



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCA CASE NO. 09 OF 2021

WILLIAM OKIYAH OKECH.....APPELLANT

VERSUS

GEORGE AWUOCHE.....1ST RESPONDENT

LINDA OKEYO.....2ND RESPONDENT

(Being an appeal for the Judgment of the Honorable C.L. Yalwala SPM in PMCC ELC Case No. 8 of 2019 Maseno)

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.

This matter was commenced by plaintiff that was later amended on 15th August 2019 and filed on 19/8/2019 in the Senior Resident Magistrates Court Maseno, the appellant claimed that sometimes on or about the month of December 2014, Damaris Kavinza Okeyo (Now Deceased) informed the appellant that Plot No. 19/20 Kodiaga Market- Siaya County, including the commercial building erected thereon, and wherein the appellant was a tenant, was up for sale and at which point she offered to sell it to the appellant who agreed to buy it.

The appellant further stated that consequent to offering to purchase the Plot No. 19/20 Kodiaga Market- Siaya County, he approached Kenya Commercial Bank (K) Ltd to advance him a secured loan facility to enable him purchase the said land parcel with a view of using the same said parcel as collateral but the said application for a loan facility was rejected as the subject land parcel had no title deed.

The appellant averred that upon informing Damaris Kavinza Okeyo (Now Deceased) of the insufficiency of funds, Damaris Kavinza Okeyo offered to guarantee the appellant's loan application and offered her land parcel number Uasin Gishu/Ngenyilei Scheme/649 to be used as security to enable the appellant be in funds to purchase the Plot No. 19/20 Kodiaga Market- Siaya County.

The appellant further averred that at all material times between March and April 2015, Damaris Kavinza Okeyo personally secured all requisite consents and documentation to facilitate the creation of a legal charge over her land parcel number Uasin Gishu/Ngenyilei Scheme/649 to enable completion of the sale of Plot No. 19/20 Kodiaga Market- Siaya County.

The appellant stated that Damaris Kavinza Okeyo accepted to sell the property to him at a consideration of Kenya Shillings One Million, Three Hundred Thousand (Kshs. 1,300,000/-) Only and after negotiating on the terms of the agreement and the modes of payment, a sale agreement dated 25th day of April 2015 was executed and the appellant paid to DAMARIS KAVINZA OKEYO (Now Deceased) the sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/=) Only in cash and thereafter directly transferred into Damaris Kavinza Okeyo (Now Deceased) bank account the balance of Kenya Shillings One million (Kshs. 1,000,000/-) Only, both transactions conducted on the 25th day of April 2015.

The appellant further stated that on or about the 26th May 2015, Damaris Kavinza Okeyo visited the Plot No. 19/20 Kodiaga Market- Siaya County and informed all the tenants therein that the appellant had taken over possession of the property and sought their cooperation to enable conciliate transition and that he took possession of the property and made necessary renovations but in the month of June 2015, the respondents wrongfully entered/trespassed into the Plot No. 19/20 Kodiaga Market- Siaya County and forcefully took over control of and demanded rent from the tenants therein thereby depriving the plaintiff of vacant possession thereof on claims that Damaris Kavinza Okeyo (Now Deceased) had not sold the land parcel.

The appellant contended that the 1st and 2nd respondents being the children of Damaris Kavinza Okeyo and the former having sold the land parcel to the appellant, the latter herein have no claim over the land parcel and should be evicted therefrom.

The appellant stated that by virtue of the respondents' trespass and wrongful occupation of the Plot No. 19/20 Kodiaga Market- Siaya County, the respondents have misused, damaged, wasted, destroyed and/or degraded the property and by reason of which, the appellant has been deprived of the use and enjoyment of the property. The appellants particularized the trespass and wrongful occupation and loss and damage.

The appellant claimed to be an innocent purchase for value of the suit property hence ought to be accorded peaceful uninterrupted and or exclusive occupation of the property.

Before the trial court the appellant prayed for a **permanent injunction restraining the respondents; whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the appellant's property being all that is Plot No. 19/20 Kodiaga Market- Siaya County. General Damages for trespass and an order for mesne profits at the rate of Kshs. 35,000/- per month with effect from 1st June 2015 until the date of the declaration of exclusive and unimpeded right of possession, use and occupation of Plot No. 19/20 Kodiaga Market- Siaya County. Vacant possession of all that is Plot No. 19/20 Kodiaga Market- Siaya County. Specific performance of the transfer of lease agreement dated 25th April 2015. Costs of this suit.**

The respondents filed an amended statement of defence on 18/9/2019. The gist of the defence was that Damaris Kavinza Okeyo (deceased) had proprietorship of land parcel at PLOT NO. 19/20 Kodiaga Market- Siaya County and states that she held the said parcel in trust for all the respondents herein as an administratrix of the estate of the late John Muger Okeyo and further denied ever informing the appellant of the sale of the suit parcel of land.

The respondents further denied that the appellant was offered by Damaris Kavinza Okeyo a guarantee for loan application by offering land parcel Uasin Gishu/Ngemiyilel Scheme/649 to secure funds for the purchase of Plot No. 19/20 Kodiaga Market- Siaya County.

They denied that Damaris Kavinza Okeyo ever negotiated any terms of the agreement allegedly dated 25th April 2015 for the sale of Plot No. 19/20 Kodiaga Market- Siaya County and that if the same was ever concluded they did not receive a sum of Kshs. 1,300,000/=. The respondents contended that if at all the said agreement was ever concluded which they still denied, the same was fraudulent due to undue influence and unsoundness of the mind by the 1st defendant.

The defendants claimed that through Damaris Kavinza Okeyo, they were the proprietors of the property at Plot No. 19/20 Kodiaga Market- Siaya County and they averred that if there was a sale which they denied knowledge of, the same was done fraudulently as they were never consulted as the beneficiaries.

The respondents contended that the appellant was trespassing and wrongfully occupying the said parcel of land as the same continues to legally belong to them and that Damaris Kavinza Okeyo held the said parcel of land in their trust as aforementioned hence incapable of disposing the same without their consent.

When the matter came up for hearing before the trial Magistrate, the appellant stated on oath that sometimes on or about the month of December 2014, Damaris Kavinza Okeyo informed him that Plot No. 19/20 Kodiaga Market- Siaya County including the commercial building erected thereon, and wherein he was a tenant, was up for sale and at which point she offered to sell it to him and he agreed to buy. As he had no funds, he approached Kenya Commercial Bank (K) Ltd to advance him a secured loan facility to enable him conclude the purchase of the said land parcel and he offered to use the same said parcel as collateral but his application for a loan facility was rejected as the subject land parcel had no title deed.

The appellant explained the set back to Damaris Kavinza Okeyo and she proposed that since she trusted him, she could be his guarantor at the bank and agreed to offer her land parcel number Uasin Gishu/Ngeniyilel Scheme/649 as security. Damaris Kavinza Okeyo therefore proceeded to Eldoret in person as she assured him that she was able to apply for and secure the consent to charge the land parcel from the Land Control Board. Damaris Kavinza Okeyo also signed all the requisite bank loan facility application forms. After obtaining all the necessary documents and providing the original title deed, a charge was registered and the loan facility disbursed.

The appellant testified that Plot No. 19/20 Kodiaga Market- Siaya County was in the names of John Muger Okeyo – now deceased, he inquired from Damaris Kavinza Okeyo whether she had the legal capacity to sell the said land. The 1st Defendant provided a copy of her marriage certificate to the said John Muger Okeyo – now deceased, copy of his ID card, death certificate and a certificate of confirmation of grant that confirmed she was the legal administrator of the estate of John Muger Okeyo – now deceased.

In the strength of the above and due to the availability of funds the appellant and the 1st Defendant executed an agreement dated 25th day of April 2015 wherein she agreed to sell him the Plot No. 19/20 Kodiaga Market- Siaya County at a consideration of Kshs. 1,300,000/-. On the same day he gave the 1st defendant the sum of Kshs. 300,000/- in cash and thereafter directly transferred into her account the balance Kshs. 1,000,000/-. After completion of the transaction he asked the 1st Defendant to inform the tenants on the property of the change in ownership which she came and did on the 26th May 2015 with the assistance of a village elder known to the appellant as Alex and he proceeded to renovate the property.

That prior to the above agreement, the appellant had on several occasions given the 1st Defendant money at her instance and request. The funds totaling Kshs. 136,200/- though not included in the purchase price, were transferred to the Damaris Kavinza Okeyo through M-pesa and were on account of friendly loans he gave to her to assist her in her personal and basic needs.

Sometimes in the month of June 2015, the 1st respondent wrongfully entered/trespassed into the Plot No. 19/20 Kodiaga Market- Siaya County and forcefully took over control of and demanded rent from the tenants therein thereby depriving the appellant of vacant possession thereof on claims that the Damaris Kavinza Okeyo had not sold the land parcel. The 1st and 2nd respondents used rowdy youths to keep the

appellant away from the property and occasionally sent him abusive messages on SMS. These actions he reported at the Yala Police Station vide OB numbers 23/237/2015 and 6/5535/71/2. The respondents have also in the meantime threatened and directed the tenants not to pay him any rent.

By virtue of the respondents' said trespass and wrongful occupation, there have been constant confrontations between himself and the respondents in respect of the suit property and the appellant being a purchaser for value of the suit property, he ought to be accorded peaceful, uninterrupted and/or exclusive occupation of the suit property as the respondents have no claim over the same. On cross-examination he states that there was no witness to the agreement.

The respondents called DW1, Linda Margaret Ndege Okeyo, a daughter to Damaris Kavinza Okeyo and a brother to George Awuoche testified that Damaris Kavinza Okeyo was the legal administratrix vide succession cause no. 37 of 1998 of the estate of the late John Okeyo who died intestate.

Upon the death of John Okeyo, Damaris Kavinza Okeyo held a number of immovable properties on behalf of all of them as the beneficiaries. Among such properties include PLOT NO. 19/20 KODIAGA MARKET each measuring approximately 50ft by 30ft within Kodiaga Market, Siaya County.

She stated that on 26/05/2015, Damaris Kavinza Okeyo informed the tenants at PLOT NO. 19/20 KODIAGA MARKET to vacate the premises as the same were due for renovation by 01/07/2015 and under new management. This development made other beneficiaries and she was suspicious of the actions of Damaris Kavinza Okeyo.

By a letter dated 15/07/2015, the respondents informed the tenants of PLOT NO. 19/20 KODIAGA MARKET that Damaris Kavinza Okeyo lacked the ability to transact any business in relation to the property as he was and is suffering from acute dementia. In the interim, DW1 was appointed to manage the above mentioned property.

She later received information that unknown people connived with their mother Damaris Kavinza Okeyo to co-own the above mentioned property. This is when she later discovered that in the same year of 2015, Damaris Kavinza Okeyo entered into and executed a sale of PLOT NO. 19/20 KODIAGA MARKET to one William Okiyah Okech for a sum of Kshs. 1,300,000/=.

She also received information that in order to facilitate and conclude the sale, a credit facility was executed at the Kenya Commercial Bank dated 05/03/2015 to which Damaris Kavinza Okeyo was a signatory as a third party security owner for which she allowed property Uasin Gishu/Ngenyilel/649 to be used as security for the repayment of the borrowed sum.

Damaris Kavinza Okeyo never obtained their consent as beneficiaries of the estate of the late John Okeyo before entering into and concluding the estranged sale of PLOT NO. 19/20 KODIAGA MARKET to one William Okiyah Okech. She knew that this transaction was entered into to defraud and disinherit them of the above mentioned property as their mother was suffering from acute dementia at the time of the transaction. She knew that a person on unsound mind cannot enter into and conclude any transaction.

DW2, Nathan Otiyo Kosanya, the location chief testified that Damaris Kavinza Okeyo was his resident. He was not aware of the agreement between Damaris and William

The trial court after hearing the suit found the issues for determination as

- 1. Whether or not the plaintiff and the 2nd and 3rd Defendants' mother being the 1st Defendant, Damaris Kavinza Okeyo entered into an agreement of sale of the subject property namely PLOT NO. 19/20 KODIAGA MARKET- SIAYA COUNTY from her to the plaintiff.**
- 2. Whether or not the 2nd and 3rd Defendants' mother being the 1st Defendant, Damaris Kavinza Okeyo had the legal capacity to enter into an agreement that is legally binding and to pass good title of the subject property to the plaintiff.**
- 3. Whether or not the plaintiff paid valuable consideration for the purchase of the subject property from the 2nd and 3rd defendants' mother.**
- 4. Whether or not the plaintiff is entitled to the orders sought herein and hence judgment against the 2nd and 3rd defendants.**
- 5. Who should pay the costs of this suit.**

On the 1st issue, the Learned Magistrate found that there was an agreement between the appellant and the 1st respondent (decease).

On the issue as to whether the 1st respondent was suffering from mental illness the court found that there was no expert evidence to that effect.

The Learned Magistrate found that the disputed property belonged to the deceased husband to the 1st respondent hence was to be dealt with in accordance with the law of succession Act and not in accordance with the condition in the certificate of confirmation of grant.

The trial court held that upon death of her husband, the 1st Respondent held the residue of the net estate of her deceased husband in trust for the children of the deceased spouse and had no powers to dispose of the land by sale to third parties.

Quoting Section 37 of the Law of Succession act Cap 160 Laws of Kenya, the Learned Magistrate found that there is no evidence that the consent of court was sought or obtained as required by law.

The court found that the 1st respondent was holding the property in trust for 3rd and 4th respondents.

The trial court found that Damaris Kavinza Okeyo was limited to only administer the deceased's estate and distributing the property to the beneficiaries.

On whether the appellant paid valuable consideration for the purchase of the property from the 2nd and 3rd respondents' mother, the court found the appellant did not have money for the subject land. He took a loan using the 1st defendant's property known as Uash Gishu/Ngenlel/649 as a collateral and that the rent paid in the suit property was used to pay the loan.

The court found that the appellant did not incur any liability to the 1st Defendant for the purchase of the property. The appellant gave nothing to the 1st Defendant hence he did not give valuable consideration for the purchase of the subject property from the defendant's mother. The Appellant's suit was dismissed with costs.

The Appellant being dissatisfied with the decision of the court has appealed on grounds that:

1. The learned Magistrate erred in law and fact and contradicted himself when, having found and held that the Respondents' mother had entered into an agreement for sale of land with the Appellant also found and held that she had no capacity to enter the agreement.
2. The learned Magistrate erred in Law and fact when he proceeded to rewrite the agreement for sale of land between the Appellant and the Respondents' mother.
3. The learned Magistrate erred in law and fact when he failed to find that there was a valid contract (agreement) entered into between the Appellant and the Respondents' mother.
4. The learned Magistrate erred in law and fact when he failed to find and hold that the Appellant paid valuable consideration for the purchase of the land.
5. The learned Magistrate erred in law and fact when he failed to find and hold that the Respondents' mother as the Administrator (confirmed) of the land and had legal capacity to dispose of the land.
6. The learned Magistrate erred in law and fact when by implication he invalidated the then Confirmed Grant given on 11th day of November 1998 by the High Court of Kenya, Kisumu.
7. The learned Magistrate erred in law and fact by failing to find and hold;
 - i) That the Grant could not have been confirmed to the Respondents' mother if the 2nd and 3rd Respondents had not either consented to it or not opposed to it.
 - ii) That having failed to apply for a review or revocation of the Confirmed Grant neither the 2nd nor the 3rd Respondents' nor the Honorable Subordinate Court had the capacity and/or jurisdiction to question and/or ventilate the efficacy or otherwise of the grant in an Environmental and Land Court case.
8. The learned Magistrate erred in law and fact by entertaining and upholding the 2nd and 3rd Respondents' submissions for nullification of the sale agreement in the absence of a counterclaim.
9. The learned Magistrate erred in law and fact by rewarding the 2nd and 3rd Respondents with favorable decision in the face of their disobedience of a court order to deposit rents collected in the Bank to service the loan guaranteed by their mother.
10. The learned Magistrate erred in law by failing to exercise his discretion in a judicious manner on the available evidence and his decision amounted to an error in principle.
11. The learned Magistrate erred in law and as a result arrived at a wrong decision and in all circumstances failed to do justice to the Appellant.
12. The judgment was against the weight of evidence.

The appellant prays that the appeal be allowed, Judgment set aside and judgment be entered for Appellant as prayed in the lower court.

The appellant submits that an administratrix who has obtained full grant which has been certified has the power to dispose of the property belonging to the estate of the deceased. He submits that the law of succession only prohibits an administratrix from dealing with estate of the deceased person before a grant has been confirmed. In this case, the grant of representation which made the widow an administratrix had already been confirmed and that clothed her with all the powers to dispose of any part of the estate. In the circumstances, the court is bound

to hold that the plaintiff's title to the land is totally unchallenged, as indeed it is not.

Therefore, to determine the rights for the parties over the subject land, one must turn to the provisions of Sections 27 and 28 of the Registered Land Act Cap 300, which provides where pertinent as follows;

Section 27(b) provides that 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;

Section 28- The rights of a proprietor, whether acquired on a first registration, or whether acquired 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.-

(c) To the leases, charges and encumbrances and to the conditions and restrictions, if any, shown in the register; and

(d) Unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting in the register;

Provided that nothing in this section shall be taken to relive a proprietor from any duty or obligation to which and he is subject as a trustee.

This court finds that the learned trial magistrate correctly found that there was no document to substantiate the claim that the 1st defendant was suffering from acute dementia and therefore was not capable of appreciating what she was doing and the first defendant was in good mental health when she executed the agreement. The learned trial magistrate also correctly found that it required an expert to prove that the 1st defendant was not in her mental capacity.

Moreover, by finding that the 1st defendant had no legal capacity to enter into agreement the learned trial magistrate properly applied the provisions of section 83(f) of the law of succession act cap 160 laws of Kenya. The 1st defendant was a personal representative of the estate of the deceased and had no powers to sale the deceased's property.

Section 83 provides for the duties of personal representatives thus:-

Personal representatives shall have the following duties—

(a) to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him;

(b) to get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;

(c) to pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);

(d) to ascertain and pay, out of the estate of the deceased, all his debts;

(e) within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(f) subject to [section 55](#), to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;

(g) within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;

(h) to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;

(i) to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

None of the duties include selling the property of the deceased person.

I do agree with the finding of the trial magistrate that the deceased died intestate and left behind one surviving spouse being the widow and the children and that the widow was entitled to the personal and household effects of the deceased absolutely and a life interest in the whole

residue of the net intestate estate. The 1st defendant held the whole residue of the net estate of the deceased property in trust for the children and had no powers to dispose the same by sale to third parties. Moreover, the law required that for such a sale to occur consent of the trustees and all children of full age must be obtained and further it should be by consent of the court, no such consent was obtained and therefore the trial court properly applied the law in dismissing the appeal.

On the issue of as to whether the appellant paid valuable consideration for the property, this court agrees with the trial magistrate that the appellant borrowed money and used the 1st defendant's property as a collateral and relied on the rent from the suit property to repay the loan with the risk of the 1st defendant losing the land that was charged in case of default. The loan was not repaid and therefore the 1st defendant risked losing the property. This cannot be described as valuable consideration. The upshot of the above is that the appeal lacks merit and is dismissed with costs.

DATED AT KISUMU THIS 17TH DAY OF FEBRUARY 2022

ANTONY OMBWAYO

JUDGE

This Judgment 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

ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON 15TH MARCH 2020.

ANTONY OMBWAYO

JUDGE