



Paul v Kokelo (Suing as the Administrator of the Estate of Joram Okello Ngar) (Environment and Land Appeal E068 of 2021) [2024] KEELC 3634 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3634 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E068 OF 2021**

E ASATI, J

MAY 2, 2024

BETWEEN

KENNEDY ONYANGO PAUL APPELLANT

AND

BABUGUN KOKELO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF JORAM OKELLO NGAR) RESPONDENT

(An appeal from the Judgment and decree of the Principal Magistrate delivered on 31/08/2021 in Tamu MC ELC NO. 2 OF 2019)

JUDGMENT

Background

1. The appellant herein was the 3rd Defendant and the Respondent the Plaintiff in TAMU MC ELC NO 2 OF 2019 (the suit). Vide the plaint dated 7th March 2019, the Respondent claimed that a land parcel known as KISUMU/FORT TENAN/22 (the suit land herein) belonged to one JORAM OKELLO NGAR, who was deceased. That one PAUL OWUOR OKELLO the 1st Defendant in the suit, fraudulently and without obtaining Letters of Administration to the estate of the deceased, caused the suit land to be transferred in his favour, subdivided into numbers KISUMU/FORT TENAN/1174, 1175 and 1176 and caused the resultant parcels to be transferred to one Odungo Dan Odhiambo sued as the 2nd Defendant in the suit and the appellant herein. The Respondent therefore on behalf of the estate of the deceased sought for;
 - a. An order of rectification of the register by deleting from the register title NO. KISUMU/FORT TENAN/1174, 1175 and 1176 and replacing the same with parcel NO. KISUMU/FORT TENAN/22 in the name of the deceased
 - b. Costs of the suit with interest



- c. Any other relief this Court may deem fit and just to grant
2. The record of appeal shows that the appellant, vide his Statement of Defence dated 28th February 2020, denied the claim and prayed that the suit be dismissed. The record further shows that the suit was heard before the trial court which vide its judgement dated 31/8/2021 found, inter alia, that the 1st Defendant had no legitimate title to the land and he had no capacity to transfer that which he did not have to the appellant and the 2nd Defendant. The court found that the Respondent had proved his case on a balance of probabilities and was entitled to the remedies sought. The court then proceeded to make a number of orders the last one of which was that though the 3rd Defendant (the appellant herein) obtained the necessary consents for transfer of the land to him, the 1st Defendant had no legitimate title to the land and no capacity to transfer that which he did not have. That the 3rd Defendant failed to exercise due diligence. The trial court then proceeded to dismissed the appellant's claim for refund.
3. The Appellant being dissatisfied with the judgement filed the present appeal vide the Memorandum of Appeal dated 22nd September 2021 seeking for orders that the appeal be allowed, the judgement of the trial court that dismissed the appellant's claim for a refund be set aside and costs of the appeal be awarded to him. The grounds of appeal as contained in the Memorandum of Appeal are that:
 - a. The Honourable Principal Magistrate erred in law when she dismissed the appellant's claim for refund when there has no such prayer in the appellant's pleadings before her.
 - b. The Honourable Principal Magistrate erred in law when she made an order on refund against the appellant (litigating before her as the 3rd Defendant which has the effect of denying the appellant of the right to claim a refund of the purchase price if he wished to do so.
 - c. The order dismissing the appellant's non-existent claim for a refund was premature, uncalled for and oppressive to the appellant as it has the effect of barring the appellant from making such claim in future.

Submissions

4. On 25. 4. 2023 directions were given that the appeal be canvassed by way of written submissions. Consequently, written submissions dated 7th February, 2024 were filed on behalf of the appellant by the firm of Omay & Company Advocates. Similarly, written submissions dated 21st February, 2024 were filed on behalf of the Respondent by the firm of Otieno Justus & Co Advocates.

Issues for determination

5. The substantive issue raised in all the three grounds of appeal is whether or not the trial court erred in making findings and ultimately dismissing a claim for refund of the purchase price which claim was not before court.

Analysis and determination

6. This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. In *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123) it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court. The court stated; -

“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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.”

7. The sole issue for determination herein is whether or not the trial court erred in law in making findings and ultimately dismissing a claim for refund of the purchase price which claim was not before court for determination.
8. The record of appeal shows that the trial Court found that the 1st Defendant had no authority to transfer Land parcel Kisumu/Fort Ternan/22 and as such all the dealings on the Land after it was registered in the names of the deceased, including the transfer of the Land to the 1st Defendant, the subdivision of the Land into parcels number Kisumu/Fort Ternan/1174, Kisumu/Fort Ternan/1175 and Kisumu/Fort Ternan/1176 and the transfer of those parcels to the 2nd and 3rd Defendants, were illegal null and void. That the 1st Defendant had no capacity to sell land and that the appellant did not exercise due diligence. The trial court then dismissed the 3rd Defendant (appellant’s) claim for refund.
9. It has been submitted on behalf of the appellant that the appellant purchased the suit property from the 1st Defendant who did not have a good title. That the only recourse that the appellant has is to seek for refund of the purchase price from the 1st Defendant who had acquired the suit property fraudulently by not undertaking succession to the estate of the deceased registered owner and by concealing some important information about the existence of other beneficiaries. That the Appellant is an innocent purchaser who bought the suit property rightfully and even got a title for the property after paying the purchase price That by making the order dismissing the claim for refund, the court barred the appellant from claiming for the refund in any other court. That the order was unjust and unfair to him.
10. Perusal of the pleadings and the evidence in the suit shows that the issue of refund of the purchase price was not mentioned at all. It was also not framed as an issue for the trial court’s determination. In the case of Geoffrey Kamau Ndishus & Another vs Peter Muchiri Murungi eKLR it was held that a court has no power to make an order, unless by consent, which is outside the pleadings. Also, in Galaxy Paints Co. Ltd vs Falcon Guards Ltd (2000) EA 385 it was held that the general rule is that courts should determine a case on the issues that flow from the pleadings. As the issue of refund of the purchase price was not before court, I find that the trial court erred in making an order dismissing a claim for refund.
11. The Appellant’s case is that he bought the land from the one Paul Owuor Okello who was the 1st Defendant in the suit and to whom he paid the purchase price. Paul Owuor Okello was however not made a party in the appeal. He was the author of the whole mess in which he transferred the suit land to himself, caused it to be subdivided and sold a portion thereof to the appellant, all without Letters of administration to the estate of the deceased registered owner. The Respondent in this appeal only filed the suit to correct the mess. It was not his fault that an order was made dismissing the appellant’s claim for refund. He cannot be burdened with an order for payment of costs.
12. In conclusion I find that the appeal has merit. As the appeal is against only part of the judgement namely; the part that dismissed the appellant’s claim for refund, I hereby allow the appeal and set aside that part of the judgement as prayed in the Memorandum of Appeal. No order as to costs.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 2ND DAY OF MAY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.



In the presence of:

Maureen: Court Assistant.

Nyangano h/b for Omayya for the appellant.

Otieno for the Respondent.

