

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.253 OF 2002

MBOGO OCHOLA APPELLANT

VERSUS

JOSEPH GOR OBETI RESPONDENT

JUDGMENT

The appeal is against the judgment of Principal Magistrate Homa Bay in Civil Case No.29 of 1999.

The Respondent who was the plaintiff in the lower court had sued the appellant who was the defendant seeking for transfer of the whole of land No.KABUOCH/KOBITA/KAWUOR/1815 to himself which he said was erroneously registered in the appellants name. He later amended the plaint and stated that the appellant caused the land to be registered in his name through fraud.

In evidence the Respondent had said that the appellant had encroached into his land. Their lands are adjacent to each other.

Mr. Masese for the appellant submitted that the magistrate erred when he ordered a portion of 1/2 of an acre be excised from the appellants land and be transferred to respondent. He said the Respondent had not prayed for 1/2 of an acre. The registration was a first registration and should not have been interfered with.

Ms. Orwa opposed the appeal. She submitted that the decree on record is not signed. Further she said that the magistrate reached a proper conclusion after considering the evidence of all the witnesses.

Indeed the decree on record is not signed or the date issued stated. However it shows the date the judgment was delivered was 26th April 2004. Order 20 rule 7 CPR provides that a decree has to show the date judgment was delivered. This has been done in this case and as such submission that there was no decree cannot stand.

The Respondent had sued the appellant alleging fraud and demanding the whole of parcel No.1815. The Court found that there was no such fraud. Respondent had not claimed that the appellant encroached on 1/2 of an acre of his land. The finding that 1/2 of an acre be carried from the appellants land was not supported either by the pleadings or the evidence.

Appellant's registration as the owner of parcel No.1815 was a first registration. S.143 R.L.A clearly provides that such registration cannot be interfered with. In the case of AMBALE VS. MASOLIA (1986) KLR 241. It was held a first registration is indefeasible even if there is allegation of fraud or mistake. The court therefore ought not to have interfered with the registration by ordering the register to be rectified.

I therefore find the appeal is merited and the same is allowed. The lower courts judgment is therefore set aside.

Appellant will get costs in the appeal and in the lower court.

Dated at Kisii this 14th October 2004. KABURU BAUNI

JUDGE.

14/10/04