



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 12 OF 2014

BETWEEN

SOROFINA OMURUNGA NDUNDE APPELLANT

VERSUS

AGNES NAMUSIA SHATI RESPONDENT

MARK MUTENDE BARAZA 1ST INTERESTED PARTY

MESHAK ALUCHIO BARAZA 2ND INTERESTED PARTY

JOSEPH YESWA AMUMBWE 3RD INTERESTED PARTY

(An appeal from a Ruling of the High Court of Kenya at Kakamega (S. J. Chitembwe, J.) dated 2nd day of May, 2013

in

SUCCESSION CAUSE NO. 423 OF 1996)

JUDGMENT OF THE COURT

1. By summons for revocation of grant presented to the High Court at Kakamega on 18th August 2010, Margaret Juma Chilande, (the original appellant in this appeal to whom we shall refer as “Margaret”) sought two prayers from the court. The first was for the revocation or annulment of a grant of letters of administration issued to Agnes Namusia Shati (the Respondent) in respect of the estate of Paul Litali Amumbwe, deceased (“the deceased”) who died on 9th February 1989. The second prayer was for revocation of title over a property known as Title Number Butsotso/Esumeyia/1486 (“the property”) issued to the first interested party, Mark Mutende Barasa, (hereafter referred to as “Barasa”) the first interested party, purportedly on the basis of that grant of letters of administration.

2. In a ruling the subject of this appeal delivered on 2nd May 2013, the High Court (Chitembwe, J.) declined to revoke the grant; dismissed that application and ordered, “*The disputed land shall remain registered in the names of Mark Mutende Barasa who shall be the registered owner.*”

The appeal and submissions by counsel

3. Aggrieved Margaret obtained leave to appeal. She challenged the ruling on grounds that the judge disregarded evidence proving that the said title was acquired irregularly and fraudulently. Margaret withdrew the appeal by a notice filed in the registry of this Court on 17th March 2014. However, by a consent order recorded by this Court on 14th May 2015, the appeal was reinstated and Sorofina Omurunga Ndunde (hereafter referred to as “Sorofina”) substituted as the appellant.

4. During the hearing of the appeal before us, learned counsel for Sorofina, Mrs. June Ashioya, withdrew the appeal as against the 2nd and 3rd interested parties. Referring us to the memorandum of appeal, counsel submitted that in issuing the title over the property to Barasa, the legal requirements and procedures applicable to the transfer of the land under transmission and sale were not complied with; that the judge wrongly disregarded evidence showing that a consent letter purportedly signed by Sorofina and all her siblings as beneficiaries of the estate of the deceased allegedly consenting to the transfer of the property to Barasa was a forgery; that the Judge wrongly ignored findings of the Chief Land Registrar that the title in favour of Barasa was for revocation, having been obtained fraudulently.

5. Opposing the appeal, Mrs. Elizabeth Chunge, learned counsel for the respondent, and for Barasa, submitted that there is no basis for interfering with the decision of the High Court; that the respondent was appointed the administrator of the estate of the deceased by consent of all beneficiaries; that upon confirmation of grant all the beneficiaries agreed to transfer their respective shares in the property to Barasa; that the lower court properly analyzed the evidence of alleged fraud and irregularity in the transfer of the property and reached the correct decision; that the property is properly registered in the name of Barasa; and thus the title issued to him should not be tampered with.

The standard on appeal and issues arising

6. We have considered the appeal and the submissions by learned counsel. The application on the basis of which the impugned ruling was made was determined after an oral hearing. This being a first appeal, we are entitled to review and re-evaluate the evidence with the usual caution that unlike the Judge in the lower court, we have not had the benefit of hearing and observing the witnesses. In the well-known and often cited case of **Selle v. Associated Motor Boat Company [1968] E.A. 123**, the Court stated that:

“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 conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

7. Bearing that in mind, there are two issues that require our consideration. The first is whether based on the evidence adduced the lower court should have revoked or annulled the grant of letters of administration for the estate of the deceased issued to the respondent. The second issue is whether Barasa’s title over the property issued on the basis of that grant should be revoked. But first, the context.

Background

8. The deceased died on 9th February 1989. He was survived by his four daughters, that is to say, the respondent, Margaret, Sorofina and Beatrice Anyembe Makulu. (We will refer to the four sisters collectively as “the siblings”).

9. Sometime in 1996, the respondent petitioned the High Court at Kakamega in Succession Cause No. 423 of 1996, naming herself and her sisters as the beneficiaries of the estate of the deceased. The property was indicated as the only asset of the deceased.

10. In December 1996, the deceased's brother, one Rev. Joash Barasa Amumbwe, who has since died and who was the father of Barasa, objected to the making of the grant of letters of administration to the respondent. Contemporaneously with that objection, Rev. Amumbwe cross-petitioned for the grant of letters of administration. The basis for his objection and for cross petitioning for the grant was that the siblings were all married women residing in their respective matrimonial homes with their husbands; and that as a brother of the deceased, and under Luhya customary law, he was the one entitled to be issued with the grant.

11. On 16th September 1998, the Deputy Registrar of the court, endorsed consent in Succession Cause No. 423 of 1996 in terms that:

“By consent;

1. *That the land parcel No. Butsotso/Esumeyia/1486 shall be subdivided into 4 equal shares amongst the following;-*
 - a. *Agnes Namuse Shati – the petitioner /Respondent herein.*
 - (b) *Margaret Juma Chilanda*
 - (c) *Sorofina Murunga Ndunde*
 - (d) *Beatrice Anyembe Makolo*
2. *That after sub division each to sell her own portion to the grandsons of Amumbwe's family the objector and applicant herein.*
3. *Those costs of survey/sub division shall be shouldered by JOASH B. AMUMBWE.*
4. *That this agreement brings to an end all the disputes we had over parcel of land No. BUTSOTSO/ESUMEYIA/1486 and never to be revived again whatsoever.”*

12. That endorsement was based on a controversial 'consent letter' purportedly executed by the siblings by affixing their thumbprints on it on 23rd February 1998. That consent was however disowned by Margaret and by Sorofina who claimed it was forged.

13. On 29th December 1998, grant of letters of administration intestate for the estate of the deceased were issued to the respondent. A certificate of confirmation of grant was issued on 8th February 1999 under which the mode of distribution of the property was set out. The siblings were each to get 1.16 hectares of the property.

14. Thereafter, on 21st October 1999, the Lurambi Divisional Land Control Board, which had on 25th March 1999 deferred an application allegedly submitted by the siblings for land control board consent for the transfer of the property to Barasa, granted the same. A transfer of Land purportedly executed by the siblings by affixing their thumb prints transferring the property to Barasa was submitted to the land registry and registered on 22nd June 2000 and a new Title Deed in the name of Barasa issued by the Land Registrar, Kakamega on 23rd June 2000.

15. On 8th August 2000, Margaret and Sorofina applied to the High Court to review the alleged consent endorsed by the Deputy Registrar on 16th September 1998 *“with a view to setting aside paragraph 2 of the said order”*. That application was based on the grounds that they did not thumbprint the alleged consent letter; and that the effect of the order was to bind them to transfer their share of the estate to persons who were not entitled. It is not clear from the record whether that application was ever heard or disposed of.

16. On 18th August 2010, Margaret filed the summons for the revocation of grant issued to the respondent complaining that the respondent, as the administrator of the estate of the deceased, had “*allowed a stranger register himself as the absolute proprietor*” of the property and that the other siblings had not surrendered their respective shares of 1.16 hectares of the property. She requested the court to distribute the estate accordingly and if the respondent “*wishes to transfer her portion to current registered owner she may be free to so do.*”

17. Having heard the parties on the application for revocation of the grant, the learned Judge framed the issue for determination thus:

“From the evidence on record the main issue for determination is whether the grant issued to the petitioner [the respondent] should be nullified and plot number BUTSOTSO/ESUMEYIA/1486 be restored in the names of the deceased for re-distribution.”

18. The answer to that question in turn depended on the question whether the siblings were privy to the consent endorsed by the Deputy Registrar of the court on 16th September 1998. The learned Judge found that forgery was ruled out in the course of a criminal trial, being criminal case no. 422 of 2001, where the respondent, Barasa and the third interested party were acquitted of the offences of forgery and conspiracy to defraud. The Judge also found that the siblings had signed the transfer in favour of Barasa but were seeking to change their minds, and that the transfer in favour of Barasa was regular, procedural and lawful.

19. What then was the evidence presented before the lower court regarding the consent, the application for land control board consent and the transfer?

The evidence

20. The testimony by Margaret and by Sorofina was that upon the siblings applying for letters of administration, the court distributed the property amongst the four siblings equally; that they thereafter discovered that their elder sister, the respondent, collaborated with Barasa to cause a title deed over the property to be issued to Barasa. Margaret and Sorofina were both categorical that they did not affix their thumb prints on the consent that was endorsed by the Deputy Registrar of the court. They were also categorical that they did not affix their thumb prints on a transfer of the property in favour of Barasa. Sorofina said that upon discovery of the forgery she reported to the police and the respondent and Barasa were charged with offences of forgery and conspiracy to defraud.

21. By letters dated 21st February 2003 and 28th February 2003, addressed to the Chief Land Registrar, Margaret and Sorofina expressed shock that a new title deed over the property had been issued. They requested the Chief Land Registrar to “*verify keenly the documents which were used to process the new Title Deed-whether they were genuine documents...*” stating that since the death of their father, the deceased “*Margaret JumaChilande has kept all documents concerning the land.*”

22. Having investigated the matter, the Chief Land Registrar responded to those letters, by a letter dated 27th January 2004 addressed to Margaret and Sorofina and to Joseph Godfrey M. A. Sisa stating that the registration of Barasa as the owner of the property and the issuance of a title deed to him was fraudulent.

23. In her testimony, Sorofina also stated that the siblings had sold the property to one Joseph Godfrey Sisa (Sisa) who in turn had bought them another parcel of land elsewhere.

24. Sisa’s testimony was that the siblings approached him with a request to buy the property; that he agreed to do so and he gave them Kshs. 495,000.00 to enable them buy title number 1452/Butsotso/ Esumeya on the understanding that once succession proceedings were over and the property vested in them, they would in turn transfer it to him. That after the succession proceedings were over, the siblings proceeded to Kakamega lands office and onto Lurambi Land Control Board to seek consent; that

the application for consent to transfer the property to him was booked for 25th March 1999 but was deferred as it was discovered there was a caution registered over the property; that it was when the siblings were to have the caution removed, that it was discovered that the property had a new title in favour of Barasa.

25. When cross examined, Sisa stated that he started giving the siblings money towards the purchase of the property in 1996 when it was still in the deceased's name; that Barasa filed suit against him in the Magistrate's Court at Kakamega being Civil Case No. 246 of 2005 seeking removal of a caution that Sisa had placed on the property claiming a purchaser's interest; that he was also aware that the respondent and Barasa were acquitted of criminal charges that had been preferred against them in connection with the consent and the transfer instrument.

26. On her part, the respondent testified that that upon the death of the deceased, the siblings were left with their uncle, Rev. Barasa Amumbwe who is the father of Barasa; that she petitioned for letters of administration of the estate of the deceased, on behalf of herself and her siblings; that after finalizing the succession cause the siblings did not divide the property amongst themselves but agreed to transfer it to Barasa; that all the siblings went to the Kakamega lands office and to Lurambi land control board and agreed to the transfer of the property to Barasa.

27. The respondent further stated that her sisters sold the property to Sisa. She initially claimed that she did not know who Sisa was, but after consulting with her advocate, she however revised her testimony and acknowledged that she did in fact know Sisa; that the siblings had an agreement with Sisa regarding the property; that Sisa paid them Kshs. 480,000.00 prior to succession, but that the clan objected to the property being given to a Sisa; that the siblings consented to give the land to Barasa and the clan resolved that the money Sisa had paid be refunded. She went on to say that Sisa sued her in Criminal Case No. 422 of 2001 claiming that she had forged documents, but the court found that all the siblings had signed the consent. Under cross examination, the respondent accepted that all the four siblings had agreed in writing to pass the property to Sisa, but that the clan refused.

28. Barasa testified that after the death of the deceased, his father, Rev. Joash Barasa Amumbwe, found that the siblings had sold the property to Sisa without his consent and objected; that following the objection by his father, a consent was signed in court on 23rd February 1998 between the siblings and his father agreeing to pass the property to a grandchild; that he is the grandchild mentioned in that consent; that it was then agreed that he should refund the money the siblings had received from Sisa, and that an agreement drawn up to that effect got lost. He subsequently obtained a police abstract report confirming the loss. He asserted that he obtained land control board consent with the concurrence of the siblings who also executed a transfer of land in his favour, and upon registration, he was issued with a title deed for the property.

29. Barasa went on to say that following a complaint by Godfrey Sisa that he had forged documents in connection with the property, he was charged in Kakamega Criminal Case No. 422 of 2001 but was later acquitted of the charges; that a document examiner confirmed that the siblings had all signed the documents vesting him with the property. He also sued Sisa in Kakamega Civil Case No. 246 of 2005 seeking an order for the removal of the caution that Sisa had placed against the title to the property, and the court had ruled in his favour. He maintained that he did not obtain title to the property fraudulently and that he bought the same from the siblings. Under cross-examination, he maintained that his sale agreement over the property entered into with the siblings was stolen along other documents.

30. After reviewing the evidence, the learned Judge was not satisfied that that there was any irregularity with the registration of Barasa as the owner of the property and the issuance of a title to him. In his view, three sisters had ganged up against one sister, the respondent, contending that they did not agree to sell the property to Barasa. He accordingly held that "*the suit land was lawfully transferred to Mark Mutende Barasa.*"

Analysis and determination

31. Though the drama over the deceased's property has pitted sister against sister, with alliances between them shifting from one to the other over time, the real protagonists in relation to the ownership of the property appear to be Barasa, who is currently the registered proprietor of the property, and Sisa, who claims he should be the owner of the property. That should not however detract from the two issues that require our consideration.

32. There is really no controversy, based on the evidence, that the siblings agreed to the appointment of the respondent as the administrator of the estate of the deceased; and that the only asset of the estate that was available for distribution amongst the siblings was the property. Indeed, the substantive grounds on the face of the summons for revocation of grant was that the respondent had "*contrary to the distribution made...allowed the suit property to be registered into (sic) the names of a stranger*" and that "*the applicant and other beneficiaries have been disinherited.*"

33. When they testified, Margaret and Sorofina complained that the property was transferred to Barasa fraudulently. On the face of it, the certificate of confirmation of grant accorded with the wishes of all the beneficiaries. That is to say the property was to be shared between the four siblings with each one of them getting 1.16 hectares. There was absolutely no reference to Barasa in the certificate of confirmation of grant.

34. That then takes us to the question whether Barasa's title over the property issued on the basis of that grant should be impeached and revoked. A lot was said during the hearing that a complaint was made to the police regarding alleged forgery of documents; that Barasa and the respondent were charged in Criminal Case No. 422 of 2001 and acquitted; and that a document examiner concluded that the documents on the basis of which Barasa was ultimately registered as owner of the property and issued with a title for the same were genuine; and that a civil suit between Barasa and Sisa for the removal of a caution on the property was determined in Barasa's favour.

35. As we shall hereafter demonstrate, the learned Judge does not however appear to have considered the contents of the Chief Land Registrar's communication to Margaret and Sorofina in response to their complaint before concluding, "*the suit land was lawfully transferred to Mark Mutende Barasa.*" The Judge had this to say:

"The extract from the lands office in relation to plot number BUTSOTSO/ESUMEYIA/1486 shows that the plot is 4.65 Ha. On the 22.6.2000 Agnes Namusia Shati was registered as the administrator of the estate. On the same date all the other sisters together with petitioner were registered with each one of them getting 1.16 Ha. On the same date a transfer in favour of Mark Mutende Barasa was registered. On 23.6.2000, that is to say the following day Mark Mutende Barasa was issued with his title deed. There is nothing un-procedural with that registration. A consent to transfer the property to Mark Mutende Barasa had been obtained from the Lurambi Land Control Board. An application for the consent was produced by the defence as well as the transfer document. The document examiner did confirm that the objectors executed the transfer document. I do find that the suit land was lawfully transferred to Mark Mutende Barasa."

36. The Chief Land Registrar's said communication dated 27th January 2004 was filed in court in September 2011. It was therefore part of the record of the trial court when the defence hearing commenced on 25th April 2012 although there does not appear to have been any specific reference made to it in the course of the defence hearing. In the closing submissions filed on 13th November 2012 on behalf of the appellant, counsel submitted that it was puzzling that Barasa would have obtained title using certified copies of documents when the original certificate of confirmation of grant and original title deed were held by Margaret who was never asked to surrender them; that the lands office had recommended the recall of Barasa's title on account of irregularities; and that by reason of the respondent having facilitated the irregular registration of Barasa as the owner of the property, she had failed to diligently administer the estate of the deceased.

37. On the respondent's part, counsel submitted the respondent and Barasa were both acquitted of

criminal charges against them where they had been charged with fraud and conspiracy to defraud; that the issue of fraud was finally dealt with by the court in the course of the criminal proceedings and that “the letter by the officer from the Ministry of Lands and Settlement dated 27th January, 2004 has no purposes and this court has not been called upon to enforce the recommendations.”

38. Based on those submissions, it is clear that the matters raised in the Chief Land Registrar’s communication to Margaret and Sorofina were canvassed before the Judge and required consideration by the court. [See **Odd Jobs vs. Mubia [1970] E A 476**]. We think that the learned Judge was under a duty to consider the same but failed to do so. Had he done so, we think he would have reached a different conclusion regarding Barasa’s proprietary interest in the title over the property. Here is why.

39. As already indicated, the Chief Land Registrar’s letter dated 27th January 2004 was a result of the complaint raised by Margaret and Sorofina regarding the manner in which the property was transferred to Barasa. It is evident from that letter that the siblings as well as Barasa were all heard on 15th July 2003 and 6th August 2003 regarding the complaints before the Chief Land Registrar’s office reached the conclusion that:

“Accordingly, I wish to inform you that your claims have been investigated and found to be genuine. Indeed, a serious fraud was committed on your original land documents – Succession Form R.L. 19 & 7, Application for Consent of Land Control Board and Transfer of Land Form I and R. L.I, respectively. That is, most of the typed particulars belonging to Joseph Godfrey M. A. Sisa, the legal purchaser/Transferee of Plot No. Butso/Esameya/1486 were erased/rubbed and those of Mark Mutende Barasa were inserted (typed) using the Typewriter available at Kakamega Land Registry so that the documents were registered and a title deed was issued in his name fraudulently and without payment of registration and title deed fees as well as stamp duty.”

40. When that letter or communication is considered alongside the other evidence tendered before the court, there is no doubt that, the land control board application form submitted to the Lurambi Control board related to the intended transfer to Sisa; that documents in that regard were left with the board when the application for land control board consent was on 25th March 1999 deferred to a subsequent date; that consent was not given on account of a caution and subsequently, consent was on 21st October 1999 given for the transfer to Barasa, we think the appellants had on a balance of probabilities established that the transfer of the property to Barasa was irregular. This is particularly so as, the certificate of confirmed grant clearly indicated that the property was to be shared equally between the siblings, and made no reference to Barasa. As such, it was incumbent upon the respondent as the administrator of the estate to transmit the property in accordance with the confirmed grant to the siblings. It would then be up to the individual siblings to transfer their respective interest, if they so wished, to whomever they deemed.

41. We are fortified in that view, by the impression we formed regarding the credibility of the respondent. Based on the record, she was prepared to state under oath that she did not at all know Sisa. Her advocate had to intervene by requesting the court to step her down in the course of her testimony in order for the advocate to consult with her. When she resumed her testimony after consultation with her advocate, her memory was ‘jogged’ and she then readily accepted that she and her sisters had had dealings with the Sisa, and that they had in fact taken money from him and were prepared to transfer the property to him, but the clan had objected. That, in our view, is not the mark of a credible witness whose evidence can be considered reliable and preferred to that of her siblings. The conclusion the Judge reached that her sisters ganged up against her to disown the transaction in favour of Barasa is therefore not well founded.

42. We think it was also irregular for the registration of the transfer in favour of Barasa to have been effected on the basis of certified copies of the certificate of confirmation of grant and title deed when the originals of those documents remained with Margaret. Furthermore, it emerges from the Chief Land Registrar’s letter dated 27th January 2004 that the original title deed was published in the Kenya Gazette

No. 2204 of 14th April 2000 as having been lost, allegedly at the behest of Barasa's father, when in fact the same was safely kept in Margaret's custody.

43. The result is that we are satisfied that learned Judge fell into error in failing to consider the totality of the evidence, including the contents of the letter from the Chief Land Registrar. We must therefore interfere with the decision of the lower court. We hereby set aside that part of the decision declining to revoke the title in favour of Barasa. We substitute therefor an order that the registration of title number Butso/Esameya/1486 in the name of Mark Mutende Barasa be and is hereby revoked. The title deed issued to him shall be surrendered to the Lands Office for cancellation. The title to the property shall revert to the estate of the deceased, and shall from there be distributed and title deeds issued to the beneficiaries in equal shares as follows:

Agnes Namusia Shati - 1.16 Hectares

Margaret Juma Chilande - 1.16 Hectares

Sorofina Omurunga Ndunde - 1.16 Hectares

Beatrice Anyembe Makulu - 1.16 Hectares

It shall be upto each of the beneficiaries to determine whatever they wish to do with their respective parcels of the property.

44. The respondent and the 1st interest party shall pay the costs of the proceedings in the High Court and of this appeal.

Dated at Kisumu this 17th day of December, 2015.

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 a true

copy of the original.

DEPUTY REGISTRAR