



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELCA CASE NO. 28 OF 2019

ROSELINE AKINYI OMONDI1ST APPELLANT

MARGRATE ODONGO2ND APPELLANT

(Suing as Administrators of the Estate of MARTIN OMONDI OPONDO)

VERSUS

ISAAC OTIENO OBURE.....1ST RESPONDENT

REGISTRAR OF LANDS, SIAYA.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

(An appeal from the Ruling and order of Honourable Tom M. Olando, Senior Resident Magistrate Siaya delivered on 31st July 2019 in SIAYA ELC NO. 33 OF 2018)

JUDGEMENT

The genesis of this appeal is a suit filed by the appellants against the Respondents by way of plaint dated 27/4/2017. The Appellants claimed that the deceased was registered as the absolute proprietor of the land comprised in the title deed for parcel of land known as SIAYA/BARAGULU/2096 (hereinafter referred to as “the suit property”), with full powers and authority to dispose of the same or any part thereof and/or deal with it as he pleases subject to the relevant land laws within the Republic of Kenya. The said parcel of land embodied a freehold interest measuring 0.51 Hectares.

The appellants are among the four persons appointed as administrators of the estate of the deceased and filed the suit in the lower court in such capacity. As Administrators of the estate of the deceased, the appellants obtained letters of administration and successfully conducted succession and a certificate of confirmation of Grant dated 27th August 2015 granted in Kisumu High Court Succession Cause No. 334 of 2009.

The estate of the deceased was thereafter subdivided and transferred to the beneficiaries in accordance with the Certificate of Confirmation of grant, the 2nd appellant benefiting the suit property amongst others from the estate.

Sometimes around the 10th day of November 2015, the appellants went to Siaya County Land Registry to transfer the suit property to the 2nd appellant only to be informed much to their shock that the suit property had been registered in the name of the 1st Defendant on 29th May 2003.

The suit property was registered in the name of the deceased as the sole and absolute owner as at the time of his death and was therefore not in a position to transfer any property to the 1st Defendant around 29th May 2003.

It was the appellant’s contention that the 1st respondent successfully registered the title deed to his name on 29th May 2003, more than two (2) years after the deceased had demised and the Letters of Administration intestate were obtained 12 years later on 27th August 2015. The appellants are still in possession of the original title to the property in the name of the deceased issued on 31st August 1999.

The appellants together with other family members then confronted the 1st respondent on the fraudulent transfer and upon deliberation, it was

resolved that no formal complaint for fraud be filed with the police against the 1st respondent, after he surrendered the original title deed registered in his name to the appellants and promised to sign transfer documents to facilitate its transfer back to the rightful beneficiaries, being the 2nd appellant herein.

When the time came for the 1st respondent to sign the transfer documents, he declined to execute the documents stating that he was the lawful owner of the suit property. It was the appellant's contention in the lower court that the 1st and 2nd appellants conspired to fraudulently and irregularly transfer the suit property to the 1st respondent way after the deceased died and before the letter of Administration were obtained and certificate of confirmation of grant issued. As a result of the fraudulent actions of the 1st and 2nd respondents, the plaintiff has suffered loss and damage.

The appellants claimed for indemnity as against the 3rd respondent for the above stated negligence. In the light of the foregoing, the appellants averred that the respondents had jointly and severally colluded, connived and acted fraudulently as against the appellants.

The appellants contended that the said transfers ought to be declared null and void and of no effect whatsoever, and that the property be declared to be that of the deceased. The appellants prayed for Judgment against the respondents thus:

- 1. A declaration that the deceased is the registered absolute proprietor of all that parcel of land known as SIAYA/BARAGULU/2096.**
- 2. Orders compelling the Registrar to reconstruct the Register and have it reflect the plaintiff as the registered proprietor of all that parcel of land known as SIAYA/BARAGULU/2096.**
- 3. Damages for fraud against all the respondents jointly and severally.**
- 4. Costs of the suit and interest thereon.**

The 1st respondent filed defence claiming to be the registered owner of the suit land. He bought the land and had it transferred to him by the bonafide original owner Alloys Onjira Obando. He bought the land from one Agnes Acheing Apondi who had been sold the land by Aloys Onjira Obando.

The 1st Respondent stated that being a bishop and owing to his kind heartedness and for the sake of peace and harmony, decided to hand over the title to the plaintiffs but when they demanded he bears transfer costs for the land, he decided to withdraw his benevolence and insisted for his rights. He denies any fraud as alleged. He stated that the deceased Martin Omondi Opondo could not have owned the land since he did not attend the Land Control Board with the original owners.

When the matter came up for hearing Margaret Ondongo Omondi relied on her statement dated 7/4/2017 which statement was adopted as evidence in chief. She added that her husband, Martin Omondi Opondo died on 3/4/2001. The wives of the deceased did Succession and obtained letters of administration intestate of the deceased's estate. Margaret Odoyo Omondi was given parcel number SIAYA/BARAGULU/2096. The family discussed with the 1st Respondent who agreed to give them back the title and transfer the land to her but he refused to sign the transfer.

The 1st respondent on his part testified that he is a bishop and he Director of Future Life Academy and nursery home along Siaya Kisumu Road near Karen. The land in dispute belongs to the 1st Respondent as he bought it from Agnes Achieng Apondi. He paid Kshs. 90,000/= in 1998.

He equally adopted his statement dated 19/6/2019 and produced the two sale agreements. On cross examination, he concedes that the appellants took the title deed from him but denies having surrendered the same to the appellants. He denies having agreed to transfer the land to the appellants. He does not know why the land was not registered in the names of Agnes Acheing Apondi. He bought the land in 1998. On cross examination, he states that he did not sign any agreement between himself and Martin Omondi Opondo.

DW2, Agnes Achieng Apondi relied on her statement which was adopted as her evidence in chief. She sold the suit land to the 1st Respondent.

On cross examination, she admits that she was not issued a title when she purchased the land from Alloys Onyira. PW3, Richard Ogunda relied on his statement which was adopted as evidence in chief.

In a nutshell, he is the one who commended the 1st Respondent to Agnes who was the 1st to buy the land. He was present when the 1st Respondent bought the land from Agnes. No one lives on the land.

After considering the evidence tendered by the parties, the learned magistrate found that the land was initially registered in the names of Alloys Onyira Obando (deceased) but was later transferred to the names of Martin Omondi (deceased) before being transferred in the names of the 1st respondent. The learned Magistrate found that the appellants did not give an explanation as to how the land was transferred to the deceased Martin Omondi. That there was no evidence that the documents produced by the 1st respondent were fraudulent. That it is not clear how the deceased Martin Omondi Opondo got himself registered in 1999.

The Learned Magistrate found that the appellants having failed to demonstrate how the deceased Martin Omondi Opondo was registered as

the proprietor of the land his registration was fraudulent and that the appellants had not proved their case on a balance of probabilities. The suit was dismissed.

The appellants have now preferred this appeal on grounds that:

- 1. The Learned Trial Magistrate erred in law and in fact by failing to address all the main issues raised in the suit particularly whether the deceased property, SIAYA/BARAGULU/2096, was fraudulently transferred and registered in favour of the 1st Respondent which transfer was done more than two years after the deceased's demise.**
- 2. The learned trial magistrate erred in law and in fact by finding that an agreement can confer ownership to property.**
- 3. The learned trial magistrate erred in law and in fact by relying on the agreement dated 3rd August 1995 which agreement was not corroborated and the fact that the said agreement was invalid as at 1995 the suit property was owned by two proprietors' jointly and that only one proprietor could not sell the property.**
- 4. The Learned trial Magistrate erred in law and in fact by blatantly disregarding the Appellants' evidence on record that the 1st Respondent acquired ownership of the suit property through a fraudulent transfer from the deceased too himself and not any other way.**
- 5. The learned trial Magistrate erred in law and in fact by finding that the deceased title was fraudulently acquired without any evidence to support that finding.**
- 6. The learned trial Magistrate erred in law and in fact by finding that one Agnes Achieng Apondi was once the proprietor of the suit property with rights to sell the suit property to the 1st Respondent.**
- 7. The Learned trial Magistrate erred in law and in fact in failing to appreciate that the Appellants had proved their case on a balance of probabilities having adduced evidence to support their case.**

The appellants pray for orders that:

- 1. This appeal be allowed.**
- 2. The Judgment delivered on 31st July 2019 and the decree emanating therefrom be set aside and**
- 3. The 1st Respondent be condemned to pay costs.**

As a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in *Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123* in the following terms:

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are 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 witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hamed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

The Court of Appeal for East Africa took the same position in *Peters v Sunday Post Limited [1958] EA 424* where Sir Kenneth O'Connor stated as follows:

*It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt v Thomas (1), [1947] A.C. 484.**

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and

especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

From these cases, the appropriate standard of review to be established can be discerned that on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions and that in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and

iii. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

To begin with, the 1st Respondent is bound by his pleadings where he states that he had surrendered the title to the appellants and was ready to execute the transfer but changed his mind when they required that he pays the transfer fees. The 1st Respondent attempted to depart from the pleadings by stating in evidence that the appellants took the title from him. The 1st Respondent is bound by his pleadings. It appears that the 1st Respondent's conscience initially did not allow him to retain the property but it changed later for reasons known by him.

The historical background of the parcel of land is that the register was opened on 12/8/94 being a subdivision of plot number 2076. On the 12/8/1994, it was registered in the names of Alloys Onyira Obando and Vitalis Sino Obando and title was issued. On the 5/1/1999, it was registered in the names of Alloyce Onjira Obando through succession.

On the 31/8/1999, it was transferred to Martin Omondi Opondo and title deed issued. Martin Omondi Opondo died on 3/4/2001 but the property that was registered in his name was transferred to the 1st respondent on 29/3/2003, more than 2 years after his death. There is no explanation by the 1st Respondent how it happened. The 1st Respondent merely produced the sale agreements but no instrument of transfer.

I do find that transferring property registered in the names of a deceased person to another person without a proper succession cause and transmission is evidence of a fraud.

The learned magistrate erred in finding that the appellants had not proved their case on a balance of probabilities as evidence on record was sufficient to find otherwise. I do allow the appeal and do grant orders that the Judgment delivered on 31/7/2019 and the decree issued thereafter be and is hereby set aside. The 1st Respondent is condemned to pay costs in the lower court and of Appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF OCTOBER, 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 2020.

ANTONY OMBWAYO

JUDGE