



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISUMU

ELC APPEAL CASE NO. 25 OF 2019

DONALD OCHIENG ABOGE.....APPELLANT

VERSUS

JACTONE OTIENO ONYANGO.....1ST RESPONDENT

LAWI AUMA ABUORO.....2ND RESPONDENT

MICHAEL OCHIENG OMBOGA.....3RD RESPONDENT

MAURICE OGINGAY ABUORO.....4TH RESPONDENT

(All suing as the legal representatives of the estate of JARED

ABUORO AUMA alias ABUORO AUMA (Deceased)

DAVID OCHIENG OKOTH.....5TH RESPONDENT

(Appeal from the Ruling of the Principal Magistrate's court at Bondo, Hon. E.N. Wasike S.R.M.) dated 25th July 2019 in ELC Case No. 86/2018)

JUDGEMENT

Donald Ochieng Aboge, hereinafter referred to as the Appellant has come to court on appeal against the ruling of the Principal Magistrates court at Bondo, Hon. E.N. Wasike S.R.M. dated 25/7/2019 in ELC case no. 86 of 2018. The aforesaid ruling was in respect of an application dated 28/12/2018 made pursuant to the provisions of Order 40 of the Civil Procedure Rules 2010.

On the 18/01/2021, when the court found that some primary documents were missing from record of Appeal namely the Notice of Motion dated 28/12/2018 from which the ruling arose, and the order of the court extracted from the ruling, the court gave the appellant leave to file a supplementary record of Appeal within 30 days with submissions.

The Appellant has filed a supplementary record of Appeal without the said primary documents. Moreover the appellant has not filed submissions as ordered by the court.

However the said application and order are in the lower court file and therefore this court will exercise its wider powers in the interest of justice and in application of Article 159 of the Constitution to rely on the applications and order in the lower court file.

The lower court heard the application dated 28/12/2018 and found that the main contention was the prayer for injunction against the appellant from encroaching or in any other way declining within the land parcel No. Siaya/Osigu/1194 and 3686 on the issue as to whether the plaintiff had established a prima facie case with a likelihood of success the learned magistrate found that the respondents had demonstrated that parcel of land number Siaya/Usigu 3686 was fraudulently created from plot no. 1194 Maliki deceased who was the 1st respondents father.

The learned Magistrate found that the allegation that the appellant bought the parcel no. 3686 from the 1st respondent was a word by the appellant against the 1st respondent. The learned magistrate also raised the issue of the 1st Respondent capacity to sell the property to appellant. Moreover the court considered the issue of the consent of the Land Control Board as the land was agricultural. The court found

that the 1st respondent did not have the capacity to sell the land. Moreover, the court found that all these facts showed that the respondents had a prima facie case with a probability of success.

On the issue of irreparable loss, the learned magistrate found that land was an emotive issue and therefore if the prayers sought were not granted, the respondents would suffer irreparable loss. The court found that the balance of convenience tilts towards granting the injunction.

The appellant has now appealed on grounds that:

- 1. The honourable trial magistrate in ELC case No. 86 of 2018 at Bondo erred in fact and in law in reinstating notice of motion application dated 28th December 2018 on the 12th February 2019 without any formal application by the Respondents which application had been earlier dismissed on 12th February 2019.**
- 2. The honourable trial magistrate erred in fact and in law by failing to factor in the contents of the statements of the 3rd and 4th defendants and documents tendered and/or filed by the Attorney General on behalf of the 3rd and 4th defendants in his ruling of 25th July 2019.**
- 3. The honourable trial magistrate erred in fact and in law by failing to down his tools despite a preliminary objection being raised touching on the jurisdiction of the court which preliminary objection was dated 7th May 2019.**
- 4. The honourable trial magistrate erred in fact and in law by ordering the canvassing of the application dated 28th December 2018 by way of written submission dispute protests by counsel for the Appellant that a viva voce hearing would be appropriate in the circumstance.**
- 5. The honourable trial magistrate erred in failing to appreciate that the suit land no. 3686 came about as a result of adjudication process which required that party not satisfied with the process do appeal to the minister within 60 days of the decision.**
- 6. The honourable trial magistrate erred in law and in fact in finding that there was no. 3686 between MALAKI OKOTH BWOGA and JARED ABWORO AUMA despite the objection proceedings being attached by both appellant and 3rd and 4th defendants.**
- 7. The honourable trial magistrate erred in fact and in law in granting prayers 2,3 and 4 of the application dated 28th December 2018 which in effect disposes of the entire suit leaving nothing to be determined by the magistrate's court in the main suit.**
- 8. The honourable trial magistrate erred in both fact and law in failing to appreciate the appellants submission that there was a collusion between the plaintiff and the 1st defendant to defendant the ends of justice by claiming that his father acquired Suitland illegally.**
- 9. The honourable trial magistrate erred both in fact and in law in failing to appreciate that parcel no. SIAYA/USIGU 1194 could not retain the said number the parcel number 3686 having been curved out of the same and that there no longer exist parcel number 1194 having been sub divided into SIAYA/USIGU/4214 and SIAYA USIGU/4215.**

This being a first appeal, this court is required by law to analyse the evidence adduced before the magistrates and reach its own findings in the application dated 28/12/2018, the 1st respondent in the supplementary affidavit stated that the appellant had invaded the property that belonged to deceased late Jared Abuoro Auma.

The deceased was the owner of land known as Siaya/Usigu/1194. The suit property was transmitted to Lari Auma Abuoro and Michael Ochieng Omboga and are holding the same in trust. The 1st respondent alleged that the appellant had been illegally sold the parcel of land.

According to the 1st respondent the registration of the late Malaki Okoth Bwoga as owner of part of the deceased land was illegal and unlawful. The 1st respondent annexed the green card for 1194 to object the proceedings and the adjudication records.

The objection proceedings show that Malaki Okoth Bwoga objected to the adjudication record and was heard on objection no. 129/94/95 and the nature of objection was subdivision. In the hearing Abworo Auma was represented by his son Aggrey Oduor Abworo.

According to the objection proceedings Aggrey Oduor Abworo on behalf of his father the respondent conceded that his father sold a portion of the parcel of land measuring 2 acres to Malaki Okoth Bwoga at an agreed sale price of Kshs 17,500 in 1989. He was to be given a new number as per the demarcated boundary.

The appellant reply was that on 16/5/2008 he bought the parcel of land Title no. Siaya/Usigu/3686 from one David Oching Okoth the legal representative of the estate of Malaki Okoth Buoga who was the registered owner. He took possession. He states that parcel number 1194 was subdivided to create Siaya/Usigu/4214 and 4215.

According to the appellant the son of Malaki Okoth Buoga, now deceased sold the land to the appellant but was reluctant to incorporate on transmission. Going back to the grounds of Appeal, the 1st ground is in respect of the application dated 28/12/2018 on how it was reinstated

without formal application.

The application was reinstated on the 12/2/2019 on the same date it was dismissed. It was dismissed before 9.50 a.m. and reinstated at 9.50 a.m.

I do find that the court exercised its discretion properly in reinstating the application because none of the parties were present when it was dismissed.

The same was dismissed for nonattendance and the magistrate was requested to reinstate it before the ink had even dried. This was not a matter for a formal application. Moreover, the appeal on this ground is filed out of time more than 30 days after the decision. This ground is dismissed.

On the 2nd ground of Appeal, I do agree with the appellant that the court should have considered the position taken by the Attorney General that parcel no. 1194 was registered in the name of Abuogo Auma but an objection was filed in 1995. The objection was allowed and 1194 subdivided to create 3686 which was registered in the name of Malaki Okoth Buoga. There was no appeal by the said Abuogo Auma.

The available facts indicate that parcel of land 3686 exists on its own and the respondents have not demonstrated any interest in the parcel of land which is registered in the names of Malaki Okoth Buoga. This parcel of land was created after objection proceedings and there was no appeal.

I do find ground 4 of the appeal without merit as it is within law to direct parties to do written submissions.

On ground five of the appeal, I do agree with the appellant that the learned magistrate did not appreciate the fact that parcel number 3686 was created by way of adjudication process as evidenced by the objection proceedings.

I do find that the 5th respondent who was the 1st Defendant was sued as the legal representative of the estate of the late Malaki Okoth Buoga the registered owner of 3686. It baffles this court why the 5th respondent herein did not commence any suit against the appellant and yet his late father is the registered owner of the parcel 3686.

I do find that the learned magistrate erred in finding that there was fraud before hearing the case and that the learned magistrate could not declare the process a nullity before hearing the parties.

The appellant is already in occupation of the parcel of land number 3686 and has put up structures. The estate of Malaki Okoth Buoga has not complained by way of plaint or counter claim. Parcel no. 3686 is clearly registered in the names of the father of the 5th respondent and not the 1st-4th respondent's.

This court concludes that the 1st to 4th respondents did not demonstrate a prima facie case with a likelihood of success as the suit property was not registered in their names.

On whether the respondents would suffer irreparable loss, I do find that they have confirmed that the appellant is in possession and the parcel of land is not registered in their names and therefore I do not face any irreparable loss they are likely to suffer.

On the balance of convenience, I do find that it tilts towards dismissing the application as allowing the same amounts to an eviction of the appellant. The appeal is allowed and the ruling of the trial magistrate is set aside.

DATED AT KISUMU THIS 30th DAY OF APRIL, 2021

ANTONY OMBWAYO

JUDGE

This Judgement 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