



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Appeal 105 of 1995

(An appeal from the Judgment of the Senior Resident magistrate (Mrs. J. Matu) Delivered on the 13th Day of October 1995 in M-SRMCC No. 417 of 1993 – MOHAMED ATHUMANI ALI TONDOO VS. ATHUMAN MATANO)

ATHUMAN MATANO.APPELLANT

VERSUS

MOHAMED ATHUMAN ALI TONDOO.....RESPONDENT

J U D G M E N T

In a plaint dated 21st May 1993, Mohamed Athuman Ali Tondoo, the Respondent herein, prayed for judgment against Athuman Matano, the appellant herein, as follows:

- (i) A permanent injunction to injunct the appellant from interfering with the Respondent's rights to the premises standing on Plot 804/Kisauni/Mombasa North.
- (ii) A declaration that the suit premises belonged to the Respondent.
- (iii) Mesne profits of Kshs.740 per month w.e.f. 16.7.92 until full payment
- (iv) Costs of the suit.

After hearing the suit, the learned Senior Resident Magistrate gave judgment as prayed save that the Mesne profits were assessed at Kshs.500 per month w.e.f. July 1992 until full payment instead of Kshs.740/-. Being aggrieved by that decision, the appellant preferred this appeal.

The facts leading to this appeal are short and straightforward. On the 16th day of July 1992, the Respondent bought houses without land standing on Plot No. 804/Kisauni/Mombasa North from one Mohamed Omar (P.W.2) at a consideration of Kshs.60,000/- Mohammed Omar had convinced the Respondent that he had inherited the property from his sister called Panya Mohammed (deceased). It is the submission of the Respondent that since he paid the money to purchase the property he has been unable to take possession of the same because of the hostility and resistance mounted by Athuman Matano, the appellant. Due to that problem he was forced to sue him for the available remedies in law. The appellant resisted the Respondent's suit claiming that the property had been inherited by one Waja Mohammed (deceased) who later bequeathed the same to his two daughters namely Bibi Athumani and Mwanamkuu Athumani. He denied ever resisting the plaintiff's claim over the property.

On appeal, the appellant put forward 8 grounds of appeal in his memorandum of Appeal. When the appeal came up for hearing, Mr. Odongo advocate for the appellant chose to argue two main grounds in support of the appeal. The first ground argued is to the effect that the learned Senior Resident Magistrate erred in law by holding that the Respondent acquired good title over the property whereas it was clear that the person who sold the property to him had no good titles to pass. Mr. Gunga advocate was of the view that P.W.2 had a good title to pass over to the Respondent. Mr. Gunga further argued that even if P.W.2 had no good title, still the Respondent's rights could not be affected because he was an innocent purchaser for value.

I have considered the powerful submissions for and against this ground. I have also perused the record placed before this court. The record shows that the Respondent purchased a house without land standing on Plot No. 804/Kisauni/Mombasa North from one Mohammed Omar (P.W.2) who had convinced the appellant that he had inherited the property from his late sister called Panya Mohammed. The evidence on record shows that he purchased the property at Kshs.60,000/- . The Respondent admitted in his evidence on cross-examination that he was not shown the inheritance papers. It is also the evidence of the Respondent that he has not taken up possession of the suit property because the appellant had resisted his entry.

On his part the appellant denied that he prevented the Respondent from taking possession of the property. It was the appellant's contention before the trial court that P.W.2 had no good title to pass because he had not inherited the property from Panya Mohammed (deceased). The appellant told the trial court that the property had been bequeathed to his 2 daughters by Waja Mohammed (deceased), who was a son to Panya Mohamed. The learned Senior Resident Magistrate came to the conclusion that the property was vested in P.W.2 because he was the nearest surviving next of kin to Panya Mohammed, deceased.

The learned Senior Resident Magistrate also concluded that the whole family had agreed to allow P.W.2 to sell the property save for the appellant who resisted their move. What is not denied is that the property in dispute is a house without land standing on Plot No. 804/Kisauni/Mombasa North. All the parties agree that the property belonged to the late Panya Mohamed who passed away sometimes in 1975. It is admitted that none of the parties had obtained letters of administration in respect of the Estate of Panya Mohammed. If it is true that P.W.2 had inherited the property from Panya Mohamed then it was imperative for him to secure letters of administration to enable him legally deal with the property. I agree with the submissions of Mr. Odongo advocate that P.W.2 had no good title to pass over to the Respondent.

The learned Senior Resident Magistrate therefore misapprehended the point when she failed to properly direct her mind over this issue. It cannot be said that the Respondent was an innocent purchaser for value. The Respondent was told from the beginning that P.W.2 had inherited the property. It was incumbent upon him to establish first that P.W.2 had a good title to pass. The Respondent was only shown receipts by P.W.5 showing that he collected rents from tenants occupying the suit premises. That was not enough.

The Respondent has admitted that he has been unable to take possession of the property. That should have pricked his mind that there was something amiss. In the end I think he was not an innocent purchaser for value. The Respondent dealt with a person who was actually intermeddling with the property of the Estate of Panya Mohamed deceased. He has himself to blame for his misfortunes.

The second ground argued on appeal is that the learned trial Senior Resident Magistrate erred when she purported to determine the validity of a Will produced in evidence in disregard of the law of succession. Mr. Gunga advocate for the Respondent did not address me over this ground. The record shows that the appellant produced a document, which he claimed to be a Will written by the late Waja Mohamed in which he bequeathed the property in dispute to Bibi Athumani and Mwanamkuu Athumani, the appellant's daughters. It is said that the Will was made at the Chief's office on the 5th day of September 1991. The learned Senior Resident Magistrate formed the opinion that the late Waja Mohamed had no capacity to make the Will because he was of unsound mind at the time of making the Will. She also came

to the conclusion that the appellant manufactured the Will to disinherit the other beneficiaries. She rejected the Will on the ground that the appellant had not established that Waja Mohamed was of a sound mind when he made the Will. I have perused the evidence tendered before the learned Senior Resident Magistrate and it is quite clear that the appellant had told the trial court that the Will was made by Waja Mohamed when he was mentally sound. It was the contention of the Respondent and P.W.2 that Waja Mohamed (deceased) was mentally unsound when he made the Will. Section 5(4) of the Law of Succession Act states as follows:

“The burden of proof that a testator was, at the time he made the Will, not of sound mind, shall be upon the person who so alleges.”

It is beyond peradventure that the learned Senior Resident shifted the burden of proof to the appellant. That was obviously in contravention of the above provisions of the law.

In the final analysis and for the above reasons the appeal is allowed with the result that the judgment of the Senior Resident Magistrate of 13th October 1995 is set aside and substituted with an order dismissing the suit. Costs of the appeal and that of the case before the subordinate court shall be awarded to the appellant.

Dated and delivered at Mombasa this 24th day of May 2006.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Odongo for the appellant

N/A Gunga for the Respondent.

SERGON, J