



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELCA NO. 18 OF 2016

SERFINA OWIDI DODO.....APPELLANT

VERSUS

CAROLYNE ATIENO APUNDA.....RESPONDENT

(Being an Appeal from the judgment and decree of the Honorable

B. Kasavuli (Esq) the Senior Resident Magistrate delivered on the

19th August 2016 in WINAM SRMCC No. 25 of 2010).

JUDGEMENT

Serfina Owidi Dodo hereinafter referred to as the appellant has come to this court against Carolyne Atieno Apunda hereinafter referred to as the respondent in this appeal from the Judgment of honourable Senior Resident Magistrate B. K. Kasavuli delivered on the 19/8/2016 in Winam SRMCC No. 25 of 2010 on grounds that there was no evidence to support the finding of the learned Magistrate as there were no two titles as there was only one title. That the learned Magistrate did not appreciate the admissibility of evidence.

According to the Appellant the learned Magistrate erred in law and in fact in holding that the appellant did procure the title to the suit land by way of fraud. The learned Magistrate arrived at the wrong decision and did not consider exhibits and submissions.

This being a first appeal, this court is obliged under Section 78 of the Civil Procedure Act Cap 21 Laws of Kenya to reassess, reconsider and reexamine the evidence and extracts on record and arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses as they testified and therefore giving due allowance to that. (See **Sielle V Associated Motor Boat Company Ltd [1968] EA 123**).

The respondent claim was based on fraud. She claimed to have bought the suit property jointly with the husband and got the property registered in the name of her husband. The property was not for sale without the consent of the family members.

However, the said husband attempted to sell the property an act that prompted the husband to surrender the original title deed to the respondent to pre-empt any transaction. The respondent further registered a caution on the property but the respondent's husband and the appellant still went ahead to transact and transfer the property. It was claimed by respondent that the necessary papers were not signed or executed.

The respondent in the lower court ultimately prayed a declaration that the registration of the suit property LR. NO. KISUMU/MANYATTA 'A'/4407 in favour of the Defendant was fraudulent, irregular, null and void initio and should be revoked, nullified and/or cancelled and the status quo ante be maintained and an order of permanent injunction do issue restraining the Defendant, by herself, her agents or employees from transferring, alienating, selling, charging, developing or howsoever interfering with the suit land LR. NO. KISUMU/MANYATTA 'A'/4407 till the determination of the suit.

a) Costs of the suit plus interest.

The appellant's response in the lower court was a denial of the allegations by the respondent. She claimed that she followed the laid down procedure. She is an innocent purchaser for value in overt market without notice. She paid consideration. Her property rights are indefeasible. She claimed that the court had no jurisdiction.

Analyzing evidence on record the respondent stated that she still held the original title deed in the husband's name. She is in occupation and use of the land and uses the same as a timber yard. There is her container on the land. The appellant also gave her testimony and produced a title deed in her name she produced the sale agreement with the respondent's husband. She states that the transaction was one by her son.

DW2 Picha William Otuol an accountant by profession stated that an official search was done which revealed the owner of the land as the respondent's husband. An agreement was done and the consideration was paid.

The Respondent's husband surrendered original title deed. Transfer form was filled and signed. The documents were handed over to the advocate for processing. After two weeks, her advocate brought a title deed in the appellant's name. He had a green card. He could not recall the date of the Land Control board and did not produce any consent of the Land Control Board.

The Land Registration Officer, George Oruaru stated that his duty was to keep records. He stated that the suit property was registered in the name of Seraphina Owidi Dodo. He confirmed that he did not see a transfer document. He did not see a consent to transfer, valuation report, registration fees, receipts, PIN no. ID.

Monica Bor the Land Registrar worsened matters when she stated that in 2008, the suit land was transferred to Joseph Apunda Wandera and in 2010 transferred to Serphina Owidi Dodo and title deed issued. However, it is confirmed on cross-examination that a new title deed was issued without surrender of the old title and that she was not aware of the existence of a transfer.

After hearing the parties and submissions and the witnesses, the honourable court found and rightfully so that the most important issue was whether the transfer of the suit property was done procedurally and legally.

The court found that there were two title deeds and the issue of authority of the two titles was important.

The trial court further found that the process of registration of Serphina Owidi Dodo as the owner of the property was not proper because the original title had not been surrendered. The court placed all the blame on Remmy Nganyi an Officer at the Lands offices who issued the two titles deeds over the same land.

I have considered the submissions of both counsel and do find that the relevant provisions of the law are **Section 24, 25, 26 of the Land Registration Act** that provides as follows:

Section 24

“(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

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

“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.”

This buttressed by **Article 40 (6) of the Constitution** that provides:

“(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

The fact that the appellant title deed was issued when another title was subsisting in itself evidence of an irregularity that borders on fraud. It is illegal to issue a title deed without the surrender of a subsisting one. Secondly, without an instrument of transfer, real property can't be conveyed to another person.

The upshot of the above is that the honourable trial Magistrate did not err in finding that the transfer of the property was whimsically done without a transfer instrument and without a surrender of the initial title deed.

The upshot of the above is that appeal is dismissed with costs.

Orders accordingly.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS 30th DAY OF January, 2020.

In the presence of:

M/S OMAVA FOR RESPONDENT.

M/S IMBAYA FOR APPELLANT.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE