



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELCA NO. 17 OF 2019

DALMAS ODHENGO ODHENGO.....APPELLANT

VERSUS

JOSEPH ALOIS GEOGHAN AJODE.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

DISTRICT LAND REGISTRAR – KISUMU....3RD RESPONDENT

JUDGMENT

On 4th June 2019, the Appellant lodged a Memorandum of Appeal against the whole judgment and decree of Hon. Bernard Kasavuli PM in Winam PMC ELC No. 24 of 2018 on the grounds that the Learned Magistrate erred in law and in fact by:

- 1. Delivering a judgment in blatant disregard to the fact that the 1st Respondent had no *locus standi* to file the suit.**
- 2. Failing to appreciate the provisions of the Law of Succession Act and precedents.**
- 3. Failing to consider the evidence, submissions and apply case law cited which precedents are binding upon the court hence arriving at a wrong decision.**
- 4. Entering judgment in favour of the 1st Respondent who failed to prove his case to the required threshold and instead shifted the burden of proof to the Appellant.**
- 5. THAT the decision was against the weight of evidence.**

The Appellant seeks orders setting aside the judgment and striking out/dismissing the 1st Respondent' suit; and for costs to be awarded to the Appellant.

Brief Facts

The 1st Respondent filed suit against the Appellant, 2nd and 3rd Respondents, claiming that he was the administrator of the estate of his late father Celestine Ajode Akoth alias Ajode Akoth (deceased in 1987) who owned half share undivided in KISUMU/CHIGA/1748 together with the 1st Respondent's late mother Ogore (deceased in 1986). That by virtue of the rule of joint ownership, the 1st Respondent's father was entitled to the whole of the suit parcel on his mother's death. That the whole of the suit parcel was registered in the Appellant's name as the absolute proprietor.

The 1st Respondent claimed that the Appellant was a total stranger and had gotten the suit parcel registered in his name by fraudulent means in cohort with the 2nd and 3rd Respondents, since the 1st Respondent had not done succession over the suit parcel. That on the strength of the fraudulent transaction the Appellant purported to enter the suit parcel for the purpose of planting sugarcane therein. The 1st Respondent therefore sought orders cancelling all the fraudulent entries in the register of the suit parcel, namely entries number 3-9, and costs of the suit.

On the other hand, the Appellant claimed that he legally acquired the suit parcel in 2010, having purchased it from the then registered owner Regina Anne Akinyi (deceased). That the Appellant carried out the necessary due diligence before purchasing the suit parcel, and that he was therefore a bona fide/innocent purchaser for value with a good title to the suit land. The Appellant stated that the plaint was fatally defective

for offending mandatory provisions of the Civil Procedure Rules and the Appellant stated his intention to raise a preliminary objection to strike out the suit.

The 2nd and 3rd Respondents denied the 1st Respondent's allegations and also reserved a right to raise a preliminary objection that the suit contravened Section 13A of the Government Proceedings Act.

In his judgment, the Learned Magistrate first considered whether the land was registered in the names of the alleged original owner. The Learned Magistrate held that despite the right to survivorship as per the rules of joint tenancy, there were no documents to show that the 1st Respondent was a beneficiary as the son of the one of the sole proprietors. That the Appellant had also not provided proper documentation to establish how the title was transferred after the sale.

On the question of whether there was fraud or illegality in the transfer of the title to the 1st Respondent, the Learned Magistrate held that apart from the land sale agreement produced by the 1st Respondent, no other documents required to legally transfer the title were presented. Particularly, the Magistrate centred on the lack of evidence of consent of the Land Control Board as required by Section 6 of the Land Control Act. That the title stood impeached on this ground.

Further the Learned Magistrate noted that the green card contained a restriction entered upon the death of the sole proprietors dated 14th December 1996. That it was not clear how the restriction was lifted in order to allow the transactions indicated in the subsequent entries. The Learned Magistrate held that therefore Regina Anne Akinyi did not have the capacity to transfer the title to the Appellant since one cannot pass a title he/she does not possess. That the Appellant's transaction was void for lack of consent from the Land Control Board. The Learned Magistrate held that the sale of the suit parcel was improper and the entries in the register done irregularly, and that the 1st Respondent had established his case on a balance of probabilities and thus his claim was allowed as prayed.

Appellant's Submissions

Counsel for the Appellant submitted that the 1st Respondent had alleged in his plaint that he was the administrator of the estate of Celestine Ajode Akoth yet he did not produce a grant in support of the same in court. Counsel cited several cases to support the contention that a party can only bring a suit involving the estate of a deceased person without first obtaining a grant for that purpose. Counsel asserted that the onus is on the Plaintiff or any other claimant to prove the position he or she postulates on a balance of probabilities as per Sections 107-109 of the Evidence Act.

On the allegations of fraud particularised by the 1st Respondent, Counsel submitted that the 1st Respondent has failed to discharge his duty through his evidence and the allegations were not proven. Counsel cited **Urmilla W/O Mahendra Shah vs. Barclays Bank International Ltd & Another [1979] KLR 76** where the court held that allegations of fraud must be strictly proved to a standard more than a mere balance of probabilities.

Counsel asserted that the Appellant was a bona fide purchaser for value. That the Appellant produced the sale agreement signed by one Regina Anne Akinyi who was at that point in time was the registered owner of the suit parcel as per copies of the official search and the green card. Counsel cited **Katende v Haridar & Company Limited [2008] 2 EA 173**.

1st Respondent's Submissions

Counsel for the 1st Respondent submitted that the burden lies on a purchaser of a property to ensure that he has carried out thorough due diligence. That due diligence would require the Appellant to seek a green card to establish the history of the owners and to determine the actual owner of the parcel. That the Appellant was required to determine how the vendor had acquired the suit parcel. That Regina Akinyi made a false representation as the owner of the suit parcel which amounted to fraud. That the Land Registrar was liable for failing to investigate the documents produced to effect the transfer of the suit parcel, leading to an improper and unprocedural transfer and issuance of title deed. That under Section 26 of the Land Registration Act, the title of Regina Akinyi was impeachable on the ground of misrepresentation and being acquired through an illegal, unprocedural or corrupt scheme.

Issues for Determination

1. Whether the 1st Respondent had no locus standi to bring the suit

Even though the 1st Respondent intimated in his statement of defence that he would raise a preliminary objection to strike out the suit, he failed to do so. The 1st Respondent also failed to raise the issue of the *locus standi* at any point of the trial, and the issue was not dealt with by the Learned Magistrate. The 1st Respondent instead chose to belatedly raise the issue in his Memorandum of Appeal.

On whether the 1st Respondent has lost his opportunity to raise the issue of *locus standi*, Mrima J. in **Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR** held:

“On an equal footing, the argument that the issue of *locus standi* was not raised before the trial court in the first instance cannot stand. I take that position since the issue was raised in the Memorandum of Appeal and both parties responded to it in their respective submissions and made references to judicial decisions on the same. The failure to raise the matter before the trial court, although inappropriate, does not therefore amount to a bar against the same being raised on appeal especially when the same was raised timeously and with liberty to all parties to respond to it. Further the issue of *locus standi* is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without *locus standi* in

a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. *Locus standi* relates mainly to the legal capacity of a party. The impact of a party in a suit without *locus standi* can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of *locus standi* becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

The issue of *locus standi* has been raised by the Appellant in his Memorandum of Appeal, and since the issue of *locus standi* goes to the heart the validity of a suit in its entirety, it must be determined at the earliest opportunity presented to the court.

Regarding the *locus standi* of a party filing a suit involving a deceased’s estate, the court in *Hawo Shanko v Mohamed Uta Shanko* [2018] eKLR held:

“The general consensus is that a party lacks the locus standi to file a suit before obtaining a grant limited for that purpose. This legal position is quite reasonable in that if the Plaintiff or applicant has not been formally authorized by the Court by way of a grant limited for that purpose, then it will be difficult to control the flow of Court cases by those entitled to benefit from the estate... It is the Limited grant which gives the plaintiff the locus to stand before the Court and argue the case... One has to first obtain a limited grant that will give him/her the authority to file the suit.”

The 1st Respondent stated in his witness statement that he had done the succession process till completion, which would mean that he had obtained a grant of letters of administration intestate. The Appellant in his statement of defence denied the claim and that the 1st Respondent was the administrator of the estate of the late Celestine Ajode Okoth and put him to strict proof thereof. The onus was therefore on the 1st Respondent to present the relevant grant that bestowed upon him the *locus standi* to bring the suit. No such proof was forthcoming from the 1st Respondent. The only conclusion to be made is that, on a balance of probability, the 1st Respondent had not obtained a limited grant or grant of letters of administration that would enable him to file this suit relating to the estate of Celestine Ajode Okoth.

Therefore, the suit as initiated was void *ab intio* and all orders flowing from the proceedings have no legal effect.

I do grant orders setting aside the judgment and striking out/dismissing the 1st Respondent’ suit and costs are awarded to the Appellant.

DATED AND DELIVERED THIS 6th DAY OF MARCH, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

M/S ODONGO FOR APPELLANT

MR OTIENO FOR RESPONDENT