REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Civil Appeal 96 of 1995

AMUGE ARAP LANGAT …….....APPELLANT

AND

1. **KIPRONO KABREBEREWO**
2. **KIPTOO**
3. **TOROITICH**
4. **JOSEPH KIPRONO …….....……..RESPONDENT**

(Appeal from the Judgment of the High Court of Kenya at Nakuru by Honourable Justice D. M. Rimita dated 31st January, 1995

IN

H. C.C. C. NO. 164 OF 1990)

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JUDGMENT OF THE COURT

This is an appeal from the judgment of the High Court of Kenya (Rimita, J.). Briefly the facts are that the appellant claims to be the registered owner of approximately 67 hectares (166 acres) of land known as Title No. Baringo/Perkerra 101/178 (hereinafter known as suit farm) in Eldama Ravine, since 1970 having lawfully bought the same from the Settlement Fund Trustees (the Trustees). The Trustees had asked him to pay a loan of Shs. 32,000/= in respect of which he produced photostat copies of 13 receipts (Ex. 1). He also produced a copy of a transfer executed in his favour by the Respondents' father after the father had accepted before the Trustees that he was unable to pay the loan and had agreed on the appellant's paying him Shs. 7,000/= which he did, to transfer to him the land together with the obligation to pay back to the trustees the aforesaid loan. This was in 1976. Surprisingly this copy of the transfer was not a part of the record of appeal before us. The appellant claimed that before the District officer and the representative of the Trustees there were also present the Respondent's elder son and the Chief.

The appellant had prior to the trial obtained an ex-parte judgment. In response to the respondent's application to set aside the ex-parte judgment the appellant had filed a replying affidavit to which he had annexed the photostat copy of an undated transfer of land in settlement scheme which purpoted to have

been certified on 17th March, 1986. This purpoted to be a formal transfer of the suit farm from the Trustees of the Scheme to the appellant in consideration of Shs. 7,000/=. In February, 1989, the Respondents invaded the suit farm. While the Criminal Trespass Case No. 444/89 against them was still pending the District Commissioner and the Chief had brought them back to the suit farm. The appellant in his plaint had sought permanent injunction to keep the Respondents physically out of the land and general damages.

The respondents' case is that the suit premises belong to their 88-year-old father Kapiebero Koibos(D . W. I) who formerly had 300 acres of land in the forest but later the government took his forest land and in exchange allocated him this comparatively much smaller land of 166 acres. The suit plot was at that time already surveyed with bounderies fixed when it was shown to the father by the Chief and the District Officer. Piped water had been installed by the Government to serve the whole settlement. The appellant had been the employee of the father. It appears from the evidence of the father that about 10 years earlier the appellant had attempted to get him to execute some document in some office in Nakuru but the father had refused to do so in the absence of his sons. The old man categorically denied that he signed any document in Nakuru or that he ever received any money from the appellant or that he had sold the suit land to the appellant. He was surprised how the appellant had obtained the title deed. He maintained that the appellant had obtained title to the land by fraud.

The respondents had pleaded in their defence that when the appellant took their father, Koibos, to the Trustees offices he fraudulently induced the latter to thump-print the transfer and/or allocation papers and thereby had obtained registration of the suit plot in his name and they counter-claimed praying for a declaration that the registration in the name of the appellant was obtained by fraud and therefore was null and void and for it to be cancelled and for a declaration that the suit farm be registered in the names of Kapiero Koibos and/or the respondents.

The learned trial judge after hearing the evidence given by the appellant and his one witness; and that by the respondents and their father and; having observed their demeanour on which he commented in his judgment disbelieved the appellant and his witness and believed the evidence of Koibos,the father (D. W. I), and his four sons, the respondents. He also made pertinent comments on the documentary evidence that was produced and particularly on the receipts and transfer of land in the Settlement Scheme and the absence of certain relevant documents such as the receipt for the payment of Shs. 7,000/=. He dismissed the appellant’s case for a permanent injunction against the respondents and for general damages and instead found that the suit farm was allocated to Koibos (the father) as compensation for his family land in the forest which had been acquired by the government and that the appellant had subsequently obtained registration of the suit farm in his own name through fraud. He gave orders accordingly.

There are ten grounds of appeal of which Mr. Kiplenge, advocate for the appellant, abandoned the first ground which had sought to question the authority of the trial judge to set aside an ex-parte judgment of a previous judge. The 2nd ground of appeal was conceded by Mr. Sheth for the respondents to the effect that Plot L. R. No. 615 and the suit farm Baringo/Perkerra 101/178 were in fact one and the same plot. Th consequence of this concession was that the findings of the trial judge relating to the bunch of receipts were rendered a misdirection on his part.

The 3rd ground of appeal complains that the trial judge had failed to find that the registration of the suit farm in favour of the appellant was a first registration. This point, it appears has been taken for the first time now in this appeal. As to whether it was a first registration or not is a question of fact and had to be proved by the appellant. The defence had pleaded that the appellant had obtained registration by fraud and had in consequence prayed in the counter-claim for the registration to be quashed and a new title to be issued in favour of the Respondent’s father. That was the time when the appellant in his reply to defence and defence to counter-claim ought to have as a matter of law pleaded first registration. That was not done, nor had this fact been pleaded in the plaint itself. Nor had the appellant in his evidence started that his was a first registration; nor had he questioned any of the respondents' on that allegation. In fact at the beginning of his cross-examination (P.87 of the record –2nd line of cross-examination) the appellant had said (quote) “I am the second registered owner” (unquote). There is no merit in this ground of

appeal and it is rejected.

There are two parts of the fourth ground of appeal. The 1st part claims that the judge had failed to find that the appellant had derived the title from Settlement Fund Trustees who had transferred the Title to him upon completion of the Loan. The transfer of title referred to in this ground is the one attached to the appellant's replying affidavit referred to earlier. This is a document which purports to transfer the suit farm to the appellant in consideration of Shs. 7,000/= paid by the letter to the Trustees. But in his evidence the appellant had claimed that he had paid Shs. 32,000/= to the Trustees. So why is that sum not stated in this transfer form as being the consideration paid by him to the Trustees. The appellant had claimed that he had paid Shs. 7,000 to Koibos,the father, but he did not produce any receipt for that payment.

Apart from the above serious discrepancy between the viva voce evidence of the appellant and his documentary evidence the transfer deed of the title itself is clearly a fake. The date of execution at the bottom of the first page is blank. On page 2 the officer administering the Fund is required to sign and affix the seal of the Settlement Fund Trustees to the transfer. Both his signature and seal are missing. Finally, the transfer has not been registered at the office of the Land Registrar. The space for that purpose and the space for the Land Registrar's signature are both blank. This transfer is a worthless document and the learned trial judge were properly declined to accept it as evidence of a lawful transfer.

Second part of the 4th ground complains that the trial judge had erred in failing to find that there was no privity of contract between the appellant and the respondents. Mr. Kiplenge did not address us on this issue, and wisely so, because what the appellant had all the time alleged was that there had been a contract between him and Koibos, the father. We reject the forth ground of the petition of appeal.

The fifth ground of appeal complains of misdirection in the holding that the suit farm had been given to Koibos free of any payment in exchange for land in the forest that he had supposedly given up to the Government. Mr. Kiplenge stressed the absence of documentary evidence to substantiate this allegation. Mr. Sheth, for the respondents, very rightly pointed out that since the respondents had claimed fraudulent registration on the part of the appellant and the appellant had failed to show that his was not a fraudulent registration then the evidence given by Koibos and the respondents must be accepted as the truth particularly in view of the fact that the appellant had admitted that he had bought the suit farm from Koibos. We, on our part, are satisfied that the trial judge who had the advantage of having heard and observed the demeanour of witnesses, on which aspect he had commented, had come to the right conclusions. We reject the fifth ground of appeal.

The rest of the grounds of appeal are more or less a repetition of the earlier grounds of appeal which we have dealt with above and are covered therein. The learned trial judge had already carefully dealt with the issues now raised in the grounds of appeal and except for the misdirection relating to the confusion created over the unexplained different plot numbers given to the suit farm and in consequence his views in respect of the receipts bearing Plot No. L. R. 615, we are unable to find any fault in his conclusions which are well supported by the rest of the viva voce and documentary evidence. As stated earlier the transfer claimed to have been executed in 1976 by Koibos to the appellant has not been made a part of this record. But the trial judge who had a sight of the photostat copy had commented on the fact that though it had purportedly been executed on 20th June, 1976, the witness to the execution had signed the document on 26th June, 1976 six days later which grave anomaly had not bee explained. We have no hesitation in accepting as proper the rejection of this document by the learned judge who had also correctly commented on the facts that no witness from the Settlement Fund Trustees or the Land Registrar had been called and that only photostat copies of all the documentary evidence had been produced.

We do not find any merit in this appeal and we reject it and confirm the judgment of the superior court. Cost of this appeal are awarded to the respondents against the appellant.

Dated and delivered at Nakuru this 27th day of September, 1996.

A. M. COCKAR

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JUDGE OF APPEAL

R. S. C. OMOLO

…….

JUDGE OF APPEAL

P. K. TUNOI

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR