



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELC APPEAL CASE NO.12 OF 2021

MICHAEL OTIENO KUYO.....APPELLANT

VERSUS

DOMNIC OWEGI OSWAGA.....RESPONDENT

(Being an appeal from the judgment and decree of Senior Principal Magistrate

Hon.J.O. Ong'ondo on 25/03/2021 in Siaya Principal Magistrates Court

ELC Number 31 of 2019)

JUDGEMENT

Introduction

1. Before we delve into the gravamen of this appeal, a detailed background on the dispute is of import. The appellant and respondent are relatives. By a plaint dated 4/04/2019, the appellant alleged that the respondent had trespassed on his parcel of land known **SIAYA/KARAPUL/RAMBA 3459 (the suit property)** thus usurping his interests as the registered proprietor of the suit property. He alluded that the respondent had illegally and unlawfully encroached on the suit property and had interfered with the suit property by evicting tenants, demanding rent from tenants and had illegally connected electricity to the suit property. He prayed for a permanent injunction restraining the respondent, his agents and any other person deriving authority from him from trespassing or continuing to trespass, occupy, till, cultivate or in any way interfere with the suit land. He also prayed for vacant possession and costs of the suit.

2. In response, the respondent filed a defence dated 26/04/2019. In his amended defence, the respondent denied the averments. He admitted that though the suit property was registered in the appellant's name, one half of the suit property was held by the plaintiff in trust for the respondent's father one **John Oswaga Kuyo (deceased)** who had acquired it by means of purchase. He prayed for the suit to be dismissed with costs.

3. Upon hearing the parties, the court by its judgment dated 25/03/2021 entered judgement in favour of the respondent by dismissing the appellant's suit with costs to the respondent and cancelled the plaintiff's title to the suit property and declared that the title was illegal, null and void. It declared that the respondent's family was entitled to a portion of the suit property as per the surveyors report and ordered the Siaya County Land Registrar to recall the title deed to the suit property and upon subdivision, rectify the register in the following terms; (i) the first portion of the suit property measuring 0.06 HA be awarded to the **appellant**, (ii) the 2nd portion of the suit property measuring 0.05 HA which contained rental premises be awarded to the **Leonida Oswaga** [mother to the plaintiff] and, the 3rd portion of the suit property measuring 0.04 HA be awarded to **Martin Okello**.

4. Aggrieved and dissatisfied by the decision of the court, the appellant filed a memorandum of appeal dated 8/04/2021 and a record of appeal dated 23/09/2021. The appeal is the subject of this judgement.

5. The respondent filed a replying affidavit together with written submissions dated 9/11/2021. This replying affidavit is a strange in law and is hereby expunged from the court record.

Memorandum of appeal

6. The appellant's memorandum of appeal sets out 6 grounds of appeal as follows;

a) *The Learned magistrate completely misunderstood the evidence before him, wrongly analysed the evidence and therefore came to the wrong conclusions of fact and law.*

b) *The Learned magistrate erred in law and in fact by holding that the appellant obtained the title to the suit property through fraud and yet the same was neither pleaded by the respondent nor proved.*

c) *The Learned magistrate erred in fact and in law by relying on allegations of the respondent that his father together with the appellant jointly purchased a portion of the suit property from Simon Omollo and the appellant caused the same to be registered in his name yet no documentary evidence was produced before the court to prove the same.*

d) *The Learned magistrate erred in fact and law by granting prayers that were not pleaded for in the respondent's pleadings.*

e) *The Learned magistrate erred in fact and law by relying on the respondent's inconsistent evidence.*

f) *The Learned magistrate totally misunderstood and wrongly evaluated the evidence before him and consequently, arrived at a wrong conclusion.*

7. The appellant prayed for; (i) the appeal be allowed, (ii) the judgement of the lower court be set aside, (iii) the court do reassess and reappreciate the evidence afresh and, (iv) costs of the appeal.

The appellant's submissions

8. The appellant filed his submissions dated 17/11/2021. He grounded his submissions on three issues that he framed for determination; (i) whether the respondent pleaded that the appellant's title was obtained by means of fraud and if he proved the same (ii) whether the respondent proved that his father purchased the suit land and the appellant registered it in his name instead of that of the respondent's father and, (iii) whether the orders granted by the trial court were prayed for. On the 1st issue, the appellant contended that respondent neither pleaded nor proved fraud and on this, he placed reliance on the case of **Virjay Morjoria v Nansingh Darbar and another [2000] eKLR**. On the second issue, he contended that the respondent's testimony was contradictory and that he [the respondent] did not prove his case. On the 3rd issue, he contended that the trial court went beyond his jurisdiction in granting orders that were not pleaded and on this, he placed reliance on the case **Independent Electoral and Boundaries Commission and Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR**.

The respondent's submissions

9. The respondent filed written submissions dated 1/12/2021. On grounds 1, 2, 3 and 4 of the memorandum of appeal, he contended that he had produced enough evidence to challenge the legality of the title deed of the suit property being waved by the appellant. He submitted that the appellant had not discharged proof of how of he acquired title to the suit property. On these grounds, he placed reliance on **Sections 24(a) of the Land Act, Section 26 of the Land Registration Act and Chemei Investments Limited v the Attorney General & others Nairobi Petition number 94 of 2005**. On ground 5 and 6 of the memorandum of appeal, he contended that the trial court's findings and decision were sound, legal and lawful. He urged the court to dismiss the appeal with costs to him.

Analysis and determination

10. Having considered the original lower court record, record of appeal, memorandum of appeal and rival written submissions, this court has identified two issues as falling for determination; (i) whether the trial court issued orders that were not sought, and, (ii) whether the respondent proved that the appellant held the suit the property in trust for the estate of **John Oswaga Kuyo (deceased)**.

I will proceed to analyse the legal and jurisprudential framework in a sequential manner.

11. This being a 1st appeal, it is the duty of this court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. The jurisdiction of a 1st appellate Court was well settled in the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, which was quoted by the case of **Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR** as thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

12. As a 1st appellate court, this court will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judicial officer misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong conclusion.

13. To answer the first 1st issue, this court has to investigate the pleadings of the parties vis a vis the orders issued by court. The appellant, in his pleadings sought orders against the respondent for; permanent injunction, vacant possession and costs of the suit. In his defence, the respondent denied the averments in the plaint and contended that he had an equal right to the suit by virtue of trust because the appellant held one half of the suit property in trust for the estate of **John Oswaga Kuyo (deceased)**. The trial court found that the appellant obtained title to the suit property by means of fraud and misrepresentation of facts and went ahead and made several declarations against the appellant

including cancelling title to the suit property and held that the appellant together with one **Martin Okello** and the family of the respondent were entitled to the suit property.

14. In an adversarial system as ours and subject to the relevant provisions of the law on the structure of particular pleadings, each party has the burden to chart his own case which binds him. The essence of this is to ensure certainty and finality so that each party knows well in advance the case that he has to meet and cannot be taken by surprise. It is trite law that courts are bound by pleadings presented before it by the parties and the court cannot enter the arena of litigation. As an independent arbiter, the courts role is to adjudicate upon the specific matters in dispute which the parties themselves have raised in their pleadings and not otherwise. This position of law was upheld by the Court of Appeal in the case of **Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 others [2016] eKLR** that cited the decision of **Malawi Railways Ltd. -vs- Nyasulu [1998] MWSC 3** which equally quoted an article by **Sir Jack Jacob** entitled "**The Present Importance of Pleadings.**" published in [1960] **Current Legal problems, at page 174** which stated thus;

"Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation".

15. Whether the appellant's title to the suit property was illegally or unlawfully acquired was not available for the trial court's determination because this was never pleaded. This court is guided by the Court of Appeal decision in the case of **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others [Ibid]**, which held thus;

"Guided by our evaluation of the prayers sought in the amended petition... we make a finding that the trial court erred in law in issuing orders and directions on unpleaded issues"

16. After carefully evaluating the pleadings, it is my finding that the trial court erred in law by issuing orders that were not pleaded by the parties.

17. On the 2nd issue, it is evident that *trusts including customary trusts are recognized as overriding rights* within the provisions of **Section 28** of the **Land Registration Act** and *these trusts being overriding rights are ordinarily not noted in the register and therefore a proprietor's title is defeasible on grounds of trust.* Within the provisions of **Section 25 of the Land Registration Act**, certain trusts can still be noted in the register. Once so noted, such trusts, not being overriding interests, would bind the registered proprietor on the terms noted in the register.

18. From the evidence adduced in the trial court, it is evident that the rights of **John Oswaga Kuyo (deceased)** were not registered in the register of the suit property and it therefore follows that that the claim by the beneficiaries of the estate of **John Oswaga Kuyo (deceased)** lies within the provisions of **Section 28** of the **Land Registration Act** and not **Section 25** of the **Land Registration Act**.

19. It is settled law that to prove a trust in land; one need not be in actual physical possession and occupation of the land. This was the position upheld by the Supreme Court of Kenya in the case of **Isack M'inanga Kiebia v Isaaya Theuri M'lintari & another [2018] eKLR**. The question that then arises is whether the respondent discharged the burden that the appellant held one half of the suit property in trust for **John Oswaga Kuyo (deceased)** as pleaded in the defence and thus justify his actions on the suit property. I have re-evaluated the evidence adduced by the appellant and his witnesses as well as that of the respondent and his witnesses.

20. In his evidence, the appellant contended that he bought the suit property from one **Simon Abednego** in the year 1992 for the sum of kshs.3,150/- He produced a copy of the title deed to the suit property as proof of purchase. He contended he had constructed a home on the suit property and not rental houses from which he had been collecting rental income. He contended that the respondent's father **John Oswaga Kuyo** had never raised a claim to the suit property. He led evidence of **PW2** and **PW3** who were respectively **Simon Onyango Omolo** and **Zablon Ngeso**. They contradicted the appellant when they contended the suit property was bought by the appellant in 1986. They testified that they witnessed the sale agreement between the appellant and the vendor. Apart from the title deed, the appellant did not produce any other documents evidencing purchase of the suit property.

21. In his evidence, the respondent contended that the appellant held one half of the suit property in trust for his [respondent's] father. He alluded that this one half had five rental rooms which belonged to his father. He contended that, despite a period of over 28 years having lapsed from the time the appellant had the suit property registered in his name to the time his father died, his father **John Oswaga Kuyo** never sought to be registered as co-owner to the suit property. He contended that his family had given the appellant some money for a surveyor's fees for purposes of subdivision however, the appellant declined to sign the relevant documents. Evidence of such remittance of funds were never produced. The respondent's evidence was led by **DW2, DW3, DW4** and **DW5**. **DW2** who is a brother to the appellant contended that the appellant held the suit property in trust for him too. In other words, the property was owned by the appellant, himself and their brother **John Oswaga Kuyo [deceased]**. He contended he purchased his portion for kshs. 5,000/-. He averred that he surrendered his sale agreement to the appellant in 1992 for purposes of processing the title deed in his name. **DW3** who is a widow to **John Oswaga Kuyo [deceased]** corroborated the evidence of **DW1** and contended that the purchase price and monies for construction of the 5 roomed rental houses were paid directly to the appellant and not the vendor. That the sale agreement for the purchase of the suit property was surrendered to the appellant in 1992 for purposes of processing a title deed in the name of **John Oswaga Kuyo**. The sale agreements and receipts confirming payments were not produced by the respondent. **DW2** and **DW5** corroborated the testimony of **DW1** and **DW3**.

22. The respondent produced as "**Dexh 3**" a surveyor's report which showed that the appellant approached a surveyor to subdivide the land into 3 portions but the names upon whom these 3 intended subdivisions were to be registered upon were not disclosed in the report. From the report, it is apparent that after the subdivision exercise, the appellant refused to append his signature on the documents.

23. The respondent's pleadings and evidence are in contradiction. In his pleadings, he contended the appellant held one half of the suit property in trust for **John Oswaga Kuyo** while in the evidence he led, it was contended that apart from **John Oswaga Kuyo**, the appellant equally held the suit property in trust for another 3rd party [**DW2**]. From the evidence of **DW3**, she contended that she paid the purchase

price and monies for construction of the rental units to the appellant and not to the vendor. Whether this money if at all indeed it was made to the appellant was utilised towards part purchase of the suit property and used for construction of rental units is neither here nor there. What is clear is that neither **John Oswaga Kuyo** nor **DW3** ever remitted the purchase price personally to the vendor. Consequently, the respondent failed to prove his case on a balance of probabilities. Having evaluated and analyzed the evidence afresh and the applicable law, it is my finding that that the appellant did not hold the suit property in trust for the estate of **John Oswaga Kuyo** and he has proved his case on a balance of probabilities.

24. In the case of **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012: [2014] eKLR**. The Supreme Court of Kenya settled the law on award of costs: that costs follow the event, and that the Court has the discretion in awarding costs. The appellant and the respondent are close relatives and it would be in the best interests if parties bore their respective costs of this appeal.

25. Ultimately, the appeal is merited and the court makes the following disposal orders: -

a) The judgement of the trial court is hereby set aside in entirety and substituted with an order entering judgement for the appellant as prayed for in the plaint.

b) Each party to bear their own costs of this appeal and lower court.

26. It is so ordered.

JUDGMENT DELIVERED VIRTUALLY,

DATED, SIGNED AND DELIVERED THIS 20TH DAY OF JANUARY 2022

IN THE PRESENCE OF:

MR. OKELLO FOR APPELLANT

MS. JUMA FOR KORONGO FOR RESPONDENT

COURT ASSISTANT: SARAH

HON. A. Y. KOROSS

JUDGE

20/1/2022