



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO. 18 OF 2009

(Being an appeal from the judgment in the original

Kisii CMCC No. 346 of 2003 – C.G. Mbogo, CM)

BETWEEN

SHEIKH NURU MOHAMMED.....APPELLANT

VERSUS

SAMWEL ORINDO MANANI

OMAKAYARESPONDENT

JUDGMENT

The respondent was the plaintiff in the subordinate court matter against the appellant and three others. The respondent pleaded that by a written agreement of sale dated 20th December 1992, one **Asman Ibrahim**(the 1st defendant in the subordinate court matter), sold to him a portion of land within Migori Township known as **Plot No. 46 ‘A’** at a price of Kshs.150,000/=. The said sum was duly paid and the respondent took possession of the said plot, hereinafter referred to as “**the suit plot.**” The respondent further stated that in 1993 one **Mkuu Salim Mkuu** filed civil case No. 18 of 1993 in the Khadhi’s court at Kisumu against Salim Ibrahim and Asman Ibrahim praying that the suit plot be declared to be his on the basis of being the beneficiary of the estate of one **Mrs. Zena Salim**. The court ordered that the portion of the suit plot which had been sold by Salim Ibrahim and Asman Ibrahim be deemed as a gift from their guardians and the remaining portion of the plot be registered in the name of Mkuu Salim. The respondent further stated that as a purchaser of the suit plot his interest is thus recognized as against the interest of Mkuu Salim.

In July 1994 Asman Ibrahim together with his late brother, Salim Ibrahim, purported to transfer the whole of the suit plot to the appellant. Particulars of fraud as against the aforesaid transferors were set out. It was not alleged that the appellant was aware of the alleged fraud.

On 2nd August 1995 the late Mkuu Salim Mkuu entered into a sale agreement with the appellant whereby the deceased purported to sell to the appellant a plot known as **Suna East/Wasweta I/46**. The respondent alleged that the said plot was non-existent within Migori Township and that the said agreement did not in any way whatsoever refer to the suit plot. He further alleged that the purported sale

did not confer any proprietary rights upon the appellant as regards the suit plot.

The respondent alleged that the appellant and one **Junet Sheikh Nuru** (who was the 4th defendant in the subordinate court matter) had trespassed onto the suit plot and commenced digging a foundation thereon claiming that the plot belonged to the appellant. The respondent prayed for an order of permanent injunction to restrain the appellant and Junet from trespassing onto the suit plot. He also sought a declaration that he is the rightful owner of the suit plot. He further sought an order directing the appellant to transfer the suit plot to him as well as general damage for trespass.

The appellant and Junet Sheikh Nuru filed a joint statement of defence and denied any knowledge of the respondent's averments regarding the history of the suit plot. They however stated that they were the lawful allottees of plot No. 46 Migori town, having lawfully purchased the same from the lawful owner. They denied that the trial court had jurisdiction to hear and determine the respondent's suit.

During the hearing before the subordinate court, the respondent testified that on 20th December, 1992 he entered into a sale agreement with Asman Ibrahim (the 1st defendant) in respect of a portion of plot No. 46 'A'. Later on he learnt that there was a dispute over the said plot. A case was filed in the Khadhi's court at Kisumu by one Mkuu Salim. The court ruled that the portion of the plot which he had purchased be given to him and the remaining portion be transferred to Mkuu Salim. The respondent was aware that the plot in dispute had been registered in the name of the appellant. He alleged that the sale and transfer of the entire plot to the appellant was done fraudulently. This was in view of the orders that had been issued by the court.

The respondent's witness, **Benjamin Orwa**, was the Town Clerk, Municipal Council of Migori. He produced the records in respect of Plot No. 46 Migori town. The same was registered in the name of Rena Salim. The record also shows that Rena Salim was deceased. In or about 1997 a beneficiary of Rena Salim's estate obtained letters of administration of the deceased's estate and thereafter became the registered owner of the said plot. The plot was later transferred to two persons namely **Sheikh Mohammed and Eva Okello Opere**. The plot was subdivided into **46'A'** and **46'B'**. The former was registered in the name of the appellant. However, the subdivisions were nullified by an order issued by the Khadhi's court on 24th July, 2007. But sometimes thereafter the entire plot No. 46 was sold and transferred to the appellant by the Administrator of the estate of Rena Salim.

In cross examination, Benjamin stated that that plot is now registered as **L.R. No. 8534/160**, being **Grant No. ILN6041** issued under the Registration of Titles Act. The property is registered in the name of the appellant since 28th November 2002. It is a leasehold interest for a period of 99 years by the County Council of Migori to the appellant. He further stated that if the court issued any order in respect of Plot No. 46 as prayed by the respondent, he would not be able to effect the same as the said plot number was not in existence. He further stated that plot No. 46 had earlier been allocated to Rena Salim on the basis of temporary occupation.

Junet Sheikh Nuru Mohammed is a son of the appellant. He testified as **DW1**. He had been given a Power of Attorney by the appellant who was unwell at the time of the hearing. He testified that the appellant purchased plot No. 46 from one **Mkuu Salim** at a consideration of **Kshs. 280,000/=**. The sale and transfer of the plot was passed by the Municipal Council of Migori. Thereafter the appellant wrote to the Commissioner of Lands and sought official allotment of the same. The Commissioner gave his approval and the aforesaid Grant was issued. The same was produced in court as an exhibit. He further testified that the plot had been developed. A valuation report was produced showing that the value of the plot and the developments thereon stood at **Kshs. 37,500,000/=**. The property was also charged to Kenya Commercial Bank to secure a loan of **Kshs. 5, 500,000/=**. He denied that the appellant had ever dealt with the respondent.

The appellant's counsel submitted, *inter alia*, that under **sections 22 and 23** of the **Registration of Titles Act, Cap 281**, the appellant's title was indefeasible. It could not be challenged except on the ground of fraud or misrepresentation to which the appellant was a party. The allegations of fraud had been made against the 1st and 2nd defendants only but not as against the appellant. He further submitted that the suit plot (No. 46 'A') was no longer in existence and therefore the orders sought by the respondent could not issue. Counsel further submitted that the court lacked pecuniary jurisdiction in view of the value of the property in dispute.

The respondent's counsel submitted that his client had sufficiently demonstrated that he purchased a portion of Plot No. 46 which was later assigned plot No. 46 'A'. That had been confirmed by the Khadhi's court at Kisumu. He further submitted that the above information was known to the

appellant. Although he submitted that the appellant was a party to the subsequent fraudulent sale of the plot to him, there can be no denial that in the respondent's pleadings no allegations of fraud were made against the appellant.

With regard to the pecuniary value of the property, though counsel did not dispute the valuation report that was produced by DW1, he pointed out that on 16th April, 2003 the court had issued an order restraining the appellant and other defendants from carrying on any construction work thereon. The developments on the plot were done in breach of the aforesaid order. According to the valuation report the value of the undeveloped land was Kshs. 1,000,000/=. The trial court was therefore seized of jurisdiction, he submitted.

In its judgment, the trial court agreed with the respondent's counsel as regards the issue of pecuniary jurisdiction.

With regard to the provisions of **sections 22 and 23 of the Registration of Titles Act**, the learned trial magistrate held that there was evidence that the respondent had earlier purchased plot No. 46 and that there was no evidence of repossession of the same since no notice had been given to him. He further held that the sale and transfer of the plot to the appellant was fraudulent and that the appellant was a party to that fraud. Without commenting on the non-existence of plot No. 46, the learned trial magistrate proceeded to enter judgment for the respondent in terms of the amended plaint dated 16th April 2003.

The appellant, being aggrieved and dissatisfied with the aforesaid judgment, preferred an appeal to this court. The pertinent grounds of appeal may be summarized as hereunder:

- **The learned trial magistrate had no jurisdiction to hear and determine the dispute in view of the provisions of section 2 of the Registration of Titles Act which vests jurisdiction upon the High Court.**
- **The learned trial magistrate had no pecuniary jurisdiction to hear and determine the matter.**
- **The learned trial magistrate erred in law in failing to give effect to the provisions of sections 22, 23 and 24 of the Registration of Titles Act.**
- **The learned trial magistrate erred in law in finding for the respondent in respect of Plot No. 46 'A' which was not in existence.**

The advocate for the parties agreed by consent that this appeal be canvassed by way of written submissions and they proceeded to file their respective submissions. I have carefully perused and considered the same.

Let me start with a consideration of the trial court's jurisdiction with regard to the provisions of **section 2 of the Registration of Titles Act**. Under the Act, "**Court**" means the High Court. The respondent's suit was filed in April, 2003. As at that time the respondent was the proprietor of the land in dispute which had been registered as **L.R. No. 8534/160**. The Grant was duly registered on 28th November 2002. Although the respondent had referred to the suit plot as No. 46 'A', there was no such plot in existence at the material time. If the respondent had exercised due diligence by conducting an appropriate search he would have known as much. Disputes as to properties registered under the Act fall in the exclusive province of the High Court and not the subordinate court. It matters not whether that issue was not raised before the trial court. The general rule is that litigants do not raise new points of law for the first time before an appellate court but the issue of jurisdiction is an exception. An appellate court can consider a point going to jurisdiction of a trial court even though it had not been raised before the subordinate court. See **KENYA COMMERCIAL BANK LIMITED –VS- JAMES OSEBE**, [1982-88] 1 KLR 48. The trial court acted without jurisdiction and therefore its findings are unsustainable. In **KARANJA –VS- ATTORNEY GENERAL**, Civil Appeal No. 310 of 1997 at Nyeri (unreported) the Court of Appeal held that:

“Any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order.”

But with regard to the appellant's counsel's submissions relating to pecuniary jurisdiction, I will agree that the trial court had sufficient jurisdiction in view of the fact that the developments that were done on the property in dispute were in open disobedience of a court order. The value of the plot without the

developments was Kshs. 1 million.

Turning to the issue of the alleged fraud, in paragraph 9 of the amended plaint the respondent averred that Asman Ibrahim together with his late brother, Salim Ibrahim, purported to transfer plot No. 46 'A' to the appellant in a fraudulent manner. It was not pleaded that there was any fraud perpetrated by the appellant. The particulars of fraud that were pleaded related to the aforesaid persons only. **Section 23 (1) of the Registration of Titles Act** states as hereunder:

“The Certificate of Title issued by the registrar to a purchaser of land upon a transfer by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed therein, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

Although the appellant had been issued with a Grant and not a certificate of title, his interest on the land was indefeasible unless it was shown that there was fraud in acquiring the same and that he was a party thereto. That was not demonstrated.

I would agree with the appellant's counsel that the learned trial magistrate erred in law in entering judgment in favour of the respondent in respect of Plot No. 46 'A' Migori Township which was non-existent. Even if the orders had been properly and lawfully granted, they were not enforceable in law to the extent that the property in dispute had been registered as **L.R. No. 8534/160**. The registration had been effected long before the suit was instituted. The respondent was aware of that but had not sought to amend his pleadings to cite the proper plot number. Court orders are not issued in vain.

Lastly, the learned trial magistrate was well aware that the appellant had developed his property at a considerable expense. The valuation report that was before the court showed that the plot and the developments thereon were valued at Kshs. 37,500,000/=. That was not disputed by the respondent. In light of that, it is inconceivable that the learned trial magistrate ordered the appellant to transfer the property to the respondent.

All in all, I allow this appeal and set aside the trial court judgment. I substitute therefor an order dismissing the respondent's suit before the trial court with costs to the appellant. The respondent shall also bear the costs of the appeal.

DATED, SIGNED AND DELIVERED AT KISII THIS 10TH DAY OF SEPTEMBER, 2010.

**D. MUSINGA
JUDGE.**

10/9/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Minda for Mr. P.J. Otieno for the Appellant

Mr. Oguttu for the Respondent

Court: Judgment delivered in open court on 10th September, 2010.

**D. MUSINGA
JUDGE.**