



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI JJ.A)

CIVIL APPEAL NO. 332 OF 2010

BETWEEN

NOAH ONYANGO AMWAYO APPELLANT

AND

SYLVANUS O. OTUMBA1ST RESPONDENT

BENARD M. OTUMBA2ND RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Kisumu (Karanja J.) dated 25th March, 2010

in

H.C.C.C. NO. 147 OF 2006)

JUDGMENT OF THE COURT

The appellant, **Noah Onyango Amwayo**, sued the respondents **Sylvanus O. Otumba** and **Benard M. Otumba** in the High Court at Kisumu claiming two main reliefs expressed as follows:-

“(i) A declaration that land Title No. Kisumu/Konya/167 and ½ share in land Title No. Kisumu/Konya/166 are owned solely by the plaintiff.

(ii) A mandatory injunction restraining the defendants, their servants, or agents or any other person or entity acting under the defendants, instructions or on their behalf from trespassing upon the plaintiff's parcels of land and/or wasting or interfering with land Title No Kisumu/Konya/167 and the plaintiff's ½ share in land Title No Kisumu/Konya/166.”

In a judgment delivered by the High Court (*J.R. Karanja, J.*), on 25th March, 2010, the court declared that land title number **Kisumu/Konya/167** is lawfully owned by the appellant and issued a permanent injunction restraining the respondents, their servants/agents or any other persons or entities acting under their instructions or on their behalf from trespassing upon the said parcel of land and/or wasting or in any manner interfering with it. The appellant's claim with respect to title number **Kisumu/Konya/166** (*hereinafter the disputed land*) was not allowed. Costs were to be borne by the respondents.

Being dissatisfied with that decision, the appellant appealed to this Court and, in a Memorandum of Appeal dated 14th December, 2010, the appellant cited four grounds of appeal, namely:-

- “1. *The learned trial Judge erred on the standard of proof in civil cases.*
2. *The learned trial Judge erred in failing to find that the evidence adduced by the appellant was sufficient to establish the appellant's claim on a balance of probability.*
3. *The learned trial Judge erred in dismissing part of the appellant's case when the same was not disputed.*
4. *The learned trial Judge's decision was against the weight of evidence.”*

The facts of the dispute which landed the parties in the High Court were brief and straightforward. The appellant is the registered proprietor of land parcel numbers Kisumu/Konya/167 and half share in parcel number Kisumu/Konya/166. The extracts of titles he produced showed that he was so registered on 1st registration. Before the High Court, he claimed the whole of land parcel number Kisumu/Konya/167 absolutely and ½ share of title number Kisumu/Konya/166 which he said he purchased from the father of the respondents. He produced the title deed, for Kisumu/Konya/167 but said the one for Kisumu/Konya/166 was misplaced. He also produced the green cards, certificates of official search and the adjudication records of both parcels of land. He denied obtaining registration of the parcels fraudulently. As the registered proprietor, he sought a declaration to that effect and an injunction restraining the respondents, their servants and/or agents and/or any other persons or entities acting under the respondents from trespassing upon his said parcels of land. The respondents, according to the appellant, had entered the said parcels without his consent or authority and had laid claim thereon.

The respondents denied the appellant's claim in their written statement of defence. They also raised a counter-claim for cancellation of the appellant's titles on the ground that the appellant had obtained registration thereof by means of fraud. The 1st respondent testified on his own behalf and on behalf that of the 2nd respondent, his brother. He said that the disputed titles belonged to their deceased father and no part thereof had been sold to the appellant. He acknowledged that he had entered on the two parcels of land in the years 2002, 2004 and 2005 and cleared some bushes thereon and learnt that the parcels had been registered in the name of the appellant – a dispute he referred to the local administration and the Land Disputes Tribunal which decided the dispute in their favour which decisions, according to the 1st respondent, were stayed by the High Court.

In his oral submissions before us **Mr. Menezes**, learned counsel for the appellant, contended that the only reason why the learned Judge of the High Court did not find for the appellant with respect to his ½ share in parcel number Kisumu/Konya/166 was that he did not produce a land title deed in respect of the same. The record shows that the appellant, at the trial, alleged that the same was misplaced. The failure to produce the title deed of Kisumu/Konya/166 by the appellant should not, according to counsel, have been held against him.

When counsel for the respondents (**Mr. Kowinoh**) addressed us in response to the submissions of Mr. Menezes, he supported the Judgment of the High Court and reiterated that the appellant besides not producing the title deed of Kisumu/Konya/166 also produced an unsigned adjudication record thereof. The adjudication record was therefore, according to counsel, unauthenticated.

In his Judgment, the learned Judge of the High Court said this in respect of the appellant's claim to ½ share in parcel number Kisumu/Konya/166 (*hereafter the disputed land*):-

“With regard to plot number 166 the plaintiff claims a half share of the land. However, he did not exhibit a title deed in respect thereof. He alleged that the same was misplaced. Instead, he exhibited a copy of adjudication record (P EX5) and a copy of the green card (PEX1) showing that the parcel of land is jointly owned between him and the late father of the defendants Otumba Asir. The adjudication record was the precursor to any future

registration of the land but the copy produced herein (PEX5) is neither dated nor signed by the Director of land Adjudication. Its authenticity would be in doubt in the absence of any registration certificate such as a title deed.

If the plaintiff had indeed misplaced the title deed to the said plot number 166 there would have been nothing easier than him obtaining a copy thereof from the land registry.”

It is plain therefore that the learned Judge of the High Court declined the appellant's claim with respect to land parcel number Kisumu/Konya/166 on two grounds: Firstly that he did not exhibit a title deed in respect of the same and secondly that the adjudication record produced at the trial was not dated and was not signed by the Director of Land Adjudication. We shall therefore briefly discuss the two grounds for rejecting the appellant's claim with respect to the disputed land. The starting point is **Section 32** of the Registered Land Act (Cap 300 - now repealed). **Subsections (1) 2 and 3** are pertinent and they read as follows:-

“32(1) The Registrar shall, if requested by a proprietor of land or a lease where no title deed or certificate of lease has been issued, issue to him a title deed or a certificate of lease, as the case may be, in the prescribed form showing, if so required by the proprietor, all subsisting entries in the register affecting that land or lease.

Provided that-

(i) only one title deed or certificate shall be issued in respect of each parcel of land or lease;

(ii) no title deed or certificate of lease shall be issued unless the lease is for a certain period exceeding five years.

2. A title deed or certificate of lease shall be only *prima facie* evidence of the matters shown therein and the land or lease shall be subject to all entries in the register.

(3) When there is more than one proprietor, the proprietors shall agree among themselves as to who shall receive the title deed or the certificate, and failing agreement the title deed or the certificate shall be filed in the registry.

(4)”

The language of **subsection 2** of the above Section is clear that a title deed or a certificate of lease are only *prima facie* evidence of the matters shown therein but the land and lease are subject to all entries in the register. The subsection therefore cedes primacy to the register in respect of the title. **Section 27** of the same Act puts the matter beyond controversy. It reads as follows:-

“27 Subject to this Act -

(a) the registration of a person as proprietor of land shall rest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b)”

It is therefore plain, from the above provisions, that what in reality constitutes a title to land under the Registered Land Act is the register. A title deed is only a *prima facie* evidence of the matters shown therein but the land or lease are subject to all entries in the register.

In the case before us, the appellant testified at the trial before the High Court that he had misplaced

his title deed in respect of the disputed land. He however produced the green card and a certificate of official search in respect of the same parcel of land. The two documents, in our view, constituted what we may refer to as extracts of title and were better evidence of his title than a title deed would have been, because they contained all the entries on the register in respect of the disputed title and carried current information relating to the parcel of land.

In the premises we have come to the conclusion that the learned Judge of the High Court misdirected himself in placing undue importance to the failure of the appellant to produce a title deed in respect of parcel number Kisumu/Konya/166 when he had produced a copy of the register in respect thereof.

With respect to the adjudication record produced by the appellant at the trial, we note that the same does not appear to have been signed by the Director of Land Adjudication. The learned Judge took an adverse view of that failure and concluded that its authenticity was suspect.

With respect, we are of the view that that conclusion was a serious misdirection. We say so, because an adjudication record is not evidence of title. Besides, the adjudication process came to an end when the Chief Land Registrar opened the register in respect of the disputed parcel of land which had no pending appeals before the Minister then responsible for land. The respondents did not allege, before the High Court, that they had objected to the registration of the appellant as proprietor of the disputed parcel of land during the adjudication process. They also did not allege that they had appealed to the Minister for Land against any determination by the Adjudication Officer of the relevant area.

The registration of the appellant as proprietor of ½ share in land parcel number Kisumu/Konya/166 therefore became a first registration in terms of **Section 14(d)** of the Registered Land Act (supra). The appellant's title was therefore protected by **Section 143(1)** of the same Act. The appellant had indeed pleaded the same in his plaint at paragraph 7 thereof. We note that in the entire Judgment of the learned Judge of the High Court, he made no reference to the effect of the appellant being the owner of the disputed parcel of land on 1st registration. With respect, we do not think the learned Judge of the High Court appreciated the legal status of 1st registration under the Registered Land Act. We say so, because he came to his decision that the appellant had not established his claim in respect of the disputed parcel of land almost casually without reference to **Section 143(1)** of the Registered Land Act.

The upshot is that this appeal is allowed. We set aside the Judgment and orders made by the learned Judge with respect to land parcel number Kisumu/Konya/166 and substitute them with an order allowing the appellant's claim as prayed in paragraphs (a) and (b) of the plaint with respect to land parcel number Kisumu/Konya/166. The appellant shall have the costs of this appeal to be borne by the respondents.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2013

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR