IN THE COURT OF APPEAL
AT KISUMU

(CORAM: TUNOI, ONYANGO OTIENO & AGANYANYA, JJ.A.)

CIVIL APPEAL NO. 68 OF 2005

BETWEEN

BOSIRE TIEBIRO ……………….……………………………………..APPELLANT
AND
SAMUEL MARIITA OPANDE ……………………………………..RESPONDENT

(Appeal from judgment of the High Court of Kenya at Kisii (Kaburu Bauni, J.) dated 21st October, 2004

in

H.C.C.C. NO. 2 OF 2000)
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JUDGMENT OF THE COURT

The appellant ***Bosire Tiebiro*** is brother in law of the respondent ***Samuel Marita Opande***, he having married respondent's sister. His father in law who was respondent's father, was Zedekiah Opande (deaceased). Before the demise of Zedekia, both appellant and Zedekia were members of Abanchani Farmers Company. They jointly bought one share in that company and were both jointly allocated 23 acres of land being their joint entitlement for their one share. However, it would appear that their individual contributions for that one share were not equal and the record shows that they had disputes as to what portion of the 23 acres was to be allocated to each of them. That dispute, according to the record before us, was taken to court and a decision made thereon. We will revert to that hereafter in this judgment. It appears that the appellant was not satisfied by that decision or ignored it. Whatever is the case, in a plaint dated 5th January 2000, and filed in the superior court on 6th January 2000 as HCCC No. 2 of 2000, the appellant sued the respondent seeking:-

"(a) An order of eviction against the defendant, his agents or servants for land parcel No. YAMIRA/NYANKONO/54,
(b) A permanent injunction restraining the defendants from entering, tilling, cultivating, erecting any structures and/or dealing with land parcel No. NYAMIRA/NYANKONO/54.
(c) Costs of this suit
(d) Any other order this Court deems fit to grant."

These prayers were sought by the appellant on grounds that were set out in the plaint and which were covered in paragraph 4 of the plaint thus:-

"Sometimes during 1999, without any justifiable and/or excuse, and without the consent of the plaintiff, the defendant entered onto a portion of the plaintiff's land parcel No.

NYAMIRA/NYANKONO/54 and erected structures thereon and has also continued to occupy and/or till the same at the exclusion of the plaintiff making the filing of this suit necessary."

In response, the respondent filed statement of defence, but later amended it by way of amended defence filed on 26th March 2002 in which the respondent stated at paragraphs 3, 4 and 5A as follows:-

"3. The defendant refers to paragraph 4 of the plaint and denies entering the disputed land and occupying 3 acres of the same and puts the plaintiff to strict proof thereof.

4. In further answer to paragraph 4 of the plaint the defendant avers that since 1975 to date he is in occupation of about 5 acres being part of the unadministered estate of his late father, Zedekia Opande Mwaro whose land borders and touches that of the plaintiff namely L.R. No. NYAMIRA/NYANKONO/55.

5A. In further answer to paragraph 4 of the plaint the defendant avers that in or about 1999 the plaintiff had 3 acres fraudulently registered in his name thus depriving the estate of the late Zedekia Opande 3 acres comprising NYAMIRA/NYAKONO/55 (sic).

<u>PARTICULARS OF FRAUD</u>

The plaintiff was fraudulent in that:
(a)He informed the Land Registrar Nyamira District that he was entitled half share of 23 acres comprised in the then L.R. No. 941/7/2 and 741/6/1 owned by Abanchani Farmers Company Limited well knowing that it was decreed on 7th July 1981 in Kisii RMCC 75/80 that the plaintiff was entitled 2/5 of the land the late Zedekia Opande was awarded by Abanchani Farmers Farmers Co. Ltd."

He sought an order of rectification of the Register in his favour to reflect the true position as was spelt out in RMCC 75 of 1980. The appellant filed reply to amended defence on 28th March 2002 and at paragraph 8 of that reply, the appellant stated:-
"8. That this plaintiff further also reiterates that this court has jurisdiction."

At the close of pleadings, the parties filed a list of agreed issues, signed by their advocates. Issue No. 3 of those agreed issues was:-

"3. Whether or not the filing of this suit is premature, traveolous (sic) and/or an abuse of the court process."

After all the above, the matter came up for hearing before Wambilyanga J,
(as he then was). After the appellant was heard, Wambilyanga ceased to exercise jurisdiction and the matter started *de novo* before Bauni J. Only the appellant gave evidence and closed his case. The matter was then adjourned for defence case. It was fixed for further hearing on 28th July 2004 but on that day neither defendant nor his advocate were present in court and the advocate for the appellant sought a date for judgment. That was granted. Only the appellant's counsel filed written submissions.

In a short judgment dated 21st October 2004, the learned Judge dismissed the appellant's case and directed that the register in the lands office be rectified in respect of the two parcels i.e. NYAMIRA/NYANKONO/54 and NYAMIRA/NYANKONO/55 as per the judgment in RMCC No. 75 of 1980 and appellant be registered as owner of 8.8 acres and the estate of late Opande to own 13.2 acres.

The appellant felt aggrieved by that judgment and hence this appeal premised on four (4) grounds of appeal which are that:-

"1. The learned trial Judge erred and misdirected himself in law in deciding this case by relying on material and/or evidence not tendered by the parties in this suit.

2. The learned trial Judge erred and misdirected himself in law in deciding against the appellant whereas there was overwhelming and/or largely unchallenged evidence on record in favour of the appellant.

3. The learned trial Judge erred in law in awarding reliefs not put forth by the respondent in evidence though pleaded in the amended defence.

4. The learned trial Judge erred in law in deciding the case against the weight of evidence."

Mr. Soire, the learned counsel for the appellant submitted in the main that the learned trial Judge erred in considering the pleadings in the statement of defence whereas the same were not proved as the respondent never gave evidence in support of the same pleadings and thus they remained mere pleadings and no more. Mr. Migiro, the learned counsel for the respondent on the other hand contended that as the appellant had in his evidence in cross-examination conceded the allegations in the statement of defence, the learned trial Judge was perfectly entitled to consider the pleadings together with appellant's evidence and to arrive at a decision notwithstanding that the respondent had not given evidence. Further he contended that as the evidence that was before the court pointed to the need for rectification of the Lands Register to reflect the correct position and as that was requested in the statement of defence, the learned trial Judge was perfectly right in granting the order sought in the defence.

We have considered the pleadings, the evidence on record, the record as a whole, the memorandum of appeal, the submissions by the learned counsel, the judgment of the learned trial Judge and the law. The main part of the judgment of the superior court challenged reads as follows:-

"The plaintiff produced a title deed which shows that he is the registered owner of land No. 54 which measures 4.5 ha. Which is about 11.5 acres? It is clear that he and the defendant's father had bought a share from Abanchani Company and were entitled to 23 acres. What however seems to be the bone of contention is the acreage each was entitled to. Though the plaintiff says he was entitled to half share which in (sic) 11½ it emerged from defence and cross-examination that he was entitled to only 8.8 acres. Though the plaintiff was careful to avoid bring (sic) out issues, it came out that the land was cause of action in other cases – KISII RMCCC. NO. 75 of 1980 and KISII HCCC. NO. 2 of 2000, I checked the two cases. In KISII RMCC. NO. 75 of 1980 the court ordered that the plaintiff and the defendant's father share the land in ration of 2:3 – The plaintiff herein was to get $^2/_5$ share of the land. The decision still stands and has not been appealed against. It should be noted that by then the land had not been subdivided and registered. Subsequently the defendant filed HCCC NO.2 OF 2000 claiming the same land. However the plaintiff herein applied for the suit to be struck out as being res judicata vide KISII RM CC NO. 75 of 1980. The court struck out the suit on that ground. What this means therefore is that the decision in KISII RMCC. NO. 75 of 1980 still stands unchallenged. It seems that subsequent to that ruling the land was subdivided and registered. Plaintiff got 11.5 acres and the father of the defendant got the same. The plaintiff did not explain how he got 11.5 acres. The lower court had ordered he gets $^2/_5$ of 23 acres. $^2/_5$ of 23 is 8.8 acres. It certainly is clear that the order in RMCC. No.275 of 1980 was never followed. It is worth to note that the defendants are said to be occupying 3 acres of the plaintiff's land. This possibly is that land which should have gone to his father. There must have been a mistake in the title deed which showed the plaintiff is registered as proprietor of 4.454 (11½ acres) when in fact he should have registered (sic) to be the owner of 8.8 acres. He possibly never pointed this to the Land Registrar. He must have been satisfied with the judgment in RMCC.NO.75 of 1980 and that is why he never appealed.

I therefore find that the plaintiff has failed to prove his case. I direct that the register be rectified in respect of the two parcels of land as per the judgment in RMCC.NO.75 of 1980. Plaintiffs be registered as owner of 8.8 acres and the estate of late Opande to own 13.2 acres."

It is correct as Mr. Soire pointed out, that the learned Judge of the superior court did not hear the respondent, yet on the evidence of the appellant and the pleadings in the statement of amended defence, he decided the matter that was before him in favour of the respondent. In our view, whereas it would have been an added advantage to the court if the respondent had given evidence and had also highlighted the

allegations in his statement of amended defence, we do not think that respondent's evidence was necessary in this case and we cannot fault the learned Judge that he proceeded to pronounce judgment in favour of the respondent whereas only the oral evidence of the appellant was before him. In our view, the main issue in contention was as to whether the respondent had trespassed on to the appellant's land. To decide that point, there was need on the facts of this case to establish the correct shares of the appellant and the respondent's father for both the appellant and respondent's father had been allotted one share by Abanchani Land Buying Company and that share was to be divided between the two in the ratio reflected on what each of them contributed towards the purchase of that one share. That issue of how to divide their one share which was equivalent to 23 acres had been decided by a competent court of law in Kisii RMCC. No.75 of 1980. The respondent's defence was that the appellant had, through fraud obtained title for a bigger parcel than was ordered in the judgment in RMCC.No.75 of 1980. He thus pleaded in effect that the issue as to the portions of land each of them should have had, had been decided and the appellant fraudulently hoodwinked the Land Registrar into allotting to him a bigger parcel than he deserved. This was refuted by the appellant in his reply to defence – the parts we have reproduced here above. The matter was listed as an agreed issue and we have reproduced the relevant part hereabove. When the appellant took to the witness box, that was the main issue between them and whether depending on the decision on that issue the register required to be rectified to reflect the decision in RMCC No.75 of 1980 as was pleaded and made an issue. What did the appellant say in evidence? In his evidence in chief he said inter alia:-

"His father has his land. It borders mine. His father also got land for (sic) the company. He also got 11 acres. The title for my land is also 11 acres. It is not true that I was entitled to just 8 acres of land."

But in cross-examination, he said:-

"It is the in 1980 (sic) I tilled (sic) a case against my father in law and Benson Kipoma. It was Kisii RMCC No.75 of 1980. My father in law wanted to kick me out of the land. He had colluded with Kipoma. It is not that I wanted more land than I was entitled to. The court ruled I was the one entitled to the land. The court ordered we stay in the land. I did not appeal against the decision. My father in law did not appeal."

Then in re-examination, he said:-

"I had sued Benson Kipoma in RMCC No. 75 of 1980. He was one of the Directors. He is since dismissed (sic). Then the land had not been subdivided."

That evidence brought out the issue of whether or not the suit that was before the trial court was *res judicata* and as the case that had been filed earlier before the Resident Magistrate on the same matter was spelt out as RMCC No. 75 of 1980 at Kisii, there was nothing wrong, in our view for the learned Judge to find out what had been divided in that case as indeed that file was the property of the court and justice demanded of him to ensure that the subject matter had been decided between the same parties and finalized by a competent court. That was clearly in reaction to the evidence of the appellant who conceded that the matter had been to court; had been decided, and none preferred an appeal against the decision. In our view, it was not necessary to receive oral evidence from the respondent on that issue. It had been raised in the statement of defence and the appellant needed to rebut it so as to succeed. Instead, he confirmed it and that meant that whatever evidence was to be adduced by the respondent would have been no more than a repetition. In any case, whether the respondent gave evidence or not, the main issue before the learned trial Judge was as to whether the judgment in RMCC No.75 of 1980 determined the issue of the portion that the appellant was to have out of the subject land and the portion that the respondent was entitled to. That could only be determined by reference to that judgment and thus by reading that file. He had a duty to do so in order to ensure justice. We have perused and considered the authorities that were placed before us. With respect we do not find any relevant to the matter before us.

From the above, it is clear that we do not share Mr. Soire's contention that the learned Judge erred in basing his judgment on issues raised in the pleadings but not given in evidence before him. Neither do we agree that he should have desisted from considering the judgment in RMCC No. 75 of 1980. He was

entitled to do so in law as those were matters before him. A decree drawn in respect of that case is in the record and it shows that the appellant was entitled to $^{2}/_{5}$ of the total acreage of the land whereas Zedekia was entitled to $^{3}/_{5}$ of the total acreage.

Having done so, the learned Judge found that indeed the appellant was only entitled to $^{2}/_{5}$ of the entire land that was allocated to him and Zedekia, the respondent's father and that Zedekia was entitled to $^{3}/_{5}$ of that land, whereas the register showed that the appellant was registered as owning 11.5 acres which was way above $^{2}/_{5}$ of the land, and the respondent's father was left with 11.5 acres which again was way below his $^{3}/_{5}$ entitlement. A court of law faced with that scenario and having been asked to order rectification of the register to reflect the correct position and noting that the appellant was pre-warned of that prayer and also owned the judgment that decreed that he was entitled to 2/5 of the land and not half the land, would in our view make the order that the learned trial Judge made i.e, an order of rectification of the register to reflect the judgment of the court. What the learned Judge did was inevitable and we cannot fault him on that aspect.

Before we dismiss this appeal as we are bound to do, one matter needs to be observed. The learned Judge found and the exhibited documents of title bear him out that the entire piece of land allotted to both appellant and respondent's father was 23 acres. He then did arithmetical calculation in his judgment and found that $^{2}/_{5}$ of 23 acres was 8.8 acres, and working on that he found that Zedekia owned 13.2 acres. This was not correct for if the appellant is registered as owner of 8.8 acres and Zedekia as owner of 13.2 acres, the total acreage would be 22 acres and not 23 acres. On our own calculation, we find that $^{2}/_{5}$ of 23 is 9.2 and $^{3}/_{5}$ of 23 is 13.8. Thus the correct position should have been that the appellant would be registered as owner of 9.2 acres whereas the estate of Zedekia would own 13.8 acres.

The upshot is that this appeal is dismissed but the order for rectification is verified to the extent that the register is to be rectified such that acreage of land parcel NYAMIRA/NYANKONO/54 is to be 9.2 acres and the acreage of land parcel NYAMIRA/NYANKONO/55 is to be 13.8 acres. The appellant is to pay costs of the appeal. Judgment accordingly.

Dated and delivered at Kisumu this 28th day of July, 2011.

P. K. TUNOI
………………………
JUDGE OF APPEAL

J. W. ONYANGO OTIENO
………………………..
JUDGE OF APPEAL

D. K. S. AGANYANYA
….…………………….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR