



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL APPEAL NO. 25 OF 2014

MARTIN AMBONYA 1ST APPELLANT

PHILIP OGWANG AMBONYA 2ND APPELLANT

VERSUS

GAUDENCIA OKELLO OGUTU RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of the Principal Magistrate's Court at Oyugis, Hon. C. L. Yalwala in PMCC No. 138 of 2008 dated 18th January, 2011)

1. Background

This is an appeal from the judgment and decree of C. L. Yalwala, RM that was delivered on 18th January 2011 in Oyugis PMCC No. 138 of 2008 (hereinafter referred to only as “**the lower court**”). The respondent herein had filed a suit against the appellants in the lower court seeking; a declaration that she is the sole proprietor of all that parcel of land known as **LR No. Kabondo/Kakangutu/574** (hereinafter referred to as “**the suit property**”), an order that the appellants do vacate the suit property or be forcefully evicted therefrom, and a permanent injunction to restrain the appellants from entering or interfering with her peaceful occupation of the suit property. The respondent amended her plaint on 7th April 2010 with leave of the court. The prayers sought remained the same in the amended plaint. In her amended plaint, the respondent averred that she is the legal representative one, Mbuya Oigala and the registered proprietor of the suit property. The respondent averred that the suit property was registered in her name as the proprietor thereof through transmission. The respondent averred that the appellants who are not related to the respondent or to the said Mbuya Oigala (hereinafter referred to only as “**the deceased**”) had unlawfully entered the suit property and started utilizing the same to the detriment of the respondent. The respondent averred that as a result of the appellants said unlawful acts, the respondent had been deprived of the use and enjoyment of the suit property and had suffered loss and damage in the process.

- The appellants filed a defence to the respondent's claim in the lower court on 11th March 2009. The appellants did not amend their statement of defence following the amendment of the plaint on 7th April 2010. In their statement of defence, the appellants averred that the respondent had no locus standi to institute the suit and that if at all the suit property had been transferred to the respondent, such transfer was carried out unlawfully through fraud and misrepresentation. The appellants contended that they were occupying the suit property lawfully and that it is the

respondent who was a trespasser on the property as she had no legal claim over the same. The appellants averred that the plaint and the verifying affidavit were fatally defective thereby rendering the suit legally incompetent and bad in law. The appellants denied the jurisdiction of the court.

3. The decision of the lower court;

The respondents' suit in the lower court was heard before C. L. Yalwala, RM. The respondent gave evidence but did not call any witness. The appellants gave evidence and called two (2) witnesses. The respondent testified that she is a widow of one, Vitalis Oguttu who died in the year 2002. Her deceased husband was the son of one Mbuya Oigala ("**deceased**") who died in the year 1992. Her deceased husband was the only son of the deceased. They used to stay with her late husband and the deceased on all that parcel of land known as **LR No. Kabondo/Kakaugutu/574** ("**the suit property**"). After the death of the deceased, the appellants chased her late husband, her mother in law, her co-wife and herself from the suit property in the year 1993. After the forceful eviction from the suit property they went and settled at a place known as Kibigori. Her late husband died and was buried at Kibigori. Before his death, he turned blind. After the death of her husband, she went to the land registry to ascertain the ownership status of the suit property. At the land registry, she was issued with a copy of the register for the suit property. She thereafter applied for a grant of letters of administration in respect of the estate of the deceased and was duly issued with the same. Thereafter, she had the suit property transferred to her name through transmission. Following her registration as the proprietor of the suit property, she was issued with a title deed for the same. After obtaining the title deed, she asked the appellants who had settled on the said property to vacate the same but they declined to do so. The respondent told the court that the appellants have put up homesteads on the suit property and are also cultivating portions thereof. The respondent stated that she did not lodge her claim with the Land Disputes Tribunal because the said tribunal had no jurisdiction to resolve the dispute.

4. The 1st appellant on his part told the court that the respondent and the deceased who was her father-in-law were known to him. He told the court that; the deceased settled on and was buried on the suit property. Before the death of the deceased, his (the 1st appellant) mother had asked him to vacate the suit property. The family of the deceased vacated and left the suit property in the year 1995 after a meeting that was attended by the deceased's wife, one Magdalena Ongawa, the respondent's husband, one Vitalis Ogutu Mbuya and one, Anthony Ambonya resolved that they vacate the property and hand it over to one, Irene Ambonya. The matter was also deliberated upon at the area chief's office at which the same resolution was reached. After the deceased's wife vacated the suit property in the year 1995 together with other members of her family that included among others, the respondent and her deceased husband, they never heard from them until the year 2007 when they received a letter from Fida (K) demanding that they vacate the suit property. The 1st appellant stated further that the deceased's wife and her family that included the respondent were not forcefully evicted from the suit property. He contended that they left peacefully after which he (the 1st appellant) and his mother and brother started using the suit property in the year 1996. The 1st appellant contended that the suit property belonged to him and that the deceased was only a settler. The 2nd appellant corroborated the 1st appellant's evidence that the respondent had resided on the suit property with her deceased husband, the deceased and her mother-in-law and that they vacated the suit property after a meeting of clan elders resolved that they vacate and handover the property to Ambonya family which resolution was confirmed by the area chief. Following these resolutions, the deceased's family moved from the suit property in 1995 and the 2nd appellant took possession thereof. He denied that the deceased's family was evicted from the suit property. The appellants' witnesses, DW3 and DW4 corroborated their testimonies.
5. After the close of the parties' respective cases, the advocates for the parties made closing submissions in writing. The lower court considered the evidence that was tendered by the parties and their witnesses together with the written submissions and concluded that the respondent had proved her claim against the appellants on a balance of probability. The lower court made a finding that; the suit property was at all material times registered in the name of the deceased. The respondent who is the daughter-in-law of the deceased applied for and was issued with a grant of

letters of administration in respect of the estate of the deceased. No objection was raised to the respondent's application for grant of letters of administration of the estate of the deceased. After confirmation of the grant of letters of administration that was issued to her, the respondent transferred the suit property to herself by transmission. The lower court found that there was no dispute that the respondent was the registered proprietor of the suit property the same having been registered in her name as the heir of the deceased. The court found that the deceased was registered as the proprietor of the suit property on first registration on 27th January 1966 and as such his title over the property was indefeasible. The court found the appellants' contention that the deceased was a settler and not a native of Kabondo inconsequential as far as the deceased's title over the suit property was concerned. The court held that the registration of the suit property in the name of the deceased as the proprietor thereof should have been challenged during the adjudication process by whoever was aggrieved therewith. The court held further that the purported resolution by the clan elders and the area chief through which the suit property was ordered to be handed over to the appellants' family (Ambonya family) was of no legal effect. The court held further, that the respondent was lawfully registered as the proprietor of the suit property. The court found no merit in the appellants' contention that the respondent's registration as the proprietor of the suit property was tainted with fraud and misrepresentation. On whether the appellants had acquired title to the suit property by adverse possession, the court held that such question could only be determined by the High Court pursuant to the provisions of section 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya. The lower court concluded that the respondent had proved that she is the lawful proprietor of the suit property and that the appellants had no legally recognized proprietary interest in the suit property. It was on the basis of the foregoing that the court entered judgment for the respondent against the appellants for vacant possession and ordered the appellants to vacate the suit property within thirty (30) days from the date of judgment.

6. The appeal before this court;

The appellants were aggrieved with the decision of the lower court and preferred an appeal to this court against the same. The appellants have challenged the decision of the lower court on the following six (6) grounds:-

- 1. That the learned trial magistrate erred in law by not appreciating that the trial court did not have jurisdiction to hear and determine the respondent's suit.**
 - 2. That the learned trial magistrate erred in law and fact in failing to appreciate that the appellants were in occupation of the subject land openly, peacefully without any interruptions and as right for a period of over 12 years immediately preceding the respondent's claim therein and therefore were entitled to the said land by adverse possession.**
 - 3. That the learned trial magistrate erred in law and fact by failing to appreciate that the appellants had lived and occupied the subject land for a period of more than 12 years and therefore the respondent's claim to recover the subject land from the appellants was time barred under the Limitations of Actions Act cap 22 laws of Kenya.**
 - 4. That the learned trial magistrate erred in law and fact by failing to appreciate that the appellants had lived and occupied the subject land for a period of more than 12 years and therefore the respondent's title to the subject land if at all had been extinguished by operation of the law.**
 - 5. That the learned trial magistrate erred in law in failing to appreciate that the respondent's amended plaint was fatally defective as it did not comply with mandatory provisions of the Civil Procedure Rules.**
 - 6. That the learned trial magistrate erred in law and in fact by appreciating the respondent's evidence as against the appellant's evidence.**
7. On 2nd October 2013, directions were given that the appeal be heard by way of written submissions. The respondent filed her submissions and further submissions on 9th October 2013 and 14th January 2014 respectively. The appellants on the other hand filed their submissions on

23rd October 2013. I have perused the lower court's record comprising of the pleadings, the evidence tendered, the submissions by the advocates for the parties and the judgment of the lower court dated 18th January 2011. I have also considered the appellants' grounds of appeal and the submissions filed by the appellants' advocates in support thereof. I have also considered the respondent's written submissions filed in opposition to the appeal.

8. I would consider the appellants grounds of appeal seriatim.

Ground 1 of appeal

The appellant has contended that the lower court erred by not holding that it had no jurisdiction to hear and determine the respondent's suit. In their statement of defence, the appellants had averred that since the respondent's claim was based on trespass, the same should have been instituted at the Land Disputes Tribunal established under the Land Disputes Tribunal's Act, No. 18 of 1990(now repealed). I have considered the amended plaint that was filed by the respondent in the lower court and the reliefs that the respondent sought. I have also considered the statement of defence that was filed by the appellants and the issues that arose for determination by the lower court. When considering whether or not to decline jurisdiction in a suit like the one that was before the lower court on account of statutory ouster in favour of a statutory tribunal, the court does not limit itself to the wrong committed. The court must consider the wrong that has given rise to the cause of action, the reliefs sought, the defence put forward and the issues that arise for determination. The cause of action may be based on a wrong that can be remedied by the tribunal but the issues that arise for determination before the wrong is remedied could be such that the tribunal may not have jurisdiction to determine. The reliefs sought for the wrong may also be of such a nature that the tribunal may not have jurisdiction to grant. Where issues arise that cannot be determined by the tribunal or reliefs are sought which, the tribunal cannot grant, the court ought not to decline jurisdiction if it can determine the issues raised and grant the remedies sought. A wrong can give rise to several causes of action. When considering its jurisdiction, the court cannot focus only on the wrong said to have been committed but must consider the case as a whole. The respondent brought the claim in the lower court in her capacity as the administrator of the estate of Mbuya Oigala ("deceased") who was at all material times the registered proprietor of the suit property. The respondent contended that she had acquired the suit property through transmission. She contended that the appellants had denied or deprived her of the use of the suit property by trespassing thereon and converting the same to their own use. The respondent sought; a declaration that she is the sole proprietor of the suit property and an order of eviction of the appellants therefrom. The respondent also sought a permanent injunction to restrain the appellants from entering, or interfering with the respondent's occupation of the suit property.

9. The appellants in their statement of defence contended among others that, the respondent had acquired title to the suit property unlawfully through fraud and misrepresentation. The appellants contended further that they were in lawful occupation of the suit property and that the respondent had no legal claim over the same. It is clear from the foregoing that although the respondents claim was based on trespass the issues that arose transcended the boundaries of trespass. The issues that arose for determination included; the ownership of the suit property and whether the respondent had acquired the same fraudulently or not. These are not issues which the Land Disputes Tribunal had jurisdiction to determine. The Land Disputes Tribunal could not also grant the declaratory reliefs that the respondent had sought in the lower court. I am in agreement with the respondent's advocate's submission that under section 159 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed), it was only the High Court or the Resident Magistrate's court that had jurisdiction to entertain the respondent's claim. Since the appellants' objection did not touch on the pecuniary jurisdiction of the lower court to entertain the claim, it is my finding that the lower court had jurisdiction to entertain the respondent's suit.

10. Grounds 2 and 4 of appeal;

The appellants have contended that the lower court erred in not finding that they had acquired title to the suit property by adverse possession. I am in agreement with the finding of the lower court that the issue of whether or not the appellants had acquired title over the suit property through adverse possession could only be determine by the High Court pursuant to an application made for the purpose under section 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya as read with Order 37 rule 7 of the Civil Procedure

Rules, 2010. For the foregoing reason, I am not satisfied that the lower court fell into error in declining to make a finding that the appellants had acquired the suit property by adverse possession.

11.Ground 3 of appeal;

Under this ground of appeal, the appellants have contended that the lower court erred by not finding that the respondent's suit was time barred. Order 2 rule 4 of the Civil Procedure Rules, 2010 which is in the same terms as Order VI rule 4 of the repealed Civil Procedure Rules provides that a party must in any pleading subsequent to a plaint plead among others any relevant statute of limitation which he alleges makes any claim or defence of the opposite party not maintainable. I have noted that the appellants did not plead time bar or statute of limitations. The issue was therefore not before the lower court for determination and in fact the lower court did not make any finding in relation thereto. The issue was raised for the first time by the appellants in their memorandum of appeal. In the case of **Openda –vs- Ahn [1983] KLR 165**, it was held that;

“The Court of Appeal cannot consider or deal with issues that were not canvassed, pleaded and/or raised at the lower court. For a matter to be a ground of appeal it has to have been sufficiently raised and succinctly made an issue at the trial.”

12.This ground of appeal which is based on statute of limitations that was neither pleaded nor canvassed before the lower court cannot be entertained by this court. The lower court cannot be faulted for not making a finding on an issue that was not raised before it. In the Court of Appeal case of, **Galaxy Paints Company Ltd –vs- Falcon Guards Ltd, Nairobi Civil Appeal No. 219of 1998** (unreported), it was held that;

“It is trite law, and the provisions of O. XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination.”

13.Ground 5 of appeal;

The appellants have contended that the trial court erred in not finding that the respondent's amended plaint was defective. The appellants have submitted that the amended plaint failed to comply with the provisions of order 8 Rule 7 (1) of the Civil Procedure Rules in that, the amended plaint was not endorsed with the date of the order that allowed the amendment. This ground of appeal in my view has no merit for two reasons. First, it is not disputed that the respondent applied for and obtained leave of the court to amend the plaint. The amended plaint that was filed in court complied with the rules on amendment of pleadings save that the respondent did not indicate in the amended plaint the date of the order that granted her leave to effect the amendment. This was a procedural lapse that affected the form of the amended plaint. The objection that has been raised by the appellants to the amended plaint is technical in nature and is concerned mainly with the form of the said plaint. There is no contention that the appellants had suffered any injustice or prejudice as a result of the respondent's failure to indicate in the amended plaint the date when she was granted leave to amend the plaint. Order 2 rule 14 of the Civil Procedure Rules expressly provides that no technical objection shall be raised to any pleading on account of want of form. Again as rightly submitted by the respondent's advocates, Article 159 (2) (d) of the Constitution of Kenya enjoins this court and the lower court to determine cases without undue regard to procedural technicalities. I would not have faulted the lower court if it had overruled this technical objection for the sake of substantive justice. Secondly, this objection was neither pleaded nor raised before the lower court by the appellants. It is not therefore open to the appellants to fault the lower court for not making a determination thereon.

14.Ground 6 of appeal;

In this ground of appeal, the appellants have faulted the lower court for failing to appreciate the evidence that was adduced by the appellants and their witnesses. Again, I find no merit in this ground of appeal. A perusal of the proceedings shows that the lower court considered the evidence that was adduced by both parties. Page 32 of the record of appeal shows that the lower court considered the evidence of the appellants and their witnesses. Pages 33 to 37 of the record of appeal show the reasons why the lower court did not agree with the evidence that was adduced by the appellants and their witnesses. I am therefore unable to agree with the appellants that the lower court failed to consider their evidence or to give weight to the same.

15. Conclusion;

For the foregoing reasons, I find no merit in all the grounds of appeal that were put forward by the appellants against the decision of the lower court. The appellants appeal therefore fails wholly and the same is dismissed with costs to the respondent. I have noted from the evidence on record that the appellants have their homes on the suit property. The period of thirty (30) days that they were given by the lower court to vacate the suit property was in the circumstances inadequate. Although this was not a ground of appeal, in the interest of justice and in order to alleviate human suffering, I would grant to the appellants one hundred and eighty (180) days from the date of this judgment within which to vacate and handover possession of the suit property to the respondent in default of which the respondent shall be at liberty to move the lower court for their forceful eviction.

Delivered, signed and dated at KISII this 20th day of February 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the appellants

N/A for the respondent

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE