



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCA CASE NO. 15 OF 2019

GEORGE OTIENO AKOTH.....APPELLANT

-VERSUS-

TERESA ANYANGO OTIENO.....RESPONDENT

(Being Appeal arising from Judgment and decree in Winam E.L.C No. 83 of 2018 by the Principal Magistrate Hon. B. Kasavuli dated 13th May, 2019).

JUDGEMENT

This is a first appeal and the role of the first appellate court was stated In the case of **Stielle Vs Associated Motor Boat Company Ltd [1968] EA 123** by Sir *Clement De Lestang*, it was held that:

“This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

In this appeal, George Otieno Akoth (*hereinafter referred to as appellant*) filed a claim by way of plaint in the Principal Magistrate’s Court at Winam in Winam ELC No. 83 of 2018 against Teresa Anyango Otieno (*hereinafter referred to as the Respondent*). The Appellant’s claim was that at all material times, the parcel of land designated as Kisumu/Kadero/Got Nyabondo/1158 containing by measurement 0.5 Ha whose boundaries are clearly delineated on the ground was registered in the name of the plaintiff’s deceased father Agus Okoth Oyogo.

The appellant claimed that his deceased father sold the parcel of land designated as Kisumu/Kadero/Got Nyabondo/3350 to one Moses Onyango Opondo but he erroneously gave him title to the parcel of land designated as Kisumu/Kadero/Got Nyabondo/1158. The appellant averred that Moses Onyango Opondo realized the mistake and went back to his deceased father who gave Moses Onyango Opondo his correct title but Moses Onyango Opondo’s name remained with the title to the land Kisumu/Kadero/Got Nyabondo/1158.

Further, that the registered owner thereof Moses Onyango Opondo never attended to the land control Board to have the said parcel of land transferred in the name of the defendant and that the respondent caused the whole suit parcel of land Kisumu/Kadero/Got Nyabondo/1158 to be registered in her name through illegal, irregular and/or fraudulent means. The respondent then proceeded to plant sugar cane on a portion of the land which as at the date hereof is now fallow.

The appellant alleged that the defendant has threatened and intended, unless restrained by the trial court, to continue or remain in wrongful occupation of the whole suit land and or trespass thereon and therefore he sought an injunction and eviction against the respondent.

The respondent filed statement of defence and counter claim in the defence, admitting that the land parcel Kisumu/Kadero/Got Nyabondo/1158 was originally registered in the names of Agus Okoth Oyogo and that the suit land was legally sold to her by the late Agus Okoth Oyogo for valuable consideration vide an agreement dated 12th January 2003. The purchasing price was to be paid in three instalments but in the year 2005 the late Augustine Okoth got sick and respondent paid the full and final amount for the purchase of the suit parcel.

The late Augustine Okoth Oyogo wrote to the Land Registrar for the suit parcel to be transferred to the respondent’s names but the parcel Kisumu/Kadero/Got Nyabondo/1158 had erroneously been transferred to one Moses Onyango Opondo to whom the deceased sold Kisumu/Kadero/Got Nyabondo/3350.

The suit parcel was later transferred to her names from the said Moses Onyango Opondo as was directed by the late Augustine Okoth Oyogo and on the strength of the letter dated 26th August 2005.

The anomaly was duly corrected and the parcel Kisumu/Kadero/Got Nyabondo/1158 was rightfully transferred to the respondent's names pursuant to the agreement with the late Augustine Okoth Oyogo.

The respondent claimed that she legally planted sugar cane on the suit parcel as she was the absolute owner and proprietor of the parcel Kisumu/Kadero/Got Nyabondo/1158 and that her continued stay and use and occupation of the suit parcel was lawful legal and an eviction order sought was misplaced.

She prayed that the suit be dismissed and in the counter claim she claimed that at all material times relevant to the suit she was the registered owner of all that parcel known as Kisumu/Kadero/Got Nyabondo/1158 and that on or about 19th August 2014 the appellant without any color of right trespassed into the parcel known as Kisumu/Kadero/Got Nyabondo/1158 and damaged her sugarcane.

When the matter came up for hearing before the trial court the appellant adopted the statement dated 13/1/2015 whose import was that at all material times, the parcel of land designated as Kisumu/Kadero/Got Nyabondo/1158 containing by measurement 0.5 Ha whose boundaries are clearly delineated on the ground was registered in the name of his deceased father Agus Okoth Oyogo. His father sold the parcel of land designated as Kisumu/Kadero/Got Nyabondo/3350 to one Moses Onyango Opondo but he erroneously gave him title to the parcel of land designated as Kisumu/Kadero/Got Nyabondo/1158. Moses Onyango Opondo realized the mistake and went back to his deceased father who gave Moses Onyango Opondo his correct title but Moses Onyango Opondo's name remained on the title to the land Kisumu/Kadero/Got Nyabondo/1158. It was to be transferred back to his father.

That the registered owner thereof Moses Onyango Opondo never attended to the land control Board to have the said land transferred in the name of the Teresia Anyango Otieno.

Teresia Anyango Otieno caused the whole suit parcel of land Kisumu/Kadero/Got Nyabondo/1158 to be registered in her name through illegal, irregular and/or fraudulent means.

On cross examination, he was shown the agreement dated 12/1/2003 between his father and Teresa, witnessed by Samuel Opiyo, Teresia's father, himself and his brother but still did not agree that his father sold the land.

He disputed his signature. He was shown the letter dated 8/4/2014 but stated that he signed the letter in the cells.

PW2 Moses Onyango Opondo a financial account adopted the statement dated 8/1/13. The gist of the statement was that he purchased land from the plaintiff's father and this was Kisumu/Kadero/Got Nyabondo/1158. The seller gave the wrong title as the right title was 3350 and not 1158. 3350 was eventually transferred to PW2 and he surrendered 1158 as requested which was to be transferred back to the seller. When shown document no. 9 on the defendant's list of documents, he claims not to have made the application but the signature was his. He was not forced to sign the document. He agreed to have asked for money from the defendant and that it was for facilitation to come to Kisumu, but not for the transfer of the land.

The respondent on her part stated that she bought a piece of land from her late uncle Mr. Augustine Okoth Oyogo in the year 2003, and they agreed with her uncle that she was to pay him Kshs. 110,000/= in 3 instalments. In the year 2005, the late Augustine Okoth Oyogo was sick and she had to pay him full and final amount for the purchase of the land and he decided to write a letter to the land register informing them to transfer the land to her name. He then gave her the photocopy of his identity card. That she went to the land office and did a search to land parcel no. Kisumu/Kadero/Got Nyabondo/1158. But it was registered in the name for Moses Onyango Opondo. She went back and told him that the land was registered in the names of Moses Onyango Opondo but he told her that they just go and agree since the latter was his brother. That she told Moses to transfer the land to her name but he refused, he told her until she pays him Kshs. 60,000/= before he transfers the land to my name, but she told him that she doesn't have such big amount.

Then she went to the district officer to seek advice, but district officer decided to call Moses who accepted that he took the title deed without realizing there was a mistake, then district officer informed her that they would help her to get her title deed. That in the 2002 she was issued with title deed by the land registrar and thereafter she planted sugar cane but appellant removed the sugarcane plantation from her land. She reported the matter to Gita Police Station and he was arrested and he promised to do weeding twice and pay her Kshs. 30,000/=. They reported the matter to sub county agricultural office who calculated the amount of the damages to the crops at Kshs. 133,300.00.

That when her sugar plantation was ready George decided to take the sugarcane to the factory without informing her but the factory declined to pay him the amount until they solved the matter.

After considering the evidence on record, the trial Magistrate, found that from the agreement dated 26/8/2009 between the plaintiff's deceased father and the defendant, there was an overt desire by the plaintiff's deceased father for the sale of land referred to as 1158. The wishes of the defendant's deceased father were captured in the agreement indicating that he sold the land to the defendant and received Kshs. 110,000 being the purchase price in cash.

Secondly, the Trial Court found that though there was no consent of the Land Control Board to transfer the land to the defendant the evidence on record pointed to the fact that the land that was sold to the defendant was erroneously transferred to Moses Onyango Opondo instead of the defendant. The person to transfer the land to defendant was the said Moses Onyango Opondo not the defendant's father.

The court found no evidence of fraud and found for the defendant in the counter claim for Kshs. 133,300. Judgment was entered for the defendant in that the suit was dismissed with costs and the plaintiff was found to have trespassed into the land. Damages were awarded as Kshs. 133,300 on assessed damaged sugar cane plantation with interest.

The plaintiff (appellant) appealed on grounds that:

1. The Learned Trial Magistrate erred in law and in fact by dismissing the Appellant's case and allowing the Respondent's counter-claim thus entering judgement against the Appellant that he had trespassed on KISUMU/KADERO/GOT NYABONDO/1158.

2. The Learned Trial Judge erred in law and in fact by failing to put into consideration the fact that there was no payment of stamp duty, consent approval from the Land Control, signed transfer forms authorizing the transfer of the land KISUMU/KADERO/GOT NYABONDO/1158 in the Respondent's name as required by the law thus the transfer of the same to him was unlawful and it amounts to depriving the Appellant of his Land.

3. The Learned Trial Magistrate erred in law and in fact by disregarding all the evidence that was adduced by the appellant as proof of fraud that was done by the Respondent to have land parcel KISUMU/KADERO/GOT NYABONDO/1158 transferred from the Appellant's deceased father name and registered in the Respondent's names.

4. The Learned Trial Magistrate erred in law and in fact in arriving at a judgment that was against the weight of evidence or record.

The appellant pray for:

i) This appeal be allowed by having the judgment and decree issued on 13th May 2019 vide Winam ELC no. 83 of 2018 set aside and the Appellant's claim against the Respondent be allowed as prayed in the plaint dated 13/01/2015.

ii) The Appellant be awarded the costs of this appeal.

In written submissions, the appellant submits that the process of transfer of the suit property was un-procedural as there was no consent of the Land Control Board, no stamp duty form receipt. Moreover, that there was no evidence that Moses Onyango Opondo transferred the property to the defendant. The honourable magistrate according to the plaintiff, ought to have ordered the property to revert to the said Moses Onyango Opondo. The appellant further argues that the suit property was erroneously registered in the names of the said Moses Onyango Opondo.

The appellant argues that because of the overwhelming evidence of fraud against the defendant, her title should be revoked.

The appellant further argues that because of the failure to obtain the consent of the Land Control Board the transition was rendered a nullity.

On her part, the respondent's counsel argues that the late Agus Okoth Onyango sold the suit property KISUMU/KADERO/GOT NYABONDO/1158 to the respondent but erroneously transferred the suit property to Moses Onyango Opondo who caused it to be registered in his name. Moses Onyango Opondo also signed an application for transfer of the land to the respondent. The right person to transfer the property to the respondent was Moses Onyango Opondo. According to the respondent, the particulars of fraud were not pleaded and or proved. The respondent relies on the principle of indefeasibility of title. Moreover, that failure to obtain consent of the land control Board did not render the transaction null.

I have evaluated the evidence and considered the rival submissions and do find that the respondent is the registered proprietor of the suit parcel of land

Though there is no evidence produced in court to demonstrate how she is registered as the proprietor of the said land. Section 24 of the LRA 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.”

Section 25 provides:

25. (1) The rights of a proprietor, whether acquired (1) 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.”

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.”

The suit parcel of land is registered in the respondent's name as an absolute proprietor. It is evident that the suit parcel of land was owned by Agus Okoth Oyogo before his demise it is also evident that the said person received full purchase price of Kshs. 110,000 from the respondent as consideration for the sale of the same. In the agreement dated 26th August 2005, the late Agus Okoth Oyogo of id no 9343787 sold to the respondent the piece of land no Kisumu/Kadero/Got Nyabondo/ 1158 at a price of kss 110000 which money was paid in cash and the seller left the land forever for the respondent and wanted nothing to do with the land and wanted the lands office to transfer the land to the respondent

It is not clear how the property was transferred to the person known as Moses Onyango Opondo who was not sued by the appellant and was never enjoined as a party in the proceedings.

According to the green card the parcel of land was transferred to the respondent by Moses Onyango Opondo on 27/4/2007 and title deed was issued on 3/5/2007. It is not clear on how the transfer and issuance of title were transacted. The Land Registrar Kisumu was never added as a party or called to produce the parcel file in respect of the suit property.

On the issues as to whether the process of transfer of the suit property was proper, I do find that there is evidence that the person referred to as Moses Onyango Opondo signed an application for the Land Control Board consent to transfer the property to the respondent despite the fact the respondent did not produce the consent.

I have also seen a stamp duty declaration, Assessment pay slip dated 26/4/200y for Kshs 500 for payment of transfer of land between Moses Onyango Opondo the transferor and Teresia Anyango Otieno as transferee.

Moreover, the said Moses Onyango Opondo received Kshs. 12,500 for unexplained reasons from the Respondent. All these facts point to the willingness to transfer the suit land to the respondent. I do agree with the trial magistrate that there was an overt willingness by the seller who was the owner, to transfer the property to the respondent

Further, I do find that the appellant did not discharge his burden of proof because he failed to avail evidence that the transfer was unprocedural. On fraud, the respondent proved that he bought the suit property from the deceased Agus Okoth Oyogo and that the same was transferred to Moses Onyango Opondo in unexplained circumstances. The willingness by the seller to transfer the property and receipt of all purchase price negates an allegation of fraud.

I do find that the person known Moses Onyango Opondo knew that the rightful owner of the plot was the respondent and that is why he showed the willingness to transfer the land to the respondent and indeed caused the land to be registered in the names of the respondent. I do find that the appellant did not avail evidence of fraud to the required standard and did not bother to enjoin the Land Registrar as a party.

On the issue of the consent of the Land Control Board, absence of this consent of the Land Control Board does not nullify a transaction especially where a party to the agreement of sale has paid all the purchase price and was registered the proprietor and has taken possession. Courts should not allow a party to a sale agreement, especially the seller to receive the money and retain the land, this will be encouraging unjust enrichment. On the counter claim, I do find the same was proved by the respondent. I do find that the Learned Magistrate did not error in his Judgment and the appeal is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 16th DAY OF JULY, 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