



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC APPEAL NO. 52 OF 2019**

**CHRISTOPHER OKELLO OWINO.....APPELLANT**

**VERSUS**

**PAUL OTIENO OGOLLA.....1<sup>ST</sup> RESPONDENT**

**RICHARD OUMA OPONDO.....2<sup>ND</sup> RESPONDENT**

**LEORNARD OCHIENG OPONDO.....3<sup>RD</sup> RESPONDENT**

(Being an appeal from the Judgment of the Learned Honourable C.N Sindani (SRM) delivered on 14<sup>th</sup> August 2019 at SRMCC ELC Case No. 27 of 2018)

IN

**PAUL OTIENO OGOLLA (Suing as the Administrator of the Estate of**

**SHADRACK ADALA OGOLA.....PLAINTIFF**

**VERSUS**

**CHRISTOPHER OKELLO OWINO .....1<sup>ST</sup> DEFENDANT**

**RICHARD OUMA OPONDO.....2<sup>ND</sup> DEFENDANT**

**LEORNARD OCHIENG OPONDO.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**BRIEF FACTS**

The 1<sup>st</sup> Respondent suing on behalf of Shadrack Adala Ogola (deceased) filed a Plaint on 18<sup>th</sup> September 2012 where he averred that the deceased was the registered proprietor of land registration number UHOLO/SIGOMERE/951. On or about 26<sup>th</sup> February 2002 after the death of the deceased, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents irregularly and fraudulently transferred the suit property to their names. The Plaintiff further averred that on or about 16<sup>th</sup> May 2002, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents subdivided the suit property into two parcels to UHOLO/SIGOMERE/1182 and UHOLO/SIGOMERE/1183 where UHOLO/SIGOMERE/1182 was registered in their names while UHOLO/SIGOMERE/183 was registered in the name of the 3<sup>rd</sup> Defendant herein.

The Plaintiff (1<sup>st</sup> Respondent) alleged that the transfer of the suit property and the subsequent subdivision by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was fraudulent, irregular and void and as a result, the deceased's estate suffered loss and damages. The Plaintiff therefore prayed for the following orders:

a) A declaration that the transfer of parcel number UHOLO/SIGOMERE/951 registered in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the subsequent subdivision was irregular, illegal, null and void.

b) An order for cancellation of titles number UHOLO/SIGOMERE/1182 and 1183 and the cancellation of the Defendants names from parcel number UHOLO/SIGOMERE/1182,1183 and 951 into the name of the deceased.

- c) An order of eviction from the 3<sup>rd</sup> Defendant from parcel number UHOLO/SIGOMERE/1183.
- d) Costs of the suit.
- e) Interest.

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a statement of admission and averred that they were not involved in the transfer of land parcel number UHOLO/SIGOMERE/951 into their names from the deceased, its subsequent subdivision and registration of one parcel into the 3<sup>rd</sup> Defendant's name. The 3<sup>rd</sup> Defendant is the one who carried out subdivision of the suit property and they never obtained letters of administration of the deceased. They alleged that the transfer and subdivision by the 3<sup>rd</sup> Defendant was irregular and void.

The 3<sup>rd</sup> Defendant in his statement of Defence denied the averments by the Plaintiff and averred that he is a bonafide purchaser for value without notice and he acquired an indefeasible title. That the registration of parcel number UHOLO/SIGOMERE/1183 was properly done. He alleged that the Plaintiff is an imposter since he applied for grant ad litem yet the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being grandsons of the deceased were the ones to apply for the letters of administration. The 3<sup>rd</sup> Defendant further averred that the Plaintiff had no genuine interests in the proceedings before court and was acting on behalf of Peter Okoth Obare who maliciously intends to dispute the peaceful and quiet enjoyment of the 3<sup>rd</sup> Defendant.

The 3<sup>rd</sup> Defendant brought a counterclaim where he averred that the deceased transferred to him land parcel number UHOLO/SIGOMERE/1183 in consideration of the value of the estate. The transaction was handled by a surveyor appointed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The transfer was done by the surveyor and all the necessary documents were obtained and retained by him.

That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the counterclaim misrepresented themselves that they had legal capacity to transfer the land and had agreed to co register the 1<sup>st</sup> Defendant in land parcel number UHOLO/SIGOMERE/1182 when he attains the age of majority but they were being motivated to revenge this arrangement but the 4<sup>th</sup> Defendant who has a personal grudge against him that caused the Siaya District Surveyor to open access road between UHOLO/SIGOMERE/1183 and UHOLO/SIGOMERE/297.

The Plaintiff averred that the 4<sup>th</sup> Defendant provided finances to the 3<sup>rd</sup> and 4<sup>th</sup> Defendant to sue the Plaintiff in Siaya Land Dispute Tribunal Cause No. 57A/74/2008 where the Tribunal found in favour of the Plaintiff and directed the Provincial Administration to open access road between UHOLO/SIGOMERE/1183 and UHOLO/SIGOMERE/297.

He prayed that the suit be dismissed with costs and judgment be entered against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants jointly and severally for:

- a) A declaration that a resulting trust, constructive or otherwise would arise in favour of the Plaintiff over all that parcel of land known as UHOLO/SIGOMERE/951 (ORIGINAL) on UHOLO/SIGOMERE/1183 and that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are under an obligation to perfect the Plaintiff's title in the event the present title is declared null and void.
- b) General Damages.
- c) Costs.

The trial court in its judgment delivered on 14<sup>th</sup> August 2019 entered Judgment against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in favour of the Plaintiff as follows:

- a) A declaration that the transfer of land parcel no. UHOLO/SIGOMERE/951 into the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and the subsequent transfer and registration of parcel no. 1182 in the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and parcel no. 1183 in the name of the 3<sup>rd</sup> Defendant is irregular, illegal and null and void.
- b) Cancellation of titles of land parcel no. UHOLO/SIGOMERE/1182 and UHOLO/SIGOMERE/1183 and cancellation of the Defendants from the register and records of parcel number UHOLO/SIGOMERE/1182, 1183 and 951 and the title of parcel no. UHOLO/SIGOMERE do revert to the name of the deceased.
- c) An order for eviction of the 3<sup>rd</sup> Defendant from parcel no. UHOLO/SIGOMERE/1183 on the expiry of 60 days from the date of this order.
- d) The Plaintiff shall have costs to be paid by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and interest at court's rate.

#### **GROUNDS OF APPEAL**

Aggrieved by the Judgment of the Court, the 1<sup>st</sup> Defendant/Appellant filed this appeal against the judgement based on the following grounds;

That the Trial Magistrate erred both in Law and in Fact by;

1. Failing to appreciate that land parcel number UHOLO/SIGOMERE/1183 was transferred to the appellant as consideration of

value for the debts of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that were offset by the Appellant and that the order for eviction was premature even if the title was cancelled as there was no proper administrator to the estate.

2. Failing to appreciate that the Land Tribunal Case of Siaya No.95 of 2008 ruled that the land parcel UHOLO/SIGOMERE/1183 which was given to the appellant knowingly remain as his and the same was adopted as an order of the court.

3. Failing to appreciate the fact that the Ruling of the Land Tribunal Case No. 95 OF 2008 was not appealed against by the Respondents.

4. Failing to rely on the weight of evidence on record that clearly pointed that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents falsely misrepresented that they had legal capacity to transfer the said parcel to the appellant ye the estate was un-administered and that by this act a resultant trust was created in favour of the appellant over land parcel no. UHOLO/SIGOMERE/1183.

5. Relying solely on the false evidence of the respondents against the solid evidence the appellant.

6. Failing to appreciate that he had no jurisdiction to hear the Respondents' claim for eviction as he was not having any confirmed grant as to be entitled to eviction orders on behalf of the estate of the deceased.

7. Failing to consider the Appellant's counterclaim and representations in court and instead believing wholly on the 1<sup>st</sup> Respondents' witnesses and representations.

The appellant prayed that the Appeal be allowed and the lower court Judgement be set aside and, in its place, there be judgment in favour of the Appellant as per the counterclaim and costs be in favour of the Appellant.

The court directed parties to file written submission.

### **APPELLANT'S SUBMISSIONS**

The appellant filed submissions on 18<sup>th</sup> May 2021 where the only issue raised is discussed below:

#### **Whether the Appeal has merits**

The Appellant submitted that the Trial Magistrate failed to appreciate the evidence that was tabled before her as she aided the Respondents in their bid to deny the Appellant his rights to enjoy the property that he had bought. Through the land dispute tribunal, the tribunal held that the Appellant was the owner of land parcel number UHOLO/SIGOMERE/1183 and any party aggrieved was to Appeal to the Appeals Tribunal within 30 days. However, no party aggrieved by the Tribunal's decision appealed and the decision of the Tribunal was adopted as a court order.

When the matter was being filed at the Tribunal, the issues that the Tribunal was to resolve were whether the Appellant had purchased the parcel of land in question and whether consideration for the land had been paid.

It was established that the Appellant paid the purchase price to the daughter of the deceased which money was used to clear mortuary fees for the deceased. The Appellant further submitted that the Respondent are using deception technics so that they can detained the portion of land awarded to him and relies in the case of *Simon Erot Ajeko & Another vs Robert Okello & Another (2018) eKLR* and prayed that the Appeal be allowed.

### **RESPONDENTS' SUBMISSIONS**

· The Respondents did not file any submissions.

### **ISSUES FOR DETERMINATION**

The main issues to be determined in this matter include the following:

1. Whether the Appeal has merits.

2. Whether the transfer of land parcel number UHOLO/SIGOMERE/951 into the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the subsequent transfer of UHOLO/SIGOMERE/1183 was valid.

3. Whether the trial Magistrate failed to appreciate the Ruling of the Land Disputes Tribunal that held that land parcel number UHOLO/SIGOMERE/1183 BELONGED to the Appellant.

4. Whether the learned trial magistrate failed to appreciate the fact that the Land Tribunal case no. 95 of 2008 was not appealed against by the Respondents.

5. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had legal capacity to subdivide and transfer land parcel number UHOLO/SIGOMERE/951.

6. Whether the Trial failed to consider the Appellant's counterclaim.

### **ANALYSIS AND DETERMINATION**

**Whether the transfer of land parcel number UHOLO/SIGOMERE/951 into the names of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and the subsequent transfer of UHOLO/SIGOMERE/1182 and 1183 was valid.**

Subdivision of land parcel number UHOLO/SIGOMERE/951 into land parcel number UHOLO/SIGOMERE/1182 and 1183 by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as there was no transfer documents produced neither did they produce any consent from the Land Control Board.

**Section 3 (3) of the Law of Control Act** provides as follows: -

***“No suit shall be brought upon a contract for the disposition of an interest in land unless: -***

***a. the contract upon which the suit is founded –***

***1. is in writing***

***2. is signed by all the parties thereto; and***

***b. the signatory of each party signing has been attested by a witness who is present when the contract was signed by such party....”***

The Appellant in his counterclaim averred that the estate of the late SHADRACK ADALA OGOLA transferred to him land parcel number UHOLO/SIGOMERE/1183 at a consideration and the transaction was handled by a surveyor. He has not specified how much he paid to the daughter of the deceased. It is clear from the evidence on record that the Appellant the Agreement entered between him and the daughter of the deceased was not in writing.

In this case I find that the Appellant did not meet the threshold of Section 3 (3) of the Law of Contract Act.

Having a look at the Appellant's statement, the Appellant stated that 2<sup>nd</sup> and 3<sup>rd</sup> Respondents undertook the registration process. However, the Appellant did not produce any document to show that transfer was effected between him and the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Although the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents transferred land belonging to SHADRACK ADALA OGOLA (deceased), they had not obtained letters of administration for the estate of the deceased.

We further note that no Land Control Board consent was obtained for land parcel number UHOLO/SIGOMERE/951 to be subdivided and transferred to Appellant.

**Section (6(1) of the Land Control Act provides as follows: -**

(1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply; is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

**Section 8 of the Land Control Act provides as follows:**

***“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any part thereto”.***

**DAVID SIRONGA OLE TUKAI VS FRANCIS ARAP MUGE AND 3 OTHERS C.A CIVIL APPEAL NO. 76 OF 2014 (NAIROBI)**,  
***“The Land Control Act requires consent to be obtained from the relevant Land Control Board if the transaction involves agricultural land and failure to do so renders the transaction void for all purposes and in addition any occupation of the land pursuant to such void transaction is declared to be a criminal offence. We are firmly of the opinion that no estoppels can arise under the Land Control Act to render valid and lawful conduct which is otherwise declared by the Act to be void for all purposes and also a criminal offence”***

The Appellant in his statement alleged that the title was registered in 2002 and he has no reason to doubt the documents. However, he has not any evidence to show

Section 26 of the Land Registration Act provides as follows:

***(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—***

***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***

***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

From the provisions of Section 26 of the Land Registration Act, I can confidently state that the Appellant acquired the title illegal and unprocedurally. The Appellant did not follow the procedure in law even though he claims to be a bona fide purchaser for value.

**Whether the trial Magistrate failed to appreciate the Ruling of the Land Disputes Tribunal that held that land parcel number UHOLO/SIGOMERE/1183 belonged to the Appellant.**

The matter before the Land Disputes Tribunal was about opening of access road between land parcel number UHOLO/SIGOMERE/1183 and 297. The Tribunal was not tasked with determining transfer and subdivision of land parcel number UHOLO/SIGOMERE/951.

The trial Magistrate was tasked with determining whether the Appellant acquired land parcel number UHOLO/SIGOMERE/1183 was acquired fraudulently and illegally.

**Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had legal capacity to subdivide and transfer land parcel number UHOLO/SIGOMERE/951.**

The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents lacked legal capacity to transfer land parcel number UHOLO/SIGOMERE/951 AS IT belonged to the deceased who had passed on. The right procedure would have been for them to obtain grant of letters of administration from court.

Section 45 of the Law of Succession Act, Cap 160 Laws of Kenya (hereinafter "*the Act*") provides: -

***"45. (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased.***

***(2) Any person who contravenes the provisions of this section shall-***

***a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and***

***b) be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration."***

Section 82 of the Act provides: -

***"82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers -***

***a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;***

***b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:***

***Provided that -***

***i. the purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and***

***ii. no immovable property shall be sold before confirmation of the grant;"***

The Appellant alleges that DORCAS ACHIENG who is the beneficiary to the estate of the deceased gave out a portion of land to him so that she could be able to bury the deceased. Based on the provisions of Section 82 of the Law of Succession Act, DORCAS ACHIENG had not taken Grant of Letters of Administration.

The fact that land parcel number UHOLO/SIGOMERE/1183 was transferred to the Appellant by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as a result of the subdivision of land parcel number UHOLO/SIGOMERE/951 was illegal since the Appellant knew very well that the parcel of land was

being subdivided yet Grant of Letters of Administration had not been obtained.

**Whether the Trial Magistrate failed to consider the Appellant's counterclaim.**

The facts alleged in the Appellant's counter claim in my view lack merit and from the above discussed issues, it is clear that the Appellant acquired land parcel number UHOLLO/SIGOMERE/1183 illegally and fraudulently.

**Whether the Appeal has merits.**

This is a first appeal, and the court bears an obligation to evaluate and consider all the evidence tendered before the trial court and make its own independent conclusion. This duty was enunciated in *Selle v Associated Motor Boat Company [1968] E.A. 123 at page 126*, wherein the Court held 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 witness and should make due allowance in that respect."***

I have considered the evidence on record and find that the Appellant's Appeal lacks merit as he acquired land parcel number UHORO/SIGOMERE/1183 through fraudulent means. I therefore dismiss this Appeal with costs and uphold the decision of the trial court.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 1<sup>ST</sup> DAY OF OCTOBER, 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 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**