



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELC APPEAL CASE NO.22 OF 2021

PIUS MBOGO ODUMA.....APPELLANT

VERSUS

BRIAN OCHIENG OWINO.....1ST RESPONDENT

PETER OBIERO JUMA.....2ND RESPONDENT

SIAYA COUNTY LAND REGISTRAR.....3RD RESPONDENT

(Being an appeal from the judgment and decree of Principal Magistrate

Hon.J.O. Ong'ondo on 25/03/2021 in Siaya Principal Magistrates Court

ELC Number 201 of 2018)

JUDGEMENT

Introduction

1. The background to the dispute giving rise to this appeal, as expressed in the pleadings, may briefly be stated thus: by dint of a plaint dated 27/06/2017, the appellant sued the respondents for fraudulently transferring land parcel number **SOUTH GEM/NDORI/497 ('the suit property')** from the appellant to the 1st respondent on 3/02/1999 and subsequently from the 1st respondent to the 2nd respondent on 15/03/2016 without his knowledge or authority.
2. In his plaint, the appellant prayed for (i) an order directing the 3rd respondents to rectify the register by deleting the fraudulent entries in the register and revert the suit property back to him, (ii) an order of eviction against the respondents from the suit property, a permanent injunction restraining the respondents and anyone acting on their behalf from interfering with the appellant's quiet possession, ownership and occupation of the suit property and, (iii) costs of the suit and interest thereon.
3. The 1st respondent neither entered appearance nor filed a defence.
4. A statement of defence dated 24/11/2017 was filed. Though the defence does not indicate which party the defence was being filed on behalf of, the notice of appointment of advocate dated and filed on the same day as the defence demonstrates it was being filed on behalf of the 2nd respondent.
5. In it, the 2nd respondent denied the assertions in the plaint and stated that the suit property was procedurally transferred to the 1st respondent and subsequently to him. He averred that he would prove vide valid documents that title documents to the suit property were regularly acquired. He averred that he had lived on the suit property for over 20 years and that the appellant's claim was tainted with malice, was an afterthought and it should be dismissed with costs.
6. By a memorandum of appearance dated 3/09/2018, the Attorney General entered appearance for the 3rd respondent and filed a defence of even date. It denied the averments in the plaint and contended that if a Transfer was effected, then it was done lawfully and procedurally.
7. From the court record, the respondents did not adduce evidence and their cases were closed. Upon hearing the appellant and his witness, the court by its judgment dated 25/03/2021 dismissed the appellant's case.

8. Aggrieved and dissatisfied by the decision of the court, the appellant filed a memorandum of appeal dated 23/04/2021 and a record of appeal dated 5/11/2021.

Memorandum of appeal

9. The appellant's memorandum of appeal sets down the following four grounds of appeal:

a) The Learned Trial Magistrate erred in law and fact by reaching a finding that contracts touching on land are enforceable only within 12 years whereas the appellant's claim was based on fraud which was discovered in 2016.

b) The Learned Trial Magistrate erred in law and in fact by considering the defence of the respondents whereas the respondents did not call any witnesses to adduce evidence.

c) the Learned Trial Magistrate erred in law and fact by failing to appreciate the facts of the case, the evidence adduced and the law to wit, the law of contract Act and the Limitation of actions Act thus arriving at a wrong conclusion.

d) the Learned Trial Magistrate erred in law and fact by misdirecting himself on the law and fact by failing to consider the issues for determination at all despite the express detailed submissions on the issues for determination before him.

10. The appellant prayed that the judgment, decision and decree of the Learned Magistrate dismissing his suit be set aside and, in its place, the appellant's case be allowed as sought in the plaint.

The appellant's submissions

11. The appellant filed his written submissions dated 24/01/2022 and he identified four issues for determination: (i) When does time start to run on claims of fraud in land (ii) Whether the trial court erred in considering evidence of the 1st and 2nd respondents yet they did not adduce any evidence, (iii) Whether the Transfer of the suit property to the 1st and 2nd respondents were invalid or irregular and, (iv) Who should bear the costs of the appeal.

12. On the 1st issue, it was his case that from his testimony in the trial court, he had sold the suit property in the 1990's to the 1st respondent's grandmother one Maria Akoth Odengo who testified as "PW 2" for Ksh.70,000/=. That a sum of Kshs. 35,000/= had been paid to him leaving an outstanding balance of Kshs. 40,000/=. On the strength of this agreement, he gave "PW 2" the title document to hold as security. However, he discovered the 1st respondent had fraudulently transferred the suit property to the 2nd respondent in the year 2016. The appellant contended that in an action of fraud, time starts to run from the time fraud is discovered. On this, he placed reliance on **Section 7 and 26(1)** of the **Limitation of Actions Act** and the case of **Edward Moonge Lengusuranga v James Lanaiyara & another (2019) eKLR**.

13. On the 2nd issue, the appellant reiterated that he neither obtained a Land Control Board Consent nor did he execute any Transfer Forms to enable him transfer the suit property to the 1st respondent. On this, he relied on **Section 6** of the **Land Control Act** and the court decision of **Simiyu v Watambamala [1985] eKLR**.

14. On the 3rd issue, the appellant submitted that the respondents had failed to tender evidence and therefore their pleadings remained mere allegations and the trial court ought not to have based its decision on an unsubstantiated defence and that he had proved his case. In support of this, he placed reliance on **Sections 107, 108, 109 and 112** of the **Evidence Act** and the authorities of **Autar Singh Bahra and another v Raju Govindji HCCC No 548 of 1998** and **Trust Bank Limited v Paramount Universal Bank Limited & 2 others Nairobi Milimani HCCS No 1243 of 2001**.

The 1st and 2nd respondents' submissions

15. Despite service, the 1st and 2nd Respondents failed to file written submissions.

The 3rd respondent's submissions

16. The 3rd respondent filed its written submissions dated 6/12/2021 in which it set 3 issues for determination; (i) Whether or not the suit property was fraudulently and illegally transferred (ii) Whether the 3rd respondent should be bound to adjust the register by cancelling the name of the 2nd respondent and, (iii) Whether the appellant is entitled to reliefs sought.

17. On the 1st issue, the 3rd respondent submitted that in the trial court, the appellant failed to discharge prove that there were fraudulent dealings on the suit property and that he had failed to produce evidence to support his claim. It placed reliance on the Court of Appeal decision of **RG Patel v Lalji Makanji [1957] EA 314** which held that allegations of fraud must be strictly proved and the standard of proof was below reasonable doubt but higher than a balance of probabilities.

18. On the second issue, it was the 3rd respondent's position that the 2nd respondent held a title which is prima facie evidence that he was the proprietor of the suit property as provided for within the provisions of **Section 26** of the **Land Registration Act**. It contended that nothing had been presented by the appellant to prove that the 2nd respondent's title was fraudulently acquired.

19. On the third issue, the 3rd Respondent stated that the appellant failed to meet the requisite legal and evidential threshold in support of his claim and as such, the appeal was not merited.

Analysis and determination

20. Having considered the original lower court record, memorandum of appeal, record of appeal and rival written submissions, this court will render its determination on four issues it has identified for determination; (i) Whether the appellant's suit was statutory barred (ii) Whether fraud was proved by the appellant (iii) Whether the trial court considered the pleadings and evidence of the respondents and, (iv) Who shall bear the costs of this appeal. As is evident from the appellant's submissions, ground 4 of his appeal was abandoned. This court shall make sequential pronouncements on the four issues.

I will proceed to analyse the legal and jurisprudential framework on the grounds of appeal in a sequential manner.

21. This being a 1st appeal, it is the duty of this court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. The jurisdiction of a 1st appellate was well settled in the case of **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, which was quoted with approval by the case of **Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR** as thus:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of 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..."

22. As a 1st appellate court, this court will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judicial officer misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong conclusion.

23. On the 1st issue, the provisions of **Section 7** of the **Limitation of Actions Act** limits the period of an action in land to 12 years. **Section 26** of the same Act provides that if the action is for a relief from the consequences of a fraud, then the period of limitation does not begin to run until a plaintiff has discovered the fraud, or the mistake or would with reasonable diligence have discovered it.

24. In the case of **Edward Moonge Lenguuranga v James Lanaiyara & another (2019) eKLR**, the court defined a cause of action as a set of facts sufficient to justify a right to sue to obtain property or enforcement of a right against a party. Looking at the plaint, the main course of action was fraud on the suit property and consequently, the appellant could seek refuge in **Section 26** of the **Limitation of Actions Act**. The Court of Appeal in the case of **Kenya Ports Authority vs Timberland(K) Ltd [2017] eKLR** upheld the view that where an action is based on fraud the period of limitation prescribed does not begin to run until the plaintiff discovers the fraud.

25. In his testimony, the appellant testified that he discovered that the 2nd respondent's name had been entered in the register in the year 1999. That may not be so, because as evidenced by "**P Exh 2**" which is a register of the suit property, the 2nd respondent's name was recorded in the register on 15/3/2016 and the probable date that the appellant allegedly discovered fraud was 27/10/2016 which was the date the 3rd respondent issued him with a certified copy of the register. It is the considered view of this court that the alleged fraud was discovered by the appellant on 27/10/2016. This suit was instituted 8 months later and therefore he was not statutory barred to institute suit.

26. The finding of the trial court that the appellant's suit was statutory barred for being filed 21 years late because the contract for sale of the suit property between the plaintiff and "**PW 2**" who is the 1st respondent's grandmother and who allegedly acted for the 1st respondent was flawed for two reasons; a contract for sale was never pleaded by the parties and such a contract was never produced as envisaged by **Section 3(3)** of the **Law of Contract Act**. The appellant succeeds on this issue.

27. It is settled law that fraud must be specifically pleaded and that its particulars must be stated on the face of the pleadings. The alleged fraudulent acts must be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and fraud cannot to be inferred from the facts of the case.

28. The trial court found that fraud had not been proved and held thus;

"...there was no fraud as Brian was the ultimate beneficiary of the purchase from his grandmother..."

29. In his witness statement, the appellant alludes fraud on the basis of an Official Search that he obtained from the 3rd respondent's office. In his exam in chief, he testified that the 1st respondent was known to him while the 2nd respondent was a stranger to him. It was his testimony that he sold the suit property to the 1st respondent's grandmother (who testified a **PW 2**) and a balance of the purchase price of Ksh. 35,000/= had not been paid to him. He testified that as he awaited for the balance of the purchase price, he registered the suit property in the names of **PW 2** and that of the 1st respondent. In cross examination, he testified that the title document was misplaced in **PW 2's** custody.

30. In his plaint, the appellant avers that the Transfer did not follow the laid down procedure and that he neither obtained a Land Control Board Consent nor executed the requisite Transfer Form. In his testimony he never led evidence on the particulars of fraud alluded to in his plaint. His testimony was somewhat contradictory. On one hand he testified that he registered the suit property in the names of **PW 2** and the 1st respondent while on the other he testified that he discovered fraud upon conducting an Official Search on the suit property.

31. From this testimony and pleadings, I am not satisfied that the appellant proved fraud to the required standard. In the Court of Appeal decision of *Kinyanjui Kamau vs George Kamau [2015] eKLR*, the court expressed itself thus on the standard of prove in a claim of fraud 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: “...the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

32. It is my finding that though the reasoning of the trial was flawed, I arrive at the same conclusion and finding that the appellant did not discharge prove that the respondents fraudulently dealt with the suit property.

33. On the 3rd issue, this court has had a chance to interrogate the judgement of the trial court and save for its introductory part, the trial never made its decision on the basis of the respondents' evidence or defence and the appellant fails on this issue.

34. Ultimately it is my finding that the appeal is partially merited. However, this court's view is that the success of the 1st issue has no effect whatsoever on the appeal. In this regard, the appeal is hereby dismissed.

35. *In the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012: [2014] eKLR*. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs. Despite service, the 1st and 2nd respondent did not participate in these proceedings and in the absence of special circumstances, I award half the costs of this appeal to the 3rd respondent.

36. The upshot is that this court finds that the appeal is partially merited and makes the following disposal orders:

a) The decision of the Honorable Magistrate delivered on 25/3/2021 in Siaya PM ELC NO. 201 of 2018, is hereby upheld.

b) The 3rd respondent shall have half the costs of the appeal.

37. It is so ordered.

JUDGMENT DELIVERED VIRTUALLY.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF FEBRUARY 2022

In the Presence of:

M/s Obware h/b for M/s M.M Omondi for the appellant

N/A for the 1st and 2nd respondent

N/A for the 3rd respondent

Court assistant: Sarah Ooro

HON. A. Y. KOROSS

JUDGE

24/2/2022