



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L APPEAL NO. 2 OF 2016

JOSEPH KOMEN SOMEK..... APPELLANT

VERSUS

PATRICK KENNEDY SUTER..... RESPONDENT

JUDGMENT

INTRODUCTION

1. The appellant and the respondent laid claim over a parcel of land known as **Moiben/Kimnai/497** situate in Stoton area of Elgeyo Marakwet District. The respondent based his claim on the fact that he was the owner of the suit land at all material times. However, sometimes in 1970, the appellant wrongfully and without any justification registered himself as the owner of the parcel of land in dispute. According to the respondent, the said registration was wrongful and therefore, the appellant held the land in trust for his benefit. Ultimately, the respondent prayed for the eviction of the appellant and the register to be rectified to reflect the respondent as the owner of parcel of land.

2. In a judgment delivered on 30th June 1995, the Resident Magistrate's Court at Iten found in favour of the respondent and proceeded to enter judgment in terms that the appellant had no right to the land as the registration was illegal. Ultimately, the court issued orders of eviction of the appellant and ordered the Land Registrar not to issue the title to the appellant.

3. The facts that were availed before the lower court are that the appellant is the registered owner of the suit land. The appellant's mother was a step sister to the respondent. The respondent's claim was that the appellant was fraudulently registered as the proprietor of the land but the plaint did not clearly state the particulars of fraud. The respondent claimed that the appellant was holding the land in trust for his benefit.

4. The principle issues in the appeal are whether the claim by the respondent was time barred and whether the Magistrate's Court had jurisdiction over the matter in view of section 159 of the Registered Land Act (repealed).

APPELLANT'S SUBMISSIONS

5. The appellant submits that the Learned Resident Magistrate erred in law and in fact in making a finding that the appellant has no right on the said land, yet the appellant is the absolute proprietor of the said land and is registered as such.

6. According to the appellant, the Record of Appeal shows clearly, on page 20, that he is the registered proprietor of Moiben/Kimnai/497 was, and he retains his original title document. The respondent himself

admitted in his evidence, (page 7 of the Record of Appeal) that "He (***the appellant***) then surveyed and took the title." In effect, if the appellant surveyed and took the title, then the Honourable Magistrate erred in finding that the appellant had no right on the said land. The relevant and applicable law then, the Registered Land Act Cap 300 Laws of Kenya (now repealed), clearly provided in section 27 (a) that:

Subject to this Act:

a) 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.

7. The Honourable Magistrate therefore erred and misdirected himself on this law. The Learned Resident Magistrate erred in law in making a finding for the eviction of the appellant out of the said land, yet he is registered under a first registration and there was no scintilla of evidence that he acquired the land fraudulently. Pursuant to section 143(1) of the Registered Land Act Cap 300, Laws of Kenya, such registration could only be cancelled if it was proved that the same was obtained by fraud or mistake. No such fraud or mistake was proved herein. In any event, section 159 of the Registered Land Act, Cap 300 Laws of Kenya was the applicable law at the time. On the effective date of 2.5.2012 when the Land Registration Act 2012 came into operation, Section 106 (3) of the same Act provided that:

“For the avoidance of doubt, any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under this Act.”

8. It is clear therefore that the applicable law is the Registered Land Act, Cap 300, Laws of Kenya.

9. The appellant further submits that that the Honourable Magistrate did not have jurisdiction to make a finding of eviction or rectification of the register and cites section 159 of the repealed Registered Land Act Cap 300 laws of Kenya.

10. Moreover, that the Learned Resident Magistrate erred in law in making a finding that the respondent is entitled to the said land without making a finding as to the basis of such a holding. Part of the judgement indicates that there was a meeting that required the appellant to leave the land, but this is not a legal basis to cause someone to leave land over which he is the registered proprietor. The judgement itself is sketchy and too general.

11. Of importance is the argument by the appellant that the Learned Resident Magistrate erred in law in not making a finding that the said suit is barred by the Limitation of Actions Act, Cap 22, Laws of Kenya. It is averred in paragraph 4 of the plaint, that in 1970, the defendant wrongfully and without any justification registered himself as the owner of Moiben/Kimnai/497 and therefore it is evident that the claim dates back to 1970. The plaint is dated 12.7.1994; and filed in Court on the same date. It was first in open Court on 28.10.1994. There is no evidence that leave was ever sought to file suit out of time. The Limitations of Actions Act Cap 22, Laws of Kenya, clearly spells out the law on this point in its section 7. It states:

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him.”

12. This suit was therefore not properly before the court. The cause of action accrued in 1970. Suit is filed 24 years later in 1994.

13. The ***gravamen*** of the appellant’s submissions is that the Learned Resident Magistrate erred in making a finding that the registration of the appellant is illegal when there was no evidence on record to warrant such holding. All the witnesses did not, and the pleadings do not show, that there were any particulars of illegality claimed.

SUBMISSIONS BY RESPONDENT

14. The respondent submits that this appeal is not properly filed before court as due procedure was not followed and therefore it cannot succeed. According to the respondent, the Magistrate was very right in cancelling the title upon realization that the same was registered on the Defendant's name by fraud. The law is very clear on the fact that a title acquired fraudulently may be revoked.

15. Section 26(1) of the Land Registration Act, 2012, states; The certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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 party or (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

16. The respondent further argues that the appellant was found to have acquired the title fraudulently and it follows therefore that he ought to vacate the suit land to pave way for the rightful owner, the plaintiff. On jurisdiction the respondent argues that section 11 of the Civil Procedure Act provides that; Every suit shall be instituted in the court of the lowest grade competent to try it except that where there are subordinate courts more than one with jurisdiction in the same district competent to try it, a suit may if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any such subordinate court provided that;

i) If a suit is instituted in a court other than a court of lowest grade competent to try it, the Magistrate holding such court shall return the Plaint for Presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no point of law involved or no other good and sufficient reason for instituting the suit in his courts; and

ii) Nothing in this section shall limit or affect the power of the High court to direct the distribution of business where there is the one subordinate court in the same district.

17. Further to this, the trial court had pecuniary jurisdiction to hear and determine this matter, the land is situated in Stoton area Elgeyo Marakwet District.

18. The learned Magistrate correctly found out that the suit land was registered to the defendant fraudulently and that he did this in order to sell it. The Defendant only joined his step-mother, sister to the Plaintiff and afterwards the Defendant decided to settle on the same land but that does not give him any right of ownership.

19. There was no defence on grounds of limitation of time and more so, there is no statement of defence in the record of Appeal. In any event, there is no time limit for the claim, the title was obtained in 1984. In paragraph 4 of the Plaint, the cause of action was clearly demonstrated.

20. The proceedings, pleadings and all the plaintiff's witnesses proved the illegality committed by the Defendant. The Defendant was welcomed in the suit land but went ahead and registered himself without any proof of ownership of the suit land. He does not own that land as he only came to live with plaintiff's sister.

ANALYSIS AND DETERMINATION

21. I have considered the appeal, the proceedings and evidence in the Lower Court and submissions by counsel and do find that the first issue for determination is whether the honourable Magistrate erred in law in not finding that the suit was time barred by virtue of the Limitation of Actions Act, Cap. 22, Laws of Kenya. This court has painstakingly gone through the record of appeal and the Lower Court file and finds that there is no statement of defence on record. It appears that the appellant did not file a statement of defence. Order 2, Rule 4 provides that the issue of limitation of time should be specifically pleaded and proved. Failure to plead limitation of time effectively denied the appellant the right to rely on the defence of limitation and therefore the honourable Magistrate did not err in failing to find that the suit

was time barred as the issue was not before him. This court could have made a finding on the issue of limitation of time if evidence was available. I do find that there was no material before trial court on the basis of which a finding on limitation would have been made. It trite law that limitation as regards fraud begins running when the fraud is discovered. There was no evidence of fraud and there was no evidence as to when it was discovered if any. Moreover, the respondent did not clearly bring out the issue of fraud in the pleadings and therefore, the respondent's claim was purely based on ownership and not illegality.

22. On jurisdiction, I do find that no material was placed before the Magistrate to enable him make a decision that he had no jurisdiction to make an order of eviction as section 159 of the Registered Land Act, Cap. 300 (repealed) did not bar the Magistrate's Court from issuing an order of eviction. The section only provided for percurring limitation. **The appellant did not tender any evidence in respect to the value of the property.** Section 159 of the Registered Land Act provided that:-

“Civil suits and proceedings relating to title to, or possession of land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered under this Act, or which is expressed by this Act not to require registration, shall be tried by the High court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrates Courts, or where the dispute comes within the provisions of section 3(1) of the Land Disputes Tribunals Act in accordance with this Act.”

23. The Honourable Magistrate made a decision that the appellant had no right on the land. I do find that the evidence on record showed that the appellant was the absolute proprietor of the said land. The appellant being the registered proprietor of the suit land the applicable law is the section 27 of the Registered Land Act, Cap. 300, Laws of Kenya (repealed) which is replicated in sections 24, 25 and 26 of *Land Registration (Act No.3 of 2012)*

a) *Section 24 (a) of Land Registration (Act No. 3 of 2012)* that provide: -

“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.”

24. The registration of the appellant as proprietors of the suit land, gives the appellant absolute proprietorship for the said parcel of land. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

S.25 (i) **“The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject:**

to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

25. The appellant produced the title deed and in terms of Section 26 (1) of the Act;

“The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer, or transmission by the proprietor 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 subject to the encumbrances, easements, restrictions and conditions contained and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

(a) **On the ground of fraud or miss-representation to which the person is proved to be a party**

to:

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

26. I do find that the appellant being the registered proprietor of the suit land and there being no evidence of fraud, the trial Magistrate erred in law in making a finding that the appellant had no right on the said land yet the material before court showed that the appellant was the registered proprietor of the suit land. I do agree with the appellant that there was no basis for the court to make a finding that the plaintiff is entitled to the land. Ultimately, I do find that had the Lower Court considered the material before it, it would no doubt have come to a conclusion that the respondent had no title to the property and therefore, was not entitled to the property in dispute. The court therefore, erred in holding that the respondent was entitled to the property and that the appellant was to be evicted. On the above ground, this appeal succeeds and therefore, the orders of the Resident Magistrate made on 30th June, 1995 are hereby set aside. The respondent to pay costs.

Dated and delivered at Eldoret this 9th day of February, 2018.

A. OMBWAYO

JUDGE