



**Opilio v Opilio (Environment and Land Appeal E016 of 2021)
[2022] KEELC 12689 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12689 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT AND LAND APPEAL E016 OF 2021
AA OMOLLO, J
SEPTEMBER 27, 2022**

BETWEEN

VINCENT OMOIT OPILO APPELLANT

AND

FLORENSIO OKITUK OPILO RESPONDENT

*(An Appeal from the whole judgment of Hon. Lucy
Ambasi, CM Busia in ELC Case No. 72 of 2018))*

JUDGMENT

1. The appellant who was the defendant in the case before the subordinate court being dissatisfied with the whole of decision of the trial magistrate Hon L Ambasi CM in Busia CM ELC case No 72 of 2018. He raised the following seven (7) grounds in his appeal.
 1. The learned trial chief magistrate erred in law and in fact in failing to take into account and give due weight to the evidence that the land registrar sue moto caused the cancellation of South Teso/Apokor/4018 and South Teso/4017 being sub-divisions of LR No South Teso/Apokor/589 by the respondent without appellant's consent.
 2. The learned trail chief magistrate erred in law and in fact in finding that the respondent had acquired LR No South Teso/Apokor/4018 as a gift ignoring the evidence by the appellant that the respondent had snatched the whole parcel and sub-divided it himself, hence a wrong conclusion.
 3. The learned trial magistrate erred in law and in fact in failing to hold that the respondent sub-divided the appellant's land and created two numbers that is South Teso/Apokor/4018 and South Teso/4017 in his name and the appellant's daughter's name, rendering the appellant landless hence an erroneous decision.



4. The learned trial chief magistrate erred in law and in fact by misinterpreting the appellant's surprise on learning that the respondent had sub-divided the land and created two numbers South Teso/Apokor/4018 and South Teso/4017, fraudulently which prompted the appellant to report to the land registrar who *suo moto* caused the said sub-divisions to be cancelled hence reaching a wrong decision.
 5. The learned trial magistrate erred in law and in fact in finding that the respondent's evidence was met the requisite standards hence reaching a wrong decision.
 6. The learned trial magistrate erred in law in fact by dismissing and or ignoring the appellant's evidence that the respondent as his brother has his neighboring portion and caused a sub-division of the appellant's land without justifiable reasons hence a wrong decision.
 7. The learned trial magistrate erred in law and in fact by disregarding the evidence given by the appellant and his witnesses vis a vis the respondent's evidence hence a wrong decision.
2. At the stage of directions, parties agreed to argue the appeal by filing of written submissions. The appellant filed his submissions on March 18, 2022 and the respondent filed his on June 13, 2022. The brief background of the case is that *vide* a plaint dated July 26, 2018, the respondent sued the appellant claiming the reliefs by way of an order directing the land registrar to re-instate the registration of the respondent as the absolute owner of LR No South Teso/Apokor/4018. The appellant denied the claim and filed his statement of defence on July 9, 2019. He pleaded that his land parcel No South Teso/Apokor/589 was fraudulently sub-divided to create the suit parcel 4018 and parcel No 4017. He also denied uprooting any boundary marks placed between the two plots.
 3. During hearing both parties relied on the evidence of two witnesses each. The appellant stated they are brothers with the respondent. The respondent in his evidence stated that he has been living on LR No 589 all his life and has established a home on it. That it was agreed on April 16, 2017 that parcel No 589 be sub-divided between him and the appellant with the appellant retaining 3 acres while he takes 1.25 acres. In support of this averment, the respondent produced an agreement dated May 16, 2017 executed by the two parties before their area chief for Kaujakito location. The respondent added that the terms of this agreement was implemented and he produced a mutation form sub-dividing the land into two; minutes of the land control board seeking consent for sub-division, green card for the title No 589 and copy of title for LR No 4018 in the respondent's name. The respondent's second witness who was the assistant county commissioner for Teso South reiterated the evidence given by the respondent.
 4. The appellant in his evidence stated that LR No 589 was registered in his name in 1972 while the respondent was given LR No 588. He stated further that the respondent decided to build his home at the boundary between his land (LR 588) and parcel No 589. The appellant avers that since he worked in Uganda, in 2017, the respondent visited the lands office and lied that he was dead and wanted to succeed his land. That the respondent proceeded to cause LR No 589 to be registered in his name as the owner thereof. The appellant threatened to sue the respondent unless he reversed the said transfer but instead the respondent went to court first now the suit the subject matter of this appeal. During cross-examination, the appellant admitted the respondent has built on his land and that he did not authorize him to cultivate the land. According to him, the agreement of May 16, 2017 was over a dispute regarding parcel No 569 not 589. The appellant admitted that the respondent has never been charged with any case of forgery.



5. After the trial court considered the evidence before her, she found for the respondent. The honourable Chief Magistrate at paragraph 17 & 18 of her judgment stated thus

“17. In the instant case, the defendant had pleaded at paragraph 3 of the defence that there was fraud perpetuated by the plaintiff in acquiring the suit land. However, the plaintiff’s supporting documents showed a clear pattern that the plaintiff followed the requisite procedures in acquiring the suit land, starting with a clear worded agreement before the area chief, the land control board minutes which affirm he was gifted the suit land and not purchased as submitted by the defence.

“18. Where a certificate of title has been issued by land officials and there is no evidence that a buyer has been involved in fraud or irregular registration of property and the root of the title can be traced, he holds good title which cannot be cancelled or revoked.”

6. Further in reaching her conclusion the trial court held thus at paragraph “20 I am further in agreement that under section 60 of the repealed Registration of Titles Act, the registrar was required to summon the holder of a title where there was an erroneous entry made or a fraudulent title issued, or to apply to the court for such person to be summoned.”
7. This court is called to determine whether the trial magistrate erred in the conclusion she arrived at. This is a first appeal and this court is given liberty under the law to re-evaluate the facts adduced by both parties in reaching her determination on the merits or otherwise of the appeal. In arguing ground 1 & 2 that the trial magistrate erred, the appellant blamed the court for failing to take into account the provisions of the law that the land registrar sue moto cancelled titles nos 4018 and 4017 which were sub-divisions from LR 589 without the appellant’s consent and that the court ignored the evidence that the respondent had snatched the whole of 589 and sub-divided it himself.
8. The appellant submitted thus; “looking at the record of appeal from pages 1 to 93, it is *prima facie* evident that the land LR No South Teso/Apokor/589 belonged to the appellate, and how it became the respondent’s was through fraud as all the initial transactions were done without appellant’s consent. That the respondent had it fraudulently and illegally divided into two portions that is South Teso/Apokor/4017 and South Teso/Apokor/4018. Thus the action of the county registrar cancelling the two numbers and reverting them to the name of the appellate is justified and to treat the land registrar’s action as an offence will be to allow the fraudsters to have their day even in public offices.”
9. The respondent submitted that the sub-division was done pursuant to the agreement dated May 16, 2017 which agreement the appellant admitted he was part of. That the issue before the trial court was whether or not the respondent had lawfully acquired LR No S Teso/Apokor/4018. He relied on the provisions of section 27 and 28 of the Land Act and in particular section 80(2) of Land Registration Act which provides thus; “The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration unless the proprietor had knowledge of omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”
10. From the evidence on record, the green card for LR 589 entry No 1 shows the appellant was the sole registered owner as at August 1, 1972. Entry No 2 made on March 22, 2017 indicates that the respondent became the registered owner of No 589 and entry No 4 made on September 29, 2017 the title was closed on sub-division into numbers 4017 and 4018. Entries No 5 cancelled entries No 2 – 4 and title deed issued on March 5, 2018. The respondent placed reliance on acquisition of his title on account of implementation of the agreement dated May 16, 2017. However, the green card show the



change of registration into the respondent's name took place earlier than the agreement. The agreement even provided that the land to be subdivided was currently registered in the name of the respondent.

11. The documentary evidence produced show that title LR No 589 was registered in the name of the respondent before the arrangement of sharing was done. The appellant pleaded that the registration of the respondent as owner and the subsequent sub-division of the said title No 589 was without his consent. It was therefore incumbent upon the respondent to demonstrate to the court how the land changed names from the appellant's name into his name. It is on the basis of his registration that he proceeded to sub-divide the land to create LR No 4018 and 4017 which sub-divisions the land registrar cancelled. It is the cancellation of his registration and the sub-division that he challenged in CMC ELC No 72 of 2018 and it is the order issued by the honourable chief magistrate directing the land registrar to reverse the cancellation that the appellant challenged.
12. Hon Ambasi Esq CM cited the law correctly that certificate of a buyer cannot be challenged unless there was proof that he was involved in or was party to a fraud. This then brings the question of whether or not the respondent acquired valid ownership of LR No 589 and with it the subsequent sub-division which created the impugned No 4018. The respondent in support of his case produced minutes of the land control board held in February 2017 with Min 108/2/2017 recording that; "South Teso/Apokor/589 LCR 108/2/2017 – the consent was given to Omoit Opilio as transfer of 1.70ha to Florencio Okituk Opilio as a gift". The actual letter of consent and duly executed transfer in favour of the respondent was not produced. The question that begs answers is; if indeed the appellant obtained consent to transfer the entire parcel No 589 to the respondent, why was there a need to enter into an agreement after his registration which introduced new terms about sharing the land in May 2017?
13. Although the respondent stated that the sub-division was regular, there was nothing he presented to prove that the consent of the relevant land control board had been obtained. The trial magistrate still found that the plaintiffs' (respondents') supporting documents showed a clear pattern that the respondent followed the requisite procedures in acquiring the suit land. These procedures referred to by the trial court was not brought out by the respondent's oral and documentary evidence. In the case of *Munyu Maina v Hiram Gathima Maina* (2013) eKLR the Court of Appeal stated thus, "It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."
14. This court is not invalidating the terms of the agreement reached between the parties on May 16, 2017. However, the court cannot allow itself to be used to rubberstamp an illegal activity i.e. normalize entry No 2, in the register for LR No 589. The burden was upon the respondent to demonstrate that the land registrar was in error by reverting the title of LR No 589 to its original owner by producing supporting documents for entries Nos 2, 3 and 4 and he failed to discharge this burden. More importantly, if the agreement was to be implemented, it was the appellant to undertake the process of transferring the land to the respondent. Once the appellant pleaded in his defence that he did not consent to the whole process, the respondent had an obligation to demonstrate by producing these signed documents.
15. The respondent relied on an earlier decision by this court (*Safarino Ojuma Isogoli v Joseph Ekurut & 3 others* (2021) eKLR) and in particular the proviso to section 79(2) which requires the registrar to notify any interested parties if their title is being cancelled before rectification of the register is done. In the records of the lower court file, there is a letter dated January 15, 2018 and annexed in the appellant's replying affidavit sworn on October 2, 2018 in response to the interlocutory application by the respondent. The letter from the land registrar is addressed to the respondent through the chief and stated thus, "Re: South Teso/Apokor/589 (4017 and 4018): call on the undersigned on January 29, 2018 at 9.30am without fail regarding a complaint touching on ownership of the above land(s)"



signed. This letter confirmed that the respondent was duly notified before the process of rectification of the register was done by the land registrar on March 5, 2018.

16. In view of the foregoing analysis, I find merit in this appeal. Accordingly, the judgment of the trial magistrate allowing the respondent's suit be and is hereby set aside. In its place, I issue an order dismissing the respondent's suit. The appellant is awarded the costs of this appeal and costs in the suit in the subordinate court.

DATED, SIGNED AND DELIVERED IN BUSIA THIS 27TH DAY OF SEPT., 2022.

A. OMOLLO

JUDGE

