



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELCA CASE NO.8 OF 2019**

**GORDON OTIENO MUNA.....APPELLANT**

**VERSUS**

**DENNIS ONGESO OJANY.....1<sup>ST</sup> RESPONDENT**

**BENEDETA ATIENO OJANY.....2<sup>ND</sup> RESPONDENT**

**ESTHER ADHIAMBO OMENO.....3<sup>RD</sup> RESPONDENT**

**THE LAND REGISTRAR, KISUMU.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree by the Learned Principal Magistrate*

*Mr. Christopher Yahwala delivered on 20.6.2019 in the Kisumu*

*CMC ELC NO. 138 of 2018)*

**JUDGEMENT**

The appellant sued the Respondents in the lower court claiming that at all material times the land parcel Kisumu/Kadero-Got Nyabondo/3556 was registered in the names of Karilus Ojany Abondo (now deceased). By an agreement for sale of land made on or about 25/4/1986, the appellant purchased parcel of land No. Kisumu/Kadero-Got Nyabondo/3556 at agreed purchase price of Kshs. 8,300/= full and final payment which was acknowledged by the deceased.

Pursuant to the said agreement, the deceased had only land adjudication sketch map/or demarcation sketch map as proof of ownership, at that time green card had not been in place. However, the deceased Karilus Ojany Abondo who was the father and husband to the 1<sup>st</sup> and 2<sup>nd</sup> respondent respectively, emigrated to South Nyanza now Homabay County and died before he could transfer the said parcel of land to the appellant. Upon learning of the death of the deceased Karilus Ojany Abondo, the appellant approached the 1<sup>st</sup> respondent and both of them appeared before area Chief and District Officer Winam Division in a bid for the 1<sup>st</sup> respondent to obtain a letter to enable the 1<sup>st</sup> respondent to pursue succession cause in a court of law, thereafter to transfer the suit land to appellant.

Consequently, the appellant attended the Land Registry placed a caution on 20/2/2015 to safeguard his interest while waiting for the completion of the process of succession from the 1<sup>st</sup> defendant and finally transfer the suit land to the appellant.

That after the grant of letters of administration intestate, the 1<sup>st</sup> & 2<sup>nd</sup> respondents colluded with the 4<sup>th</sup> respondent unlawfully, irregularly fraudulently and without following the right procedure of informing the appellant, secretly removed the caution placed by the appellant on 20/2/2015.

That upon the removal of the caution secretly by the 4<sup>th</sup> respondent, the suit land Kisumu/Kadero-Got Nyabondo/3556 was finally transferred to the 3<sup>rd</sup> respondent in total disregard to the appellant's/purchaser's interest which was within the knowledge of the 1<sup>st</sup> & 2<sup>nd</sup> respondents as it was no secret to them that it is the appellant who has been in occupation and tilling the suit land from 25/4/1986 to date without interruption from anybody whatsoever.

According to the appellant, the 3<sup>rd</sup> respondent had on certain occasions trespassed upon the suit land and fenced it off with appellant's crops inside thus denying him access to the suit land. The action by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> respondents intend to alienate the suit premises from the appellant and the appellant will suffer irreparable loss and damage.

The appellant prayed for a declaration that all entries in the register purporting to transfer the land parcel Kisumu/Kadero-Got Nyabondo/3556 by the 4<sup>th</sup> respondent to 3<sup>rd</sup> respondent after registration of a caution are null and void and an order of permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> defendants, either by themselves or through their agents and/or employees or anybody acting on their behalf from trespassing upon parcel Kisumu/Kadero-Got Nyabondo/3556, transferring, fencing and/or in any way alienating the said parcel and finally, an order that the suit parcel of no. Kisumu/Kadero-Got Nyabondo/3556 be transferred to the plaintiff. Plus, Costs and interest of the suit.

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed a joint defence stating that at no particular time be it 25/4/1986 or any other, did the deceased enter into an agreement for purchase of the suit land parcel till his death and further the agreement cannot be relied upon since it is statute barred. The defendants averred that the suit land parcel was legally transferred to the 2<sup>nd</sup> respondent through a legal process in which the appellant was very much aware of but never made any claim.

Further that the appellant purports that the agreement was entered in the year 1986 but upto the 2003, 17 years after the agreement was entered to the land had never been transferred to the appellant.

The respondents averred that there was no agreement between the deceased and the appellant and that the 3<sup>rd</sup> respondent purchased the land from the legal owner and that the land was legally transferred to the 3<sup>rd</sup> respondent. The respondents averred that the Appellant has never been in possession or occupation of the land and that the 3<sup>rd</sup> respondent is in actual possession.

When the matter came up for hearing in the lower court the appellant testified that his claim was about the land No. KISUMU/KADERO-GOT NYABONDO/3556 which he bought from Karitus Abondo Ojany. That he bought the land at Ksh. 8,300/= which he paid at once. Subsequently, the seller went to South Nyanza and passed on before completing the transaction. That he contacted Denis Ongeso Ojany (the 1<sup>st</sup> Defendant) to facilitate the same. They went to the chief who gave him a letter to do the necessary. The 1<sup>st</sup> defendant conducted a succession, then sold the land to somebody else. The appellant put a caution on the land on 20/2/15 to safeguard his interest. The land was sold to the 3<sup>rd</sup> Defendant. The appellant took possession and that nobody has interfered with him. He wants to registered as the owner of the parcel of land. He called PW2 who testified that he was a witness when appe;;at bought the land from Karitus. That he witnessed Gordon paying Karitus Abondo Kshs. 8,300/=. That the agreement was done and signed at the courts.

The 1<sup>st</sup> respondent testified that the suit parcel of land initially belonged to Karitus Abondo Ojany, his father who died in 2003. That he does not know Gordon Otieno Omuna. That in 1986 he was 29 years and already married staying at Suba with their father. At that time his uncle called Alexander Atinga used to stay in the land. That his father did not know how to read and write and thus could not sign the agreement. That after his father's death, nobody ever went to him claiming the land from his father. He obtained the land through Succession Case No. 160 of 2015, the same was duly gazetted on 22/5/2015. Confirmation was done and land was allocated to his mother Benedette Atieno Ojany. That upon family' discussions, they agreed to sell the land to Esther Emily Adhiambo for Kshs. 600,000/= which land was duly transferred to her and issued with title deed. That during the process, there was no objection raised. He prayed that the plaintiff's suit be dismissed. The 2<sup>nd</sup> Respondent testified that she got title deed to the land before she sold it to Esther Emily Adhiambo and she prayed that this case be dismissed. The 3<sup>rd</sup> respondent testified that she

purchased land parcel No. KISUMU/KADERO-GOT NYABONDO/3556 and she produced original land Title deed copy. She prayed that the case be dismissed.

After considering the submissions of counsel for appellant and counsel for the respondents, the Learned Magistrate found that the appellant's suit was statute barred pursuant to the provision of section 7 of the Limitation of Action Act which provides:-

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

The appellant has now come to this court on appeal on grounds that:-

- 1. The Learned trial Magistrate erred in law and fact in dismissing the Appellant's suit.**
- 2. The Learned trial Magistrate erred in both law and fact by failing to appreciate that the transactions carried in the lands records after a caution was registered were illegal, null and void.**
- 3. The learned trial Magistrate erred in law by failing to frame the issues for determination.**
- 4. The learned trial Magistrate erred in law and fact in failing to properly evaluate the entire evidence on record thereby arriving at wrong findings.**
- 5. The learned trial Magistrate erred in law and in fact in failing to take into consideration the Appellant's case.**
- 6. The Judgment was against the weight of evidence.**

The Appellant prays that the appeal be allowed with costs and the Judgment of the trial Magistrate, Honourable Mr. Christopher Yahwala (PM) delivered on 26/3/2019 in Kisumu CMCC ELC No. 138 of 2018 be set aside in its entirety and Judgment be entered for the appellant as follows:

- i) A declaration that all entries in the register purporting to transfer land parcel KISUMU/KADERO-GOT NYABONDO/3556 by the 4<sup>th</sup> Defendant to the 3<sup>rd</sup> Defendant after registration of a caution are null and void.**
- ii) An order of a permanent injunction do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from trespassing upon the said parcel of land, transferring, fencing and/or in any way alienating the same.**
- iii) An order that the suit land be transferred to the Plaintiff.**
- iv) Costs of and incidental to the suit plus interest.**

Parties filed their written submissions after the court gave directions. The appellant submits that the trial court overlooked the issue of the caution as it was placed on the record by the appellant and yet the Land Registrar transferred the parcel of land to the Respondents despite the existence of a caution. The appellant relies on the decision of this court in Lawrence Muguti Rutere vs Nelly Wachira & another. District Land Registrar Mbere (interested party) 2019 eKLR. The gravamen of the appellant's submissions is that the Learned Magistrate erred in law in failing to appreciate that the transactions carried in the lands registry after a caution was registered were illegal null and void. The appellant further argues that the Learned Magistrate erred in law and fact in failing to properly evaluate the entire evidence on record thereby arriving at wrong findings. The appellant refers to the exhibits produced and the evidence of PW1 and PW2 who clearly stated that the appellant was tilling the land. The appellant further argues that the land was registered in the names of the 1<sup>st</sup> – 3<sup>rd</sup> Respondents on the 27/6/2016 and therefore the cause of action occurred on 27/6/2016. The suit was filed on 3/8/2017. The Appellant argues that time did not run until the discovery of fraud.

On the issue of innocent purchaser for value without notice of any fraud, the appellant argues that the 3<sup>rd</sup> Respondent did not do due

diligence to ascertain that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had a valid title having obtained title after overlooking a caution. The caution was not removed. On the consent of the land control Board, the appellant argues that the court had the power to invoke the principle of equitable doctrine of constructive trusts and propriety estoppel

The respondents filed their submissions whose gravamen is that the transactions that were carried out after the registration of a caution were in order since they were done pursuant to an order that came from court giving the land to the 1<sup>st</sup> and 2<sup>nd</sup> respondents who were the beneficiaries of the estate of the deceased. The appellant had all the opportunity to pursue his interest in the succession cause but he failed to do so and therefore he cannot claim that the transactions were not valid. The only proper cause the appellant had was to challenge the succession process before the estate could be distributed but he failed to do so he cannot therefore challenge the title which has been transferred to the 3<sup>rd</sup> respondent who bought it for value after succession process in court. Section 93 of the Law of Succession Act Chapter 160 provides that:

(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.

The green card does not show that the caution was removed by any of the respondents. What is there is the transfer of the suit land parcel to the respondents after completion of the succession process and issuance of an order from court and this was proper and in compliance with section 82 of the law of succession Act. It was not a normal transfer from one person to another which would require a caution hearing but it was done pursuant to an order from court and therefore the transactions were valid and proper and they pray that this appeal be dismissed.

The respondent argues that proceedings show clearly the trial court analysed the entire evidence on record and was justified in dismissing the appellant's case. In page 69 of the record of appeal the learned magistrate noted that although the appellant's evidence is that he bought the entire land parcel the agreement that was produced in court shows that he was only buying a portion and that portion was not indicated in the agreement and therefore there is no way the court could have made an order for specific performance as sought for in the plaint.

The trial court considered the entire evidence adduced in court and the submission of the parties. The learned trial magistrate considered the evidence that the land parcel was transferred to the 3<sup>rd</sup> Respondent after succession in the High Court in Kisumu and that the 3<sup>rd</sup> defendant bought the same on valuable consideration as evidenced by the sale agreement and the green card. This analysis is in page 68 of the record of appeal. This clearly show that he 3<sup>rd</sup> defendant purchased the suit land parcel legally and it was lawfully transferred into her name and that there was no fraud or illegality involved. The learned Trial Magistrate noted that the sale agreement the plaintiff was relying on was dated 25<sup>th</sup> April 1986. The plaintiff did not take any step to sue the seller to be given the suit property until the year 2017 when the suit was filed that is over 20 years. That as per Section 7 of the Limitations of action Act the suit was time barred.

The appellant did not adduce evidence to show that the defendants committed fraud in transferring the said land parcel. That everything was done pursuant to succession that was done in court and therefore the issue of fraud does not arise. There were no particulars of fraud pleaded by the appellant in the plaint which is in page 3 of the record of appeal. The courts have held that fraud must be clearly pleaded and proved by the person alleging the same. The next and only other issue is fraud.

The respondent submits that the Trial Magistrate correctly held that the 3<sup>rd</sup> defendant purchased the suit land parcel as innocent purchaser for value and therefore her title to the suit land parcel cannot be defeated. The evidence in court is that the 3<sup>rd</sup> respondent purchased the suit land parcel after succession had been conducted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the land parcel had been transferred into their names. The green card which has been produced in court show clearly that at the time the 3<sup>rd</sup> respondent was purchasing the suit land parcel it was in the name of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and there was no caution at that point. The 3<sup>rd</sup> respondent made payments for the same as per the sale agreement EXHIBIT D5 in page 29 of the record of appeal. That subsequently transfer was done into her name. There is nothing on record to show that at the point of sale there was claim by the appellant since succession had been done in court.

On whether the appellant was entitled to an order for specific performance, the appellant argues that the trial magistrate correctly held that there was no evidence that there was compliance with the provisions of the Land Control Act. The court referred to the sale agreement itself exhibit P2 (a) page 14 of the record of appeal which provides in clause 5 that the parties were to obtain the land

control board consent to transfer the suit land parcel but this was never done. The court found that in the absence of consent from the land control board the agreement is void and the remedy for the appellant was to sue for refund of the money he had paid but not the land and therefore claim for specific performance could not succeed. The trial court was right in arriving at this decision. The agreement itself provided that parties will obtain the land control board consent and therefore failure to obtain the said consent rendered the transaction void as per the provisions of Section 6 of the Land Control Act. They prayed that the appeal be dismissed with costs.

I have considered the evidence on record, revival submissions and do find that for court to deal with grounds of appeal, the following issues should be considered.

- 1. Whether the Learned Magistrate erred in law and fact by failing to appreciate that the transactions carried in the land records after a caution was registered were illegal, null and void.**
- 2. Whether the suit was statute barred.**
- 3. Whether the 3<sup>rd</sup> Respondent was an innocent purchaser for value without notice.**
- 4. Whether the consent of Land Control Board was necessary.**
- 5. Whether there was fraud or illegality by 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents.**
- 6. Whether a relief specific performance could be granted.**

On the first issue, I do find that the relevant Section is Section 71 (1) (a) of the Land Registration Act that provides:

“A person who—

(a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;”

Section 72 (2) provides:-

“(2) A disposition that is inconsistent with the caution shall not be registered while the caution is still registered except with the consent of the cautioner or by the order of the court.”

Section 73 provides:

**A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.**

**(2) The Registrar, on the application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.**

**(3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.**

**(4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.**

**(5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee’s power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.**

**(6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner**

**previously incurred under section 74 shall not be affected by the cancellation.**

This court finds that registration of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was effected while a caution was registered and therefore the transactions were highly irregular, illegal null and void. On the 2<sup>nd</sup> issue as to whether the suit was statute barred, I do find that the appellant's claim is based on illegality, fraud and irregularity. The cause of action arose when the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were registered as the owners of the parcel of land and that was on 27/6/2016 for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and on 24<sup>th</sup> August 2016 for the 3<sup>rd</sup> Defendant. The limitation period for commencing an action based on fraud is 3 years. This suit was filed on 3/8/2107 less than one year after the 24/8/2016 and therefore the suit was not statute barred.

On the issue as to whether the 3<sup>rd</sup> respondent was an innocent purchaser for value without notice of any illegality, I do find that it was clear on the green card that a caution existed and was not removed before the entries were made. By failing to peruse the green-card to establish the status of the caution, the 3<sup>rd</sup> respondent failed in due diligence. And therefore can't be said to be an innocent purchaser for value without notice. The caution was notice.

On whether the consent of the Land Control Board was necessary, I do find that the appellant established that he purchased the land from the deceased. He produced sale agreements. PW1 and P2 stated that the appellant took possession. PW2 was a reliable witness because his parcel of land where he stays is next to the suit parcel. He states that the appellant has been cultivating the land. DW1 and DW2 state that their uncle and brother in law respectively have been cultivating the land but they did not call the uncle or any son or daughter of their uncle and brother in law respectively to testify in court. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have never lived on the land and have never utilized the land. The appellant utilized the land from the date of purchase.

I do find that this is a proper case to invoke the equitable doctrine of constructive trust and proprietary estoppel and do find that the appellant has rights and interest in the suit land.

On the issue as to whether there was fraud on the 1<sup>st</sup>, 2<sup>nd</sup> respondent was fraud on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents, I do find that registering the property in the names of 1<sup>st</sup> and 2<sup>nd</sup> Respondents when a caution existed was fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the Land Registrar.

On the issue as to whether the court on the issue to order of specific performance, I do find that the agreements were made in the year 1986. Specific performance can be made within 6 years of the agreement or contract of sale. The order was being sought in 2017 more than 30 years after the agreement was signed. The relief is not available.

In conclusion, I do find that the Learned Magistrate erred in law and fact in making his decision and do allow the appeal and do grant a declaration that all entries in the register of the land parcel number **KISUMU/KADERO-GOT NYABONDO/3556** entered after registration of a caution are null and void and are hereby cancelled.

I do further grant a permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents either by themselves or through their agents and or employees or anybody acting on their behalf from trespassing upon parcel No. **KISUMU/KADERO-GOT NYABONDO/3556**, transfer from on or any way alienating the land. Costs of the appeal and costs in the lower court are awarded to the appellant. Cost of appeal to the appellant.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 17<sup>th</sup> DAY OF DECEMBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**



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