



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A.)**

**CIVIL APPEAL NO. 28 OF 2013**

**BETWEEN**

**THOMAS NYAWADE ..... APPELLANT**

**AND**

**RICHARD SULE ODONGO .....1<sup>ST</sup> RESPONDENT**

**MARY ANYANGO ODAK .....2<sup>ND</sup> RESPONDENT**

**CHRISTOPHER MUTUKHU .....3<sup>RD</sup> RESPONDENT**

**DAVID MBITHI .....4<sup>TH</sup> RESPONDENT**

**ZACHARIA OBONYO OLEWE .....5<sup>TH</sup> RESPONDENT**

**(An Appeal from a Judgment of the High Court of Kenya at Kisumu, (Ali-Aroni, J.) dated 13<sup>th</sup> September, 2012**

**in**

**H.C.C.C. NO. 135 OF 2014)**

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**JUDGMENT OF THE COURT**

**Introduction**

1. This is an appeal against the judgment of Aroni, J. delivered in Kisumu HCCC No. 135 of 2014 in which the learned Judge dismissed the appellant's claim with costs.

**Facts of the case**

2. In that case the appellant claimed that the piece of land known as **Title No. Kisumu/Kasule/549** (the suit land) was ancestral land, which belonged to his late father. He all along believed that the land was

registered in the name of his father. He testified in the year 2002 after an altercation between him and the 1<sup>st</sup> respondent over a tree on the suit land that the appellant had cut, the appellant carried out a search only to discover that the suit was registered in the name of the 1<sup>st</sup> respondent.

3. The appellant thereafter filed a dispute in the Kisumu District Land Disputes Tribunal (the Tribunal) which found in his favour and directed the 1<sup>st</sup> respondent to surrender the title deed to the suit land for cancellation and issue of a fresh one in the appellant's name. In an attempt to execute the decree arising from the Tribunal's said award, the appellant discovered that the respondent had subdivided the suit land into five portions and fraudulently sold four of them to the 2<sup>nd</sup> to 5<sup>th</sup> respondents. As those other respondents were not party to the Tribunal dispute, the appellant only managed to get the portion known as **Title No. Kisumu/Kasule/3341**, which was still in the 1<sup>st</sup> respondent's name, transferred to him. He thereafter filed the said suit and claimed the other portions alleging that the 1<sup>st</sup> respondent had conspired with the other respondents and transferred those portions to them.

4. In his defence, the 1<sup>st</sup> respondent denied the appellant's claim and averred that the suit land was after adjudication registered in his name without any objection from the appellant's father. The other respondents claimed they were bona fide purchasers for valuable consideration of their respective portions. After hearing the case, as stated, Aroni, J. dismissed the appellant's claim thus provoking this appeal.

### **Principles guiding determination of Appeals**

5. The principles guiding the determination of appeals are now well settled. In a first appeal like this one, the appellate court is obliged to take the appeal as a re-trial. As such, it is required to re-evaluate the evidence on record and come to its own conclusions – **Selle & Another - Vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123**. In doing so, however, the first appellate court should give allowance for the fact that as the trial court had the advantage of seeing and hearing the witnesses testify, it was better placed to observe their demeanour and assess their credibility. In the circumstances, the appellate court should be slow to overturn the trial court's decision unless the trial court's decision is perverse or is not based on the evidence or is based on a misapprehension of the evidence on record. **Mwanasokoni Vs Kenya Bus Services Ltd, [1985] KLR 931**.

### **Grounds of Appeal**

6. The six grounds in the appellant's memorandum of appeal raise more or less the same issues the appellants raised in the trial court. They fault the learned Judge for a lackadaisical consideration of the matter that ended up in failing to find that the 1<sup>st</sup> respondent fraudulently got himself registered as the owner of the suit land and thereafter conspired with and transferred a greater chunk of it to the other respondents.

7. Amplifying those grounds of appeal, Mr. Mwamu, learned counsel for the appellant, faulted the learned Judge for ignoring the appellant's testimony that during land adjudication in the area where the suit land is situate, the 1<sup>st</sup> respondent took advantage of his position as a member of the adjudication committee for that area and fraudulently got himself registered as the proprietor of the appellant's father's land. Thereafter he kept quiet and did not disturb the appellant's family's occupation of the suit land and did not even object to the burial on the suit land of the appellant's parents and other siblings. To complete his nefarious scheme, he subdivided the suit land and sold portions thereof to the other respondents. Counsel dismissed the other respondent's claims that they were bona fide purchasers for valuable consideration of their respective portions as simply ridiculous. He argued that not even the blind would have failed to know of the appellant and his family's occupation of and buildings on the suit land.

8. Counsel for the appellant also faulted the learned Judge for nullifying the Tribunal's award and yet the issue was not on appeal before her. Despite the Tribunal's decision to award the entire suit land to the appellant and directing the 1<sup>st</sup> respondent to surrender the title for cancellation, counsel surprisingly

maintained that the Tribunal acted within its jurisdiction and that is why the 1<sup>st</sup> respondent did not appeal its award or pursue the judicial review application he had filed to have the award quashed.

9. Mr. Onyango, learned counsel for the respondents, dismissed this appeal as totally unmeritorious. He submitted that, other than his word of mouth, the appellant placed no evidence, oral or written, on the record that the suit land was the appellant's family's ancestral land. Furthermore, the appellant failed to plead the particulars of fraud or call evidence to prop his claim that the 1<sup>st</sup> respondent fraudulently transferred portions of the suit land to the other respondents.

10. Learned counsel for the respondents further argued that the purchasers' evidence that they bought an empty piece of land was never challenged. The purchasers had bought their respective portions in 2002 and obtained titles thereof. The Tribunal's order directed to them to surrender their titles was therefore made in ignorance of that fact and without jurisdiction. Moreover they were not parties to the dispute before the Tribunal. With those submissions, counsel urged us to dismiss this appeal with costs.

11. We have considered these rival submissions. We have also carefully read the record of this appeal. It is not in dispute that the 1<sup>st</sup> respondent was, in 1988, registered, on a first registration, as the proprietor of the suit land. There is nothing on record to show that, prior to 2002 when the appellant lodged a claim against the 1<sup>st</sup> respondent in the Tribunal, the appellant, his father or any member of the appellant's family had challenged that registration.

12. In court, during the hearing of the suit from which this appeal arose, other than his word of mouth, the appellant never called any evidence to prove that the suit land was his family's ancestral land. As the learned trial Judge correctly observed, one would have expected the appellant to call evidence from his neighbours to support that claim but he did not. In the circumstances, the learned Judge cannot be faulted for dismissing the appellant's claim.

13. The appellant also failed to adduce sufficient evidence to prove his claim that the other respondents fraudulently bought their respective portions from the 1<sup>st</sup> respondent. His claim that his family had buildings on the suit land that the respondents could not have missed to see when they bought their respective portions is also not anchored on any evidence other than the appellant's word of mouth. The appellant did not even plead particulars of the fraud he alleged against the respondents, leave alone prove them to a standard, higher than a balance of probabilities as required by law – **Gudka v. Dodhia [1982] KLR 376**.

14. For these reasons we find no merit in this appeal and we accordingly dismiss it with costs.

**DATED and delivered at Kisumu this 20<sup>th</sup> day of November, 2015.**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**