

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.34 OF 2010

PAMBA ONGWENO AMILA.....APPELLANT

VERSUS

JOHN JUMA KUTOLO.....RESPONDENT

JUDGMENT

The Appellant, Pamba Ongweno Amila filed suit against the Respondent, John Juma Kutolo seeking judgment to be entered in respect of a parcel of land registered as LR. No. Samia/Luanda Muydoma/1537 (hereinafter referred as the suit parcel of land). The Appellant alleged that the Respondent had transferred to himself the entire suit parcel of land yet he had only sold him part of the parcel of land. The Appellant averred that the Respondent transferred the said parcel of land by fraudulently indicating to the Land Registrar that he had purchased the entire parcel of land from the Appellant. The suit parcel of land measures 1.32 hectares. The Appellant therefore asked the court to order the Land Registrar to rectify the title in respect of the suit parcel of land to indicate the proper acreage that the Respondent purchased. The Respondent filed a defence to the suit. He averred that he was properly registered as the owner of the suit parcel of land after he purchased the same and had the same transferred to him. The Respondent denied the Appellant's assertion that he had fraudulently obtained registration of the suit parcel of land. In that regard, he put the Appellant to strict proof thereof.

After hearing the respective witnesses of the Appellant and the Respondent, the trial court dismissed the Appellant's suit with cost. At the relevant part of the judgment, the trial court made the following observations:

“On the next issue as to whether the suit land was legally transferred to the defendant, I have no doubt in finding that the transfer was legally done. There was an application for land control board consent, followed by letter of consent. The plaintiff admits that he went to the land control board Funyula and went to the lands office where he signed documents. He cannot therefore turn round and claim that he did not know what he was signing. There were proper documentation which preceded the registration of the suit land. The plaintiff had capacity to transfer the suit land which had been legally registered in is name as per copy of the register produced before court.”

The Appellant was aggrieved by this decision and has filed an appeal to this court.

In his memorandum of appeal, the Appellant raised six (6) grounds of appeal challenging the decision of the trial court in dismissing his case. He was aggrieved that the trial court had failed to take into consideration the fact that the suit parcel of land had been transferred from the name of a deceased to the Respondent. In his view, this was proof of fraud. He took issue with the fact that the trial court had taken into consideration extraneous facts to arrive at its decision. He was aggrieved that the trial court had disregarded the testimony of his witnesses who were present when the agreement was reduced into writing. He faulted the trial court for not taking into consideration the fact that no transfer could be effected in respect of a parcel of land that was registered in the name of a deceased person without the sanction of the court in a succession cause. He was finally aggrieved that the trial court had failed to take into consideration the evidence that he had adduced which was to the effect that he had been duped into signing documents which did not reflect the nature of the transaction that he had entered with the Respondent. For these reasons, the Appellant asked the court to allow the appeal, set aside the decision of the trial court and substitute it with a decision of this court upholding his claim.

At the hearing of the appeal, this court heard oral rival submission made by Mr. Oyagi for the Appellant and by Mr. Manwari for the Respondent. This court has carefully considered the said submission. It has also had occasion to read the pleadings filed by the parties to this appeal and also the proceedings before the trial court. This being a first appeal, the duty of this court is to reconsider and to reevaluate the evidence adduced before the trial court, and subject it to fresh scrutiny in light of the submission made on this appeal, and thereafter reach its own determination. In doing so, this court is required to always put in mind the fact that it neither saw nor heard the witnesses as they testified and therefore cannot be expected to make any comment regarding the demeanour of the witnesses (See **Selle –Vs- Associated Motor Boat Company Limited [1968] EA 123** at page 126).

Having reevaluated the evidence adduced before the trial court, it was apparent to this court that there were certain facts which were established during the said trial. It was established that the Appellant sold to the Respondent the suit parcel of land which was described in the agreement dated 21st November 1996 as measuring 1.32 hectares. The purchase consideration was stated to be Kshs.50,000/-. On the execution of the agreement (before the Assistant Chief of Mudoma Sub-location) the Respondent paid to the Appellant a sum of Kshs.30,000/-. A further sum of Kshs.15,000/- was paid to the Appellant on 23rd April 1997. The final installment was paid to the Appellant on 29th August 1997. All these transactions were reduced into writing and were duly witnessed. At the time the Respondent entered into the agreement with the Appellant, the suit parcel of land was registered in the name of the Appellant. The allegation by the Appellant that the land was registered in the name of a deceased person is not therefore supported by evidence.

The claim by the Appellant that he had only sold part of the suit parcel of land to the Respondent is also not supported by evidence. The document that the Appellant relied on in support of his claim which was to the effect that he had sold part of the parcel of land is an obvious forgery meant to dupe the court. The trial court, and this court too, is not persuaded that the document that the Appellant relied on to support his claim that he had sold part of the suit parcel of land to the Respondent is genuine. The Appellant on his volition signed the application for consent to the Land Control Board at Funyula. He attended the Land Control Board meeting. Consent for the transaction was issued by the said Land Control Board. The Appellant signed the transfer form transferring the suit parcel of land to the Respondent. The Respondent was thereafter registered as the owner of the suit parcel of land. It is this court's determination that the Respondent was properly registered as the owner of the sit parcel of land.

The claim by the Appellant that he was duped into transferring the entire parcel of land yet he had agreed only to sell and transfer part of the suit parcel of land is not supported by evidence. It is this court's considered view that the Appellant appears to be one of the sellers, more common nowadays, who sell their land, use the money, and after exhausting the money, look for ways to get back into the very same parcel of land that they had sold in a willing seller willing buyer basis.

The upshot of the above reasons is that the grounds of appeal put forward by the Appellant in support of his appeal lack merit and is hereby dismissed with costs. This court cannot fault the decision of the trial court. The same is upheld. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 25TH DAY OF AUGUST, 2013.

F. TUIYOT

JUDGE