



Ongoro (Suing as Legal Representative of the Estate of Zachary Ongoro Akello - Deceased) v Ongoro & 2 others (Environment and Land Appeal E019 of 2021) [2023] KEELC 15824 (KLR) (28 February 2023) (Judgment)

Neutral citation: [2023] KEELC 15824 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E019 OF 2021
GMA ONGONDO, J
FEBRUARY 28, 2023

BETWEEN

DUNCAN ODIWUOR ONGORO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF ZACHARY ONGORO AKELLO - DECEASED) APPELLANT

AND

BOAZ OMONDI ONGORO 1ST RESPONDENT

COOPERATIVE BANK OF KENYA LIMITED 2ND RESPONDENT

LAND REGISTRAR (RACHUONYO SUB COUNTIES) 3RD RESPONDENT

(An Appeal from the Ruling and order of Hon. B Omwansa (SPM) Dated and Delivered on the 29th Day of November 2021 in the original OYUGIS MELC NO 48 OF 2021)

JUDGMENT

1. The present appeal is from the ruling of the trial court (B Omwansa, SPM) where the learned magistrate struck out the appellant's suit originated by way of a plaint (Fast Track) dated July 27, 2021 and filed in court on August 24, 2021 with costs to the respondents.
2. Being aggrieved at the said decision, the appellant, Duncan Odiwuor Ongoro who appears in person, lodged this appeal by way of the Memorandum of appeal dated December 15, 2021 based on grounds 1 to 11 set out on the face of the same. The grounds include;
 - a. The Learned Trial Magistrate erred in law when the same failed to appreciate and hold that the cause of action touching and/or anchored on the deceased ownership on whose behalf the suit was mounted was distinct and maintain as against the defendants who occasioned the suit land to be unlawfully and unprocedural transferred to themselves and effected the charge over



the same, and was thus not res judicata, as between the plaintiff and defendants based on the issues advanced and articulated vide Homabay Hcc No 1 of 2019.

- b. That the Honourable Court equally failed to appreciate that the parties and issues canvassed in Homabay Hcc No 1 of 2019, were distinct and different from those advanced vide the instant suit the subject of this appeal.
 - c. The Learned Trial Magistrate was plainly wrong to have struck out the application together with the suit in its entirety whereas he was clothed with the requisite jurisdiction to entertain and grant the same.
3. So, the appellant has sought thus;
- a. The ruling and/or order of the Learned Trial Magistrate dated November 29, 2021, be set aside, varied, vacated and/or quashed.
 - b. The Honourable Court be pleased to re-instate the suit mounted by the Appellant vide the plaint dated the, July 27, 2021, and direct that the same be heard on merit by another Magistrate other than one who struck out the suit.
 - c. The Court be pleased to hold that the Appellant had demonstrated a prima facie case vide the application dated July 27, 2021, and proceed to grant the same as prayed or make such other order as shall preserve the suit property pending hearing and determination of the suit.
 - d. Costs of the Appeal, of the suit and the application before the Subordinate Court, be borne by the Respondent.
 - e. Any Such and/or further Orders that Honourable Court shall deem just and expedient in the circumstance.
4. The appeal was heard by way of written submissions pursuant to this court's orders made on July 18, 2022.
5. By the appellant's submissions dated August 14, 2022 and filed on September 14, 2022, reference was made to background of the matter including the orders sought in the plaint and the appellant's application dated July 27, 2021 (the application herein) alongside the memorandum of appeal. He framed three issues for determination including whether the trial court had jurisdiction to entertain the suit. He submitted that the matter was within the jurisdiction of the trial court hence urged the court to allow the appeal with costs to be borne by the respondents. To buttress the submissions, he relied upon, inter alia, Articles 48 and 50 of the *Constitution* of Kenya, 2010, sections 7 and 11 of the *Civil Procedure Act* Chapter 21 Laws of Kenya (The CPA herein) and the case of *Independent Electoral and Boundaries Commission-vs-Maina Kiai and 5 others (2017) eKLR*.
6. Clearly, the 1st and 3rd respondents were duly served as disclosed in the affidavit of service of five paragraphs sworn by an authorized process server and filed in court on December 8, 2022. Be that as it may, they did not appear and file submissions in this appeal.
7. The 2nd respondent through Moronge and Company Advocates filed submissions dated October 12, 2022 on October 21, 2022 set out the background of the appeal including the orders sought in the appellant's application, the respondent's replying affidavit sworn on September 13, 2021 in opposition of the application, the mandate of the first appellate court and the grounds of appeal. Counsel delineated three issues for determination including whether the trial court had jurisdiction over the suit. Counsel submitted that the suit is res judicata in view of Homa Bay HCCC No 1 of 2019 and relied on *National Land Commission-vs-Registered Trustee of the Arya Pratinidhi Sabha,*



- Eastern Africa and Another (2019) eKLR* and *James Muthoka Ndolo-vs-Park Towers Limited and 2 others (2019) eKLR*, among other authoritative pronouncements. That the appeal lacks merit and ought to be dismissed with costs.
8. By further submissions filed in court on October 24, 2022, the appellant cited, inter alia, the decision in *Dorothy Adhiambo Odhiambo & 5 others-vs-Salen Yakub Ibrahim and others (2004) eKLR*, Order 12 Rule 5 as read with Order 8 Rule 5 of the *Civil Procedure Rules, 2010* and sections 22 and 23 of the CPA.
 9. In the 2nd respondent's supplementary submissions of nine pages dated 8th December and filed on even date, the original suit before the trial court is termed res judicata under section 7 of the CPA in light of the judgment delivered in Homa Bay HCCC No 1 of 2019. That the appellant's further submissions are of no value. That on the strength of the 2nd respondent's initial submissions, this appeal has no merit hence urged the court to dismiss it with costs to the 2nd respondent.
 10. In the foregone, the central issues in this appeal are as captured on the grounds of appeal which boil down to whether;
 - a. The trial court had jurisdiction in respect of the original suit.
 - b. Depending on the outcome in issue number (a) hereinabove, the appellant is entitled to the orders sought in the memorandum of appeal.
 11. It is important to note that as a first appellate court in the matter, this court is seized of the jurisdiction to review the reasoning of the trial court but should be reluctant to disturb the findings of the trial court on matters of fact; see *Peters-vs-Sunday Post (1958) EA 424 at 429* and *Kiruga-vs-Kiruga and another (1988) KLR 348*.
 12. The genesis of the appeal is that the appellant who was the plaintiff before the trial court sued the respondents seeking, inter alia;
 - a. A declaration that the 1st defendant acquired title to land parcel No Central Kasipul/Kamuma/1635 fraudulently thus the same be cancelled by an order of court and revert to the original owner (Zachary Ongoro Akello) for purposes of succession.
 - b. Pronouncement that the Rachuonyo Lands Registrar/Office /Court or any other means be used to subject the suit land to a succession cause in favour of the Plaintiff and all other beneficiaries.
 13. The 2nd defendant who was the 2nd defendant before the trial court denied the appellant's claim by the statement of defence dated September 13, 2021 and implored the court to dismiss the suit with costs. It was the statement of the 2nd defendant that the appellant lacks locus standi to initiate the suit as the Letters of Administration Ad Litem relied upon had lapsed, among other things.
 14. Notably, the appellant's application was based on the grounds on its face and supporting affidavit of the appellant seeking a temporary injunction against the respondents, among other orders, before the trial court. The application targeted at attaining the threshold in the celebrated case of *Giella-vs-Cassman Brown & Co Ltd (1973) EA 358*.
 15. By a replying affidavit of twelve paragraphs sworn on September 13, 2021 by David Mangoya, the 2nd defendant's Business Banker, the application was opposed. He deposed in part as stated at paragraph 13 herein above.



16. In that regard, the trial court rendered the impugned ruling by taking into consideration the parties' respective submissions. Indeed, the 2nd respondent's submissions referred to the judgment delivered on February 6, 2020 in Homa Bay HCCC NO 1 of 2019 between the 1st respondent and the 2nd respondent herein and as stated at the appellant's affidavit in support of the application and the appellant's statement. Furthermore, a copy of the said judgment is contained in the appellant's list of documents dated July 27, 2021 and filed in the trial court on August 4, 2021.
17. The 2nd respondent's counsel further submitted in part;
- ' He (the appellant herein) attached the said judgment as his annexure. No application has been filed at the High Court at Homa Bay nor at the Court of Appeal at Kisumu seeking to stay those orders. Hence this court has no jurisdiction to entertain this suit since the orders of the High Court have not been challenged in a higher court.'
18. In arriving at the ruling, the trial court relied on the Court of Appeal decision in the case of *Owners of Motor Vessel 'Lillian S' Caltex Oil (Kenya) Ltd (1989) eKLR* and observed thus;
- ' This court has no jurisdiction to undo that which has been done by the High Court at Homa Bay.'
19. In the case of *Mukisa Biscuit Manufacturing Company Ltd-vs-West End Distributors Ltd (1969) EA 696*, the Court of Appeal was succinct that;
- ' A preliminary objection consists of a point of law if argued as a preliminary objection, will dispose of the suit. Examples are; an objection to jurisdiction of the court a submission.'
20. At the trial court, the 2nd respondent raised a preliminary objection to the court's jurisdiction over the matter at the earliest opportunity in consonant with Mukisa case (supra). It is noted that in Homa Bay HCCC No 1 of 2019, the appellant and the 2nd respondent were the plaintiff and defendant respectively. The property in dispute therein is the same as in this appeal. At paragraphs 6,7 and 8 of the plaint concerning the estate of Zachary Ongoro Akelo, the appellant and the 1st respondent are same party and a party privy to original parties respectively in Homa Bay HCCC No 1 of 2019. Therefore, the suit satisfied the elements of res judicata as set out in section 7 of the CPA (supra) alongside *Black's Law Dictionary 10th Edition at 1504* and *Halsbury's Laws of England 4th Ed Vol 22* at page 273 that litigation has to come to an end.
21. Thus, it is my considered view that the learned trial magistrate correctly reached the impugned ruling grounded upon the record presented before him and the relevant law. This court has no iota of reason to vilify him and proceed to affirm the trial court's ruling.
22. A fortiori, this appeal fails and is hereby dismissed with costs to the 2nd respondent.
23. Orders accordingly.

VERTUALLY DELIVERED, DATED AND SIGNED AT HOMABAY THIS 28TH FEBRUARY 2023.

G.M.A ONG'ONDO

JUDGE

PRESENT

Appellant, present in person.



Mr. Bosire, learned counsel for the 2nd respondent.

Court Assistants, Mutiva and Kachuodho.

