



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT KISUMU

CIVIL APPEAL NO 22 OF 1986

MARK MUTSEMBI & OTHERS.....APPELLANT

V

ISAIAH ANDATI TITIYA.....RESPONDENT

JUDGMENT

The plaintiffs by their plaint filed in the High Court Kakamega claimed a piece of land from the defendant. They alleged that the defendant fraudulently cheated their father alleged to be blind, to thumb print papers and caused the transfer of 38 acres, as they say, to be registered in his name at a price of Kshs 7,400. They further claimed that the defendant did not pay the said amount and still wonder how 38 acres of land could be sold for the amount of Kshs 7,400. The plaintiff's further alleged that they did not know about the alleged sale until their father died. Because they do not have any other piece of land to go to, they are claiming that the land should revert to them to be inherited by those who have no land. They are pleading that they be allowed to refund the sum of Kshs 7,400 which they are ready, to the defendant. So they applied for an order of eviction of the defendant from the land and asked for perpetual injunction restraining the defendant and all those claiming under him from claiming interest in their father's land. They also claimed damages for trespass. In addition they prayed for orders for sub-division and transfer to the plaintiff parcel numbers, Butso/Ingotse/1064/1065/1068. A further prayer was for the court to order the refund to the purchase price.

The defendant in his defence refuted all that and stated that the father of the first, second, third and fourth and the husband of the fifth plaintiff's was an ex-chief who had vast land in two places. He was of sound mind and was never blind till his death. The Ex-chief divided his land and gave to his sons. In 1969 parcel No Butso/Ingotse/445 was sub-divided into five plots two which Nos 1065 and 1068 were sold to the defendant. He took possession in 1970. The plaintiffs' father died in 1979 and was buried in plot No Butso/Ingotse/1069 which is registered in the name of the fifth plaintiff, which is also occupied by the second plaintiff. The defendant states further that the first plaintiff sold the piece of land allocated to him and had sued other people claiming land given to them by the deceased. The defendant goes on to say that the deceased who was a member of the Land Board, sold many parcels of land and plots in Kakamega Municipality which sales went through the Municipal Board and other boards in the proper manner. He claimed that he paid the money in terms of the price pertaining at the time. He requested the suit to be dismissed with costs.

The parties appeared before the learned judge of Kakamega where an order by consent was recorded referring all matters in dispute to arbitration of four elders two to be appointed by each party with the District Officer of the area as the Chairman.

The matter was arbitrated upon when parties appeared with their witnesses. The decision of the arbitrators was filed in court within the time extended by the court.

The appellants were dissatisfied with the award and applied for it to be set aside. Their application was dismissed because their complaints did not comply with rule 15 of order 45 of the Civil Procedure Rules. The appellants have appealed to this court against the said dismissal.

The grounds of appeal are not clear but on the appellants being asked to state what was wrong with the ruling of the learned judge, they stated that the District Officer did not inform them of the decision of the elders, the written decision was contrary to the decision given by the elders and that they were not given chance to state their case.

The decision of the elders is not to be communicated to the parties by the panel but the award is filed in court for the court to pronounce. Then the aggrieved party has 30 days within which to file an application as provided by order 45 rules 16 and their application was dismissed. There is no ground for alleging that the D O failed to announce the decision of the elders as he is not entitled to do so.

On the question of not having been given chance to state their case, this is not so because on the heading of the arbitration proceedings there is a reference to four others. Since they have a common claim there was nothing wrong with them agreeing that one of them becomes their spokesman. In fact before this court, it is only the first appellant who spoke, the rest merely adopted what the first appellant said.

The claim that the sale price was inadequate, is unsound. The appellants are not in a position to challenge it at this stage. They claim that they never knew about it. The sale was by their late father and the respondent went into possession in 1970 during his lifetime. It may well be that the time, they could have objected to the sale of what would be their inheritance. But their claim under the custom is that their father could not disinherit them. This is not so because the fifth appellant said that her husband had more wives who were given pieces of land for themselves and their children. How come that it is only the fifth appellant and her children who were disinherited?

I am inclined to accept the defence that the appellants were given their portion of lands and sold them and, now, after their father's death, they want to claim what was sold by him, during his lifetime. This is not open to them at this stage. The decision of the elders is correct. The learned judge was right in dismissing their application to set aside the arbitration award, because the reason given were outside the arbitration award, because the reason given were outside order 45 rule 15 of the Civil Procedure Rules. This appeal has no merit, I would dismiss it with costs.

Nyarangi J A I agree.

I take advantage of Gachuhi J A's factual narration.

The two short questions raised are, first, whether the defendant fraudulently concealed from the panel of elders that one Mutsembi Nduku, the registered owner of land the subject matter of this appeal, was blind and illiterate at the time the transfer was executed to the defendant and that he, the defendant, knew the 3rd and 4th plaintiff, matters which the defendant ought to have disclosed. Secondly, whether the District officer as Chairman misconducted himself and so failed to understand the plaintiffs' case in their request for the court proceedings relating to the land which the late Mutsembi Nduku shared out to his sons to be produced to the panel of elders.

A reading of the arbitration proceedings does not suggest, in any way, that the plaintiffs pursued their averment in their plaint that Mutsembi Nduku was blind at the time the sale transaction was started and completed and the transfer executed. In his defence the defendant rejected the plaintiffs' claim as false and added that the prescribed procedure for registration of transfer was adhered to. The elders, who included the two selected by the plaintiffs specifically referred to the circumstances surrounding the transfer and stated that the deceased carried out all the transactions during the arbitration proceedings but the defendant has all the documents as proof thereof.

The 3rd and 4th plaintiffs were present during the arbitration proceedings but the defendant was not asked if he knew either or both. On the facts of this case, the answer to the first question is The second ground of complaint, in a nutshell, is that the chairman misapprehended the plaintiff's contentions based on records of surveys of the material land. That argument is wrong for this previous court proceedings. The chairman adjourned the proceedings and then telephoned the appropriate court about the files. Two files were produced to the panel where upon the panel suggested to the parties to produce documents in support of their argument. The defendant produced several documents. The plaintiffs did not produce several document. I cannot share the opinion of the plaintiffs that the chairman misconducted himself because there is no substance in this line of argument.

I have no hesitation in holding that the appeal ought be dismissed and as Apaloo J A concurs, the appeals is dismissed with costs.

That is the order of the court.

Apaloo J A I agree and have nothing to add.

February 20, 1987

NYARANGI, GACHUHI & APALOO JJ A