



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 18 OF 2019

FADHILI MUDAKI RASHID.....APPLICANT

VERSUS

FRANCIS MMBULIKA OKENE

ETAM ASARA OKENGE

THE HON. ATTORNEY.....RESPONDENTS

JUDGEMENT

The appellant being dissatisfied with the whole of the judgment of Hon. L. Nabibya (PM) delivered on 4th June, 2019 vide Civil Case No. 68 of 2018 now appeals against the whole of the said judgment and sets forth the following grounds:-

1. The learned trial magistrate erred in dismissing the appellants defence and counterclaim even after holding that the respondent did not have capacity to sue on behalf of the late Gerishom Enavaya.
2. The learned trial magistrate erred in law by entertaining the respondent's claim as it had become apparent to her that the issues raised by the respondent were issues that concerned an estate of a deceased person and could only have been ventilated in the Kakamega High Court Succession Cause No. 134 of 2012 and not in the Hamisi PMs Court Civil Case No. 68 of 2018.
3. The learned trial magistrate erred in failing to hold that the title in the name of Miriam Mwaniga (deceased) in respect of land parcel Maragoli/Mbale/1538 was good title and therefore protected under section 61 and 62 of the Registration of Title Act and section 26 of the Registered Land Act.
4. The learned trial magistrate erred in law in misinterpreting the law in regard to the person of the appellant as an administrator of the estate of Miriam Mwaniga (deceased) having been appointed so and confirmed by the same court in Hamisi PM Succession Cause No. 9 of 2017.
5. The learned trial magistrate erred in law in failing to appreciate that the late Mirima Mwaniga had legally purchased the land.
6. The learned trial magistrate erred in law and fact by failing to recognize and appreciate the fact that the respondent had his own distinct land known as Mbale/Maragoli/1539 as opposed to the one the appellant was claiming as an administrator of the estate of Mariam Mwaniga.
7. The learned trial magistrate erred in law and fact by interrogating the transfer of the suit land into the name of Mariam Mwaniga (deceased) when the appellant was neither privy to the transaction nor a party during the purchase and eventual transfer of the suit property into Mariam Mwaniga's name.
8. The learned trial magistrate erred when she did not evaluate or consider the evidence of DW1 and the respondent.
9. The learned trial magistrate erred in law by arriving at a wrong conclusion that the title in the name of Mariam Mwaniga was not good title in the absence of the evidence of the Land Registrar.
10. The learned trial magistrate erred in law and fact by entertaining rather extraneous issues which were not germane to the case presented before her.

11. The learned trial magistrate otherwise erred by holding that the appellant had not proved his counter-claim on a balance of probability as required by law.

12. The learned trial magistrate otherwise misapprehended the law as against the evidentiary material presented to her.

The appellant therefore, asks the honourable court;

a. To allow the appellant's appeal.

b. Set aside the judgment of the Trial Magistrate delivered on 4th June, 2019 and issue the following orders.

i. An order for eviction of the respondent and his relatives/proxies or agents from land parcel No. Maragoli/Mbale/1538.

ii. Costs of the respondent's suit in Hamisi Civil Case No. 68 of 2018, the costs of the counter-claim and costs of this appeal.

iii. Any other or further order the court may deem just to grant in the circumstances.

The appellant submitted that the court having held that the respondent did not have capacity to sue, it ought to have struck out his case. The appellant being the administrator to the estate of Mariam Mwaniga had correctly approached the court for orders of eviction and injunction. That it follows that the court having found that the respondent had no capacity to sue on behalf of Gerishom Ekene, it would thus have proceeded to determine the issues raised by the appellant in his counter claim.

This court has carefully considered the appeal and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, 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.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The Judge in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

I have perused the records of the lower court and it is a finding of fact that Mariam Mwaniga is the registered proprietor of Land parcel No. North Maragoli/Mbale/1538. The appellant testified that Mariam was his daughter and became the registered owner of the suit land on 27th December 2004. That the 1st defendant in the lower court case one Etam got registered on 24th September 2003 and then transferred it to Miriam. From the evidence it is not disputed that the plaintiff and the 1st defendant are sons of the late Gerishom who died on the 24th May 1999 and who was the registered proprietor of the suit land. The suit land was later transferred to the 1st defendant without going through the succession process and the 1st defendant does not dispute this. He then transferred the same to Miriam. A copy of the register was produced to confirm the said transfer. Indeed the trial magistrate stated in her judgement that;

“In his own testimony the 1st defendant admitted not to have done succession before transferring the land to the 2nd defendant's daughter. It means he acquired no right to deal with Gerishom's estate in any way including selling and/or transferring any part thereof. Am also aware that there may be other interested parties in the said estate and this court cannot grant eviction orders without hearing such a case substantively.”

I find that the trial magistrate did consider the counter claim and reached a finding hence disallowing the same. I find the transfer of the said

title to the appellant' daughter was done unprocedurally and cannot stand. I find that the learned trial magistrate did not err in failing to hold that the title in the name of Miriam Mwaniga (deceased) in respect of land parcel Maragoli/Mbale/1538 was good title

In the case of Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision by the Trial Magistrate was judiciously arrived at. I find this appeal is not merited and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 28TH DAY OF JULY 2020.

N.A. MATHEKA

JUDGE