Khaukha v Korosia & 12 others (Civil Appeal 84 of 2018)
[2023] KECA 578 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 578 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 84 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MAY 12, 2023

BETWEEN

ELIUD WEPUKHULU KHAUKHA ..... APPELLANT

AND

FRED WANYAMA KOROSIA ..... 1ST RESPONDENT

NELSON MASIKA ..... 2ND RESPONDENT

ZEBEDAYO MATIASI KOROSI ..... 3RD RESPONDENT

JOSEPH OGINGA ..... 4TH RESPONDENT

JOB WANYONYI ..... 5TH RESPONDENT

ABRAHAM MABONGA ..... 6TH RESPONDENT

BEWNATE NAMBOKO MUKHEBI ..... 7TH RESPONDENT

JAMIN WEPUKHULU ..... 8TH RESPONDENT

MOSES BARASA ..... 9TH RESPONDENT

SAULO KHAEMBA WEPUKHULU ..... 10TH RESPONDENT

PATRICK NJURU KAMAU ..... 11TH RESPONDENT

SYLVESTER WAKOLI BIWOLI ..... 12TH RESPONDENT

MESHACK S WEKESA ..... 13TH RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of Kenya at Bungoma (Mukunya, J.) dated 6th October, 2016 in ELC Case No. 169 of 2013)

JUDGMENT

Judgment of Kiage, JA

1. The genesis to this appeal can be traced back to the Chwele Dispute Tribunal (the tribunal) where the 3rd respondent, Zebedayo Matias Korosi (Zebedayo) and the 8th respondent Jamin Wapukhulu (Jamin) filed a claim, on behalf of their brothers, the 1st, 6th, 9th and 10th respondents, against the appellant, Eliud Wepukhulu Khaukha (Eluid). Zebedayo and Jamin claimed that title number Bokoli/Chwele/1092 (the suit property), which was registered in the name of the Eluid actually belonged to their late father Isaya Masaba (the deceased). After conducting a hearing, the tribunal found in their favour. It held that the suit land indeed belonged to the deceased, and consequently ordered the Land Registrar to transfer it to them. That award was made a decree of the Bungoma Senior Principal Magistrate's Court on July 4, 2005. Thereafter, the brothers obtained title and sold part of the suit property to the rest of the respondents.

2. Disgruntled, Eliud filed a Judicial Review application under Miscellaneous Civil Number 395 of 2005 seeking an order of certiorari and prohibition. The former order was to quash the tribunal's award and its subsequent adoption by the court, while the latter was to prohibit the tribunal from adjudicating the dispute over the suit property. By a judgment delivered on December 9, 2008, Mbogholi, J. (as he was then) quashed the decision of the tribunal for the reason that it lacked jurisdiction to entertain the claim.

3. Zebedayo appealed against Mbogholi J's judgment under Civil Appeal No 47 of 2009 which upheld the decision of the High Court that the tribunal lacked jurisdiction and directed that the entries made in the Land Register pursuant to the adoption of the award by the court be reversed and title revert to Eluid.

4. Emboldened by this pronouncement, Eliud filed suit, which is subject to this appeal, against the respondents at the Environment and Land Court via Land Case No 169 of 2013. Hinging his prayers on this Court's pronouncement, he claimed that the respondents contemptuously and defiantly continued to sell, sub- divide and build on the suit property despite the pronouncements by the courts. He prayed for an eviction order against them from the suit property.

5. Zebedayo and Jamin, together with the 1st, 6th, 9th and 10th respondents, filed a joint statement of defence and counterclaim. They averred that registration of Eliud as proprietor of the suit property was tainted with fraud and irregularities. They claimed that the suit property was legally owned by the deceased, their late father, and that they had been in open, peaceful and continuous occupation thereof since 1971.

6. In their counterclaim, the respondents asserted that the deceased bought a property, title number Bokoli/Chwele/253, measuring 11 acres, from Hamisi Kimalewa in 1954. In 1957, he sold it to Kaptein Watasi Mutoro (Kaptein). On September 18, 1967, the two entered into a fresh agreement after Kaptein failed to pay the full purchase price. In the said agreement, Kaptein retained 6 ½ acres while the deceased retained 4 ½ acres of the property. In conformity to the fresh agreement, title number Bokoli/Chwele/253 was subdivided, to correspond with the acreage agreed upon, into Bokoli/Chwele/1091 and Bokoli/Chwele/1092. The latter is the suit property.

7. The said suit property was to be registered in the name of the deceased. However, the respondents discovered, after his death, that the same had been fraudulently registered in the name of Eliud. In what they described as an implied admission to the impropriety of his registration, the appellant in

2005 offered to transfer 2 ½ acres of the suit property to them, an offer they rejected. They concluded that Eliud merely held the suit property in trust for them and sought a declaration to that effect, and to compel him to transfer the property to them.

8. Eliud filed a reply to the defence and a defence to the counterclaim. He denied holding the suit property in trust for the respondents. It was his assertion that the deceased, his elder brother, indeed sold Bokoli/Chwele/253 to Kaptein and eventually moved to Uganda with some of his children. Then, in 1967, Kaptein expressed interest to dispose of what is now the suit property. On September 18, 1967, an agreement was written in the Assistant Chief's diary, under which Eluid paid a total of Kshs 2,600.00 as consideration. Kaptein then paid to the deceased Kshs 2000.00 which was the balance he owed from the purchase of the suit property, making him the rightful proprietor of the suit property.

9. Subsequently, Eluid took vacant possession of the suit property on September 30, 1967, applied for consent from the Land Control Board and was duly registered as the proprietor. He maintained that none of the respondents raised any objections during the pendency of the transaction.

10. S Mukunya, J delivered judgment on October 6, 2016 after hearing the testimonies from both sides and evaluating the evidence tendered. He found that Eliud had fraudulently registered himself as the proprietor of the suit property. Zebedayo, Jamin and their brothers had proven their counterclaim that Eliud undeniably held the suit property in trust for them and should therefore transfer the suit property to them.

11. Aggrieved, by the judgment, Eliud filed the instant appeal containing 9 grounds which, condensed, are that the learned judge erred by:-

    a. Misapprehending the evidence presented before him and the facts of the case thereby arriving at an erroneous conclusion.

    b. Concluding that a trust had been created whilst still holding that Eliud's registration as proprietor was fraudulent.

    c. Failing to find that the claim for the cancellation of title was statutorily barred.

    d. Overruling the requirement for letters of administration prior to the filing of the counterclaim.

12. During the hearing of the appeal, the appellant was represented by learned Counsel Mr Sichangi while the respondents were represented by the firm of Ocharo Kebira & Co Advocates and Masinde & Co Advocates. However, none of the respondent's Counsel attended the hearing, even though they were served and neither did they file submissions.

13. Learned Counsel for the appellant submitted that the learned judge erred by holding that the sons of the deceased did not require administration letters in order to pursue the suit. It was his view that obtaining such letters was mandatory prior to claiming interest in suit land that was allegedly purchased by the deceased. The learned judge ought to have struck out the counter-claim as incompetent.

14. Counsel further complained that the learned judged failed to find that the counter claim was filed out of time and was therefore statutorily barred. The deceased's sons claimed that they discovered the fraud upon the death of their father which occurred in 1983, yet the counter-claim was made in 2013, 30 years after that discovery. The learned judge thus ignored the dictates of the law of limitations providing for a 12 year-time frame. Hence the finding of fraud cannot stand having been found outside the timeframe within which it ought to have been brought. Furthermore, the learned judge held that the appellant held the suit property in trust for the deceased's sons. Counsel's belief is that these two findings are contradictory and do not augur well for the precedents on the equitable doctrine of trust.

15 Finally, Counsel insisted that the matter having originated from the Court of Appeal, the superior court was bound to obey or to apply the findings of Court of Appeal, overturning it was against the rule of stare decis. He claimed that since the Court of Appeal ordered the titles that were issued pursuant to the Tribunal case be revoked, by upholding the counter-claim the Superior Court's decision was contrary to that of the Court of Appeal. He urged us to allow his appeal with costs.

16. I have carefully considered the record of appeal, the grounds of appeal and the submissions by the appellant cognizant of our duty to re-evaluate and re-assess the evidence and arrive at our independent conclusions on a first appeal. See *Selle Vs Associated Motor Boat CO Ltd & others* [1968] EA 123.

17. The issues before the Court for consideration are:- whether there was a requirement for the deceased's sons to take out letters of administration prior to filing the counter-claim; whether the claim for cancellation of title was time barred; whether the learned judge misapprehended the evidence; whether the judgment which was hinged on the principle of trust and the existence of fraud was contradictory and whether the judgment itself contradicted the judgment of this Court.

18. Counsel's contention that the deceased's sons were required to obtain letters of administration prior to pursuing the counter-claim cannot be right. Such letters as provided for in the *Law of Succession Act* are for purposes of administration of the estate of a deceased and for any other incidental purposes. To be clear, "estate" is defined in the Act as the free property of a deceased person. Therefore, I concur with the learned judge's holding that since the suit property was not in the name of the deceased at the time of his death, his sons did not need letters of administration to claim for it. The claim was made in their personal capacities as heirs to the suit property for enforcement of a trust which they alleged had been breached by the appellant not on behalf of the deceased's estate.

19. It is next contended that the claim was time barred given the provision of Section 7 of the *Limitations of Actions Act* which provides that an action of recovery of land cannot be made after the lapse of 12 years. However, a look at the respondents claim clearly reveals that it was hinged on the allegation of fraud to which the learned judge rightly applied Section 26 (1) of the *Land Registration Act* and arrived at a proper conclusion that the title of the suit property could be challenged on the ground of fraud, which had not been caught up by time limitation.

20. Regarding the complaint that the learned judge misapprehended the evidence on record, I have had to re-examine the said evidence as contained in the record bearing in mind the principle that he who alleges must prove as espoused in Section 107 and 109 of the *Evidence Act*. In *Anne Wambui Ndiritu Vs Joseph Kiprono Ropkoi & another* [2004] eKLR this Court held;

> " As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80...
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> ...
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> There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act...
>
> ...
>
> The two sections carry forward the often repeated evidential adage: "he who asserts must prove"."

21. The appellant filed suit for eviction on the premise that he was the proprietor of the suit property having bought it from Kaptein. Whilst acknowledging that Kaptein bought the suit property from the deceased, the purported agreement which was entered into between them at the Assistant Chief's office was not produced in court. Nor did the appellant call on any of the witnesses to the said agreement, or any other witnesses at all to support his case. His evidence consisted of search results proving that he was indeed registered as the proprietor of the suit property and an application for consent to transfer signed by a transferor known as Munyokoli Mutovo who he claimed was Kaptein.

22. On the other hand, the deceased's sons produced in evidence; the initial sale agreement between the deceased and Kaptein of 1967; the second agreement entered into between Kaptein and the deceased where he returned the 4 ½ acres; the green card as evidence of the subdivision which resulted the existence of the suit property; and a written agreement as evidence that the appellant accepted to donate 2 ¼ acres of the suit property to them during a clan meeting.

23. Some of the defence witnesses included 91-year-old Elijah Mutolo, the son of Kaptein. He affirmed he was privy to the events as stated in the counterclaim and confirmed that since the deceased was living in Uganda, it was agreed that the appellant was to hold the suit property in trust for the deceased's sons and transfer it to them once they were of age. He further stated that the appellant never bought any property from Kaptein and neither did his father go by the name Munyokoli Mutolo as alleged by the appellant. Elias Kwanyi, a relative of both the appellant and deceased, confirmed that narrative that the appellant was merely holding the property in trust for the deceased's sons.

24. The standard of proof in civil matters is on a balance of probability. For the burden of proof to be discharged, there has to be a reasonable degree of probability so that a tribunal can say "we think it more probable than not". See *Palace Investments Limited Vs Geoffrey Kariuki Mwenda & another* [2015] eKLR. From my analysis of the evidence, I find that the learned Judge correctly applied his mind on the uncontroverted evidence produced by the deceased's sons which proved that the appellant did not purchase the suit property as alleged. Rather, he was to hold in trust but fraudulently transferred it to himself as though he purchased it from Kaptein. It is worth noting that the appellant acknowledged, during cross examination, that during the family meeting in 2005 he indeed agreed to hand over 2 acres to the deceased's sons but they rejected the offer. As the learned judge noted, this was further proof that he was not entitled to the suit property from the beginning. The deceased's sons discharged their burden of proof as required as the learned Judge found, carefully so, in my view.

25. The finding that the indeed the appellant held that suit property in trust and the existence of fraudulent transfer were not contradictory. The appellant committed fraud by misrepresenting himself as the purchaser and having an unknown individual pose as Kaptein to the detriment of the true beneficiaries of the suit property.

26. Finally, it seems to me that learned counsel misapprehended the following passage in Maraga, JA's lead judgment:-

> "...[I] direct that the entries made on July 5, 2005 in the register of Title No Bokoli/Chwele/1092 be reversed forthwith and the title do revert to the first respondent. By that action, I should not be misunderstood as dismissing (sic) Appellant's and his siblings' claim, if any, to the suit. Having held that Chwele Land Dispute Tribunal had no jurisdiction to adjudicate on the ownership dispute over the suit land, the Appellant and/or his siblings are at liberty to file a fresh suit in a court with competent jurisdiction and have the dispute determined once and for all."

27. That judgment did not extinguish the deceased's sons right to claim the suit property. It merely upheld the decision of the High Court which was based on the tribunal's lack of jurisdiction and did not determine that the appellant was the indefeasible proprietor of the suit property. The learned judge's decision did not contradict and was not in defiance of that of this Court.

28. In all the circumstances of the case, I find that the learned judge arrived at a just conclusion that the suit property rightfully belonged to the deceased sons in their capacity as beneficiaries and would not interfere with his judgment.

29. Accordingly, I hold that this appeal lacks merit and would dismiss it but with no order to costs given the relationship between the parties.

30. As Tuiyott and Joel Ngugi JJA agree, it is so ordered.

Judgment of Tuiyott, JA

31. I have had the advantage of reading in draft the judgment of Kiage, JA, with which I am in full agreement and have nothing useful to add.

Judgment of Joel Ngugi, J.A

32. I have had the advantage of reading in draft the judgment of Hon. Kiage, JA I am in full agreement with his reasoning and conclusions and, therefore have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR