



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 80 OF 2011

BETWEEN

CORNELIUS ROBIN NYAMONGO..... APPELLANT

AND

MOKAYA MAYEKA RESPONDENT

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

at Kisii (Makhandia J.) dated the 17th January, 2011

in

H.C.C .C. NO. 272 OF 2006)

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful 2nd defendant in the subordinate court, now the appellant, against the judgment of *Makhandia J. (as he then was)* delivered on 17th January, 2011 whereby he dismissed, with costs, the appellant's appeal which he had filed from the judgment of *Hon. Soita, Principal Magistrate*, in Kisii Chief Magistrate's Court *Civil Suit Number 87 of 2000*. In that suit the respondent had sued the appellant and one *Joseph Tayari Dangache, (hereinafter "the 1st defendant",)* for orders that the two do transfer land parcel numbers *Central Kitutu/Ikuruma/1512* and *1513* respectively to him and in default the Executive officer of the Chief Magistrate's Court, Kisii be authorized to do so. He also sought cancellation of the transfer of Central Kitutu/Ikuruma/1512 to the appellant by the 1st defendant.

In the alternative he sought refund of purchase price with interest thereon; damages for breach of contract and the value of developments made by him on the properties. He also claimed costs of the suit. The learned Principal Magistrate granted the principal prayers of the respondent namely that the appellant and the 1st defendant do transfer the suit titles to the respondent and in default the Executive Officer of the court to do so; that the transfer of title number Central Kitutu/Ikuruma/1512 by the 1st defendant to the appellant be cancelled and costs of the suit.

The appellants appeal to the High Court, as already stated, was dismissed thus prompting this appeal. The appellant has raised six grounds of appeal which were all argued by *Mr. Anyona*,

learned counsel for the appellant. The grounds are expressed as follows:-

- “ 1) That learned trial Judge of the Superior Court erred in holding that the appellant had fraudulently obtained Title Deed without sufficient evidence on record.**
- 2. The learned trial Judge of the Superior Court erred in law and fact when he did not consider the issue of the respondent not obtaining Land Control Board (sic) within 6 months as required.**
- 3) The learned trial Judge of the Superior Court mis-directed himself to the fact that appellant was a witness in the respondent's agreement when he was not.**
- 4) The learned trial Judge of the Superior Court erred in law and fact in dismissing the appellant's defence without considering that the plaint was defective as it did not contain particulars of fraud as contained (sic) in law that made the trial Judge to arrive at the wrong conclusion.**
- 5) The learned Judge of the Superior Court erred in law and fact when claiming that the respondent was in occupation when it (sic) was not.**
- 6) That the learned trial Judge of the Superior Court erred in law and fact in shifting the burden of proof to the appellant when it was upon respondent to proof (sic) his case.”**

The facts giving rise to the trial before the subordinate court and eventually the appeal before us are not complex. The suit property was formerly registered as Central Kitutu/Ikuruma/158 in the name of **Mokaya Rangache** who was the brother of the 1st defendant. It is common ground that Mokaya Rangache died and by transmission the said title was transferred to the 1st defendant.

In early 1989, the 1st defendant sold a portion of the land comprising 183 paces by 27 paces to the respondent for **Kshs.15,000/=** which the respondent paid for. It is not clear from the home made agreement which was produced at the trial as to which parcel of land was the subject of the sale but since the respondent and the 1st defendant agreed that it is the same title the subject matter of this case nothing turns on the absence of the parcel number in the agreement.

On 20th April, 1989 the 1st defendant entered into another agreement of sale with one **Dickson Nyandoro Bosire** by which he sold to the latter a portion of the said title comprising 1 ½ acres at the consideration of **Kshs.15,500/=**.

On 8th March 1995 the said title number Central Kitutu/Ikuruma/158 was closed and two titles created namely Ikuruma/1512 and 1513. The former was registered in the name of the appellant and the latter in the name of the 1st defendant. That was the status of the subject piece of land when the respondent filed his suit before Kisii Chief Magistrate's court aforesaid.

The respondent sought the orders already referred to above against the 1st defendant and the appellant. In the defence filed by 1st defendant, he admitted the respondent's claim and blamed the appellant for fraudulently sub-dividing his piece of land and unlawfully transferring the portion he had sold to the respondent to himself. He averred as follows in paragraph 7:-

“The 1st defendant requests this honourable court to nullify and cancel the title deed issued to the second defendant CORNELIUS ROBIN NYAMONGO without his knowledge nor consent and order the title to revert back to the 1st defendant to enable him transfer the land to the plaintiff who had bought it from him.”

The appellant also filed his defence to the respondent's claim. He denied it in **toto** and specifically

averred that he purchased the subject piece of land lawfully and obtained a good title to the same.

At the hearing of the suit before the subordinate court, the respondent gave evidence that he purchased from the 1st defendant a portion comprising 183 metres by 135 metres of title number Central Kitutu/Ikuruma/158 for Kshs.17,000/= which he paid in full. He then took possession of the portion he purchased.

In 1990 he was informed that the same piece of land had been sold to one *Nyamongo* the father of the appellant. It was then agreed that the said Nyamongo gets back his purchase price which he said was 7,500/=. He paid the same plus an additional Kshs.10,000/= as costs. According to the respondent the appellant was the one who recorded the agreement.

The respondent then left for Yugoslavia where he was deployed by his employer, Kenya Defence Forces. While so engaged, he was informed that the same piece of land had been sold a 2nd time.

When he returned, in July, 1995, he found that the land had been sub-divided and the resultant titles registered as already stated. When he enquired of the 1st defendant his position on the matter, the latter denied re-selling the subject piece of land.

The 1st defendant gave evidence at the trial before the subordinate court to the effect that the appellant sub-divided his piece of land by means of fraud. The appellant also testified at the trial and called several witnesses. The substance of his case was that his father purchased a portion of parcel number Central Kitutu/Ikuruma/158 for Kshs.15,500/= which was paid, in full. Sub-division followed and new title numbers Ikuruma/1512 and 1513 were created and he was duly registered as proprietor of Ikuruma/1512.

The learned Principal Magistrate, in a judgment dated and delivered on 5th June, 1997 granted the respondent's prayers as already stated.

The appellant felt aggrieved and moved to the High Court vide Civil Appeal *No. 272 of 2006* in which he cited 8 grounds of appeal which are substantially similar to the grounds raised in the appeal before us.

The learned Judge of the High Court after hearing counsel for both sides, dismissed the appellant's appeal with costs to the respondent as already stated. The learned Judge found that no credible evidence had been adduced regarding how the subject piece of land had been transferred to the 1st defendant by way of transmission; he also found that the appellant had departed from his pleading in his statement of defence in that whereas he had averred that he had purchased the subject piece of land, he testified that it was infact his father who had done so. The learned Judge further found that the 1st defendant had acknowledged the respondent's claim and besides pleading so in his statement of defence he testified to that effect before the subordinate court.

The learned Judge was not satisfied that the transaction between the appellant and the 1st defendant had received the approval of the relevant Land Control Board. Finally the learned Judge found that the appellant and his witnesses lacked candour.

Mr. Anyona, the learned counsel for the appellant in his address to us faulted the learned Judge for holding that the appellant had obtained title to the subject piece of land when no particulars of fraud had been given. He further submitted that the appellant's father had indeed purchased the subject piece of land but had authorized his son, the appellant, to process the title in his name which events should not have been construed against the appellant.

On the issue of succession to the estate of the brother of the 1st defendant, counsel contended that even though the succession proceedings were instituted by the father of the appellant, the 1st defendant was the beneficiary thereof as he became the registered proprietor thereof and subsequently lawfully transferred a portion of the subject piece of land to the appellant which

transaction, according to counsel, was more legitimate than that of the respondent who purchased the same title which was in the name of a deceased person.

Counsel further faulted the learned Judge for ordering transfer of the subject titles to the respondent when one of them was registered in the name of the 1st defendant who was deceased even before the appeal was filed.

Counsel also took issue with the learned Judge, for not considering the provisions of the Land Control Act when he ordered the said transfer to the respondent. He also discredited the testimony of the 1st defendant who was prepared to transfer the subject title to the respondent even though he was not paid any purchase price.

Finally counsel submitted that the learned Judge failed to consider the appellant's testimony and that of his witnesses and thereby arrived at a wrong conclusion.

Mr. Nyasimi, learned counsel for the respondent supported the decisions of the High Court and the subordinate court. Counsel contended that the transaction between the appellant and the 1st defendant was tainted with fraud as was admitted by the 1st defendant and the court could not ignore the same. Further evidence of want of candour on the part of the appellant was available in the documents produced at the trial in which the appellant had been the author of the agreement to the refund of purchase price paid by his father yet he purported to purchase the same later.

On the issue of want of the consent of the Land Control Board to the transaction between the respondent and the 1st defendant, counsel contended that the same could not now arise as when the respondent sued the appellant and the 1st defendant the subject piece of land was already in the name of the appellant and the 1st defendant.

In our view this appeal turns on three main issues: Whether the appellant's title to Central Kitutu/Ikuruma/1512 should have been cancelled for having been obtained by means of fraud or for any other sufficient reason; whether the order of the High Court would be subject to the provisions of the Land Control Act and whether the High Court could make an order affecting title number Central Kitutu/Ikuruma/1513 which was in the name of the 1st defendant who was deceased when the order was made.

We will consider the last issue first. The record shows that on 19th February, 2003 when the case for the appellant was to commence before the subordinate court, Mr. Anyona, learned counsel who represented the appellant in that court, informed the court that the 1st defendant had passed away. Notwithstanding that fact, both counsel agreed to proceed with the matter from where it had reached. The case then proceeded upto conclusion. And even when the appeal before the High Court was filed no attempt was made to substitute the deceased 1st defendant. That position is not in controversy at all.

As at the time of his demise the 1st defendant was registered as proprietor of title number Central Kitutu/Ikuruma/1513. That title was therefore the property of a deceased person and could only be dealt with under the Law of Succession Act. Only a person armed with a grant of representation would have authority to sue or to be sued with respect to that property. The estate of the 1st defendant was not represented when orders were made by both the subordinate court and the High Court with respect to the property of that estate.

We think that if both the learned Principal Magistrate and the learned Judge were alerted of the provisions of the Law of Succession Act, they would not have made orders affecting the said title.

The next issue we shall consider is whether the appellant's title to Central Kitutu /Ikuruma/1513 should have been cancelled. The two courts below considered the testimonies of all the parties before concluding that the said title be cancelled. We have ourselves considered those testimonies and particularly the position taken by the 1st defendant in his written statement of defence and in

his oral evidence before the subordinate court. He averred *inter alia*, that the appellant misled him that he could assist him obtain a National Identity Card only to obtain from him transfer of his land to himself fraudulently. His testimony before the subordinate court was as follows:-

“ I am the 1st defendant herein. The 2nd defendant brought land people and sub-divided the land he even has my Title Deed. He used fraud to get the land from me. He is the one who arrested me to acquire the ID and he used it to transfer the land to himself.”

The 1st defendant maintained that position even in cross-examination. He was believed by the learned trial magistrate and the learned Judge of the High Court. The 1st defendant may not have particularized the allegations of fraud as an advocate would. But he averred that forms he thought were for obtaining an identity card turned out to be forms of transfer of his land to the appellant. He may not have called that pleading particulars of fraud but the averment in our view disclosed the allegation of fraud he alleged against the appellant with sufficient clarity.

With regard to the respondent's pleading in his amended plaint there are paragraph 5 and 6 which read as follows:-

“5. The late 1st defendant sold the same parcel of land to the second Defendant and later the second Defendant agreed to leave the said land parcel to the plaintiff on condition that the plaintiff pays the second Defendant Kshs.18,550/= which was paid in full.

6. That the Defendants later colluded and had the said L.R CENTRAL KITUTU/IKURUMA/158 sub-divided amongst themselves to give rise to L.R. Nos CENTRAL KUTUTU/IKURUMA/1512 and 1513 without transferring same to the plaintiff, in spite of the plaintiff's persistent demands.”

The averments in the two paragraphs in our view identify the allegations of fraud made against the appellant without referring to them as particulars.

Then the parties themselves introduced the issue of consent of the relevant Land Control Board at the trial. The appellant, even though unsuccessfully, attempted to have evidence of such consent adduced at the trial before the subordinate court. There is no doubt that the transaction between the appellant and the 1st defendant was a controlled transaction. It could only be sanctioned with the approval of the relevant Land Control Board. The appellant failed to prove, on a balance of probability, that such approval had been obtained. Surely, the learned Judge could not ignore what the parties themselves sought to demonstrate. Then there was the undisputed fact that the appellant alleged in his pleadings that he had purchased the subject piece of land when in fact his father is the one who had allegedly purchased it.

In all those premises we have come to the conclusion that there was basis for the order cancelling the transfer to the appellant of Central Kitutu/Ikuruma/1512.

The final issue for our determination is whether the order of the High Court would be subject to the provisions of the Land Control Act. We do not think so. The subject property is already registered in the name of the appellant. The effect of the order of the High Court is to cancel that registration and in his place the respondent be registered as proprietor. There was no agreement of sale between the appellant and the respondent which would require the consent of the Land Control Board. The two courts below concluded that the subject piece of land rightly belonged to the respondent and the orders of the two courts can be put into effect without complying with the requirements of the Land Control Act.

The sum total of the above is that, save for orders made in respect of parcel number Central Kitutu/Ikuruma/1513, which we hereby quash, and set aside this appeal fails.

As the appeal has succeeded to a small extent we order that the appellant pays half (½) of the costs of this appeal and half (½) of the costs of the Appeal before the High Court and the Chief Magistrate's Court to the respondent.

Judgment accordingly.

Dated and Delivered at Kisumu this 1st day of November, 2013

J.W. ONYANGO OTIENO

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR