



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Civil Appeal 34 of 2002 (1)

ELIAS OBONYO OKONO APPELLANT

VERSUS

JOHN OMONGE MISENYA RESPONDENT

(Appeal from the Judgment of the Senior Resident Magistrate's Court at Homa-Bay,

delivered by J. WANJALA /RM dated 13th November, 2001)

IN

(LAND CASE NO. 5 of 2001)

JUDGMENT

This is an appeal from judgment and decree of the Homa-Bay Senior Resident Magistrates Court in Civil Suit No. 5 of 2001, which was delivered on 13th November 2001.

In his submission, Mr Kowinoh contended that the Magistrate erred in entertaining a dispute relating to a piece of land which was still under adjudication process without a consent of the Land Adjudication Officer in terms of Section 30(1) of the Land Adjudication Act (Cap 284). That was confirmed according to Mr Kowinoh by the evidence adduced in lower Court.

It was also submitted by Mr Kowinoh that the respondent's claim in this case is time barred as confirmed by Paragraph 4 of the plaint which indicates that the appellant moved onto the suit land in 1972. It was confirmed that this suit was filed at Homa-Bay Senior Resident Magistrates Court on 21st February 2001. According to Mr Kowinoh, the defence and the evidence of the respondent and his witnesses all confirmed that the appellant entered the suit land and built his house thereon in 1972, and that when the suit was filed, the appellant had had 19 years of continuous and uninterrupted occupation of it which indicated that the respondent's rights had long been extinguished when he brought this case.

In his reply, the respondent claimed that the suit land had belonged to his grandfather. He had contended at the lower Court that the land Adjudication Officer had referred him to the Court to seek an order of eviction of the appellant.

The difficulty I have in this appeal is that there is no evidence that when the suit was filed at Homa-Bay Senior Resident Magistrate's Court, the land in dispute was still under Land Adjudication Process. The respondent in his plaint had averred that his claim against the appellant was a declaration that parcel no. Kaksingri East/Suba/121 belongs to him. The title given denotes that the land is registered and that it is no longer under adjudication process. On the other hand the appellant in his defence appears to suggest that adjudication it was not finalized. It is not therefore clear from the evidence adduced that the suit land was such that a consent of the Land Adjudication Officer was necessary before the suit was filed. Likewise, the prescriptive rights of the owner of a piece of land could only be adversely acquired by an intruder after registration of the land. If the appellant had been a first registered owner of the suit land by the time this suit was filed then the grounds in support of the appeal should be different from those advanced before me.

On the material made available to me, I cannot positively decide that the Learned Magistrate had erred in entertaining a dispute involving a parcel of land which was still within the land adjudication process contrary to Section 30(1) of the Land Adjudication Act. I am also not able to conclusively hold that the appellant had acquired by adverse possession the land in dispute between him and the respondent.

In the circumstances, I would dismiss the appeal with costs.

Dated and delivered at Kisumu this 11th day of November, 2005.

B. K. TANUI

JUDGE

In the presence of: Mochana for Kowino for appellant N/A for respondent

B. K. TANUI

JUDGE



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