



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELC APPEAL NO. E003 OF 2021

**SHADRACK MIDUDA OCHUKA (Suing as the administrator of the estate of Samuel Marenya Miduda-Deceased).....APPELLANT**

**VERSUS**

**WALTER OWALLA NYADUE.....1<sup>ST</sup> RESPONDENT**

**ELLY ODERA NYANDUE.....2<sup>ND</sup> RESPONDENT**

**SIAYA COUNTY LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**(Being an Appeal from the judgment and decree of the Principal Magistrate Hon. J. Ong'ondo given on 29/07/2021 in Siaya SPM ELC Number 31 of 2018)**

**Introduction**

1. A detailed background of this appeal is of importance. The substratum of the appellant's suit in the lower court was grounded on an alleged fraudulent conduct by the respondents on a parcel of land known as **North Gem/Marenya/942 ("the suit property")**.
2. By a plaint dated 11/11/2016, The appellant who was the plaintiff in the lower court sought several orders: (i) A declaration that all entries on the registration of the suit property and its resultant subdivision and subsequent transfer to the respondents be declared illegal, null and void (ii) The register of the suit property be rectified by cancelling the subdivision and for the suit property to be reverted back to the Estate of Samuel Marenya Miduda who was the 1<sup>st</sup> registered owner (iii) The 1<sup>st</sup> and 2<sup>nd</sup> respondents do give vacant possession of the suit property to the appellant and a permanent injunction do issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from trespassing onto, remaining upon or interfering with the suit property, (iv) General damages and mesne profits for trespass to property and, (v) costs and interest of the suit.
3. By a memorandum of appearance dated 2/03/2017 the firm of S. M. Onyango & Associates Advocates entered appearance for the 1<sup>st</sup> respondent and filed a defence dated 3/04/2017. He denied the averments in the plaint and contended that one Abiakara Omondi Marenya who was the owner of the suit property sold **East Gem/Marenya/1271** to him and that he was an innocent purchaser for value. A reply to this defence dated 19/04/2017 was filed by the appellant.
4. Vide a memorandum of appearance dated 9/03/2017, the 4<sup>th</sup> respondent entered appearance for the 3<sup>rd</sup> and 4<sup>th</sup> respondent and filed a defence dated 17/07/2017. They denied the averments in the plaint and contended that the transfer of the suit property was done in accordance with the law. The appellant countered this defence with a reply to defence dated 6/09/2017.
5. By a memorandum of appearance dated 10/07/2017, the 2<sup>nd</sup> respondent who was acting in person entered appearance and filed a notice of admission of claim dated 19/02/2019.
6. After hearing the parties, the court by its judgment dated 29/07/2021 dismissed the appellant's case with costs to the respondents.
7. Aggrieved and dissatisfied by the decision of the trial court, the appellant filed a memorandum of appeal dated 25/08/2021 and a record

appeal dated 15/11/2021.

### **Memorandum of appeal**

8. The memorandum of appeal set down 4 grounds of appeal;

**a. The trial magistrate erred in law and fact in dismissing the suit without considering the fact that the 2<sup>nd</sup> respondent had admitted the appellant's claim.**

**b. The trial magistrate failed to appreciate the law and facts of the case before him together with the evidence tendered and exhibits produced thus arriving at an erroneous decision.**

**c. The trial magistrate erred in law and fact by failing to comply with Order 21 Rule 4 by failing in its judgement to set out a concise statement of case, points for determination, decisions therein and reasons for the decision.**

**d. The trial magistrate erred in law and fact in not appreciating or at all the pleadings and the evidence on record as a whole and considering extensive issues thus arriving at a wrong decision.**

9. The appellant prayed for the appeal to be allowed, the judgment and decree be set aside and for judgment to be entered for the appellant as prayed for in his claim.

### **The appellant's submissions**

10. The appellant filed his written submissions dated 17/01/2022 in which he submitted on the 4 grounds of appeal.

11. On the first ground, he contended that contrary to the provisions of the **Order 13 Rule 1 and 2 of the Civil Procedure Rules**, the trial Court failed to exercise its discretion by not entering judgement on admission against the 2<sup>nd</sup> defendant and erred in law and fact by dismissing the suit with costs to all the respondents. He relied on the case of **Peter Mwangi Matimu & 3 others v Samuel A. Kaigi Mucheru [2018] eKLR** which held that courts should judiciously exercise its discretion on whether or not to enter judgement on admission. He contended that the 2<sup>nd</sup> respondent's admission was plain and unambiguous as postulated in the Court of Appeal decision of **Choitram & Another v Nazari (1984) eKLR**.

12. On the second ground, the appellant submitted that he was the legal administrator of the Estate of Samuel Marenya Miduda and that Abiakara Omondi Marenya was neither the sole heir of Samuel's estate nor the administrator of his estate. He submitted that the transactions effected over the suit property contravened the provisions of **Section 45 and 82 of the Law of Succession Act** and were thus null and void. He submitted that contrary to the provisions of **Section 3(3) of the Law of Contract Act and Section 107, 108, 109 and 112 of the Evidence Act**, the 1<sup>st</sup> respondent did not discharge proof that there was an agreement of sale. He relied on the case of **Daudi Ledama Morintat v Mary Christine Kiarie & 2 Others (2017) eKLR** which held that contracts in land that do not meet the requirements of **Section 3(3) of the Law of Contract Act** are unenforceable.

13. On the 3<sup>rd</sup> ground, the appellant submitted that the judgement fell short of the provisions of **Order 21 Rule 4 of the Civil Procedure Rules** by not being concise and it failed to disclose points for determination, the decision and reasons for such decision.

14. On the 4<sup>th</sup> ground, the appellant submitted that the trial magistrate neither directed his mind on the evidence that was adduced by the parties, analyse the issues raised by the parties nor consider the parties' pleadings. He contended that the trial court dealt with the suit as if the suit was a succession matter and in doing so, arrived at the wrong conclusion. He contended that he had obtained limited grant on behalf of the Estate of Samuel and he relied on **Section 54 of the Law of Succession Act** and the case of **Rajesh Prinjivan Chudasama [2014] eKLR** and **Hawo Shanko v Mohamed Uta Shanko [2018] Eklr** which stated that a person had locus to institute suit on behalf of a deceased person once he had obtained grant of letters of administration.

### **The respondents' submissions**

15. Despite service, the 1<sup>st</sup> and 2<sup>nd</sup> respondents failed to file written submissions.

16. The 3<sup>rd</sup> and 4<sup>th</sup> respondents filed written submissions dated 17/02/2022. They identified one issue for determination; whether upon finding that the appellant lacked locus, the trial court was called upon to consider other matters raised in the pleadings. They submitted that the appellant admitted that he was not entitled to obtain letters of administration on behalf of the estate of Samuel and thus had no locus to institute suit against the respondents. They relied on the case of **Alfred Njau & 5 others v City Council of Nairobi [1983] eKLR** which stated that where the court has determined that a person lacked locus, the court divests itself from entertaining the matter. To buttress on the issue of jurisdiction and *locus standi*, they cited the classic case of **Owners of Motor vessel 'Lilian S' V Caltex Oil Kenya Limited [1989] eKLR** and **Daykio Plantations Limited v National Bank of Kenya Limited & 2 others [2019] eKLR**.

### **Analysis and determination**

17. This being a 1<sup>st</sup> 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 it

did not have the advantage of seeing and hearing the witnesses.

18. As a 1<sup>st</sup> 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.

19. Having considered the original lower court record, memorandum of appeal, record of appeal and rival written submissions, this court will sequentially render its determination on the four grounds of appeal.

20. On the 1<sup>st</sup> ground of appeal, though the 2<sup>nd</sup> respondent filed a notice of admission of the appellant's entire claim dated 19/2/2019, the appellant did not move the trial court to enter judgment on admission pursuant the provisions of **Order 13 (2)** of the **Civil Procedure Rules**.

21. In a line of judicial cases including **Choitram (Supra), Momanyi v Hatimy & Another (2003)2 EA 600, Express Automobile Kenya Limited v Kenya Farmers Association Limited & another [2020] eKLR** and **Cassam Vs Sachania (1982) Klr 191**, it has been held that **judgment on admission** is discretionary and only to be exercised in cases that are plain, clear and unconditional with the deliberate act of the person making it showing an intention to be bound by it. Bearing in mind that a judgment on admission is a judgement without trial which permanently denies a remedy to the sued party by way of an appeal on merits, the court is bound to examine the facts and prevailing circumstances.

22. From the proceedings, the appellant merely stated that there was an admission on the claim and the trial court took cognizance of this. The appellant's claim against the 2<sup>nd</sup> respondent was entwined to that of the 1<sup>st</sup> and 3<sup>rd</sup> respondent and the appellant having not sought judgment on admission against the 2<sup>nd</sup> respondent, the trial court in my view, rightfully so, left the appellant to prove his case in accordance with the provisions of **Section 61** of the **Evidence Act** which reads thus:

**“No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions. (Emphasis added)**

23. This court will not interfere with the trial court's discretionary powers that was exercised judiciously and it is my finding that this ground of appeal fails.

24. On the 2<sup>nd</sup> ground of appeal, the appellant has contended that Abiakara was not the administrator of the Estate of Samuel and that the 1<sup>st</sup> respondents did not produce valid agreements to prove that he purchased the subdivided portions of the suit property.

25. It is trite law that fraud has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. The case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** cited this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition** at page 427:

**“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings ... (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308). The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489).”**

26. The particulars of illegality and fraud alluded to in the appellant's claim are that Abiakara was allegedly not an administrator of the Estate of the registered owner one Samuel and therefore did not have capacity to transact on the suit property.

27. There are two issues that arise at the point of transfer from Samuel to his son Abiakara. One is that Samuel having died in 1968 and could not have transferred the suit property to his son Abiakara in 1994. It therefore follows that Abiakara either acquired the suit property by succession or illegal means.

26. It is trite that he who alleges must prove. **Section 107** of the **Evidence Act** states as follows:

**“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.**

29. The evidential burden to prove the existence of facts fell on the appellant. From the register of the suit property, the suit property was transferred from Samuel to his son Abiakara by a transfer form number **“RL 7”** which was a transfer via transmission by an administrator of an estate of a deceased person under the retired **Registered Land Act**. In other words, from the register, Abiakara was an administrator of the Estate of Samuel.

30. It is trite law that parties are bound by their pleadings. From the trial court record, the impropriety of the agreements of sale between the various parties including that of the 1<sup>st</sup> and 2<sup>nd</sup> respondent were never specifically pleaded by the appellant. Needless to say, I have made observations on the several agreements that were produced by the 1<sup>st</sup> respondent. All the agreements except one met the requisite standards

of **Section 3(3)** of the **Law of Contract Act**. Though I find that the trial magistrate erred by not considering the law, facts and evidence before it, the appellant did not prove his case to the required standard.

31. On the third ground, **Order 21 Rule 4** of the **Civil Procedure Rules** provides that the elements of a judgment in a defended claim are that it must contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. In the case of **South Nyanza Sugar Company Limited v Omwando Omwando [2011] eKLR**, the court stated that ordinarily and in law a judgment should deal with issues raised and should not be scanty.

32. From the judgment of the lower court, the judgement contained a statement of the appellant's case in its introduction, it singled out the issue for determination; the appellant's *locus standi* and its decision and reasons thereof are contained in its analysis and determination. I find that it did not contain a statement of the respondent's case and the appeal succeeds on this ground.

33. The 4<sup>th</sup> ground of appeal on locus goes to the core of the case and in my view, it could dispose of the suit in entirety without necessarily delving into other issues for determination. According to **Black's Law Dictionary 9th Edition**, it is the right to bring an action or to be heard in a given forum.

34. In his judgment, the trial magistrate found thus on the capacity of the appellant to institute suit against the respondents;

**“...It therefore follows that the plaintiff is a mere busy body who cannot sustain a cause of action against the defendants. This suit is a non-starter and ought to be dismissed.”**

35. From the evidence adduced in the trial court, the appellant within the provisions of **Section 54** of the **Law of Succession Act**, obtained limited grant in **Siaya HC Succession Cause No. 38 of 2015** prior to instituting the suit and therefore, he had locus to institute suit against the respondents. In the case of **Hawo Shanko (Supra)** Chitembwe J in a case whose circumstances were almost similar to this case observed thus;

**“It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case... One has to first obtain a limited grant that will give him/her the authority to file the suit...”’**

36. It is my finding on this ground that indeed the trial magistrate erred when it found that the appellant did not have *locus standi* to institute suit against the respondents and the appellant succeeds on this ground of appeal.

37. It is my finding that though the reasoning of the trial was flawed, I arrive at the same conclusion as the trial court that the appellant did not discharge prove that the respondents fraudulently dealt with the suit property and ultimately it is my finding that the appeal is partially merited and I decline to grant the appellant the orders sought.

38. The upshot of this judgment is that the appellant's appeal partially succeeds to the extent that the judgment failed to some degree to contain the requisite elements of a judgment and that the trial court's finding that the appellant did not have locus to institute suit is hereby set aside.

39. 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 of Kenya held that costs follow the event and that the Court has the discretion in awarding such costs. Despite service, the 1<sup>st</sup> and 2<sup>nd</sup> respondent did not participate in these proceedings and in the absence of special circumstances, I award half the costs of the appeal to the 3<sup>rd</sup> and 4<sup>th</sup> respondents.

**Judgment delivered virtually.**

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 21<sup>ST</sup> DAY OF APRIL, 2022**

**In the Presence of:**

Ms Obware h/b for M.M Omondi for the appellant.

Mr. Kayo for the 3<sup>rd</sup> and 4<sup>th</sup> respondents.

Court assistant: Ishmael Orwa.

**HON. A. Y. KOROSS**

**JUDGE**

**21/4/2022**