



**REPUBLIC OF KENYA**

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

**ELCA CASE NO. 10 OF 2020**

**PROTUS ODUOR MALALA.....APPELLANT**

**VERSUS**

**WANYANGU LIVINGSTONE ONJALA.....RESPONDENT**

**JUDGEMENT**

The appellant being aggrieved by the judgment of the Honourable T.A. Odera, SPM delivered on the 9<sup>th</sup> day of April, 2020 vide Mumias MCL & E Cause No. 36 of 2018 prefers an appeal against the judgment as follows;

1. That the learned lower court erred in law and fact by holding that the payment of moneys to DW3 by the deceased Lawrence Mubatsi Kundu was not a refund of the consideration earlier paid by the respondent.
2. That the learned lower court erred in law and fact by failing to find that the respondent obtained a title deed to L.R. No. North Wanga/Namamali/1598 despite not having paid the total consideration of Ksh. 140,000/=.
3. That the learned lower court erred in law and fact by failing to hold that the respondent obtained title deed to L.R. No. North Wanga/Namamali/1598 illegally through fraudulent and corrupt means by unduly inducing Bashiri Ekesa Okumu to distribute the parcel of land to him vide Kakamega High Court Succession Cause No. 410 of 2004 in spite of there being no privity of contract between them.
4. That the learned lower court erred in holding that the respondent had established a case for issuance of a permanent injunction against the appellant with regard to L.R. No. North Wanga/Namamali/665 when such a title was not in existence at the time of the judgments.

The appellant prays that the learned lower court's judgment be set aside and quashed and that the appeal herein be allowed in toto by upholding the counter claim in the lower court.

The appellant submitted that the dispute herein revolves around the true nature of the refund of Ksh. 100,000 received by Jane Nasurumbi Wanyangu (DW3) (who is the mother of the respondent) from the late Lawrence Mubatsi Kundu, who had earlier in the year 1988 purchased 2 acres (Plot 1598) from the late Okumu Wambundo Watsabina (the father to Bashiri Ekesa Okumu). That, Lawrence sold plot 1598, in the first instance, to the respondent on the 26<sup>th</sup> day of April, 2007 and then to the appellant on the 26<sup>th</sup> day of November, 2007. According to the appellant the sale to the respondent was frustrated by the community who did not welcome the respondent amongst them and that the refund was what the respondent had so far paid to Lawrence as purchase price. But the respondent and DW3 maintain that Lawrence had received 2 distinct amounts of Ksh. 140,000 (as purchase price) and Ksh. 100,000 (for filing of succession proceedings in respect of the estate of the late Okumu) and that the refund was in regard to the filing of succession proceedings although no such evidence was adduced. The appellant holds this position taken by the respondent as being untenable for the reasons that, there is no documentary evidence to show that the respondent paid Lawrence the full purchase price of Ksh. 140,000/=. There is further no documentary evidence supporting the fact that the respondent gave Lawrence an amount of Ksh. 100,000/= as fees for filing of succession proceedings. DW3 conceded in her evidence that the acknowledgements she signed concerning the refund did not indicate that the same was in respect of moneys paid towards the filing of succession proceedings,

That granted, it is trite law that title is indefeasible; however, Section 26 (1) (a) and (b) of the Registration of Law Act is an exception to this rule. Thus, the appellant urges this honourable court to impeach the title given to the respondent on the following grounds that the respondent becoming the registered proprietor of plot 1598 without completing payment of the purchase price of Ksh. 140,000/=. The respondent becoming the registered proprietor of plot 1598 despite receiving the refund of the purchase price he had so far paid and the respondent colluding with Bashir Echesa to deprive the appellant of plot 1598 via succession proceedings whereas there was no privity of contract between the deceased Okumu and the respondent to warrant him obtaining title to plot 1598. That, despite assertions by the respondent that he got the title legally via succession proceedings, nevertheless, the dispute between the parties herein is such that it is only the ELC Court, and not the Probate Court, which has the jurisdiction to arbitrate over the same.

The respondent submitted that he obtained title to land parcel N/Wanga/Namamali/1598 following a lawful succession process undertaken vide Kakamega High Court Succession Cause No. 410 of 2004. He exhibited all the supporting documents (list and the copies at page 6-15 of the record). None of the said documents was disputed or challenged at trial or at all. It is in fact instructive to note that the appellant himself unsuccessfully challenged the process of succession affirming the legality thereof. The process does not become illegal or fraudulent on account only that the result does not favour a particular litigant. That the appellant made no attempt or at all at trial to prove the alleged fraud so as to bring himself within the provisions of section 26 of the Land Registration Act No. 3 of 2012. Further that, the appellant cannot seek to rely on corruption as a ground of appeal when he neither pleaded nor relied on the same at trial as to benefit from section 26 (1) (b) of the Land Registration Act.

That the respondent testified and proved that he purchased the land in question and paid the purchase price fully. The seller's sole contention was that the local community constitute a ground for annulment of title to land. Even if it were true, which is not, that the entire purchase price was not paid, the seller's remedy would have been to claim the balance. Lawrence Mubatsi Kundu never made any such claim for the entire period of the dispute while he lived until his unfortunate death when the hearing of the respondent's case had commenced. He was listed as the appellant's witness No. 3 and recorded his statement in which he does not at all expressly deny that the whole purchase price was paid. The trial court after hearing all the witnesses particularly the defence witnesses concluded that the refund made was not purchase price but part of the sum paid to the seller to finance the process of acquisition of title. That the trial magistrate correctly rejected the evidence of DW1, DW2 and DW4 on the alleged refund of purchase price but correctly accepted the evidence of DW3, the recipient of the refund who confirmed that the same was for succession and not purchase price. That there is therefore no error in the determination made by the trial court on the said twin issues and her judgment ought not to be disturbed.

That the remedies sought are in respect of land title number N/Wanga/Namamali/1598 which is a creation of the old title N/Wanga/Namamali/665. The entire reference to old title N/Wanga/Namamali/665 instead of N/Wanga/Namamali/1598 is a mere slip that does not affect the substance of the judgment. The same is in fact correctable administratively under order 45 rules 1 and 2 as the same clearly constitutes a clerical error. The respondent fully relies on this submission and his submissions before the trial court dated 24<sup>th</sup> September, 2019 and filed on even date which were deliberately omitted from the record of appeal a copy whereof is attached hereto for easy reference. The respondent therefore humbly prays that the appeal be dismissed with costs as the same is not merited.

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 respondent is the registered proprietor of L.R. No. North Wanga/Namamali/1598. The respondent produced the agreement dated 26<sup>th</sup> April, 2007 confirming that they entered into the land sale agreement with the said Lawrence Mubatsi Kundu. From the evidence on record I find that, Lawrence sold plot 1598, in the first instance, to the respondent on the 26<sup>th</sup> day of April, 2007 and then to the appellant on the 26<sup>th</sup> day of November, 2007. The respondent was indeed the first buyer. The respondent testified that Lawrence received two distinct amounts of Ksh. 140,000 (as purchase price) and Ksh. 100,000 (for filing of succession proceedings in respect of the estate of the late Okumu) and that no money was refunded back to him. I find that the respondent obtained title to land parcel N/Wanga/Namamali/1598 following a lawful succession process undertaken vide Kakamega High Court Succession Cause No. 410 of 2004.

Indeed I 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 was fraudulent. The trial magistrate held as follows;

*“on whether the agreement between the defendant and Lawrence is enforceable against the plaintiff as per the counterclaim, I have already found that the contract between the plaintiff and Lawrence was valid. The latter agreement can therefore not be enforced against the plaintiff as he was the first purchaser and not a party to the said agreement but to the estate of Lawrence as was held by the judge. The counterclaim must fail”*

On the submissions that what he pleaded in the plaint is different from the evidence he adduced in court as those are two different parcels of land I find that this is a mere clerical error and the documents speak for themselves. The remedies sought are in respect of land title number N/Wanga/Namamali/1598 which is a creation of the old title N/Wanga/Namamali/665.

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 25<sup>TH</sup> NOVEMBER 2020.**

**N.A. MATHEKA**

**JUDGE**