



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC APPEAL CASE NO.110 OF 2012
JOSEPH OWITI RAGOT.....APPELLANT
VERSUS
JULIUS ONYANGO OTIENDE.....RESPONDENT

JUDGMENT

1. Joseph Owiti Ragot, the Appellant, being dissatisfied with the judgment of Honorable S. Atonga, Principal Magistrate Kisumu, delivered on the 22nd June 2012 in Kisumu C.M. CC No.397 of 2010, **Julius Onyango Otiende –V- Joseph Ragot Owiti**, filed this appeal through the memorandum of appeal dated 6th September 2012 on the 7th September 2012. The appeal is based on the nine grounds reproduced herein below;

- i) The learned principal magistrate erred in law and fact by failing to appreciate that Obaso Ondu having died on 18.8.1978 could not transfer land to the respondent on 11.11.2003 without a grant being issued to the estate of the deceased.
- ii) The learned Principal Magistrate erred in law by failing to appreciate that without approval of land control board for the alleged transaction the same was void ab initio.
- iii) The learned principal magistrate erred in law by failing to appreciate fraud had been committed in the transaction that led to the transfer of land without any document to show correction of names of the appellant in the register.
- iv) The learned principal magistrate erred in law and fact by relying solely on the false evidence of the respondent against the solid evidence of the applicant.
- v) The learned principal magistrate erred in law and fact by relying solely on the false evidence on record that clearly pointed fraudulent transfer from the deceased and the applicant to the respondent.
- vi) The learned principal magistrate erred in law and fact by failing to appreciate that the respondent claimed to have purchased appellants share through third parties which was not allowed by law.
- vii) The learned principal magistrate erred in law by failing to appreciate that lack of transfer documents in the land registry file of LR KISUMU/OJOLA/1740 was a clear pointer towards fraud committed by the Respondent.

vii) The learned principal magistrate erred in law and fact by failing to appreciate that he had no jurisdiction to hear and determine the plaintiffs/Respondents' claim.

ix) The learned principal magistrate erred in law and fact by failing to consider the appellants counter claim and representations in court and instead believing wholly on the Respondent's witnesses and documents and representations."

The Appellant prays for the lower court judgment be set aside and judgment be entered in his favour in terms for the counter claim.

2. The court gave directions on the hearing of the appeal on the 30th January 2014 in the presence of counsel for both parties. Then on the 10th May 2016, directions on filing of written submissions on the appeal were given and the matter placed for mention on the 14th July 2016. That on the mention date, counsel for the Respondent requested for more time to file and serve their submission and another mention date of 6th December 2016 was fixed. That on 6th December 2016, the counsel for the Appellant requested a date for judgment after pointing out that Respondent's counsel, who was absent, had not filed their submissions as earlier directed. The matter was then fixed for judgment.

3. The Lower court case had been commenced by the Respondent through the plaint dated 23rd September 2010, in which he sought for an order of permanent injunction and eviction of the appellant from land parcel **Kisumu/Ojolla/1740**, general damages for trespass, and loss of income and costs. The Respondent had averred that he was the registered proprietor of the said land and that the Appellant had trespassed onto it on the 28th August 2010.

The Appellant filed a defence dated 9th November 2010 and amended on 15th July 2011 to include a counterclaim. He averred that the Respondent obtained registration with the suit land through fraud and prayed for the cancellation of the Respondent's title and ownership to revert as it was on 21st July 1978 and costs. The Respondent filed a reply to the amended defence and counterclaim dated 27th July 2011, denying that he got registered through fraud and prayed for the counterclaim to be struck out.

4. The counsel for the Appellant filed the written submission dated 14th July 2016 on principally on two grounds of jurisdiction and fraud as set out in grounds (viii) and (vii) respectively. The submissions are summarized as follows:

A. JURISDICTION:

- That Article **162(2) (b)** of the Constitution and **Section 13** of the Land and Environment Act bestows Jurisdiction on land matters on the Environment and Land Court, and therefore the lower court had no jurisdiction to hear and determine the suit.

B. FRAUD

- That the absence of transfer document filed in the land registry in respect to **Kisumu/Ojola/1740** was a pointer towards fraud by the Respondent and the learned trial Magistrate erred in law in failing to find so.
- That half share of the land belonged to a deceased person and no succession process had been undertaken in respect of his estate. The counsel referred the court to the case of **Mohamed Siaka Ali (through Mohamed Shaibu Shosi – Personal Legal Representative) –V- Sunpalm Limited & 3 others** [2015] eKLR where the court found a transfer that had been effected without land control board consent being obtained to have been irregular, illegal and therefore null and void and faulted the learned trial magistrate for not having arrived at a similar finding.

5. This being a first appeal, the court has a duty to re-evaluate the evidence tendered and come to its own conclusions. That in doing so, the court must be aware that it did not have the opportunity to see the

witnesses as they testified. The hearing of witnesses in the lower court commenced on the 16th September 2011. Both parties were presented by counsel. The Respondent testified as PW1, and he called Daniel Ochung Oluge who testified as PW2 as his witness. The Appellant testified as DW1 and called Peter Owiti Nyambok and George Gachiri [Land Registrar], who testified as DW2 and DW3 respectively. The Learned trial Magistrate rendered his judgment on 22nd June 2012 which is the subject matter of this appeal. The learned trial Magistrate correctly found that the Respondent's claim to the suit land was through the land sale agreements. The first sale agreement was between the Respondent and two vendors, namely George Onyango Obaso and Moses Okeyo Obaso and is dated 15th October 2001. The second sale agreement dated 7th November 2005 is between the Appellant and Dan Ochieng Otuge (PW2), and the third agreement dated 7th May 2005 is between the Respondent and the Appellant.

The three agreements are about the sale of the same land, **Kisumu/Ojola/1740**. The learned trial magistrate made reference to the evidence of the Land Registrar (DW2) and concluded that **“there is nowhere in his evidence that he disowned the title deed and search certificate which were produced in court as exhibit P1 and P2 as forged and/or fraudulently acquired by PW1.”** That while it is true that DW3 confirmed that the title deed and certificate of official search were issued from the Land Registry, and were therefore not forgeries, the Learned Trial Magistrate failed to address himself on the evidence tendered on how the suit land was transferred to the Respondent. The Land Registrar (DW3) did not confirm having traced any letters of administration or land control board consent that may have been used to transfer the land to the Respondent. The Land Registrar is reported to have stated as follows during cross-examination on that issue of consent;

“ I presume from the exhibit that both the owners may have gone to the land control to transfer because its not on record whose possession was transferred and again the record is silent.”

That had the learned trial magistrate considered that evidence against what the Appellant (DW1) and his brother (DW2) had told the court, he would have come to the conclusion that the Land was transferred to the Respondent without obtaining the Land Control Consent. That as confirmed by DW3 and from the copies of the green card, and title deed for land parcel Kisumu/Ojola/1740, the said land was first registered on the 21st July 1978 in the names of Obaso Ondu and Ragot Owiti. The person named Ragot Owiti is the same known as Joseph Ragot Owiti who was the Defendant in the lower court matter and the Appellant in this appeal. That none of the three sale agreements under which the Respondent claims to have bought the land through was signed by Obaso Ondu, who is reported to have died on the 18th August 1978, a fact that is confirmed by the certificate of death No.011386 issued on the 27th January 2011. The Respondent appear to have known about the death of Obaso Ondu as he stated in his evidence that the sale agreement of 15th October 2001 was signed by George Onyango Obaso. He further stated that **“George Onyango Obaso appeared as Obaso Ondu when we were signing the mutation form.”** The copy of the identity card for George Onyango Obaso indicates that he was born in 1974 and obviously could not have been the one known as Obaso Ondu. That even if he were, then he needed to have undertaken the process to correct his names in accordance with the law before he could transfer the interest over the land. That this court finds and hold that Obaso Ondu, who was the registered proprietor of half share of the suit land had died in 1978 and could therefore not have been then one who entered into the sale agreement of 15th October 2001 with the Respondent. That the said Obaso Ondu could not have been the one who transferred the land to the Respondent. That it is also clear no succession cause was filed in respect of the estate of the late Obaso Ondu and therefore George Onyango Obaso Moses Okeyo Obaso could not have transacted over the land on the basis of being the administrator of the estate. The said George Obaso and Moses Okeyo Obaso, not being in possession of a confirmed grant in respect of the estate of the late Obaso Ondu, lacked capacity to enter into any sale agreement over the sale of the suit land.

6. That having considered the grounds of appeal and the submission by the Appellant, the court comes to the following conclusions:

a) That the land sale agreement between the Respondent and the Appellant if any, did not receive

the mandatory land control board consent within six months contrary to the requirement of **Section 6 (1)** of the Land Control Act Chapter 302 of Laws of Kenya. That the absence of the consent made the sale agreement void and therefore could not be the basis of transferring land parcel **Kisumu/Ojola/1740**, or half of it, to the Respondent. That the registration of the Respondent as proprietor of the suit land or half of it, was therefore irregular, unprocedural and unlawful.

b) That George Onyango Obaso and Moses Okeyo Obaso had no confirmed grant in respect of the estate of Obaso Ondu, who was the registered proprietor of half share of land parcel **Kisumu/Ojola/1740**. That the two alleged vendors had no capacity to enter into a land sale agreement over the said land with the Respondent and or to transfer the land or half share of it to him. That the Respondent's registration as proprietor of the suit land or half share of the said land was unlawfully, irregularly and unprocedurally done.

c) That had the learned trial magistrate considered the two issues of absence of Land Control board consent and lack of confirmed grant in respect of the estate of the late Obaso Ondu, he would have come to the conclusion that the registration of the Respondent as proprietor of the suit land 11th November 2003 was irregular, illegal and therefore null and void. [see **Mohammed Siaka Ali (Through Mohamed Shaibu Shosi – Personal Legal Representative) –V- Sunpalm Limited & 3 others** [2015] eKLR J.

d) That it, follows therefore that the Respondent's suit against the Appellant fails and that the Appellant's counterclaim against the Respondent succeeds.

7. That flowing from the foregoing, the appeal succeeds with costs in this and the lower court and the judgment dated 22nd June 2012, is hereby set aside. That the court enters judgment for the Appellant in terms of the counterclaim with costs in this and the lower court.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 5TH DAY OF April 2017

In presence of;

Appellant Absent

Respondent Present

Counsel Mr. Nyanga for Appellant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

5/4/2017

5/4/2012

S.M. Kibunja Judge

Oyugi court Assistant

Respondent present

Mr. Nyanga for the Appellant

Respondent in English.

My advocate has not come

Court: Judgment dated and delivered in open court in presence of the Respondent and Mr. Nyanga for the Appellant