



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & MURGOR, JJA)

CIVIL APPEAL NO. 58 OF 2014

KENNEDY ODOYO OKELLO..... APPELLANT

VERSUS

DISTRICT LAND REGISTRAR, MIGORI FIRST RESPONDENT

NATIONAL BANK OF KENYA SECOND RESPONDENT

BHAVAN ASHWIN..... THIRD RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Kisii, (OKONGO J) dated and delivered on 14th day of March, 2014 at Kisii in Petition No. 37 of 2012)

BETWEEN

KENNEDY ODOYO OKELLO APPELLANT

A N D

DISTRICT LAND REGISTRAR, MIGORI FIRST RESPONDENT

NATIONAL BANK OF KENYA SECOND RESPONDENT

BHAVAN ASHWIN THIRD RESPONDENT

JUDGMENT OF THE COURT

1. This is an appeal from the decision of Okongo, J. in petition No. 37 of 2012 that was filed by the appellant. In the petition, the petitioner (now the appellant) stated that he is a grandchild of the late **OGOLA ONDINGO** (hereinafter referred to as ("**the deceased**") who hailed from South Sakwa, Kogelo West Sub-Location, Rinya Village in Migori County. The petition was supported by an affidavit sworn by the Appellant to which was annexed copies of several documents.

2. The appellant alleged that the deceased died on **12th September, 1983** and was survived by two sons namely; **Zedekiah Onyango Ogola** and **Samuel Okello Ogolla**, the appellant's father. The appellant's father died on 11th September, 1994 and was survived by nine children. At the time of filing the petition, the deceased's first born, **Zedekiah Onyango Ogola**, was still alive.

3. The appellant alleged that at the time of the deceased's demise, land parcel No. **South**

Sakwa/Kogelo/420 measuring 6.4 hectares (hereinafter referred to as “**the suit land**”), was registered in the name of the deceased and it was expected that it would be inherited by the deceased’s sons and thereafter by the deceased’s grandchildren.

4. Sometimes in 2012 or thereabout, the appellant realized that the suit land had been transferred and registered in the name of the 3rd respondent. He attributed that transfer to fraud committed by all the respondents. The appellant stated that the transfer unlawfully deprived him and other beneficiaries of the deceased’s estate of the suit property in contravention of **Article 40 of the Constitution of Kenya, 2010**.

5. The particulars of fraudulent acts were pleaded as follows:

“ (a). That a power of Attorney to one JOHN ONANGO ANGOLO was purportedly executed and registered by the late Ogola Ondingo our grandfather on 1st July, 1991 when the said Ogola Ondigo had died on 12th September, 1983.

(b). That the late Ogola Ondigo purportedly executed a charge dated 15th November, 1991 for K.Shs.200,000/= in favour of the 2nd respondent for a loan to John Angolo on when the said Ogola Ondigo was already deceased by then.

(c). That the late Ogola Ondigo thumbprinted the charge document against Identity Card Number 636220/69, yet we knew that by 15th November, 1991, he was already deceased by then.

(d). That the late Ogola Ondigo purportedly presented himself to the Land Control Board, Rongo on 30-10-1991, purportedly affixed his thumbprint to the application for consent to charge Land No. South Sakwa/Kogelo/420 when he had died on 12th September, 1983.”

6. The suit property was sold by the 2nd respondent in exercise of its statutory power of sale and transferred to the 3rd respondent. The appellant and the deceased family members were not aware of all the above transactions, it was alleged.

7. The appellant accused the 1st respondent of mismanaging the land register in respect of the suit land and in paragraph 14 of the petition set out some unusual discoveries relating to various entries that came to light upon inquiries. They are as follows:

a). “That by a search dated 28th May, 2003, the property L. R. No. South Sakwa Kogelo/420 was unencumbered and there was no charge registered against the title.

b). That as per the Green Card maintained and issued by the 1st respondent dated 20th September, 2012, the 1st respondent had purportedly transferred to Zedekiah Onyango Ogola our Uncle, the whole land parcel and issued him with a title on 11-10-2005 without following due process.

c). That on 21-6-2012, the 1st respondent apparently “dispossessed” or “disentitled” the said Zedekiah Onyango Ogola of the title and somehow registered the 3rd respondent as proprietor while discharging at the same time a charge in favour of the 2nd respondent, again without following any due process of law.”

8. In view of the foregoing, the appellant sought the following orders:

(a). “A declaration that the property comprised in the number L.R. No. South Sakwa Kogelo/420 belongs to Ogola Ondigo and was not constitutionally and lawfully or procedurally charged and sold transferred or disposed of to the 2nd and 3rd respondent respectively, or any third party.

(b). A declaration that the Respondents failed to maintain an accurate Land Registrar, the Registry Map and parcel price in relation to title Number L.R. No. South Sakwa Kogelo/420 and thereby endangered the ownership of the suit property and breached Article 47 of the Constitution of Kenya

and Section 6 and 112 of the Registered Land Act, Chapter 300 Laws Of Kenya (repealed) and Section 12 of the Land Registration Act 2012.

(c). An order of mandamus and or mandatory injunction to restore the ownership of the title number South Sakwa/Kongelo/420 to Ogola Ondigo for the benefit of the Petitioner and/or the estate of Ogola Ondigo to issue against the Respondents.

(d). An order to issue canceling the registration of all charges and transfers allegedly registered against the Number South Sakwa/Kogelo/420.

(e). An order restraining the 3rd Respondent by himself, agents or servants from entering, trespassing or remaining in possession of the Title Number South Sakwa/Kogelo/420.

(f). An order that the Respondents do pay to the Petitioner and the estate of Ogola Ondigo, damages and the costs of this Petition plus interest.”

9. In response to the petition and the affidavit in support thereof, the 2nd respondent filed an affidavit saying *inter alia*, that the suit land was charged to it by the deceased sometime in 1991 to secure a loan facility of K.Shs.200,000/= advanced to John Onango Angolo. Copies of the letter of request, letter of offer and the charge were exhibited.

10. The 2nd respondent stated that upon default on the part of the borrower, the Bank exercised its statutory power of sale, having given the requisite statutory notices to the families of the guarantor and the borrower. The suit land was subsequently sold by public auction on 30th March, 2012 and was purchased by the 3rd respondent at a price of K.Shs.1,100,000/=.

11. The 3rd respondent affirmed in his Replying Affidavit that he was the registered proprietor of the suit land, having purchased the same at a public auction as stated by the 2nd respondent.

12. The 3rd respondent added that upon receipt of the petition and the affidavit in support thereof, including the annexures thereto, he perused the death certificate and discerned apparent alterations as to the age of the deceased and the date of birth. As a result of the suspicion, he instructed his advocate to write to the District Registrar of Births and Deaths, Migori District, with a view to confirming the authenticity of the said certificate. His advocate did so and, the said Registrar supplied a copy of the application for Late Registration of Death which was made by Zedekiah Onyango Ogola, the deceased's first born on 27th April, 2003. The application which was also signed by the Senior Chief of East Sakwa Location showed that the deceased died on 12th September, 1993 aged 110 years, but that the copy of the death certificate in support of the petition showed that the deceased died on 12th September, 1983 aged 100 years.

13. The 3rd respondent therefore concluded that the death certificate had been deliberately doctored to ground the Petition, that is, to make it appear that all the transactions relating to the suit land took place long after the deceased's demise. Consequently, the appellant, having come to court with unclean hands, was not entitled to the orders sought, the 3rd respondent contended.

14. The 3rd respondent stated that the appellant had no locus standi to institute the suit as he had not obtained letters of administration in respect of the estate of the deceased.

15. Before the hearing of the main suit commenced, **Mr. Oguttu**, learned counsel for the 3rd respondent, sought to have the copy of the death certificate that had been annexed to the appellant's affidavit in support of the petition submitted to the District Criminal Investigation Officer, Central Kisii District, to investigate and ascertain whether it corresponded with the original. That application was opposed by the appellant through **Mr. Oduk**, his learned counsel, who argued, *inter alia*, that it is not the duty of a Civil Court to jump into the arena of litigation by engaging in investigation on a matter before it with a view to making a decision thereon.

16. The court declined to give the direction as sought by the Appellant but ordered that the original certificate of death be produced for its perusal. However, the Appellant was unable to do so, despite several mentions of the matter to confirm compliance.

17. During the hearing, the appellant reiterated the contents of his affidavit regarding the alleged fraud. In particular, he re-stated that his grandfather (the deceased) died in 1983.

In cross-examination by **Mr. Otieno** learned counsel for the 2nd respondent, the appellant stated that although his uncle, Zedekiah Ogola, had given them the original death certificate of the deceased, the copy that was annexed to the affidavit in support of the petition had been altered. This is what he stated:

“Our uncle gave us the original documents in the presence of our advocate. We also got the original death certificate of Ogola Ondigo. The death certificate that we have annexed is a copy of the original certificate which we received from our uncle Zedekia Onyango Ogola. This death certificate is altered in the age of the deceased and the year of death. I do not believe this death certificate. I do not know who altered this document. We do not have any other document to show when our grandfather died.”

18. But upon the appellant’s cross-examination by Mr. Oguttu, the appellant’s explanation regarding the discrepancies on the death certificate was rather different from what he had stated above. He said:

“The death certificate Zedekiah gave us was original. We photocopied it and gave it back to him. When we photocopied the document the alteration had been effected. The areas that were altered related to the age of the deceased and the date of his death. We inquired about this alteration from my uncle. He said that what he gave us is what he had. ... My brother went to the District Registry Migori and he got another death certificate showing that the deceased died in 1993. I do not have this new certificate. I left it in Nairobi.”

19. The Appellant did not produce a copy of the deceased’s Burial Permit. The Burial Permit would have shown the date when the deceased passed away as well as the burial date.

Apart from the photocopy of the doctored death certificate, the only other document relied upon by the appellant in proof of the date of the deceased’s demise was a handwritten letter dated 19th November, 2012, allegedly authored by father Olage Philip of St. Martin Deporres, Ulenda Catholic Parish. The letter stated, **inter alia**:

“Mzee Ogolla Ondigo died in 1983. This finding has been got from the reliable faithful of the church who even attended his burial. The following faithful having given me the information:

1. Catechist Silvannus Onditi

2. Gilbert Olik – former Parish Chairman.”

20. The appellant called Gilbert Olik as a witness. Olik testified that the deceased was his maternal uncle and that he died on 12th September, 1983. The witness said that at the time the deceased passed away there was a snap general election and there was a campaign rally at Rinya Market that was addressed by a local politician, (now deceased) who donated bread to mourners.

21. Regarding the letter dated 19th November, 2012 by father Philip Olage, Olik said that he did not go to Ulenda Parish to seek the details concerning Ondigo’s death. He said that the letter was taken to him by the grandson of Ondigo who had gone to enquire about the date of Ondigo's death. He however, confirmed that he supplied the information contained in the said letter. When the letter was given to Olik for his signature it had already been signed by father Olage Philip.

22. The trial court identified the following as the issues for determination:

“ (i). Whether the petitioner has the locus standi to institute these proceedings?

(ii).whether the suit property was lawfully charged by Ondigo to the 2nd respondent to secure a loan?

(iii). whether the sale and transfer of the suit property by the 2nd respondent to the 3rd respondent was proper and valid?

iv). whether the petitioner and his family members were fraudulently, wrongfully and unconstitutionally deprived of the suit property.

(v). whether the petitioner (sic) constitutional rights have been violated and/or threatened by the respondents and if so, whether the petitioner is entitled to the reliefs sought?

vi). which party is to bear the costs of the petition?"

23. In its judgement, the trial court held that **Article 22** of the **Constitution of Kenya, 2010** gives every person, whether acting in their own interest or in the interest of another person liberty to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. It therefore held that the petitioner, having shown his legitimate interest in the suit property, had **locus standi** to institute the suit.

24. As to whether the suit property was lawfully charged by Ondigo to the 2nd respondent, having weighed all the evidence on record, the trial court was not persuaded that the deceased died on 12th September, 1983. The learned judge stated:

“No evidence has been placed before me to prove either that the thumb print endorsed in the said charge and the identity card number given in the said charge do not belong to Ondigo. I therefore have no reason to find that the charge dated 15th November, 1991 and registered on 18th November, 1991 is a forgery and as such invalid. In my view, the said charge is valid and proper in law. I am unable at all to appreciate the Petitioner’s alternative argument on the admissibility in evidence of the charge dated 15th November, 1991 that was produced in evidence by both the petitioner and the 2nd respondent. I would not wish to say more on the same save only to state that the onus was upon the Petitioner to rebut the presumption by law under Section 96 of the Evidence Act Cap. 80 Laws Of Kenya that the charge dated 15th November, 1991 was properly executed by Ondigo and attested by N. R. Ombija, advocate. The petitioner having failed to rebut the presumption, the onus could not shift to the 2nd respondent to prove the proper execution and attestation of the said document. A mere allegation without proof is not enough to rebut a statutory presumption.”

25. In view of the above finding, it followed that the sale and transfer of the suit property by the 2nd respondent to the 3rd respondent was proper and valid. The trial judge remarked, and in our view rightfully so, that there was no way Zedekia Onyango could have had the suit land transferred to him while the 2nd respondent’s charge remained in force.

26. The trial court found that the appellant and his family members had not been fraudulently and unconstitutionally deprived of the suit land and dismissed the petition with costs to the 2nd and 3rd respondents.

27. Being dissatisfied with the trial court’s judgment, the appellant preferred an appeal to this Court and raised the following grounds of appeal:

“1. The learned trial judge erred in law and in fact in failing to consider or consider favourably the evidence led by the Petitioner as to the true date of death of Ogolo Ondigo being 1983 and not 1993 and thereby arrived at a wrong decision.

2. The learned trial judge erred in law and in fact by treating the evidence of the records of the Civil Registry tending to disapprove the deceased Ogola Ondigo’s death as being 1993 proof of the true date of death of the said Ogola Ondigo, and thereby came to a wrong conclusion.

3. *The learned trial judge wrongly took a negative and slanted view of the Petitioner's entire petition and evidence merely because the Petitioner honestly owned up that the exhibit tendered (Death Certificate) appeared "altered" and thereafter embarked on an exercise, meant to berate and completely ignore the Petitioner's parol evidence as to the true date of death of the deceased Ogola Ondigo while placing great reliance on the secondary evidence as adduced by the Respondent contrary to law.*

4. *The learned trial judge wrongly found that the charge document dated 15th September, 1991 was properly executed when on the evidence set out by the Petitioner, he ought to have disregarded the prima facie date of execution and call for other proof of execution which other proof was also not tendered and the decision then rendered was a wrong decision.*

5. *In addition to or in the alternative to paragraph 5 above, (sic) the learned trial judge failed to find that the date of execution of the charge having been challenged the burden and incidence of proof shifted and lay on the 2nd Respondent to prove the date of the execution of the charge and by whom, and that on the evidence, the 2nd Respondent had failed to prove that it is the late Ogola Ondigo who executed the charge on the date appearing on the charge document.*

6. *The learned trial judge failed to resolve the issue of the validity of the existence of the three title deeds (certificate of titles) over the suit land South Sakwa/Kogelo/420 in the names of Ogola Ondigo, Zedekiah Onyango and the 3rd Respondent and erred thereby in law in not finding that no good title could pass to the 3rd Respondent at a time when the land was still registered in the name of one Zedekiah Onyango.*

7. *The learned trial judge erred in fact and in law by failing to consider that the 3rd Respondent neglected to exercise due diligence to conduct a search over the suit property for purposes of establishing the legitimate ownership and encumbrance attached to such property, thus making the transfer to the 3rd Respondent void.*

8. *The learned trial judge failed to find in favour of the Petitioner that the Respondents had manipulated the land register concerning title number South Sakwa/Kogelo/420, the 1st Respondent had failed to properly maintain the same to the prejudice of, and leading to loss to the late Ogola Ondigo's estate, the Petitioner and other persons, beneficially entitled to title number South Sakwa/Kogelo/420.*

9. *The learned trial judge erred in law in finding that the Petitioner's constitutional rights and others beneficially entitled to the property was not breached and further contradicted himself having initially found that the petitioner had legitimate interest to protect and had locus standi.*

10. *The learned trial judge erred in fact in failing to find for the petitioner and in failing to award the petitioner damages."*

28. In our view, the first five grounds of appeal relate to the issue of the date of death of the deceased, whether it was 1983 or 1993 and the legal implications relating to the execution of the charge over the suit property. We shall therefore combine the first five grounds and dispose of them together.

29. Sections 107 and 108 of the Evidence Act state as follows:

"107 (1). Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

1. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108 The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

30. The foundation of the appellant's petition was that the deceased, who was the registered proprietor of the suit land upto the date of his demise, died on 12th September, 1983 and therefore could not have executed the charge over the suit land in 1991. The appellant alleged fraud in the manner in which the charge was executed, and the eventual transfer of the suit land to the 3rd respondent. The appellant therefore bore the burden of proving his averments as aforesaid.

31. It is important to emphasise that at the time of filing the petition, the appellant solely relied on a copy of the deceased's death certificate which he annexed to his affidavit in support of the petition. The certificate showed the date of death as 12th September, 1983. The death certificate was however contested by the respondents, who contended that there were obvious alterations on the face of the certificate relating to the date of death and age of the deceased when he died. They asserted that the deceased died on 12th September, 1993 aged 110 years.

32. The appellant was unable to produce the original death certificate, even after conceding that the photocopy that he had annexed to his supporting affidavit had glaring alterations.

The issuance of the certificate of death, having been premised on an application made to the Office of the Registrar of Deaths and Births by Zedekia Onyango, the deceased's first born, on 27th April, 2003, the appellant ought to have called Zedekia as a witness. No good reason was given for the failure to call such a material witness, who had made the application and obtained the death certificate long before the petition was filed.

33. And that is not all. The application for late registration of the deceased's death was also signed by Policap Odero Owiti, the Assistant Chief of West Kogelo Sub-Location as well as the Senior Chief of East Sakwa Location. The appellant did not deem it necessary to call these two key persons who had certified the contents of the application made by Zedekia Onyango.

The trial court was right in rejecting the parole evidence of the appellant and Olik (PW1) to prove the death of the deceased. The appellant had not given satisfactory explanation leading to his presentation to court of a doctored and yet vital document.

34. Regarding the execution of the charge, the appellant ought to have adduced forensic evidence to show that the thumb print and the identity card numbers appearing on the execution part of the document were not those of the deceased.

Had the appellant submitted the charge document to a Forensic Document Examiner he would have easily established whether the charge was actually thumb printed by the deceased or not. There was no evidence to show that the appellant ever made any complaint regarding the alleged fraud to the Criminal Investigations Department of the Kenya Police for appropriate investigations. The burden of proof did not shift to the 2nd respondent. He who alleges must prove. According to the 2nd respondent, the charge was executed by the deceased and attested to by Mr. Ombija Advocate, now a judge of the High Court of Kenya.

35. Turning to grounds 6, 7 and 8 of the appeal, the evidence tendered by Alice Okwar for and on behalf of the 2nd respondent was to the effect that since 1991 the bank held the title to the suit land in the name of Ondigo Ogola. It was not clear how a title regarding the same property could have been issued in favour of Zedekia Onyango during the subsistence of the charge. Irrespective of how it was issued, the same was null and void. We must agree with the appellant that 1st respondent did not properly maintain the register and the parcel file in respect of the suit land.

36. We say so because the extract of the title (Green Card) that was produced by the appellant showed that the land certificate was issued to Ogola Ondigo on 26th June, 1974. On 18th November, 1991 a charge to secure a sum of K.Shs.200,000/= in favour of the 2nd respondent was registered. While the charge was still subsisting, on 18th June, 2003 the suit land was registered in the name of Zedekia Onyango Ogola and a title issued to him on 11th October, 2005. The 1st respondent, though served with the court process, did not appear and testify at all.

37. There is sufficient evidence that the 3rd respondent lawfully acquired title to the suit land following exercise of the 2nd respondent's statutory power of sale of the suit land. A discharge of the charge stated herein above was registered on 21st June, 2012 and on the same day the suit land was registered in the name of the 3rd respondent. Prior to the sale of the suit land by public auction, the deceased's family members were aware that the 2nd respondent intended to exercise its statutory power of sale. On 27th September, 2011 Zedekia Ogolla wrote to the 2nd respondent pleading for the release of the title and offered to pay K.Shs.50,000/= in full settlement of the outstanding debt.

38. With regard to grounds 9 and 10, there is no basis of alleging that the appellant's constitutional right to property was breached by any of the respondents. It is elementary law that where a property is lawfully charged to a financial institution to secure repayment of a loan, upon default, the charge has a statutory right to sell the charged property to realize the advanced sum. In such circumstances, it amounts to crying wolf for the appellant to allege that his constitutional right to property and those of his family members have been breached.

In our view, the petition did not raise any constitutional issues and whatever complaint the appellant had squarely lay in the domain of private law.

39. Having carefully reviewed and analysed the evidence that was tendered before the trial court, we see no basis of interfering with the decision of Okongo, J.

Consequently, this appeal is hereby dismissed in its entirety. The appellant shall bear the 2nd and 3rd respondents' costs both in this Court and in the court below.

DATED AT KISUMU THIS 3RD DAY OF JULY 2015

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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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