REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCA CASE NO. 20 OF 2019

MARKO ASUTSI LIHANDA

LAWI ASUTSI LIHANDA.....APPELLANTS

VERSUS

GEORGE NADIDA OMINGO.....RESPONDENT

JUDGEMENT

The 1st appellant being dissatisfied with the judgment of Honourable Malesi, Resident Magistrate, dated 2nd of July, 2019, wishes to appeal from the same on the following grounds:-

1. The honourable court erred in law and fact in holding that the plaintiff proved his case on a balance of probabilities.

2. The honourable court erred in law and fact in allowing a claim which was time barred.

3. The honouruable court erred in law and fact in holding that there was fraud committed by the 2nd appellant.

4. The learned magistrate erred in law and fact in failing to rule that the title held by the 2nd appellant was indefeasible and hence could not be struck out without following the legal process.

5. The learned magistrate erred in law and fact in holding that there was a valid contract between the plaintiff (Respondent) and the 1st defendant (1st appellant) capable of enforcement.

The 1st appellant prays that this appeal be allowed as follows:-

(i) Appeal be allowed and the decree of the lower court be set aside.

(ii) That costs of the appeal and lower court be granted.

On the 28th July 2019 the 1st Appellants appeal was consolidated with the Appeal No. 22 of 2019 where the appellant, being dissatisfied with the whole decision of Kakamega Chief Magistrate's Court made on 2nd July, 2019 in MC E & L Case No. 680 of 2018, the appellants who were the defendants in the said Kakamega Chief Magistrate's Court MCL & E Case No. 680 of 2018 hereby appeal against the said decision and all orders made pursuant thereto and sets forth the following as their principal grounds of appeal:-

1. That the learned trial magistrate erred in law and fact by holding that the transfer of L.R. No. Isukha/Shirere/2148 by the 1st appellant to the 2nd appellant was fraudulent, illegal and/or unlawful thus ordering the cancellation of title thereto and it reverts to 1st appellant's name and that the respondent is its lawful owner thereto when there is no evidence on record to support such finding.

2. That the learned trial magistrate erred in law and fact by holding that the cause of action arose on 23rd September, 2005 when there is evidence on record to show that there was no such cause of action.

3. That the learned trial magistrate erred in law and fact by failing to analyze the evidence on record in totality to arrive at a conclusion what the respondent had no enforceable rights over L.R. No. Isukha/Shirere/2148.

4. That the learned trial magistrate erred in law and fact by totally ignoring the appellant's evidence and ordered that title to L.R. No. Isukha/Shirere/2148 be cancelled, revert to 1st appellant and the respondent declared owner thereof when there is no evidence on record to support such finding.

5. That the learned trial magistrate's orders have caused grave injustice.

The appellants pray that the decision of Kakamega Chief Magistrate's Court MCE & L Case No. 680 of 2018 be set aside and orders made allowing the appellant's appeal with costs.

The appellants submitted that, by a plaint filed in the lower court at paragraph 4 thereof, the respondent pleaded that he purchased part of L.R. No. Isukha/Shirere/163 on or about 20th November 1978 from the 1st Appellant. When he gave evidence in the lower court, he said that the land he purchased was part of L.R. No. Isukha/Shirere/613. What he pleaded in the plaint is different from the evidence he adduced in court as those are two difference parcels of land. The learned trial magistrate erred by holding that the respondent had adduced documents showing that he purchased the land. This was wrong because the evidence he adduced was over L.R. No. Isukha/Shirere/613 and not Isukha/Shirere/163 that is in his plaint. Parties are bound by their pleadings and there is no way the respondent could escape from what he pleaded in the plaint. That he pleaded that the land was sub-divided and his portion given a new number viz Isukha/Shirere/2148. This means that it was L.R. No. Isukha/Shirere/163 that was sub-divided and L.R. No. Isukha/Shirere/2148 created. This is at variance with his evidence he adduced. He produced a copy of the green card showing that L.R. No. Isukha/Shirere/2148 was created out of L.R. No. Isukha/Shirere/613. The learned trial magistrate ignored these anomalies and declared that the respondent is the lawful owner of the land. Furthermore, no evidence is on record to show that the actual space he allegedly purchased is the same that was registered as L.R. No. Isukha/Shirere/2148.

They submit that there is evidence on record that the 1st Appellant entered into a sale of land agreement on 20th November 1979. This was agricultural land. They never attended any land control board for its consent to sub-divide and transfer any portion thereof to the respondent. This was a controlled transaction subject to the provisions of the Land Control Act Cap. 302 Laws of Kenya and in particular Section 6 thereof. The respondent could not enforce the agreement. His recourse should have been to recover the purchase price, though again, still he could not because he started claiming the land 30 years later. It was, therefore, wrong for the trial magistrate to hold that the appellants relied on technicalities to try and take away the land from the respondent. It is the law and in particular section 6 of the Land Control Act which is applicable and not technicalities.

The learned trial magistrate also held that the transfer of the land by the 1st Appellant was fraudulent. No evidence is on record to show that there was any fraud. The appellants attended the relevant Land Control Board for its consent to transfer the land and the consent was obtained. The land legally belonged to the 1st appellant and no fraud was involved. It had not been transferred to the respondent at all. Also, the respondent filed his statement saying that he fenced the land and went away. When he was cross examined, he admitted that he has never been in possession of the land. He could not, therefore, say it is his. Since he never occupied the land, there was no trust created for him to claim it was his.

That the transaction between the 1st appellant and respondent was voided six months after 20th November, 1978 when he allegedly bought the land as per section 6 of the Land Control Act, which is clear that such transactions, if within six months of the making of sale of land agreement, no consent of the Land Control Board is obtained, such agreement is void for all purposes. Section 4 of the Limitation of Actions Act also provides that after the end of six years, an action cannot be brought to recover a sum of money recoverable by written law or contract. By the learned Trial Magistrate holding that the cause of action arose 29th September, 2005, he made an error.

The appellant s adduced evidence to show that they have been in physical occupation of L.R. No. Isukha/Shirere/2148. The respondent has never been in occupation of it. It is on record that the 1st appellant legally transferred the land to the 2nd appellant. The said 2nd appellant produced title deed showing that he is the registered owner of the land. The title deed is conclusive evidence of ownership unless it is proved that he acquired it by fraud, misrepresentation to which he was party, illegally acquired or unprocedurally as per the provisions of Section 26 of the Land Registration Act. That the land legally belongs to the 2nd appellant. By ordering the cancellation of his title and he be evicted there from will cause him suffer damage. He has been in possession of it and developed it and stays there with his family. This will cause a lot of injustice to him.

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 the 2nd appellant is the registered proprietor of Land parcel No Isukha/Shirere/2148. The respondent produced two agreements which are handwritten and one dated 19th January 1979 and 25th March 1979 confirming that they entered into the land sale agreement with the 1st Appellant. There is also evidence that the parties had a dispute at the Kakamega Municipal Land Disputes Tribunal and the 1st Appellant did not dispute this sale. Indeed l agree with the trial magistrate that the respondent proved his case on a balance of probabilities and any subsequent sale of the same piece of land to the 2nd Appellant was fraudulent. The trial magistrate held as follows;

> *"The defendant well aware of the transaction he had entered into with the plaintiff went ahead and transferred the suit property to the 2nd defendant."*

On the submissions that what he pleaded in the plaint is different from the evidence he adduced in court as those are two difference parcels of land and that learned trial magistrate erred by holding that the respondent had adduced documents showing that he purchased the land. That that was wrong because the evidence he adduced was over L.R. No. Isukha/Shirere/613 and not Isukha/Shirere/163 that is in his plaint. I find that this is a mere typographical error and the documents speak for themselves.

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 26TH OCTOBER 2020.

N.A. MATHEKA

JUDGE