



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 57 OF 2017

BETWEEN

JOYCE WANJIRU KIMANI.....APPELLANT

AND

NJENGA KINYANJUI (legal representative of the

estate of Leah Wanjiku Kinyanjui (deceased)..... 1ST RESPONDENT

NJENGA KINYANJUI.....2ND RESPONDENT

SIMON MATHERI.....3RD RESPONDENT

MICHAEL GITAU KINYANJUI.....4TH RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO 61 OF 2017

IN THE MATTER OF THE ESTATE OF NGANGA GAITHO (DECEASED)

BUXTON FARMERS CO. LIMITED.....APPELLANT

AND

NJENGA KINYANJUI (legal representative of the

estate of Leah Wanjiku Kinyanjui (deceased)..... 1ST RESPONDENT

NJENGA KINYANJUI.....2ND RESPONDENT

SIMON MATHERI.....3RD RESPONDENT

MICHAEL GITAU KINYANJUI.....4TH RESPONDENT

(An appeal from the judgment and decree in Limuru SPMCC No. 360 of 2011 by Hon. G.H.Oduor (CM) on 21st April, 2017)

JUDGMENT

Introduction

1. The Respondents herein in their further re-amended plaint filed on 07th June, 2016 sued **Joyce Wanjiru Kimani** (*hereinafter referred to*

as the 1st Appellant) and Buxton Farmers Co. Limited, (hereinafter referred to as the 1st Appellant) seeking various orders.

Evidence

Plaintiffs 'case

2. When the hearing commenced on 27th August, 2013, **LEAH WANJIKU KINYANJUI (hereinafter referred to as deceased)** was alive. She stated that she could not recall how many shares she held with Limuru Dairy Farmers' Co-operative Society and denied transferring her shares to anyone. In cross-examination by counsels for the Appellants, she maintained that she did not transfer any shares to the 1st Appellant.

3. **PW2 NJENGA KINYANJUI (hereinafter referred to as the 2nd Respondent)**, son to PW1 and brother to the 1st Appellant and **SIMON MATHERI (hereinafter referred to as the 3rd Respondent)**, and **MICHAEL GITAU KINYANJUI (hereinafter referred to as the 4th Respondent)** stated that their late father bequeathed his shares held by the 2nd Appellant to their mother, the deceased herein.

4. **PW3 MICHAEL GITAU KINYANJUI (hereinafter referred to as the 4th Respondent)** stated that the deceased owned 105 shares as shown on the share certificate which was tendered as **PEXH. 2**. He disputed the authenticity of the letter allegedly transferring shares to the 1st Appellant on the ground that it was written in English which the deceased did not understand because she was illiterate. It was his evidence that the dividends declared by the 2nd Appellant to the equivalent of 1,995,000/- ought to have been for the benefit of the deceased and not the 1st Appellant and urged that 2nd Appellant pays the 2nd phase of dividends to the equivalent of Kshs. 5,309,535/- that it was holding.

1st Defendant's case

5. **JOYCE WANJIRU KIMANI (hereinafter referred to as the 1st Appellant)** and who was the 1st Defendant in the lower court told court that the deceased transferred 105 shares to her by a letter dated 28th February, 2006 DEXH. 1 in the presence of her brother David Mbugua and was issued with a share certificate DEXH. 2. It was her evidence that she sold 60 shares and remained with 45 as shown on the share certificate DEXH. 3. In cross-examination by Respondents' counsel, the witness conceded that the deceased did not understand English and that there was no evidence that the letter dated 28th February, 2006 DEXH. 1 was received by the 2nd Appellant.

1st Defendant's case

6. **DW1 PETER KAHIA GIATHE**, chairman of Board of Directors of the 2nd Appellant stated that at the request of the deceased, the 2nd Appellant in a board meeting held on 17th March, 2006, transferred 105 shares to the 1st Appellant. He produced the board minutes dated 17.03.06 as DEXH. 2. He confirmed that around July 2011, the 2nd Appellant filled an instructions form DEXH. 3 authorizing Equity Bank Limuru Branch to pay the 1st Appellant Kshs. 855,000/- being the part of the dividends for 45 shares, the 1st Appellant having sold 60 shares, and he produced a bank statement DEXH. 4 to confirm that payment was made. He confirmed that payment of dividends in the sum of Kshs. 2,275,000/- to the 1st Appellant, declared in 2013 was not paid as a result of this dispute. He also tendered the register of members DEXH. 5 confirming transfer of the shares to the 1st Appellant.

7. The trial court after hearing the parties pronounced itself in a judgment dated 21st April, 2017, allowed the Respondents' case and made the following orders:

- a) 105 shares held by Leah Wanjiku Kinyanjui (hereinafter referred to as deceased) or what was left of them shall revert to the estate of the deceased
- b) The 1st Defendant (1st Appellant) illegally or fraudulently received the sum of Kshs, 855,000/- for 45 shares which she shall refund to the estate of the deceased
- c) The 2nd Defendant shall refund the equivalent of the dividend value for the remaining 60 shares as declared by the 2nd Defendant (2nd Appellant) about June/July 2011
- d) That all outstanding dividends payable by the 2nd Defendant (2nd Appellant) on account of membership number 78 shall be paid to the estate of the deceased
- e) That the defendants (Appellants) share the costs of the suit

8. Aggrieved by the lower court's decision, the Appellants preferred these appeals where they challenged all the orders issued against them.

9. The Appeals were consolidated and argued by way of written submissions.

SUBMISSION BY THE PARTIES

1st Appellant's submissions

10. It was submitted for the 1st Appellant that particulars of fraud in transferring deceased's shares to the 1st Appellant were not proved and further that deceased's evidence that she did not transfer any shares to the 1st Appellant ought to have been treated with caution due to her ill health and old age. In support of its proposition, the 1st Appellant placed reliance on the following authorities:

a) Nyangate Guto alias Watson Mogere Mogoko v Maxwell Okemwa Mogoro & another [2015] eKLR where the Court of Appeal stated as follows:

As the claim was based on fraud, the appellant, as the party making the allegation was required not only to plead it but also to prove the same.

b) Rosemary Wanjiku Murithi v George Maina Ndinwa [2014] eKLR, where the Court of Appeal held that:

Proof of fraud involves questions of fact and that simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud.

c) Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR, the Court of Appeal held that:

In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

11. Additionally, the 1st Appellant urged the court to find that the Respondents had not discharged the burden to prove that the deceased did not have capacity to transfer her shares. In support of its submission, the 1st Appellant placed reliance on the following authorities:

a) In Re: J N M (Deceased) [2005] eKLR, the court reiterated the provisions of Section 5(4) of the Law of Succession Act that:

“The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who alleges”.

b) In James Maina Anyanga v Lorna Yimbiha Ottaro & 4 others [2014] eKLR (In The Matter of the Estate of Wilfred George Makunda Ottaro) the court held that

“The burden of proof in the first instance lies upon the person alleging lack of capacity”.

2nd Appellant's submissions

12. It was submitted for the 2nd Appellant that the deceased willingly transferred her shares to the 1st Appellant and that dividends were lawfully paid to her and the outstanding dividends lawfully belong to the 1st Appellant.

Respondents' submissions

13. It was submitted for the Respondents that the deceased denied transferring her shares to the 1st Appellant or appearing before the 2nd Appellant's Board to transfer the same.

14. The Respondents also submitted that the letter by which the deceased is alleged to have authorized transfer of shares was in English language and had not been translated into Kikuyu language which was the only language that the deceased understood. It was additionally submitted that the 1st Appellant had admitted in her evidence that the secretary that wrote the letter did not read it over to the deceased thereby giving credence to the deceased's evidence that she did not transfer her shares as alleged.

15. Further to the foregoing, the letter was alleged to have been written by the 2nd Appellant's secretary whose name was not even disclosed. The court was urged to reject the said letter and reliance was placed on Peter Muiruri Kamau v Mary Mwihiaki Kamau [2017] eKLR in where the court rejected a thumbprint that was disputed on the ground that there was no certificate to certify that the meaning of the agreement in issue had been explained to the Plaintiff. Reliance was also placed on **Black Law Dictionary, 10th Edition** which defines fraud to consist of:

some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another.

16. Respondents submitted that the transfer was doubtful for the reason that the board minutes dated 17.03.06 tendered on behalf of the 2nd Defendant do not show when the deceased and the 1st Appellant appeared before the Board and that whereas the 1st Appellant stated that the transfer was on 04th April, 2006, DW1, the 2nd Appellant's director stated that the transfer was effected on 17.03.06.

17. Respondents urged court to find that the orders by the trial court were merited and further that the transfer having been fraudulent, the

court rightfully directed the 2nd Appellant to refund the equivalent of the dividend she had received value as declared by the 2nd Appellant about June/July 2011 and the 2nd Appellant to pay the equivalent of dividends for the remaining 60 shares that were fraudulently acquired and sold by the 1st Appellant.

18. Concerning the share certificate issued to the 1st Appellant, the Respondents submitted that it was illegally acquired for the reason that the deceased's original share certificate had not been cancelled. In support thereof, reliance was placed on Munyu Maina v Hiram Gathiha Maina [2013] eKLR where the Court of Appeal held as follows; -

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (Emphasis added).

19. Finally, the Respondents submitted that their brother David Mbugua who the 1st Appellant alleged was present during the transfer was neither called as a witness to corroborate 1st Appellant's case nor was his presence noted in the board minutes dated 17.03.06 by which the transfer was alleged to have been approved.

ANALYSIS AND DETERMINATION

20. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See Sumaria & Another –Vs- Allied Industrial Ltd (2007)2KLR and Selle & Another –Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123.) It then behooves this court to summarize the evidence that was tendered before the trial court.

21. I have carefully considered the appeal in the light of the evidence on record and submissions for both parties and authorities in support thereof.

22. The trial court considered the deceased's evidence in detail and while acknowledging that it was taken before another magistrate, found as a fact that the deceased, though aged had in her evidence repeated 8 times that she did not transfer her shares to the 1st Appellant. The court also noted that the deceased recalled well enough that David Mbugua Kinyanjui was her last born child; that the 1st Appellant did not get land from her father's estate and further that Kagia Giathi was a director of the 2nd Appellant. On the basis of the foregoing, the Learned Magistrate concluded that deceased's mind was lucid.

23. The court had this to say concerning the deceased's evidence:

I would have expected that as she remembered that the 1st defendant (1st Appellant) did not inherit land, PW1 (Deceased) would equally recall that that was the reason she gave the 1st defendant (1st Appellant) her shares.

24. Concerning the transfer of the shares, the court record demonstrates that the Learned Magistrate noted that the board minutes dated 17.03.06 tendered on behalf of the 2nd Defendant were produced at the tail end of the proceedings; that their numbering is disjointed; that they do not show when the deceased and the 1st Appellant appeared before the Board because whereas the 1st Appellant stated that the transfer was on 04th April, 2006, DW1, the 2nd Appellant's director stated that the transfer was effected on 17.03.06. The court also noted that the language used during the proceedings was in English which the deceased did not understand and further that the deceased's original share certificate had not been cancelled and from all of the above concluded that the transfer was fraudulent.

25. The share certificate issued to the 1st Appellant by the 2nd Appellant was challenged. Other than rely on the said share certificate, the Appellants had a duty to go an extra mile to prove that the share certificate was legally acquired a duty that they failed to discharge.

26 From the totality of the evidence on record. I am persuaded that the Respondents demonstrated by their evidence that the Appellants by willful device, intentionally resorted to transfer the deceased's 105 shares to the 1st Appellant with intent to deprive the deceased of her right over the shares. The Appellants acts amount to fraud which any court ought to frown at.

27. I have considered the finding by the Learned Magistrate and I have no doubt in my mind that with the set of facts presented before the court, any court would have arrived at the same decision. Having re-evaluate the evidence on record, it has not been demonstrated that the findings of the trial court were based on no evidence or on misapprehension of the evidence or that the trial court applied the wrong principles in reaching its findings. I therefore decline the invitation to interfere with that decision.

Disposition

28. For the foregoing reasons, the appeals are dismissed with costs to be borne by the Appellants.

DELIVERED AND SIGNED IN KIAMBU THIS 25TH DAY OF OCTOBER 2019

T.W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Nancy

1st Appellant - Mrs. Muhuhu

2nd Appellant - Mrs. Muhuhu hb for Ngata Kamau

Respondent - N/A