



REPUBLIC OF KENYA

COURT OF APPEAL AT NAIROBI

Civ Appeal 279 of 1999

OBADIAH MANASSEH MUSERA APPELLANT

AND

JELITA MAKOKHA MWECHELESI 1ST RESPONDENT

CHRISTINE LICHUMA MWECHELESI 2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Kakamega (Tanui, J) dated 8th July, 1999

In

H.C.C.C. No. 196 of 1993)

JUDGMENT OF THE COURT

On 18th May, 1993, Jelita Makokha Mwechelesi and her co-wife Christine Lichuma Mwechelesi instituted H.C.C.C. No. 195 of 1993 in the High Court of Kenya at Kakamega and the said suit was brought against Obadiah Manasseh Musera over land known as LR KAKAMEGA/CHEKALINI/84. It appears that at the time the suit was instituted, the two women who brought it were the widows of one Mwechelesi Butiya Lusweti for in paragraph (1) of the plaint it was averred that:-

“The plaintiffs are female adults of sound mind and personal Representatives of MWECHELESI BUTIYA LUSWETI, their deceased husband -----“

In the relevant parts of the plaint, it was alleged as follows:-

“3. During 1964 the deceased MWEICHELESI BUTIYA LUSWETI purchased the parcel of land now registered in the Defendant’s name as KAKAMEGA/CHEKALINI/84 from the Settlement Fund Trustees and commenced paying off the outstanding loan thereof.

4. The deceased settled on the said land with his wives the plaintiffs.

5. That on the demise of the said MWEICHELESI BUTIYA LUSWETI the plaintiffs discovered that the Defendant had without any colour of right illegally and/or fraudulently transferred the whole of land parcel No. KAKAMEGA/CHEKALINI/84 into the Defendant’s name.

6. The plaintiffs will contend that the Defendant registered himself as the owner of land Parcel No KAKAMEGA/CHEKALINI/84 through fraud:-

PARTICULARS OF THE DEFENDANTS FRAUD:

(a) Obtaining Registration of a parcel of land he knew very well to belong to the plaintiffs’ deceased husband secretly and without notifying the plaintiffs who are in occupation of the land.

(b) Falsely representing himself to the Director of Settlements as a bona fide purchaser of the said land.

(c) Deliberately telling lies to the Provincial Administration and to the Land Control Board and thereby obtaining registration by fraud.

(d) Using forged documents to obtain registration of the said land into his name.

7. The plaintiffs claim against the Defendant is for an order canceling the Defendant’s registration as proprietor of land parcel No. KAKAMEGA/CHEKALINI/84.

8. The plaintiffs also claim for a declaration that they are in adverse possession of land parcel No. KAKAMEGA/CHEKALINI/84 and by virtue of section 38 of the limitation of Actions Act are entitled to be registered as the proprietors of the said parcel of land and should be registered.”

The prayers based on these pleadings were:-

“(a) Cancellation of the Defendant’s name from the register of land Parcel NO. KAKAMEGA/CHEKALINI/84.

(b) A declaration that the plaintiffs are in adverse possession of land parcel NO. KAKAMEGA/CHEKALINI/84 and an order to be registered as proprietors thereof.

(c) Costs of this suit plus interest.

(d) Any other or further relief this Honourable Court may deem fit to grant.”

The then defendant Obadiah Manasseh Musera having been served with the plaint filed his defence through his then lawyers M/s Khamati, Minishi and Company Advocates of Kakamega and in that defence it was averred, inter alia, that:-

“2. The Defendant avers that the late Mwecheresi (sic) Butiya had sold Land Number KAKAMEGA/CHEKALINI/84 to one Anjelina wife of Abis Mpapale in or about 1975 who transferred her interest in the said land to the Defendant upon the said Defendant having paid to her K.shs.33,000.00/- as consideration of the said parcel.

3. The said Anjelina had not obtained transfer of the said parcel of land to her name and hence she approached the said MWECHERESI (sic) BUTIYA who agreed to transfer the same land to the Defendant in place of Angelina.

4. The late Mwecheresi (sic) therefore sought and obtained consent to transfer land parcel Number KAKAMEGA/CHEKALINI/84 to the Defendant.

5. The Defendant took immediate possession of the said parcel of land and continued to pay the Settlement Fund Trustees a land and development loans which he duly paid in full.

6. The Defendant has had continued occupation of the parcel of land known as Kakamega/Chekalini/84 since 1975 without interruption and the said occupation has been open and peaceful within a period of 12 years and if the Plaintiff had any interest on (sic) the said parcel of land (which is denied) the same has been extinguished by way of adverse possession.

7. On or about the 2nd day of April, 1992 the 2nd Plaintiff, jointly with John Wangulwa and John Juma Lusweti trespassed upon the Defendant’s land parcel Number Kakamega/Chekalini/84 and the Defendant duly filed a cause, the same being Kakamega PMCC NO. 323 of 1992, which cause is pending hearing.

8. The Defendant will aver that this claim has been brought in bad faith, the same is misconceived as there is no cause of action and hence should be dismissed with costs.

9. The Defendant hence denies all allegations made on (sic) the plaint and in particular denies paragraphs 3, 4, 5, 6 7, 8, 9 and 10 and puts the Plaintiffs to strict proof thereof.”

These are the conflicting claims which came up for determination before Tanui, J, between 24th September, 1997 and 24th November, 1998. For the Plaintiffs, the learned Judge received evidence from Jelita Makokha Mwechelesi (PW1), Charles K. Lagat (PW2) and John Wangulwa Butiya (PW3). PW1 was of course the 1st Plaintiff and is now the only Respondent in the appeal. The effect of her evidence was that her late husband “bought” the disputed land from the Settlement Fund Trustees. She could not remember the year when the “buying” took place. In the course of the buying, she had a dispute with her husband and she ran away to her parent’s home. The husband also had his own problems with the law and had to flee to Uganda. This was in 1972. Before fleeing to Uganda the late Mwechelesi borrowed Kshs.4000/- from their Assistant Chief Alloys Mpapale and Alloys was to look after their land. When she returned to the land she found the Defendant on the land. She could not remember the year she returned to the land and she did not know the circumstances under which the Defendant had come to be on the land. She inquired from the Chief and from the offices of the Settlement Fund Trustees and was told the Defendant had some papers. In the meantime her husband returned from Uganda and was sick. He died and his remains were buried on the land. When she learned that the Defendant had some papers in connection with the land, she and her co-wife instituted the suit.

In cross-examination, she insisted her husband had only borrowed Kshs.4000/- from Anjelina Mpapale who was apparently the wife of Assistant Chief Alloys. She strenuously denied suggestions that her husband Mwechelesi had sold the land to Anjelina.

PW2 Charles K. Lagat was the District Settlement Officer, Kakamega District. He produced the file in respect of the disputed land and the file showed that on 7th October, 1977, one Chief Richard Locho of Lumakanda Location wrote to the Settlement Officer to facilitate the sale of the land from the allottee (Mwechelesi Butiya Lusweti) to Obadiah Manasseh Musera (Defendant). No copy of the sale agreement was in the file, but the file had a copy of application to the land control board. That application was undated. The file also contained a letter written by the District Settlement Officer, Kakamega, (not the witness, though) to the Director of Settlement and the letter forwarded the application for consent and the consent itself. The copies of those two documents, however, were not in the file. In cross-examination PW2 said there was no copy of the agreement of sale. There was only a copy of the letter from the chief asking for the transfer. In further cross-examination, the witness stated:-

“If an allottee wants to sell settlement fund trustees (sic) he comes to settlement office and they go through the file to see if there is any arrears. The seller and members of his family must consent to the sale. Wife is very important.”

The evidence of John Wangulwa Butiya (PW3) largely echoed that of PW1. He was the brother of the deceased Mwechelesi Butiya Lusweti and having repeated the escape of his brother to Uganda, he said the land was left with Alloys Mpapale who subsequently became an assistant chief. PW3 was himself imprisoned for some offence and was released in 1975 before his brother returned from Uganda. When the brother returned, he was sick and never recovered. Like PW1, this witness also strenuously denied any sale of the land by his deceased brother to the Defendant.

Then it came to the turn of the Defendant whose evidence was that he bought the land for Kshs.33,000/- from Angelina Mpapale. He bought it on 6th September, 1976 and the land was still in the name of Mwechelesi Butiya Lusweti, who had sold the land to Angelina. Butiya Lusweti then signed the relevant forms for him and the land was then transferred to him. He however, agreed he did not see Butiya Lusweti sign any document though he said he saw Lusweti write his name on a document. Before buying the land from Angelina he had seen the agreement of sale between Angelina and Mwechelesi Butiya Lusweti. The witness produced the sale agreement between himself and Angelina Mpapale.

The next witness for the Defendant was ANJELINA MPAPALE (DW2).

On 1st January, 1972 she entered into an agreement with the late Mwechelesi Butiya Lusweti for the sale of the land. They later went to the offices of Mr. Wafula Advocate and signed the agreement which DW1 produced before the learned trial Judge. She bought the land for Ksh.4000/-, paying Kshs.4000/- as a first instalment and another Kshs.1000/- later on. Mwechelesi sold the land to her in 1972 before going to Uganda and she subsequently sold it to the Defendant. Aloys Mpapale Lipombolo (DW3) was the husband of DW2 and his evidence largely re-echoed that of his wife and the Defendant but he added that Mwechelesi the seller came and went to the land control board with the Defendant.

Having heard all these people and having received written submissions from Mr. Onyinkwa who has always conducted the case for the Mwechelesi and from Mr. Momanyi Birundu who appears to have conducted the case for the Defendant in the superior court, the learned trial Judge sifted the evidence, weighed it one side against the other and believed the side of the plaintiffs while rejecting that of the Defendant. The learned trial Judge concluded his judgment as follows:-

“For all the above reasons I find that the deceased did not sell his land to Angelina Mpapale but he had entrusted it to Alloys Mpapale her husband who was then the Assistant Chief of the area. I also find that the said Alloys Mpapale used his wife Angelina to fraudulently sale (sic) the land which the deceased had entrusted to him to the defendant who from what he said about the deceased appeared to be not an innocent purchaser. I, therefore, order the registration of the defendant as the proprietor of the said parcel of land be cancelled. The plaintiff to have the costs of the suit.”

Obadiah Manasseh Musera was aggrieved by this decision so on 25th April, 1999, his advocates, M/s Olago-Aluoch & Company Advocates filed on his behalf a memorandum of appeal containing nine grounds as follows:-

- “1. The learned Trial Judge erred in law in ordering for the cancellation of the Appellant (sic) registration as proprietor of the suit land without appreciating that the said Registration being a first registration was indefeasible even for fraud.**

- 2. The learned Trial Judge erred in law and in fact in finding that there was no sale of the suit land by the Respondent’s deceased husband to DW2 while there were (sic) overwhelming documentary and oral evidence in support of a sale.**

- 3. The Learned Trial Judge erred in law and fact in finding that the Appellant obtained the suit land by fraud while no fraud was proved as alleged.**

- 4. The Learned Trial Judge erred in law in failing to address himself to the issue of adverse possession raised by the Appellant which therefore , rendered the plaintiff’s suit by (sic) Respondents time-barred by virtue of the provisions of the limitation of Actions Act.**

- 5. The Learned Trial Judge erred in law in failing to find that the Appellant was a bona fide purchaser for value without notice, his title was indefeasible.**

6. The Learned Trial Judge erred in law in holding that the sale agreement executed between the Respondents' deceased husband and DW2 was a forgery while the evidence on record clearly pointed to the contrary.

7. The Learned Trial Judge erred in dealing with issues which were not properly before him and thereby arrived at a wrong conclusion.

8. The Learned Trial Judge erred in law in failing to find that the suit in so far as it prayed for a declaration on the basis of adverse possession was incompetent and a nullity ab initio.

9. The Judgment is against the weight of the evidence.

It appears that by the time this memorandum of appeal was being lodged in this Court, Christine Lichuma Mwechelesi named as the second Respondent and who was the 2nd plaintiff in the superior court had died. She was not and has never been substituted and so the appeal against her had long abated by the time we heard the appeal. That must mean we cannot make any order which would be adverse to the interest of her estate as we did not hear anybody on behalf of her estate.

Again Obadiah Manasseh Musera, the original appellant, died while the appeal was still pending and Mr. K'Owinoh who argued the appeal before us told us that he had been substituted by Miriam Muthoni Manasseh, Risper Jamenga Edagisa and Eddy Kavetsa Manasseh. There are, accordingly, three appellants representing the interest of the estate of Obadiah Manasseh Musera.

When the hearing of the appeal opened before us, Mr. K'Owinoh told us that he was abandoning ground one contained in the memorandum of appeal. We think Mr. K'Owinoh was right in abandoning that ground as it was bound to fail. The record shows that before being transferred to the deceased appellant on 14th October, 1992, the land had been owned or registered in the name of the Settlement Fund Trustees. The deceased appellant's registration was accordingly not a first registration as was contended in the abandoned ground of appeal.

We think we should also at this stage deal with the issue of adverse possession which was raised by both sides in the superior court and which is again raised before us in ground four of the grounds of appeal. A copy of the Title Deed to the disputed land is at page 59 of the record of appeal. It shows clearly that the deceased appellant was registered as the proprietor of the land on 14th October, 1992. Before that the land had been registered in the name of the Settlement Fund Trustees. **Section 175** of the Agriculture Act **Chapter 318** Laws of Kenya provides that:-

“Notwithstanding anything to the contrary contained in any law relating to limitation, no suit, application or proceeding by the Settlement Fund Trustees shall be rejected or dismissed on the ground only that the suit, application or proceeding is barred by limitation under any such law.”

So that until 14th October, 1992, no question of adverse possession could have been raised either by the appellants or the respondent with regard to the land which was owned by the Settlement Fund Trustees. The deceased appellant acquired his registration on 14th October, 1992. The respondent and her deceased co-wife brought their suit in the High Court on 18th May, 1993. No question of adverse possession could arise to defeat that claim. There is, accordingly, no merit in ground four of the grounds of appeal.

Mr. K'Owinoh argued grounds two, three, six and nine together. He submitted that the respondent had not strictly proved that any fraud had been involved in the sale of the land between the deceased Lusweti and Angelina (DW2). Even if fraud had been proved as required by law, it was not proved that the deceased appellant had been a party to such fraud and Mr. K'Owinoh submitted that the deceased appellant was an innocent purchaser for value without any notice. Are these contentions right? We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion – see PETERS VS. SUNDAY POST LTD [1958] EA 424; SELLE & ANOTHER VS. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS [1968] EA 123; and EPHANTUS MWANGI & ANOTHER VS. DUNCAN MWANGI WAMBUGU [1982-88] 1 KAR 278. In the last case HANCOX, JA put it thus at page 292 of the Report.

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

The first holding in that case is also relevant, namely that:-

“The Court of Appeal would hesitate before reversing the decision of a trial judge on his findings of fact and would only do so if (a) it appeared that he had failed to take account of particular circumstances or probabilities material to an estimate of the evidence or (b) that his impression based on the demeanour of a material witness was inconsistent with evidence in the case generally.”

We must bear these injunctions in mind when dealing with Mr. K'Owinoh's submissions.

The deceased appellant's case was that he had bought the land from Angelina (DW2) who had in turn bought the land from Mwechelesi, the deceased husband of the Respondent. In support of the sale of the land by Mwechelesi to Angelina, she produced an agreement of sale and according to her, that document, to be found at page 61 of the record and marked as Exhibit D7, was drawn up by J.M. Wafula Advocate. In respect of this document, the learned trial Judge stated as follows:-

“----- In support of that assertion an agreement alleged to have been prepared by J.M. Wafula Advocate was put in. That document cannot have been prepared by an advocate due to the contents of it and its format. The particulars of the land sold are not given and the terms of sale were not stipulated. The purchase price is not shown whether it was for the land together with developments on it. It is also strange that an advocate would call witnesses to attest to the signatures of the parties who have entered into a sale agreement. There is also no rubber stamp of the advocate affixed to his signature. This document is not, in my view, an agreement which could have been drawn and witnessed by Mr. Wafula Advocate. It is a forged document which appears to have been completed by one hand. It cannot, therefore, support the defendant's claim that the deceased sold his land to DW2. -----“

The learned trial Judge then goes on to hold that the document must have been prepared later on to cover up the sale of land by the Assistant Chief Alloys Mpapale and that if the document had been available earlier, the Chief in his letter of 7th October, 1977 to the Settlement Fund Trustees would have included a copy of the document.

We have ourselves looked at the document. It appears to be on the letter heads of Wafula and Company

Advocates and bears a stamp at its head “LUGARI STATION BAR.” No one would expect an advocate of Mr. J.M. Wafula of Kitale to draw up documents involving the sale of 7.7 Hectares of land in a bar. Again no-one would expect Mr. Wafula to say in such a serious document:-

“1. THE SALER WHO IS SALING THE LAND IS

HAVING ANOTHER LAND AND CAN

NEVER MANAGE TWO FARMS AT

AGO.

2. THE LAND IS NOT SOLD BECAUSE OF ANY MISLEADING POINTS.

3. THEY HAVE AGREED THAT MR. PETER BE GIVEN SHS 4000/- THEN ANJELINAH MUBABALE WOULD PAY THE REMAINING AMOUNT TO THE LOAN OFFICER INCHARGE OF THE SETTLEMENT. -----“

There are more paragraphs but these three examples are enough to show that the learned trial Judge was perfectly entitled to hold that the document could not possibly have been drawn up by any advocate. If Angelina and her associates had said they had drawn up the document themselves, different considerations would have applied, but that was not their case. In fact the document itself shows at the bottom that it was:-

“DRAWN FILED” and “SIGNED by J.M WAFULA as “ADVOCATE IN WITNESS.”

While the Identity Card Numbers of the two witnesses are recorded, that of “SALER” Muchesi Batiya does not appear against his alleged thumb print. We agree with the learned Judge that this document was a forgery, probably made by Assistant Chief Alloys to cover up his illegal sale to the deceased appellant.

As to whether the deceased appellant knew of the fraud, we are, like the learned trial Judge satisfied that if he did not actually know the document was a forgery he ought to have known it was. The alleged sale to Angelina took place around February, 1972 and the sale to him took place around 6th September, 1976. He knew that Anjelina had only paid Kshs.4000/- to Muchesi and another Kshs.10,000 to the Settlement Fund Trustees, making a total of Kshs.14,000/-. Within four years the value of the land had risen to over Kshs.33,000/-. The documents he himself produced in support of his case, i.e. documents such as application for consent of the land control board, are undated and bear very suspicious names of the seller – MUCHELES BUTIYA and only a thumb print with no identity card number which is shown in paragraph 1 (b) of the application to have been “LOST.” There was no evidence that Muchesi Butiya Lusweti had lost his Identity Card at any stage. The application for consent was itself made on 26th January, 1978, and the consent to the transaction was given on the very same day. A chief had to write to the Settlement Fund Office to facilitate the transfer and the deceased appellant did not take Muchesi and his wives to the Settlement Fund Trustees Offices as was the practice. On a re-consideration and re-evaluation of the entire evidence, we are, once again wholly satisfied that the deceased appellant was part of the team which had the land fraudulently transferred to himself. We agree with the learned trial Judge on this aspect of the matter as well. Grounds 2, 3, 6 and 9 of the grounds of appeal must also fail. We have already rejected the ground or grounds dealing with limitation and the consequence of all that must be that all the grounds of appeal argued before us must fail. The upshot of that must be that this appeal fails and we order that it be and is hereby dismissed with the costs thereof to the respondent. Those shall be the orders of the Court.

Dated and delivered at Nairobi this 13th day of July, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

W.S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.