



REPUBLIC OF KENYA



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**Okendo v Oyuko & 2 others (Environment and Land Appeal
E024 of 2022) [2024] KEELC 4655 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4655 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E024 OF 2022**

E ASATI, J

JUNE 6, 2024

BETWEEN

SAMSON ANGAGA OKENDO APPELLANT

AND

CHRISTINE OYUKO 1ST RESPONDENT

GAUDENCIA JUMA OKIRI 2ND RESPONDENT

ACHUNGA OKIRI 3RD RESPONDENT

(Being an Appeal from the Judgement of Hon. Kennedy Cheruiyot, Principal Magistrate at Kisumu delivered on 12th April, 2022 in Chief Magistrate's Court, ELC Case No.310 of 2018)

JUDGMENT

Introduction

1. The Appellant, Samson Angaga Okendo, was the Defendant in Kisumu CMC EL CASE NO.310 OF 2018 (Formerly KSM HCCC NO.175 OF 2010) (the suit). Vide the Complaint dated 12th November, 2010, he was sued by the Respondents herein in their capacity as the Administrators of the estate of one Jason Okwiri Oyuko, deceased. The subject matter was a parcel of land known as Kisumu/Wang'aya 1/3332 (the suit land). In the suit, the Respondents sought the following reliefs against the Appellant;
 - a. A permanent injunction to issue against the Defendant himself, his agents, servant and/or any person purporting to derive authority, restraining them from any way whatsoever selling, cultivating, entering upon, transferring and/or interfering with the whole of the land parcel number No.Kisumu/Wang'aya 1/3332.
 - b. An order directing the Registrar of Land Nyando District to rectify the register, to revert the land parcel No. No.Kisumu/Wang'aya 1/3332 into the name of Jason Okwiri Oyuko.



- c. Costs of the suit.
 - d. Interest on (b) above
 - e. Any other relief the Honourable court deems fit to grant.
2. The record of appeal shows that in response to the Respondents' claim, the Appellant had filed Defendant's Written Statement of Defence dated 18th July, 2017 denying the Respondents' claim.
 3. The Respondents' claim in the suit was that as at the time of his demise, Jason Okwiri Oyuko, deceased was the registered owner of land parcel known as No.Kisumu/Wang'aya 1/3332 (the suit land herein). That the Appellant without any colour of right and/or authority of the Respondents illegally obtained Letters of Administration in respect of the estate of the deceased and transferred the suit land into his name, sub-divided it and sold a portion of it despite the Letters of Administration having been revoked on 2nd September, 1999. That unless the actions of the Appellant were stopped, the Respondents were bound to suffer irreparable loss and damage.
 4. The record of appeal shows that the suit was heard before the trial court which vide its judgement dated 12th April, 2022 found in favour of the Respondents and entered judgement in their favour and against the Appellant as prayed in prayers (a), (b), (c) and (d) of the plaint; in essence allowing the Respondents' claim in entirety.
 5. Aggrieved by the judgement, the Appellant filed the present appeal vide the Memorandum of Appeal dated 10th May, 2022 on the grounds that: -
 - i. The learned trial Magistrate erred in law and fact in holding that the Title deed for Land Parcel No.Kisumu/Wang'aya 1/3332 held by the Appellant is null and void for fraud without the legal threshold of evidence presented brought before court.
 - ii. The learned trial Magistrate erred in law and fact by finding that the impugned title deed held by the Defendant/Appellant is null and void for fraud when there was overwhelming evidence before the honourable court that the title passed to Appellant through a due process and by the order of the Honourable court that was never appealed or annulled.
 - iii. That the learned trial Magistrate erred in law and in fact in making a finding that the land parcel No. No.Kisumu/Wang'aya 1/3332 belonged to the Estate of the deceased when there was glaring evidence before the court it was not a free property for succession by the Estate by the time of the administration of the estate.
 - iv. The learned trial Magistrate erred in law and fact in entertaining the suit and invalidating the title deed for land parcel No. No.Kisumu/Wang'aya 1/3332 which is jointly owned with a 2nd party, Mr. Richard Okendo, who is my brother whereas I am the only one who was sued.
 - v. The learned trial Magistrate erred in law and fact by failing to consider, analyse and sanction the obvious omission on the relevant Land Registrar whereas the orders of the Honourable court would be directed to the office.
 - vi. The learned trial Magistrate erred in law in disregarding issues raised in submissions filed by Counsel for the Appellant.
 6. Directions on the manner of disposal of the appeal were taken by consent on 27th September, 2023, inter alia, that the appeal be argued by way of written submissions.



Submissions

7. Written submissions dated 30th November, 2023 were filed by the firm of Otieno Aluoka & Company Advocates on behalf of the Appellant. Similarly, written submissions dated 21/2/2024 were filed by the firm of S. M. Onyango & Co. Advocates on behalf of the Respondents.

Issues for Determination

8. From the grounds of appeal and the submissions made, the issues that emerge for determination are: -
 - i. Whether or not the trial court erred in holding that the title held by the appellant in respect of the of the suit property was null and void for fraud.
 - ii. Whether the suit land was part of the estate of the deceased.
 - iii. Who pays the costs of the appeal?

Analysis and Determination

9. This being a first appeal, the court reminds itself of the duty, under section 78 of the *Civil Procedure Act*, to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. See case of *Selle & another vs Associated Motor Boat Company Ltd & Another* (1968) IEA 123 where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.
10. The first issue for determination is whether or not the trial court erred in law and fact in holding that the title deed held by the Appellant in respect of the suit land was null and void for reasons of fraud.

Perusal of the plaint shows that the Respondents had pleaded in paragraphs 5 and 6 thereof that the Appellant had illegally caused the suit land to be transferred into his name from the name of the deceased and sub-divided it and started selling portions thereof. The particulars of fraud were itemized in the plaint as fraudulently obtaining Letters of Administration dated 2nd July 1997, fraudulently causing cancellation of deceased's name in the adjudication record dated 24th March 1983 vide illegally obtained Letters of Administration dated 2nd July 1997, fraudulently obtaining Letters of Administration dated the 2nd July 1997 which Letters were revoked by Objection proceedings by the plaintiffs before the High Court in Miscellaneous Application number 133 of 1999 vide order dated 2nd September 1999 and failing to surrender the suit land title for cancellation at the Land Registry and reversion to the plaintiffs.
11. The record shows that the 1st Respondent who testified as PW1 stated vide her witness statement dated 1st August, 2016 that she was a daughter-in-law of the deceased who was the registered owner of the suit land as at the time of his death on 1st October, 1990. That she discovered that the land had been transferred into the appellant's name when strange people started clearing portions of the said land claiming to have purchased it. That the illegally obtained Letters of Administration upon which the suit land was transmitted to the Appellant were revoked on 2nd September, 1999. That the Appellant was not the next of kin of the deceased. That Letters of Administration to the estate of the deceased were issue to the Respondents on 2nd September, 1999. That the use of revoked Letters of Administration by the Appellant to transfer the suit land to his name was illegal. That the deceased did not sell, sub-divide or gift the suit land to the Appellant.
12. The record shows that PW1 produced documents as exhibits 1 to 11 as listed in the list of documents.



13. The Appellant on the other hand denied the Respondent's claim. He stated in his witness statement dated 9th December 2019 which was adopted as his evidence in chief, that in the year 1954 Jason Okwiri trespassed onto the appellant's land parcel No. Kisumu/Wangaya 1/3332. That his father reported the complaint to the area chief. That the case was resolved that he vacates the land. That when the appellant's father died in 1973, the appellant took up the complaint and filed a case before the Land Committee case number 57/07/1976 which decided that the land be subdivided between Jason Okiri and the appellant. That both parties were given a right of appeal but that although he was dissatisfied, he did not appeal because he was financially unstable. That later he opted to file a suit namely Muhoroni District Magistrate Court Case No. 36 of 1996 where orders of eviction of the family of the late Jason Okiri were issued. That the registration of the land in his name was a result of court judgement.
14. On cross-examination, the appellant stated that he owns the suit land with his brother one Richard Okendo. That the land was transferred to them through Succession. He produced documents as exhibits 1 – 11.
15. The record shows that the trial court upon considering this evidence found that the Appellant obtained the registration of land parcel number Kisumu/Wang'aya 1/3332 fraudulently by use of Letters of Administration which had been obtained fraudulently and which were null and void and were eventually revoked.
16. The Appellant faults the trial court for this finding. It was submitted on behalf of the Appellant that the Appellant filed papers explaining that he acquired the land in question lawfully and legally. That the land was to devolve to him from his father. In addition, he filed a suit in Muhoroni District Court and got a judgement that conferred the land to him and his brother and not the Respondent's family and that when the Plaintiff withdrew an intended appeal against the judgement, the matter was exhausted. That the land was not a subject of transmission by a succession court at all. That no details of the fraud were given.
17. Replying on the case of Githinji Kibutha –vs- Caroline Nduku ELCA NO.16 OF 2007 – ELC Muranga, Counsel submitted that fraud must be proved. That it is a question of evidence. That the alleged fraud was never reported to the police or any relevant authority for investigation. That the Plaintiff did not explain why it took them so long to institute the claim since the title to the Appellant was issued in the year 2003. That the Land Registrar was not joined in the suit. That the court ought to have considered the jurisprudence of Esiroyo –vs- Esiroyo and Opiyo -vs- Opiyo relevant to the case.
18. The certificate of death certificate in respect of the deceased No. 472792 produced as exhibit shows that the deceased died on 1st October, 1090. The copy of adjudication record in respect of the suit land produced as exhibit shows that the name of Jason Okiri Oyuko deceased was the first one to be registered therein. From the contents of on page 2 thereof (the reverse side) it is clearly shows that there was objection which was dismissed and parcel No. 3332 awarded to Jason Okiri. That Solomon Ongoro Jamwe informed the of the right of appeal within 60 days from the date of the judgement. That the Objection number was No.101. The document was signed by adjudication officer and dated 24.3.1983. There is no evidence that this state of affairs ever changed till the death of the deceased on 1st October 1990. It was therefore the correct position as stated by the Respondents that as at the time of the death of the deceased, the suit land was registered in his name.



19. On how the land was eventually registered in the name of the appellant and his brother, the appellant in his testimony in court clearly stated that it was through a succession process. He stated

“We got the parcel of land from our father who inherited it from our grandfather. The land parcel was transferred to us through succession process.”

20. However, in his witness statement and the submissions herein, he claimed that he got registered as owner of the land through a judgement of court. The appellant did not deny that he took out Letters of Administration in respect of the estate the deceased. He also did not deny that the Letters of Administration were later revoked by court. A copy of court order dated 2nd September 1999 in KISUMU HC CIVIL APPL. NO 133 OF 1999 In The Estate Of Jason Okiri Oyuko produced as exhibit was to the effect, inter alia, that

“the Letters of Grant of the Administration of the estate of Jason Okiri Oyuko issued on 2/7/97 to Samson Angaga Okendo vide Muhoroni Succession Cause No. 36 of 1997 is hereby revoked and annulled.”

21. There was no evidence that the appellant had any other Grant of letters of Administration to the estate of the deceased other than the one that was revoked and annulled. Yet he testified that he got the land through the succession process. Secondly, it was the appellant’s own claim that there existed a decision by the Land Committee to the effect that the land be subdivided between the appellant and the deceased. Yet the appellant at whose instance the decision was made, abandoned the decision. He did not execute it or appeal against it or have it reviewed or set aside. He instead pursued other ways of causing the entire land to be registered in his name to the exclusion of Jason Okiri. I find that there was sufficient evidence placed before the trial court that the registration of the suit land in the appellant’s name was fraudulent.

22. Under Order 2 rule 4 (1) fraud is one of the matters that must be specifically pleaded. The Respondents specifically pleaded fraud in the amended plaint and itemized the particulars thereof. The burden of proof was with the Respondents and I am satisfied that from the evidence placed before the trial court, they discharged the burden.

23. I find that the trial court did not err in holding that the title held by the appellant was null and void having been procured through fraud through a succession process using Letters of Administration that were later revoked.

24. On the second issue for determination of whether or not the suit land was part of the estate of the deceased, the evidence before the trial court was that the deceased died leaving the suit land awarded to him and registered in his name in the adjudication record. Thus, upon his death, the suit land became property of a deceased person to be processed as provided for under the Law of Succession Act Cap 160 Laws of Kenya. It therefore was part of the estate of the deceased.

25. The upshot is that this court finds no reason to interfere with the findings and decision of the trial court which it hereby upholds. The court finds that the appeal lacks merit and hereby dismisses it. Costs of the appeal to the Respondents.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 6TH DAY OF JUNE, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,



JUDGE.

In the presence of:

Maureen Court Assistant.

Otieno Aluoka for the appellant.

Owino for the Respondents.

