



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC APPEAL NO. E1 OF 2021

JOSEPH KITHAKA GITERU APPELLANT

VERSUS

JAMES NJOGU KATHENGE RESPONDENT

(Being an Appeal from the Judgment of Hon. E.O. Wambo, Senior Resident Magistrate at Kerugoya Civil Case No. 89 of 2014, dated 28/03/2019)

JUDGMENT

1. The Appellant instituted the appeal herein by way of a Memorandum of Appeal dated 14th January, 2019, filed pursuant to leave granted by this Honourable Court on 20th September, 2019 in Kerugoya ELC Misc. Civil Application No. 8 of 2019.
2. The appellant appeals against the judgment and orders of the learned Senior Resident Magistrate the Honourable E. O. Wambo in Kerugoya CMCC NO. 89 of 2014 dated 28th March, 2019.
3. The Appellant has raised the following grounds: -

a. The Learned Magistrate erred in law and in fact by entering judgment against the defendant without considering the fact that the defendant had been given the subject matter by the rightful registered owner hence a miscarriage (sic) of justice was occasioned.

b. The Learned Magistrate erred in law and in fact by not considering the

defendant's evidence as against the Plaintiff and therefore arriving at this wrong conclusion hence a miscarriage (sic) of justice was occasioned.

c. The Learned Magistrate erred in law and in fact by entering judgment against the defendant while there was no cause of action to warrant the same hence a miscarriage (sic) of justice was occasioned.

4. The Appellant seeks the following orders: -

a) The Appeal be allowed.

b) The judgment/orders of the learned Chief Magistrate read on 28th March 2019 be set aside and be substituted with an order dismissing the Respondent case with costs.

c) Costs of the appeal and lower court be awarded to the appellant.

5. By consent of the parties through their advocates on record made on 17th May, 2021, the appeal was agreed to be disposed of by way of written submissions. The Appellants filed theirs on 2nd July, 2021 while the Respondent filed his on 19th July, 2021.

APPELLANT'S SUBMISSIONS: -

6. The Appellant submitted that the trial magistrate entered judgment without considering that Land Parcel No. Kabare/Gachigi/938 had been

given to him by the registered owner during their life time. The said registered owner was their father.

7. The Appellant submitted that the learned magistrate erred in facts at page 73 of the record of appeal line 6 by finding that all the brothers of the plaintiff were given land save for the plaintiff, while he had clearly demonstrated through the search certificate at page 26 that this was not true.

8. The Appellant submitted that there was no evidence tabled to show that he was registered to hold the subject matter in trust for the Plaintiff and neither did the plaintiff make such a claim in the plaint.

9. He submitted that the trial magistrate introduced his own evidence in the proceedings which is not found anywhere or which was not tabled by either of the parties at page 73 line 23 and 24.

10. He submitted that the trial magistrate did not find that he illegally transferred the subject matter to himself and wondered how he entered judgment against him without giving reasons in the judgment.

11. He submitted that he was the absolute owner of parcel of land number Kabare/Gachigi/938 subject to the provisions of *Section 25 of the Land Registration Act No. 3 of 2012* which provisions the plaintiff did not rely on.

12. He submitted that the learned magistrate did not consider or even give analysis of his evidence as he had tabled document to prove who got land and who did not. Further that the trial magistrate did not consider the lease agreement tabled at page 36 to 38 where the plaintiff was leasing land that was not registered in his names.

13. He submitted that there was no cause to warrant entry of the impugned judgment as the claim was time barred and that the plaintiff didn't prove any of the particulars of fraud tabled against the defendant.

14. He submitted that the learned magistrate erred in law by relying on a document that was irregular and that even if the said document was genuine, the purpose of the transfer was a gift and thus he could have decided to change his mind without giving any reasons.

15. He submitted that his appeal is merited and thus the judgment of the lower court should be set aside with an order dismissing that suit with costs.

RESPONDENT'S SUBMISSIONS: -

16. On ground one of the appeal, the Respondent submitted that the Appellant had admitted at page 7(b) of the record of appeal that the suit land belonged to the plaintiff and that he was holding it as a trustee for the plaintiff.

17. He submitted that the Defendant had admitted at page 71 (b) of the record of appeal, that he had taken the Plaintiff to the land control board to transfer the said land to him, and therefore the Court entered judgment as per the evidence on record and per the admission of the Defendant.

18. He submitted that the trial magistrate took into consideration and analyzed the defendant's evidence conclusively as contained at pages 73 and 74 of the record of appeal thus the court came to a conclusion that the said land parcel belonged to the Plaintiff due to the fact that the Defendant troubled himself by taking him to the land control board for transfer.

19. He submitted that the issue of the plaintiff's suit being time barred was not raised during the preliminary stages and the Appellant did not seek leave of the court to bring up new issues during the hearing of the appeal.

20. He submitted that the appellant cannot allege that the Court relied upon an irregular yet he had admitted that he had taken him to the land control board for a consent.

21. He prayed that the appeal be dismissed as it had no merit.

ANALYSIS: -

22. I have considered the Memorandum of appeal, the record of appeal, supplementary record of appeal and the rival submissions of the parties herein.

23. Being a first appeal, this Honourable Court is mandated to re-evaluate the evidence adduced before the trial court. This position was held in the case of *Christopher Ngeno v Eunice Langat [2021] e KLR* where the Honourable Court held that: -

"6. This court being the first appellate court is under a duty and indeed is obligated to re-evaluate the evidence adduced before the trial court in order to determine whether the determination made by the trial court was justified. The court is not bound by the findings of fact and law reached by the trial court and is at liberty to make its own findings and/or reach different conclusions upon evaluation and reconsideration of the evidence. The court of appeal enunciated this principle in the case of Selle -vs- Associated Motor Boat Company Ltd (1968) EA 123 where the court stated as follows:-

"An appeal to this court from a trial by the high Court is by way of retrial and principles upon which this court act 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances of probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -vs- Ali Mohamed Sholan (1955) 22 EACA 270)".

24. The Respondent/plaintiff in his plaint before the trial court claimed that the defendant/Appellant had fraudulently transferred the suit land and upon realizing this mistake the Defendant/Appellant applied and was granted Land Control Board consent for the same to be transferred back to him (Plaintiff.)

25. On the other hand, the Defendant pleaded that the suit land was transferred to him by their father, Kathenge Muchiri, and that all procedures were rightfully followed.

26. It is trite law that to succeed in a claim of fraud, the particulars of fraud have to be specifically pleaded and proved. This position was held in the case of **Demutla Nanyama Pururmu v Salim Mohamed Salim [2021] e KLR** where the Court of Appeal held as follows:

“20. As regards the standard of proof, this Court in the case of Kinyanjui Kamau vs George Kamau [2015] e KLR expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”(Emphasis ours)”

27. The burden was squarely on the Defendant/Respondent herein to prove on a standard higher than a balance of probability but lower than beyond reasonable doubt that indeed the Defendant/Appellant was a party to the alleged acts of fraud.

28. I have looked at the evidence tendered by the Plaintiff/Respondent in the trial court. I notice that other than alluding that there was fraud committed since the Appellant took him to the Land Control Board and acquired consent to transfer the suit land to him, that cannot be construed as an act of fraud on the part of the Defendant/Appellant. In any case, the extract of the minutes of Gichugu Land Control Board produced as P-exhibit 1 was no accompanied with the application forms and the consent itself. If indeed consent was given by Gichugu land control Board as alleged, nothing could have been easier than for the plaintiff to obtain a copy from the board. The plaintiff did not even call any official from Gichugu land control board to verify the authenticity of the extract produced by the plaintiff/Respondent. There was no evidence who really initiated the purported transfer as there was no Agreement for the disposition of the suit land produced by the plaintiff/Respondent as required under the law. The plaintiff/Respondent in the particulars of fraud at paragraph 6 of the plaint averred as follows;

“(a) Transferring the said land without the proper land control Board consent

(b) Transferring the said land knowing that the said land belonged to the plaintiff and it is where he resides with his family.

(c) Transferring the said land without proper transfer form.

(d) Making the father of the plaintiff to sign documents when he knew the said person was senile.

29. From my point of view, it is clear from the first three alleged particulars of fraud that the proper person to speak on whether the Land Board consent and the transfer forms used to effect the transfer in favour of the defendant/Appellant were proper, genuine or authentic is the Land Registrar. The Land Registrar was not joined as a party or even called as a witness by the plaintiff/Respondent.

30. The fourth issue on fraud relate to the plaintiff's father who was alleged to have been senile when he signed the transfer documents in favour of the defendant/appellant. Again, senility or mental condition of a person can only be assessed by a medical doctor through a medical Report. The plaintiff did not prove these elements from the evidence on record. I am therefore satisfied that the decision of the trial magistrate is not based on the evidence adduced in court. That can be seen from the judgment where the learned magistrate stated as follows;

“This is not convinced that there is anything special, and or that ordinarily that defendant did to their father to entitle him to transfer Kabare/Gachigi/930 to him---- living and supporting an aged ailing parent is a new possibility of a child hence, a parent decides to give land as a token of appreciation. They are known to give a little more but not deny one child completely the benefit of another, this is strange----- But either way it is clear, that the defendant was living with him and is likely to have exercised some undue influence on him.----- On a balance of probability this court find that the plaintiff has established that indeed he was the only son who did not get land and the defendant is registered in both Kabare/Gichigi/940 and 938----- This indication above this court is not convinced that there is anything special the defendant did to entitle him to have land to the detriment of one son the plaintiff-----“

31. The above extract of the judgment of the trial Magistrate shows clearly his decision was influenced by extraneous matters other than the evidence by the parties and the witness. Infact, one reading the judgment can be tempted to think that it is a succession cause/dispute and not an ELC case that was in dispute. The issues that were observed by the trial magistrate are legitimate expectations but courts decisions are based on evidence and not conjecture or inferences.

32. It is therefore my view that the trial magistrate acted in error as he made the judgment based on assumptions and inferences contrary to the law of evidence.

CONCLUSION: -

33. In view of the foregoing matters, I find and hold that this Appeal is merited and the same is hereby allowed as prayed. Since the parties are siblings, I order each party to bear his own costs of this Appeal as well as the dismissal of the plaintiff's/Respondent's case in the lower court.

Judgment READ, DELIVERED and SIGNED in the open Court at Kerugoya this 21st day of January, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Mr. Munyori holding brief for Munene Muriuki for Appellant*
2. *Ms Wambui holding brief for Mr. Ndana for Respondent*
3. *Kabuta – Court Assistant.*