



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 38 OF 2015

BETWEEN

DAVID OTEBA OOKO.....APPELLANT

AND

PETER JOE EMONGOR ..... RESPONDENT

*(Being an appeal from the judgment of the Environment and Land Court (Kibunja J.) dated 19<sup>th</sup> June 2014*

*in*

*Busia ELC Cause No. 101 of 2013 formerly HCCC No. 32 of 2010)*

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**JUDGMENT OF ASIKE-MAKHANDIA, J.A**

By a Complaint dated 3<sup>rd</sup> June 2010, a suit was filed seeking an order that the respondent be ordered to surrender 7.50 acres of land out of LR No. SOUTH TESO/APOKOR/731 to the appellant; and that the Deputy Registrar of the High Court be ordered to sign the transfer forms and all statutory forms on behalf of the respondent to enable the appellant to get registration of the 7.50 acres out of the suit property.

The facts in support of the claim were that at all material times, the appellant was the son of the late Okuo Oteba Ojwang who was the original registered proprietor of LR No. SOUTH TESO/APOKOR/731 measuring 8.5 acres. On diverse dates in the late 1970s, the late Okuo Oteba Ojwang sold to the respondent a portion of one acre from the suit property at a consideration of Ksh. 9,980. The portion of one acre was to be transferred to the respondent by way of sub-division.

In the complaint, the appellant averred that on or about 13<sup>th</sup> February 1989, the respondent fraudulently obtained the title deed for the entire parcel of land thus appropriating the entire 8.5 acres to himself leaving the appellant landless and homeless. The particulars of fraud on the part of the respondent were pleaded:

- (i) Excising a further 7.5 acres of the deceased's land without consent/knowledge of the deceased.
- (ii) Obtaining transfer of the entire suit land to his name without first obtaining the consent of the Land Control Board.
- (iii) Forgery of transfer and other statutory forms.
- (iv) Obtaining a huge chunk of land that he never paid for.
- (v) Disinheriting the appellant and being fraudulent per se.

In his statement of defence, the respondent denied in entirety the allegations of fraud and particulars thereof as pleaded in the complaint. He averred that in 1979, the late Okuo Oteba as the registered proprietor of the suit property offered for sale to the respondent the entire land through the Chief's Office in Amukura. The respondent accepted the offer and purchased the entire suit property at a meeting chaired by the area Chief. The deceased returned to his ancestral home at Tangakona where he later died and was buried, and where his family resides.

Upon receipt of the full purchase price, the late Okuo Oteba in 1984 applied to the Land Control Board for consent to transfer the suit property to the respondent. That consent was obtained and the transfer was duly executed and the suit property registered in the name of the respondent.

In the statement of defence, it was further averred that the respondent genuinely purchased the suit property without any fraud and he openly, continuously, peacefully and without interruption occupied the suit property for twenty-nine (29) years without any question from any person. The suit land does not form part of the estate of the late Okuo Oteba.

Upon hearing the parties, the learned judge dismissed the appellant's claim for excision and transfer of 7.5 acres of land. In dismissing the claim, the judge expressed as follows:

*That though the plaintiff position was that his late father told him he had sold only one acre out of the suit land to the defendant, there is no documentary evidence to support the position. Both the plaintiff and the defendant agree that indeed there was a written land sale agreement between the deceased and the defendant, but coincidentally, both told the court that they could not produce a copy to the court as the agreements got burned in some house fire.*

*That both plaintiff and defendant agree that the defendant took possession of the suit land after the sale agreement of 1980. However, the plaintiff's claim that the defendant occupied the extra 7.5 acres only as a caretaker from 1999 is contested by the defendant. .... The fact that the deceased did not take any steps to assert his right over the 7.5 acres until his death on 1<sup>st</sup> November 2009 tends to lend credence to the defendant's position that the sale agreement was for the whole land and not one acre as claimed by the plaintiff.*

*The plaintiff's allegation that the defendant obtained registration as proprietor of the South Teso/Apokor/731 fraudulently has not been proved as no evidence has been tendered before court to challenge the details attributed to deceased like thumbprint and identity card numbers on the application for consent of the Land*

*Control Board and the transfer document. No evidence was tendered before this court to suggest that the thumbprint and identity card numbers attributed to the deceased were obtained by the defendant through misrepresentation or by force. There is therefore nothing before this court to make the court interfere with the clear manifestation of the parties to the land sale agreement of 1980. The requisite Land Control Board consent was obtained and the transfer duly executed before the Land Registrar, Busia upon both parties being identified by one Festo Papai on 13<sup>th</sup> February 1989.... Had Okuo Oteba not been satisfied with the defendant's claim... that he bought the whole suit land, Okuo Oteba or the plaintiff would reasonably have been expected to commence recovery proceedings of the 7.5 acres.....*

*The plaintiff's father died on 1<sup>st</sup> November 2009 which is about 29 years from 1980 which is the time the defendant took possession of the suit land. It was also about 21 years from 1989 when the defendant got registered as proprietor of the suit land.*

*Even if the plaintiff's father had any claim over the suit land, it had become statutory time barred at the expiry of 12 years from the time the defendant took possession and or got registered as proprietor.*

Aggrieved by the judgment of the court, the appellant has preferred the instant appeal citing the following grounds:

- (i) That the transfer documents purported to have been signed by the late Okuo Oteba Ojwang were not actually signed by him and the learned judge did not call upon or involve the experts of signatories and handwriting to come and ascertain the authenticity of the signature and thumbprints that transferred the whole parcel to the respondent (*sic*).
- (ii) That the learned judge did not consider the evidence and argument of the appellant.
- (iii) That the judge did not consider that the transfer documents produced by the respondent did not bear the acreage which the deceased was transferring.
- (iv) That the deceased had two wives who did not give consent to the transfer.

At the hearing of this appeal, learned counsel Mr. Justus Okoth holding brief for Mr. Moses Omondi appeared for the appellant. Learned counsel Mr. William Ikapel appeared for the respondent. Both parties filed written submissions in the appeal.

Counsel for the appellant rehashed the antecedent and contextual facts to the dispute between the parties. It was submitted that the appellant's claim is founded on the statement told to him by his deceased father that he (deceased) had only sold one acre of land to the respondent; the respondent fraudulently transferred the entire suit property to himself. The respondent capitalized on the illiteracy of the deceased Okuo Oteba to register the entire suit property in his name; that in 1999, the appellant's father informed him that he never sold the entire suit property to the respondent and asked the respondent to vacate the 7.5-acre portion that was not sold to him. In support of the claim, the appellant relied on the testimony of PW2, Festo Odwokolo who testified that he was a witness to the sale agreement between the deceased

and the respondent and only one acre of land was sold.

In his written submissions, the appellant identified two issues for determination; namely, whether the suit before the learned judge was time barred, and whether the appellant failed to prove his case against the respondent.

It was submitted that the suit before the trial judge was not time barred since time began to run in 2002 when the deceased discovered the fraud. Under **Section 26 of the Limitation of Actions Act**, the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it. It was urged that the appellant's claim against the respondent is based on fraud and as such, the trial judge erred in finding that the limitation period had barred the appellant's suit. Counsel submitted that the deceased did not know of the fraudulent conduct of the respondent.

The appellant further submitted that the trial judge erred in finding that the claim against the respondent was not proved. It was submitted that it was common ground between all parties that there was an agreement of sale between the deceased and the respondent. The only issue is the portion and acreage of the suit land that was sold to the respondent. The appellant discharged the burden of proof and called PW2 Festo Odwokolo who was a witness to the sale agreement and who testified that it was one acre of land that was sold to the respondent. The evidence of PW2 was not challenged. It was further submitted that the particulars of fraud as itemized in the plaint were conclusively proved and the trial judge erred in failing to find that fraud had been proved.

In opposing the appeal, the respondent submitted that documentary evidence was tendered before the trial court to prove that the respondent purchased the entire suit property from the deceased. The application for Land Control Board consent, the approved Letter of Consent and the instrument of Transfer were all tendered in evidence. At no time was the authenticity of the documents presented to court challenged. No evidence was adduced that the documents were forgeries. The signature and thumbprint of the deceased were authenticated as required by law by none other than the Land Registrar who affixed his signature and stamp thereto. No evidence was adduced that the involvement of the Land Registrar was also a forgery.

With regard to expert evidence, the respondent submitted it was not the responsibility of the trial judge to call evidence or witnesses. The appellant neither applied to have the documents subjected to expert examination nor sought to call any expert witness to assist him. In any event, the issue of expert witnesses was never raised before the trial court.

On the sale agreement, it was urged that non-production of the sale agreement alone could not defeat the respondent's case. The appellant was equally unable to produce the sale agreement to show that it was one acre that was sold to the respondent.

The respondent urged that the suit land was not the appellant's father's ancestral land; that it was a gift from maternal uncles but the deceased opted to sell the land and return to his ancestral land at Tangakona; the appellant lied that he was landless; and that he had two parcels of land belonging to his father at Tangakona.

On the issue of limitation period, the respondent urged that limitation was not specifically pleaded in the suit and no application for extension of time had ever been made. In any event, if the appellant had any claim to the suit land, time began to run in 1980 when the respondent took possession of the suit land or in the alternative in 1989 when the respondent became the registered proprietor of the land. For the foregoing reasons, the respondent urged us to dismiss the appeal with costs.

This being a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusion. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123**, it 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 evidence in the case generally (Abdul Hameed Saif -v- Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”*

I have considered the written submissions filed by both parties and the authorities cited. It is not in dispute that the suit property measures 8.5 acres. It is also not in dispute that the respondent took possession of the suit property in 1980. It is not in dispute that there was a sale agreement between the deceased Okou Oteba and the respondent whereby the deceased offered to sell “the suit property” to the respondent. It is also not in dispute that the whole suit property is registered in the name of the respondent. With all these undisputed facts, there is one critical issue to be determined in this appeal namely: what acreage of land was sold to the respondent by the deceased?

The trial judge in answering the question made a finding that on balance of probabilities, the deceased sold the entire suit property to the respondent. Did the learned judge err in arriving at this finding? The appellant contends that the judge erred. The appellant points to the evidence of PW2 Festo Odwokolo who testified that he knew the respondent was buying land from the deceased. He was present when the deceased sold one acre of land to the respondent. The deceased did not sell the whole parcel of land to the respondent. He signed the written agreement. In cross-examination, PW2 stated that he had no evidence of fraud on the part of the respondent relating to how he got the deceased's land.

The trial judge in evaluating the evidence on record stated that the fact that the deceased did not take any steps to assert his right over the 7.5 acres until his death on 1<sup>st</sup> November 2009 tends to lend credence to the defendant's position that the sale agreement was for the whole land and not one acre as claimed by the plaintiff.

On my part, I have re-evaluated the evidence on record. Apart from the testimony of PW2 Festo Odwokolo, I have failed to find any other item of evidence that suggests the deceased sold only one acre of land to the respondent. This leads me to the question whether oral evidence by PW1 and PW2 can contradict and override documentary evidence that shows the entire suit land was sold to the respondent. I have examined and scrutinized the letter of consent from Amagoro Land Control Board dated 21<sup>st</sup> August 1980. The consent is to transfer the entire suit property to the respondent. The interest being transferred is stated to be absolute in Land Parcel South Teso/ Apokor/731. There is no entry or approval for sub-division of the suit property. The authenticity of the Land Control Board consent has not been questioned.

I have also examined the instrument of Transfer dated 13<sup>th</sup> February 1989 transferring the suit property from the deceased to the respondent. The signature of the transferor is evidenced by way of the Left Hand Thumb Print of Okou Oteba Ojwang. Before the trial judge, the authenticity of the thumb print was not raised.

A ground urged in this appeal is that the thumb print does not belong to the deceased Okou Oteba Ojwang and the judge erred in not calling expert witnesses to discount the same. A cardinal principle of law is that, '**he who alleges must prove**'. This is well captured in **Sections 107 to 109 of the Evidence Act** which read as follows: -

*“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

*108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.*

*109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”*

As correctly submitted by the respondent, it is not the duty of a trial court call a witness to prove or disprove any claim or assertion. It is the appellant who alleged that the instrument of transfer was fraudulent. It is the appellant who alleges that the thumb print on the instrument of transfer does not belong to the deceased. Pursuant to **Sections 107 to 109 of the Evidence Act**, the evidential burden to prove the alleged fraud and non-authenticity of the thumb print on the instrument of transfer was on the appellant. If at all the appellant wished to have a handwriting expert witness to authenticate the thumb print on the instrument of transfer, it was upon the appellant to call such a witness.

On burden and standard of proof, the dispute between the parties is a civil dispute. The standard of proof is on balance of probabilities. I have examined the evidence on record. The appellant has not been able to establish on balance of probabilities that indeed the deceased sold one acre of the suit property to the appellant. On balance of probability, I find that testimony by PW1 and PW2 cannot dislodge the documentary evidence tendered in court (more particularly the Letter of Consent of the Land Control Board and the Instrument of Transfer) that indicate that the entire suit property was sold to the respondent. It is a settled principle of law that documentary evidence is the best evidence. It is the best proof of the contents of such document and no oral evidence will be allowed to discredit or contradict the contents thereof except where fraud is pleaded. In the instant matter, yes indeed, fraud was pleaded but not proved. The consent of the Land Control Board and the Instrument of Transfer thus remained unchallenged. Even PW2 in cross examination stated he had no evidence to prove fraud on how the respondent came to be registered as proprietor of the suit property.

On limitation period, the appellant's claim was based on allegation of fraudulent transfer and acquisition of the suit property. The respondent's defence was grounded on bona fide purchaser for value of the entire suit property. The proceedings before the trial judge were not founded on the limitation period. I thus find that the statement by the learned judge on the limitation period was *orbiter dicta* and not the *ratio decidendi* for the decision to dismiss the appellant's suit.

For the foregoing reasons, I affirm and uphold the judgment of the trial court. I find that this appeal has no merit and would dismiss it with costs. As Kiage J.A concurs, it is so ordered.

This Judgment is delivered pursuant to rule 32 (3) of the court of appeal rules as Odek, J.A. sadly passed on before the delivery of the Judgment.

**Dated and delivered at Kisumu this 19<sup>th</sup> day of June, 2020.**

**ASIKE – MAKHANDIA**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**

**IN THE COURT OF APPEAL**

**AT KISUMU**

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

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*(An appeal from the judgment of the Environment and Land Court of Kenya at Busia (Kibunja, J.) dated 19th June 2014*

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**JUDGMENT OF KIAGE, JA**

I have had the advantage of reading in draft the Judgment of my learned brother Makhandia, JA with which I agree and to which I have nothing useful to add.

**Dated and delivered at Nairobi this 19<sup>th</sup> day of June, 2020.**

**P.O. KIAGE**

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**JUDGE OF APPEAL**