



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELCA CASE NO. 23 OF 2019**

**PETER AKAMA MUDIWO.....APPLICANT**

**VERSUS**

**FRANCIS OMONDI ONIALA**

**GEDION OCHIENG' MALALA**

**LAND REGISTRAR KAKAMEGA.....RESPONDENTS**

**JUDGEMENT**

The appellant above not being satisfied by the judgment and decree of the honourable Senior Resident Magistrate Hon. Cheruto C. Kipkorir at Senior Principal Magistrate's Court at Mumias in SPM ELC No. 105 of 2018 made on 21/6/2019 appeals against part of the said judgment and decree on the following grounds:-

1. That the learned trial magistrate failed to appreciate the fact the appellant purchased one acre and a half acre out of L.R. No. South Wanga/Bukaya/566 on 11/2/2015 when it was registered in the name of the 2<sup>nd</sup> respondent.
2. That the learned trial magistrate failed to appreciate the fact the appellant did not participate in the transfer of the title from the name of the first registered proprietor to the 2<sup>nd</sup> respondent's name.
3. That the learned trial magistrate failed to appreciate the land register of the L.R. No. South Wanga/Bukaya/566 that was adduced as evidence to arrive at a correct decision.
4. That the learned trial magistrate abused her discretion in condemning the appellant to pay costs to the 1<sup>st</sup> respondent.

The appellant prays for:-

- (a) Setting aside part of judgment and decree of Mumias SPM ELC No. 105/20/2019 in terms of costs of the suit against the appellant.
- (b) The appellant be granted costs of this appeal.

The appellant submitted that he purchased one and a half acres out of the then out of L.R. No. South Wanga/Bukaya/566 on 11/2/2015 when it was registered in the name of the 2<sup>nd</sup> respondent. That he was an innocent purchaser for value hence unfairly condemned to bear the costs of the trial.

The 1<sup>st</sup> respondent submitted that, the suit land herein South Wanga/Bukaya measured 8.5 acres and was registered in the name of Oyale Chesa, the father of the 2<sup>nd</sup> defendant who voluntarily gave at a value, 5.0 acres to Yustinus Oniala Ogutu, the father of the plaintiff. That both the said Oyale Chesa and Yustinus Oniala Ogutu, died before the actual sub division and transfer of the 5.0 acres had been effected to Yustinus Oniala Ogutu but all the requisite requirements and payments including consents had been lawfully applied for and obtained. That the survey was done and mutation executed to subdivide as such into parcel Number 914 and 915 in their names. That all that was outstanding was the actual registration of the two titles into the names of the said parties with 5.0 acres going to the father of the plaintiff and 3.5 acres remaining in the name of the father of the 2<sup>nd</sup> defendant. That at the time of the demise of the two parties, the late Yustinus Oniala Ogutu has settled in his portion measuring 5.0 acres and his family has since occupied and used the said portion to date pending the issuance of a title. Indeed, the said Yustinus Oniala Ogutu, his wife and children had been buried in the said portion of land and have been in actual occupation and used uninterrupted since his demise to date. That there was never any dispute regarding ownership and size of the portion of the suit land that was occupied and used by the family of the late Yustinus Oniala Ogutu when both were still alive. That the 1<sup>st</sup> and the 2<sup>nd</sup>

defendants committed a serious offence with the provisions of the Law of Succession, by intermeddling with the property that was registered in the name of Oyale Chesa, by purporting to have the same transferred directly into the name of the 2<sup>nd</sup> defendant, subdivided and a portion sold to the 1<sup>st</sup> defendant without obtaining letters of administration in respect of the estate of the late Oyale Chesa. That the title in the name of the 2<sup>nd</sup> defendant and consequent transfer to the 1<sup>st</sup> defendant was done irregularly and unlawfully and the 2<sup>nd</sup> defendant had no capacity to transfer, subdivide and sell the suit property or any portion of it whatsoever and their titles are therefore null and void ab initio and should accordingly be revoked. That all that was outstanding was the actual subdivision and transfer as expressed by both parties voluntarily, into the name of the late Oyale Chesa and Yustinus Oniala Ogutu. That the entire process that led to the acquisition of the titles by the 1<sup>st</sup> and 2<sup>nd</sup> defendants was fraudulent considering that other than failure to undertake prior succession process, there was no lawful survey exercise that was done and the defendants did not seek and obtain any consents to subdivide and transfer the suit property.

This court has considered the appeal and the submissions therein. The appellant prays for setting aside part of judgment and decree of Mumias SPM ELC No. 105/20/2019 in terms of costs of the suit against the appellant. Section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya, provides as follows with regard to costs:

*“ (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:*

**Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”**

In the case of Party of Independent Candidate of Kenya vs Mutula Kilonzo & 2 others the court held that:

*“...it’s clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs in a matter in which the trial judge is given discretion...but this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”*

In **Orix Oil (Kenya) Limited vs. Paul Kabau & 2 Others (2014) eKLR** the court stated:

**“...the court should have been guided by the law that costs follow the event, and the Plaintiff being the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied the costs or the successful issue was not attracting costs. None of those deviant factors are present in this case and the court would still have awarded costs to the Plaintiff, which I do.**

In the instant case the appellant submitted that he did not participate in the transfer of the title to the 2<sup>nd</sup> respondents name but he was an innocent purchaser for value. I find that the appellant ought to have done due diligence in the said land transaction. One the land was occupied at the time of the sale and it is clear from the record that succession had not been done and the original owner Oyale Chesa Mukotsa had died. I find that *the award of costs in a matter in which the trial judge is given discretion and in this case the judicial discretion was exercised upon grounds on which a reasonable man could come to the conclusion arrived at. I find that the trail magistrate did not err in awarding the said costs against the appellant in her judgement. I find this appeal is not merited and I dismiss it with costs.*

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF JUNE 2020.**

**N.A. MATHEKA**

**JUDGE**