



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)
CIVIL APPEAL NO. 263 OF 2011

BETWEEN

PETER OWADE OGWANG APPELLANT

AND

JARED OBIERO OUYA RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya

at Kisii (Musinga J.) dated the 5th March, 2009

in

H.C.C .C. NO. 171 OF 1990)

JUDGMENT OF THE COURT

Peter Owade Ogwang (“the appellant”) and **Ogwang Omolo** (“the deceased 2nd plaintiff”) filed a suit against **George Orayo Olulo** (“the deceased 1st defendant”) and **Jared Obiero Ouya** (“the respondent”). In the amended plaint filed on 3rd October, 1990, the plaintiffs alleged that in 1972 the deceased 2nd plaintiff sold five (5) acres of land parcel number **South Sakwa/Kogelo/5** (“the suit land”) to one **Hezron Olulo Olongo** who was the father of the deceased 1st defendant at the purchase price of Kshs.4,300/= of which only Kshs.2,800/= was paid leaving a balance sum of Kshs.1,500/= payable upon sub-division and transfer of the said portion. The plaintiffs claimed that the said Hezron Olulo Olongo died on 8th February, 1976 before paying the said balance of purchase price of Kshs.1,500/= and before the sub-division and transfer of the portion sold to him. The plaintiffs further claimed that they had been staying on the unsold six (6) acres of the suit land on which they had constructed a semi-permanent house and lived thereon with their families of nineteen members, cultivating thereon such crops as sugarcane, maize, millet, cassava, beans and potatoes and also planted trees on the plot.

It was further alleged by the plaintiffs that after the demise of the said Hezron Olulo Olongo, on or

about 26th of November, 1976 the deceased 1st defendant, by means of fraud, registered the suit piece of land in the name of the deceased Hezron Olulo Olongo which fraud, the plaintiffs alleged, they discovered in the year 1990. The plaintiffs further claimed that as they pursued their claim before the local administration officers, the deceased 1st defendant applied for and obtained a grant of representation to the estate of his deceased father Hezron Olulo Olongo and then transferred the suit piece of land to the respondent. It was further alleged, by the plaintiffs, that the deceased 1st defendant had knowledge or had reasons to know that his deceased father was only entitled to five acres of the suit land after paying the said balance of purchase price of Kshs.1,500/= and must have bribed land officers to have his father's name registered as the proprietor of the suit land.

On the basis of those averments the plaintiffs sought, among other reliefs, cancellation of the respondent as the registered proprietor of the suit land, an injunction restraining the respondent from interfering with their quiet possession of the suit land, an order directing the defendants to transfer the suit land to the plaintiffs and damages.

On 29th June, 2001 the defendants filed a joint statement of defence and the respondent set up a counter-claim. Besides denying the plaintiffs' claim, the defendants alleged that the plaintiffs had only moved to the suit land in the year 1989. The respondent admitted being the registered proprietor of the suit land but alleged that he was an innocent purchaser for value without notice of the alleged fraud which fraud was also specifically denied by him. The defendants further contended that the plaintiffs' suit was statute barred and was bad in law.

In his counter-claim, the respondent averred that he was the registered proprietor of the suit land upon which the plaintiffs were staying without his consent or authority having forcibly entered thereon. The respondent therefore sought an order of eviction of the plaintiffs/agents/servants and/or employees from the suit land together with an order of injunction restraining them from re-entering, re-occupying or otherwise interfering with the respondent's quiet and peaceful enjoyment of the suit land after their eviction.

The case was partly heard by **Kaburu Bauni J**, (as he then was) who took the evidence of the appellant and the respondent. The deceased 2nd plaintiff and the deceased 1st defendant had, by the time hearing commenced, passed on. **Gacheche J**, heard the principal submissions of counsel and Musinga J, (as he then was) heard the respondent's submissions in reply. He also wrote the judgment which is the subject of this appeal. The judgment was in favour of the respondent.

The following findings of the learned Judge triggered this appeal: that the appellant who, although armed with a limited grant of letters of administration *ad colligenda bona* in respect of the deceased 2nd plaintiff's estate, lacked capacity to represent his estate as he had not obtained a grant of representation in respect of the said estate; that the appellant had no right of his own to make any claim against the respondent as the latter did not purchase the suit land from him but from the deceased 1st defendant; that the suit land therefore was not one of the free properties of the deceased 2nd plaintiff; that the respondent was a bone fide purchaser for value without notice of any other interest over the suit land; that no allegations of fraud were made against the respondent and none were particularized in the amended plaint and that the appellant be evicted from the suit land. The respondent was awarded costs of the suit and of the counter-claim.

It is against those findings that the appellant appealed to this court citing fourteen (14) grounds of appeal. At the hearing of this appeal **Mr. Oguttu**, learned counsel, represented the appellant as he did before the lower court and **Mr. Mwamu**, learned counsel, represented the respondent. Both learned counsel addressed us at length and invoked various decisions of this Court and those of the High Court. Counsel for the appellant condensed the fourteen (14) grounds of appeal into eight grounds by arguing grounds 1, 2, and 3 together, grounds 4, 5 and 6 together, grounds 7, 8, 9 and 10 separately, grounds 11 and 12 together and grounds 13 and 14 together.

We have considered the said grounds and learned counsel's submissions thereon. We have also

given due consideration to the entire record and the relevant law. Having done so, it is our view that the following broad issues were raised and determination thereof will dispose of this appeal:-

1. ***Whether the learned Judge was right in holding that the appellant had no locus standi to represent the estate of the deceased 2nd plaintiff.***
2. ***Whether the evidence disclosed fraud.***
3. ***Whether the respondent had knowledge of the fraud if any.***
4. ***Whether the respondent's counter-claim should have been allowed.***

On the first issue the learned Judge stated:-

*“Upon the demise of the second plaintiff, the first plaintiff did not obtain letters of administration of his father's estate. He only applied for a limited grant of letters of administration **ad colligenda bona**. That grant could not vest upon him legal capacity to step into his late father's shoes and continue to prosecute the case as though he was the administrator of the second plaintiff's estate. A limited grant of letters of administration **ad colligenda bona** is only meant for collecting and preserving such estate of a deceased as may be liable to be wasted. When a person is suing or prosecuting a case as an administrator, he cannot rely upon such a grant.”*

The learned Judge invoked the decision of this court in **Coast Bus Services Ltd -Vs- Samwel Mbuvi Lai [Civil Appeal No. 8 of 1996] (UR)** for his conclusion that the appellant had no **locus standi** to represent the estate of the deceased 2nd plaintiff and prosecute the case as he was not the administrator of the said estate. In the case of **Morjaria -Vs- Abdalla [1984] KLR 490**, it was, *inter alia*, held as follows:-

“5. The purpose of a grant of letters of administration ad colligenda bona is to collect the property of the deceased person where it is of a perishable or precarious nature, and where regular probate administration cannot be granted at once.

6. The appointment of a person as an administrator ad colligenda bona in respect of the estate of a deceased person cannot include the right to take the place of the deceased for the purpose of instituting an action or appeal, especially where there is specific provision for that purpose in paragraph 14 of the Fifth Schedule to the Law of Succession Act.”

The learned Judge of the High Court was therefore plainly right on the general proposition that a limited grant of letters of administration **ad colligenda bona** cannot generally be relied upon in suing or prosecuting a case as an administrator of the estate of a deceased person. However, the record before the learned Judge shows that on 12th October, 1998 the appellant, vide his chamber summons dated 7th October, 1998 moved the court for the following order:-

“1. That the second plaintiff herein Ogwang Omollo having died but since the cause of action survives him he be and is hereby substituted with the first Plaintiff, his legal representative who has obtained Letters of Administration the First Plaintiff allowed to prosecute the suit on his own behalf and on behalf of the second Plaintiff.”

The chamber summons was, on 16th November, 1998 allowed as prayed by **Mbaluto J**, (as he then was). The record does not show that that order was ever set aside. It therefore remained a valid order of the court and could not be revisited by **Musinga J**, who, at that time had concurrent jurisdiction with Mbaluto J. In our view, notwithstanding that the appellant was armed with only a grant of letters of administration **ad colligenda bona** and therefore did not invoke paragraph 14 of the **Fifth Schedule of the Law of Succession Act**, the order of Mbaluto J, allowing the appellant to represent the estate of his deceased father, the 2nd plaintiff, in effect converted the grant of letters of administration **ad colligenda bona** to a grant limited to the prosecution of the case before the High Court especially as the respondent

never challenged it in that court. This Court, differently constituted, in Morjaria -Vs- Abdalla (supra) in similar circumstances held:-

“7. Notwithstanding that the grant of letters of administration ad colligenda bona was not a form of grant appropriate for this case and that it did not follow Form 47 in the First Schedule to the Law of Succession Act as provided by rule 36 (2) of the Probate and Administration Rules, the grant was specifically limited to “the purpose only” of representing the appellant in this appeal and those words in themselves constituted a valid grant under rule 14 enabling the appellant's son and his step-mother to represent the appellant in this appeal.”

In the premises, we have come to the conclusion that the learned Judge, with respect to him, was wrong in holding that the appellant had no **locus standi** to represent the estate of his deceased father who was the second plaintiff.

On the issue of fraud, the learned Judge held:-

“The plaintiffs made allegations of fraud against the first defendant. Their case against the first defendant abated. Those allegations therefore cannot stand. No allegation of fraud was made against the second defendant and if at all there was such an allegation the same was not satisfactorily proved.”

The starting point is therefore the averment in the amended plaint. The particulars of the alleged fraud were contained in paragraphs **10, 11** and **12** which were expressed as follows:-

“10. The 1st defendant knew or had reasons to know that his father was entitled for (sic) only 5 acres of land after offsetting the balance of Kshs.1500/=.

11. That since Hezron Olulo Olongo died on 8th February, 1976 and later on 26th November, 1976 he got registered as sole proprietor of the aforementioned land parcel, then his son who is the 1st defendant must have bribed land officers to have his father's name registered.

12. That the 1st defendant having realized the whole mess, he obtained the grant on 23rd August 1990 and transferred the whole land to 2nd defendant on the same day which is a clear (sic) of something feasy (sic) taking place.”

And when the appellant testified before the High Court, he never attributed any fraud to the respondent in his entire testimony. With respect to the case against the deceased 1st defendant, the learned Judge stated:-

“The plaintiffs made allegations of fraud against the first defendant. Their case against the first defendant abated. Those allegations therefore cannot stand.”

The record shows that on 16th February, 2006 counsel for the appellant informed the trial court as follows:-

“Mr. Oguttu: *The matter can continue against the remaining defendant without affecting the deceased defendant. He does not want to proceed against the deceased defendant. I therefore apply to withdraw the case against the 1st defendant.*

Ruling: *Case against the 1st defendant is hereby marked as withdrawn, as the plaintiff does not want to proceed against him.”*

With the case against the deceased 1st defendant having been withdrawn, the appellant's case against the respondent, in our view, collapsed. We are of that view, because there was no nexus between the

appellant and the respondent with the deceased 1st defendant out of the way, since it was the latter who sold the suit land to the respondent. Under Order **VI rule 4 (1)** (now Order 2 **rule 4 (1)**) of the Civil Procedure Rules, a party is required in any pleading subsequent to a plaint to plead specifically, among other matters, fraud which he alleges makes any claim or defence of the opposite party not maintainable and **rule 8 (1)** of the same Order (now **rule 10 (1)** of order 2) provides:-

“..... every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing:-

(a) particulars of any misrepresentation, fraud, breach of trust wilful default or undue influence on which the party pleading relies; and

(b) where a party pleading alleges any condition of the mind or any malice, fraudulent intention or other condition of mind except knowledge particulars of the facts on which the party relies.”

(emphasiz supplied.)

The above provisions have received judicial interpretation in a plethora of authorities including the cases of Urmila w/o Mahendra Shah -Vs- Barclays Bank International Ltd and Another [1979] KLR 76, Jared Iqbal Abdul Rahman & Another -Vs – Bernard Alfred Wekesa Sambu & Another [Nairobi CA No. 11 of 2001] (UR), Virani t/a Kisumu Beach Resort -Vs – Phoenix of East Africa Assurance Company Ltd [2004] 2 KLR 269, among many other cases. Those decisions are unanimous that allegations of fraud must be specifically pleaded and that proof thereof is higher than mere balance of probabilities. In the Virani (supra) case, the Court went further to state that in the absence of such specific pleading, a party is not at liberty to agitate the allegations of fraud or fraudulent intention as fraud is a serious quasi criminal imputation and requires more than proof on a balance of probability though not beyond reasonable doubt.

The appellant through his learned counsel Mr. Oguttu, contended that the suit property was sold to the respondent in the absence of the relevant Land Control Board Consent and that the transfer to the respondent was effected prior to the confirmation of grant of representation in respect of the estate of the deceased 1st defendant. It was further submitted that the respondent had knowledge of the appellant's occupation of the suit land and could therefore not be a bona fide purchaser for value without notice of the appellant's interest.

With all due respect to learned counsel for the appellant, submissions do not amount to pleadings. As we stated in the Viran (supra) case, the appellant was not at liberty to agitate the fraud allegations in the absence of specific pleading in the plaint against the respondent especially as the appellant had withdrawn the case against the deceased 1st defendant. The respondent had no notice of the allegations as particulars thereof were not supplied for his rebuttal. In those premises we have no difficulty in answering the second issue in the negative: Allegations of fraud were neither pleaded nor proved against the respondent.

Our above analysis answers the third issue as to whether the respondent had knowledge of the fraud if any. The pleadings made no such allegation and the knowledge alleged in the evidence and submissions was insufficient to impute fraud against the respondent.

The analysis also provides an answer to the last issue as to whether the respondent's claim should have been allowed. It was not disputed, indeed it was expressly admitted by the appellant, that the respondent was at the material time the registered proprietor of the suit land having purchased the same from the deceased 1st defendant. As such proprietor, he was entitled to all the rights of a registered proprietor. The appellant's interest in the suit land having been based on fraud which was neither pleaded nor proved against the respondent, had no justification for staying on the suit land. He was a trespasser thereon and the High Court was plainly right in concluding that the appellant should vacate the suit land and hand over vacant possession of the same to the respondent. We agree with Mr. Mwamu, learned counsel for the respondent, that the appellant's claim was bound to fail and the counter-claim was

properly allowed.

For the reasons we have endeavoured to give hereinabove, we dismiss this appeal with costs to the respondent. We so order.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF SEPTEMBER 2014

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR