject title**”) into title numbers **Manga Settlement Scheme/714 to 719** and restoring the original title number Manga Settlement Scheme/55 and then ordering fresh sub-division of the restored title into four (4) equal portions to be registered in the names of **Andrew Ontiti Obwoge, Ezekiel John Makori, Joshua Nyakeriga Obwoge** the respondents and the estate of **Hezron Nyabwari Obwoge**. Hezron Nyambari Obwoge was the father of the appellant and brother of the respondents and the four brothers were the sons of **Teresia Nyamorabu (Teresa)** who was originally the registered proprietor of the subject title.

It would appear that Teresa died intestate and Hezron Nyabwari Obwoge, the father of the appellant, applied for and obtained a Grant of Representation to her estate. The record shows that he became registered against the subject title as an Administrator and obtained a Title Deed on 31st March, 1995. The record further shows that Hezron Nyabwari Obwoge in turn died on 15th August, 1995 and his son,

the appellant herein, applied for and obtained a Grant of Representation to his estate in Kisii High Court succession cause No. 203 of 1996. He became registered as proprietor of the subject title on 17th January, 1997.

The respondents felt disinherited and therefore instituted Kisii **HCCC NO. 131 of 1997** seeking two main orders of the court namely; a declaration that the appellant's registration as proprietor of the subject title was a nullity and the same be transferred equally in their names and that of the appellant and in the alternative the appellant be directed to sign documents of transfer of four acres each in favour of the respondents and the appellant. In a defence dated 23rd April, 1997, the appellant denied the respondents' claim.

In due course that case came up for hearing on 9th December, 1998 before *Mbaluto, J.* The respondents were represented by learned counsel Soire and the appellant was represented by learned counsel G. Masese. The record shows that by consent the dispute between respondents and the appellant was referred to the arbitration of the **District Officer Nyansiongo** assisted by four (4) elders, two (2) appointed by each side to the dispute.

On 5th March, 1999 the arbitral proceedings and the resultant award were filed in the High Court. The award was in the following terms:-

**“That the piece of land in question should be divided equally among (4) sons of the late Teresa Nyamoraby (sic).**

**Thus:**

- 1) Andrew Obwoge**
- 2) Ezekiel John Makori**
- 3) Joshua Nyakariga Obwoge**
- 4) Hezron Nyabwari Obwoge”**

The appellant made several attempts to challenge the above order and the award itself without success. He however, somehow, effected a sub-division of the subject title and created title numbers Manga Settlement Scheme/714 to 719. The subject title was then closed on 10th March, 2004.

That event triggered the filing of the application which came up for hearing before Bauni J, and the ruling whereof is the subject of this appeal. The learned Judge delivered himself as follows:-

***“The facts are very clear. The land belonged to Teresa who was mother of the applicants and the father of the respondent. In fact even a letter from the Chief supporting the respondent's father(s) application in succession cause No. 8 of 1998 clearly indicates the four are sons of Teresa. This suit was referred to arbitration by court and the elders award which I have set out above is very clear. This award was adopted as court's judgement and as such the purported sub-division of the land into five portions flies to (sic) the face of that court's order.***

***I therefore find the application is merited and the same is allowed and court orders as follows:-***

- 1) The registration of Manga Settlement Scheme/Nos 714-719 which, was a result of sub-division of Manga Scheme/55 be and is hereby cancelled.***
- 2) Registration of Manga Scheme/55 be restored after which it be sub-divided into four equal portions***

***each to be transferred to:-***

- 1) *Andrew Ontiti Obwoge,***
- 2) *Ezekiel John Makori,***
- 3) *Joshua Nyakeriga Obwoge and***
- 4) *The estate of the late Hezron Nyabwari Obwoge.***
- 5) *The respondent to pay costs of the application.”***

The appellant appeals against that decision on the main grounds that the learned Judge of the High Court erred in accepting the arbitral award when the arbitrator misconducted himself; that non-parties were considered when the arbitral award was adopted by the court; that the learned judge considered extraneous matters in arriving at his decision and also failed to consider that succession cause No. 8 of 1996 had disallowed the respondent's claim. The appellant passionately urged those grounds before us on 24th April, 2013.

Mr. Soire, learned counsel who represented the respondents, as he did in the High Court, opposed the appeal contending, in the main, that all the complaints made by the appellant had been considered by the learned Judge of the High Court who had correctly rejected them. He therefore saw no merit in the appeal and urged that we dismiss it with costs.

At the heart of this matter is who is entitled to the subject title. The learned Judge of the High Court, in the decision being challenged, determined correctly, in our view, that the title initially belonged to Teresa the mother of the appellant's father and the respondents. There is really no dispute that on 22nd November, 1994, Teresa was the registered proprietor of the subject title. This record has a certified copy of the register in respect of the subject title which clearly shows that Teresa was indeed the registered proprietor thereof as at the said date.

There is also no dispute that the appellant's father and the respondents are the sons of Teresa.

It is also not in dispute that the respondent's brother Hezron Nyabwari (Nyabwari) who was also the father of the appellant applied for and obtained a Grant of Representation to the estate of Teresa. He then obtained registration of the subject title in his name. It is incontestable that Nyaribwari was not a purchaser of the subject title. On his demise, the appellant applied for and obtained a Grant of Representation to his estate followed by registration of the subject title in his name.

His action provoked the institution of HCCC No. 131 of 1997 by the respondents which, as already stated, was referred to arbitration, in which arbitration, the appellant fully participated. The arbitral team directed that the subject title be divided equally among four (4) sons of the late Teresa namely; the respondents and the appellant's father. That award was filed in the High Court on 9th March, 1999.

Before the award could be enforced, the appellant sub-divided the subject title and created title numbers Manga Settlement Scheme/714 to 719. That event triggered the respondent's application dated 2nd June, 2005 in which they sought, among other orders, cancellation of the said sub-division and restoration of the subject title and for a consequential order that the restored title be sub-divided into four (4) portions in terms of the arbitral award.

There is no doubt that when the appellant carried out the sub-division of the subject title into the said portions on 10th March, 2004, the award made by the arbitrator and the four elders was subsisting as it had not been set aside or reviewed notwithstanding the various applications made by the appellant. On 5th May, 1999, the appellant, through G. Masese, advocate, sought the setting aside of the arbitral award on the main ground, that the arbitrator mis-conducted himself. That application was dismissed on 27th March, 2000. On 23rd May, 2000, the appellant sought an order reviewing the said arbitral award to

conform to the prayers in the plaint and for a further order that the award be modified with the result that each brother gets four (4) acres taking into account the developments on the subject title. This record does not contain the results of that application.

On 11th December, 2000 the appellant, through M/S Nyatundo & Company advocates, sought among other orders, one declaring the respondents' suit a nullity. That application was struck out on 13th March, 2001.

The appellant did not give up because on 21st June, 2001 he again sought an order reviewing or setting aside of the order referring the dispute to arbitration. The appellant, among other grounds, alleged that the suit was resjudicata by reason of Kisii Succession Cause No. 8 of 1995 previously decided against the respondents. That application was dismissed on 30th November, 2001.

There is no evidence that the appellant challenged the adverse orders made against him in those applications by way of any appeal. Having failed to challenge those High Court orders refusing to set aside or review the order referring the dispute to arbitration or refusing to set aside the award itself, the appellant, in our view, could not seriously challenge the order of Bauni J. cancelling the sub-divisions made contrary to the order on record. We also fail to appreciate how Bauni J's order would be challenged given that in one of his own applications (application dated 23rd May, 2000) the appellant sought an order sub-dividing the subject title into four (4) portions taking account of existing developments on the ground.

In all those premises, we do not think that to re-open litigation of the matter, given the history we have discussed above, would serve the ends of justice. The complaints made by the appellant in this appeal were considered by various Judges of the High Court at various stages as stated above without eliciting appeals therefrom to this Court. In any event once it is appreciated that the subject title was initially the property of the mother of the respondents and the father of the appellant, the appellant's complaints lose lustre and the order of Bauni J. was, in our view, inevitable

We therefore find that the learned Judge of the High Court reached a correct and just decision.

Accordingly, this appeal has no merit. We dismiss it with costs to the respondents.

**Dated and delivered at Kisumu this 14th day of June, 2013.**

**J.W. ONYANGO OTIENO**

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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 the true copy of original.

**DEPUTY REGISTRAR**