



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCA CASE NO. E017 OF 2020

NICHOLAS OKOTH MIRUKA

SAMWEL OTIENO MIRUKA

PETER ODDOYO MIRUKA

MAURICE OTIENO MIRUKA

AND TWO OTHER SISTERS (Suing as the surviving beneficiaries of the late

CHARLES S. AKECH).....APPELLANTS

VERSUS

HENRY ODHIAMBO AKECH.....RESPONDENT

(Being an appeal for the Judgment of the Honorable W. ONKUNYA SRM in KISUMU CMC ELC NO. 260 OF 2018 delivered on 2/12/2020)

JUDGMENT

This this being a first appeal which is by way of retrial, this court, as the first appellate court, has a duty to **re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions**, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.

The chronological fact of this appeal are that Nicholas Okoth Miruka, Samwel Otieno Miruka, Peter Odoyo Miruka, Maurice Otieno Miruka, Sarah Juma Rombo and Everlyne Akech (hereinafter referred to as the Appellants) filed a suit in the lower Court against the Respondent claiming to be the biological grandsons of Charles S. Akech aka Joanes Akech Osonde deceased. The Appellants further alleged that the Respondent was also a grandson and surviving grandson of Charles S. Akech. The Appellants averred that at all material times during the adjudication the said land was registered in the names of Charles S. Akech aka Joanes Akech Osonde their grandfather (deceased) as confirmed by the letter from the land adjudication and settlement dated 30th May 2016.

The Appellants averred that on the 16th March 2016 at lands office Kisumu they conducted an official search but they were amazed only to find out that the land had already changed ownership which was transferred under unclear circumstances in the names of Henry Odhiambo Akech on the 8th March 2011 and consequently issued with a title deed.

The Appellants further averred that the suit property is ancestral land and it is the only land they depend on and stay on the same. Their grandmother and grandfather died and were buried on the suit property and even the house they were staying still stands on to date. Their two surviving aunts Abigail Anyango Midigo and Jenipher Awala Wadulo reside on the land anytime they come to visit them. That despite several requests and attempts to have Henry Odhiambo Akech sit with them and see amicable resolutions that will help them solve the dispute as family but all has been in vain.

The Appellants further averred that the Respondent had illegally and without following due process of the succession act and the consent of the family members transferred the suit property of the deceased into his names. Thus he did not have a good title or any title the basis upon which he could claim any benefit from the suit parcel. Despite the written letters and several talks to the Respondent, the respondent has refused, neglected and/or otherwise failed to sub-divide the said land to TRANSFER to the beneficiaries.

Particulars of illegality were transferring the suit property of the deceased without carrying out succession, failing to seek consent from the family/beneficiaries of the deceased, intermeddling with the estate of the deceased for his selfish gain.

The appellants further alleged that the respondent has unlawfully caused a greater damage to the compound by harvesting murrum and quarry stones especially the portion which is supposed to be of their side, intimidation of threats to vacate from his land and or deny the appellants of their right of inheritance. The Respondent filed defence denying the allegations by the appellants.

The matter was heard by the Learned Trial Magistrate who considered the pleadings, oral and documentary evidence of all parties and found that the search for Kisumu/Buoye/3503 showed that the respondent was the registered owner of the land having been registered on 8/3/2011 and title issued on 7/12/2011. The Learned Magistrate heavily relied on the evidence of DW3, George Ramogi Abuya the Paternal uncle to both the Plaintiffs and defendant who confirmed that their grandfather Joanes Akech Osonde divided his land parcels among his sons. The suit parcel of land was originally owned by Joanes Akech Osonde and went to Charles Shikuku Akech and currently to the son of Charles Shikuku Akech thus Respondent. The adjudication register showed that the land was awarded to Charles Shikuku Akech and the land was transferred to the respondent. The learned trial Magistrate dismissed the appellants claim.

Appellants now appeal to this court on grounds that:

- 1. The learned trial Magistrate erred in law and fact in failing to analyze and evaluate the evidence presented by the parties.**
- 2. The learned trial Magistrate erred in law and fact in making a finding in favour of the Defendant despite both parties being related and beneficiaries of the suit land.**
- 3. The learned trial Magistrate erred in law and fact in finding that the Plaintiffs failed to prove their case on a balance of probabilities.**
- 4. The learned trial Magistrate erred in law and fact in failing to find that the plaintiffs have been in occupation of their respective portion of the suit land for over 20 years.**
- 5. The Learned trial Magistrate erred in law and fact in failing to address and analyze the historical ownership evidence of the suit land tendered by the plaintiffs.**

I have considered the rival submissions and evidence on record. I have re-evaluated, re-considered and re-analyzed the same and do agree with the learned trial Magistrate that the suit property was registered in the names of the respondent. He was registered on 8/3/2011 and title issued on 7/12/2011. The suit land could not be described as ancestral as the same had been allocated to the respondent's father and the respondent during adjudication. Moreover, the appellants were allocated alternative parcels of land during the said adjudication. The adjudication record speaks for itself that the suit parcel of land was registered in the names of the respondent through the process of adjudication.

Having been registered as the proprietor of the suit land after the process of adjudication, the parcel of land ceased being ancestral land and Section 24, 25 and 26 of the Land Registration Act came into operation.

Section 24 provides:-

Subject to this Act—

“(a) 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; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

Section 25 provides:-

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Section 26 provides:-

(1) “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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

No evidence of illegality was adduced during the hearing of the case before the trial court. I do find that the appeal lacks merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 17th DAY OF FEBRUARY, 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.