



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELC APPEAL CASE NO. 7 OF 2021

NATIONAL BANK OF KENYA.....APPELLANT

VERSUS

MARY AWINO ABIERO (suing as the legal representative of the Estate of

EVEREST ABIERO AMENY.....1ST RESPONDENT

WASHINGTON OTIENO MULUARE.....2ND RESPONDENT

COLINET AUCTIONEERS.....INTERESTED PARTY

JUDGEMENT

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

Honourable J.Ogondo delivered on 3/6/2021 in Siaya SPM

ELC Case Number 219 of 2018)

Introduction

1. By a plaint dated 30/11/2018, the 1st respondent who was the plaintiff in the lower court and one of the legal representatives of the Estate of Everest Abiero Ameny filed a suit against the 2nd respondent.
2. The subject matter of the suit was alleged trespass and encroachment by the 2nd respondent on land parcel **Siaya/Karapul Ramba/1599 (“the suit property”)** that allegedly belonged to Everest. The 1st respondent prayed for permanent injunctive orders against 2nd respondent and sought for his eviction from the suit property and costs of the suit. The suit property was ostensibly charged by the appellant.
3. By a memorandum of appearance dated 23/01/2019, the firm of Sala & Mudany Advocates entered appearance on behalf of the 2nd respondent and filed a defence and counterclaim dated 6/02/2019 in which he denied the assertions in the plaint and contended that he was the proprietor of the suit property. In his counterclaim, he averred that he purchased the suit property on 26/09/2018 from one Elizabeth Auma Abungu (**DW 2**). He prayed for possession of the suit property, permanent injunctive orders against the 1st respondent, general damages for loss of use of construction materials and rental income from November 2018 until payment in full and costs of the suit and interest.
4. When the appellant advertised to sale the suit property by auction during the course of the proceedings in the trial court through the interested party in this appeal, the 2nd respondent by a motion dated 25/07/2019 sought several orders including joinder of the appellant and the interested party; which was allowed by the trial court.
5. By a memorandum of appearance dated 17/09/2019, the firm Otieno Yogo Ojuro & Company Advocates, entered appearance for the appellant.
6. Upon hearing the parties, the court by its judgment dated 3/06/2021 dismissed the 1st respondent’s claim and allowed the 2nd respondent’s counter claim and permanently restrained the appellant and interested party from advertising the suit property for sale. It is noteworthy that

the 1st respondent did not file a defence to counterclaim and in essence, the 2nd respondent's claim was unchallenged.

7. Dissatisfied by the judgment of the trial court, two separate and substantive appeals were filed; **the instant one that is the subject of this court's determination and Siaya ELC Appeal No. 27 of 2021 Mary Awino Abiero (suing as the Legal Representative of the Estate of Everest Ameny) v Washington Otieno Muluare** . The two appeals were not consolidated and are both pending determination before this Court.

Memorandum of appeal

8. Though the memorandum of appeal dated 30/06/2021 sets out 9 grounds of appeal, the appellant's written submissions dated 21/02/2022 condensed them into one ground of appeal;

a) The Learned Trial Magistrate erred in law and fact by introducing new issues by finding that there were two distinct parcels of land; the suit property and East Alego/Karapul Ramba/1599 yet the same had never been pleaded by the parties.

9. The appellant prayed for the appeal to be allowed with costs and for the lower court's judgment to be set aside.

Appellant's submissions

10. The appellant submitted that the suit only dealt with one property and that it was uncontroverted that it had charged the suit property and/or land parcel number **East Alego/Karapul Ramba/1599** and that it was not feasible for it to auction the same property twice; to **DW 2's** husband and during the course of the trial court's proceedings.

11. It submitted that the issue for determination before the trial court was who between the respondents was the owner of suit property and/or **East Alego/Karapul Ramba/1599** and that the official search produced by the 1st respondent demonstrated that her deceased husband Everest was the registered owner of the suit property and he was issued with a title document on 18/4/1991 and it had subsequently been charged by it. It submitted that the 2nd respondent equally produced a search which demonstrated that **DW 2** too obtained a title deed to the suit property on the same date as Everest who had allegedly also purchased it by public auction from the appellant.

12. It identified one issue for determination; who between the 1st and 2nd respondent was the owner of the suit property. On this issue, it submitted that as evidenced by the certificate of official search produced by the 1st respondent, Everest obtained loan facilities from it and its interests had been recorded in the encumbrance section as entry no. 7.

13. It contended that **DW 2** did not produce documents in support of her assertion that the suit property was purchased from the appellant by auction and further, did not produce any transfer form. Further, that the 2nd respondent neither paid stamp duty at the time of purchase of the suit property, produced a consent from the Land Control Board nor produced the transfer documents. Consequently, it was its submission that the 2nd respondent's title document was null, void and a fictitious registration and on this they relied on the case of **Macfoy v United Africa Ltd (1961) 3 ALL E.R 1169** where the court stated that where there is a nullity, everything founded on it is incurably bad. It submitted that the root of the 2nd respondent's title document was questionable and on this it relied on the case of **Daudi Kiptugen v Commissioner of Lands & 4 Others (2015) eKLR** which stated that if there's contention that a title was improperly acquired, the holder must demonstrate that he acquired it properly.

1st respondents' submissions

14. In support of the appeal, the 1st respondent filed her written submissions dated 12/02/2022 which were more less a replication of the appellant's submissions.

15. She submitted that there was a discrepancy in the testimony of the 2nd Respondent and **DW2**; the 2nd Respondent stated that **DW2** was the original owner whereas **DW2** stated that she acquired the suit property from an auction by the appellant.

16. Additionally, she submitted that the registration of a person as a proprietor of land can by virtue of **Section 26(1)** of the **Land Registration Act** be challenged on grounds of fraud or misrepresentation to which a party is proved to be a party or if the title document had been acquired illegally, unprocedurally or through a corrupt scheme. In support of this assertion, she relied on the case of **Munyu Maina v Hiram Gathiha Maina (2013) eKLR** which held that the root of a challenged title must be investigated to prove its legality. She also relied on the case of **Hubert L. Martin & 2 others v Margaret J Kamar & 5 others [2016] eKLR** which stated that where there are two titles over the same parcel of land, the root of the titles has to be traced and interrogated so as to ascertain ownership.

17. She submitted that **DW 2** did not have a good title and therefore could not pass a good title to the 2nd respondent and that the 2nd respondent did not carry out due diligence to establish the authenticity of **DW 2's** title to the suit property.

18. She submitted that the 2nd respondent could not seek refuge in the plea of bona fide purchaser for value for the reason that the Ugandan *locus classicus* case of **Katende v Haridar & Company Limited [2008] 2 EA 173** had been departed from in several court decisions including **Mwangi James Njehia v Janetta Wanjiku Mwangi & another [2021] eKLR** and **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR** where in the latter, the court stated that the title of an innocent purchaser is impeachable as long as the title was obtained illegally, unprocedurally or through a corrupt scheme.

19. She contended that in the proceedings in the trial court, the parties treated the suit property and **East Alego/Karapul Ramba/1599** as one

and the same parcel of land and it was erroneous for the trial court to treat them as distinct parcels of land. She contended that the trial court was bound by the pleadings of the parties and on this she relied on the case of **Independent and Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others Civil Appeal No. 219 of (2014) eKLR**.

2nd respondents' submissions

20. 2nd respondent filed his written submissions dated 22/02/2022. He submitted that he had proved his case in the trial court. He asserted that in the trial court, the certificate of official search dated 5/06/2012 was for **East Alego/Karapul Ramba/1599** and not of the suit property and that the 1st respondent neither produced a title document or a "greencard" to assert ownership over the suit property and that the Attorney General and Land Registrar who were pertinent in the proceedings were not joined as parties. He asserted that fraud was never pleaded and that the appellant and 1st respondent did not produce any evidence to prove that the appellant had charged the suit property.

21. He contended that the certificate of confirmation of grant that was waved by the 1st respondent did not hold water because the suit property was not listed as one of the assets forming part of the estate of the deceased Everest.

22. He submitted that he was an innocent purchaser for value without notice of defect of title and he relied on the cases of **Lawrence Mukiri v Attorney General & 4 others [2013] eKLR** and **Eunice Grace Njambi Kamau and Another v The Honourable Attorney General & 5 others Civil suit Number 976 of 2012** that cited the case of **Fletcher v Peck 10 U.S. 87 1810** which stated that an innocent purchaser for value without notice should be protected. He asserted that he conducted due diligence before he purchased the suit property.

23. He contended that it was trite law that a title document could only be impeached if it was shrouded with fraud, illegality, corruption or misrepresentation. He relied on the case of **Eunice Grace Njambi Kamau and Another v The Honourable Attorney General (Supra)** which stated that a fraudulent conduct must be distinctly alleged and proved and cannot be inferred from the facts of the case. He submitted that fraud must be proved beyond a balance of probabilities and on this, he relied on the case of **Central Bank of Kenya Limited v Trust Bank Limited & 4 others [1996] e KLR**

24. The interested party did not participate in these proceedings.

Analysis and determination

25. This being a 1st appeal, it behoves this court to re-evaluate the evidence afresh, reassess the case and make its own independent finding and conclusions. See **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, which was quoted by the case of **Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR**. However, in re-evaluating the evidence, the court must bear in mind that did not have the advantage of seeing and hearing the witnesses.

26. 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.

27. Having considered the original lower court record, memorandum of appeal, record of appeal and rival written submissions, this court will render its determination on the single ground as condensed in the appellant's written submissions. I will proceed to analyse the legal and jurisprudential framework on it.

28. Interests in land are registered so as to facilitate ascertainment of rights over a particular parcel of land. Within the provisions of **Section 6** of the **Land Registration Act**, the government constitutes areas of land into registration units which are subsequently divided into registration sections. These registration sections are identified by distinctive names and may further be divided into blocks which have distinctive numbers or combinations of numbers and letters. The name of the registration section, the number and the letter of the block is deemed sufficient reference to a particular parcel of land. This provision of law echoes the provision of **Section 18(3) and (4)** of the repealed **Registered Land Act**. What these provisions of law imply is that each parcel of land has a unique reference that is distinct from any other parcel of land.

29. The case of **David Peterson Kiengo & 2 others V Kariuki Thuo [2012] eKLR** aptly pointed the purpose of registration of titles as thus:

"The State maintains a central register of land title holdings which is deemed to accurately reflect the current facts about title".

30. In her claim, the 1st respondent asserted that the 2nd respondent had without colour or right trespassed and encroached on the suit property that belonged to Everest. To buttress ownership of the suit property, she produced a certificate of official search of land parcel number **East Alego/Karapul Ramba/1599** and not that of the suit property; **Siaya/Karapul Ramba/1599**. Apart from the certificate of official search which depicts that Everest was registered as the owner of **East Alego/Karapul Ramba/1599** on 18/4/1991 which was charged by the appellant on 11/7/1991, the 1st respondent never produced title documents to this property or to that of the suit property.

31. On the other hand, the 2nd respondent filed a defence and counterclaim in which he claimed ownership of the suit property and armed himself with a certificate of official search and a copy of a title deed to the suit property. A defence to counterclaim was never filed and its averments were never challenged. From these two documents that were produced, it can be deduced that the register of the suit property was opened on 14/5/1987 and registered in Siaya/Karapul Ramba unit and section as parcel number 1599 and registered in the name of the 2nd respondent on 9/10/2018 and previously, it was registered in the name of **DW 2**.

32. Bearing in mind the provisions of **Section 6** of the **Land Registration Act** and **Section 18(3)** and **18(4)** of the repealed **Registered Land Act**, the suit property; **Siaya/Karapul Ramba/1599** and **East Alego/Karapul Ramba/1599** are two distinct parcels of land. If indeed the appellant and the 1st respondent had a stake in the suit property, nothing could have been easier than for them to adduce documentary prove of their interest in the suit property such as a Registry Index Map, title deed and charge documents; which they did not.

33. It is trite law that parties are bound by their pleadings. The trial court record speaks for itself. Within the provisions of **Section 35** of the **Evidence Act**, the 1st respondent duly produced an official search certificate of **East Alego Karapul Ramba/1599** as prove of ownership of the suit property. She laid foundation of its authenticity and relevance to the facts of the case and it became part of the trial court record. Once it was admitted as evidence and produced, the court was bound to apply its judicious mind on it. In the Court of Appeal decision of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR**, the court held thus on the stages of filing, production and prove or disprove of documents;

“First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence...Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case”.

34. Contrary to the assertion in the ground of appeal that the trial court introduced new issues, the pleadings of the parties and judgement demonstrates otherwise; the trial court applied its judicious mind on the evidence presented before it before arriving at a finding that the 1st respondent had not proved her case on a balance of probabilities and entered judgement for the 2nd respondent.

35. Ultimately it is my finding that the appeal is not merited and I decline to grant the appellant the orders sought.

36. 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 held that costs follow the event and that the Court has the discretion in awarding such costs. In the absence of special circumstances, I award the costs of the appeal to the 2nd respondent.

37. The upshot is that this court finds that the appeal is not merited and I make the following disposal orders:

a) The judgement and decree of the Honorable Magistrate delivered on 3/6/2021 in Siaya SPM ELC Case Number 219 of 2018, is hereby upheld.

b) As the appellant was not successful in its appeal, the 2nd respondent shall have the costs of the appeal.

38. It is so ordered.

Judgment delivered virtually.

Dated, signed and delivered at Siaya this 28th Day of April 2022.

In the Presence of:

M/s Anyango for the appellant

Mr. Obiero h/b for Sala for the 1st respondent

Mr. Oduol for the 2nd respondent

Court assistant: Ishmael Orwa

HON. A. Y. KOROSS

JUDGE

28/4/2022