



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CIVIL APPEAL No. 109 of 2016

BETWEEN

PHILLIP BRAINFIELD OTIENOAPPELLANT

AND

JACOB OCHIENG OTIENO 1st RESPONDENT

JENNIFER w/o ADEDE2nd RESPONDENT

(Sued as the administrator of the Estate of Joseph Adede Otieno) - deceased

(Appeal against the judgment and decree of the Environment and Land Court at Kisumu, (A. K. Kaniaru, J) dated 8th September, 2016 in ELC CAUSE NO. 59 OF 2013)

JUDGMENT OF THE COURT

1. Before the magistrate's court, Nicholas Omolo Oloo, now represented by the appellant filed suit against the respondents claiming ownership of Land Parcel No. Uholo/Madungu/250. At all material times, the suit land was registered in the name of Joseph Adede Otieno (deceased) who was husband to the 2nd respondent. The said Joseph Adede Otieno was step brother to the 1st respondent.
2. The appellant's contention before the trial magistrate was that the registration of the suit property in the name of Joseph Adede Otieno was fraudulent and through misrepresentation. That the suit property belonged to the then plaintiff Nicholas Omolo Oloo (also now deceased).
3. Upon hearing the parties, the trial magistrate dismissed the appellant's suit. In dismissing the suit, the magistrate stated:

The other issue is whether Joseph Adede Otieno had the said parcel of land fraudulently registered in his name. The plaintiff has failed to demonstrate that the late Joseph Adede Otieno misrepresented himself as the owner of the suit before adjudication officials. This is corroborated by his conduct after the registration.

The 2nd defendant's family and or their agents have made use of the land as per the evidence adduced up to the year 2004 when the plaintiff is alleged to have cultivated the suit land. It is evident that the plaintiff never filed any other suit concerning the suit land until after the death of the 2nd defendant's husband. Evidence to the effect that the mother of Joseph Adede Otieno was buried in the suit land was not rebutted. And if that happened, the plaintiff or his father would have raised objection to the burial.

DW3 indicated that his mother ploughed the land from 1966 when Joseph Adede's mother died up to 1993 when she died and that he continued ploughing it up to 1995. He said that the plaintiff started ploughing it after chasing the 2nd defendant in the year 2003. It is evident that the 2nd defendant's family peacefully used the land for not less than 37 years.

From the foregoing, I find that the plaintiff has failed to demonstrate that the late Joseph Adede Otieno was fraudulently registered as owner of Parcel No. Uholo/Madungu/250. Neither has he proved that he was holding the said land or had it registered in his name in trust for the plaintiff and his family. His father had the capacity to have it registered in his name and there was no reason to register the same in another person's name.....

4. Aggrieved by the dismissal of the suit by the trial magistrate, the appellant lodged a first appeal to the Environment and Land Court. The appeal was dismissed. In dismissing the appeal, the learned judge expressed himself as follows:

[32] ... The issues surrounding ownership in the lower court concerned fraud and or trust. The lower court addressed itself to these issues and found that neither fraud nor trust was proved. And because of that, the lower court decided that the case of the plaintiff could not succeed..... The case failed primarily because fraud and trust were not proved.

5. Further aggrieved, the appellant has proffered the instant second appeal to this Court raising several repetitive grounds which can be compressed as follows:

(i) That the learned judge erred in law when he omitted part of the evidence of the appellant witness marked PW2 showing cause why the original owner of the land leased part of his land to the respondent's father and thereafter returned back to his original resident village in Ugana together with his family before the land adjudication process. That this was a trust between Nicholas Omolo Oloo and Otieno Olwanga.

(ii) That the judge erred when he overlooked the document evidence regarding findings on adverse possession (*sic*).

(iii) That the judge erred when considering the evidence of the respondent's witness allegation that the appellant was going round with land adjudication officials educating the public during the time of land registration (*sic*).

(iv) That the judge erred when he mixed issues before him by omitting part of the evidence of the appellant witnesses namely PW2, PW3 and PW4.

(v) That the judge erred in failing to establish how Joseph Adede Otieno came to be the owner of the suit property.

(vi) That the judge erred and failed to establish who was in occupation of the suit property.

6. At the hearing of the appeal, the appellant appeared in person. Despite service of the hearing notice, there was no appearance by the respondent. Both the appellant and respondents had filed written submissions. Being satisfied with service of the hearing notice upon the respondents, the instant appeal proceeded for hearing.

APPELLANT'S SUBMISSIONS

7. In his written submissions, the appellant contends that the respondents ought to have served the appellant with a written authority or court order for eviction before they entered the suit property on 18th October 2003. That the suit property was ancestral land. That the respondents fraudulently procured the title to the suit property in 1992 in the absence of the parties concerned. That the respondents had vacated the suit property and gone back to their ancestral land in Ugana Nyahera village. That the respondents were misleading the court and purporting to have been developing the suit property by using third parties in order to skip or evade justice. That the respondents by virtue of being retired senior government officers through fraud or corruption took opportunity to obtain a letter from the District Commissioner of Siaya dated 30th October 2003 illegally intending to obstruct the appellant from being heard in court. The appellant submitted that he relied on the affidavit deposed to by his deceased father who stated that in 1953, his father leased the suit property to Otieno Olwanga. That he never saw anybody developing the suit land.

8. In his submissions, the appellant prayed for rectification of the register, general damages and that the instant appeal be allowed.

RESPONDENTS' SUBMISSIONS

9. In joint submissions by the respondents, it was submitted that the late Joseph Adede Otieno was the first registered proprietor of the suit property. That the suit land was originally owned in 1933 by one Okum Awimbo who died in 1934. That Ms Omboga, the widow of Okum Awimbo was remarried to Mr. Otieno Olwanga in 1934, who is the father of the 1st respondent. The said Otieno Olwanga moved on the suit property and happily lived with Ms Omboga. In 1935, the said Otieno Olwanga married his first wife Ms Wilfrida Akello with whom he lived on the suit property and begot five children including Joseph Adede Otieno – the late husband of the 2nd respondent.

10. The respondents in their submissions narrated a detailed and lengthy genealogy of the children, wives and dependents of their deceased parents and relatives. Further, the respondents in their lengthy written submissions narrated events not on record that allegedly occurred before the trial magistrate when one, Mr. Edwin Mubinya Murema stormed the trial court when in session shouting that the magistrate had made a mistake on 30th October 2013. The respondents concluded by urging this Court to find that the instant appeal was a non-starter and that the respondents have been homeless and have suffered for the last 16 years when this matter has been in court.

ANALYSIS and DETERMINATION

11. In this matter, we observe that both the appellant and the respondents act in person and hence the written submissions filed have dwelt substantially on rehashing the evidence on record, matters of fact and with no succinct identification of an error of law on the part of the learned judge. Nevertheless, we have considered the record of appeal, the written submissions filed by both parties and the law. We have also taken into account the historical narrative given by the parties on their respective occupation of the suit property.

12. This is a second appeal. In *Kenya Breweries Ltd –v- Godfrey Odoyo, Civil Appeal No. 127 of 2007*, Onyango Otieno, J.A expressed himself as follows:

“In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not

have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

13. The key contestation in this appeal is that the learned judge omitted to consider the evidence on record from the testimonies of PW2 (Teresia Odit Omollo), PW3 (Joseph Okumu Obote) and PW4 (James Malowa Ndir). That the judge erred in mixing up issues drawn from the testimony of PW1 (Phillip Brainfield Otieno); that the judge erred when he overlooked the appellant’s further affidavit filed on 1st October 2013 and the submissions filed on 15th July 2014; that the judge erred when considering the defence evidence as given by DW1 (Jacob Ochieng Otieno) and DW2 (Jennifer Awino Adede); that the judge erred in failing to establish who was in occupation of the suit property when the respondents invaded the land.

14. In our view, the pivotal disputation is the appellant’s contention that the two courts below did not properly evaluate the evidence on record. We have scrutinized the trial magistrate’s judgment. In the judgment, the magistrate succinctly summarized the testimony of each of the eight witnesses who testified, four from each side. The magistrate then proceeded to analyze and weigh the totality of the evidence tendered in court.

15. On his part, the learned judge considered, evaluated and weighed the evidence on record based on the grounds of appeal that had been urged. Interestingly, the grounds of appeal urged before the learned judge had nothing to do with the *ratio decidendi* of the trial magistrate’s decision. The trial magistrate dismissed the appellant suit on the basis that the alleged fraud and misrepresentation had not been proved.

16. Before the learned judge, the appellant urged that the respondents did not have letters of administration to defend the suit; that the proceedings before the trial court were signed in a manner that offended the law; that the judgment was not dated; that the trial court did not consider affidavits; that the trial magistrate failed to appreciate the applicable customary law on inheritance; and that the trial court erred in basing its decision on adverse possession.

17. We have re-examined the grounds of appeal as urged before the learned judge and contrasted the same with the *ratio decidendi* of the judgment of the trial court. The decision of the trial court was grounded on the finding of fact that fraud and misrepresentation on the part of the late Joseph Adede Otieno was not proved. Before the learned judge, the appellant did not point out any evidence on record that proved fraud or misrepresentation. Further, the appellant did not offer any cogent submission to prove that the two courts below erred in finding that fraud and or misrepresentation had not been proved. On our part, we find that the learned judge correctly concurred with the trial court that fraud and misrepresentation was not proved.

18. Painstakingly, we have read and re-read the submissions filed by the appellant in this matter. From the grounds of appeal as stated in the memorandum of appeal to the written submissions urged in support thereof, the appellant has dwelt on issues of fact that have been determined by the two courts below. In a second appeal, an appellate court will not *interfere with the concurrent findings of fact arrived at by the two courts below unless the findings are based on no evidence or are simply perverse. The test to be applied on a second appeal is whether there was evidence on which the trial court could find as it did.* We have taken the liberty to examine the plaint dated 28th October 2003 that instituted the appellant’s suit against the respondents. The appellants claim to the suit property was founded on fraud. It was alleged that the late Joseph Adede Otieno through fraud and or misrepresentation got himself registered as proprietor of the suit property.

19. We have examined the record of appeal right from the trial magistrate’s court to the Environment and Land Court to identify the evidence in support of the particulars of fraud that the late Adede misrepresented that he was the owner of the suit property. We are unable to detect a scintilla of evidence proving fraud or misrepresentation. In the case of **Kampala Bottlers Ltd –v- Damanico (U) Ltd, Civil Appeal No. 22 of 1992**, **Wambuzi JA** observed that *where fraud is pleaded, particulars of the fraud must be given.* In addition, the courts have held that the requirement for pleading particulars of fraud is mandatory.

20. In the instant matter, the two courts below made a concurrent finding of fact that fraud and the alleged misrepresentation by the late Joseph Adede Otieno was not proved. The appellant has not pointed to our satisfaction any item of evidence that proves the alleged fraud or misrepresentation. Accordingly, we find no reason to interfere with the concurrent findings of the two courts below.

21. In penultimate, the appellant urged that the learned judge erred in failing to establish how Joseph Adede Otieno came to be the owner of the suit property; and that the judge erred and failed to establish who was in occupation of the suit property. In **Galaxy Paints Limited – v- Falcon Guards Limited, Civil Appeal No. 219 of 1998** it was restated that parties are bound by their pleadings and a court cannot issue an order that is not in the pleading. In this matter, we have considered the contestation that the learned judge erred in not determining how the late Joseph Adede came to be registered as proprietor of the suit property and that the judge failed to determine who was in occupation of the property. From the plaint and pleadings filed before the trial court, these were not issues for determination either by the trial court or the learned judge. In addition, the issue of adverse possession was not raised in the pleading and any comments thereon are *obiter dicta*. Accordingly, the learned judge did not err in failing to pronounce himself on the issues.

22. Finally, as already stated heretofore, we have considered the written submissions filed by both parties. The submissions were simply a repetitive rehashing of the facts and evidence on record. No point of law or error of law is evinced or argued in the submissions. The jurisdiction of this Court in a second appeal is confined to matters of law. The factual contestations and genealogical rendition in the written submissions filed by both parties are not relevant to the instant appeal as they raise no point or error of law on the part of the learned judge.

23. The upshot is that this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE – MAKHANDIA

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

OTIENO-ODEK

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.