IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MUSINGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 39 OF 2015

BETWEEN

NAPHTALY OMIDO……..……APPELLANT

AND

DAVID AKONYA AMAYA…….1ST RESPONDENT

JOSPHAT CHIMWANI SIHAFU…..2ND RESPONDENT

SOLOMON ATSULU OMULUPI….3RD RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kakamega, Chitembwe, J.) dated 30th December 2014 **in Succession Cause. NO. 541 of 2013)**

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JUDGMENT OF THE COURT

The appellant, ***Naphtaly Omido,*** *(Omido)* claimed that by two sale agreements made on 14th February 2009, Joash Amaya *(the deceased,)* had sold him two portions of Land Parcel No. Butsotso/Shibeye/339 *(the suit land*), one portion comprising 2 acres for an amount of Kshs. 260,000/- (*the first agreement*), and the other 1½ acres for Kshs. 110,000/- (*the second agreement*).

Upon payment of the agreed sums, Omido immediately took over possession of the portions, and together with his brother, ***Thomas Uyangi*** *(Thomas)* ***DW 8,*** erected a house on the 2 acres, and planted trees on the 1½ acres.

It was his further claim that at the time of distribution of the estate of the registered owner of the suit land Mulupi Wetende *(the registered owner*), ***David Akonya Amaya*** *(David)*, the 1st respondent, and administrator of the registered owners' estate, and ***Solomon Atsulu Omulupi*** (*Solomon*) the 3rd respondent, had failed or refused to list his interest in the suit land as part of the registered owner's estate; that they had purported to sell it to ***Josephat Chimwani***, (*Chimwani*), the 2nd respondent, whose interest they had listed instead.

By the time of his demise, the deceased and his sons had disposed of a number of plots to various purchasers.

When the parties appeared before Kimaru, J. on 26th October 2011, the court confirmed the grant and ordered that, the suit land comprising 29 acres be subdivided and distributed as follows;

David Akonya Amaya - 8 acres

Samuel Akhulunya Amaya - 4 acres

Harron Namale Anday, - 1 acre

Reuben Okoti Omusebe, - 1.5 acres

John Ochieng Othieno, - 2.5 acres

Josephat Chimwani - 3 acres

Naphtaly Omido - 2 acres

Meshack Khayega Ilati - 3 acres

Lilian Anyanda Sakwa - 3 acres

Road access - 0.2 acres

Omido was aggrieved by the court's decision, and filed an application dated 5th December 2012, seeking the revocation of the grant, claiming that though he was given the 2 acres, the court failed to appreciate that he had also purchased another 1½ acres from the deceased on the same day. As a consequence, he sought to have his interest included.

After hearing the parties, the High Court agreed that Omido was entitled 2 acres of the suit land, but the court was not convinced that he had purchased an additional 1½ acres as it found the second agreement in respect of this portion to be doubtful.

Being dissatisfied by the decision of the High Court, Omido brought this appeal on grounds, *inter alia*, that the learned judge was wrong to disregard the second agreement as there was no evidence to show it was fraudulently contrived; that the learned judge fell into error when he questioned the existence of the two agreements, and failed to appreciate that the second agreement concerned the portion of the suit land that was separated by a road; that by disregarding the second agreement the learned judge improperly allocated the portion comprising 1 ½ acres to Chimwani who had purported to purchase it almost two years later; and finally, that the learned judge failed to evaluate the evidence and in so doing arrived at the wrong conclusion.

In his submissions, Omido, who appeared in person stated that by two agreements of 14th February 2008 he purchased 3 ½ acres of land from the deceased. He was granted possession the same year and that the land was surveyed by one Amos Chahayo, a surveyor. It was his case that he is still in possession of the land, and has built a house on one portion and planted trees on the other.

Omido complained that the learned judge's conclusion that the second agreement was invalid was without any basis whatsoever, as at no time was it established that that the second agreement was fraudulent or unlawful, and that the existence of the two agreements was not at any time questioned by the respondents. Furthermore, the learned judge erred when, without reason, discounted the appellant's explanation for the cancellations in the second agreement.

It was Omido's further argument that the learned judge failed to take into account that since Chimwani was not shown the actual portion of the suit land he had purchased, he could not purport to have purchased land that already belonged to Omido.

In response, David, the 1st respondent, who appeared in person, submitted that their deceased father had not sold any land to Omido, and that the two agreements for the sale of the two portions were fraudulent and an attempt to mislead their father into believing that he had sold land to him. It was further submitted that Omido's two sale agreements were forgeries, having been copied from a prior sale agreement made between the deceased and one Odongo Suna. It was further argued that none of the witnesses to the agreements were members of their family.

Solomon, the 3rd respondent who also appeared in person, submitted that, Omido did not purchase land from the deceased but from their neighbours, Odongo and Saulo; that investigations showed that Omido wrongfully occupied the suit land, forcing them to file a succession cause to dispute his illegal occupation. He further submitted that they had sold 3 acres to Chimwani to finance the succession matter and that neither Odongo nor Omido paid the deceased for the portions of suit land that were purchased, as Kshs. 260,000/- was paid to Odongo, and Kshs. 110,000/- was paid to Saulo.

We have considered the record of appeal and the submissions of counsel. As this is a first appeal, it is our duty to analyze and re-evaluate the evidence on record and reach our own conclusions while appreciating that we have not seen or heard the witnesses. (See ***Selle vs Associated Motor Boat Co. [1968] EA 123; Jabane vs Olenja, [1986] KLR 661, 664; Ephantus Mwangi vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278*** and ***Mwanasokoni vs Kenya Bus Services (1982-88) 1 KAR 870).***

It will be observed at this stage that, the court below found that Omido was entitled to 2 acres which portion was allocated to him in the confirmation of grant of letters of administration. As no cross appeal under ***rule 93 (1)*** of the ***Court of Appeal Rules*** was filed by the respondents in respect of the 2 acres under the first agreement, this appeal is restricted to the 1 ½ acres claimed by Omido.

As such, the issues for our determination are whether Omido purchased 1½ acres of land; whether the learned judge rightly disregarded the second agreement for 1 ½ acres; and whether the 1 ½ acres portion was the same portion sold to the Chimwani.

As is required of us, we will begin by reevaluating the evidence in order to determine the issues identified.

The court below heard viva voce evidence wherein David, PW1 testified that his father, the deceased, had sold 3 acres to Chimwani for Kshs 400,000/-. As concerns the appellant, he confirmed that he was a neighbour who was alleged to have purchased two plots, one for Kshs. 260,000/- and the other comprising 1½ acres for Kshs. 110,000/-. Though he confirmed that the appellant had built a house on one of the portions, he denied that any sale existed in respect of either of the two portions.

Solomon (PW2) testified that the appellant had bought land from one Saulo and not from their father. On cross-examination by Omido, Solomon testified that he was not present when Omido purchased portions of the suit land from their father, but contended that Omido had purchased the portions from one Odongo, and that his father had merely witnessed the sale agreement.

The deceased testified as PW 3. He stated that, he sold portions of the suit land to Chimwani, as well as to other purchasers. With regard to the appellant, it was his evidence that he was at Odongo's house where he found Omido, Thomas, and one Amos when he was told to sign a document concerning sale of Odongo's land; that soon thereafter, Omido and his brother occupied portions of the suit land, and planted trees. It was then that, he realized that one Meshack and his mother had given them his land. On cross-examination by Omido, the deceased denied having received money from him, but admitted to signing an agreement, following which Omido took possession of the portions of the suit land. He also denied signing any mutation forms.

John Ochieng Odhiambo, DW1, stated that his father purchased 2 acres from the deceased in 1978 and that they had lived there for 39 years. When cross-examined by the appellant, he stated that he was aware that Chimwani had purchased land, but did not have any land on the ground; that he was aware that Omido had also purchased land, one with a house and the other on the other side of the road comprising 1

½ acres with trees which the appellant had planted. He stated that the deceased did not plant the trees.

Chimwani, DW 3, stated that he was approached by the family of the registered owner to purchase a portion of the suit land as they required money to distribute his property. He testified that he purchased 3 acres for Kshs.400,000/-, and that when he went to the ground only 2 acres were available. It was as he waited to be apportioned the entire 3 acres that the dispute arose with the appellant. He admitted that he had not been shown the 3 acres he was to purchase, and was also not aware that the plot with the mature trees had already been purchased by the appellant.

Robert Ogutu, DW 4, stated that he was one of the deceased's sons. He was present at the time Chimwani purchased 3 acres from his father. He admitted that Omido had a semi-permanent house on one of the plots and that there were trees on the other portion, and that that Chimwani was not shown the portion of land that he was to purchase. ***Ainea Mukhwana Makokha, DW 5,*** a former village elder who witnessed the sale agreement with Chimwani also corroborated this evidence.

Thomas testified that he was Omido's brother and that on 14th February 2009, they met the deceased who showed them 3 ½ acres of the suit land for sale. The first agreement comprising 2 acres for Kshs. 260,000/- was drawn by Omido, and that he had drawn up the 2nd agreement. After the deceased received the purchase price, he signed the agreements and the mutation form. They immediately took possession of the portions of the suit land, and planted trees on the 1½ acre portion. He later built a house on 2 acres. He testified that the dispute arose during the distribution of the estate of the registered owner, as the portions of the suit land sold to Omido were also sold to Chimwani.

In his evidence, Omido agreed with Thomas' testimony, but added that he (Omido) had drawn up the first agreement while Thomas drew up the second agreement; that Thomas had mistakenly indicated a sum of Kshs. 260,000/- for the 1 ½ acre portion instead of Kshs. 110,000/- hence the cancellation and the correction.

At the close of the proceedings the trial court visited the suit land and was shown Omido's land comprising the 2 acres portion and a 1½ acres portion with mature trees. The court was also shown the portion that Chimwani was given comprising Omido's 1½ acres and one acre of Omido's 2 acres portion.

Our analysis of the evidence shows that the dispute turns on the validity of the second sale agreement purported to have been made between the deceased and Omido for 1 ½ acres.

In this regard the learned judge stated thus;

> ***"Given the evidence on record and the statement of Joash Amaya given in court on 10.2.2013, I do find that Naphtali only bought two (2) acres from Joash and not 3 ½ acres. There is no enough evidence that Joash agreed to add Naftali more land after the first agreement had been signed. There is no good reason given to the court as to why two separate agreements were done on the same day instead of one. The second agreement of 1½ acres is doubtful. Even the sum of Ksh. 110,000/- in both figures and words were initially indicated as Kshs. 260,000/- which is the consideration of the two acres. The contention by Naftally that his brother was simply copying the earlier agreement is not true. Why would he copy the purchase price wrongly in both figures and words if he knew the price was Kshs.110,000/=?***

The respondents' contention is that the deceased did not sell 1½ acres to Omido, and did not enter into any sale agreement with him. They argue that if indeed he signed any agreement it was as a witness to an agreement for the sale of land made between one Odongo and Omido.

Section 107 of the ***Evidence Act*** makes it a requirement that he who alleges must prove. In this case, the onus was upon the respondents to show that the second agreement was fraudulently contrived, or that the deceased's signature was forged.

A consideration of the second agreement shows that it was signed by the deceased and Omido, and

witnessed by one Amos Y. Chahayo of ID No. 10694707, as secretary. Amos was not called to testify. Also evident on the agreement were cancellations, where the purchase price was changed to reflect an amount of Kshs. 110,000/-. The deceased did not deny that he had signed the agreements, nor did he declare or provide any evidence to prove the signatures therein were forgeries. No such allegation was advanced, and no effort was made to call the only witness who attested the agreement one, Amos Chahonyo, to testify as to its invalidity. As such, no basis for rejecting the validity of the agreement the High Court was established, and we find that a valid agreement existed between Omido and the deceased.

The trial court also took the position that the second agreement lacked legitimacy, as the appellant had not explained the rationale behind the existence of two agreements concerning the same land, drawn up on the same date, and of which had been subjected to the cancellations appearing on the face of the document.

It was Omido's evidence that since the 1½ acres was on the other side of the road, he was advised by one Amos, a surveyor, to enter into a separate agreement for that portion. He also explained that the cancellations arose when the second agreement was corrected to reflect the agreed purchase price. Neither of the explanations were refuted or challenged by the respondents.

Given that Omido's explanation was not controverted or questioned by the respondents, we find that the learned judge wrongfully disregarded the second agreement on the basis that it was doubtful, to the appellant's detriment.

Having found, as we have, that the agreement for the sale of 1 ½ acres was valid, the next issue for determination is whether the 1 ½ acres portion sold to Omido was the same portion of land purchased by Chimwani.

David and Solomon testified that they sold 3 acres of land to Chimwani for a sum of Kshs. 400,000/-. Their evidence does not show that Chimwani's portion of land was at any time identified. Indeed, Chimwani testified that the portion of the suit land purchased was not pointed out to him.

To the contrary, the evidence shows that Omido purchased 3 ½ acres of which 1 ½ acres was located on the other side of the road where he had planted trees. Other witnesses including, John Ochieng Odhiambo, DW 1, Robert Ogutu, DW 4 and Ainea Mukhwana Makokha, DW 5, testified that though they were aware that Chimwani had purchased 3 acres, the portion alleged to have been purchased was not at any time physically identified. The evidence also points to Omido, and not the deceased as having planted the trees.

When the evidence is considered in conjunction with the trial court's visit to the suit land, it is apparent that part of Omido's land comprised 2 acres, and the 1 ½ acres portion where trees were planted was the same land that David and Solomon had purported to sell to Chimwani. What emerges is that, the sale of 1½ acres to Chimwani amounted to a double sale of the same portion of land that was acquired by Omido two years earlier. In our view, the concerned portion having already been sold to Omido at an earlier date was no longer available for disposal to Chimwani. In the circumstances, the dispute must be resolved in favour of Omido the earlier in time purchaser for value.

In view of the aforegoing, we find that we must interfere with the decision of the High Court, which we hereby set aside and allow the appeal to the extent of the 1½ acres portion of the suit land purchased by the appellant herein.

In so doing, we make the following orders;

1. That the 1 ½ acres portion sold in terms of the second agreement belongs to the appellant;

2. That the 1 ½ acres portion be surveyed and transferred to the appellant; with the result that the distribution is as follows;

David Akonya Amaya – 8 Acres

Samuel Akhulunya Amaya – 4 Acres

Harron Namale Andayi _ 1 Acre

Reuben Okoto Omusebe _ 1.5 Acres

John Ochieng' Othieno _ 2.5 Acres

Josphat Chimwani Shihafu _ 1 ½ Acres

Naphtaly Omido _ 3 ½ Acres

Meshack Khayega Itali _ 3 Acres

Lilian Anyonde Sakwa _ 3 Acres

Road Access _ 0.2 Acres

3. That the respondents shall be responsible for the costs in the High Court and in this Court.

It is so ordered.

Dated and delivered at Kisumu this 16th day of December, 2016.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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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

DEPUTY REGISTRAR