



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 5 OF 2019**

*(Being an appeal from the Judgment and decree of Hon. W. K. Chepseba CM in Busia CMCC No. 265 of 2017 delivered on 16/5/2019)*

**BENEDICT BARASA OLAIMO .....APPELLANT**

**VERSUS**

**DAVID OYE ASHIOYA .....RESPONDENT**

**J U D G E M E N T**

1. The Appellant being dissatisfied with the judgment of the Honourable Magistrate delivered on 16/5/2019 filed this appeal on the following grounds;

- 1) The learned trial magistrate erred in law and fact in failing to evaluate and consider the Appellant's evidence in totality.
- 2) The learned trial magistrate erred in law and fact in failing to find that the Appellant had proved his claim against the defendant on balance of probabilities.
- 3) The learned trial magistrate erred in law and fact in finding that L.R. No. SOUTH TESO/ANGOROM/11225 was legally transferred to the defendant.
- 4) The learned trial magistrate erred in law and fact in finding that Mr. Okutta Advocate witnessed an agreement in respect of South Teso/Angorom/11225.
- 5) The learned trial magistrate erred in law and fact in failing to find that the defendant had no capacity to deal in L.R No. South Teso/Angorom/11225.
- 6) The learned trial magistrate erred in law and fact by failing to find that the defendant's actions were contrary to section 45(1) and 55 of the law of Succession Act.
- 7) The learned trial magistrate erred in law and in fact in allowing the counterclaim that was not proved to the required standard.
- 8) The learned trial magistrate erred in law and fact in basing his judgement in theories and hypothesis that flew in the face of evidence before him.
- 9) The learned magistrate erred in law in altering the standard of proof in civil cases with regard to issues that were before him.
- 10) The learned trial magistrate erred in law and fact in failing to consider the exhibit tendered or produced in court by the Appellant.
- 11) The learned trial magistrate erred in law and fact in failing to accord Appellant an opportunity to call the land registrar as a witness and yet he had listed him as a witness.
- 12) The trial magistrate erred in law and fact by allowing the Respondent to lead his witnesses in evidence in chief before testifying which is contrary to the rules of procedure.

2. A brief background of the case before the subordinate court was that; the disputed parcel of land No. South Teso/Angoromo/11225 was

registered in the name of Joseph Okoro Olaimo – deceased. The Appellant’s claim is that the Respondent acquired title to the suit land after the demise of the deceased without letters of administration having been taken out. He therefore pleaded that the process of that acquisition was fraudulent and he asked the court to issue him with orders for:

**(a) A permanent injunction on the suit land and eviction.**

**(b) Costs of the suit.**

3. During the trial, the Appellant called two witnesses in support of his case. The Appellant stated that his brother Joseph Okono – deceased who owned L. R. South Teso/Angorom/6301 died leaving no family. That he visited the lands office and discovered that the Respondent had changed the title to 11225 and transferred the same to his name in 2014. He also adopted his witness statement wherein he stated that the deceased never informed the family of selling the suit title to the Respondent nor did the Appellant sell the same. The Appellant wondered how the deceased resourmiced from his death, signed and transferred the land to the Respondent.

4. In cross-examination, the Appellant said he was not aware that L.R. No. 6301 was subdivided in the year 2004 to create 4 titles. The Appellant stated he was aware the Respondent had purchased one plot only not two plots from the deceased. He also denied the deceased signature appearing on the agreement for sale of the suit title. The Appellant was then shown a letter for the map plan dated 1/12/2015 drawn by the Respondent asking for reconstruction and the reissue of the title.

5. Mariam Imere Olaimo who is a sister to the Appellant and Joseph – deceased gave evidence as **PW2**. She adopted her witness statement made on 24/10/2017 wherein she stated that she had accompanied the Appellant to the lands office on 14<sup>th</sup> November 2016 and discovered that the Respondent had transferred the land to himself on 23/12/2014. That the suit title South Teso/Angorom/11225 should be cancelled for having been acquired fraudulently.

6. The Respondent in denying the claim against him filed a defence and counter claim on 12/10/2018 and proceeded to call 4 witnesses in support of his claim. The County Surveyor testifying as DW1 stated that he obtained a sub-division scheme drawn 2005. **DW1** said he also found unsigned receipts for the scheme dated 19/5/2005. He authorized the implementation of the scheme exhibited as Nos 2, 3, and 4. That he went to the ground and picked out the plot and gave it a number L.R. 11225/South Teso/Angoromo. It is his evidence that the correction of the error was done procedurally and there was no fraud.

7. Pascal Barasa who is a brother to the Appellant and Joseph – deceased in his testimony said that he took out letters of administration of his father’s estate and shared out their land to all his brothers. According to him, the Respondent took care of the funeral expenses and memorial service of Joseph Okono – deceased. He stated that Joseph did not have any complaints against the Respondent neither is the Respondent’s wall built over the graves of their deceased relatives. That the Appellant has no right to remove the Respondent from the suit land.

8. In cross-examination, **DW2** said the Respondent purchased two plots – L.R No. 6441 and 11225. That the Respondent paid for both parcels and he cleared the ground without any complaint from Joseph. That there are three people staying in between the Respondent and the Appellant.

9. The Respondent testifying as **DW4** stated that he was introduced to the seller by Mr. Okutta advocate (**DW3**) who had earlier bought a plot from the same person. That he made enquiries and found it was a valid investment. They negotiated the price and he agreed to buy 0.074Ha to be curved from L.R No. 6301 for a price of Kshs.125,000. Subsequently an agreement was drawn and executed on 20/12/2004 (**Dex 1**). The Respondent’s evidence is that Mr. Okutta and Joseph carried out the sub-divisions and the new number 6441 was registered into the Respondent’s name. He produced a copy of the mutation form as **Dex 2**.

10. The Respondent continued that Joseph expressed the desire to add him more land so they did another agreement on 25/5/2005. That the portion sold was to be added to the earlier one. He produced the evidence of payment for this second portion as **Dex 7** which he said was witnessed by the wife of Joseph. The Respondent added that the Appellant was by then making efforts to block Joseph from selling more pieces of land and he proceeded to register a caution on it. That a Misc. Application No. 158 of 2005 was filed to remove the said caution (**Dex 8**).

11. That Joseph Olaimo drew a sketch/mutation (**Dex 9**) which left out the 2<sup>nd</sup> portion and which error was verified by the physical planning scheme of South Teso/Angoromo/6441. That the scheme plan was paid for by Joseph on 19/5/2005. The Respondent later sold L.R. No. 6441 to a Mr. Odipo in 2015 and Mr. Odipo has since put up a permanent wall around the plot. That the Appellant was misled to believe that it is the Respondent who put up the wall. The Respondent stated that he developed the second portion with residential units in 2006. That he applied for rectification in 2015 when upon verifying that he had been given plot ‘C’. He contends the rectification was done above board as the seller was paid for all the land transactions. It is the Respondent’s case that the Appellant has no right over South Teso/11225. In cross-examination, the Respondent answered that he stays on L.R 11225 and got the title on 13/6/2016 measuring 0.055ha. He did not have minutes of the Land Control Board but he had a consent. He closed his case.

12. The trial magistrate in his finding observed that the Appellant’s case was hinged on fraud whose the particulars were pleaded in the plaint. That the Appellant did not produce any evidence of fraud. Secondly, the Appellant did not know the parcel number fenced from the one the Respondent is occupying. He therefore found that the plaintiff’s case was not proved and proceeded to dismiss it with costs. The honourable magistrate allowed the Respondent’s counter-claim with costs.

13. The Appellant raised 12 points in his ground of appeal. I have grouped the grounds into 3. Grounds 1, 2, 6 and 9 raises similar issues so I shall treat them as one ground. The second ground will be grounds 3, 4 and 5 of the Memo of Appeal and the last ground is numbers 10, 11 and 12.

14. Did the trial court fail to evaluate and consider the Appellant's evidence in totality? The trial magistrate in his determination stated that the Appellant's claim was hinged on fraud and there was no evidence adduced to prove the particulars of the fraud alleged. I have looked at the plaint filed on October 2017 where at paragraph 7 pleaded that **"The plaintiff further avers that after plaintiff/beneficiary – issued with the fake title deed on 13/6/2016 he has commenced erecting a permanent wall and other development on suit land South/Angoromo/11225"** and gave the particulars of the fraud as:

- (a) *Falsely pretending to be the legal administrator in the estate of the deceased Joseph Okoro Olaimo.*
- (b) *Transferring the whole parcel of land without proper procedures of the law of succession.*
- (c) *Registering the estates of the deceased directly when he knew that the deceased had died.*
- (d) *Presenting fake documents before the land registry and transferring the deceased's property into his names.*

15. The question arising for determination is whether or not the Appellant proved the particulars of fraud enumerated above. From the evidence adduced, the green card does show that the Respondent was registered as the owner of the suit title South Teso/Angoromo/11225 on 23/12/2014 which date was after the demise of Joseph Okoro Olaimo. The Appellant produced a burial permit showing date of death as 21/5/2012. The Appellant stated further that no one in the family had taken letters of administration in respect of the estate of Joseph Okoro Olaimo save for the limited grant he took out on 21<sup>st</sup> September 2017. The Appellant thus shifted the burden on the Respondent to show how he acquired title to the suit land after the demise of Joseph Okoro.

16. The Respondent in explaining how he got his title relied on several documents *inter alia*;

- (a) *Agreement dated 25/05/2005.*
- (b) *Scheme plan for L.R South Teso/Angoromo/6441.*
- (c) *Payment dated 19/05/2005 for vetting of the scheme plan in (b) above.*
- (d) *Minutes of 30/6/12 and 8/6/2013.*
- (e) *Mutation form in respect of sub division of South Teso/Angoromo/6301 dated 25/11/2004.*
- (f) *Discharge voucher dated 6/9/2005.*

17. The Respondent in his evidence stated that he bought two plots from the deceased which measured 0.09 in total and he paid the entire purchase price as agreed. The first plot after submission was given a title No. South Teso/Angoromo/6441. The Appellant seems to have no problem with purchase of this first plot. The Respondent added that the suit plot bears title No. South Teso/Angoromo/11225 because he was advised by the Land Registrar, Busia that the numbers 6430, 6431 and 6441 were given in error as they also belong to other title deed holders in the same area thus holding them would be counterproductive.

18. From the titles presented in evidence, South Teso/Angoromo/6441 and South Teso/Angoromo/11225 measures 0.055ha. The agreement of 25/5/2005 stated that the portion being sold was in addition to the earlier one paid for. It described it as extending to the public road but the agreement did not give the size of the second plot. The sizes on the title thus contradict the defence affidavit evidence that he purchased a total of 0.09ha from the deceased on account that 0.07ha added to 0.055ha gives a higher value than 0.09ha.

19. The sketch plan dated 19/05/2005 prepared by Metro Consultants on behalf of Joseph Okoro – deceased showed the proposed subdivision of L.R 6301 into 3 i.e. **A = 0.175ha, B = 0.05ha and C = 0.09ha**. The positions were also drawn how the A, B and C would appear. Together this is a receipt No. 153746 issued to Joseph on 19/5/2005 for vetting of the subdivision of the scheme. The Appellant stated he was not aware that the deceased had subdivided the original title L.R. No. 6301. In light of the documents presented, it is not true that it is L.R No. 6301 which was charged to L.R 11225 as alleged by the Appellant.

20. Section 26 of the Land Registration Act provides thus;

**(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.**

**(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.**

21. The cited section provides grounds upon which a title can be cancelled. The Respondent submitted that he traversed the Appellant's

claim in his defence when he pleaded thus;

Paragraph 4 of the defence ***“That the transfers complained of herein were made in or about 2004 during the lifetime of the registered owner and done willingly and upon consent. There was no secrecy nor fraud involved as the agreements were made openly and before and advocate.”***

Paragraph 5, ***“That the defendant purchased two portions of land from the deceased and that the same constituted L.R. No. South Teso/Angoromo/6441 and another that gave rise to L.R No. South Teso/Angoromo/11225.”***

Paragraph 7, ***“That upon discovery that the series of L.R No. south Teso/Angoromo/6430 and 6431 has suffered a double allocation at the survey office (a mistake that is attributable to errors in that office and not caused by nor contributed to by the Defendant) the Defendant applied for issuance of a new replacement number for his title and was allocated L.R South Teso/Angoromo/11225.”***

22. I am in agreement with the decisions of ***Peter Kanithi Kumunya Vs Aden Guyo Havo NBI Civil Appeal No. 307 of 2008*** and ***Kirugi & Ano Vs Kabiya & others (1987) KLR 347*** which held that the burden of proof always rests on the person who asserts. The Appellant herein has produced evidence to show that Joseph Olaimo died in 2012 while the suit title was acquired by the Respondent in 2014 and or 2016. The Appellant ought to have gone a step further to demonstrate that the transfer was done without proper procedures of the law of succession. He did not endeavour to produce transfer documents executed in favour of the Respondent and or call the Land Registrar to produce the parcel file. The Appellant probably expected the court to exercise the benefit of doubt on how the Respondent got its title on his name. However this was not a criminal trial and claims based on fraud requires proof on strict liability and not by inference. The obligation to show that the Respondent was party to the fraud rested on the Appellant and which burden he has failed to discharge.

23. In the case of ***Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR*** it was held that,

***“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See Davy v Garrett (1878) 7 Ch. D 473 at 489.”***

24. In the instant appeal, the Appellant failed to demonstrate that;

(i) *The signature of the deceased sale agreement dated 25/5/2005 was forged.*

(ii) *The signatures of the deceased appearing on the mutation form dated 24/11/2004 and or the transfer documents for L.R No. 6441 were forged.*

(iii) *No transfer form in respect to L.R No. 11225 was produced to ascertain if there was any forgery.*

(iv) *No grant of letters of administration of the estate of Joseph Okono taken by the Respondent were produced.*

25. In regard to grounds 10, 11 and 12 of the Memorandum of appeal, Order 18 of the Civil Procedure Rules gives mode of hearing. It provides under 18(1) that the plaintiff has the right to begin and 18(2) requires the other party to then state his case. It does not specify that the defendant must begin his case before calling any witness. The Appellant did not also submit what prejudice he suffered.

26. In respect to not being allowed to call the Registrar as his witness, the Appellant on its own motion closed his case on 26/4/2018. The Appellant chose to apply to call the Registrar after the Respondent closed his case which was irregular. The Appellant could not re-open his case after the defence case was closed. I therefore find no error in the magistrate refusing to grant the same. Section 146 of Evidence Act referred to is self-explanatory i.e. it states that a witness be **recalled** not called.

27. In his submission, the Appellant raised the issue of whether L.R No. 11225 was irregularly created and transferred to the Respondent. He submits that L.R No. 6301 was intact until 2014 when it was irregularly subdivided and into several portions. There was produced a mutation form prepared in 2005 and signed by the deceased. As stated herein above, there is no evidence to support that the signature on that document did not belong to the deceased. Similarly, the Respondent produced transfer documents for sub-division No. L.R 6441 all dated the year 2005 corroborating his case that the sub-division of L.R 6301 was done in the year 2005 not 2014. The Appellant did not specify the action taken by Respondent which contravened the provisions of section 45 of the Law of Succession Act.

28. In light of the analysis herein above, I do not find any error on the part of the magistrate on his interpretation of the facts adduced before him and the applicable law. He was correct to find that the Appellant did not prove fraud against the Respondent to the required standards. I come to the same conclusion that this appeal lacks merit. I hereby dismiss it with costs to the Respondent.

**Dated, signed and delivered at BUSIA this 22<sup>nd</sup> day of October, 2020.**

**A. OMOLLO**

**JUDGE**