



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 18 OF 2020

MOSES AGEYA KEMBE.....APPELLANT

VERSUS

WASHINGTON OKELLO SULE.....RESPONDENT

(Being an Appeal arising from Judgment of the trial court in Kisumu CMCC ELC CASE NO.36 OF 2018 Delivered on the 11th March 2020 by the Hon.W.K.ONKUNYA SRM)

WASHINGTON OKELLO SULE..... PLAINTIFF

VERSUS

MOSES AGEYA KEMBE.....DEFENDANT

RULING

The Appellant, Moses Ageya Kembe being dissatisfied with the Judgment of the Lower Court court in Kisumu CMCC ELC CASE NO.36 OF 2018 Delivered on the 11th March 2020 by the Hon.W.K.ONKUNYA SRM filed this Appeal vide a Memorandum of Appeal on the following grounds:

1. That the Learned Trial Magistrate erred in law and fact by incorrectly applying the law and legal test on the case and issues before her and thereby arriving at erroneous finding.
2. That the Learned Trial Magistrate erred in holding that the Respondent is the rightful owner of the suit parcel and not addressing the issues raised by the Appellant in particular the issue of trust.
3. That the Learned Trial Magistrate did not find that the Plaintiff/Respondent had taken money from the Appellant to further the sale of the Property.
4. That the Learned Trial Magistrate did not appreciate the strong evidence given by the Appellant.
5. That the Learned Trial Magistrate granted orders not sought for.
6. That the decision was against the weight of the evidence.
7. That the Learned Trial Magistrate was completely biased against the Appellant.

On 1st July 2021 when the matter came up for Mention before the Deputy Registrar, Counsel for the Appellant stated that he had filed the Record of Appeal but were yet to serve the Respondent. On 22nd September 2021 when the matter came up for Mention before the Judge, Counsel for the Appellant confirmed that they had filed the Record of Appeal and served the same. Counsel for the Respondent too confirmed that they had been served with the Record of Appeal however some documents were missing. Counsel for the Appellant requested to file a Supplementary Record of Appeal and the court directed that the Appellant should file a Supplementary Record of Appeal within 21 days, the Appellant to file and serve Submissions within 21 days and the Respondent to file and serve his submissions within 21 days.

I have perused this file and I can confirm that the Appellant did not file the Supplementary Record of Appeal but filed his Submissions on 25th January 2022.The Respondent has failed to serve his Submissions.

Appellant's Case

It is the Appellant's case that he acquired land parcel number **KISUMU/KASULE/96** from the Respondent and his uncle Joshua Nyangwedhe. The Respondent's uncle informed the Appellant that land parcel number **KISUMU/KASULE/96** was registered in the names of Barack Sule, Respondent's father who was holding in trust for the family members. In 2010 after the Respondent had carried out succession proceedings, he requested to the Respondent for Kshs. 30,000/= to offset succession proceedings so that he could transfer the Appellant's portion to him.

The Respondent signed the transfer forms but refused to transfer the Appellant's parcel of land. The Appellant discovered that the Respondent herein was in the process of subdividing land parcel number **KISUMU/KASULE/5649** and he decided to put a caution on the said land. It is the Appellant's case that there was no land exchange Agreement as alleged by the Respondent and he is the rightful owner of the suit property having bought it from the Respondent's uncle who co-owned the suit property with the Respondent's father. The Appellant sought for orders of dismissal of the Respondent's suit and prayed that he be granted the orders sought in the counterclaim where he had prayed that for orders to be declared the rightful owner of the suit property land parcel number **KISUMU/KASULE/5649** and a permanent injunction restraining the Respondent from interfering with the suit property.

Respondent's Case

The evidence on record show that the Respondent and his uncle Joshua Nyagwedhe Oongo entered into an Agreement with the Appellant with regard to land parcel number **KISUMU/KASULE/96**. When the Respondent's uncle died, he decided to carry out a search at the Lands Registry for his father's property land parcel number **KISUMU/KASULE/ 3241** and **KISUMU/KASULE/3242** registered in his mother's name and land parcel number **KISUMU/KASULE/96** was registered in his father's name. The Respondent tried to look for the original title of the suit property but did not find it and he sought help from the Land Registrar who directed him to report the matter to the police where he was issued with a police abstract.

The Respondent then wrote a letter to the Land Registrar to re-gazette the title. The Respondent attached all the necessary documents including the grant of Letters of Administration having obtained them through a succession process and he was issued with a title. The Respondent subdivided the suit property into five parcels namely **KISUMU/KASULE/ 5649,5650,5651,5652 and 5653** and he wanted to subdivide 5649 which belonged to him. He approached the Appellant for an amicable settlement since the land which had been sold to him belonged to his father.

The Appellant and the Respondent entered into a verbal Agreement where the Appellant was to take an alternative parcel of land equal to the land parcel number **KISUMU/KASULE/5649** but the Respondent did not accept as the proposed parcel of land was smaller. The Appellant had lodged a caution against the suit property and when the Respondent went to the Land Registrar to have the caution removed, the Land Registrar wrote a letter to the Defendant asking him to show cause why the caution should not be removed. The Appellant was using the suit property for grazing but was residing in the neighboring land parcel number **KISUMU/KASULE/6707**.

Appellant's Submissions

He stated in his Submissions that he was aware of the Agreement dated 15th January 2001 and signed it as a seller and not a witness. The Appellant also signed the transfer form in favour of the Respondent after receiving Kshs.30,000/=. It is his submissions that he was holding the land in trust for the Respondent and prayed that the Appeal be allowed.

Analysis and Determination

Pursuant to the Agreement for Sale for land parcel number **KISUMU/KASULE/96** dated 27th November 2011 between the Respondent together with his uncle Joshua Nyagwedhe as the Vendors and the Appellant herein as the Purchaser, it is clear that land parcel number **KISUMU/KASULE/96** did not belong to the Respondent nor his uncle as Land parcel number **KISUMU/KASULE/96** was family land registered in the name of Barack Sule who was the Respondent's father. The Respondent's father died on 28th December 1992 as per the death certificate. The uncle to the Respondent wanted to sell his parcel of land and therefore summoned the Respondent to come and sign the Sale Agreement.

The Respondent and his uncle signed the Sale Agreement despite the fact that they did not have legal capacity to do so as they ought to have taken out Letters of Administration for the late Barack Sule. The Appellant too on the other hand should have done due diligence at the Lands Registry to ascertain whether the suit property belongs to the Respondent and his uncle. The Appellant has not produced any document to show that he conducted due diligence at the Lands Registry.

The provisions of Section 26 of the Land Registration Act, Act No.3 of 2012 provide as follows:

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

In the case of **Elijah Makeri Nyangw'ara -Vs- Stephen Mungai Njuguna & another (2013) eKLR**, the court held, inter alia:-

“...is the title impeachable by virtue of Section 26(1) (b) ? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

The Respondent has alleged that after his father passed on, his mother Dorine Sule filed a Succession Case in respect of his estate to enable her transfer the piece of land and was issued with the Letters of Administration. The Respondent has failed to produce the said letters of Administration Respondent's mother later passed on and the Respondent sought for letters of Administration and was granted the same. The Respondent has failed to produce the said letters

As per the succession proceedings, the Respondent herein subdivided land parcel number **KISUMU/KASULE/96** into five parcels being **KISUMU/KASULE/ 5649,5650,5651,5652 and 5653** and his portion was land **KISUMU/KASULE/ 5649** and was issued with a title deed. The Respondent did not produce the title deed issued to him for the suit property as he has alleged. The only document produced was the Transfer document which showed that the Appellant transferred the suit property to the Respondent. However, the Appellant in his Statement of Defence stated that the Respondent unlawfully and illegally without his consent proceeded to register the suit property in his favour.

Section 24 (a) of the Land Registration Act which provides thus:

“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Munyu Maina vs. Hiram Gathiha Maina [2013]eKLR.

“...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.... the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal....”

The Respondent herein is entitled to seek of Letters of Administration as required by the Law of Succession Act since he was the child to Barack Sule which he sought vide Succession cause No. 432 of 2009. He is therefore a beneficial owner of the deceased estate. The Respondent subdivided the property into five parcels and was issued with the title to the suit property. This court can therefore conclude that the Respondent followed the right procedure in acquiring the title.

in the case of **Daudi Kiptugen vs Commissioner of Lands & 4 Others** [2015] eKLR where the Court held that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

Although the Appellant alleges to have acquired the suit property legally, he did not conduct a search or conduct proper due diligence to ascertain who owns the property before buying it. The Sale Agreement between the Respondent, his uncle and the Appellant indicate the parcel being sold was land parcel KISUMU/KASULE/96 and not the suit property.

The trial court correctly found that the respondent was the registered proprietor of the suit property and was entitled to all rights and privileges appurtenant thereto. There was no proof of fraud or any illegality by the appellant to the required standards in law. Moreover the court found that by the time of the sale agreement the property was registered in the names of a deceased person and that no succession had been carried on in respect of his estate and therefore the agreement amounted to intermeddling in the estate of the deceased. This court agrees with the findings of the lower court and upholds the decision of the lower court and the appeal is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28th DAY OF JANUARY, 2022

ANTONY OMBWAYO

JUDGE

THIS JUDGEMENT HAS BEEN DELIVERED TO THE PARTIES BY ELECTRONIC MAIL DUE TO MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN THE LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON 15TH MARCH 2020.

ANTONY OMBWAYO

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31st DAY OF JANUARY, 2022

ANTONY OMBWAYO

JUDGE

THIS JUDGEMENT HAS BEEN DELIVERED TO THE PARTIES BY ELECTRONIC MAIL DUE TO MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN THE LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON 15TH MARCH 2020.

ANTONY OMBWAYO

JUDGE