



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC APPEAL NO 11 OF 2019

CHARLES O. OMONDI.....APPELLANT

VERSUS

MAURICE NYAGINDE OKOYO.....RESPONDENT

(Being an Appeal from the judgment and Decree of Hon. G. Adhiambo Senior Resident Magistrate's Court at Ukwala in UKWALA SPMCC ELC CASE NO 8 OF 2018 delivered on 28th March 2018)

JUDGMENT

This appeal arises from a suit filed by the respondent against the appellant in the lower court seeking for an injunction against the appellant, vacant possession and general damages for loss of use together with costs. The court heard the case and entered judgment in favour of the respondent with costs but decline to award general damages for loss of user. The appellant being aggrieved filed a memorandum of appeal listing five grounds as follows;

1. THAT the Learned Trial Magistrate misdirected herself in failing to sufficiently take into account the issues of fraud, illegal and unprocedural registration of the suit parcel (Uholo/Ugunja/888) in the names of the Respondent thereby arriving at an erroneous finding in favor of the Respondent .
2. THAT the Learned Trial Magistrate misdirected herself in failing to sufficiently take into account the evidence given by the Deputy Land Registrar Ukwala that the Mutation form used for the subdivision of Uholo/Ugunja/738 which led to Uholo/Ugunja/888 were never signed by the then Proprietor of Uholo/Ugunja/738 and that there were no Consents obtained by the Respondent to transfer nor subdivide the suit parcel and thereby arriving at an erroneous finding in favour of the Respondent.
3. THAT the learned Trial Magistrate erred in law in failing to appreciate the facts that the Respondent failed to produce any documents that initiated/allowed the subdivisions (no consent for subdivision nor signed Mutation forms by the then proprietor of Uholo/Ugunja/738 which led to Uholo/Ugunja/888 and also failed to produce any transfer documents (no consent for transfer, no agreements between the Respondent) and thus arriving at an erroneous finding in favour of the Respondent.
4. THAT the Learned Trial Magistrate proceeded on wrong principles when analyzing the issues of Adverse Possession raised by the Appellants in his pleadings and thus arriving at an erroneous finding in favour of the Respondent.
5. THAT the Learned Trial Magistrate erred in allowing the Plaintiff's suit in entirety.

Parties agreed to canvass the appeal by way of written submissions. The respondent filed his submissions and served the appellant's counsel who was granted 7 days to file his submissions but by the time of writing this judgment no submissions had been filed by the appellant. The court will therefore rely on the record of appeal together with the submissions by the respondent.

From the record of appeal, the appellant is aggrieved by the judgment of the lower court which found in favour of the respondent. The respondent has opposed the appeal and stated that he moved the court in his capacity as the registered proprietor of the suit land.

The respondent relied on the provisions of Sections 24, 25 and 26 (1) of the Land Registration Act on indefeasibility of title and that he had produced a title to the suit land in his name and official search to confirm ownership. That the appellant has alleged fraud but did not prove the same as required by law as he who alleges must prove.

It was the respondent's submission that he followed all due legal processes including, but not limited to, attending the Local Land Control Board whereby he obtained the necessary consents of which the appellant did not challenge.

The respondent further stated that the Honourable trial Magistrate was right to point out that the Respondent was not to blame for the

disorganization at the land registry where documents were either misplaced or missing in a file. The respondent submitted that the Land Registrar did not state that the Mutation that was used for the sub-division of UHOLO/UGUNJA/738 that gave rise to UHOLO/UGUNJA/888 was never signed by the then proprietor. Further that land parcel No. 738 did not belong to the Respondent and he had nothing to do with the mutation that led to its sub-division long before it created No. 888.

The respondent finally submitted that Section 25 and 26 of the Land Registration Act asserts the Respondent's rights to title and the rights appurtenant thereto and that the burden of proof of fraud cannot be shifted to the Respondent. The respondent therefore urged the court to dismiss the appeal with costs.

ANALYSIS AND DETERMINATION

The appellant never took this appeal seriously therefore did not bother to file any submissions even after being given time to do so. This means that the appellant has not argued his appeal as was agreed that they canvass the appeal by way of written submissions. Nonetheless the court will rely on the record of appeal as earlier stated.

From the memorandum of appeal, it is evident that the appellant is complaining about proof of fraud. The appellant had an opportunity in the lower court to prove that the respondent obtained the title through fraud or through misrepresentation, Section 26 (1) of the Land Registration Act allows a title to be impeached if there is proof that it has been obtained unprocedurally, through fraud or misrepresentation.

Section 26 of the Land Registration Act provides that:-

“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... 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.*

It was incumbent upon the appellant to prove that the respondent's title was procured illegally or through misrepresentation. The appellant called the Land Registrar as a witness who is the custodian of land records who did not produce the parcel file. The Land Registrar confirmed that from his records land parcel number Uholo/Ugunja/888 is registered in the name of the respondent. The Trial Magistrate therefore rightly found that the respondent is the registered owner of the suit land and that the appellant was a trespasser.

It is trite law that fraud must be specifically pleaded and specifically proved. The proof must be a standard above a balance of probabilities but not beyond reasonable doubt. I note that the appellant enumerated the particulars of fraud in his defence but fell short of the standard of proof as was held by the Learned Magistrate.

It is the duty of this Court as a first appellate court to reconsider the evidence, reevaluate and make its own conclusions. This duty was set out by the Court of Appeal in the case of **Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212** where the court held inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

After revaluation of the evidence on record, the court finds that the Learned Trial Magistrate did not err in her findings that the respondent had proved his case against the appellant having established that he is the registered owner of the suit land and further that the appellant did not prove any fraud.

The upshot is that I find no reason to upset the finding of the learned trial Magistrate and therefore this appeal lacks merit and is dismissed with costs to the respondent.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF MAY, 2021

M. A. ODENY

JUDGE