



REPUBLIC OF KENYA

Court of Appeal at Kisumu

Civil Appeal 180 of 2006

JOEL OTIOGO NYASINGA APPELLANT

AND

KENNEDY ONYANGORE

MARY KEMUNTO MATAGARO RESPONDENTS

(Appeal from a judgment of the High Court of Kenya at Kisii (Bauni, J) dated 29th March, 2006

in

HCC. NO. 506 OF 1997)

JUDGMENT OF THE COURT

The suit before the High Court Kisii, which has now snowballed into this appeal was filed by **JOEL OTIOGO NYASINGA** (the appellant) against **KENNEDY ONYANGORE and MARY KEMUNTO MATAGARO** (the 1st and 2nd respondents). The appellant's claim was that he became the registered proprietor of Parcel Nos. **NYARIBARI CHACHE/B/B/BOBURIA/5355, 5355 and 5356** which was from an original subdivision of Parcel No. **Nyaribari Chache/B/B/Boburia/5085**.

He contended that the respondents unlawfully entered his parcel of land and constructed structures therein, they even buried the body of the late **Onyangore Obebo Miroro** on his parcel of land against his protest and they have continued to commit further acts of trespass on his land. The appellant sought for an order of eviction and although he also prayed for an order directing that the remains of the body of the late Miroro be exhumed from the suit land, he abandoned that aspect of the grounds of appeal.

The 1st respondent filed a defence denying the appellant's claim and in particular the ownership of the suit premises, which he claimed was their ancestral land bequeathed to them by their forefathers. The 2nd respondent did not file any pleadings in the High Court and was not represented during the hearing of this appeal although she was duly served with a hearing notice.

The appellant's case before the High Court was partly heard by Wambilyangah, J and after he left the Judiciary, the trial of the matter was taken over by Bauni, J whose judgment is being challenged.

We will recapitulate, albeit briefly the evidence that was before the learned trial Judge in order to

bring this judgment into perspective. Looking at the evidence adduced by both the appellant and the respondent, it is common ground that the suit property belonged to Onyangore Obebo who died in the year 2001; it was a share of his inheritance from his late father one Miroro Obebo. Onyangore was the one who entered into an agreement with the appellant on 8th December, 1991, to sell a portion of land known as Nyaribari Chache/B/B/Boburia/1595 measuring approximately 45ft x 125ft at an agreed price of KShs.45,000/=.

The sale was subject to the said Obebo obtaining the requisite letters of administration in respect of the estate of his late father Miroro. His mother, Helena Kemunto applied for the letters of administration in respect of the estate of Miroro. It was indicated in the certificate of the confirmed grant in Succession Cause No. 43 of 1992 that:

“... Joel Otiogo Nyasingo who are buyersJoel has bought a marked portion from the share of Onyangore in the Parcel No. 1595.”

The evidence before the learned trial judge further shows the parcel was subdivided and a portion known as O/S 5085 was carved out. It would appear the appellant subdivided that parcel further into plot Nos. 5354, 5335 and 5356. The respondent put up a spirited defence that challenged the sale agreement and which alluded to several aspects of fraud in the way the subdivision and transfers were effected even before the letters of administration were issued.

After evaluating the evidence, the learned trial judge arrived at a conclusion that there was unchallenged evidence that the appellant bought a portion of 45ft x 125ft from Onyangore, who is the father of the 1st respondent. The learned trial judge nonetheless, disregarded the defence evidence that alluded to some irregularities regarding the subdivision and transfer of the suit land from the late Miroro to the appellant. The learned judge seems to have carefully scrutinized the records of transfer and the sizes of the three [3] plots subdivided by the appellant from parcel No. 5085 which came to a total of 11,840.2 sq ft; this was despite the fact that he had purchased 45ft x 125ft which is 5625 sq ft. The learned Judge ordered a resurvey so that only a portion of 45ft x 125ft was transferred to the appellant.

Being aggrieved by that judgment, the appellant has mounted the present appeal. In his memorandum of appeal, he raised four [4] grounds of appeal to wit:

“1. The learned trial judge erred in law and misdirected himself fundamentally in holding that appellant had fraudulently acquired more land than purchased when no such issue was pleaded or any evidence adduced to that effect for determination.

2. The learned trial judge erred in law and misdirected himself fundamentally in holding that the late Onyangore Obebo was buried before the issuance of title deeds in issue were given to the appellant which is clearly against the weight of the evidence adduced at the trial.

3. The learned trial judge erred in law and in fact to take into account and fully the weight of the documentary evidence before him.

4. The learned trial judge erred in law and misdirected himself fundamentally in failing to recognize the benefits which a registered owner ought to enjoy.”

In further arguments in support of the above grounds, Mr Bosire learned counsel for the appellant, submitted that since the trial judge made a finding that the appellant was a purchaser, the judge erred by making a finding that the land was more than what was bought despite the fact that the person who sold it never complained. He urged us to find that the 1st respondent has no *locus standi* in law to complain; moreover the land was subdivided before Onyangore died and that is why the appellant protested his burial on his parcel of land; the appellant was already in possession of the land, a matter that the trial judge failed to consider.

On the part of the 1st respondent, this appeal was opposed on the grounds that the appellant was supposed to derive title after transmission to the late Obebo; the 1st respondent was sued when his father was alive for allegedly trespassing on the appellant's parcel of land which belonged to his forefathers. The respondent contended that there were glaring irregularities in the way the title was transferred to the appellant even before the letters of administration were issued; based on that evidence the learned trial judge made a finding that indeed the appellant had acquired more land than what was indicated in the sale agreement. Counsel urged us to re-evaluate the evidence and arrive at our own independent determination of the matter.

This being a first appeal, it is indeed our duty to re-evaluate the evidence before the trial court and arrive at our own independent conclusion on whether or not to uphold the judgment with the usual caution that we never heard nor saw the witnesses as they testified and to give allowance for that. In the case of **SELLE & ANOTHER V ASSOCIATED MOTOR BOARD COMPANY LTD AND OTHERS [1968] 1 EA 123**, the Court of Appeal for East Africa set out the principles to quote the Court of Appeal in determining on appeal from the High Court as follows:

“An appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial judge findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inhabited with the evidence generally.”

In a similar case this court held in **HAHN V SINGH [1985] KLR 716** that:

“On appeal of course, before coming to a different conclusion on the typed evidence this court should be satisfied that the advantage enjoyed by the trial judge of seeing and hearing the witnesses is not sufficient to explain or justify his conclusion.”

The learned trial judge who had the first hand opportunity to see and hear the witnesses considered all the evidence in support of the appellant's case, which was based on a sale agreement. The sale agreement specifically identified the portion he was buying as 45ft x 125ft totaling 5,625 square feet. However, the title deeds that the appellant wanted the court to decree as his properties measured almost double the land the appellant had purchased as per the sale agreement and as rightly pointed out in the judge's well reasoned opinion, the appellant could not explain how he came to have more land than he had purchased. At page 6 of the judgment; he said:

“I have stated the plaintiff was first registered as owner of plot No. 5085. He did not tell court why he chose to subdivide it into three portion [sic]. I have looked at the three green cards he produced parcel No 5354 measures 0.03 ha, parcel No. 5355 measures 0.04 ha. If my calculations are right that is a total of 11,840.2 square feet. He had bought only 45 x 125 ft which is 5625 square feet. It is clear, therefore, that he got more land than he had bought and I would not be surprised if the subdividing of parcel No. 5085 was not to hide this fact. In his evidence he was economical and did not say how big the land he was holding was. Taking more land than he bought of course is fraud and though the defendants had not put in a counterclaim they cannot legalise the fraud.”

We are in agreement with the learned trial judge who had the advantage of hearing and seeing the witnesses. Besides, the reasons given are well founded and supported by documentary evidence adduced by the appellant. On the issue that the judge made a determination of issues that were not before the court. We hasten to add that when parties to a case (as in this case) adduced their evidence, it was left for the decision of the Judge and he made a determination on the evidence contained in the sale agreement, thus, since the issue of the size of land was indicated in the sale agreement, there was no impediment to stop the judge from making due consideration and import of the agreement as it was a matter canvassed and left for the determination of the Court.

This is also in line with the opinion of this Court posited several years ago in the case of **VYAS INDUSTRIES V DIOCESE OF MERU, CA NO 23 OF 1976**, in which Law, VP, Mustafa & Musoke, JJA expressed themselves thus:

“The court may base its decision on an unpleaded issue if during the course of the trial the issue has been left for the decision of the court. In this instant, the issue was left for the court’s decision when the appellant addressed the court and led evidence on the issue.”

Also in the case of **ODD JOBS VS. RUBIA, (1970) EA 476.**

In the circumstances of this case, the learned judge did not misapprehend the evidence. He rightly interpreted the sale agreement which was the basis upon which the appellant came to be the owner of the suit property. The judge also rightly disregarded the defence that the respondent’s father had not sold the land, as the court could not have re-written the agreement for the parties. By ordering a re-survey and re-transfer, any fraud that was committed was to be rectified. This finding is borne out of the law of contract as it was held in the case of **NATIONAL BANK OF KENYA LIMITED V PIPEPLASTIC SAMKOLIT (K) LTD, [2002] 2 EA 504 at page 507:**

“A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved.”

From the defence evidence, the judge did not come across any evidence that vitiated the written agreement and by ordering a re-survey and transfer of the exact portion that the appellant purchased, any irregularity that was committed was to be rectified.

Since counsel for the respondent abandoned the ground of appeal regarding the exhumation of the body of the late Obebo, we need not say more on that. The appeal lacks merit and it is dismissed with costs to the 1st respondent.

Dated and delivered at Kisumu this 10TH day of October, 2012.

J. W. ONYANGO OTIENO

JUDGE OF APPEAL

W. KARANJA

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR