



REPUBLIC OF KENYA



KENYA LAW
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**Rongai v Osoro (Civil Appeal E015 of 2021)
[2023] KEHC 19255 (KLR) (30 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19255 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E015 OF 2021
WM MUSYOKA, J
JUNE 30, 2023**

BETWEEN

NOVA OGOTI RONGAI APPELLANT

AND

SAMUEL KEBATI OSORO RESPONDENT

(n appeal arising from the judgment of Hon. PA Olengo, Senior Principal Magistrate, SPM, delivered on 19th May 2021, in Busia SRMCCC No. 213 of 2018)

JUDGMENT

1. The suit at the primary court was initiated by the respondent, against the appellant and another, for a sum of Kshs 10, 500, 000.00, plus costs and interests. The respondent allegedly bought, Bukhayo/Bugengi/1533, in respect of which the appellant and the other were administrators, by private treaty, to obviate foreclosure by a bank. The appellant brought proceedings in Busia ELC No 30 of 2012 over the land, and the sale was subsequently nullified. The appellant and the other filed a defence, denying that the respondent was entitled to the moneys that he was claiming.
2. The appellant and the other then filed a preliminary objection on a point of law, dated July 26, 2020, essentially arguing that the issues raised in the suit in Busia SRMCCC No 213 of 2018 were res judicata Busia ELC No 30 of 2012 and Kisumu CACA No 85 of 2015.
3. The preliminary objection was canvassed by way of written submissions. In the end, the court ruled, on May 19, 2021, that the suit in Busia SRMCCC No 213 of 2018 was not res judicata Busia ELC No 30 of 2012 and Kisumu CACA No 85 of 2015, as Busia ELC No 30 of 2012 and Kisumu CACA No 85 of 2015 were about ownership of Bukhayo/Bugengi/1533, while Busia SRMCCC No 213 of 2018 was about refund of the purchase price of Bukhayo/Bugengi/1533. It was held that it would be unjust for the appellant and the other to keep the money that the respondent paid and to keep Bukhayo/Bugengi/1533 too.



4. The appeal herein arises from the ruling of May 19, 2021. The appellant avers that the sum claimed in the suit was not for refund of the purchase price, the appellant did not sell the land to the respondent, the issues raised in the instant suit were addressed in Kisumu CACA No 85 of 2015, among others.
5. Directions were given on April 17, 2023, for canvassing of the appeal by way of written submissions. The record before me reflects that only the appellant has filed written submissions, which I have read through, and noted the arguments made.
6. The decision in Busia ELC No 30 of 2012 is not in the record of appeal, but the judgment in the appeal arising from it, that is to say in Kisumu CACA No 85 of 2015, dated July 20, 2017, is. I have read through it, and noted the following findings and holdings by the Court of Appeal:

“ 22. The question is whether the evidence supports that finding. What the evidence shows is that the appellant’s father approached the bank with a view to redeeming the property and offered to get a buyer. The bank informed him it had no objection to its letter to him dated March 15, 2001. The appellant’s father went ahead to get a buyer, the 1st respondent, and entered into an agreement for sale purporting to do so as an agent of the bank. The Bank was not itself privy to that agreement. There was accordingly no material placed before the trial court to support the finding that the bank sold the property in exercise of its power of sale. The finding by the judge is based on a misapprehension of the evidence. The appellant’s father, James Masaki Rongai, was categorical in his testimony that he was the one who sold the property to the 1st respondent. The evidence does not support the finding by the learned judge that the sale of the property to the 1st respondent was through the Bank’s exercise of its statutory power of sale.

23. Had the learned judge properly evaluated the evidence, he would have come to the conclusion that the sale of the property to the 1st respondent was by the appellant’s father.

24. ...”

7. The appellant herein was the appellant in Kisumu CACA No 85 of 2015, while the respondent herein was the 1st respondent in that appeal. The finding and holding by the Court of Appeal was that the bank did not sell Bukhayo/Bugengi/1533 to the respondent herein. It also found and held that the sale was not lawful, hence its cancellation, and the reversion of the property to the estate of the deceased. It was after that judgment, in Kisumu CACA No 85 of 2015, of July 20, 2017, nullifying the title that the respondent herein had in Bukhayo/Bugengi/1533, that the respondent initiated the suit herein, on August 13, 2018, seeking to recover, from James Masaki Rongai, who had sold it to him, being the value of Bukhayo/Bugengi/1533, which he had lost in the judgment of July 20, 2017, and the appellant herein, as administrator of the estate of the deceased. Whether the respondent is entitled to the value of Bukhayo/Bugengi/1533, that is to say Kshs 10, 500, 000.00, or a refund of the money that he paid for it, is not for me to determine, it is a matter for the trial court.
8. The judgment in Kisumu CACA No 85 of 2015 nullified the sale of Bukhayo/Bugengi/1533, and made a finding that there had been a sale of that land, which was not valid, to the respondent. A sale presupposes that money changed hands. When the sale was nullified, the respondent lost the land, and became entitled to recover the value of what he lost, in monetary terms. Whether what he lost was the value of Bukhayo/Bugengi/1533, or the price he paid for Bukhayo/Bugengi/1533, is what I have said



is not a matter for me to determine, for it is the issue for the trial court. These were the issues that were before Hon. Olengo, SPM. He properly found that the issue, in Busia ELC No 30 of 2012 and Kisumu CACA No 85 of 2015, was not recovery of what the respondent lost after the sale was nullified, and that that is what is now in issue in Busia SRMCCC No 213 of 2018. The issue in Busia SRMCCC No 213 of 2018 is, therefore, not res judicata Busia ELC No 30 of 2012 and Kisumu CACA No 85 of 2015. It is not about ownership of the land, but recovery of the monetary value of what was lost when the title was nullified, which was not a matter before the courts in Busia ELC No 30 of 2012 and Kisumu CACA No 85 of 2015.

9. In view of everything, I find that there is no merit in the appeal herein, and I hereby dismiss the same, with costs to the respondent. The file, in Busia SRMCCC No 213 of 2018, shall be returned to the registry of the Chief Magistrate's Court for finalization. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA ON THIS 30TH DAY OF JUNE 2023

WM MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Nova Ogoti Rongai, the appellant, in person.

Mr. Otanga, instructed by Bogonko Otanga & Company, Advocates for the respondent.

