



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MAKHANDIA, KIAGE & ODEK, JJA)**

**CIVIL APPEAL NO. 38 OF 2016**

**BETWEEN**

**INNOCENT CHANIA OKOA ..... APPELLANT**

**AND**

**MARKO TOYO ONYONKA ..... RESPONDENT**

*(An appeal from the Judgment of the Environment and Land Court of Kenya at Kisii (S. Okong'o, J), dated 15th April, 2016 in ELC No. 394 of 2013)*

**JUDGMENT OF THE COURT**

The respondent filed suit against the appellant seeking his eviction from all that parcel of land known as LR No. West Kitutu/Bogeka/1769 (the suit property) and an injunction to restrain the appellant from continuing with construction of a building thereon. In the Complaint, the respondent averred that he was the absolute registered owner of the suit property and, the appellant, without any authority or consent from him, entered thereon and commenced construction of a permanent building.

In response, the appellant filed a Defence and a Counter-Claim against the respondent. Even though he admitted that the respondent was the registered owner of the suit property, the appellant contended that the title had been acquired fraudulently, without his knowledge and his family. In the Counter-Claim, the appellant claimed that he was at all material times in physical possession of the suit property. He acknowledged that the respondent purchased a property from his parents. However, he stated that the same was separate and distinct from the suit property. He contended that the respondent fraudulently caused the title of the suit property, which is not the one he purchased, to be registered in his name. He outlined the particulars of fraud as that the respondent; caused to be registered in his name property that belonged to the appellant while knowing that he had purchased a different property; caused the suit property to be registered in his name without the consent of the appellant; and, colluding with the surveyor to alter the actual location of the land on the map to show that the suit property was the one lawfully purchased by the respondent. The appellant's prayers were for;

“(a) A declaration that the plaintiff is the rightful owner of Land Parcel No. West Kitutu/Bogeka/1769.

(b) An order for the reversion and cancellation of the transfer and registration of Land Title No. West Kitutu/Bogeka/1769 unto the names of the defendant MARKO TOYO ONYONKA.

(c) Permanent injunction to restrain the Defendant either by himself, his agents/servant from entering upon, trespassing onto and/or otherwise interfering or dealing howsoever with Title No. West Kitutu/Bogeka/1769.

(d) An order of cancellation of the registration of the suit land in favour of the Defendant and registration of the same in favour of the plaintiff.(sic)

(e) A declaration that the Defendant's holding Land Title No. West Kitutu/Bogeka/1769 in trust of the Counter Claim.”

During the hearing before Okong'o J, the respondent gave a meticulous account of how he purchased the suit property. He detailed that the same was bought at a consideration of Kshs. 10,000.00 from the appellant's parents Nyaanda Marao and Mary Mora Okoa, who were both later deceased. The transaction was entered into and completed while the appellant was still in school. The respondent produced in evidence; a copy of the sale agreement dated 13/6/1988; a copy of letter of the Land Control Board consent dated 27/4/1989; a copy of the instrument of transfer of land dated 4/10/1989; a copy of certificate of official search on the register of the suit property dated 23/9/2013; and, a copy of the title deed for the suit property in his name dated 26/10/1989.

It was his testimony that the suit property was traversed by a road known as Mesaria-Gesoni road. The respondent stated that the appellant had unlawfully entered the upper part of the suit property in 2013, after the demise of his parents and claimed it as his own. He further denied the respondent entry on to the said upper half of the suit property hence the respondent got physical possession of the lower half of the suit property only. The appellant then commenced the illegal developments on the said upper part. Efforts by the respondent to evict him, which included a letter from the chief and from the respondent's advocate, bore no fruit. He refuted the respondent's claims and asserted that his deceased parents only sold him the lower half of the suit property.

In his defence and in attempted proof of his counter-claim, the appellant contended that his father sold some other land adjacent to the suit property to the respondent which was along the Kisumu-Kisii road. The parcel of land allegedly so sold to the respondent was a portion of land that belonged to his brother, who needed money for dowry at the time. His evidence was not clear but he seemed to have been saying that the suit property which is on the upper half of the suit property was known as LR No. West Kitutu/Bogeka/3605 (hereinafter referred to as "plot No. 3605") and was situated along Bogeka – Gesoni road. While the property that was sold to the respondent was the one on the lower half of the suit property.

He stated that the parcel of land that the respondent had actually purchased from his parents had rental houses on it which he, the respondent, had put up. He claimed that the respondent had never laid any claim over that part of the property which he had physical possession of and as such did not acquire the title lawfully. The appellant contended that his parents were illiterate and were also not involved in the subdivision that resulted into the issuance of the impugned title to the respondent. He produced building plans and a receipt for payment of the approval of the buildings he was erecting as evidence.

In cross-examination, he stated that the suit property was a sub-division of the original parcel of land then known as L.R No. West Kitutu/Bogeka/1713. He stated that after the sub-division of plot No. 1713, his parents retained a portion thereof that was registered as LR No. West Kitutu/Bogeka/1768 while the suit property was registered in the name of the respondent. He confirmed that even though he was in school, all necessary procedures were followed before the respondent acquired title to the suit property. Nevertheless, part of the suit property that was registered in the name of the respondent belonged to him.

The appellant called, Chrisantus Otero Okoa, his brother as DW2. He confirmed that indeed his father sold the suit property, which he referred to as plot 1769, to the respondent, and that the same was a subdivision from L.R No. West Kitutu/Bogeka/1713. He continued that he was at the time proprietor of a different parcel known as plot No. 3605 and they were in the process of sub-dividing the same.

At the close of the hearing, the parties filed their written submissions which were considered by the learned Judge whose judgment was delivered by J.M Mutungi, J on 15th April 2016. The learned judge was satisfied that the respondent had proven his case against the appellant on a balance of probabilities and as such was entitled to the reliefs sought in the Plaintiff.

On the other hand, he found no merit in the appellant's counter-claim. Consequently, judgment was entered in favour of the respondent as prayed in paragraph (a) of the Plaintiff. The appellant was ordered to vacate and hand over possession of the suit property to the respondent within thirty (30) days from the date of the judgment, failing which the respondent was at liberty to apply for his forceful eviction therefrom. There was also a permanent injunction issued restraining the appellant either by himself or through his agents or servants from trespassing on the suit property. Being dissatisfied with the judgment, the appellant filed the instant appeal containing seven (7) grounds, which, condensed, are that the learned judge erred in law and in fact by;

- a) Failing to appreciate that the respondent's claim was statutorily barred.
- b) Failing to appreciate that there was an error on the index map and not on the physical location of the property.
- c) Failing to appreciate that under Article 159(1) of the Constitution the appellant's defence and counterclaim should not have been defeated by procedural technicalities.

During the hearing of the appeal, learned Counsel **Mr Nyasimi** held brief for **Mr Nyariki** who is on record for the appellant, while learned Counsel **Mr Masese** appeared for the respondent. Both parties had filed written submissions which Counsel chose to rely on without addressing us orally.

In the submissions, the appellant's Counsel interrogated the fact that the respondent filed suit for eviction on 24th September 2013, yet he obtained title over the suit property on 24th October 1989. He wondered why it took the respondent 24 years before asserting his ownership rights over the suit property. It was thus contended that the respondent was barred by the statute of limitation from bringing such an action over the suit property, the upper part of which he was not in occupation of.

Indeed, the appellant enjoyed quiet and uninterrupted possession over the same till 2013 when the respondent started construction thereon. The said portion measured approximately 50 by 100 feet out of the suit property. By operation of adverse possession, it was urged, the appellant acquired good title over the said upper part of the suit property and ought to be given title over the same.

The respondent's submissions were that the appeal lacks merit and ought to be dismissed. It not disputed that the respondent is the registered owner of the suit land and that all the legal processes of transfer of title were adhered to as was confirmed by the appellant's own brother, DW2. The suit property was subdivided from parcel No. West Kitutu/Bogeka/1713 and the appellant's parents retained parcel No. West Kitutu/Bogeka/1768 which was subdivided into No. West Kitutu/Bogeka/3604 and 3605. The latter is where the appellant has been residing and not on the suit property as he purports. Hence the learned judge did not err in finding the respondent as the legitimate owner who was entitled to the reliefs sought in the Plaintiff and the judgment cannot be faulted.

I have considered the record of this appeal and distilled the issues for consideration as whether the respondent was the legitimate proprietor of the suit property and whether he was entitled to the reliefs sought in the Plaintiff. I am conscious that as this is a first appeal, I ought to

reconsider the evidence, re-evaluate it and come to an independent conclusion bearing in mind that the trial judge had the advantage of seeing and hearing the witnesses. While I have only the cold letter of the record of appeal to guide me and must therefore make due allowance for that by according deferential respect to his findings of fact unless they be based on no evidence or are otherwise clearly wrong and untenable. See **SELLE-VS- ASSOCIATED MOTOR BOAT CO [1968] EA 123 & MOGONCHI V MOGONCHI [2004] eKLR.**

The appellant contended that the respondent had fraudulently acquired the suit property from his parents. Other than the bare allegations in the defence and counterclaim the appellant failed to provide an iota of evidence in support of the assertions. He did not discharge his burden captured in the basic rule, found in the **Evidence Act in Section 107 and 109** which states that he who alleges a fact bears the burden of proving it. From the record, the appellant tabled in attempted proof, a mutation form and receipt for payment of a building plan on parcel No. West Kitutu/Bogeka/3605, among others. However, the suit property is known as No. West Kitutu/Bogeka/1769. Not only are these two separate and distinct parcels from the face of it, the appellant failed to show the court the nexus between them or how those documents proved fraud on the part of the respondent. Moreover, in DW2's testimony, he stated that he was the current proprietor of plot number 3605, which is the same parcel the appellant was trying to prove in his testimony as being the suit property. That witness with contrarious evidence, was called by the appellant himself.

It is clear that appellant was seeking declarations over a ghost piece of land, that existing only on paper but was not situated where he purported. He further failed to establish before the court how the land that was supposedly his was allegedly fraudulently taken away by the respondent. His description of the land and the issue of the map being distorted were just mere words that did not have any backing in evidence. I find that the appellant failed to discharge his burden of proof on this limb.

The appellant besought the court to find the respondent guilty of fraud by merely mentioning the word 'fraud' in his pleadings and in his testimony. Yet the mere mention of the word fraud is not enough to find a party guilty of the same. See **BRUCE JOSEPH BOCKLE V COQUERO LIMITED [2014] eKLR.**

The allegation of fraud was put to rest by the appellant's own brother who testified and stated that the suit property was legitimately acquired by the respondent and that he was present when the transaction took place. It is trite that fraud is a serious allegation and the same ought to be strictly proved on a standard below beyond reasonable doubt but above the usual preponderance of probabilities standard in civil proceedings. I therefore find that the appellant failed to prove the allegations of fraud and the learned judge did not err in so holding. This Court in **EMFIL LIMITED V REGISTRAR OF TITLES MOMBASA & 2 OTHERS [2014] eKLR** expressed itself as follows, which I respectfully adopt;

***“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence.”***

On the issue of whether or not the respondent was the legitimate proprietor of the suit property, it should be obvious from the foregoing the answer is in the affirmative. There was no tangible evidence in rebuttal to the documents produced by the respondent, which included a copy of the sale agreement dated 13/6/1988; a copy of letter of consent dated 27/4/1989; a copy of the instrument of transfer of land dated 4/10/1989; a copy of certificate of official search on the register of the suit property dated 23/9/2013; and a copy of the title deed for the suit property in his name dated 26/10/1989. With such evidence, coupled with the appellant's failure to discharge his burden of proof on the Counter-Claim, the learned judge could not reasonably come to any other conclusion other than the respondent was the legitimate owner of the suit property.

In the upshot, I concur with the holding of the learned judge who carefully evaluated the evidence on record and arrived at the proper and logical conclusion that the respondent was lawfully entitled to the reliefs sought in the Plaintiff which he granted. I have no basis for departing from his decision which I uphold. This appeal lacks merit and I would dismiss it with costs.

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 Kisumu this 3<sup>rd</sup> day of April, 2020.**

**ASIKE-MAKHANDIA**

**JUDGE OF APPEAL**

**P. O. KIAGE**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**