



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT BUSIA

ELC APPEAL NO. 003 OF 2021

LIVINGSTONE WERE MUDONDO.....APPELLANT

VERSUS

MILDRED ATHIENO.....RESPONDENT

(An appeal from the judgement/order made in Busia Chief Magistrate's Court by Hon. L. Ambasi CM delivered on 25th January 2021 in ELC Case No. 003 of 2021)

JUDGEMENT

1. This appeal arises from the judgement/order made in Busia Chief Magistrate's Court by Hon. L. Ambasi CM delivered on 25th January 2021 in this suit. The appellant who was the 1st Defendant in the Lower Court raised the following grounds in their Memorandum of Appeal dated 26th January 2021 and their Supplementary Memorandum of Appeal dated 15th March, 2021;

1) *The Trial Magistrate failed to realise that the Appellant and the deceased whose burial was in issue before her stayed on the suit land for more than 40 years since he was born and he enjoyed the overriding interest of the rights acquired or in possession of being acquired by virtue of any written law relating to the limitations of actions or by prescriptions and would have dismissed the suit with costs;*

2) *The Trial Learned Magistrate in according to the evidence before her failed to observe the rights to any title or certificate of confirmation of the grant of the deceased's estate does not extend to any property that has been unlawfully acquired without following due process and law of which Article 40(6) of the Constitution of Kenya does not protect such or certificate of confirmation;*

3) *The Trial Learned Magistrate failed to realise that the deceased whose burial was in issue before her and the appellant herein had cited the Respondent to take the grant of the deceased's estate to defend the fraud in the change of title from BENJAMIN MUDONDO OKAKA to WILLINGTON OLOO OSORE and the certificate of confirmation relied on by the Respondent to bring her suit before the Court was obtained irregularly without following the due process and cannot be reasons to prevent the said deceased without following due process and cannot be reasons to prevent the said deceased to be buried on the land in issue and she would have dismissed the suit with costs;*

4) *The Learned Trial Magistrate failed to consider and put on record the appellant's complaint to her that the person mentioned on a certificate of confirmation in the matter before her as beneficiary number three is the court process server working with the advocate on record in the matter that was before her who conspired with the Respondent not to serve the Appellant herein with the court process in this matter in order to be rewarded a portion of the deceased's estate for concealing the matters of facts in that case from the appellant to enable them succeed before the Magistrate;*

5) *The Learned Trial Magistrate failed to observe that the certificate of confirmation made without including all the beneficiaries of the deceased's estate by concealing material facts from court is subject to revocation and cannot be reasons to be used to prevent a family member who has cited the person with priority to take the grant to be buried on the land in issue, she would have dismissed the suit with costs;*

6) *The Learned Trial Magistrate failed to observe that with the evidence before her there was no evidence produced by the Respondent to show that the Appellant and the deceased whose burial was in issue had any other land other than LR No. MARACHI/ELUKHARI/514 whereby they had stayed for more than 40 years since birth and where the said deceased herein could have been buried and she would have dismissed the suit with costs;*

7) *The Learned Trial Magistrate failed to hold that there was no evidence to show that the Appellant and the deceased whose burial was in issue before her who had served the Respondents with citation to take the grant had not been served with the process of the court by the Respondent to obtain the grant and the certificate of confirmation of such grant were unlawfully obtained and she would have dismissed the suit with costs;*

8) *The Learned Trial Magistrate failed to observe that it was the duty of the Respondent, the Plaintiff before her to produce the necessary evidence to show that the grant and the certificate of confirmation thereof was lawfully obtained to sustain the suit;*

9) *The Learned Trial Magistrate wrongly exercised her discretion in failing to dismiss the suit with costs and she would have awarded the costs of the suit and the costs of preserving the deceased's body in the mortuary to the Appellant;*

10) *The Learned Trial Magistrate wrongly relied on the certificate of confirmation obtained by the Respondent without the Respondent producing the document showing that the lawful due process was followed to obtain the same after she had been cited by the Appellant to do so;*

11) *The Learned Trial Magistrate failed to realise that the said certificate of confirmation was obtained without following the lawful due process and could not pass any right to the Respondent;*

12) *The Learned Trial Magistrate misapprehended the law and evidence before her and reached a wrong decision;*

13) *The Learned Trial Magistrate misapprehended the force and usage of Article 40 of the Constitution of Kenya section 25 and 26 of the Land Registration Act and reached a wrong decision;*

14) *The Learned Trial Magistrate failed to realise that unserved process of court denies the unserved party a right to a fair trial in violation of Article 50 of the Constitution of Kenya.*

2. The Appellant urged the court to find merit in his appeal and the same be allowed with costs in this Court as well as the trial Court and the trial Magistrate's decision be set aside and/or revised.

3. The Appellant filed his submissions on the 8th of July, 2021. He submitted that the crux of the suit in the trial court revolves around the burial of the body of Fredrick Omwala Mudondo-deceased on Land Parcel No. Marachi/Elukhari/514 which land he submits was originally registered in the name of Benjamin Mudondo Okaka and without the knowledge of the family of Benjamin was transferred to Willington Oloo Osore-deceased. He submitted further that the trial Magistrate wrongly relied upon the certificate of title to rule in favour of the Respondent. He urged this Court to allow the appeal and order that the body of Fredrick Omwala Mudondo-deceased be buried on the suit land and that if a court determines that the change of land was proper then the Respondent can have the body exhumed.

4. The Respondent's filed their submissions in opposition to the appeal on the 28th of July, 2021. She submitted:

a) That the majority of the grounds raised by the Appellant relate to a succession case which was not the subject matter in BUSIA CMC ELCC Case No. 003 of 2021 whose decision the Appellant is challenging;

b) That the Appellant did not provide the Court with any particulars as to when he came into possession of the suit property neither was any information given as to the nature, manner and style of their occupation so as to assist the Court in arriving at the finding raised in the first ground of this appeal;

c) That the Appellant did not file a counterclaim to challenge the legality of the Respondent's title neither did he produce any documents during trial to substantiate their claims of fraud in the Respondent's acquisition of the suit parcel as such the issue cannot be introduced at the appellate stage by the Appellant;

d) That the dispute before the trial Court related to the burial of FREDRICK OMWALA MUDONDO-deceased on L.R No/MARACHI/ELUKHARI/514 and not the administration of the estate of WILLINGTON OSORE OLOO-deceased whose administration the Appellant is raising issue with in grounds 3, 4, 7, and 8 of the Memorandum of Appeal;

e) That the trial Magistrate properly analysed the evidence that was before her and arrived at the correct finding.

5. The Respondent urged this Court to dismiss the appeal and uphold the trial Magistrate's judgement as the Respondent had proved their case on a balance of probabilities that she was the administrator of the estate of the registered proprietor of the suit parcel where the Appellant intended to bury their relative hence the justification of grant of a permanent injunction.

6. The Respondents relied on the following case law in support of her submissions. **Toroitich Suter vs. William Toroitich & 3 others (2017) eKLR, Michael Githinji Kimotho vs. Nicholas Muratha Mugo (1997) eKLR, I.E.B.C & Another vs. Stephen Mutinda Mule & 3 others (2014) eKLR and Christine Achieng' Ogesa & Another vs. British American Asset Managers Limited (2012) eKLR.**

7. The Appellant filed further submissions in response to the Respondent's submissions on the 18th of August, 2021 submitting that Busia High Court ELC Case No. 70 of 2015 is still pending and that it was the right forum of the Respondents to canvass the issues of the rights of the registered owner. That this is a first appeal and the duty of a first appellate court was captured by the Court of Appeal in **John Teleyio Ole Sawoyo v David Omwenga Maobe [2013] eKLR** thus:

“This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyse the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same.”

8. From the pleadings and submissions before this Court I frame two issues for determination:

(i) Whether the trial magistrate misdirected herself in finding that the Respondent’s case was proved and

(ii) Whether the appeal has merit.

9. From the record, the Respondent’s claim was for a permanent injunction against the appellant restraining him from interring the remains of his deceased brother on L.R. NO. MARACHI/ELUKHARI/514. A permanent injunction also known as perpetual injunction is granted upon the hearing of the suit on merits and it fully determines the rights of the parties before the court. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.

10. The Appellant has stated in grounds one, six and nine of his appeal that the trial magistrate did not take into consideration that the deceased had stayed on the suit land for over 40 years and thus had overriding interests in the land. The appellant further stated that the Respondent did not produce any evidence to show that the deceased had any other land other than the suit land. In my opinion, the burden upon the Respondent was to prove that she was entitled to the suit title to the exclusion of the Appellant but not to show that the Appellant had alternative parcel of land.

11. Section 107 of the Evidence Act Cap 80 Laws of Kenya provides that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108 of Evidence Act, further states thus:

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

12. The Respondent testified that she was the personal representative of the Estate of Willington Osore Oloo-deceased and that the subject matter of the suit being LR No. 514 was registered in the name of Willington Osore Oloo-deceased in the year 1979. She further testified that the appellant is in occupation of LR. No. 511 where they had even buried the children of the late Fredrick Omwala. She further stated that the Appellant came to live on LR No. 514 in 2018 and prayed that the deceased should not be buried on LR No. 514. During cross examination, the appellant did not challenge the claim that they were in occupation of LR No. 511 or that he came to be in occupation of LR No. 514 in 2018. He also did not dispute that their late father was buried on LR No. 511.

13. In paragraph 4 of his statement of defence, the Appellant pleaded that the Respondent was not entitled to the orders sought because they (him and the deceased brother) were born on the land and have been staying thereon as family land. The Appellant in his testimony before the magistrate’s court stated that the deceased should be buried on LR No. 514 since there is no other land to bury him. He averred that they all lived on LR No. 514 together with the respondent. The Appellant’s witness who gave evidence as DW2 stated that the Appellant’s father Benjamin Mudondo was buried on LR No. 511. Equally, DW3 in cross examination stated that it was the respondent in occupation of LR No. 514.

14. The Respondent produced a Certificate of Confirmation of Grant for the Estate of Willington Oloo Osore and a certificate of title for LR. No. 514 registered in the names of Willington Oloo Osore. The appellant did not present to this court evidence that before or during the trial in the subordinate court he had filed objection proceedings challenging the appointment of the Respondent as the administrator of the estate of Willington Oloo Osore-deceased. Instead the additional documents he included in his record of appeal at pages 60-65 shows the objection proceedings were filed after the impugned judgement. That application was yet to be determined during the pendency and hearing of this appeal. Nothing was brought to this court to confirm that the application seeking revocation of the grant had been concluded.

15. This trial court was constituted as the Environment and Land Court which derives its jurisdiction from section 26(3) & (4) of the Environment and Land Court Act. Section 26 (4) which states thus:-

(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle –

(b) Matter of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates’ Courts Act.

16. The trial magistrate could not therefore dig into the validity or otherwise of the certificate of grant issued to the Respondent in the case before her. It follows that the issues raised in ground 1& 2 of the memo of appeal and grounds 3 & 4 of the supplementary memo have no foundation to stand on.

17. The Appellant pleaded further in grounds one and two of the appeal that the Respondent obtained his title unprocedurally contrary to article 40(6) of the Constitution. It is a requirement in law under **order 2 rule 4(1) and rule 10(1)(a)** of the Civil Procedure Rules that particulars of fraud or illegalities must be specifically pleaded. There is none pleaded in the statement of defence that was filed. Secondly, it

is trite law that he who alleges fraud must strictly prove it. In particular, the pleader needs to be sure that there is sufficient evidence to justify the pleading. This was considered in some detail by Lewison J in *Mullarkey -v- Broad*. In *Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others (1996) eKLR* the Court of Appeal in considering the standard of proof required where fraud is alleged had this to say-

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case.”

18. Section 26 of the Land Registration Act provides that certificate of title can only be challenged if it is proven that;

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or and (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. From the proceedings on record, the appellant did not address the fraud allegations during cross examination. He simply stated that the suit land was registered in the name of Wellington Osore Oloo via fraud mentioning the existence of a pending suit, Busia HC ELC Case 70 of 2015. The Appellant did not elaborate how the two cases were related. I find that the trial court rightfully addressed the fraud allegations and held that the Certificate of Title registered in the name of Wellington Osore Oloo was regular.

19. On ground nine of the appeal, the appellant has stated that the trial court exercised its discretion wrongly in failing to dismiss the suit before it and should have awarded the appellant costs of the suit and mortuary costs. Before a court of law can arrive at a decision, it has to analyse the evidence presented before it by the parties together with the applicable law. During the hearing before the subordinate court, the Respondent presented a certificate of confirmation of grant for the estate of Wellington Osore Oloo and a certificate of title for LR. No. 514 registered in the names of Wellington Osore Oloo. The Appellant on the other hand together with his witnesses addressed the court on LR. No. 514 being the only land the deceased had ever owned and as such they should be allowed to inter his remains thereon. The trial magistrate then relied on Section 26 of the Land Registration Act to uphold the registration of Wellington Osore Oloo as the owner of LR. MARACHI/ELUKHONGO/514.

20. The Appellant has relied on the Adjudication Register dated 28/2/1966 to show that the suit land was first registered in the names of Benjamin Mudondo. However, there are no additional documents to show that the registration of Wellington Osore Oloo was through fraud or unprocedural and should be impeached. The evidence presented by the Appellant is not enough to convince the court in reaching a different decision.

21. In light of the analysis I have given herein above, I find no merit in this Appeal. The trial Magistrate exercised her discretion rightly and judicially in allowing the Respondent’s claim before her and granting the orders of permanent injunction. Consequently, I proceed to dismiss this Appeal with costs to the Respondent.

Dated, signed and delivered at BUSIA this 23rd day of September 2021.

A. OMOLLO

JUDGE