



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 73 OF 2015

BETWEEN

JAPHETH NYAWADE CHESSAH.....APPELLANT

AND

DARIA NEKESA1ST RESPONDENT

PHAUSTINA APONDO OLOO.....2ND RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya, Environment and Land Court at Busia, (Kibunja, J.) dated 30th June, 2015

in

ELC NO. 48 OF 2014

Formerly

Busia H.C.C.C. No. 69 OF 2011)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment and decree of the Environment and Land Court (*ELC*), Busia, (*Kibunja, J.*) cancelling the registration of the appellant as proprietor of land title **No. Marachi/Elukhari/528**.

[2] The 1st and 2nd respondents are widows of **Gabriel Oloo Kombo** who died on about 21st October, 1979. On 29th June, 2011, the two respondents were granted a limited grant of letters of administration ad litem in respect of the estate of their deceased husband. On 3rd October, 2011, the respondents filed a suit in the High Court at Busia which was later registered in the *ELC*. The respondents averred in the plaint *inter alia*, that their deceased husband died intestate on 21st October, 1979 and before he transferred his interest in the suit land; that in 2007, the respondents discovered that the appellant had been registered as proprietor of the land, and that the appellant's acquisition of the said land was illegal and fraudulent. The particulars of fraud pleaded included the registration of the appellant without transfer forms signed by the deceased; registration and transfer without an application for consent to the Land Control Board and without consent to transfer; and in dealing with deceased's estate without succession proceedings.

The relief sought in the plaint was the cancellation of three entries in the register of the title and the restoration of the name of the deceased as the proprietor.

[3] The appellant in his statement of defence averred, amongst other things, that the deceased sold and transferred the land to him; that the deceased acquired and bought another land from the proceeds of sale of the suit land and moved from the suit land. He denied the allegations of fraud and illegality.

[4] The two respondents gave evidence at the trial and called one **Tom Chepkwesi** the County Land Registrar as a witness.

Daria Nekesa, the 1st respondent stated at the trial, *inter alia*, that she was the 1st wife of the deceased; that the suit land was inherited by her

husband from his father; that the deceased later bought another piece of land where they settled and left the suit land vacant; that deceased had given a portion of 2 acres of the suit land to his brother **Julius Namwenge**; that the parents and son of Julius Namwenge are buried on that portion; that it is in 2008 that she discovered that the appellant was registered as the proprietor of the suit land; that she asked the District Land Registrar to provide documents relating to the transfer but none was provided and that the deceased did not sell the suit land to the appellant.

The 2nd respondent adopted the evidence of the 1st respondent but added that she was married by the deceased in 1975 and settled on the land which the deceased had bought, that her deceased husband was educated and was employed by Standard Newspapers in Nairobi until he died, and, that the deceased never told her that he had sold the suit land.

[5] The appellant stated at the trial that he bought the suit land from the deceased in 1975 at a consideration of Shs. 3,400/= and two cows; that he signed an agreement of sale and obtained the consent of Land Control Board; that he was registered as proprietor on 13th November, 1975 and issued with a Title Deed in 1991; that the deceased left the land after he sold it; that the deceased used the proceeds of sale to marry the 2nd respondent; that the title deed has never been recalled for cancellation; and that he has never applied for the correction of his name. He produced a copy of the agreement of sale as exhibit amongst other documents.

The appellant called two witnesses – **Thomas Chesa Chesa (Thomas)** and **Teres Cheruiyot (Cheruiyot)** at the trial. Thomas adopted his witness statement filed in Court. The 2nd witness Teres Cheruiyot was an executive officer of Busia Court who produced court proceedings relating to disputes between the appellant and other persons. Thomas in the said statement, stated, amongst other things, that, the appellant is his brother; that the appellant bought the said land from the deceased; that he witnessed the appellant pay three heads of cattle to the deceased; that the parties made a written agreement which was destroyed when the appellant’s house got burnt in 1980 and that the 1st respondent witnessed the sale agreement.

[6] The trial Judge considered the evidence and made findings as follows:-

“(a) .. the Court is satisfied that the deceased never signed any transfer form transferring the suit land to Japheth Nyawade Chessah of National Identity Card No. 7522643/70.

(b) That the Court is also satisfied that the deceased never applied to correct his names from Gabriel Oloo to Japheth Nyawade Chessah as seems to be suggested in entry number 3 of 30th January, 1991 as he had died about 16 years earlier.

(c) That the registration of the defendant’s names as proprietor of the suit land under entry 3 was irregularly, illegally and unprocedurally done.”

The ELC entered judgment for the respondents and ordered the County Land Registrar, Busia, to correct the register of **Marachi/Elukhari/528** by cancelling entry No. 3 and 4 and restore the name of Gabriel Oloo, now deceased, as the registered proprietor of the suit land.

[7] The appeal is based on six grounds, the main ground being that the trial Judge erred in law and in fact by solely and overwhelmingly relying on the oral testimony of the Land Registrar as to the entries made on the Land Register.

Mr. Jumba for the appellant submitted in support of that ground that the Land Registrar could not explain how entries in the register were made, that the Land Registrar never stated the specifics of fraud; that fraud was perpetrated at the Land Registry and the Land Registrar should have been made a party to the suit and that the evidence of Land Registrar was not of much value.

The other ground of appeal is that the trial Judge failed to appreciate the appellant’s long occupation of the land for over 30 years with knowledge and consent of the respondent and the issue of fraud could not be raised after such a period.

Mr. Fwaya, learned counsel for the respondents submitted, amongst other things, that the standard instruments for sale of land, that is, sale agreement, application for consent of Land Control Board; consent for transfer form and receipts for payments were not produced by the appellant; that the appellant got himself registered through correction of name and that the entry registering the transfer of the land to the appellant had been cancelled.

(8) We have considered the appeal. The copy of the register of the suit land produced by the respondents at the trial and dated 25th November, 2011, that the suit which measured approximately 2.6 Hectares show in the proprietorship section in part the following entries.

1.	8.11.66	GABRIEL OLOO	
2.	13.11.75	JAPHETH NYAWADE CHESSAH	TRANSFER
3.	30.1.91	JAPHETH NYAWADE CHESSAH	C/NAME
4.	30.1.91	TITLE DEED	ISSUED

The County Land Registrar – **Tom Chepkwesi** testified *inter alia*, that entry No. 2 (*transfer*) was made but later cancelled as it was not entered in the original register or signed; entry No. 2 was made by a Land Registrar who had been transferred to Iten; entry No. 2 was not

signed and therefore made by mistake. At the trial, Tom Chepkwesi produced the official copy of the original register showing that entry No. 2 was cancelled. As for entry No. 3 which relates to change of name, the Land Registrar stated that this was a genuine entry although it was not supported by necessary documents, namely; a letter from the Chief confirming the names and an application to the Land Control Board for consent to correct the name and the consent itself.

[9] The appellant testified at the trial that an agreement for sale was made, that they went to the Land Control Board and a consent was given and that both he and the deceased signed the transfer. He produced a copy of the consent form dated 12th September, 1975 where his identity card was recorded as 6398 NN and stated that he did not apply for the correction of the name as indicated in entry No. 3. Nevertheless, he did not produce a copy of the application for the consent of the Land Control Board and a copy of the consent itself.

[10] However, according to the Land Registrar, entry No. 2 was cancelled immediately it was entered, the transfer produced by the appellant could not have come from his office as it was neither certified nor complete; it shows that the land was being transferred to **Japheth Nyawade Zablon Chessah** which is a different name from entry No. 3; that if the transfer was effected, the name of the proprietor would have read Japheth Nyawade Zablon Chessah and that the identity card number on the transfer form and address of Japheth are different from that indicated in the register. The appellant explained that the identity card No. 6398 NN was his old identity card but in 1991 when registration was done he had been issued with a new identity card.

[11] The respondent averred in the plaint that the appellant acquired the deceased's land illegally and fraudulently and gave the particulars of fraud in the plaint. The appellant in his statement of defence merely denied the allegations of illegality and fraud. The respondents called the County Land Registrar as a witness who in essence testified that the original land register showed that the transfer in entry No. 2 was entered in the register but the entry was not signed by the Land Registrar and that the entry was entered by mistake and cancelled immediately. He also testified that the official supporting documents were not available. By **Section 112** of the Evidence Act, the burden of proving or disproving any fact which is within the special knowledge of any party is upon that party.

Further by **Section 3(3)** of the Law of Contract Act, a contract for disposition of an interest in land is required to be in writing, signed by all parties thereto and the signature of each party attested by a witness who was present when the contract was signed. It is apparent that the suit land was agricultural land. By **Section 6(1)** of the Land Control Act, a transfer of agricultural land is void for all purposes unless the consent of the Land Control Board has been obtained. Lastly, by **Section 85(1)** of the Registered Land Act (*now repealed*) which was then applicable, a transfer of land was required to be in the prescribed form.

[12] The copy of the agreement of sale which the appellant produced at the trial and which has been omitted from his record of appeal was not complete and was not an official copy as it was not certified. The Land Registrar could not trace the original. The appellant did not produce copies of the application of the consent of the Land Control Board, a copy of the consent or even the minutes of the Land Control Board. The Land Registrar could not trace any official copies. Indeed, the evidence of the Land Registrar was that entry No. 2 transferring the suit land was made in error and was not signed and was immediately cancelled. The import of the evidence of the Land Registrar is that entry No. 2 is not an official entry of transfer of the suit land from the deceased to the appellant and hence the appellant was not by that entry registered as the proprietor of the suit land. The entry having been officially cancelled could not have vested the appellant absolute ownership of the land in terms of **Section 27 (now repealed)** of the Registered Land Act. By **Section 142(1)** of the Registered Land Act, the Registrar had power to rectify the register and by **Section 37(3)** entries or notes made in or any register is conclusive evidence of the matter or transaction it records.

The appellant did not file a counter-claim joining the Land Registrar as a party impugning the rectification of the register by cancellation of the transfer.

[13] Entry No. 3 by which the name of the appellant appeared on the register was an entry for correction of name. As entry No. 2 had already been cancelled, that entry refers to the correction of the name of the deceased. The Land Registrar testified that the necessary documents to support that entry were not available. In any case, the appellant denied that he made an application for the correction of name. The procedure of correction of name was not a lawful means of transferring the land from the name of the deceased to the name of the appellant.

[14] The appellant claimed that he has been in possession of the suit land for a long period. The appellant's witness Thomas Chesa Chesa testified that the appellant has not settled on the land as there has been disputes over the land. There was evidence that there has been disputes over the land between the appellant and the relatives of the deceased. Indeed, the appellant referred to the court proceedings between him and the relatives of the deceased. Furthermore, the appellant neither identified any interest in the suit land that he may have acquired by virtue of such possession nor filed a counter-claim relating to such interest.

[15] On our reconsideration of the evidence, we are satisfied that the ELC reached the correct decision. Accordingly, the appeal has no merit and is dismissed with costs to the respondents.

Dated and Delivered at Kisumu this 24th day of May, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy
of the original

DEPUTY REGISTRAR