IN THE COURT OF APPEAL

AT ELDORET

CIVIL APPEAL NO. 118 OF 2007

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA.)

BETWEEN

GEOFFREY WAMBANDA WANDAMBUSI) …..... 1ST APPELLANT

MARGARET NALIAKA WAMBANDA ….....… 2ND APPELLANT

(Personal representatives of the estate of,

WAMBANDA KHWATENGE WANDAMBUSI

AND

THE ATTORNEY GENERAL FOR AND ON

BEHALF OF THE COMMISSIONER OF LANDS …... 1ST RESPONDENT

THE CLERK, BUNGOMA COUNTY COUNCIL ….. 2ND RESPONDENT

MOHAMMED NOOR AHMED …..... 3RD RESPONDENT

BUNGOMA MUNICIPAL COUNCIL …..... 4TH RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Bungoma by (Karanja, J.) dated 14/3/2007

in

CIVIL CASE NO. 24 OF 2003)

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JUDGMENT OF THE COURT

A). INTRODUCTION

1. The central issue for determination in this appeal is whether under the **Registered Land Act** *(now repealed),* proprietary rights over land that were not recognised during land adjudication process can be asserted, nearly 34 years after registration of land and subsequent issue of title documents.

2. The trial court determined that issue in the negative and thus gave rise to this appeal.

B). THE APPELLANT'S PLEADINGS

3. In his amended plaint filed on 17th May, 2014, **Wambanda Khwatenge Wandambusi,** the original appellant, (hereinafter referred to as ***"the deceased")*** stated that he was the beneficial legal owner of land parcel **No. East Bukusu/1062** *(the suit property)* but the 2nd respondent was unjustifiably and illegally registered as the owner thereof in 1969 or thereabout. He added that the 1st respondent, in its capacity as the trustee for the Government of Kenya, compulsorily acquired the suit property without paying him full compensation for the same but instead paid compensation to the 2nd respondent. The land was thereafter sub-divided into two portions namely, ***East Bukusu/south Kanduyi/6666*** and***East Bukusu/South Kanduyi/6668.***

4. Parcel No. 6666 was registered in the name of the 3rd respondent while parcel No. 6668 was registered in the name of the 4th respondent.

5. The appellant sought a declaration that the sub-division and transfer of the suit property was null and void and for an order that the original parcel number be reinstated and the land be registered in his name. In the alternative, he sought compensation by the Government.

6. The Attorney General entered appearance for the 1st respondent on 10th February, 2005 but did not file any statement of defence until sometimes in May, 2005. On 18th November, 2004 the appellant sought and obtained leave for judgment to be entered against the 1st respondent. The 3rd respondent filed neither a memorandum of appearance nor a statement of defence. The 2nd and 4th respondents failed to file their statements of defence in time, such that the matter was set down for formal proof.

C. THE APPELLANT'S EVIDENCE

7. During the formal proof, the appellant testfied and produced several documents relating to the suit property. Although the appellant was born on the suit property, he migrated to Uganda in 1953 and lived there until 1996. When he returned to Kenya he realised that the suit property had been registered in the name of Bungoma County Council in 1969.Subsequently the suit land had been sub-divided and the two sub-divisions transferred to the 3rd and 4th respondents as earlier stated.

8. The appellant then engaged the Government and Bungoma County Council in some correspondence, with a view to getting the suit land back. A Task force was set up by the Bungoma County Council to look into the appellant's claim and in February, 2002 the task force made the following recommendations:

"1. That the lease hold title issued to Mohammed Noor for Land Parcel No. E. Bukusu/S. Kanduyi/6666 measuring 0.7883 Ha. issued on 19th January,1996 be nullified and therefore revoked by the Commissioner of Lands;

2. That since the County Council of Bungoma was not consulted the sub- division of land parcel No. E. Bukusu/S. Kanduyi Nos. 6666 and 6668 be nullified.

3. That arrangements be now made for the council to have the matter rectified.

4. That the Council lawyer be involved in this matter where his expertisim (sic) is needed in resolving the matter/issue.

5. That Mr. Wambandas request be therefore looked into with a view to resolving the issue by the Council."

9. The above recommendations were not acted upon and as a result the appellant filed the suit that gave rise to this appeal.

D. THE TRIAL COURT'S FINDINGS

10. In her considered judgment, Karanja, J. *(as she then was)*having set out and analysed the evidence of the deceased, who did not call any witness, held as follows:

"My finding is that he did not even remotely establish any rights recognized in law over the said portion. He admitted himself that he left the place even before the adjudication process took place. Prior to the adjudication process, land was held in common and nobody had any proprietary right over any plots. After the adjudication process, some people were moved and allocated land on parcels other than those they occupied. Rights to land were conferred than to the people on the ground who were identified to represent their family interests or as individuals if there were such. Whoever was not there could not be given the land in absentia. If indeed the plaintiff's family were entitled to that land, why wasn't the same allocated to them during the adjudication process?. My considered finding therefore is that the plaintiff has failed to lay any basis for his claim over the plot in question. For the sake of argument, even assuming that the plaintiff had any rights over the plot in question, he left the land for 43 years. Bungoma County Council was registered as owner in 1962 (sic). There was no claim made against their title and so even again assuming that they had no good claim to the land, they acquired rights over the same on expiry of 12 years i.e. by 1981. The plaintiff herein would not therefore have any good claim against them. From whichever angle I look at this matter, clearly, the law is not on the plaintiff's side and he cannot get the orders he is seeking from the court."

11. Being dissatisfied with the High Court's findings, the appellant preferred an appeal to this Court and raised the following grounds of appeal:

"1. The learned trial judge erred in law and misdirected herself when she failed to realize that inter-locutory judgment had been entered against all Defendants who although served with summons to enter appearance had all failed to file any defence to the Plaintiff's claim and who deliberately chose not to defend the claims.

2. The learned trial judge failed to give any or any proper attention to the oral and documentary evidence produced by the appellant in support of his case.

3. The learned trial judge erred in law when she failed to realize and hold that the appellant had proved his case against all defendants jointly and severally on the balance of probability.

4. The learned trial judge erred in law when she reversed a proper judgment entered ex-parte against all the defendants and in case of respondent No. 1 with leave of the Superior court.

5. The learned trial judge erred in law when she took into account matters which she ought not to have taken into account in her judgment as none of the defendants had raised them.

6. The learned trial judge decided the case on extra-eneous and irrelevant matters that were no-issues in the case before the court.

7. The decision of the trial court was arrived at against the weight of the evidence adduced in court and on extraneous matters that were not encompassed in court.

8. The trial court placed undue emphasis on matters which the defence would have raised had they wanted to do so and the trial court mounted an unwarranted prosecution of a case for the defendants who had themselves never wanted to raise such defences although they had ample opportunity to do so.

9. The learned trial judge erred in law when she reversed the interlocutory judgment entered against the defendants by another judge of equal jurisdiction.

10. The learned trial judge exhibited open bias in her judgment against the appellant's case."

12. When the appeal came up for hearing, **Mr. Onyinkwa,** learned counsel for the appellants, withdrew the appeal against the 4th respondent. He then proceeded to make brief submissions in respect of some of the aforesaid grounds of appeal. He faulted the learned trial judge for setting aside the interlocutory judgment that had been entered in favour of the appellant. In his view, the appellant had proved his case on a balance of probabilities.

13. He further submitted that under ***section 115*** of the repealed Constitution, the 4th respondent was holding the land as a trustee for the benefit of the local community. He lamented that the recommendations made by the task force were not acted upon.

14. Both **Mr. Onyiso** and **Mr. Murunga,** learned counsel for the 1st and 2nd respondents respectively, opposed the appeal. They fully supported the findings made by the trial court.

The 3rd respondent passed away long before the appeal was heard and since he was not substituted, the appeal against him abated.

F). DETERMINATION

15. We have considered the grounds of appeal against the evidence on record, the submissions by counsel and the findings made by the trial court. Our findings are as follows:

*16. T*he appellant prayed for interlocutory judgment to be entered against the 2nd and 4th respondents for their failure to file their statements of defence within the requisite time or within 7 days as had been agreed by consent on 21st February, 2005. The amended plaint did not contain any claim for pecuniary damages and neither was it for detention of goods and so no interlocutory judgment could be applied for. The appellant could only seek to have the suit set down for hearing as stipulated under **Order 1 X A rule 8** of the repealed **Civil Procedure Rules.** The same can also be said of the interlocutory judgment that was sought as against the 3rd respondent for its failure to enter appearance and file defence. The interlocutory judgments were therefore wrongly sought and entered.

17. As regards the ex parte judgment that was sought and entered against the Government, there was due compliance with the provisions of ***Order 1 X A rules 7*** and ***11*** of the repealed ***Civil Procedure Rules***. The court directed that the suit be set down for hearing as a formal proof. But even in a formal proof, the appellant still has to adduce sufficient evidence to sustain his claim. The learned judge was therefore right in holding that, ***"the court would not enter judgment in favour of a plaintiff as a matter of course just because no defence had been filed or because there is interlocutory judgment on record."***

This finding is sufficient to dispose of grounds 1, 4 and 9.

18. Regarding grounds 2, 3, 5, 5, 6, 7 & 9 did the learned judge decide the case against the weight of evidence and by taking into account matters which she should not have considered ?

Having carefully perused the impugned judgment, we find nothing to indicate that the trial judge took into account any material or matters that were outside the oral and documentary evidence that was adduced by the appellant.The appellant's oral evidence as recorded by the learned judge was no more than one and a half pages long but he produced a total of 16 documents which contained considerable information and which was also relied upon in arriving at the decision.

19. The appellant's *Exhibit No. 12* revealed that he moved out of the family land in 1953 when he went to Uganda in search of employment and he returned in 1996. Bungoma County Council was the first registered proprietor of the suit property in 1969. The appellant did not prove that the said registration was illegal. In any event, under ***section 143 (1)*** of the ***Registered Land Act,*** (now repealed), a first registration cannot be impeached even if it was procured through fraud. The section provides:

"Subject to sub-section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake."

20. That legal position has been explained and affirmed in many decisions of this Court. In ***JOSEPH MARISIN V JOSEPH KIBILAT S. BARGALLIET,*** *Civil Appeal No. 306 of 1997,* this Court had the following to say regarding **section 143 (1)** of the said Act:

"Quite clearly this section envisages that the title by way of a first registration is indefeasible even if obtained by fraud. This must of necessity be so because the Land Adjudication Committee goes into all claims of ownership of the particular land prior to issuance of the first registration title. That is the law and a court of law cannot interpret the law otherwise than what it clearly lays down."

In our view therefore, the learned trial judge was right in holding that the appellant had failed to lay any basis for his claim over the suit property.

21. The recommendations that were made by the task force that was appointed by the Bungoma County Council did not have any force of law and were not binding upon the respondents. They could not therefore sway the trial court into making a decision in favour of the appellant.

22. Regarding the last ground of appeal, that the learned trial judge exhibited open bias against the appellants, the appellants' learned counsel did not make any effort to substantiate such a serious allegation. Indeed that ground was not argued at all. Our perusal of the entire judgment does not show any element of bias on the part of the learned judge against the appellants. We reject that ground of appeal.

23. All in all, we find this appeal lacking in merit and consequently dismiss it in its entirety. The appellants shall bear the costs of the appeal.

DATED and delivered at Eldoret this 29th day of October, 2015

D. K. MUSINGA

….....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

….....

JUDGE OF APPEAL

A. K. MURGOR

….....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR