



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT APPEAL NO. 7 OF 2012

LAZARUS OMBEGO KOMBO APPELLANT

VERSUS

SOSPETER KIBANGA 1ST RESPONDENT

ONYANCHA OMOGA 2ND RESPONDENT

JUDGMENT

1. The appellant was the plaintiff in Nyamira Chief Magistrate's Court Civil Case No. 30 of 2010. The appellant by a plaint filed in the lower court claimed that his deceased father and the 2nd respondent jointly owned Plot No. 25B Kebirigo Market. That following the death of the appellant's father, the appellant alleged the 2nd respondent sold the said Plot No. 25B Kebirigo Market to the 1st respondent and failed to account for sale proceeds to the plaintiff. In the suit in the lower court the appellant prayed for judgment for orders:-

- 1. A permanent injunction restraining the 1st defendant, his agents and assigns and/or representatives from entering, occupying, operating the premises on Plot No. 25B.**
- 2. An order compelling the 2nd defendant to share the sale proceeds of Plot No. 25B with the plaintiff.**
- 3. Costs of the suit.**

2. The trial magistrate after hearing the plaintiff on his evidence and the defendants, dismissed the plaintiff's case with costs holding that the plaintiff had failed to prove his case on a balance of probabilities. The trial magistrate held that the doctrine of survivorship was applicable such that when the co-joint owners died, the 2nd defendant as the surviving joint owner became entitled to the whole. The magistrate further held the plaintiff lacked the *locus standi* to bring the suit and that the suit was misconceived and devoid of any merit.

3. The plaintiff being dissatisfied with the judgment of the lower court has now appealed to this court against the whole judgment of the trial magistrate and sets forth the following grounds of appeal in the Memorandum of Appeal filed on 18th January 2012.

- 1. The learned trial magistrate grossly misdirected himself by failing to evaluate the evidence as against the defence.**
- 2. The learned trial magistrate grossly misdirected himself by failing to see that the evidence and the exhibits produced by the appellant had weight against the respondents**
- 3. The learned trial magistrate misdirected himself in treating the oral evidence before him**

- superficially and consequently coming to a wrong conclusion on the same.**
4. **The learned trial magistrate grossly misdirected herself in ignoring the principles applicable in entering judgment in a land case.**
 5. **The learned trial magistrate grossly misdirected himself in ignoring the authorities referred to in the written submissions presented and filed by the appellant.**
 6. **The learned trial magistrate grossly misdirected himself in failing to give reasons for his judgment.**
 7. **The learned trial magistrate erred in law by dismissing the suit with costs without any sufficient grounds.**

4. On the direction of the court the parties argued the appeal by way of written submissions. The appellant filed his submissions on 21st December 2015 while the respondents had filed theirs on 14th August 2015. It is evident through the memorandum of Appeal and the submissions by the appellant that the appellant faults the trial magistrate's treatment and evaluation of the evidence tendered before him. This court will therefore be required to re-evaluate the evidence to determine whether the magistrate arrived at the correct findings both of fact and law in reaching the decision that he did.

5. It is now settled law that the first appellate court is obligated to re-evaluate the evidence in the lower court both on points of law and facts, to satisfy itself that the lower court arrived at the appropriate conclusions. An appellate court, however will not ordinarily interfere with a trial court's findings of fact unless it is demonstrated the same were not based on evidence or it is shown the trial court acted on wrong principles in reaching the findings it did.

6. The court of Appeal in the case of **Jabane –vs- Olenja [1986] KLR 661** accepted the proposition that an appellate court has power to interfere with a trial court's findings of fact in appropriate circumstances. **Hancox J. A** in the lead judgment stated:

“I accept this proposition, so far as it goes, and that this court does not have the power to examine and re-evaluate the evidence and the findings of fact of the trial court in order to determine whether the conclusion reached can stand - See- Peters – vs- Sunday Post [1958] E. A 424. More recently, however, this court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – See Ephantus Mwangi –vs- Duncan Mwangi Wambugu [1982-88] 1 KAR 278 and Mwanasokoni –vs- Kenya Bus Service [1982-88] 1KAR 870.”

7. In the present case the plaintiff contends that his father who is deceased (Nicholas Kombo) was the owner of the suit premises. To support this contention the plaintiff produced a copy of a receipt issued by the County Council of Nyamira dated 28th October, 2007 which indicated the plaintiff's deceased father was the owner of Plot no. 25. The same was marked as P.ex 2.

8. The plaintiff relied on Pex. 2 which indicated that as at 28th October 2007 the plaintiff's deceased father was shown by Gusii County Council as the owner of Plot No. 25 Kebirigo but the records of plots showed that there were Plot No. 25A and 25B at Kebirigo. To which plot did this receipt refer to? The plaintiff further relied on the evidence of PW2 who testified that he was a tenant of PW1's father at Plot No. 25B and used to pay rent to PW1's deceased father and later to the deceased widow. The witness did not however exhibit a lease agreement as relates to the tenancy but tendered receipts of payments he made to the council as Plot rent and business permit. The plaintiff did not tender any documentation to show that the deceased (his father) was the owner and/or a co-owner of Plot No. 25B.

9. The 2nd defendant on the other hand is the uncle to the plaintiff. He contended that there was actually an original plot known as Plot No. 25. The said plot was divided into Plot No. 25 (A) and Plot No. 25 (B) the latter whereof is the suit premises. The 2nd defendant stated that Plot No. 25 (A) went to the

plaintiff's deceased father and the suit premises (Plot No. 25 B) was jointly owned between himself (2nd defendant), Mabwonga and Ondari Obwoga. The 2nd defendant testified that both Mabwonga and Ondari Obwoga who were joint owners with him of Plot No. 25B died leaving him as the sole beneficiary of Plot 25B. The 2nd defendant sold the plot to the 1st defendant vide the sale agreement which was produced in evidence as D.Ex No. 2 for a consideration of kshs. 650,000.00. The 2nd defendant further testified that the plaintiff's deceased father (Nicholas Kombo) had no share in the suit premises and infact he had no building in the suit premises.

10. To support this contention the 2nd defendant produced DEx. 3 a certificate emanating from Nyamira Town Council which showed that as of 25th March 2010 the 1st defendant was the registered owner of the suit premises. Furthermore a public notice published by the town council of Nyamira addressed to all plot owners in Kebirigo Market dated 15th June 2007 showed that the suit premises as at that time was owned by the 2nd defendant together with Mabwonga and Ondari Obwoga while Plot No. 25(A) was owned by one James Mokaya Ochieng. The plaintiff had the burden of proving that his deceased father was a co-owner of the suit property with the 2nd defendant and on the evidence the plaintiff did not discharge this burden. He who alleges bears the burden to prove. The plaintiff did not prove on a balance of probability that his deceased father was co-proprietor with the 2nd defendant of the suit premises. The 2nd defendant proved on a balance of probability that he was indeed a joint owner of the suit premises with the said Mabwonga and Ondari Obwoga such that when his joint owners died he was in law entitled to the whole property. **Halbury's Laws of England – 4th Edition – Re Issue Vol. 16 (2) paragraph 613 at page 424, states as follows as regards joint ownership of properties:-**

“...Where, however two or more persons purchase property in their joint names or transfer property into their joint names without making an express declaration as to their beneficial interests and contribute the purchase money or property in equal shares, they hold the property as joint tenants with benefit of survivorship both at law and in equity, unless there is evidence of a contrary intention on their part at the time of purchase or transfer or there are circumstances from which such an intention can be inferred.”

11. In present case, there is evidence that the suit property was owned by 3 proprietors jointly, being the 2nd defendant, Mabwonga and Ondari, Obwoga, the 2nd defendant survived the other two proprietors and consequently by application of the doctrine of survivorship the 2nd defendant became the sole owner of the suit premises. The 2nd defendant in the premises was entitled to sell the suit property to the 1st defendant as he did. The transfer of the Plot No. 25B was duly effected to the 1st defendant by the county council. No evidence was tendered to show that the 1st defendant purchased the plot fraudulently and indeed the evidence pointed to him being an innocent purchaser for value.

12. I have considered the appellant's grounds of appeal in the context of the evidence that was adduced before the trial court which I have carefully evaluated. I am satisfied the trial magistrate properly evaluated the evidence and arrived at correct findings of fact and law. However, the trial magistrate erred in holding that the plaintiff lacked the locus standi to sustain the suit on behalf of his deceased, father's estate. The grant of Letters of Administration Ad Litem issued by the court in Kisii Succession Cause No. 34 of 2010 on 2nd February, 2010 to Lazarus Ombego Kombo were for the purposes of filing suit as personal representative of the estate of Nicholas Kombo Ombonga (deceased). These letters of administration Ad Litem gave authority to the plaintiff to sue on behalf of his deceased father's estate. He therefore had locus standi. This error by the trial magistrate did not affect the final result that the plaintiff had not proved his case on a balance of probabilities. The trial court was justified in dismissing the plaintiff's suit.

13. In the result it is my finding and holding that the appellant's appeal lacks merit and the same is ordered dismissed with costs to the respondents.

Judgment dated, signed and delivered at Kisii this 8th day of April, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

..... for the appellant

..... for the 1st respondent

..... for the 2nd respondent

J. M. MUTUNGI

JUDGE