



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CIVIL APPEAL NO. 3 OF 2021

HEBRON ORUCHO GISEBE.....1ST APPELLANT

NELSON MOCHAMA GISEBE.....2ND APPELLANT

COSMAS GEKONGE GISEBE.....3RD APPELLANT

VERSUS

JOSEPH OMBURA GISEBE.....1ST RESPONDENT

RENISON GISEBE.....2ND RESPONDENT

(Being an Appeal from the Judgment and Order of Hon. S. N. MAKILA (SRM)

delivered on 28th February, 2020 in Kisii CMCC No. 398 of 2009)

JUDGMENT

INTRODUCTION

1. The suit herein was commenced by the Respondents vide a plaint dated 6th June, 2006 seeking an eviction order and a permanent injunction against the Appellants in respect of the property known as Gusii Plot No. 17A at Keumbu Market (hereinafter referred to as the suit property). The Respondents also sought general damages for trespass together with costs of the suit.
2. In support of their claim, the Respondents averred that they were the joint registered owners of the suit property after their father Gisebe Gikana—deceased, transferred the same to them vide Gusii County Council Minute No. 82 of 2000 of 15th November, 2000. They further averred they were thereafter issued with a plot card that was signed by the Council Chairman on 30th June, 2005 and by the Council Clerk on 29th June, 2005.
3. In response to the Respondents' claim, the Appellants filed a Statement of Defence dated 2nd May, 2007 in which they denied the Respondent's claim and insisted that they were on the suit property as of right, since the property belonged to their deceased father and that the registration of the Respondents as joint owners was obtained through fraud.
4. The matter was heard on diverse dates between March 2014 and November 2019 and the Learned Magistrate delivered her judgment on 28th February, 2020 in favor of the Respondents. In her judgment, she held that the Respondents had proved their case against the Appellants on a balance of probabilities and thus entered the judgment in their favor. She awarded the Respondents general damages for trespass in the sum of Kshs. 100,000.
5. Dissatisfied with judgment of the learned trial Magistrate, the Appellants filed an appeal against the said judgment vide a Memorandum of Appeal dated 19th February, 2021.
6. The grounds of Appeal were that:

The learned trial Magistrate misdirected herself in law and fact by;

- a) Reaching the wrong conclusion that the Respondents had proved their case on a balance of probabilities.
- b) Equating a plot card to a title deed or land certificate as envisaged in section 24 of the Land Registration Act.
- c) Not according weight to the evidence of the Administrative Officer (PW3) that 90% of their records were fictitious and hence unreliable.
- d) Awarding damages of Kshs. 100,000o *suo moto* without an iota of evidence by the respondents on the issue.
- e) Not taking judicial notice that at the age of over 100 years ordinarily a person is senile.
- f) Not appreciating the fact that the suit land was being shared by four (4) houses of the deceased and that the Respondents did not have a superior claim.
- g) Failing to appreciate that rent rates are paid for the front shop and not the rear rooms and cannot be evidence of ownership.

7. The Court directed that this appeal be disposed of by way of written submissions. Both parties complied by filing their respective submissions.

APPELLANTS SUBMISSIONS

8. **Learned counsel for the Appellants submitted that the Trial Magistrate made an erratic conclusion that there was no medical evidence that the deceased was senile or mentally unsound to transfer the suit property to the Respondent. He contended that the Learned Trial Magistrate ought to have taken judicial notice of the fact that one needed no medical evidence that the deceased having attained the age of over 100 years must have been senile hence incapable of transferring the suit property to the Respondents during his lifetime.**

9. **Counsel contended that the learned trial Magistrate erratically concluded that there was sufficient evidence that the property had lawfully been transferred to the Respondent given that the documents for the transfer had not been proved as having been obtained fraudulently. He argued that PW3 had during cross-examination conceded that 90 percent of the documents produced in court from their office as proof of ownership were fictitious and that she did not have records that the original title had been transferred to the Plaintiff. Counsel submitted that the reliance of the trial Magistrate on documents that were said to be 90% fictitious by the witness who produced them was erroneous.**

10. **It was also counsel's contention that the court misapplied the provisions of Section 24 and 26 of the Land Registration Act by recognizing that a plot card can be regarded as a certificate of ownership that gives the owner absolute and indefeasible ownership of the property. He contended that a plot card was a mere license issued by the County Council to individuals who pay to it rents in return.**

11. **Regarding the award of damages of Kshs. 100,000 to the Respondent, counsel submitted that the same was not justifiable as the Respondents did not submit any evidence to show the loss they had incurred to deserve such an award.**

RESPONDENTS' SUBMISSIONS

12. **Learned counsel for the Respondents argued that the trial court considered all the evidence presented before it and came to a just conclusion that the Respondents had proved their case on a balance of probabilities.**

13. **Counsel submitted that the law of Kenya recognizes plot cards as a form of proof of ownership of trust land within the former County Councils and thus the trial court did not make any error in its application of section 24 of the Land Registration Act which covers such forms of ownership. He buttressed his argument by relying on the case of Caroline Awinja Ochieng & another vs Jane Anne Mbithe Gitau & others (2012) eKLR where Onguto J recognized plot cards as legal documents that can prove ownership.**

14. **Counsel submitted that much as the Appellants had tried to paint a picture in the mind of the trial Magistrate that the late Gisebe Gikana was too old and senile to execute the transfer documents, they did not tender any medical evidence to prove that he was incapable of executing the transfer of the suit property to the Respondent. Learned counsel therefore contended that the trial Magistrate was right in his holding that there was no medical evidence that the deceased was senile.**

15. **On the issue of the PW3's revelation that most of their documents were fictitious, learned counsel asserted that the statement was not qualified with a follow-up question from the Respondents to clarify which documents were fictitious. He argued that the assumption that the documents that PW3 was talking about were the transfer documents executed by the deceased was unsupported.**

16. **Counsel submitted that the fact that PW3 indicated that she did not avail the transfer form in respect of the suit property from the original owner to the Respondent, did not mean that the same did not exist. He contended that PW3 was not asked whether the said document existed.**

17. **Counsel contended that the trial court at page 147 of the Record of Appeal had examined the evidence of PW3 and correctly determined that the extract of the minutes showed that the transfer of the suit property from the original owner to the Respondents was not obtained through fraudulent means so as to justify the revocation of the same.**

18. Regarding the General damages awarded to the Respondents, counsel submitted that the Respondents did not pray for special damages that require to be specifically pleaded and proved. He argued that the Respondents prayed for General damages for trespass and that trespass is actionable per se. He contended that once the trial court established that the claim for trespass by the Respondent had been proved, there was no need to prove the damages suffered by them.

19. Learned counsel contended that the trial Magistrate in exercise of her wide discretionary power awarded the sum of Kshs. 100,000 and cited an authority for the same.

20. Addressing the issue of the payment of rent, counsel submitted that the trial magistrate correctly held that the Respondents were paying rent for the property and not for the shop. He argued that it was sufficiently demonstrated to the trial court through the official receipts presented by the Respondents that they were paying for the suit property and not for the shops. Counsel further submitted that the Appellants never disputed the fact that the Respondents had been paying rent for the property from the time the suit property was transferred to them, up to and including the year 2005 when the Appellants started claiming ownership of the rear part of the suit property.

21. Regarding the claim that the trial court did not considering the evidence presented by the Appellants, Counsel argued that the trial court had considered the letter from the Appellant's learned counsel and the family agreement produced by the Appellants during trial and observed that the same lacked evidentiary value.

22. Counsel submitted that the trial court was right in disregarding the said documents as they appeared to have been generated after the death of the original owner. He argued that even though the Appellants had alleged that the original owner had in 2003 indicated that he was not aware that the suit property had unlawfully been transferred to the Respondents, they failed to present any evidence that he took steps to challenge the transfer.

23. Learned counsel argued that the evidence of DW4 who alleged to have attended a family meeting where the deceased purportedly wrote a "will" distributing the suit property among his 4 houses, was self-contradictory as the witness admitted that the said family meeting was not attended by the Respondents who are members of the same family.

24. Counsel further submitted that even though it was alleged that the transfer of the suit property to the Respondent was marred with forgery, the same had not been reported to any Police Station to undertake investigations. It was therefore his contention that the trial court was right in disregarding such evidence.

ISSUES FOR DETERMINATION

25. Having considered the history of this case, the judgment of the trial Magistrate as well as the rival submissions, the issues that emerge for determination are as follows:

- i. Whether a plot card can be used to prove ownership of a market plot.
- ii. Whether the original owner was senile by the time he transferred the suit property.
- iii. Whether the suit property was transferred to the Appellants by way of fraud.
- iv. Whether the deceased approved the transfer of the suit property to the Respondents.
- v. Whether the Respondents were entitled to General damages.

ANALYSIS AND DETERMINATION

Whether a plot card can be used to prove ownership of a market plot.

26. Learned counsel for the Appellant's argued that the trial Magistrate misapplied the provisions of sections 24 and 26 of the Land Registration Act that only recognize a title deed and a certificate of lease and documents that grant ownership rights to person laying claim over land. He argued that a plot card was a mere license issued by the Administration of the County Government to a person who in turn pays rent to the County.

27. Even though I agree with learned counsel for the Appellant that sections 24 and 26 of the Land Registration Act only recognizes a certificate of lease or other title documents as proof of ownership of land, I take judicial notice that there are several County Governments that have not registered market plots that were previously held by County Councils especially in small market centres. This therefore means that the occupants of such plots are only issued with plot cards as proof of ownership as they await issuance of Certificates of Lease.

28. In such a scenario, it would be harsh to demand that an owner of an unregistered plot in respect of which he has been paying rents produces a title document as the mother title is held by the County Government of Kisii.

29. I have valued the evidence on record and it is clear to me that the suit property was not a registered property for which a Certificate of Lease and an allotment letter would have been necessary documents to prove ownership as provided for under section 24 (b) of the Land Registration Act. When PW3 appeared in court as the custodian of the County Government's records which included those of the suit property, she was not taken to task to show that the suit property was a registered property.

30. Since the suit property is still unregistered, the only way the trial Magistrate could establish whether the Appellant had ownership rights over the suit property was by examining of all documents presented before her including the plot card. In the case **Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & 2 others [2015] eKLR Onguto J** stated that:

*“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’”: per Nourse LJ in **Sen v Headley [1991] Ch 425 at 437**. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, **Plot cards**, Lease agreements, allotment letters, **payment receipts for outgoings**, confirmations by the title paramount, notices, et al. The instant case is no exception. It is for the Court to interrogate the evidence, especially **documentary evidence** and ascertain who between the two antagonists that is to say the Plaintiffs on the one hand and the 1st Defendant on the other hand, is the true owner of the suit plot. For the court to conduct this rather wearisome and intricate task, **it is proper that the documents unless otherwise agreed are produced in their original form or format.***

31. A look at the judgment of the lower court shows that the trial Magistrate had to perform the delicate task of establishing whether the Respondents had a valid claim over the property by analyzing the documents presented by both parties. In her judgment, she observed as follows:

To support proof of ownership of the suit plot the plaintiff relied on a bundle of receipts for payment of plot land rent, minutes extract 13/82/2000 where the transfer of the plot no 17A by Gisebe Gekana was approved, and a copy of the extract of the register referring to the plaintiffs as the owners of the suit plot. The Defendants relied on what they termed to be a family agreement signed by the Deceased on 6th January, 1997, chief’s letter dated 25th May, 2006 and the letter dated 18th April 2007 by the Firm of Nyariki & Co, Advocates. The Agreement relied on was not duly signed by all witnesses and does not meet the threshold of an agreement that transfers any interest in land. The chief’s letter dated 25th May, 2006 contains an opinion of the then chief that the suit land was given to the 4 houses. The same did not transfer any interest to the Defendants. Lastly the demand letter dated 18th April, 2007 by Advocate Nyariki was not responded to nor was it acted upon. The letter was just a formal complaint and of little evidentiary value on the ownership issue. The said letter served to show the subdivision within the family of the late Gichana Gisebe. The county government is the custodian of the records within the locality.

*There is sufficient evidence that on 15th November, 2000 the deceased transferred the suit property plot to Plaintiffs. There is a copy of the minutes of the transfer which minutes have not been proved to be fake or otherwise obtained by fraudulent means to justify revocation of the same, there is no medical evidence that the deceased was too senile to transfer the plot to the plaintiffs. The Plot card in the name of the Plaintiff further **confirmed that they were registered** as joint owners of the suit plot”*

32. My analysis of the above reasoning of the trial Magistrate shows that she did not solely rely on the plot card to establish that the Respondents were the owners of the unregistered suit property. In her own words, she asserted that the plot card was a confirmation that the Respondents were the joint registered owners of the suit property.

Whether the original owner was senile by the time he transferred the property.

33. Learned counsel for the Appellants submitted that the learned trial Magistrate erred by not taking judicial notice that the original owner of the suit property was senile at time he is said to have transferred the suit property to the Respondents given that he was 100 years at the time and therefore could not have capacity to effect any approval.

34. In response to this submissions, the Respondents’ counsel submitted that this argument did not hold water since there was no medical evidence presented before the court to prove that he was senile and that advanced age was not an automatic proof that a person was senile.

35. I have considered the above arguments by both parties and I am constrained to agree with the Respondent’s counsel that advanced age is not sufficient evidence that a person is senile and cannot transfer property. As correctly held by the trial Magistrate, there was no medical evidence to prove that he was senile. In agreeing with counsel for the Respondents, I am guided the case of **Republic v Chief Land Registrar & another Ex-parte Yosabia Kerubo Manyura [2018] eKLR** the court held that:

.... the allegation further that she was senile is without any basis and it cannot be presumed that because she was aged she was senile. The death certificate shows that the cause of death was pneumonia. In the absence of any credible medical evidence that she was senile and incapable of being able to know what she was doing in January 2002 when she is said to have executed the transfer in favor of the applicant, I cannot uphold the assertion that she was senile.

Whether the suit property was transferred to the Appellants by way of fraud.

36. I have keenly evaluated the testimony of the PW3 who stated that the records in the County register were 90% fictitious. In my view this was a sweeping statement which cannot be said to prove that the documents that related to the transfer of the suit property were fraudulent.

37. As correctly submitted by counsel for the Respondents, the statement is too general and it does not directly point out which documents that are fraudulent. There was need for a follow up question directed to the witness to confirm which of the documents were fictitious.

38. Furthermore, it is trite law *that a claim of fraud is a serious accusation that cannot be inferred from a testimony of a witness in this case.* The Court of Appeal in the case of **Ardhi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** 1 considering the issue of fraud observed as follows: -

*“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:***

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see Lawrence V Lord Norreys (1880) 15 App. Case. 210 at 221). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

In the instant case the claim of fraud was not proved to the required standard.

Whether the deceased approved the transfer of the suit property to the Respondents.

39. The Appellants in this Appeal argued that the learned trial Magistrate disregarded their evidence that the suit property was transferred to Respondents without the approval of the original owner. They argued that the trial Magistrate erred by not considering their evidence that the suit property had been subdivided by the deceased amongst his four houses.

40. *Contrary to the arguments by the Appellant, my perusal of the judgement clearly reveals that the trial Magistrate had an opportunity to look at all the documents produced by the Appellants, which were the agreement entered into in 1997 subdividing the suit property, the Chief’s letter written in 2005 and the demand letter written in 2007 after which she concluded that the same did not bear any evidentiary value. As correctly observed by the learned trial Magistrate, the agreement was not attested. She further observed that the letter by the Chief only displayed an opinion that he held and did not even confirm the allegation that the suit property had been subdivided amongst the four houses of the deceased. It was also her observation that the demand letter was a mere complaint that did not materialize into a claim in a court of law. The documents could not therefore tilt the scales of justice in favor of the Respondents and thus the claim that the trial Magistrate disregarded the credible evidence presented by the Appellant is not true.*

Whether the Respondents were entitled to General damages.

41. Lastly, with regard to General Damages, it is trite law that trespass is actionable per se and unlike special damages which must be specifically pleaded and strictly proved, general damages for trespass are usually awarded once trespass is proved. I am guided by the case of **Park Towers Ltd V John Mithamo Njika and 7 Others 2014 eKLR** Mutungi J stated as follows:

“I agree with the learned judges that where trespass is proved, a party need not prove that he suffered any specific damage or loss to be awarded general damages. The court in such circumstances is under a duty to assess the damages awardable depending on the unique circumstances of each case”

42. Further in the case of **Duncan Nderitu Ndegwa V Kenya Power and Lighting Company Limited & Another (2013) eKLR** Nyamweya J held that once trespass to land is established, it is actionable per se and indeed no proof of damage is necessary.

CONCLUSION

43. From the foregoing therefore, I find that the appeal lacks merit and it is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 23RD DAY OF FEBRUARY, 2022.

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J.M ONYANGO

JUDGE