



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 53 OF 2014

LUKE OCHIENG OGADA APPELLANT

V E R S U S

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence of the Chief Magistrate's Court at Kisumu (Hon. T. Obutu PM) dated the 18th July 2014 in Kisumu CMCCR No. 554 of 2012)

J U D G M E N T

The appellant was charged, found guilty, convicted and sentenced on two offences, viz:-

Count I: Conspiracy to commit a misdemeanor contrary to section 394 of the Penal Code .

Particulars of offence

1. Luke Ochieng Ogada
2. Richard Juma Ochier
3. Elly Ochieng Agumba

On 18th day of August 2010 at Kisumu Lands office in Kisumu District within Nyanza Province jointly with others not before Court conspired together to commit a misdemeanor namely to obtain the land registration of land parcel number Kisumu/Korando/1973 in the name of Luke Ochieng Ogada.

Count II: Obtaining Land Registration by false pretence contrary to section 320 of the Penal Code.

Particulars

1. Luke Ochieng Ogada

On unknown date at Kisumu Lands office in Kisumu East District within Nyanza

Province with intent to defraud obtained registration for land parcel number Kisumu/Korando/1973 by falsely pretending that you were the lawful owner a fact you knew to be false.

The evidence adduced at the trial was that sometimes in the year 2011 Erick Opon Nyamunga (PW1) the

legitimate owner of L.R. Kisumu/Korando/1973 and who resided in Nairobi got word that some people were putting up a structure on the land. He travelled to Kisumu and upon confirming it was true visited the Land Registry to confirm the status of the parcel of land. It was then that he discovered an entry in the name of the appellant dated 25/1/2000 and an indication that a title deed had been issued to him on 3/7/2002. It was followed by an entry in the name of Suttom Holdings dated 26/7/2011 and it was indicated that a title deed had been issued to Suttom Holdings on even date. He did not know the said Luke Ochieng – now the appellant – and had never sold the land to him. He therefore lodged a complaint with the Land Registrar.

According to the Land Registrar (PW2) when he perused the original title deed and letter of consent to transfer shown to him by Erick Nyamunga (PW1) whereupon he called for the green card register but it was missing. Erick Nyamunga however had a certified true copy and upon scrutinizing the entries he concluded that they were forged. He retrieved the parcel file in which the registered documents are kept and was confounded to see that whereas there was a transfer from George Kwanya Odidi to Erick Nyamunga there was no similar document transferring the land to Luke Ochieng by Erick Nyamunga. Accordingly he reconstructed the green card by cancelling the entries subsequent to that of Erick Nyamunga and reverted the land to Erick Nyamunga. He also referred the matter to the police for investigations.

Investigations carried out by IP. Wilson Yegon (PW5) disclosed that it was the appellant who had sold the land to Noorez Misa Shamji. When the appellant was arrested he revealed that the land had been sold to him by Elly Ochieng, his co-accused and that he had parted with Kshs.30,000/= to facilitate the transfer of the land to his name. He even had an agreement executed by himself, one Benard Ochieng Juma, Richard Ochier Juma to that effect. According to the investigating officer when he looked at the appellant's identity card it appeared that he had obtained it at 15 years. He subsequently charged him with these offences. He however conceded that these offences could not have been effected without the assistance of the land officer at the registry.

On his part the appellant testified that the land was not his; that it belonged to Elly Ochieng who had together with Richard and Nereah approached him with an offer to sell the land to him and asked for 30,000/= to transfer the land into his name. He readily gave them the money and executed the agreement. He contended that by being registered as owner he was merely securing his money and that when the title came out in his name it was shown to him. Thereafter they sold the land to an Asian at Kshs. 5 million out of which he was to get a profit. He stated that he never visited the Land Registry and did not participate at all in processing the title.

His co-accused also gave sworn testimonies and called witnesses.

After hearing and evaluating all the evidence the trial Magistrate found the appellant guilty on both charges, convicted him and sentenced him to two years imprisonment on the first count and six months imprisonment on the second count. Being aggrieved he has filed this appeal and the gist of his appeal really is that by being convicted on both counts he suffered double jeopardy. His Advocate Mr. Onsongo submitted that obtaining registration by false pretences was a cognate offence and that having charged him with that offence the police ought not to have charged him with conspiracy. Learned counsel also took issue with the manner in which the judgment was written saying it did not comply with Section 159 of the Criminal Procedure Code.

The appeal was vehemently opposed by the state with Miss Wakio, learned Prosecution Counsel even proposing that as these offences were land related and hence very serious this Court should enhance the sentence.

As the first appellate Court, I have reconsidered and evaluated the evidence afresh so as to arrive at my own conclusion. I have done so bearing in mind that I did not have the benefit of seeing the witnesses testifying. I have also considered the very able submissions of Learned Counsel on both sides. I am convinced beyond reasonable doubt that an offence was committed here and that the appellant was one of the perpetrators of the offence. I find it a fact from the evidence that the land in issue belonged to Erick

Nyamunga who purchased it in the year 1990 at a consideration of Kshs.120,000/=. He had all the documents evidencing the transaction and a copy of the register (green card) exhibited in Court showed that he became the registered proprietor of that land and was issued with a title deed on 27th July 1990.

The appellant readily admitted that he was registered as proprietor of the land on 25th January 2000. It was his evidence that this was upon him paying a sum of Kshs.30,000/= as evidenced in an agreement dated 18th August 2010. It is instructive that this is not a sale agreement but just a document evidencing that he had paid 30,000/= to one Richard Juma Ochier as a fee for processing the title deed, succession, land board and all other procedures. In other words he did not pay any price for this land yet he admits that he shared in the profits once the land was sold at Kshs.5 million to an Asian man. It is also instructive that although he paid the 30,000/= to Richard Juma Ochier it was his evidence that the owner of the land was Elly Ochieng. One is therefore left in doubt that he knew exactly what he was doing and that he together with his accomplices had an intent to defraud the real owner of the land of it. Moreover it is unusual that one would purchase land in Kenya without doing due diligence which he admits he did not do.

It is correct as submitted by his counsel that there was an error on the charge sheet which seems to suggest that the offence was committed on 18th August 2010 as the register clearly shows that he did so on 25th January 2000. It is however my finding that that error is curable under Section 382 of the Criminal Procedure Code as it did not prejudice the appellant in any way. He after all admitted that he obtained the registration and there was no doubt in his mind when he did it. Since there was no sale agreement, no consent from the Land Control Board obtained, no transfer form executed and no stamp duty paid as required by the law this registration could only have been obtained fraudulently. It was an illegal registration. The fact that the appellant paid 30,000/= towards this fraudulent registration makes him complicit. I do however agree with Mr. Onsongo's submission that having charged the appellant with the complete in Count II it was undesirable to charge him with conspiracy. Dealing with a similar issue in **Mulama V. Republic [1976] KLR 24** Trevelyan and Chanan Singh J. J. had this to say:-

"Courts do not look and never have looked kindly at conspiracy charges brought instead of specific offences and this case illustrates the dangers attendant upon the police embarking upon conspiracy charges when specific charges are available. We have no alternative but to allow the appeal which we do".

Accordingly whereas I am not persuaded that he has suffered double jeopardy in

the real sense of that term I do agree that the trial Magistrate erred in convicting him on the conspiracy as well as on the specific offence.

An issue was raised concerning the manner in which the judgment is written. Judgment writing is a matter of style and differs from one judicial officer to another. Section 159 of the Criminal Procedure Code does however require that a judgment contain a summary of the evidence, the points/issues for determination, the decision and the reasons for the decision all of which characteristics the trial Magistrate's judgment has.

This Court has been urged to enhance the sentence meted out. It regrets to say it cannot do so as the sentence imposed took into consideration the maximum provided for the offence charged as well as the antecedents of the appellant. I must however proceed to quash the conviction and set aside the sentence on Count 1 because as I have stated he ought not to have been charged with conspiracy as well as the specific offence. In the event that he has completed serving the six months imposed in Count II he should be released forthwith unless otherwise lawfully held. It is so ordered.

Signed, dated and delivered at Kisumu this 18th day of June 2015

E. N. MAINA

JUDGE

In the presence of:-

Ruto for the state

Mr. Onsongo Advocate for the appellant

Moses Okumu/Rose Abondo – CC