



**Anyango v Mbata & 2 others (Environment and Land Appeal
E032 of 2022) [2024] KEELC 7077 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7077 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E032 OF 2022
E ASATI, J
OCTOBER 24, 2024**

BETWEEN

CORNEL OYUGI ANYANGO APPELLANT

AND

DALMAS OTIENO MBATA 1ST RESPONDENT

TOM OKOTH OGOLLA 2ND RESPONDENT

THE DISTRICT LAND REGISTRAR, NYANDO 3RD RESPONDENT

*(Being an appeal from the judgement and orders of the Senior Principal
Magistrate's Court Nyando (Hon R. S. Kipng'eno (PM) dated 7th
day of June, 2022 in Nyando SPMC E 7 L CASE NO 13 OF 2019)*

JUDGMENT

Background

1. A brief background of the appeal herein, as can be gathered from the record of appeal, is that the appellant was the plaintiff in Nyando SPMC E & L case No 13 of 2019 (the suit) wherein he sued the Respondents over a parcel of land known As Kisumu/sidho East /216. He claimed that although he was the bona fide purchaser and beneficial owner of the suit land which he bought from the 1st Respondent and the 1st Respondent's brother, the Respondents had fraudulently caused the said parcel of land to be transferred in favour of the 2nd Respondent. He therefore sought redress from the court.
2. The 1st Respondent filed a Statement of Defence dated 23rd August 2021 and denied the appellant's claim. It was the 1st Respondent's case that he was the registered owner of the suit land till the year 2018 when he sold it and transferred it to the 2nd Respondent.



3. The 2nd Respondent filed his Statement of Defence dated 17th September 2019. He denied the appellant's claim and averred that he was the registered proprietor of the suit land.
4. The 3rd Respondent filed the 3rd Defendant's Statement of Defence dated 29th July 2020, denied the appellant's claim and contended that if indeed there was a transfer from the 1st Respondent to the 2nd Respondent, the same was procedural and in accordance with the law.
5. The record of appeal shows that the suit was heard by the trial court which, vide the judgment dated 7th June 2022, found that the contract for sale of land between the appellant and the 1st Respondent had been frustrated by many factors. The court proceeded to award the appellant refund of the purchase price in the sum of Kshs 307,500/= with interest from the date of the judgment to the date of payment in full, issued an order compelling the 1st Respondent to take out Letters of Administration and transfer the land to the 2nd Respondent further ordered the 1st Respondent to indicate that the 2nd Respondent was a liability in the estate of the deceased by way of purchase of the whole of the land in question. The court made an order modifying the prayers in the plaint accordingly and awarded costs to the appellant.

The Appeal

6. Dissatisfied with the Judgement, the appellant preferred the present appeal on the grounds that: -
 - a. the Learned trial Magistrate erred in law by making his decision against the weight of the evidence that was placed before him
 - b. the Learned trial Magistrate erred in law by holding that the 2nd Respondent was a bona fide purchaser for value without notice of the fraud when at the time of the sale of the property the 1st Respondent never had any title to the said property
 - c. the learned trial magistrate erred in law by holding that the contract between the 1st Respondent and the 2nd Respondent regarding the disputed parcel of Land was valid when the same was in clear contravention of section 45 of the *Law of Succession Act*.
 - d. the Learned trial Magistrate erred in fact and in law by doing a judgment which is awash with internal contradictions.
 - e. the Learned trial Magistrate erred in fact and in law by making determination on facts which were neither pleaded nor litigated before him.
 - f. the Learned trial Magistrate erred in fact and in law by directing that the 1st Defendant should transfer the land to the 2nd Respondent when there was no counter-claim or any such prayer by the 2nd Respondent.
 - g. The Learned trial magistrate erred in fact and in law in holding that the contract between the 1st and 2nd Defendants was valid when indeed the same was invalidated by the fact that the manner in which the 1st Respondent transferred the parcel to his name was illegal.
 - h. The learned trial Magistrate erred in fact and in law by invoking the provisions of the LCA which are in application in this case but even if they were applicable the application invoked by the learned Magistrate are manifestly contra with holdings by the Court of Appeal over the same.
 - i. the learned trial Magistrate erred in fact and law in invoking section 26(1) of the LRA and applying it selectively to disposes the Plaintiff of his Land.



- j. the Learned trial Magistrate erred in fact by finding that the Plaintiff was never in possession of the suit parcel.
 - k. the Learned trial Magistrate erred in fact and in law by failing to appreciate that where there are two equities the first in time takes priority.
7. The appellant prays for orders that the appeal be allowed, the judgment and orders thereof be set aside and be replaced with an order allowing the prayers in the plaint dated March 5th 2019. The appellant also prays that costs of the appeal be provided for

Submissions

8. Pursuant to direction taken on 31st October 2023 the appeal was urged by way of written submissions. It was submitted on behalf of the appellant vide the written submissions dated 11th April, 2023 filed by Odhiambo B.F.O Advocate that the green card produced in evidence showed that the suit land belonged to one Mbata Otieno the deceased father of the 1st Respondent. That instead of doing succession the 1st Respondent purported to do a change of name to Dalmas Otieno Mbata on 31/8/2018 and on 8/10/2018 the suit land was transferred and title deed issued to the 2nd Respondent. Counsel submitted that Mbata Otieno and Dalmas Otieno Mbata were two different people.
9. That the trial Magistrate appreciated the fraud and illegality that took place but ignored the same. That the resultant decree was a contradiction in itself.
10. Counsel submitted further that the trial Magistrate erred by holding that the 2nd Respondent was a bona fide purchaser for value without notice of the fraud when at the time of sale of the said property the 1st Respondent never had any title to the said property.
11. That a bona fide purchaser must prove that he holds a certificate of good title that he purchased the property in good faith and that he had no knowledge of the fraud, that he purchased for valuable consideration without notice of the fraud and was not a party to the fraud. Counsel relied on the case of Malindi Civil Appeal No. 83 of 2019 Khadija Mohammed -vs- Amina Abdi Duma & another and submitted that the 2nd Respondent was part of the fraud.
12. Counsel submitted further that the trial Magistrate erred in law by holding that the contract between the 1st Respondent and the 2nd Respondent over the suit land was valid when the same was in clear contravention of section 45 of the *Law of Succession Act*. Replying on the case of the Estate of Edward Mutuku Mwalo Machakos Succ Cause No. 372 of 2012, Counsel submitted that any dealings with the deceased's parcel before succession was null and void ab initio. That the trial court erred in dismissing the appellant's case that was proved on a balance of probabilities. Counsel urged the court to allow the appeal.
13. The 1st Respondent filed written submissions dated 15th January 2024. He submitted that the appellant by failing to honour his agreement with the 1st Respondent left the 1st Respondent with no choice but rescind the same and enter into another binding agreement with the 2nd Respondent. That there was no fraud or misrepresentation in obtaining the title deed to the suit land in his name. That the 1st Respondent was the legitimate owner of the suit property at the time of transfer in favour of the 2nd Respondent as evidenced by the title deed he held.
14. That the appeal is not merited as the appellant failed to prove his case. That the lower court did not err in dismissing the appellant's case save for the award of Kshs 800,000/= that had no basis. The 1st



Respondent urged the court to dismiss the appeal as the same is incompetent and an abuse of the court process.

15. On behalf of the 2nd Respondent written submissions dated 15th January 2024 were filed by Ochieng & Associates advocates. On whether the 2nd Respondent is a bona fide purchaser of the suit land for value without notice, Counsel relied on the decision in Arthi Highway Developers Limited Vs West End Butchery Limited and 6 others (2015) eKLR and Katende -vs- Haridar & Company Limited and submitted that the 2nd Respondent is a bona fide purchaser for value without notice over the suit property. That as at the time of purchasing the property, the title was in the name of the 1st Respondent.
16. On whether the land sale agreement between the 1st Respondent and the 2nd Respondent was valid, Counsel submit that there existed a valid sale agreement between the 1st Respondent and 2nd Respondent in line with Section 3 of the *Law of Contract Act*. That the property was sold to the 2nd Respondent.
17. On whether the appeal was merited, Counsel submitted that since the appellant did not prove his case, the trial court did not err in its decision. Counsel urged the court to dismiss the appeal and award costs to the 2nd Respondent.

Issues for determination

18. From the grounds of appeal, the submissions made and the contents of the record of appeal generally the issue that emerge for determination are; -
 - a. whether or not the trial court erred in not awarding the appellant the prayers in the plaint.
 - b. whether or not the trial court erred in its findings and decision.
 - c. who pays the costs of the appeal?

Analysis and determination

19. This being a first appeal, this court reminds itself of the duty to re-examine and re-analyze the evidence placed before the trial court with a view to arrive at independent conclusion and thus determine whether the findings of the trial court are consistent with the evidence and the applicable law. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the court held that:

“ this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

20. The appellant’s evidence before the trial court was that when he entered into the land sale agreement with the 1st Respondent in September 2003 for the sale of the suit land to him, the suit land was registered in the name of Mbata Otieno. This was confirmed by the copy of register (Green card) produced as exhibit which showed that the suit land parcel No. KISUMU/SIDHO EAST/216 was registered in the name of Mbata Otieno on 14/1/1992 and remained in that name till 31/8/2018 when a change of name was effected to the name of Dalmas Otieno Mbata. The appellant pleaded in paragraph 7 of the plaint that Mbata Otieno was deceased and was the father of the seller, the 1st Respondent herein. He testified that at the time of purchase he knew that the land did not belong



to Dalmas Otieno. That he knew it was registered in the name of Mbata Otieno. The 1st Respondent testified that his father Mbata Otieno died in the year 1993.

21. The Appellant in his suit sought for a mandatory and permanent order of injunction restraining the Respondents from alienating, taking possession, selling transferring remaining upon, dealing with and/or in any other manner disposing of the suit land. He also sought for an order to compel the 1st Respondent take out Letters of Administration for the Estate of his late father so as to transfer the suit property in his (Appellants) favour, the appellant sought for revocation of the title issued to the 2nd Defendant. On the basis of the evidence that was placed before the trial court I find that the appellant was not entitled to the orders sought.
 22. Under the provisions of section 2, 79, 81 and 82 of the *Law of Succession Act*, nobody can transact in property of a deceased person except administrators of the estate duly appointed under the provisions of the Act. The contest concerns property of deceased persons. The law applicable in the handling property of deceased persons is the *Law of Succession Act*. The long title of the *Law of Succession Act* provides that the *Law of Succession Act*

“an Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and administration of estates of deceased persons and for purposes connected therewith and incidental thereto.”
- Section 2(1) provides that
- “except as otherwise provided in this Act or any other written law, the provisions of this Act shall constitute the law of Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estate of deceased persons dying after the commencement of this Act and to the administration of the estates of those persons.”
23. Section 55 of the Act prohibits distribution of the estate of a deceased person before confirmation of Grant of Letters of Administration, section 79 vests the property of a deceased person in only in a personal representative of the deceased and sections 81 and 82 vests the power to transact in the property of a deceased person in a personal representative duly appointed through the process of succession as provided in the Act and not in any other person.
 24. Neither the appellant nor the 1st Respondent had the capacity to deal in the suit land which was part of the estate of Mbata Otieno, deceased as at the time of the sale agreement between them.
 25. The sale agreement was therefore not only invalid but an act of intermeddling in the estate of the deceased under the provisions of section 45 of the *Law of Succession Act*. The same applied to the agreement or sale transaction with the 2nd Respondent.
 26. Secondly even if the agreement had been entered into with a person having capacity to transact, the same had become time barred under the provisions the *Limitation of Actions Act* as a contract and the provisions of section 6 of the *Land Control Act*. It could not form the basis of the appellants claim for recovery of the land.
 27. Further, the appellant did not prove that he had paid the entire of the purchase price so as to complete the sale.
 28. As was held in the case of Chief Land Registrar & 4 others vs Nathan Tirop Koech & 4 others [2018]eKLR a party making a claim for declaration of title must succeed on the strength of his case and not the weakness of the defence. In this case the appellant’s case could not stand on its own strength.



Further the burden of proof was on the appellant to prove his claim. Having re-examined the evidence, I find that the appellant did not discharge the burden of proof.

29. For these reasons I find that the appellant who did not prove his claim was not entitled to the relief sought in the plaint hence the trial court did not err in failing to award the same.
30. The trial court graciously awarded the appellant a refund of the purchase price which the court calculated at Kshs 307,500/= which the appellant had not prayed for. Since there is no cross-appeal challenging the award this court will let it be.
31. The trial court was right in making a finding that the 2nd Respondent's title should be cancelled. It is a title that was obtained on fraud. Instead of conducting succession to the estate of his father, the 1st Respondent simply changed the name in the register to appear like his name and thereafter transferred the suit land to the 2nd Respondent. This was in contravention of the provisions of the Law of Succession Act, it was irregular and fraudulent.
32. For the foregoing reasons I find that the appeal has no merit and hereby dismiss it. Costs of the appeal to the Respondents.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 24TH DAY OF OCTOBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the appellant.

No appearance for the 1st Respondent.

Ochieng for the 2nd Respondent.

