



IN THE COURT OF APPEAL

AT KISUMU

CORAM: MUSINGA, GATEMBU, MURGOR, JJA

CIVIL APPEAL NO. 85 OF 2015 KISUMU

BETWEEN

NOVA OGOTI RONGAI.....APPELLANT

AND

SAMUEL KEBATI OSORO.....1ST RESPONDENT

CHARLES OYARO ORANGI.....2ND RESPONDENT

(An Appeal from the Judgment and Decree of S. M. Kibunja, J. dated on 22nd July, 2015

in

BUSIA ELC NO. 30 OF 2012)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment and decree of the High Court of Kenya at Busia (Kibunja, J) given on 22nd July 2015 in which the court dismissed the appellant's suit against the respondents. In the suit, the appellant sought orders for cancellation and nullification of transfer of the property known as Title Number Bukhayo/Bugengi/1533 from the name of his deceased mother to the respondents on grounds that his father who purportedly transferred the property did not have capacity to do so.

Background

2. The appellant, Nova Ogoti Rongai, is the son of James Masaki Rongai and Hellen Kwamboka Rongai, deceased, who died on 31st July 1988. The deceased was registered as proprietor of the property known as Title Number Bukhayo/Bugengi/1533 measuring 0.27 hectares approximately (the property). In May 1987, during the deceased's lifetime, the property was charged to National Bank of Kenya Ltd, Kisii (the Bank) to secure a facility of Kshs.100, 000.00. According to the deceased's husband, James Masaki Rongai, who testified before the trial court as PW2, the deceased had given him a power of attorney "limited to getting loan" which he used to get that loan from the Bank.

3. By the time the deceased died on 31st July 1988, the Bank had not discharged the property, as the loan

had not been paid off. In March 2001, by a letter dated 15th March 2001, (approximately 13 years after the death of the deceased) the Bank informed the deceased's husband, James Masaki Rongai, that it had "*no objection in you selling off the above property so long as proceeds thereof will be channeled to us to reduce your debts in our books.*"

4. The Bank followed up that letter with another letter to the deceased's husband on 23rd March 2001, in which it wrote as follows:

"Dear Sir,

RE: TITLE NO. BUKHAYO/BUGENGI/1533

MRS HELLEN K. RONGAI

Further to our letter of 15th March, 2001 and our subsequent discussions when you called on us on 23rd March, 2001, we write to confirm that once the purchase price is approved by our control office and payments made to the bank, we shall release the title deed together with the discharge of charge to you.

Thank you for our (sic) co-operation.

Yours faithfully,

S. Odiyo

Manager"

5. On the same day, i.e. 23rd March 2001, James Masaki Rongai entered into a Sale Agreement with Samuel Kebati Osolo, the 1st respondent, under which the 1st respondent agreed to purchase the property for Kshs. 50,000.00. The Sale Agreement provided that: the purchase price would be paid to the Bank; that the Bank would transfer the property to the purchaser; that the Bank gives assurance to the purchaser that such transfer will be effected as soon as the purchase money is paid; and "*that the role of Mr. James Masaki Rongai in this transaction is merely intermediary as he is acting on authority given to him by the bank.*"

6. A discharge of charge was subsequently registered against the title on 18th December 2001 and the property was transferred to the 1st respondent on 19th December 2001.

7. On 18th May 2003, the appellant wrote a letter to the 1st respondent "*on behalf of [his] brothers*" asserting, among other things, that his father, James Masaki Rongai, entered into the agreement for sale without involving them and enquiring how the property got transferred to him.

8. Subsequently, and approximately eight years after the purchase of the property from James Masaki Rongai, the 1st respondent sold the property to the 2nd respondent under an agreement for sale dated 12th October 2009 for a consideration of Kshs. 1,300,000.00 to whom the property was then transferred on 13th November 2009.

9. Thereafter, in December 2012, the appellant commenced suit against the respondents before the High Court at Busia, which has given rise to this appeal. As already indicated, the appellant sought, in that suit, orders for the cancellation and nullification of the transfers of the property in favour of the respondents. He also sought an order for the title to the property to "*revert into the names of the deceased Hellen Kwamboka Rongai*" on the grounds that the transfers were done in violation of the provisions of the Law of Succession Act and on the grounds that the transfer to the 2nd respondent was fraudulent.

10. In his defence, the 1st respondent pleaded that he validly purchased the property “*with full participation of the [appellant’s] father one James Rongai as charger (sic) or borrower and National bank Kisii branch as chargor where the suit property was charged to the Bank by the [appellant’s] father under a general power of attorney over the suit property.*” He also pleaded that the suit “*is incompetent and statute barred under the provisions of the limitation of action Act.*”

11. On his part, the 2nd respondent pleaded in his defence that at the time of her death the deceased left the title to the property with the Bank as security for a loan advanced to her husband and as such she did not have title to the property unless he cleared the loan; that the property was transferred to the 1st respondent in accordance with the provisions of the then Registered Land Act for non-payment of the loan advanced and as such the Law of Succession Act does not apply; that he is an innocent purchaser of the property, having carried out a search, following the legal procedures and paying the due consideration; that if there is any wrongdoing, the proper persons to be sued would be the appellant’s father and the Bank.

12. After considering the evidence, the learned trial Judge made findings that the property was registered in the name of the deceased on 8th October 1986; that the deceased died on 31st July 1988; that the appellant was issued with a limited grant of probate and letters of administration for the estate of the deceased on 19th September 2012 and properly instituted suit.

13. The Judge also found that James Masaki Rongai had defaulted in repaying his loan to the Bank that was secured by the property; that the Bank had communicated its intention to realize the security but accepted a request by James Masaki Rongai to be allowed to identify a suitable purchaser “*instead of the land being sold through public auction*”; that James Masaki Rongai was actively involved in selling the property to the 1st respondent and at the conclusion of the transaction the title documents and transfer documents were transferred by the Bank to James Masaki Rongai who in turn passed them to the 1st respondent.

14. According to the Judge, should James Masaki Rongai or the appellant believe the procedure of realizing the charged property was not followed, their option is against the Bank, and not the respondents “*who were innocent purchasers for value.*”

The appeal and submission

15. Aggrieved, the appellant lodged this appeal, complaining that the learned Judge relied on a non-existent power of attorney that was neither produced nor exhibited; that in any event such power of attorney would have been revoked, automatically, upon the death of the donor; that the Judge failed to consider that the property was subject to application of the Law of Succession Act; that James Masaki Rongai, not being the personal representative of the deceased and had no capacity to sell the property and the sale transaction to the 1st respondent as well as subsequent sale transaction to the 2nd respondent were null and void; and that the judge failed to properly consider the evidence.

16. The appellant, who appeared in person, relied on his written submissions and urged that the 1st respondent did not obtain land control board consent and the sale transaction is void under Sections 6 and 8 of the Land Control Board; that his father James Masaki Rongai, could not transfer the property in the absence of a grant of representation for the estate of the deceased; that under Section 45 of the Law of Succession Act, what his father did was to intermeddle with the estate; that contrary to the finding by the Judge, the Bank did not transfer the property in exercise of its statutory power of sale; that the transfer of the property to the 1st respondent was in fact done by his father and not by the Banks power of sale. He complained that the Judge erred in relying on a power of attorney that was not produced and the Judge wrongly assumed it existed and was registered.

17. Opposing the appeal, Mr. Okeyo learned counsel for the 1st respondent and also holding brief for Mr. Onsongo for the 2nd respondent, submitted that the property was charged to the Bank which held a power

of attorney; that James Masaki Rongai had a fiduciary relationship with the Bank and was under a duty to inform the Bank of the death of the deceased; that under Section 99 of the Land Act, a remedy is provided for any person prejudiced by the wrongful exercise of statutory power of sale; that the sale by the Bank was valid and it received the full blessing of the appellant's father who requested the Bank to sell the property by private treaty; that the appellant was himself aware of the transaction and indeed benefited from the sale, but his contention was the price paid; that the property is commercial as opposed to agricultural and the question of land control board consent does not arise; that despite alleging fraud, the appellant did not prove it; that the learned Judge correctly concluded that the respondents are innocent purchasers.

Determination

18. We have considered the appeal and the submissions by the appellant and by learned counsel for the respondents. Our duty as the first appellate court was stated in **Selle and another versus Associated Motor Boat Company Limited & 2 others [1968] EA 123** in these terms:

“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 conclusion. 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 allow the trial Judge’s findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probability materially to estimate the evidence or if the impression based on the demeanor of the witness is inconsistent with the evidence in the case generally.”

19. In effect, we cannot interfere with the findings of fact by the learned Judge unless such findings are not based on evidence or are based on a misapprehension of the evidence or if it is shown that the Judge acted on wrong principles in arriving at those findings.

20. Having reviewed and evaluated the evidence, it is not in any doubt that until the property was transferred to the 1st respondent on 19th December 2001, it was registered in the name of the deceased who died about 13 years earlier on 31st July 1988.

21. There is also no doubt that the property was charged to the Bank during the lifetime of the deceased, and that by the time of her death, the charge on the property had not been discharged. In the Judge's view, the sale of the property to the 1st respondent was undertaken by the Bank in exercise of its statutory power of sale. The Judge put it thus in his judgment:

“There was no requirement for Land Control Board to be obtained in this transaction as the sale was through the bank's power of sale under section 74 of the Registered Land Act Chapter 300 of Laws of Kenya [repealed] whose remedies have been carried on under section 90 of Land Act No. 6 of 2012. There is no indication from PW 2 or the Plaintiff that the Bank and 1st Defendant were notified that Hellen Kwamboka Rongai had by the time of these transactions died. Even if disclosure had been made, the facts would not have changed as she had given PW 2 the power of attorney to charge the suit land and the Bank had statutory power to sell the charged property once the chargor defaulted. The transactions did not need to be processed through the Succession proceedings.” [Emphasis]

22. The question is whether the evidence supports that finding. What the evidence shows is that the appellant's father approached the Bank with a view to redeeming the property and offered to get a buyer. The Bank informed him that it had no objection in its letter to him dated 15th March 2001. The appellant's father went ahead to get a buyer, the 1st respondent, and entered into an agreement for sale purporting to do so as an agent of the Bank. The Bank was not itself privy to that agreement. There was accordingly no material placed before the trial court to support the finding that the Bank sold the property

in exercise of its power of sale. The finding by the Judge is based on a misapprehension of the evidence. The appellant's father, James Masaki Rongai, was categorical in his testimony that he is the one who sold the property to the 1st respondent. The evidence does not support the finding by the learned Judge that the sale of the property to the 1st respondent was through the Bank's exercise of its statutory power of sale.

23. Had the learned Judge properly evaluated the evidence, he would have come to the conclusion that the sale of the property to the 1st respondent was by the appellant's father.

24. The next question is whether the appellant's father had the capacity to sell the property? James Masaki Rongai did not at any time apply for grant of letters of administration of the estate of the deceased. What he did, spurred on by the Bank, by purporting to sell the property to the 1st respondent was tantamount to intermeddling with the estate of the deceased. Without a confirmed grant, the appellant's did not, by dint of Sections 45(1) and 55 of the Law of Succession Act, have the legal capacity to sell and transfer the deceased's property. See the decisions of this Court in **Lly Odhiambo Onyuka vs. Ayub Odhiambo Migwalla [2005] eKLR** and **Peter Ombui Nyangoto vs. Elizabeth Matundura & another [2013] eKLR**.

25. The power of attorney allegedly given to James Masaki Rongai by the deceased for purposes of obtaining a loan with the bank could not confer authority on him after the death of the deceased to transfer the property. The 1st respondent did not therefore get a good title that he could possibly transfer to the 2nd respondent.

26. For those reasons, the appeal succeeds and is hereby allowed. The judgment and decree of the lower court dismissing the appellant's suit with costs is hereby set aside. We substitute therewith an order nullifying and cancelling the transfer of the property known as Title Number Bukhayo/Bugengi/1533 from the name of the deceased. We order that the title shall revert into the name of the deceased.

27. As the appellant's father, James Masaki Rongai, who is not a party to the proceedings, has brought about the unhappy state of affairs, each party shall bear its own costs of the proceedings in the High Court and of the appeal.

Orders accordingly.

Dated and delivered at Kisumu this 20th day of July, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR