



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT HOMABAY

ELC APPEAL NO. 22 OF 2021

(FORMERLY MIGORI ELC APPEAL NO. 35 OF 2019)

(An appeal against the Judgment and orders of

HON.N.N. MOSETI (SRM) dated 6th November 2019 in

Mbita SRM's Court Environment and Land case number 19 of 2018)

SERFINA OKUTA MAGANY.....1ST APPELLANT

ANDREW ONYANGO MAGANY.....2ND APPELLANT

VERSUS

MICHAEL ABONGO OUMA.....1ST RESPONDENT

ISAYA JUMA MWARE.....2ND RESPONDENT

MARTIN JOHN OKECH.....3RD RESPONDENT

LAND ADJUDICATION OFFICER –SUBA /MBITA.....4TH RESPONDENT

LAND REGISTRAR.....5TH RESPONDENT

HON. ATTONEY GENERAL.....6TH RESPONDENT

JUDGMENT

1. This appeal was generated pursuant to the judgment of the learned trial magistrate (Hon. N.N MOSETI, SRM) delivered on 6th November 2019 in Mbita SRM's Court Environment and Land case number 19 of 2018 where the plaintiffs'/Appellants suit which had been originated by way of a plaint dated 5th June 2018, was dismissed with costs to the defendants/Respondents.

2. The subject matter of the appeal is land reference number Kaksingri/K/Waregi/43 measuring approximately zero decimal nine four hectares (0.94 Ha) in area (the suit property). It is contained in Registry Map Sheet number 415 and located within Homa Bay County.

3. The duo Appellants namely Serfina Okuta Magany and Andrew Onyango Magany are represented by the firm of Ayoo-See and Associates Advocates.

4. The 1st, 2nd and 3rd Respondents are Michael Abongo Ouma, Isaya Juma Mware and Martin John Okech respectively. They are represented by the firm of Mbugua Mureithi and Company Advocates.

5. There is no appearance for the 4th, 5th and 6th Respondents in this appeal.

6. This being the first appeal from the trial court in the matter, I am duty bound to analyze and evaluate the evidence on record afresh and

arrive at my own independent findings and inferences; see **Williamson Diamonds Limited-vs-Brown (1970) EA 1**.

7. It must be remembered that an appellate court will not ordinarily interfere with the trial court's decision unless the same has been founded on wrong principles of fact and or law or on no evidence at all or on a misapprehension of the evidence; see the case of **Mwangi and another-vs-Wambugu (1982) 2 KCA 100**.

8. The Appellants were the plaintiffs before the trial court. Briefly, their case as disclosed in their plaint dated 5th June 2018 revealed at pages 11 to 14 of the record of appeal and the testimony of the 2nd appellant (PW1) as shown at pages 43 to 47 of the said record.

9. The Respondents herein were the defendants before the trial court. The gist of their case was as revealed in their statement of defence dated 21st November 2018 captured at pages 155 and 156 of the record of appeal and the testimonies of Beth Akinyi (DW1), Grace Musundi Ombima (DW2) and other witnesses as per the record of appeal at pages 50 to 61.

10. At the conclusion of the trial, the plaintiffs' suit was dismissed as stated at paragraph 1 hereinabove. In arriving at the finding, the learned trial magistrate observed as follows;

“Having disposed off the first issue in favour of the defendants and taking into account that the defendant acquired first registration of the title deeds in respect of the parcels in dispute, I hold that their occupation of the parcels of land is regular and lawful. In the premises the prayers sought by the plaintiffs are underserved.....” (Ephasis added)

11. Being aggrieved by the trial court's decision, the appellants lodged this appeal by way of a memorandum of appeal dated 22nd November 2019 founded on the following eleven (11) grounds;

i) That the learned trial Magistrate erred in law and fact in failing to analyze and evaluate the inconsistent defence evidence and placing undue over emphasis on direct evidence by the appellants which was duly proved to the required standard.

ii) The learned trial Magistrate erred in law and fact in relying on the evidence of defence witness which was inconsistent, incredible with regards to death of appellants' husband and father respectively and which evidence was not supported with and documentary evidence as to the date of death.

iii) The learned trial Magistrate erred in law and fact in treating the evidence tendered by the appellants superficially thus reaching a wrong decision.

iv) The learned trial Magistrate erred in law and fact in failing to evaluate and analyse the issue of objection proceedings raised by the appellants since the said proceedings were allegedly conducted after demise of the appellants' husband and father respectively and furthermore the said objection proceedings contradicted the defence witness testimony instead of corroborating e.g DW6 MARTIN JOHN OKECH.

v) The learned trial magistrate erred in law and fact in failing to observe and make a finding on evidence of DW2 who testified that she was approached by the 1st, 2nd and 3rd respondents to investigate the death and where about of ALEXIUS MAGANY MATHOKORE died and buried, clearly demonstrating that the 1st, 2nd and 3rd respondents were not aware of the said death and therefore could not give evidence on the same.

vi) The learned trial magistrate erred in law and fact in finding in favour of the defendants basing on issue of first registration whereas it's the said registration that is being challenged and fraudulent therefore the respondents ought to have proved the legality of how they acquired the titles which they did not.

vii) The learned trial Magistrate erred in law and fact failing to establish that the deceased ALEXIUS MAGANY MATHOKORE passed on 14/11/1984 without parting with the ownership of the parcel No. KAKSINGRI/K.WAREGI/43 thus all the claims by the respondents after the said date were fraudulent.

viii) The learned trial Magistrate erred in law and fact in failing to establish that the parcel belonged to the deceased and the respondents fraudulently, falsely and maliciously made presentation to the Adjudication officer and registrar of title and had the parcel sub-divided in various titles and registered in their names.

ix) The learned trial magistrate erred in law and fact in failing to establish that the respondent being first registered titles owners as the Magistrate put it at page 9 paragraph 5 of his Judgment, their titles are impeachable so long as in this case where every step by the respondent, took place after the death of Alexius Magany Mathokore the registered owner.

x) The learned trial Magistrate erred in law and fact in upholding sale agreement which were never witnessed by any family member of the deceased despite the respondents confirming that the deceased had a family and it was necessary the family members were involved for this being ancestral land and the deceased held in trust for the family members.

xi) The learned trial Magistrate erred in law and fact in failing to critically analyse and evaluate the pertinent and mandatory issue of consent of the land control board which was severally raised by the appellants, the same are clear proof of fraud and also proof of whether deceased died or was present at the hearings of the land control board.

12. A fortiori, the appellants pray that;

- a) This appeal be allowed with costs to the appellants.
- b) The Judgment of Mbita ELC No. 19 of 2018 dated 6/11/2019 be set aside.
- c) The appellants be awarded costs in Mbita ELC No. 19 of 2018 and in this appeal.

13. Initially, the appeal was lodged and admitted on 9th December 2019 at Migori Environment and Land Court. On 21st January 2021, the court granted leave to the appellants to file and serve a supplementary record of appeal. Indeed, the said record is dated 28th January 2021 and was filed on 15th February 2021. Further, on 5th October 2021, the appeal was transferred to this court, upon its establishment, for hearing and determination.

14. Pursuant to the court's orders and directions given on 22nd March 2021, the appeal was canvassed by written submissions.

15. Notably, the appellants failed to file their submissions.

16. In their five (5) paged submissions duly filed in court on 4th October 2021, the 1st, 2nd and 3rd respondents gave brief introduction and background as well as raised issues with regard to the validity of year of death of Alexius Magany Mathokore (the deceased), validity of the documents including the death certificate produced by the appellants and validity of the process of transfer of the suit property. They implored upon the court to find that the family of the deceased waited over 30 years to begin the process of distribution of his estate. That the onus was not on the 1st, 2nd and 3rd defendants to obtain the grant of letters of administration thereof. That the appellants raised false allegations and followed irregular procedures in their claim that the suit property formed part of the estate of the deceased.

17. To fortify the submissions, their learned counsel made reference to **section 26 (1) of the Land Registration Act, 2016 (2012)** regarding the 1st respondent's title issued to him in his name on 30th January 2009 and an official search showing that title deed was issued in respect of the suit property. Furthermore, counsel relied on **Gladys Wanjiru Ngacha-vs-Theresa Chepsaat and 4 others (2013) eKLR, Joseph Karisa Mutsonga-vs-Johnson Nyati (1984) eKLR and Zacharia Wambugu Gathimu and another-vs-John Ndungu Maina (2019) eKLR** as set out on the list of authorities filed together with the submissions herein.

18. Having duly considered the foregoing, I find that the issues for determination in this appeal are grounds 1 to 11 as set out on the memorandum of appeal and are hereby categorized into four sets; grounds 1 and 2; grounds 3 and 4; grounds 5, 7, 8 and 9 as well as grounds 10 and 11. Thus, the issues are condensed to whether the 1st, 2nd and 3rd defendants titles over the suit property are impeachable in the circumstances.

19. I take into account the defendant's defence statement and the testimonies of witnesses namely DW1, DW2, DW3, DW4, DW5 and DW6 alongside DEhibits 1 to 11 herein. The learned trial magistrate, too, considered them all in his judgment.

20. The trial court further considered DEhibits 1 and 2 against PEhibit 11. The court then questioned PEhibit 11 on the basis of superimposition thereon.

21. The court proceeded to hold that the original death certificate of the deceased and a certified entry in the death register were not produced in the suit. That in that regard, there was no proof of the date of death of the deceased.

22. Besides, the trial court considered the 2nd Appellant's testimony inclusive of PEhibits 1 to 11. The Appellants pleaded the particulars of alleged fraud on the defendants' acquisition of title over the suit property at paragraph 13 of the plaint. In the case of **Kinyanjui Kamau-vs-George Kamau (2015) eKLR**, the Court of Appeal held-

“ It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged. It is not enough to infer from the facts.”

23. PW1 relied on his statement filed on 6th June 2018 and PEhibits 1 to 11 which include an official search, green card, letters of administration, death certificate and adjudication records. He stated that the 1st and 2nd Respondent's acquisition of the suit property was fraudulent as he was not aware of the objection purportedly lodged by 1st Respondent.

24. During cross examination, PW1 stated that the suit property was the asset of the deceased and **part of the grant of letters of administration** which were admitted as part of the plaintiff's exhibits in the suit. Therefore, the trial court's treatment of the evidence of PW1 was superficial and an over-reach.

25. The learned trial magistrate further held that the defendants (DW3, DW4 and DW6) acquired first registration of the suit property. That their occupation of the same was regular and lawful in the circumstances. I bear in mind Sections 24, 25 and 26 Land Registration Act, 2016 (2012) thereof.

26. In **Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 and Gladys Ngacha case (supra)**, it was held that allegations of fraud must be strictly proved; Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt. Something more than a mere fraud was obviously higher than on a balance of probabilities is required. The trial court reasoned that the appellants had failed to prove the

allegations of fraud against the respondents in the suit.

27. DW2 and DW3 stated that they did not obtain the consent of the relevant land control board in the acquisition of the titles over the suit property. This court is aware of sections 6 and 7 of the Land Control Act Chapter 302 Laws of Kenya as concerns consent of Land Control Board and the consequences of void transactions as noted in **Kariuki-vs-Kariuki** (1983) KLR 227.

28. On that score, the 1st and 2nd Respondents' acquisition of titles over the suit property is brought into question as I subscribe to the decision in **Munyu Maina-vs-Hiram Gitiha** (2013) eKLR, where it was held, inter alia;

“ a registered proprietor must go beyond the instrument of title and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”

29. In the foregone, the learned magistrate erred in his reasoning as captured at paragraphs 25 and 26 hereinabove. Plainly, the Appellants strictly pleaded and proved fraud on the part of the Respondents hence the statement of defence was unsubstantiated and bound to fail.

30. Moreover, the Appellants pleaded any other relief per prayer (f) in the plaint. No doubt, a declaration of trusts including customary trust is one of the remedies envisioned thereunder bearing in mind the decision in the case of **Odd Jobs-vs Mubia (1970) EA 476**.

31. It is stated at paragraph 9 of plaint that the Appellants being family members of the deceased, have been residing on the suit property. That thus, they have an overriding interest in the form of customary trust under section 28 of the Land Registration Act, 2016 (2012) as stated at paragraph/ground.

32. It is important to note that trust is a question of fact to be proved by evidence. The claimant has to prove that the land in question is held in trust for the family; see **Mumo-vs-Makau (2002) 1 EA 170**

33. In the case of **Isack M'Inanga Kiebia-vs- Isaaya Theuri M'Lintari and another (2018) eKLR**, the Supreme Court of the Republic of Kenya identified some of the elements that would qualify a claimant as a trustee. The elements include; that the land in question was before registration family, clan or group land and that the claimant belonged to such family, clan or group.

34. I further approve the decision in **Mwangi and another –vs-Mwangi** (1986) KLR 328 on the existence of trust in the title to land. That the land in dispute was subject to those interests when it was registered in the name of the respondent as also held in **Kiebia case (supra)**. By the testimony of PW1 inclusive of PExhibits 1 to 11, the Appellants proved the existence of a customary trust in their favour over the suit property.

35. So, did the Appellants prove their case before the trial court to the requisite standards? Being guided by the decision in **Kirugi and another-vs-Kabiya and 3 others** (1987) KLR 347 and the entire case, I am of the considered view that the appellants proved their claim before the trial court on a balance of probability.

36. On the whole, I find that the learned magistrate erred in fact and law in arriving at the impugned judgment. Therefore, the appeal succeeds.

37. A fortiori, I allow this appeal commenced by way of a memorandum of appeal dated 22nd November 2019 in terms of orders (a) and (b) sought therein and as stated at paragraph 12 hereinabove.

DATED AND DELIVERED AT HOMA BAY THIS 25TH DAY OF JANUARY 2022

G M A ONG'ONDO

JUDGE

In the presence of:

a) Ms Otieno learned counsel for the appellant

b) Mr.Olewe learned counsel for the 1st, 2nd and 3rd Respondents

c) Okello, court assistant.

G M A ONG'ONDO

JUDGE