



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO. 14 OF 2019

PETER OCHIENG OKORE.....1ST APPELLANT

ELIZABETH AKINYI OKORE.....2ND APPELLANT

VERSUS

GILBERT ODUOR OMONDI Suing as legal administrators of the

Estate of the late FREDRICK WILLIAM

ODUONG A.K.A FREDRICK WILLIAM ODUONG.....RESPONDENT

(Being an appeal from the Judgment and Decree of the HON. Principal Magistrate Bernard Kasavuli dated 13th May 2019 in Winam ELC Case No. 3 of 2018)

BETWEEN

GILBERT ODUOR OMONDI Suing as legal administrators of the

Estate of the late FREDRICK WILLIAM

ODUONG A.K.A FREDRICK WILLIAM ODUONG.....PLAINTIFF

VERSUS

COUNTY LAND REGISTRAR, KISUMU.....1ST DEFENDANT

MATHEW OMORO OLUDHE.....2ND DEFENDANT

PETER OCHIENG OKORE.....3RD DEFENDANT

ELIZABETH AKINYI OKORE.....4TH DEFENDANT

JUDGMENT

Peter Ochieng Okore and Elizabeth Akinyi Okore (hereinafter referred to as the appellants) were enjoined in the suit filed by **Gilbert Oduor Omondi Suing as legal administrators of the Estate of the late Fredrick William Oduong A.K.A Fredrick William Oduong** (hereinafter referred to as the respondent) in Kisumu HCCC No. 333 of 2014 seeking an order directing the County Land Registrar, Kisumu to rectify the register by cancelling the names of any other person purporting to be the owner of the suit parcel East Kisumu/Kanyakwar "B"/218 thereby leaving the deceased Fredrick W. Omondi as the sole owner thereof. Moreover, the respondents sought the eviction order of the appellants and/or other persons in occupation of the suit parcel East Kisumu/Kanyakwar "B"/268.

The suit was initially filed as against one Willis Okore Olago who was substituted with Mathew Omoro who never entered appearance.

The Appellants applied to be enjoined as co-defendants and were enjoined as legal administrators of the estate of the late Wills Okore Olago. The suit was transferred by the Environment and Land Court Kisumu to the Chief Magistrates court at Winam for hearing and determination.

The respondents claim in the lower court was basically that the **parcel of land title No. east Kisumu/Kanyakwar "B"/268 was at all material times registered in the name of Fredrick W. Omondi Oduong now deceased and whose legal personal representative is the respondent.**

The Deceased died on 30-1-2014 and when the respondent went to the County Land Registrar's office to check on the position of the suit land, he was verbally informed that he Green Card was missing from the register.

On 29.9.2014 the respondent's advocate wrote to the County Land Registrar requesting for a certified copy of the Green Card and paid the requisite fee for the same. The respondent's advocates made many visits to the office of the county registrar and even paid for Green Card but the county land registrar declined to issue the request saying that the suit land had many irregular transactions. He instead informally gave out a copy of a green card issued on 17.5.2011 which showed that the suit land had long been transferred to Willis Okore Olago, the appellants deceased father in 2002 and there was a likelihood that it had further changed hands to person's unknown.

The respondent's contention was that the purported transfer of the suit land to the Willis Okore Olago must have been done fraudulently because the respondent was aware that his deceased father never sold his land to any person.

The particulars of the alleged fraud were enumerated as **forging agreement for sale, if any. Forging application to the Land Control Board, if any. Forging transfer forms. Uttering the above false documents to the county land registrar.**

The respondent prayed for **an order directing the county land registrar to rectify the register by cancelling the name of any other person purporting to be the owner of the suit parcel East Kisumu/Kanyakwar "B"/268 thereby leaving the deceased Fredrick W. Omondi Oduong as the sole owner thereof. An eviction order of the Willis Okore Olago and/or any other person in occupation of the suit parcel East Kisumu/Kanyakwar "B"/268.**

The county land registrar denied the allegations of fraud and put the respondents to strict proof.

The appellants denied that parcel number East Kisumu/Kanyakwar "B" 268 at all material times was registered in the names of Fredrick W. Omondi Oduong (deceased) whose legal representative was the respondent.

The appellants denied the allegations by the respondent and contended that **their late father, Willis Okore Olago has a good title to the suit parcel and as such, the title issued in his name is genuine and not fake.**

The appellants further averred that the respondents suit was dubious, vexatious, devoid of merit, tainted with untruths/falsehoods and is an abuse of the process of this Honourable Court.

When the matter came up for hearing in the lower court, appellant, the son and the administrator of the estate of his father Fredrick William Omondi Oduong, deceased who died in 1983, testified that his father was the registered owner of a parcel of land title No. East Kisumu/Kanyakwar "B"/268 from December 1983. When his father died He went to the Lands Office to check on the above land but He was informed the green card could not be found. He even wrote to the Land registrar asking him to reconstruct the Green Card with no results.

He then instructed his advocates to request for the same but they too were not supplied with the same. They only managed to get unofficial copy dated 17.5.2011 which showed that their father's said land was transferred to one Willis Okore Olago in 2002.

He claimed that his father had not sold this land to any person so the above transfer must have been made fraudulently.

He prayed that the register be rectified by cancelling the name of Willis Okore Olago or any other subsequent name so that the land remains with his father's name. He also prayed that anybody occupying the land to be evicted. He also prayed for the costs of the suit.

On cross examination he stated that he never knew what his father did and that his father never complained that his land was stolen. However, that his father never surrendered the land certificate.

On the close of the respondent's case, the appellants called DW1 & DW2 Nicholas Omondi Okore and Peter Ochieng Okore who stated that their father died on 3/1/2011 and left behind land parcel No. Kisumu Kanyakwar 'B'/268. That they have been in quiet possession of the said parcel since his demise.

That they were surprised in 2014 when they found out that the respondent was claiming the suit parcel on the basis that it belonged to his late father while his father sold the same to their late father Willis Okore Olago sometimes in the year 2002. That later in 2017, they were informed by their brother Peter Ocheing Okore that their advocate on record while in Court heard the same had been listed for hearing in their absence and later informed them. That from the green card filed in Court certified by the Land Registrar on 17/5/2011, Frederick William Omondi Oduong was the registered owner and transferred the same to their late father in the year 2002 and a title deed was issued in his favour.

The respondent later filed a 2nd green card showing that before their father acquired this parcel, Mathew Omoro Oludhe owned this parcel of land and their father was now entry 6 and 7. However the entry was later cancelled.

They believed that the respondent was being insincere and trying to hoodwink the court in granting him the order yet he did not own this parcel of land.

Their father the late Willis Okore Olago bought this parcel from the late Frederick William Omondi, Oduong and his ownership is sacrosanct in law and should not be infringed. They prayed that the respondent's suit be dismissed with costs.

After hearing the witnesses and rival submissions, the court rightly identified the issues for determination as follows: -

- a) Whether the suit parcel of land No. East Kisumu/Kanyakwar "B"/268 initially belonged to the Deceased Plaintiff.
- b) Whether the Deceased Plaintiff transferred the suit parcel of land to Willis Okore Olago and/or Mathews Omoro Oludhe.
- c) Whether the titles issued to Willis Okore Olago and Mathews Omoro were acquired procedurally.
- d) Who should bear the costs of this suit.

On the first issue, the court found that the land initially belonged to the deceased plaintiff, however the transaction raised eyebrows as the application for consent was dated 23/12/2002. The consent letter was dated 4/04/2002 and the land transfer was dated 6/02/2002 and the Title deed was issued on 6/02/2002. Moreover, the name in the document was Fredrick Omondi Oduong despite the fact that the name had been corrected to Fredrick W. Omondi Oduong.

The trial court considered the fact that the land Registrar deemed the entries made in respect of Willis Olago as forgeries. The court further found that there were no records to support the transfer and registration in the name of the deceased Willis Olago. Moreover, that there could not have been a transfer without a surrender of the original land certificate.

Ultimately, the court found that the titles issued to Willis Okore Olago and Mathew Omoro Oludhe were not acquired procedurally. The court further found that the land was transferred to the 2nd Defendant under unclear circumstances. The court found for plaintiff and granted orders sought in the plaint.

The appellant has come to this court on appeal based on grounds that:

- 1. The Learned Trial Magistrate erred in law in his evaluation of the evidence presented, thereby wrongly dismissing the 3rd and 4th Defendant's case when it had been proved by uncontroverted evidence and beyond any reasonable doubt that the suit property was rightfully acquired by their father the late Willis Okore Olago.**
- 2. The Learned Trial Magistrate erred in law by failing to appreciate and apply the well-known principles of law as regards burden of proof thus arriving at a decision contrary to law.**
- 3. The learned trial magistrate erred in law by failing to properly evaluate the evidence property adduced before him thereby arriving at a wrong decision.**
- 4. The Learned trial magistrate failed to discern the issues raised during trial and thereby rendered a wrong determination on the said issues raised during trial.**
- 5. The Learned trial magistrate failed to properly apply the relevant provisions of the Land Act and land registration act and thus arrived at the wrong decision.**
- 6. The Ruling is contrary to provision of Order 21 of the Civil Procedure Rules and provisions of the Evidence Act.**

The appellant prays for orders that:

- a) The instant appeal be allowed and Judgment/decreed dated 13th May 2019, be set aside and the suit filed by the Plaintiff be dismissed.**
- b) Cost of this appeal and the lower court matter be granted the Appellant.**

This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded.

In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

The land in dispute is Kisumu Kanyakwar "B" 268 measuring approximately 0.42 hectares that was adjudicated and adjudication record issued on 13/3/1981. On 29/12/1983, the proprietor applied to correct his name from Omondi Odwong to Fredrick. W. Omondi Oduong and the land certificate was issued in the names of Fredrick. W. Omondi Oduong.

The certificate of official search done on 15/1/2002 showed that the land was registered in the names of Fredrick. W. Omondi Oduong.

By agreement dated 18/1/2002, Fredrick William Omondi Oduong agreed to sell the land to Williams Okore Olago at consideration of Kshs 250,000/= which was to be paid by the purchaser on registration. The application for consent of the Land Control Board was made on 23/1/2002 and signed by both parties. The letter of consent was issued on 4/2/2002. The transfer of land was executed by the purchaser and seller on 4/2/2002 and certified by C.M. Patel advocate on the same date. The same was registered on 6/2/2002. Title was issued on 6/2/2002.

The respondents claim in the lower court was that the appellants' father was fraudulently registered as the proprietor of the suit property.

This court finds that the plaintiff's suit is based on fraud which was properly pleaded and particulars set out but there is no evidence that the deceased Willis Okore forged the sale agreement. No document examiner was called to establish that the sale agreement was forged. There was no evidence produced by the plaintiff to demonstrate that the sale agreement, the transfer forms, the application for consent and letter of consent were forged. The burden of proof rested on the plaintiff to establish that the documents were forged. It was not incumbent upon the defendants to prove that the land documents were not forged but it was the plaintiff to prove that they were forged.

There was no evidence that the deceased Fredrick William Omondi Oduong ever complained during his lifetime that the documents were forged.

The burden of proof in fraud cases is well explained in the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR*, where *Tunoi, JA. (as he then was)* stated as follows:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts." [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. As regards the standard of proof, the Court of Appeal in the case of *Kinyanjui Kamau vs George Kamau [2015] eKLR* expressed itself as follows; -

"...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..." In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

I do find that there was no evidence of fraud and that the learned magistrate erred by relying on the fact that the land registrar was opined that there was fraud.

On the issue of the Consent of the Land Control Board though the letter of consent is dated 4/2/2002, I do find that the import of the letter is that consent was given on the 1/2/2002. The letter of consent was mere communication of the consent granted on 1/2/2002.

The import of the above is that the honourable magistrate did not evaluate the evidence properly which led to the wrong conclusion.

The upshot of the above is that the appeal is allowed and therefore the Judgment/decreed dated 13th May 2019, be set aside and the suit filed by the Plaintiff be dismissed. Cost of this appeal and the lower court matter are hereby granted the Appellant.

DATED AT KISUMU THIS 11th DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE