IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 5 OF 2013

BETWEEN

ALPHONCE MUKABALE MUSHIRA …..... APPELLANT

AND

JOSEPH NGAIRA MUKABALE …..... 1ST RESPONDENT

FRANCIS MUKABALE …..... 2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega (Chitembwe J.)

dated 12th July, 2012

in

H.C.C. NO. 64 OF 2006

****

JUDGMENT OF THE COURT

This appeal is from the judgment of the High Court at Kakamega ***(S.J. Chitembwe,J.)*** given on 12th July, 2012 in favour of the respondents herein in respect of parcel numbers ***Isukha/Mukhonje/1536, 1537*** and ***1538*** which were sub-divisions of parcel number ***Isukha/Mukhonje/244*** formerly registered in the name of the deceased father of the respondents and the appellant. The judgment was after a full trial in the suit filed by the respondents by way of a plaint dated 4th July, 2006 in which the respondents sought three declarations, cancellation of the appellant's name as proprietor of parcel number Isukha/Mukhonje/1536, and an injunction.

In response to the suit the appellant, ***Gaitano Martin Salwa Lukhavila ("Salwa")*** and ***Peter Shikanga Shimwayi ("Shikanga")*** (*"the 2nd and 3rd defendant"* in the lower court) filed a joint statement of defence by which they denied the claim and challenged the ***locus standi*** of the respondents to commence the suit. They did so, in the following terms:-

"12. The defendants aver that the contents of paragraph 19 of the plaint clearly show that there

is a succession cause No.366 of 2001 at Kakamega Law courts in respect of the estate of the late CLEMENT ITOLONDO in which the administrators are not the plaintiffs and for the plaintiffs to bring up a new succession cause No. 249 of 2006 is irregular and the plaintiff cannot be said to have acquired any legal status from the said Succession Causes. To this extent the alleged legal standii of the plaintiffs is under question."

The matter proceeded to trial before Said J. Chitembwe J. The 2nd respondent testified and closed the case for the respondents. The appellant did the same and so did the 2nd and 3rd respondents. On the conclusion of the case the learned judge found for the respondents. Being dissatisfied, the first defendant ***("the appellant")*** has appealed to this Court raising six (6) grounds of complaint vide the Memorandum of Appeal dated 27th February, 2013 and lodged on 28th March, 2013.

At the hearing of the appeal, the appellant, who represented himself, relied on the said grounds. He contended that land parcel No. Isukha/Mukhonje/244 originally belonged to his deceased father, Clement Itolondo ***(hereinafter "the deceased")*** who was also the father of the respondents. The deceased, according to the appellant, sold the said parcel of land during his life time against which sale he objected and referred the dispute to the local District Office and he was given consent to transfer the title to himself which he did. He further submitted that the respondents acknowledged that the parcel of land belonged to him and that is why it was not indicated as one of the free properties of the deceased in the succession cause No.366 of 2001 lodged by the respondents.

The appellant further submitted that he lodged Kakamega HCCC No. 74 of 2004 in which he sought similar orders as he sought in the case giving rise to this appeal which former suit was decided in his favour and which decision, according to him, should not be disturbed.

In conclusion the appellant stated that parcel No. Isukha/Mukhonje/244 had since been sub-divided and three new titles created. As a result therefore he was registered as proprietor of land parcel number, Isukha/Mukhonje/1536 to which he is lawfully entitled.

Opposing the appeal, ***Mr. Shivega,*** learned counsel for the respondents, pointed out that the appellant had not argued his grounds of appeal and had not demonstrated any error on the part of the learned Judge of the High Court. It was learned counsel's further submission that the appellant was relying on a decision made in his favour but which decision was overturned on appeal. Counsel also contended that the sub-division of former Title Number Isukha/Mukhonje 244 into new titles including parcel number 1536 was fraudulent and was lawfully interfered with by the High Court. In those premises, learned counsel urged us to dismiss this appeal.

We have gone through the entire record and examined all the evidence in exercise of our re-hearing and re-evaluation mandate as a first appellate court. We have also considered the grounds of appeal, and the submissions made to us.

It is apparent that parcel number Isukha/Mukhonje/244 was formerly registered in the name of the deceased father of the parties to this appeal. The second respondent said so in his evidence at the trial and in the statement of claim. The appellant himself acknowledged that position when he testified before the High Court.

The respondents in their statement of claim alleged that the appellant had successfully sued the deceased claiming the said title vide Kakamega ***SPMCC No. 107"B"*** of ***1985.*** The subordinate court had determined that suit in favour of the appellant which decision was overturned in Kakamega HCCA No. 56 of 1985. According to the respondents, the appellant used the judgment which had been overturned to cause the suit piece of land to be transferred to himself which event, according to the respondents, was fraudulent as the said land was family land to which they all were entitled. The respondents further contended that the 2nd and 3rd defendants had, with the knowledge of the appellants' fraud, purchased portions of the suit land which became registered as Isukha Mukhonje/1537 and 1538.

The respondents, in those premises, prayed for the declarations, cancellation and other reliefs already referred to above.

In his testimony at the trial, the 2nd respondent stated that he applied for and obtained a grant of representation to the estate of the deceased which empowered him to commence proceedings to recover the suit land from the appellant. He produced the said grant and decision in the suit which the appellant used to obtain registration of the suit land in his name and that of the appeal which overturned the judgment in favour of the appellant.

The appellant, at the trial, acknowledged that the respondents were his brothers. He added that they are all seven (7) brothers in number. He however, contended that he had requested the deceased to transfer the suit land to him during his life time as he resided thereon. He claimed he obtained consent of the Land Control Board but the deceased sold the same land to one ***Paul Kwelel*** prompting him to sue him before the subordinate court a suit which was determined in his favour. According to the appellant he executed the order of the subordinate court and the suit land was registered in his name. As the registered owner, he sold portions of the suit land to the 2nd and 3rd defendants. In the opinion of the appellant the suit land was not the deceased's after the transfer to himself and could not be considered among the assets of the estate of the deceased available for distribution to the respondents.

The 2nd and 3rd defendants confirmed purchasing portions of the suit property from the appellant who was then the registered proprietor and alleged that they had no knowledge of how the appellant had became the registered proprietor. The two defendants therefore contended, in the main, to be bona fide purchasers for value without notice. The learned Judge agreed with them and concluded as follows:-

"By the time they bought their portions, the 1st defendant was the registered proprietor, although unlawfully registered. The two plots owned by the 2nd and 3rd defendants should not form part of the estate of Clement Itolondo."

The appellant appears to have accepted that finding of the learned Judge as he did not enjoin the 2nd and 3rd defendants in this appeal. Since they are not parties in this appeal we are not at libety to make any orders against them.

The tragedy of the appellant's complaint is in his refusal to accept that the judgment of the subordinate court which he purported to execute and thereby obtained transfer of the suit land in his favour, was overturned, on appeal, by the High Court. In Kakamega SPMCCC No. 107 "B", the court stated:-

> ***"The 2nd defendant to execute the necessary transfer documents in, favour of the plaintiff and if he fails to do so the Executive Officer to do so on his behalf.***
>
> ***The 1st defendant will be at liberty to obtain a refund of any monies he might have paid to 2nd defendant. No order as to costs.***
>
> ***N. GAKUHI***
>
> ***SENIOR RESIDENT MAGISTRATE"***

The deceased who, it would seem, was the 2nd defendant lodged Kakamega High Court Civil Appeal No.56 of 1985, which was heard by ***Mbogholi J.*** The learned Judge allowed the appeal holding, that the appellant had no locus standi to institute the subordinate court case.

The decision of the High Court in Kakamega HCCA No. 56 of 1985 removed the basis of the

appellant's claim to title to the suit land. He neither challenged that decision in a second appeal to this Court nor did he seek a review of the same. The appellant cannot therefore claim to still be the legal owner of the suit land. That was the gist of the decision of the learned Judge of the High Court. We cannot fault him . The appellant had not purchased the suit land. With the order of the High Court in Kakamega HCCA No. 56 of 1985, the suit property reverted to the estate of the deceased and would be dealt with under the provisions of the Law of Succession Act, Cap 160 Laws of Kenya. The learned Judge concluded as follows:-

> *"I do therefore find that the registration of the 1st defendant* ***[appellant]*** *as the proprietor of plot number ISUKHA/MUKHONJE/244 was both fraudulent and unlawful as the decision that favoured the 1st defendant had already been overturned by the High Court. I do therefore grant the plaintiff's prayer 17 and 18 of the plaint as prayed. By the time the Executive Officer signed the transfer on 26th December, 1999 the order had already been overturned."*

The learned Judge then considered the fate of the 2nd and 3rd defendants with respect to the portions which they had purchased from the appellant when he was registered as proprietor of the suit land and held:-

> ***"The initial plot number ISUKHA/MUKHONJE/244 was measuring 7.6 Hectares. The 1st [2nd] defendant bought 0.15 Hectares (plot 1537) while the 3rd defendant bought 0.19 Hactares (Plot 1538). The 1st defendant remained with plot number ISUKHA/MUKHONJE/1536 measuring 7.16 Hectares."***

The learned Judge having found that the 2nd and 3rd defendants were ***bona fide*** purchasers of their portions for value without notice, ordered that they retain their portions as registered and made the following order with respect to the title which the appellant retained;

> ***"Having found that the 1st defendant's registration as the owner of plot number ISUKHA/MUKHONJE/244 was unlawful, I do order that title deed for plot number ISUKHA/MUKHONJE/1536 registered in the names of ALPHONCE MUSHILA MUKABALE be revoked and the title revert to the names of the late ITOLONDO LIKHUTU. The plaintiffs to surrender the original title for plot number ISUKHA/MUKHONJE/244 to the Kakamega Land Registry and obtain a fresh Title for plot number ISUKHA/MUKHONJE/1536 in the names of their deceased father ITOLONDO LIKHUTU also known as CLEMENT ITOLONDO."***

The effect of that order was to free the said title from the appellant and make it available for distribution as part of the free property of the estate of the deceased to which the appellant, the respondent and their siblings would be beneficially entitled as heirs of the estate of the deceased. In our view, the learned judge was plainly right. His decision was based on a proper appreciation of the evidence which parties adduced before him. We also do not detect any application of wrong principles in reaching those findings nor did he fail to take account of particular circumstances or probabilities material to an estimate of the evidence. We have also found no evidence that the learned Judge's impressions on the demeanour of material witnesses was inconsistent with the evidence in the case generally. ***(See Ephantus Mwangi & Another -Vs- Duncan Mwangi Wambugu [1882 – 88] 1 KLR 278 at page 292).***

We have said enough to show that this appeal cannot succeed. We find no merit in any of the grounds cited by the appellant. The appeal is accordingly dismissed in its entirety.

Given that the appellant and the respondents are biological brothers and that goodwill will be required to settle the affairs of their deceased father, we order that each party shall bear its own costs of this appeal.

Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF DECEMBER 2014

D.K. MARAGA

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL