



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

Civil Appeal 132 of 2003

PATRICK WILLIAM ATEKU APPELLANT

(Suing as personal representative, of the Estate of

WILLIAM MARENDE ATEKU-Deceased

AND

OLENJA ATEKU 1ST RESPONDENT

BENINA AMISI WILLIAM..... 2ND RESPONDENT

(Appeal from the judgment & decree of the High Court of Kenya at Kakamega (Khamoni, J.)

delivered on 3rd day of April, 2003

in

H.C.C.C. NO. 63 OF 2000)

JUDGMENT OF THE COURT

Patrick William Ateku, the appellant, as the personal representative of the estate of *William Marende Ateku* (hereinafter, *the deceased*), unsuccessfully sued *Olenja Ateku*, hereunder, the first respondent, and *Benina A. William*, hereinafter, the 2nd respondent, in the High Court at Kakamega, under *High Court Civil Case No. 63 of 2000*, for, first, a declaration that *land parcel No. Butso/So/Shibeya/469*, was part of the estate of the deceased, and, second, for an order that he be registered as the proprietor thereof in place of the 2nd respondent.

The 2nd respondent became the registered proprietor of the aforesaid parcel of land on 9th November, 1991, when transfer of title thereof was effected to her by the first respondent. Documentary evidence before us shows that the 1st respondent signed application forms for Land Control Board consent to transfer the land to the 2nd respondent, on 25th January, 1990. The *Lurambi Land Control Board* listed the matter for consideration before it on 15th February, 1990, but for some reason, the matter was deferred until 15th March, 1990, when it approved the transaction and gave its consent. A copy of the consent was adduced in evidence. The Transfer document was executed by the 1st respondent before a magistrate on 4th December, 1990, and it shows that the 2nd respondent, who, like the first appeared

before the same magistrate, also executed the same document as transferee. A land certificate was issued on 2nd December, 1992, and bears the name Benina Amisi William, as proprietor.

In his plaint, however, the appellant averred, among other things, that the deceased bought the suit premises in August, 1972, from one, *Likata Matanyi*, for Kshs.55,000/= but could not have the land registered in his name because, first, he did not have an identity card and also because he would be away during the process of transfer. He instead asked his brother, the 1st respondent, to cause the land to be registered in his (*his brothers*) name to hold the same in trust until such time that he would be able to register it in his name. The 1st respondent was duly registered, but after some time, the 1st respondent allegedly fraudulently transferred title to it to the 2nd respondent.

The first respondent in his written statement of defence, admitted transferring the suit premises but denied he did it fraudulently. In *paragraph 3* of that defence he averred as follows:-

“The first defendant admits paragraph 8 and states that he was only transferring the said land to the second defendant as a wife, an agent and or a family member of William Marende Ateku so that she could in turn surrender the title to the family if need be.”

In *paragraph 4* the 1st respondent averred that he was not aware he was selling the land to the 2nd respondent and *“that is why he did not make any sale agreement in that respect.”*

The second respondent in her written statement made general denials of the averments in the plaint and alleged that she was the rightful owner of the suit premises. In her evidence, however, she stated that she bought the suit land from the 1st respondent for valuable consideration, namely, *Kshs.30,000/=* and produced in evidence a handwritten piece of paper which she described as the sale agreement. A certified photocopy thereof was produced, and as far as is readable, it states as follows:-

“13-9-89

MAPATANO YA KUUZANA SHAMBA

Mimi Olenja Ateku wa P.O. Box 502 Kakamega Mwenye Kitambuliso (sic) 4169906/6 - nimekubali kumuuzia Benina Amisi wa P.O. Box 41632 NAIROBI Kitambuliso (sic) 1943168/64 shamba langu ekari (sic) 9½ ya Butso/Shebeye/469 kwa bei ya jumla ya Shs.30,000/= leo hi mununusi Benina Misia melipa (sic) pesa sote hakuna deni.

Mimi muusaji - Olenja Ateku

Mimi mununusi - BENINA AMOSI

Mashaiti

(1) Jarani Odori - sign

(2) Jafured Manyasa - sign

Mwandisi

Willington Alinyo - sign”.

There was no English translation given for this exhibit, but in general terms we understand it to be the agreement for the sale of the suit property to the 2nd respondent the execution of which was apparently witnessed by *Jarani Odori* and *Jafured Manyasa*.

The 1st respondent was the brother of the deceased, a fact the former does not deny. He also admitted

in his evidence that the deceased bought the suit premises and directed that he, the 1st respondent, be registered merely as trustee. The 2nd respondent was the deceased's second wife. Before that, the 2nd respondent was another person's wife and had four children with that other person. 2nd respondent testified that her earlier marriage was dissolved in or about 1965 through court process. It was her evidence that she bought the suit land before she became the deceased's wife. There is, however, documentary evidence which shows how the deceased paid for the same land when purchasing it from the previous owner one, Likata Matanyi. The latter was registered as owner on 20th February, 1969. The land was transferred by him to the 1st respondent in or about October, 1974. What is instructive is that in the foregoing documents which evidenced payment of the purchase price by the deceased, the 2nd respondent is shown as a witness. When the documents were shown to the 2nd respondent she responded as follows:-

“My first time to know this land was sold to Olenja was in 1990. Otherwise I was not present when Olenja was buying land from Original seller. I went to school up to Std.III but I have little knowledge although people of Std.III during my time could write, read and some spoke some English. You show me Exhbt.4. P/f dated 6.4.74. My name is there. Although I have read in Luhia, I have had it read. It says original seller received money from In 1974 I was at the home of my father in Bunyore. I met deceased in 1993. It was at Butso in the house of Olenja. Friendship started and we subsequently married.

The deceased worked at Airport Nairobi. He came to stay in the suit land in 1993 July. Started ailing in 1998 August.”

Faced with conflicting evidence as aforesaid, the trial Judge (Khamoni, J.) remarked as follows:-

“There are two stories before this Court. What is the solution as each one has not been shaken in cross-examination?”

In our understanding the learned Judge in effect summarised that the decision in the case depended on credibility of witnesses. The learned judge then analysed the evidence and came to the conclusion that there was no proper basis for the deceased seeking to have the suit land registered in the name of the 1st respondent. He reasoned as follows:- There was no impediment to a person owning land anywhere in the country or difficulty in having the land registered in his name. He was unaware of circumstances which would preclude registration of a person as owner of land even if he does not have an identity card. There was nothing to explain why the deceased could not obtain an identity card between 1974 and 1998. The deceased had a passport and the same could have been used to enable him be registered as owner. In absence of evidence suggesting that the deceased was not normal and reasonable, it was inexplicable, if indeed he was owner of the land, why the land was not registered in his name. On the basis of those factors the learned Judge disbelieved the appellant, believed the story of the 2nd respondent and accordingly dismissed the appellant's case and thus provoked this appeal.

There are nine grounds of appeal all of which attack various findings of fact by the learned trial judge. These are as follows:-

- (1) *The learned trial Judge upon the admission of 1st respondent that he had no interest in the suit premises should have held that the transfer of the said parcel of land to 2nd respondent was without any basis.*
- (2) *That the both respondents having failed to specifically traverse the allegation of fraud in the plaint and the learned judge having found as fact that those allegations of fraud had not been traversed, the learned Judge erred in failing to find that the two respondents thus admitted the claim.*
- (3) *That the learned trial Judge based his decision on extraneous matters.*

(4) *That he failed to uphold the appellant's evidence as to when the fraud by 1st and 2nd respondents was committed, in absence of any evidence to the contrary.*

(5) *Abandoned.*

(6) *The learned Judge erred in accepting the 2nd respondent's version as to how she acquired the land.*

(7) *The learned Judge having found that both the appellant's and 2nd respondent's respective cases were unshaken during cross-examination erred in disapproving the appellant's case without any evidence.*

(8) *Abandoned.*

(9) *The learned trial judge should not have failed to find that the respondents' defences contained bare denials and that he could not properly take into account any unpleaded issues as he did.*

Notwithstanding the aforesaid grounds of appeal, a decision on this matter largely depends on credibility of witnesses. In the case of EPHANTUS MWANGI & GEOFFREY NGUYO NGATIA V. DUNCAN MWANGI WAMBUGU 1982-1988 1 KAR 278 this Court held that it would hesitate before reversing the decision of a trial Judge on his findings of fact. It will only do so if, first, it appears that the Judge failed to take account of particular circumstances or probabilities material to an estimate of the evidence, or secondly, that his impression based on the demeanor of a material witness was inconsistent with the evidence in the case generally; or thirdly, the finding is based on no evidence, or the judge is shown demonstrably to have acted on wrong principles.

There is no dispute that in the pleadings the respondents did not unequivocally traverse allegations of fraud against them. The nearest, the first respondent came to controverting the allegations of fraud in the plaint is his averment in his written statement that he was himself duped to sign documents on the mistaken belief that he was transferring the land to the family of the deceased. He further averred that the 2nd respondent took advantage of his illiteracy. On the basis of the 1st respondent's written statement of defence it is clear that he does not claim an interest in the suit property. So that the dispute is squarely between the appellant and the 2nd respondent. He is the deceased's son by his first wife, and the 2nd respondent who is the former's step-mother.

Khamoni, J. appreciated the relationship between the appellant and 2nd respondent and concluded that it was unbelievable that the deceased had bought and registered the suit property in the name of the 1st respondent. He believed the 2nd respondent that she bought the land. But a careful evaluation of the evidence on record reveals that neither the evidence of the 1st respondent nor of the 2nd as to how the land came to be registered in the 2nd respondent's name is believable. The state of the pleadings in the circumstances are unhelpful in the determination of questions based on credibility. Considering the way the proceedings were conducted by the parties it is important to re-evaluate the evidence to determine this appeal. Starting with the evidence of the 1st respondent, he consciously took steps to effect transfer of title of the suit property to the 2nd respondent. He completed application forms for Land Control Board consent. He signed them. He appeared before the Lurambi Land Control Board and signified his consent to the transfer. The price is noted on the forms as Kshs.30,000/=. It is unbelievable that he did not know he was selling the land to the 2nd respondent. At the aforesaid board meeting he must have been asked whether he had agreed to sell the suit land to the 2nd respondent. The consent letter is clear that the transaction which the board approved was a sale. It is noteworthy that the transaction was not approved at the meeting of the board held on 15th February, 1990. The remarks on the application form is "Deferred. Seller absent. Next board. 15/2/90".

On 15th March, 1990, the transaction was approved.

Likewise the story of the 2nd respondent that she did not know the deceased had an interest in the land is unbelievable. Her name appears on exhibits produced by the plaintiff to show the deceased bought the suit property from Likata Matonyi. The exhibits were not discredited. The 2nd respondent acknowledged her name was on those documents which show that the seller received some money from the deceased.

Analysing as we do all the evidence on record, it is quite clear there is something which was kept away from the trial court concerning the land. It is also clear that evidence to show that the 1st respondent held the land in trust for the whole of the deceased's family is unclear. What is clear to us is that the deceased might have bought the land and entered into a secret deal with his brother, the 1st respondent, to later transfer it to the 2nd respondent as a sale. We say so advisedly. It is not believable as the trial Judge held that the deceased did not have an identity card, and for that reason could not be registered as the proprietor of the suit land. There is evidence the deceased owned some other piece of land which was registered in his name to wit *East Bunyore/Ebuchitwa/1870*, measuring 1.5 acres. It is also in the evidence of the appellant that the deceased built a permanent house on the suit land which he occupied and invited the 2nd respondent to live therein with him.

The deceased's eldest son, *Reuben Odindo (PW2)* testified that the deceased used to have an identity card before he obtained a passport. He did not explain what happened to it. He also testified that the deceased obtained another identity card but after the suit land had been transferred to the 2nd respondent. That evidence was not controverted. It suggests that the deceased was discreetly trying to give the land to the 2nd respondent to the exclusion of the appellant's house. Otherwise the deceased's conduct is not explainable in any other way.

Besides both PW1 and PW2 testified that the deceased took 2nd respondent as a wife in 1969 contrary to what the latter stated. It was her evidence that the deceased took her as a wife in 1993, after she had allegedly bought the suit land. In his testimony, the 1st respondent testified under cross-examination, as follows:-

"I saw payment of the last instalment by my brother to Laikata Matonyi, Kshs.1,000/= . I do not remember the year. Benina brought me the papers to sign. When transfer from Laikata Matonyi to me was effected, I was only to hold it on behalf of my brother.

.....When Benina came to me with papers to sign the second time, I did not sign them to give the land to Benina. I signed them to give the land to the family of my brother. That was what Benina was also saying and we went to Land (sic) Kakamega."

The 2nd respondent appears to have been involved in both the transfer of the suit property to the deceased's brother and also to herself by the 1st respondent as trustee.

Both transactions referred to above took place during the lifetime of the deceased. He did not object. Hence our view that the transfer of the land to the 2nd respondent was intended to take the land beyond the reach of the deceased's estate. The deceased made both PW1 and PW2 believe they had a share in it. The deceased asked PW2, his first son, to occupy part of the land. The remainder was left for the benefit of the 2nd respondent. The action was apparently to hoodwink the appellant and his siblings.

Did the appellant or the 2nd respondent have any rights over the suit premises during the lifetime of the deceased? While it is conceded that the two were his son and wife respectively, the land was registered in the name of the 1st respondent to hold the same in trust for the deceased. He was the person who could validly complain if the suit premises was handled otherwise than he had intended when causing the land to be registered in the name of the 1st respondent. As matters stand, the 1st respondent effected the transfer of the land to the 2nd respondent during the lifetime of the deceased. The deceased did not raise any objection. There is a bare statement in the evidence of the appellant that both the respondents took advantage of the deceased's sick condition and fraudulently caused the land to be

transferred to the 2nd respondent. No concrete evidence was adduced as to the deceased's state of health as at the date the land was transferred to the 2nd respondent by the 1st respondent. So it cannot be positively concluded that the deceased was either unaware of what the 1st respondent was doing with the land, or that he was incapable of understanding what was happening.

The rights of children over their father's property remain inchoate until after his death. Likewise rights of wives over their living husbands. Before death the rights over such property remain vested in the registered proprietor. That being our view on the matter, did the appellant have any justiciable rights over the suit property as at the date it was transferred to the 2nd respondent? Section 28 of the *Registered Land Act, Cap 300 Laws of Kenya* provides thus:-

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever, but subject-

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same, and are declared by section 30 not to require noting on the register.

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

The 1st appellant having admitted he had been registered as a proprietor of the suit land to hold the same as a trustee, for the benefit of the appellant's father, the proviso above affected him. There is however nothing in section 30 of the Registered Land Act upon which the appellant on his own right or as personal representative of the deceased's estate would anchor his claim on. Paragraph (g) of that Section deals with rights of a person in possession or actual occupation- *“to which he is entitled in right only of such possession or occupation..”* The appellant testified that his brother had been invited by the deceased to occupy the land. The deceased not having been the registered proprietor could not confer rights of occupancy to anybody. Besides, as we stated earlier in this judgment, the land was transferred to the 2nd respondent during the lifetime of the deceased and it can therefore be presumed in absence of any evidence to the contrary, that the transfer was effected with his tacit approval considering that he did not raise any objection to the said transfer. Besides the transfer of the suit property having been effected during the lifetime of the deceased, nothing passed on to his estate which would give rise to legal action for the benefit of the estate of the deceased.

For the reasons we have endeavoured to give, we are of the view and so hold that the appellant's appeal lacks merit and accordingly it is dismissed. However, considering the manner the transfer of the suit land was handled, we make no order as to the costs of this appeal.

Dated and delivered at Kisumu this 8th day of May, 2009.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

D.K.S. AGANYANYA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR