



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 90 OF 2010

MUKTAR DUBOW HASSAN.....APPELLANT

=VERSUS=

SHAMSA HAJI ISMAIL.....1ST RESPONDENT

ABDIFATAH ISMAIL.....2ND RESPONDENT

(Being an Appeal from the whole judgment delivered on 18th October 2010 by Richard Odenyo Principal Magistrate in Mandera Civil Case No. 1 of 2010)

JUDGEMENT

1. This Appeal arises out of the Judgment of Hon. Richard Odenyo Principal Magistrate in Mandera PMCC NO. 1 of 2010 delivered on 18th October 2010.

2. The Honourable learned trial magistrate granted these orders on 18th October 2010:-

“(a) The Plot No 195 Rhamu belongs to the Estate of Haji Ismail Sheikh (Deceased).

(b) The court hereby issues a permanent injunction order against both the 1st and 2nd Defendants from remaining on or further with Plot No 195 Rhamu.

(c) All the costs herein be met by the 2nd Defendant”

3. The Appellant being dissatisfied with the said judgment filed an appeal dated 1st day of November 2010 to this court on the following grounds:-

1. The learned trial Magistrate erred both in law and facts in granting prayers not pleaded for and with no evidence given in their support.

2. The learned trial Magistrate erred in law and fact in failing to consider the appellant’s long occupation of the suit land and subsequent registration of the same in his favour by the County Council of Mandera.

3. The learned trial Magistrate erred both in law and fact in failing to consider all the evidence tendered by the appellant hence occasioning miscarriage of justice.

4. The learned trial Magistrate erred both in law and fact in failing to consider the development done by the appellant on the suit land.

5. The learned trial Magistrate erred both in law and fact in delivering a contradicting judgment.

6. The learned trial Magistrate erred in law and in fact in entertaining the suit when the 1st respondent had no locus standi to bring the suit.

4. REASONS WHEREOF; the Appellant prays:-

a) This appeal be allowed.

b) The lower court's judgement in Madera PMCC No.1 of 2010 delivered on 18th October 2010 be set aside and substituted with an order dismissing the suit with costs to the Appellant.

c) Cost of this appeal.

d) Any other or further order in favour of the Appellant.

5. On the 27th January 2021 the court with the consent of the parties directed that the Appeal be canvassed by way of written submissions.

The Appellant's submissions

6. They are dated 20th April 2021. The Appellant raised that the following issues for determination:-

a) Whether the learned magistrate erred by entertaining the suit while the 1st Respondent lacked the requisite locus standi to institute the suit.

b) Whether the learned magistrate erred by failing to declare the Appellant a bona fide purchaser for value without notice therefore deserving the protection of the law.

c) Whether the learned magistrate erred by failing to provide a remedy to the Appellant thereby occasioning him great injustice yet he had done no wrong.

7. On the issue of *locus standi*, he submitted that the power to institute a suit with regard to the estate of a deceased person is the preserve of the grantee of representation in respect of the deceased's estate as provided for in Section 82 of the Law of Succession Act and reiterated by the Court of Appeal in **Trouistik Union International & another v Jane Mbeyu & another [1993] eKLR**.

8. He further submitted that the learned trial magistrate erred in fact and law by entertaining a suit from the 1st Respondent who had not, and up to date has never, obtained a grant or representation in respect to the deceased's estate.

9. On whether the learned trial magistrate erred by failing to accord the Appellant protection accorded to a bona fide purchaser for value, he submitted that his conduct fitted the description of a bona fide purchaser espoused in **Katende v Haridar & Company Limited [2008] 2 E.A.173** by the Court of Appeal in Uganda, thus he deserved to be protected as a bona fide purchaser for value without notice.

10. He added that that the 2nd Respondent came to the transaction with the backing of community elders (as is customary in his community), government officials and his family members, who all witnessed signatures to the agreement thereby solidified his belief in the sanctity of the title held by the 2nd Respondent. He further submitted that he built his house on the property and lived peacefully and even the Respondents visited his home as they live in the same village.

11. He also submitted that the learned trial magistrate absolved him from any fault by holding that he was not aware that the 2nd Respondent did not have the backing of grant of letters of administration when he purchased the property. He added that he was unaware that any other claims to the property stood and that there were any objections as to the transfer of the property.

12. It was his submission that he consistently acted in good faith when purchasing the suit property as he had no intention to defraud the estate of the deceased. His intention was always to enter into an honest and sincere transaction with the 2nd Respondent. He added that even the magistrate acknowledged in his judgement that he had purchased the property in good faith.

13. He however faulted the learned trial magistrate for issuing a contradictory judgement thereafter by failing to determine that he was a bona fide purchaser for value without notice who has a right to retain title to property backed by Section 26 and Section 80(2) of the Land Registration Act.

14. He also faulted the judgement for being bizarre as it finds the 2nd Respondent guilty of wrong doing yet does not punish him for this wrong doing. He added that the judgement finds that he was not guilty of any wrongdoing yet proceeds to heavily punish him.

15. He submitted that the learned trial magistrate failed to consider the principle of law that 'equity will not suffer a wrong to be without a remedy'. He added that where a court realizes that its decision will lead to injustice, it is its duty to render a wholesome judgement, protecting all the parties who deserve the protection of the law. He cited the Court of Appeal's decision in **Maroa Wambura Gatimwa v Sabina Nyanokwe Gatimwa & 5 others [2010] eKLR**.

The 1st Respondent's submissions

16. They are dated 2nd July 2021. The 1st respondent raised the following issues for determination: -

a) *Whether there was capacity for 2nd Respondent (then a minor) to enter into a Sale Agreement?*

b) *Were letters of administration taken out at the time of purported Sale of Plot No. 195 Rhamu?*

c) *Did the Appellant cite any of the beneficiaries to take out Letters of Administration to administer the Estate of Haji Ismail Sheikh (deceased)?*

d) *Did the 2nd Respondent have good title to pass to the Appellant?*

e) *Ordinate Delay*

17. On the issue of capacity to contract, she submitted that it is trite law that a minor lacks capacity to enter into a valid contract thus the Sale Agreement dated 15th February, 1999 for the sale and purchase of the suit property purportedly entered into between one Abdifatah Haji Ismail (2nd Respondent) then a minor, the son of Haji Ismail Sheikh (deceased) and the Appellant is an illegality. She added that the contract is vitiated on account of undue influence, duress, and ill will since consent purportedly given by the then minor is unavailable in law. He relied on **Nairobi Succession Cause No. 537 of 2004, In Re Estate of Jared Gitau Gichuhi (Deceased) [2021] ECLR.**

18. On whether letters of administration had been taken out at the time of sale, it was her submission that the Appellant's main ground of Appeal is that the beneficiaries lack capacity to defend their share of the Estate of their late father Haji Ismail Sheikh (deceased).

19. She admitted that the Estate of Haji Ismail Sheikh (deceased) has not been administrated within the meaning of Law of Succession Act (CAP 160 laws of Kenya) as no Letters of Administration have been taken out. She however stated that preservation has been done and in the process, she realized that the Appellant has intermeddled with the Estate and purportedly purchased the suit property.

20. She submitted that it is ironical that the Appellant is asking this court to debar the Respondents from participating in this suit to preserve the estate of Haji Ismail Sheikh (deceased) for want of letters of administration but at the same time wants the court to allow him to continue intermeddling and trespassing into Plot No. 195 Rhamu the property of the estate of Haji Ismail Sheikh (deceased) which is yet to be administered within the meaning of the Law of Succession Act (Cap 160 Laws of Kenya). She relied on **Succession Cause No. 547 OF 2009 In re Estate of Paul M'Maria (Deceased) [2017] eCLR** and on **Succession Cause No.108 OF 2014 In re Estate of M'Ngarithi M'Miriti [2017] eCLR.**

21. On whether the 2nd Respondent had good title to pass to the Appellant, she submitted that the issue of the 2nd Respondent had no capacity to transact and without good title was properly determined by the learned trial magistrate who found that the 2nd Respondent did not have good title to pass to the Appellant, as the suit property still belonged to the estate of Haji Ismail Sheikh (deceased).

22. She further submitted that the Appellant cannot be an innocent purchaser for value without notice since he did not establish by way of due diligence whether the 2nd Respondent had good title capable of being passed to him.

23. On the issue of inordinate delay, she submitted that the appeal was filed on 8th November, 2010 and the appellant delayed its prosecution or taking such steps to ensure the same is set down for directions and as such, it was dismissed on 11th June, 2016 for want of prosecution. She also submitted that the record of Appeal is incomplete and the Appellant has mixed up the record potentially obstructing justice.

24. I have considered the Grounds of Appeal, the response, the written submissions filed on behalf of the parties and the authorities cited.

25. This being a first appeal to this court, it is an appeal in all facts and the law. The duty of a first appellate court is well settled. It is to reevaluate and consider a fresh all the evidence tendered before the trial court in order to reach its own conclusion having in mind that unlike the trial court, I did not have the advantage of hearing and seeing witnesses.

26. The appellant argued that the 1st Respondent has no locus standi to institute this suit for lack of letters of administration of the Estate of Haji Ismail Sheikh (deceased). The 1st Respondent admitted that her father's estate is yet to be administered in accordance with the law of Succession Act.

27. Section 82 (a) of the Law of Succession Act confers power on personal representatives to bring a suit on behalf the Estate of a deceased person. The Law of Succession Act came into force on the 1st July 1981. The only evidence available as to the late Haji Ismail Sheikh's date of death is PW2's testimony. He told the court that Haji Ismail Sheikh died in 1981 and that they were together when he died. In light of this uncertainty, a finding on whether the law of Succession Act was applicable upon his death can only be made on a balance of probability. The learned trial magistrate did not make a determination on the issue of locus.

28. Lack of locus on the 1st Respondent's part can also not be the basis for the Appellant to continue occupying property belonging to Late Haji Ismail Sheikh.

29. On the Appellant's contention that that the court made a contradictory judgment by absolving him from blame yet failing to endorse him as a bona fide purchaser for value, the learned trial magistrate found that the 1st Defendant ;Appellant herein paid money without confirming whether the 2nd Defendant had title. That was an express indictment on the 1st Defendant's part. He was found not to be a bona fide purchaser for value on that basis.

30. The Appellant also raised ground that his testimony was not considered by the learned trial magistrate. DW2, DW3 and DW5's testimony was to the effect that they witnessed the sale agreement between the Appellant herein and the 2nd Respondent. The court considered their testimony and found that the sale transaction was illegal and has no effect. DW5 and DW6's testimony with regard to the Appellant's occupation was also considered by the court. DW8; a county council employee's testimony that the plot had changed hands to the Appellant herein was also considered.

31. The Appellant also argues that the learned magistrate found that the 2nd Defendant was at fault yet issued a judgment that punished him with dire consequences including eviction from a whom he had established and lived on for over ten (10) years.

32. While the learned magistrate found that had the 2nd Defendant not intermeddled, the suit would not have been necessary, the 1st Defendant was found to be at fault as well, therefore there were no remedies available to him at equity.

33. The 2nd Respondent purported to sell the suit property Plot No 195 Rhamu belonging to their father Haji Ismail Sheikh (deceased) to the Appellant vide a sale agreement date 15th February 1999. The 2nd Respondent was a minor at the time and had no capacity to enter into any valid agreement and/or contract. At the time of the purported sale the beneficiaries of the Estate had not taken out letters of administration.

34. In the case of **re Estate of Paul Maria (deceased) [2017] eKLR**; J Gikonyo observed thus:

“The restriction provided by law that no immovable property shall be sold or distributed before confirmation of grant is not merely directory or an embellishment. It is a statutory command with fatal consequences on any transaction done in contravention of the said law. Accordingly, acquisition of immovable property of the estate in contravention of the Law of Succession Act is tainted with killer poison; and is unlawful acquisition; thus property so acquired does not enjoy the protection of property rights under article (40)(6) of the Constitution.

In granting an injunction and cancelling ownership of the suit property to the deceased Justice Gikonyo further observed that:-

I have heard before and I am now hearing the argument that an injunction does not lie in succession causes.Except however, following after the maxim that law will not suffer wrong without remedy, there is nothing in the Law of Succession Act that prevents the court from issuing such orders by whatever name they are called-as are necessary to preserve the estate. Again, with the advent of the Constitution of Kenya, 2010, courts are now obligated to take a much wider view of justice and to serve substantive justice in accordance with the principles of justice enshrined in article 159 of the Constitution.”

35. I find that the learned trial magistrate did no err in law and in facts in his finding that the suit property belongs to the Estate of Haji Ismail Sheikh (Deceased). I find no merit in this Appeal and the same is dismissed with costs to the 1st Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF DECEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms M. Mutemi for the Appellant

Ms Ngure for Mr. Omboga for the 1st Respondent

No appearance for the 2nd Respondent

Steve - Court Assistant