



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

APPEAL NO. 30 OF 2018

LEGION MARIA CHURCH OF AFRICAN MISSION.....APPELLANT

VERSUS

MELKIO ODUOR OGOGLA.....1ST RESPONDENT

ANGELINE APONDI.....2ND RESPONDENT

DISTRICT LAND REGISTRAR SIAYA.....3RD RESPONDENT

JUDGMENT

Legion Maria Church of African Mission (hereinafter referred to as the Appellant) has come to this court on appeal against the judgment of the learned senior resident Magistrate Mr T Orlando delivered on 19th December, 2018 in Siaya Principal Magistrates court case number 1 of 2016 between herself and Melkio Oduor Ogolla and Angeline Apondi (*hereinafter referred to as the respondents*).

The respondent had moved to lower court by way of plaint claiming that he is the biological elder son of Gilbert Ogola Odhiambo (now deceased) who died testate on 12th January, 2001 and who at the time of his death was the known legal owner and in actual possession of LR No. SIAYA/OJWANDO 'A'/3409 measuring 0.47Ha. The 2nd respondent is the beneficiary of the estate of the late Gilbert Ogola Odhiambo (now deceased) who died testate on 12th January, 2001 and who at the time of his death was the known legal owner and in actual possession of LR No. SIAYA/OJWANDO 'A'/3409 measuring 0.47Ha.

It is claimed that Prior to the death of 1st respondents father, he had executed a will on 12th January, 2000 and in which he had appointed the 1st plaintiff herein as the executor of the said will.

That in the said will, properly executed and attested on 12th January 2000, the late Gilbert Ogola had listed all his assets among them being the said piece of Land LR. NO. SIAYA/OJWANDO 'A'/3409 which the late respondent's father had good and clear intentions that the said piece to devolve to his children upon his demise.

On 31st July 2013, the 1st respondent realized after doing an official search at the District Land Registry in Siaya, that the said entire piece of land had been registered in the name of the appellant on 3rd March 1997 and Title Deed issued on 3rd June 1999 by the District Land Registrar Siaya.

The registration of the said land to the appellant was purportedly done before the demise of plaintiff's late father and subsequently before the respondents father wrote his will, in which will, the said land was to be administered and devolve among the respondent's siblings.

At the time the respondent's father died, he had never transferred or authorized any transfer of the said land to anyone or entity and had not consented or given any indication to dispose of the said land to any entity.

The registration of the said entire piece of land to the 1st Defendant's name and subsequent issuance of title deed by the 2nd Defendant to the 1st Defendant was done fraudulently, illegally, irregularly and unprocedurally without any due processes of law.

The respondent's maintained that the Appellant had no interest in the said piece of land and no consideration passed from the 1st Defendant to plaintiff's late father neither did he give any consent to the said registration and subsequent transfer hence 1st Defendant's ownership to the said piece of land is illegal, null and void, and this court should order for cancellation and/or revocation of the same.

The respondent's claim against the Appellant was for an order of revocation and cancellation of registration and transfer of said piece of land by the district land registrar to the Appellant's name and this Honourable Court do order that the ownership of LR. No. SIAYA/OJWANDO

'A/3409 reverts back to the estate of Gilbert Ogola Odhiambo (now deceased).

The respondent's also claimed for mesne profits for illegal occupation, damages for illegal ownership of the said piece of land by the 1st Defendant and denial of plaintiff's right of ownership by the 1st Defendant and 2nd Defendant for the period when such illegal registration and transfer was effected to date.

The respondent's averred that the 1st Defendant had commenced construction of several permanent structures on the said land parcel and had violently and menacingly resisted all peaceful entreaties to cease their activities on the land.

The respondents were apprehensive that the appellant would together with the Land Registrar dispose of, or transfer or in any way deal with the said piece of land which would result in great loss and irreparable damage.

The Respondents prayed for a declaration that the registration of LR. NO. SIAYA/OJWANDO 'A'/3409 in the name of the appellant on 3rd March 1997 and issuance of title of LR. NO. SIAYA/OJWANDO 'A'/3409 on 3rd June 1999 by the land registrar to the appellant was fraudulent, unlawful, illegal, irregular and Order for Revocation and Cancellation of said title.

The respondents further prayed that the title ownership of LR. NO. SIAYA/OJWANDO 'A'/3409 do revert back to the estate of Gilbert Ogola Odhiambo (now deceased). General damages and interests thereon at court rates. Mesne profits Costs of this suit together with interest.

The Appellant on the part stated that all that parcel of land known as LR. NO. SIAYA/OJWANDO 'A'/3409 was registered in her name and hence she was owner and proprietor of the same. The said parcel of land was demarcated, adjudicated and subsequently registered in favour of the 1st Defendant in compliance with the relevant statutes including the Land Adjudication Act (now repealed).

The deceased, Gilbert Ogola Odhiambo, was present during the demarcation, adjudication and registration of the said parcel of land in the name (s) of the appellant.

Neither the deceased nor the respondents raised any objection, claim, and resistance or in any other way opposed the demarcation, adjudication and or registration of the said parcel of land in favour of the appellant. The appellant has been in actual, physical and active possession and occupation of the said parcel of land.

The appellant further stated that the respondents' claim was statutory time barred and hence an affront to the relevant provisions of the Limitation of Actions Acts (Cap.22).

The appellant claimed to have been in open, actual, active and overt occupation and possession of the said parcel of land since 1984 and hence the respondents were economic with the truth by saying that they realized that LR. NO. SIAYA/OJWANDO 'A'/3409 was in the name of the appellant.

According to the appellant, the 2nd respondents had no locus standi to institute and or prosecute this suit. The appellant prayed that the suit be dismissed with costs.

When the matter came for hearing in the lower court, PW1, Angelina Apondi testified that she filed Succession Cause and was granted letters of administration. The brother also filed an application for a grant. She produced a will written by her father prepared before Patrick Ochieng an advocate of the High Court of Kenya. She stated that she did not know how the appellant obtained the title deed. The land in dispute is their home and they have a house on the land.

On cross examination by Onsongo, learned counsel for the appellant, advocate she stated that she did not understand the provision of land adjudication. She does not have any document indicating that the land was in the name of their father. She has not taken the will to court and that she has been seeing the church pray on the land.

DW1 Maurice Akelo Okodo a pastor with Legio Maria stated that in 1984, Gilbert Ogola, the owner of the land gave the church the authority to use the land. Later the land was obtained by the church through adjudication.

On cross examination he states that the land is the name of Gilbert Ogola and that Melkio has no construction on the land. He does not know who resides in the home. Mekio Oduor Ogola is the son of Gilbert Ogola.

The honourable Magistrate after considering the evidence on record found that the defendant (Appellant) did not rebut the evidence that the plaintiffs' father was the owner of the land in issue.

The Honourable Court relied on the will and the fact that the plaintiffs home was on the land. There was no evidence that the land was given to the church. The honourable court found that though the appellant was rightful owner he was not convinced that the appellant was rightful and legally registered. The court found that there was clear evidence of fraud.

I have considered the submissions on record and evidence adduced in the lower court and the pleadings on record and do find that the plaintiffs claim was based on fraud but no particulars of fraud were pleaded. Failure to plead fraud and particulars it as required in law made the claim based on fraud weak. Moreover, there was no evidence that the appellant obtained title fraudulently. It is trite law that a claim based on fraud should be proved above balance of probability.

The law on fraud is clear as 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.”

The same procedure goes for allegations of misrepresentation and illegality.

See **Order 2 Rule 4 of the Civil Procedure Rules.**

As regards the standard of proof, this Court 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. The respondent merely alleged fraud did not set out the particulars and did not prove the same and therefore the finding of fraud by the learned magistrate was improper.

The appellant is the registered owner of the suit property.

Section 24 provides:

“(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease,

Together with all implied and expressed rights and privileges

Belonging or appurtenant thereto and subject to all implied or

Expressed agreements, liabilities or incidents of the lease.

Rights of a proprietor.”

Section 25 provides:

“25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of

court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and

appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Certificate of title to be held as conclusive evidence of proprietorship.”

Section 26 provides:

“26. (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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

There being no evidence of fraud the Hon. Magistrate had no basis to find for the respondents.

The plaintiffs claim on the suit property was a claim on land. Section 7 of the Limitation of Action Act Cap 22 laws of Kenya provides as follows:-

7. Actions to recover land :-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. “

Section 9 of the said act proceeds to provide as follows:-

(1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.

(2) Where a person brings an action to recover land of a deceased person, whether under a will or on intestacy, and the deceased person was on the date of his death in possession of the land, and was the last person entitled to the land to be in possession of the land, the right of action accrues on the date of death.

(3) Where a person brings an action to recover land, being an estate or interest in possession assured otherwise than by will, to him, or to some person through whom he claims, by a person who, at the date when the assurance took effect, was in possession of the land, and no person has been in possession of the land by virtue of the assurance, the right of action accrues on the date when the assurance took effect.

It is clear from the evidence on record that the appellant was registered as the proprietor on the 3rd Day of March 1997 after adjudication process. There was no evidence of any objection filed by the late Gilbert Ogolla Odhiambo who donated the land to the appellant or the respondents who claim to be the heirs to the deceased. The land has never been registered in the respondent's father's name and therefore the alleged will had no basis.

Moreover, the suit in the lower court was filed more than 12 years when the cause of action accrued. I do hold that the claim was time barred.

I do find that the appeal to be merited and the same is allowed thus the decision of the honorable magistrate is set aside and the plaintiff's suit is dismissed with costs. Orders accordingly.

DATED AND DELIVERED THIS 5TH DAY OF MAY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE