



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MAKHANDIA, KIAGE & ODEK, J.J.A)

CIVIL APPEAL NO. 53 OF 2014

BETWEEN

HABIL NDISI 1ST APPELLANT
CALISTO ALERI 2ND APPELLANT
ALICIO KANORI O. OLOO.....3RD APPELLANT
MOSES WAMBANI OKWALO.....4TH APPELLANT
JAMES OMOLO5TH APPELLANT
JOSHUA CALLINS NYULIA.....6TH APPELLANT
PAMELA ADEMBA7TH APPELLANT
D.F. ADEMBA.....8TH APPELLANT
JOHN LEONARD OKUNGA 9TH APPELLANT
MARGARET TATU OKUNGA.....10TH APPELLANT
SAMUEL KHATENYA..... 11TH APPELLANT

AND

PASKALI OUMA MUDAKHI.....1ST RESPONDENT
MICHAEL JUMA MUDAKHI 2ND RESPONDENT
GRACE AUMA SIKUKU.....3RD RESPONDENT
MARY SIKUKU.....4TH RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of Kenya at Busia (S.M. Kibunja, J), dated 10th July, 2014 in ELC No. 122 of 2013)

JUDGMENT OF THE COURT

The subject matter herein is known as Bukhayo/Kisoko/740 “the suit property” which was first registered on 21st May, 1971 in the name of Mudakhi Munene Ndege, deceased, who died in 1984.

The deceased also owned Bukhayo/Kisoko/737. At the time of his death, he was survived by three wives namely; Wilimina Mudakhi, Philister Nyongesa and Teresa Nyangweso Mudakhi. The issues of the 1st house are; the 1st respondent, Julius Mudakhi Murere, Daniel Mudakhi and John Masinde; the issue of the 2nd house is the 2nd respondent and the issues of the 3rd house are, Lexitina Anyango, Beatrice Auma and Everlyn Nabwire and Peter Sikuku, who was deceased and survived by the 3rd and 4th respondents.

It was adduced that prior to his death, the Mudakhi Munene Ndege bequeathed parcel number Bukhayo/Kisoko/737 to the 1st house while the suit property was to be shared between the 2nd and 3rd house. Unfortunately, the 1st wife Teresa Nyangweso sold part of the suit property to the appellants prior to her death on 24th April, 2007.

This necessitated the respondents to file suit at the High Court in their capacities as beneficiaries of the estate in order to safeguard it. As earlier stated, the 1st and 2nd respondent are brothers while the 3rd and 4th respondents are their sisters in law. In the Complaint, it was averred that the 1st respondent was also an administrator of the estate, pursuant to a confirmation of grant awarded to him on 28th November 1996 via **Nairobi Succession Cause No. 75 of 1993**. Subsequent to the said confirmation, the 1st respondent proceeded to the Busia Land Registry to file the requisite forms for transmission of the Mudakhi Munene Ndege properties. The members of the 1st house were ready to proceed with the process, however, the members of the 2nd and 3rd house were not able to raise money for survey and subdivision of the suit property so the same had to be postponed in relation to the suit property.

In 1998, the appellants unlawfully took possession of the suit land without the knowledge or consent of the respondents and proceeded to build structures thereon. Efforts by the respondents to evict them were fruitless. When the 1st respondent wanted to subdivide the suit property in order to transmit the same in 2006, he discovered that the documents he lodged at the Busia Land Registry, which included a grant of letters of administration together with the forms of transmission were missing from the registry. He sought the intervention of the Attorney General when he further discovered that the Busia Land Registry had illegally subdivided the suit property and thus created LR. No. 3292, 3293 and 3294. This necessitated the 1st respondent to institute a civil suit in **Busia PMCC No. 298 of 2006** in which he sued the land Registrar and Attorney General. An order compelling the registration of the documents was issued therein.

The respondent pleaded that the appellants knew all along that Teresa Nyangweso had no capacity to sell the suit property. As a result, they fraudulently; forged land sale agreements to show Teresa Nyangweso Mudakhi had acquired Bukhayo/Kisoko/740 under the Law of Succession; forged Land Control Board applications, mutations and transfers of portions subdivided from Bukhayo/Kisoko/740 and colluded with the surveyor, Land Registrar, District Officer and area Chief to falsely assert Teresa Nyangweso's right over Bukhayo/Kisoko/740 to illegally advance their claim over the suit property. The respondents sought the

Court's intervention for a declaratory order that Bukhayo/Kisoko/740 was part of the estate of Mudakhi Munene Ndege and orders to vacate the appellants from the suit property.

The appellants filed a joint statement of defence and stated that the portions of land they occupy were legally created from the suit property. That Teresa Nyangweso succession proceedings caused Bukhayo/Kisoko/740 to be registered in her names and on 10th February, 1993 applied to the Nambale Land Control Board for consent to subdivide it into four portions. The said portions were bought at a valuable consideration and the appellants took possession thereof. The developments made thereon were made with the knowledge of the respondents who never challenged their titles during the life time of Teresa Nyangweso Ndaki. They were therefore, bonafide purchasers for value without notice of fraud.

The 7th and 8th appellants had filed suit in **Busia PMCC. NO. 482 of 2010** against the land Registrar, Busia and Attorney

General where they sought to have the District Land Registrar, Busia directed to close the register for the suit property and costs.

The said suit was consolidated together with the High Court suit.

From the records, the history of the subdivision of the suit property is as follows;

Teresia Nyangweso subdivided the suit property into;

- a. Bukhayo/Kisoko/3291 measuring 1.13Ha which was registered in the name of Gabriel Barasa Mudaki.
- b. Bukhayo/Kisoko/3292 measuring 1.13Ha which was registered in the name of Gabriel Barasa Mudaki.
- c. Bukhayo/Kisoko/3293 measuring 0.48Ha which was registered in the names of the 7th and 8th appellant.
- d. Bukhayo/Kisoko/3294 measuring 0.62Ha which was registered in the name of Teresia Nyangweso.

Teresia Nyangweso then subdivided LR. No. Bukhayo/Kisoko/3294 subdivided into 3 portions into;

- a. Bukhayo/Kisoko/4823 measuring 0.86Ha which was registered in the name of the 4th appellant.
- b. Bukhayo/Kisoko/4824 measuring 0.40Ha which was registered in the name of Teresia Nyangweso.
- c. Bukhayo/Kisoko/4825 measuring 0.02Ha which was registered in the name of the 1st appellant.

Teresia Nyangweso further caused the subdivision Bukhayo/Kisoko/4824;

- a. Bukhayo/Kisoko/5825 measuring 0.20Ha which was registered in the name of the Teresia Nyangweso.
- b. Bukhayo/Kisoko/5826 measuring 0.20Ha which was registered in the name of the 2nd appellant.

The 2nd appellant further caused Bukhayo/Kisoko/5826 to be subdivided into;

- a. Bukhayo/Kisoko/5927 measuring 0.141Ha which was registered in the name of the 9th appellant.
- b. Bukhayo/Kisoko/5928 measuring 0.49Ha which was registered of the 3rd appellant.

In 1998 the father of the 6th Appellant named Harun Nyanjeri Nyuliah bought 0.41Ha of land from Gabriel Barasa Mudakhi out of parcel Bukahyo/Kisoko/3938. who caused it to be subdivided into two parcels namely Bukhayo/Kisoko/5034 and 5035 and transferred the later to the 6th appellant upon subdivision.

The learned Judge S.M Kibunja, J considered the pleadings, testimonies and submissions before the court and delivered a judgment on 10th July 2014. He held that there was no evidence tabled in court to show that indeed Teresa Nyangweso had followed the provisions of the Law in the process of being registered as proprietor of the suit property. Therefore, her only interest was a life interest and hence had no capacity to pass good title. As a result, the titles held by the appellants pursuant to subdivisions from the suit property were illegally and un-procedurally acquired as they were not based on any registers. The following orders were then granted;

“a. A declaration is hereby issued that the suit land, Bukhayo/Kisoko/740 is part of the property of the deceased Mudakhi Murere Ndege.

b. That the Defendants do vacate from the suit land Bukhayo/Kisoko/740 in ninety (90) days failure to which eviction orders to issue.

c. That Busia PMCC. No. 482 of 2010 without merit and is dismissed with no orders.

d. That due to the fact that the main architect of the scheme that resulted to this case, that is, Teresa Nyangweso, was not a party in this suit and in any has since passed on, each party will bear his/her own costs.”

The appellants were dissatisfied with the judgment and filed the instant appeal containing 8 grounds, which, condensed, are that the learned judge erred in law and in fact by;

- a. Holding that the suit property was part of the estate of the late Mudakhi Munene Ndege.
- b. Holding that the appellants were trespassers on the suit property.
- c. Ordering for the eviction of the appellants without granting them any form of compensation.
- d. Dismissing Busia PMCC. No. 482 of 2010.
- e. Holding the appellants liable for the mistakes and or fraud that may have been committed by Teresia Nyangweso.

The respondents filed a Notice of cross-appeal and complained that;

- a. The principle that costs follow the event was breached.
- b. The learned Judge did not exercise his discretion judicially by denying the respondents costs.

During the hearing of the appeal, learned Counsel **Mr Okeyo/Mukele** appeared for the appellants, while learned Counsel

Mr Jumba appeared for the respondents. Both parties had filed written submissions and Counsel elected to highlight the same.

Mr Okeyo submitted that the Teresia Nyangweso as the wife of the Mudakhi Munene Ndege had a right to sell the suit property as the deceased had already bequeathed it among the 2 houses prior to his death. Further, the appellants cannot be faulted since they were informed that the suit property was available for sale, they followed due procedure, conducted searches before proceeding to purchase the same. If anything fraudulent, took place, which was never proved, then the same was not committed by the appellants. Counsel argued that the respondents failed to show a common intention by the appellants in collusion with the Land

Registry officers to commit fraud. Hence the appellants were *bona fide* innocent purchasers for value without notice.

On the issue of costs, Counsel pleaded with on the Court to have mercy on the appellants who had already suffered eviction the court should

worsen their unfortunate predicament with an order for costs. He urged the Court to allow the appeal.

Mr. Jumba, maintained that the learned judge did not err in finding that the suit property was still part of the estate of the Mudakhi Munene Ndege and that the appellants were indeed trespassers thereon. He pointed out that the suit property was still intact and that the appellants had failed to produce the register within which their subdivided parcels were registered on. Since Teresia Nyangweso was not the proprietor of the suit property, any transaction between her and the appellants were illegal and did not confer any registrable interest.

On the cross-appeal, Counsel submitted that since the respondents won the case, they were entitled to costs of the proceedings. He admitted that on certain occasions, a successful litigant can be denied costs. However, in this instance, the appellants were fully aware of the illegality of the transactions they were engaging in with Teresia Nyangweso. The evidence on record reveals the appellants' defiance and recklessness. Therefore, the respondents are entitled to costs, he relied on **COUNCIL OF GOVERNORS V SENATE & ANOTHER [2014] eKLR**.

On the basis of the foregoing, Counsel urged the Court to award to the respondents costs of the suit in the High Court and of this appeal.

We have considered the record of this appeal and distilled the issues for consideration being: as whether Teresia Nyangweso had capacity to sell the suit property and whether the respondents are entitled to costs of the suit and of this appeal. The Court shall consider the issues before whilst keeping in mind its mandate as a first appellate Court as held in In **SELLE -VS- ASSOCIATED MOTOR BOAT CO [1968] EA 123**, where was expressed:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the

Page 10 of 16 evidence in the case generally (*Abdul Hameed Saif -v Ali Mohamed Sholan (1955), 22 E. A. C. A. 270*).”

The learned judge held that Teresia Nyangweso did not have capacity to sell the property to the appellants as follows;

“There is nothing provided to this court to show that indeed Teresa Nyangweso had followed the provisions of the Law in the process of being registered as proprietor of Bukhayo/Kisoko/740. Had that been the case, the title would have noted that her interest was only a life interest would have been forced to seek the concurrence of her children including DW 8 or consent of the court to sell the said land.”

As a result he found that the suit property was still part of the estate of the Mudakhi Munene Ndege and therefore the appellants were trespassers. In the hearing of the appeal, the appellant's Counsel contended that Teresia Nyangweso had capacity to sell the property as she was the widow of the deceased and was bequeathed the said property together with the 3rd house. From the face of it, being a widow to a deceased does not confer proprietary rights.

From the record, the suit property was registered in the name of Mudakhi Munene Ndege on 21st May 1971. There was no evidence placed before the Court to show that he had transferred the suit property to Teresia Nyangweso. Therefore, at the time of Mudakhi Munene Ndege's death, the property formed part of the estate of the deceased to be dealt with in accordance to the provisions of the Law of Succession Act, steps which the 1st respondent took via **Nairobi Succession Cause No. 75 of 1993** where he was issued with a confirmed grant on 28th November 1996. Effectively making him the administrator of the estate of Mudakhi Munene Ndege with powers to administer the estate in accordance of **section 83** of the **Law of Succession Act**.

That being said, it is prudent to note what the learned judge stated concerning the lack of evidence of Teresia Nyangweso having gone through the succession process. It is further worth noting that the appellants had the burden of proof to the court to show that Teresia Nyangweso had capacity to sell and transfer ownership rights over the suit property as envisioned in **section 107** of the **Evidence Act**. However, the appellants failed or neglected to table in court evidence showing that Teresia Nyangweso obtained a confirmation of grant or at the very least, was the proprietor of the suit property. In absence of any evidence contrary, we are inclined to believe the assertions made by the learned judge. Therefore, we concur with the finding of the learned judge that Teresia Nyangweso did not have capacity to sell and transfer the suit property.

Thus, Teresia Nyangweso was only a beneficiary in her capacity as a widow and was only entitled to a life interest over the estate as envisioned in **section 35** of the **Law of Succession Act**. The meaning and import of the said provision was well explained by this Court in **TIMINA NDAVOLA AFUNDI V FESTUS AFUNDI [2015] eKLR**;

“We have considered the record of appeal as well as the submissions made by counsel. Under section 35 (1) of the Law of Succession Act, where the intestate leaves a surviving spouse and children, the surviving spouse is entitled to the personal and household effects of the deceased absolutely and a life interest in the whole residue of the net intestate estate. The children are not entitled absolutely to the deceased's property but the surviving spouse holds the estate in trust for the children. But in the event of death of the surviving spouse, the residue of the intestate estate devolves upon the children and should be divided equally among them. See section 35 (5) of Act.”

It goes without saying that Teresia Nyangweso did not have capacity to sell nor pass good title to the appellants. Therefore, the learned judge did not err by holding that they were trespassers on the suit property and in ordering their eviction. The defence that the appellants were *bona*

fide purchasers was raised by Counsel during the appeal. Be that as it may, Black’s law Dictionary 8th Edition defines a “bona fide purchaser” as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

The learned judge held that the suit property was fraudulently subdivided by Teresia Nyangweso in collusion with officers at the Land Registry. Further, the appellants had knowledge of the anomalies surrounding the same and thus declared that they were not *bona fide* purchasers. Among other instances he found the following discrepancies in the evidence of the appellants; an agreement dated 4th December, 1998 was accompanied by a letter of consent dated 3rd December, 1998 which was the day before the agreement; the sale agreement annexed to the evidence affidavit of 2nd appellant shows he was buying 0.2Ha from Bukhayo/Kisoko/3294 but his testimony showed that the land he got was a subdivision from Bukhayo/Kisoko/4824 and no sale agreement was availed in respect of buying 0.2 hectares from Bukhayo/Kisoko/4824; the 4th appellant did not avail any documentary evidence to confirm the existence of a sale agreement between him and Teresa Nyangweso over 0.86 hectares from

Bukhayo/Kisoko/3294 or exhibit any documentary evidence to confirm that Bukhayo/Kisoko/4823 was a subdivision of Bukhayo/Kisoko/3294 and that it was transferred and registered in his names as alleged in his evidence affidavit; the mutation forms show the survey was done on 8th July, 1998 but at the top right corner bore the date of 27th February, 2006 as the date it was registered.

From the foregoing, we concur with the learned judge that indeed the appellants must have been aware of some anomalies of the alleged ownership of the suit property by Teresia Nyangweso. By virtue of this, they cannot hide behind the principle of *bona fide* purchasers.

On the issue of costs, the Court is very careful not to interfere with the judicial discretion of the trial court. This was well captured in **UNITED INDIA INSURANCE CO LTD, KENINDIA INSURANCE CO LTD & ORIENTAL FIRE & GENERAL INSURANCE CO LTD vs EAST AFRICAN UNDERWRITERS (KENYA) LTD [1985] eKLR;**

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

On that note, we see no reason to depart from the finding of the learned judge. Hence, this appeal has no merit and is dismissed in totality.

We find that costs are meritorious of the respondents in this instance.

As Asike Makhandia, JA agrees, it is so ordered.

This judgment is delivered under **Rule 32(3)** of the Court of Appeal Rules, our learned brother Odek, JA having died before signing it.

Dated and delivered at Nairobi this 3rd day of April, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR