



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUSIA.

Civil Appeal No. 19 Of 2014.

JOHN JUMA NYANGWESO.....1ST APPELLANT

FREDRICK BARASA OUMA.....2ND APPELLANT

VERSUS

JACOB OKUMU BUSERA.....RESPONDENT.

(Being an Appeal from the ruling of Hon. C.I Agutu – Resident Magistrate in Busia CM, Land Dispute case No. 5 of 2009 dated 4TH July, 2014)

R U L I N G.

JOHN JUMA NYANGWESO and **FREDRICK BARASA OUMA**, hereinafter referred to 1st and 2nd Appellant respectively, being dissatisfied with the ruling 4th July, 2014, filed this appeal through their advocates M/S Gabriel Fwaya Advocate. In their memorandum of appeal dated 24th July, 2014 the Appellants set out 7 grounds as shown hereunder;

- ‘1. THAT** the learned magistrate erred in law in sitting on appeal on her own ruling.
- 2. THAT**, the learned magistrate erred in law, making orders which were beyond her jurisdiction.
- 3 THAT**, the learned magistrate erred in law in entertaining an application which was Res Judicata.
- 4. THAT** the learned magistrate erred in law and fact in allowing and giving substantial orders against a 3rd party without giving him a chance to be heard.
- 5. THAT**, the learned magistrate erred in law and fact and in entertaining new issues when what was pending was only execution.
- 6. THAT**, the learned magistrate erred in law and fact in her failure to find the application was in competent and lacked merit.
- 7. THAT**, the learned magistrate erred in law and fact in considering and being influenced by matters not placed before her.’

Mr. Fwaya and Mr. Jumba advocates for the Appellants and Respondent respectively, filed a consent letter dated 30th September, 2014 agreeing that the hearing of this appeal do proceed by way of written

submissions. The counsel for the Appellant filed their written submissions dated 9th February, 2015 on the 11th February, 2015. The counsel for the Respondent had earlier on filed their written submissions dated 6th November, 2014.

APPELLANTS' SUBMISSIONS.

1. That the learned trial magistrate had dismissed an earlier application dated 31st July, 2013 which had similar prayers to the application dated 27th January, 2014 which she allowed effectively overturning her earlier decision. The counsel submitted this amounted to the learned trial magistrate sitting on her own decision which is illegal.
2. That the learned trial magistrate's ruling amounted to cancellation of the registration of title to the Appellants which was beyond her jurisdiction.
3. That the 2nd Appellant was not served with the application seeking to enjoin him as a party in these proceedings. That the 2nd Appellant learned that he had been enjoined much later and was not even given an opportunity to be heard and yet he is the registered proprietor of Land parcel Bukhayo/Bugengi/10074.
4. That the learned trial magistrate entertained new issues including whether or not land parcels Bukhayo/Bugengi/10073 and 10074 should be cancelled, which was not an issue in the hearing before the tribunal.
5. That the application before the court was incompetent and the learned trial magistrate erred in failing to hold a search.
6. That the learned trial magistrate erred in failing to hold that the proceedings and decision of the tribunal was a nullity as the tribunal lacked jurisdiction to entertain a claim of specific performance.

RESPONDENT'S SUBMISSIONS.

1. That on 6th March, 2009, the Lower court adopted the award of Busia Municipality Tribunal as the judgment of the court in the following words.”

“ THAT the defendant Mr. John Ouma Nyangweso of identity card number 0103068 who is the current owner of land number BUKHAYO/BUGENGI/7892 to transfer one (1) acre of land to the plaintiff Mr. Jacob O. Busera as stated in the purchase agreement as indicated in the mutation form and signed by him. ”

That John Nyangweso the 1st Appellant, was not satisfied with the decision of the tribunal and filed an appeal before the Provincial Land Disputes Appeals Committee. The Appeal Committee dismissed the appeal and upheld the Busia Land Disputes Tribunal Award. No party has so far preferred any further appeal.

2. That after the Provincial Land Disputes Appeals Committee dismissed the appeal, Jacob Okumu Busera, the Respondent, commenced the process of executing the courts order in terms of the award of the tribunal and later discovered that John Ouma Nyangweso had subdivided land parcel Bukhayo/Bugengi/7892 into parcels Bukhayo/Bugengi/10073 and 10074. The said John Ouma Nyangweso had also registered the two parcels subdivided from Bukhayo/Bugengi/7892 in the names of his children namely, Fredrick Barasa Ouma and Mary Apiyo Ouma.
3. That the Respondent herein filed an application under certificate of urgency before the lower court to have the land registry record of the suit property rectified to reflect the position that existed as on 6th March, 2009 so as to facilitate the execution of the court order. The court granted the prayers in its ruling of 4th July, 2014, which is the subject matter of this appeal. The counsel for the Respondent therefore

submitted that the lower court had the jurisdiction to make the order it did.

4. That upon adoption of the Land Disputes Tribunal award by the court, the procedure to be followed in executing the award is in accordance with the Civil Procedure Act. That the Respondent's contention to the effect that the parcels of land subdivided from Bukhayo/Bugengi/7892 were registered in the names of the children of the 1st Appellant was not rebutted and the should therefore treat that fact as not contested. The orders to rectify the register that were granted by learned trial magistrate, which is subject matter in this appeal, was with a view of allowing the execution of the court's order and do not amount to dealing with new issues.

5. That as the earlier application that had been rejected by the learned trial magistrate related orders on land parcel Bukhayo/Bugengi/8313, and not Bukhayo/Bugengi/7892, the issue of the case being res judicata does not arise.

That the court has carefully studied the court record, both typed and hand written, and also considered the submissions filed by both counsel and noted the following;

1. That the ruling relating to the application dated 27th January, 2014 was delivered on 4th July, 2014 and not on 7th July, 2014 as the papers filed by the Appellants seems to suggest.
2. That there is no ruling in the lower court file that was delivered on 7th July, 2014 and therefore no appeal can arise on an inexistent ruling. That there was no application for leave to appeal made in respect of the ruling of 4th July, 2014 as the application dated 14th July, 2014 and consent order of 21st July, 2014 related to ruling of 7th July, 2014.
3. That having found as in (2) above, the appeal herein would stand dismissed and there would be no need to look on the grounds of appeal grounds. The court has however found it appropriate to address all the other issues so as to come up with a ruling based on merit. The court will for that purposes treat the reference to the ruling of 7th July, 2014 to have been meant for the ruling of 4th July, 2014.

ISSUES FOR DETERMINATION.

- a. Whether land parcels Bukhayo/Bugengi/10073 and 10074 are subdivisions from land parcel Bukhayo/Bugengi/7892.
- b. Whether the subdivision of land parcel Bukhayo/Bugengi/7892 to give rise to Bukhayo/Bugengi/10073 and 10074 was done after the tribunal award granting one acre to the Respondent was adopted as the judgment of the court.
- c. Whether the application subject matter of the ruling from which this appeal arises from was part of the execution process of the tribunal award that was adopted by the lower court.

CONCLUSION.

1. That Jacob Okumu Busera, who is the Respondent herein, is the one who filed Busia Municipality Land Dispute Tribunal Case No. 19 of 2008 against John Ouma Nyangweso and another, over land parcel Bukhayo/Bugengi/7892. The tribunal made its ruling dated 4th December, 2008 awarding one acre of land from Bukhayo/Bugengi/7892, then registered in the names of John Ouma Nyangweso, the 1st Appellant herein, to Jacob Ouma Busera. The award was forwarded to Busia Chief Magistrate's court and adopted as judgment of the court on 6th March, 2009 in Busia CM. Land Dispute case No. 5 of 2009.

2. That from the copy of the register for Land parcel Bukhayo/Bugengi/7892 attached to the affidavit of the Respondent, sworn on 27th January, 2014 in support of his notice of motion of the same date, the 1st Appellant was registered as the proprietor of the said parcel on 12th May, 2006 and remained as the registered owner until 23rd October, 2012 when the register was closed after subdivision into land parcels Bukhayo/Bugengi/10073 and 10074. Also attached to the said affidavit were two copies of official search in respect of land parcels Bukhayo/Bugengi/10073 and 10074. The certificate of official in respect of

land parcel Bukhayo/Bugengi/10073 shows that the land was registered in the names of Fredrick Barasa Ouma, the 2nd Appellant, on 22nd October, 2012. The certificate of official search for Bukhayo/Bugengi/10074 indicates that Fredrick Barasa Ouma who is the 2nd Appellant, and Mary Apiyo Ouma, who is described as a minor, were registered as proprietors of the said land on 19th December, 2012.

3. That as shown in (2) above, the subdivision of Land parcel Bukhayo/Bugengi/7892 and the transfer of the two parcels arising out of the said subdivision was done when the execution proceedings in respect of the tribunal award adopted by the lower court 6th March, 2009 was still pending. The application dated 27th January, 2014 aimed to revert the status of the suit land to the position it was before the subdivision so as to enable the execution of the order to give the Respondent herein one acre that was awarded to him.

4. That in view of the finding (3) above, the order of the learned trial magistrate that was aimed to return the status of land to that obtaining on 6th March, 2009 when the tribunal award was adopted as the judgment of the court cannot therefore be said to be beyond the jurisdiction of the court. It cannot also be said that the learned trial magistrate was sitting on appeal of her earlier orders in relation to the application dated 31st July, 2013.

5. That the application dated 27th January, 2014 contained a prayer 2 which was seeking to have Fredrick Barasa Ouma, the 2nd Appellant, to be enjoined as a party to the application. That prayer was granted at the ex parte stage on 27th January, 2014. The record shows that the 2nd Appellant filed a replying affidavit sworn on 6th February, 2014 to the application dated 27th January, 2014. It cannot therefore be said that the 2nd Appellant was not given an opportunity to be heard before the learned trial magistrate issued the order that the subject matter of this appeal. The affidavit of service of one Peter N. Oduori sworn on 30th January, 2014 has not been challenged. It is a fact that 2nd Appellant instructed counsel as shown in the Notice of Appointment of advocate dated 6th February, 2014.

6. That the Respondent had in his supporting affidavit sworn on 27th January, 2014 at paragraph 7 indicated that the 2nd Appellant was a son of the 1st Appellant. This fact has not been disputed in the subsequent affidavits filed in reply thereto. A reasonable person looking at the conduct of the 1st Appellant to subdivide land parcel Bukhayo/Bugengi/7892 and transfer the two parcels arising therefrom to his children, who includes the 2nd Appellant, without first ensuring that the tribunal award that was adopted by the lower court on 6th March, 2009 had been honoured would be right to conclude that the 1st Appellant intended to hide the property from the reach of the court. His aim was therefore to defeat the claim of the Respondent. I agree with the finding of the court in the case of *Mawji -vs- USIU & B Another H.C.C. 512 of 1976 (NRB)* where *Madan J* (as he then was held;

“It would be a poor and insufficient system of justice, unethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to a third party. The court therefore must protect the status quo. Lord Cranworth L.C. said in Bellamy -vs- Sabine (I DeG & J at page 578) the Law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.”

7. That having found as above, it follows therefore that the Appellants appeal has no merit and the same is dismissed with costs.

It is so ordered.

S. M. KIBUNJA,

JUDGE.

DATED AND DELIVERED ON 17TH DAY OF MARCH, 2015.

IN THE PRESENCE OF.....N/A..... 1st APPELLANT

..... N/A2ND APPELLANT

.....N/A.....RESPONDENT.

MR. JUMBA FOR RESPONDENT COUNSEL.

JUDGE.