



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED.J.J.A)

CIVIL APPEAL NO. 27 OF 2015

BETWEEN

SAMUEL WAFUNAFU WACHILONGA APPELLANT

VERSUS

JOHN MAKOKHA SAKWA RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Bungoma,

(A. Omollo, J) dated 5th November, 2014 in

ENVIRONMENT & LAND DIVISION CIVIL CASE NO. 82 OF 2005)

JUDGMENT OF THE COURT

[1] This is an appeal from the judgment of the High Court (*A. Omollo, J*, which dismissed the appellant's claim for recovery of land title **No. Kimilili/Kimilili/813** comprising of 3.5 acres (*suit land*), from the respondent.

[2] The respondent is the son of **Kefa Sakwa Wafunafu** (deceased) who died on or about 4th July, 2009 after the suit giving rise to this appeal had been filed. The deceased was the proprietor of the suit land. He was registered as the proprietor after land adjudication on 10th August, 1965. On 11th February, 2004, the deceased transferred the suit land to the respondent herein as a gift and the respondent was registered on the same day and issued with a title deed.

[3] The suit against the respondent was filed on or about 26th September, 2005. The appellant had previously filed two other suits against the deceased. The first suit was **KIBINGEI LAND DISPUTES TRIBUNAL CASE NO. 10 OF 1999**. In that case, the appellant claimed that the deceased who was his father's eldest brother had by agreement dated 8th June, 1964 sold the suit land to the appellant for Shs. 350/=. The deceased denied the claim. However, the tribunal awarded the land to the appellant. The appellant's evidence in the High Court showed that the award was adopted as a judgment of the court on 22nd September, 1999 in Kimilili case No. 29 of 1999 but later on 3rd November, 1999 the court set aside the award.

The second case was filed in the High Court at Bungoma being Civil Case No. 153 of 1999 (O.S) in which the appellant claimed the land from the deceased on the basis of adverse possession. That suit had not been prosecuted by the time the deceased died.

[4] On 4th April, 1999, the appellant lodged a caution against the title of the suit land claiming purchasers' interest. However, the deceased filed Miscellaneous Civil Application No. 41 of 2003 in the Senior Resident Magistrate's court at Webuye seeking the removal of the caution. The court by an order given on 20th January, 2004 removed the caution.

[5] The appellant pleaded in the suit in the High Court, *inter alia*, that he bought the suit land from the deceased on 8th June, 1964; that he has been in continuous and peaceful possession of the land since 1964; that he lodged a caution against the title and filed High Court Bungoma case No. 153 of 1999 (O.S); that the respondent fraudulently procured transfer of the title to himself; that the transfer to the

respondent should not have been made as it was subjudice, and that a declaration should be made that the respondent was holding the title in trust for the appellant.

The particulars of fraud pleaded against the respondent were:

“1. Falsely representing to the Land Registrar that he had a valid land control consent.

2. Falsely representing to the Land Registrar that there was a valid title to be transferred to him when such title had been extinguished by adverse possession of the plaintiff.

3. Procuring the transfer of title which he knew was the subject of an on-going suit.”

The appellant further pleaded that the respondent invaded the suit land on 21st September, 2005 and destroyed the appellant’s crops. The relief sought in the amended plaint were, *inter alia*, an order for rectification of the register; a permanent injunction restraining the respondent from interfering with the land; a declaration that the respondent holds the suit land in trust for the appellant and compensation for malicious damage to crops.

[6] At the trial, the appellant was represented by his son **John Manyonge Wafunafu** to whom he had donated a power of Attorney. The appellant’s son gave evidence and called three witnesses. The gist of the evidence was that the deceased sold the suit land to the appellant by an agreement dated 8th June, 1964; that the appellant was given possession of the suit land; and that the appellant was still in possession of the suit land.

[7] The respondent filed a defence and counter-claim. He denied that the deceased sold the land to the appellant and gave him possession. He further averred that the deceased transferred the land to him as a gift; and that he was lawfully registered as proprietor after a valid consent of the Land Control Board was given. By the counter-claim, he sought an order of eviction. He gave evidence at the trial and called two witnesses.

[8] The agreement dated 8th June, 1964 that the appellant relied on as the contract of sale of land between him and the deceased, was in the following terms:

“MAPATANO YA KULIPA DENI

Bwana Kefa Sakwa M/No. 292 wa Khamulati Area amekubali kukopa mabati 60 x 9 x 30 G pamoja na Ridgings. Kulipa Shs. 50/00 cash.

Mr Samwel Wafunafu Naliye atalipa Shs 350/00 ambazo ni ya mapatano ya kusiana shamba yaani Bw. Kefa amemuuzia Bw. Wafunafu shamba lake kwa bei ya Shs 350/00. Zinazo bakia Bw. Kefa atakuwa akilipa kila mwezi tangu mwezi wa July 31/7/64

Sahihi za:

1.(name inserted)

2.(name inserted)

APPROVED BY(signed) Secretary”

[9] Paul Wasiandu who recorded the agreement gave evidence at the trial for the appellant. His evidence was in essence that the deceased who was a member of Khamulati Coffee Growers Co-operative Society Ltd wanted to take iron sheets on loan from the society but his coffee trees did not meet the amount of iron sheets he wanted, that deceased agreed to sell his land to the appellant who was also a member of the society for Shs. 350/=, that the Shs. 350/= was later paid to the society by the appellant on behalf of the deceased by instalments, that he recorded the agreement as secretary of the society and both the appellant and the deceased signed the agreement. The appellant averred that the Shs. 350/= was deducted by the society from his coffee proceeds in three instalments the last instalment being made on 10th December, 1965.

[10] The High Court considered the evidence relating to the agreement and said in part:

“The document ... as drawn did not give details of the land sold e.g. its number and size. The document did not indicate any acknowledgement of any of the instalments by the late Kefa or any receipt issued by the co-op society.”

[11] The learned judge also considered the evidence of the appellant’s witnesses particularly, the evidence of **Godfrey Masibo Sakwa** – a brother of the respondent who said that he was a witness to the agreement of sale of land; **Richard Wachionga** who said, amongst other things, that, the appellant paid the purchase price of Shs. 350/= to the deceased in three instalments at the home of the appellant; the evidence of **Paul Wasiandu**, already referred to, who, in addition, said that the appellant gave the money to the society and that there was no direct payment from the appellant to the deceased. In view of contradictions, the trial judge doubted the credibility of the witnesses regarding the authenticity of the agreement. Ultimately the trial judge made a finding that the agreement was a debt agreement and could not be conclusively used as a sale of land agreement.

[12] As regards the claim of fraud against the respondent, the trial judge made a finding that the suit claiming the land by adverse possession (HCCC No. 153/00 (O.S)) had abated after the death of the original proprietor, that there was no encumbrance on the land and the land was lawfully transferred to the respondent after the consent of Land Control Board was obtained.

[13] Lastly, on the claim that the respondent held the land in trust for the appellant, the High court said in part:

“The plaintiff’s occupation of the suit land appears to me to be founded on a document that did not give him any right to do so. There is no valid contract between him and the late Kefa over suit land ... It follows that there is no relationship legal or equitable that was established/created between him and the late Kefa over the suit land. In the absence of such relationship, it is difficult for the Court to apply the doctrine of constructive trust in his favour as the defendant got title to the suit land clear of any obligations equitable or otherwise. In my view, the plaintiffs claim if any would have been put forward by a claim for adverse possession and not trust. The claim on trust fails as it is not supported by any facts on record.”

[14] The High Court however entered judgment for the appellant for Kshs.670/= plus interest for damage to crops but each party was ordered to pay his own costs of the suit.

There is no cross appeal against the award of Kshs.670/=. The respondent’s counter-claim was also allowed.

[15] The grounds of appeal fault the findings of the court particularly the finding that the agreement of sale was void; that the suit claiming the land by adverse possession had abated; that the transfer of the land to the respondent was not fraudulent; and that the doctrine of constructive trust was not applicable.

[16] We have considered the grounds of appeal, the written submissions by the appellant’s counsel, the respective oral submissions and the appellant’s authorities.

[17] The parties in the dispute are closely related. The respondent claimed that the appellant’s land borders the suit land and that the deceased was using the suit land for grazing.

Godfrey Masibo Sakwa, the brother of the respondent and who gave evidence for the appellant at the trial admitted that the appellant owns three other parcels of land that surround the suit land. Further, Richard Wachilonga, the appellant’s witness testified at the trial that there is no boundary between the suit property and the appellant’s other parcels of land. The respondent disputed at the trial that the appellant was in possession of the suit land and claimed that the appellant lives on the neighbouring land.

It is clear from the pleadings that the appellant’s suit against the respondent was not based on adverse possession. The finding of the trial court that the appellant was not claiming the land from the respondent by virtue of adverse possession has not been impugned and cannot be faulted.

[18] Substantial evidence was called by the appellant to prove that he bought the said land from the deceased, and that he was put in possession subsequent to the sale.

As the trial judge correctly pointed out, there was no express and unequivocal agreement of sale of identifiable land, nor were the terms of such sale between the appellant and the deceased agreed and executed in accordance with the law.

In any case, that agreement was superseded by the land adjudication process, by which the deceased was adjudicated the owner and subsequently registered as the proprietor.

Moreover, the appellant’s rights under that agreement were extinguished by effluxion of time. That is perhaps why the appellant filed HCCC NO. 153/99 (O.S) for adverse possession against the deceased, instead of a suit for specific performance of the agreement of sale of land.

[19] The appellant’s claim that the respondent procured the transfer of the suit land to himself by fraud was correctly rejected by the High Court.

The caution lodged against the suit land by the appellant was removed by a court order. The deceased applied for consent of the Land Control Board and the consent was granted. Although there was a pending suit filed by the appellant against the deceased, the appellant had not obtained any judgment granting him proprietary rights over the suit land or an order of injunction restraining the deceased from transferring the land. As there was no encumbrance on the title, there was no legal bar against transferring the suit land by the proprietor to the respondent.

[20] The appellant’s claim that the respondent held the suit land in trust for him was rejected on the ground that there was no legal or equitable relationship between the appellant and the deceased which could give rise to constructive trust as the contract for the sale of land was not valid and thus did not give the appellant a right of occupation of the suit land.

The appellant pleaded that the respondent’s father died on 4th July, 2009. Japheth Wafunafu Sakwa, the respondent’s brother confirmed that his father died in 2009. Thus, at the time the suit was filed in 2005 the deceased was alive. The appellant did not make him a party to the suit. He was a necessary party because the respondent’s title could not be challenged without challenging his title.

It seems from the amended plaint that the claim that the respondent held the land as a trustee was based on the fact that the transfer was done

when the appellant was in possession and also when there was a pending suit relating to adverse possession. The claim could not lie because there was no privity of contract between the appellant and the respondent or any legal relationship.

In addition, by the time the suit was determined on 5th November, 2014, more than five years had elapsed since the death of the respondent's father yet the appellant had not applied for a legal representative of the respondent's father to be made a party in the pending suit. As the trial judge correctly stated, the pending suit against the respondent's father had abated by operation of law as provided by **Order 24 Rule 4(3)** of the **Civil Procedure Rules**. In these circumstances, the appeal against the finding that the respondent did not hold the land in trust for the appellant has no merit.

[21] For the foregoing reasons, the appeal has no merit and is hereby dismissed with costs to the respondent.

DATED and delivered at Eldoret this 4th day of October, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR