



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, MAKHANDIA & SICHALE, JJ.A)

NAKURU

CIVIL APPEAL NO. 64 OF 2017

BETWEEN

DANIEL KIRAGU KINYUA.....APPELLANT

AND

CONSOLATA KIPSOI (Suing as a legal representative of the

Estate of FRANCIS SAWE KIPSOI).....RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court of Kenya at Nakuru (Janet Mulwa, J.) dated and delivered on the 14th July, 2017 *in H.C.C.C. No. 22 of 2010*)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court at Nakuru (Janet Mulwa, J.) dated 14th July, 2016 in which the learned Judge made the following orders against the appellant: *a declaration that Francis Sawe Kapsoi (deceased) is the registered proprietor of Land parcel known as Nakuru Municipality Block 29/802 (original land parcel); that the subdivision of Nakuru Municipality Block 29/802 into two portions (land parcel no. Nakuru Municipality Block 29/1730 (the suit property) and land parcel no. Nakuru Municipality Block 29/1731) and subsequent registration of the said sub-divisions in the appellant's and the 2nd defendant in the trial court's name as the proprietors respectively, are fraudulent, illegal and therefore null and void; an order of cancellation of title no. Nakuru Municipality Block 29/1730 is issued together with an order for the amendment of the map to restore Land Parcel no/Nakuru Municipality Block 29/802, to its status as at 16th March, 2004; permanent injunction restraining the appellant by himself, his agents and servants from selling, leasing, constructing, developing or in any other way dealing with the Land parcels Nakuru Municipality Block 29/1730; a claim for Kenya shillings three hundred and ninety one thousand (Kshs. 391,000) is dismissed and; an order of eviction of the appellant from land parcel no. Nakuru Municipality Block 29/1730.*

2. A brief background of this appeal is that the respondent herein is the wife of the deceased who died on 10th April, 1995. It was her case that at all material times the deceased was the sole proprietor of Land Parcel No. Nakuru Municipality Block 29/802 (the original land parcel). Following a dispute over alleged fraudulent dealings in the suit property, she filed a suit, as the legal representative of the Estate of the deceased, as against the appellant and the 2nd defendant in the trial Court, one Ernest Morara Sakwa, (the suit against whom was later withdrawn following his demise) before the High Court. It was her case that on or about April 2005 the said parties fraudulently, illegally and without her knowledge caused a sub-division of the original land parcel into LR No. Nakuru Municipality Block 29/1730n (*the suit property*) and Nakuru Municipality Block 29/1731 and registered themselves as the owners of the same on 16th January, 2007 and 9th June, 2005 respectively. She cited the following particulars of fraud and illegality:-

- a. Subdividing and registering themselves as the owners of the suit property without consent of the family of the deceased.
- b. Subdividing and registering themselves as the owners of the suit properties when they knew or ought to have known that the registered owner was deceased and the estate was not represented.
- c. The defendants knew or ought to have known that there was a restriction on the dealing with the suit property.
- d. Removing the restriction without grant of letters of administration.

3. The particulars of fraud were premised on the evidence that: the deceased was the registered owner of the original land parcel as from sometime in 2004 having bought the same through Kalenjin Enterprises as a member and; one of the deceased's daughters was living on the suit property after the demise of the deceased until she was evicted by the appellant who claimed ownership of the suit property and accrued rent on allegations that he had acquired the same on 16th January, 2007 from the deceased's son, one David Kiprono Mutai, who was not an administrator of the deceased's estate.
4. In his defence, the appellant denied all allegations of fraud. It was his case that: he bought a sub-division of the suit property, for valuable consideration from the deceased's son, David Kiprono Mutai, vide a sale agreement dated 27th September, 2006; he lodged the transfer of the same, paid the requisite fees and was issued with a title deed on 16th January, 2007 hence taking possession and; vide a notice of distress he caused the eviction of the deceased's daughter and demanded accrued rent for a period of 3 years claiming she was a trespasser on the suit property.
5. The learned Judge upon hearing the case identified the issues for determination to be whether the sub-division of the original parcel of the land and subsequent sale of the resultant sub plots, in particular the suit property to the appellant, were fraudulently and illegally done; whether the suit property is subject to the Land Control Board Act; whether the respondent's suit ought to be dismissed for non-joinder of the seller of the suit property and the Commissioner of Lands as necessary parties and whether the respondent was entitled to the prayers sought in the plaint.
6. In her findings, the learned Judge held that the original parcel of land was registered in the deceased's name; that the deceased's son subdivided the said parcel of land and sold the suit property to the appellant without a grant of letters of administration; that the suit property was agricultural land and, therefore, subject to the Land Control Act hence the transfer required consent of the Land Control Board and that the duty to join the seller of the suit property and the commissioner of lands was an equal duty and choice by either party hence the appellant had a duty to do so if he deemed it necessary. Ultimately, the learned Judge held that the respondent had proved the particulars of fraud against the appellant on a balance of probabilities and so the appellant's title was bad in law and ought to be cancelled hence restitution in favour of the respondent.
7. Aggrieved, the appellant proffered the instant appeal which is premised on 9 grounds being that the learned Judge: *erred and misdirected herself* in law in finding that the suit property was subject to section 6 of the Land Control Act, a matter not founded on either pleadings or evidence; erred and misdirected herself in finding that the respondent had withdrawn the suit against the 2nd *defendant hence her judgment was a nullity as it affected the proprietary rights of the 2nd defendant*; erred in law in finding that the respondent had proved her case of fraud against the appellant; erred in law in finding that the appellant's title was acquired through fraud and illegality without evidence in support; erred in law and fact by finding that the deceased's son had no authority to transfer the suit property to the appellant and; erred and misdirected herself in finding that the deceased was the registered proprietor of the original land parcel.
8. The appeal was heard through video link due to the current Covid 19 Pandemic in accordance with this Court's Practice Directions. The appellant's submissions were filed on 10th July, 2020 by the firm of Musembi Ndolo & Co. Advocates while the respondent's were filed on 7th July, 2020 by the firm of Ogolla & Co. advocates. By consent of both learned counsel for the parties, the appeal was canvassed by way of written submissions without oral highlighting.
9. Urging the Court to allow the appeal, counsel for the appellant submitted that the learned Judge erred by introducing issues not pleaded by the parties. He maintained that the issue of whether the suit property was subject to the Land Control Board hence that the consent of the Land Control Board was required before the transfer, was not an issue before the trial Court as it was not pleaded. Therefore, that the learned Judge ought not to have delved into it. (See: **Kinyanjui Kamau v. George Kamau Njoroge Civil Appeal No. 132 of 2005**).
10. Citing Order 25 of the Civil Procedure Rules, counsel submitted that the proceedings before the trial court were faulty as trial proceeded before the court granted leave for withdrawal of the 2nd defendant in the trial Court. He maintained that the learned Judge despite noting the said application for withdrawal failed to give directions as to the effects of the said withdrawal on the respondent's pleadings and prayers as against the 2nd defendant in the trial Court.
11. Placing reliance on **Kinyanjui Kamau v. George Kamau Njoroge** (supra) counsel argued that the respondent failed to discharge her obligation to prove her case to the required threshold by failing: to produce evidence that the appellant sub-divided the entire original parcel of land; to produce evidence that the appellant fraudulently acquired the suit property and caused himself to be registered as the owner and; to avail the surveyor who did the subdivision, the Commissioner of lands who registered the sub-division and the deceased's son who was the seller, who were all relevant witnesses in the case.
12. He contended that the learned Judge misapprehended the evidence before her hence arriving at erroneous findings that the suit property was in a controlled area and that the deceased's son had no legal authority vide a grant of letters of administration, to sub-divide and transfer the suit property.
13. He maintained that according to the evidence on record, the suit property was transferred to the deceased's son and subsequently transferred to the appellant long before the caution was registered against the original parcel of land.
14. He contended that the learned Judge having agreed with the appellant's submissions that the deceased's son and the Commissioner of Lands were necessary parties to the suit who would have shed some light on how the suit property was registered in the appellant's name, ought to have dismissed the suit. Based on the above submissions, he urged this Court to allow the appeal.
15. In opposition of the appeal, counsel for the respondent submitted that the sub-division of the original parcel of land was fraudulent and illegal as it was effected over 10 years after the registered sole proprietor had died and that the same was done without either the issuance of a grant of letters of administration or a consent from the Land Control Board.

16. He maintained that from the search conducted by the respondent on 29th September, 2008, the original parcel of land was still intact and the search had confirmed the deceased as the registered owner. Further, that the said parcel of land had a caution registered against its title long before the purported sale of the suit property to the appellant.

17. Counsel reiterated that from the foregoing it was evident that the deceased was the registered owner of the original parcel of land on 16th February, 2004 hence the purported sub-division of the original parcel of land was illegal, null and void as no grant of letters of administration had been issued as at 2005; the acquisition of the suit property was in contravention of section 82 and 45 of the Law of Succession Act which prohibit and nullify any dealings with the estate of a deceased without a grant of letters of administration. He maintained that the appellant's defence that he was an innocent purchaser for value did not hold water on account of the fraud. (See: **Daniel Gituma Marete v. Frankline Mutwiri (2017) KLR**).

18. Citing **section 143** of the repealed Registered Land Act, counsel submitted that the appellant in his own evidence before the trial court acknowledged that the deceased's daughter was in possession of the suit property when he bought the same from the deceased's son. Therefore, he was aware of the respondent's and the deceased's daughter's right over the suit property and the fraudulent manner in which the transfer of the suit property to him was effected as the deceased's son was not the administrator of the estate.

19. Further, placing reliance on this Court's decision in **Kepha Maobe & 365 Others v Benson I. Mwangi & Another, Nairobi Civil Appeal No. 8 of 2004** (unreported) he submitted that the appellant could not claim an equitable right over the suit property as it was in his knowledge that his purchase of the same would infringe on the respondent's and the deceased's daughter's rights as protected under **sections 45 and 82(ii)** of the Law of Succession Act.

20. Placing reliance on **Order 25 Rule 1** of the Civil Procedure Rules, counsel submitted that the notice of withdrawal of the suit as against the 2nd defendant was brought to the attention of the trial court and the learned Judge was properly guided in making her pronouncements on the same to be marked as withdrawn.

21. Citing **section 6** of the Land Control Act and **David Sironga Ole Tukai v. Francis Arap Muge & Others (2014) eKLR** counsel submitted that from the evidence on record by the Director of Kalenjien Enterprises, it was evident that the suit property was located in a controlled area. Therefore, that the consent of the Land Control Board was necessary during the alleged transfer of the suit property to the appellant. He maintained that the appellant in his evidence before the trial court had conceded to having not acquired such consent prior to the purported transfer.

22. This being a first appeal, it is this Court's duty to re-analyze and re-assess the evidence on record and reach its own conclusions in the matter. In **Selle v. Associated Motor Boat Co. (1968) EA 123**, it was put more appropriately thus:

“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 vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”

23. Having considered the record in its entirety and rival submissions by counsel, the sole issue falling for the determination of this Court is whether the respondent proved fraud to the required threshold against the respondent.

24. It is common ground that according to the mother title, the original parcel of land was first registered in the deceased's name and title was issued on 16th March, 2004. It is also common ground that the suit property is resultant of the sub-division of the original parcel of land and that the respondent herein bought the suit property from one David Kiprono Mutai who is the deceased's son. On one hand, the appellant herein claims property rights over the suit property by virtue of his title dated 16th January, 2007 and on the other hand, the respondent claims the same on behalf of the estate of the deceased by virtue of a title registered in his name on 16th March, 2004.

25. In the persuasive High Court case of **Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016] eKLR**, Munyao J held as follows;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

26. In an earlier decision of this Court in **Munyu Maina v. Hiram Gathiha Maina, Civil Appeal No. 239 of 2009**, the same position of law was expounded as follows:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

27. A close perusal of the mother title registered in the deceased’s name shows that there is no other entry after the title issued to the deceased. As correctly observed by the learned Judge, it is not clear how the original parcel of land was sub-divided since according to the evidence on record, the deceased’s son caused a registration of the sub-divisions of the original parcel of land in his name after the death of the deceased. Therefore, seeing that the deceased died on 10th April, 1995, the son ought to have taken out a grant of letters of administration before he could have the original parcel of land transferred to his name and Title Deed issued on 29th September, 2005. A careful perusal of the evidence on record reveals that no grant of letters of administration were ever issued to the deceased’s son hence he had no good title, *ab initio*, which was capable of being transferred to anybody else.

28. The only defence by the appellant as to how he acquired the suit property is that he acquired title from the deceased’s son. However, there being two titles on record, as seen in **Munyu Maina v. Hiram Gathiha Maina** (supra) it was upon the appellant to prove the legality of how he acquired title in respect of the suit property.

29. A careful perusal of the proceedings before the trial Court shows that the appellant only relied on his own testimony. It is peculiar that he did not call the deceased’s son to testify as to the legality of the acquisition of the suit property. Further, as appears on the record, the fact that the respondent acquired an interim grant of letters of administration is evidence that there was no existing grant and/or administrators of the estate as at the time the suit property was sold to the appellant. In addition, it is common ground that the suit property was not vacant as at the time the appellant acquired it. Thus, he ought to have done his due diligence to ensure that no other parties had an interest in the same.

30. The appellant faulted the learned Judge for making findings that the suit property was in a controlled area yet the same was not pleaded. He argued that the learned Judge in addressing the same considered what she ought not to have considered as it was not pleaded hence arriving at erroneous findings.

31. It is trite that whereas parties are bound by their pleadings, it is the duty of the trial court to frame and answer such pertinent issues as may be disclosed by the pleadings and which the parties have sufficiently canvassed and tendered evidence in the course of the hearing. A careful reading of the proceedings before the trial court indicates that the issue of whether the appellant had acquired consent from the Land Control Board was an issue before the trial Court. Further, in the appellant’s own testimony during re-examination, he stated that he did not acquire the same as according to him, it was not necessary for the transaction.

32. The appellant also faulted the learned Judge for finding that the deceased’s son had no authority to sell the suit property to him and; that it was not detrimental to the case that necessary parties such as the commissioner for lands and the deceased’s son were not summoned to testify before the trial Court to shed some light on the contested issues.

33. As aforementioned, there is no evidence that the deceased’s son had a grant of letters of administration to clothe him with authority to effect the sub-division of the original parcel of land and, therefore, he had no good title to the suit property which he could pass to the appellant. The learned Judge cannot be faulted for finding that the deceased’s son had no authority to enter into a sale agreement with the appellant and transfer the suit property. This point alone is sufficient to dispose of the appeal.

34. For the foregoing reasons we come to the ultimate finding that this appeal is devoid of merit and the same is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 4th day of December, 2020.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR