



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 126 OF 2018

JAMES LANYO ODENYO.....1ST APPELLANT

SUSAN ATIENO ODENYO.....2ND APPELLANT

VERSUS

GORBETY AKINYI OORO.....1ST RESPONDENT

LAND REGISTRAR KISUMU.....2ND RESPONDENT

AREA ASSISTANT CHIEF KONYA.....3RD RESPONDENT

[Being an appeal arising from the ruling of the Hon. YALWALA in KISUMU

CMC LAND CASE NO. 419 OF 2018 delivered on 27th November 2018]

JUDGMENT

On 27th November 2018 the learned trial magistrate dismissed the Plaintiff's application dated 21st September 2018.

1. The Plaintiffs, **JAMES LANYO ODENYO** and **SUSAN ATIENO ODENYO**, were dissatisfied with the said Ruling, hence this appeal.

2. Through their Memorandum of Appeal, the Appellants raised 8 issues which can be summarized as follows;

(i) The trial court failed to sufficiently take into account the evidence and the submissions;

(ii) In arriving at the decision that the Appellants had not made out a case against the Respondents, the trial court grossly misdirected itself;

(iii) The trial court erred in law and fact by failing to find that the Appellants had bought the disputed parcel of land;

(iv) The trial court disregarded annexures which the Appellants had provided;

(v) The trial court disregarded evidence of the 1st Respondent's illegal sale of the disputed land, to strangers;

(vi) The trial court failed to appreciate the fact that the 1st Respondent was willing to refund the purchase price to the Appellants;

(vii) The trial court ignored the fact that the 1st Respondent had illegally and fraudulently acquired the title deed for the suit parcel of land;

(viii) The Ruling was against the weight of evidence.

3. The application which was the basis upon which the Ruling in issue arose had two limbs to it.

4. In the first part, the Appellants sought a Temporary Injunction against the 1st Respondent, to restrain him from entering upon, encroaching, trespassing, constructing and/or in any other manner, interfering with the Appellants' right of ownership of the suit parcel of land known as **KISUMU/KONYA/2738**.
5. It was the Appellants' further prayer that the 1st Respondent be restrained from their illegal possession of, or the selling of the suit land.
6. In the second part, the Appellants had sought an order against the 1st Respondent, compelling him to sub-divide the suit land and to give to the Appellants the portion which they are entitled to.
7. When canvassing the appeal the Appellants indicated that '*the suit property*', being **L.R. NO. KISUMU/KONYA/2738**, had originally belonged to **NAFTALI ONDU ODIA** (Deceased).
8. The Appellants said that the said suit property was later inherited by **GLADYS JUMA ONDU** (Deceased).
9. The Appellants said that prior to the demise of Gladys Juma Ondu (hereinafter "*Gladys*") she entered into an Agreement with the Appellants.
10. Pursuant to the said Agreement, Gladys would transfer a portion of the suit property to the Appellants, if the Appellants constructed a house for her son.
11. The Appellants' case was that they met their side of the bargain, by constructing a house for the son of Gladys.
12. However, before the said Gladys could perform her side of the bargain, by transferring a portion of the suit property to the Appellants, she passed away.
13. Thereafter, the Appellants tried, in vain, to have the suit property transferred to them.
14. And it was the Appellants' case that the 1st Respondent, **GORBERTI AKINYI OORO (IN THE ESTATE OF GLADYS ONDU and HESBON ONDU)**, had fraudulently transferred the suit property to her name.
15. The Appellants said that the transfer was fraudulent because it was not obtained through a Succession Cause.
16. Accordingly, the Appellants asked this Court to review the Ruling of the trial court.
17. In answer to the appeal, the 1st Respondent, (who gives her name as **GORRETY AKINYI OORO**) submitted that the learned trial magistrate gave due consideration to all the evidence tendered, together with the submissions made by all the parties.
18. In her considered view, the Ruling in issue had properly captured the whole essence of the relevant land law.
19. I have given due consideration to the appeal before me. I have, (in the process of the said consideration), re-evaluated all the evidence on the record.
20. In determining this appeal, I have reminded myself that this matter arose from an Interlocutory Ruling. Therefore, it was of utmost importance that this court must refrain from making final findings, as the substantive case was still pending at the Magistrate's Court.
21. In the Complaint, the Appellants stated, (at paragraph 3) that they entered into a Sale Agreement with Gladys Juma Ondu and Hesbon Otieno Ondu.
22. The date of the said Sale Agreement was given as being 24th May 2002.
23. The purchase price was cited as having been Kshs 100,000/=. However, it was also indicated that the purchase price was to have been paid through the construction of a house for **HESBON ONDU**.
24. A perusal of the Sale Agreement reveals that it was unsigned by the parties named in it.
25. Therefore, as the learned trial magistrate held, the unsigned document;

"cannot be the basis of a claim of title to land."
26. I find no error in that pronouncement.
27. In any event, the said Sale Agreement cites the owner of the suit property as **GLADIS ONDU**, who is described as "*the Sole Owner*."
28. Therefore, it is not clear how the said property was being sold to the Appellants by two persons.

29. The Application for Consent of the Land Control Board cited the registered proprietor of the suit property as **GLADIS JUMA ONDU**. The said citation is in line with the Sale Agreement, (which had names Gladis as the sole owner).

30. Nonetheless, the Application for Consent of the Land Control Board was also unsigned.

31. As the learned trial magistrate said, it is doubtful that the unsigned Application would give rise to legal rights and obligations.

32. The trial court had also noted that the evidence tendered by the Appellants showed that the suit property had already been sub-divided.

33. The Appellants have not challenged that finding of the trial court.

34. In the event, it does appear that the title of the suit property does not exist anymore.

35. Therefore, I find that the learned trial magistrate did not err when he held that;

“... any orders purporting to restrain activity in respect of Land Parcel No. Kisumu/Konya/2738 will serve no purpose, and shall be issued in vain, as there is no such land in existence as of now.”

36. Having given due consideration to the submissions made before me, I find no merit in the Appeal.

37. In the event, the appeal is dismissed, with costs to the 1st Respondent.

DATED, SIGNED and DELIVERED at KISUMU

This 19th day of **November** 2019

FRED A. OCHIENG

JUDGE