



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC APPEAL No. E011 OF 2021

VINDENCIO NACHERI NAMAJANJAAPPELLANT

VERSUS

ANNA MASAKHWE WATEKA.....RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Mumias (Hon. T.A. Odera Chief Magistrate) delivered on 26th March 2021 in Mumias MELC No. 24A of 2019)

JUDGMENT

1. This appeal traces its roots to the plaint dated 8th May 2019 which the respondent herein filed in the subordinate court on 4th June 2019 against the appellant as defendant and one Suleiman Watako (sued as a legal representative of the late Abdala Watako) as interested party. The said interested party was not joined in this appeal. The appellant and the respondent have close family ties – the respondent's late husband was a cousin of the appellant.

2. The respondent averred in the plaint that at all times, she was the registered proprietor of the parcel of land known as L.R No North Wanga/Kholera/701 (formerly plot 701) measuring approximately 2.8 hectares (the suit property). That she was residing on the property and upon being taken ill in the month of December 2018, she decided to dispose a part of it in order to defray medical expenses only to shockingly learn that the appellant had fraudulently caused the suit property to be registered in his name on 28th September 1990 before proceeding to subdivide it to plots 1149 and 1150.

3. In the particulars of fraud, she accused the appellant of purporting that she gifted the suit property to him, of transferring the suit property to himself without following due process of the law, unlawfully causing subdivision of the suit property into plots 1149 and 1150 and transacting on the suit property with the full knowledge that it belonged to her. She therefore prayed in the plaint for judgment against the appellant for 'cancellation of the transaction leading to the subdivision of the former plot 701 in to plots 1149 and 1150' and for costs of the suit.

4. The appellant filed a statement of defence wherein he admitted that the respondent was the registered proprietor of the suit property. He averred that he is a bona fide beneficiary of the land, having been willingly transferred to him by the respondent. He denied the respondents other allegations and prayed that the suit be dismissed with costs.

5. Upon hearing the matter, the subordinate court (Hon. T.A. Odera, Chief Magistrate) delivered judgment on 26th March 2021. The learned magistrate found merit in the respondent's case and therefore allowed it in the following terms:

The plaintiff has proved her case against 1st defendant on a balance of probability. I order that title deeds North/Wanga/Kholera/1149 and 1150 be cancelled by land registrar Kakamega. The land to revert back to North/Wanga/Kholera/701 in the names of Tofiko and Ann Masakwe Wateka in equal shares. The defendants to surrender title deeds for land parcels North/Wanga/Kholera/1149 and 1150 to the Land Registrar for cancellation within 30 days from the date of this judgment. Costs be borne by 1st defendant.

6. Aggrieved by the judgment, the appellant filed this appeal, praying that the appeal be allowed with costs and that the judgment be set aside. The following grounds of appeal are listed on the face of the Memorandum of Appeal:

1. THAT the learned trial magistrate erred in law and in fact in failing to appreciate the proper effect and purpose of the evidence and arriving at a decision which is not supported by or is against the weight of the evidence.

2. THAT the learned trial Magistrate erred in law and in fact in failing to allow the Defendant defense and his submission.

3. *THAT the learned trial Magistrate erred in law and in fact in failing to appreciate the fact that the appellant had an arguable case.*
4. *THAT the learned trial Magistrate erred in law and in fact in failing to appreciate the reasons advanced by the Appellant and fact that he is the legal occupier of the suit parcel of land.*
5. *THAT the learned trial Magistrate erred in fact by failing to consider the evidence presented by the Appellant to the honourable court to support his case.*
6. *THAT the trial Magistrate erred in fact and in law in finding that the case against the appellant had been proved on a balance of probability.*
7. *THAT the learned trial Magistrate erred in law and in fact in finding that the Appellant did not have a good defence worth the courts time for determination.*
8. *THAT the learned trial Magistrate erred in law and in fact in finding that the Appellant should bear the costs of this suit.*

7. The appeal was canvassed through written submissions. The appellant filed his submissions on 17th November, 2021. He submitted that the learned magistrate failed to appreciate the proper effect and purpose of evidence availed before the subordinate court. That the documentary evidence brought before the subordinate court was genuine but his advocate in the subordinate court erred in not calling witnesses to verify the authenticity of the documents under the custody of the Land Registrar of Kakamega. He wondered why the subordinate court did not involve the Directorate of Criminal Investigations yet fraud had been alleged. The appellant further submitted that the transaction between him and the respondent was mutual. The appellant went beyond his grounds of appeal and purported to adduce new evidence in his submissions. He even filed a document titled “List of Documentary Evidence as Part of the Written Submissions”. Needless to state, leave to adduce additional evidence was neither sought by the appellant nor granted. Thus, the said *List of Documentary Evidence* and the new evidence have no place in this appeal. In conclusion, he urged this court to dismiss the respondent’s case.

8. The respondent filed her submissions on 14th December, 2021 and argued that the appellant’s submissions failed to squarely address the grounds of appeal but instead largely purport to adduce new evidence which the appellant did not lead in the trial court. The respondent further submitted that to support the fact that the ownership of plot 1149 was fraudulent, the respondent led evidence indicating that it was the Lurambi Land Control Board, whose jurisdiction is within Kakamega area, which gave consent for the transfer of plot 1149 from the respondent to the appellant despite the fact that the parcel of land is located in Mumias under the jurisdiction of the Mumias Land Control Board. She further submitted that the appellant did not show that other family members were aware that the respondent had passed on plot 1149 to him as a gift and thus the trial court had to conclude on a balance of probabilities that the change of ownership from the respondent to the appellant was fraught with illegalities.

9. I have carefully considered the grounds of appeal and the parties’ respective submissions. This being a first appeal, my mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore make due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence. See **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR.**

10. All of the grounds of appeal that the appellant has listed can be collapsed into one: that the learned magistrate misconstrued both the evidence and the law in the matter. The issues that emerge for determination are whether the appellant fraudulently obtained registration of the parcel of land known as L.R No North Wanga/Kholera/701 in his name and whether the reliefs that were sought by the respondent were available.

11. From the material placed before the subordinate court, there is no dispute that the respondent herein and one Tofiko Waliaro Mombo became joint registered proprietors of the parcel of land known as L.R No North Wanga/Kholera/701 in equal shares on 16th January 1980 and that subsequently on 28th September 1990 became the sole registered proprietor of the property. The consideration for the transfer was recorded as “gift”. The material further shows that the title in respect of the parcel of land known as L.R No North Wanga/Kholera/701 was closed on 21st August 1991 upon subdivision by the appellant herein into L.R No North Wanga/Kholera/1149 and L.R No North Wanga/Kholera/1150 both of which were registered in the name of the appellant. On 31st December 1991, the appellant transferred L.R No North Wanga/Kholera/1150 to Abdalah Watako Akwanalo.

12. The respondent did not dispute that the appellant was at some point the registered proprietor. Her case in the subordinate court was that the appellant fraudulently caused the parcel of land known as L.R No North Wanga/Kholera/701 to be registered in his name before proceeding to subdivide it to the aforesaid parcels 1149 and 1150. Her case was built exclusively on fraud. Fraud is a serious allegation that has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR** and **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR.** Thus, a party who approaches the court on allegations of fraud knows, or should know, that she has raised the bar and has placed upon her own shoulders an onerous burden. To succeed, she needs to work much harder than the ordinary litigant. Did the learned magistrate identify and correctly apply these principles? From the onset, I note that the learned magistrate neither identified nor outlined the standard of proof applicable.

13. Among the particulars of fraud that the respondent levelled against the appellant were that he purported that she gifted the suit property to him, that he transferred the suit property to himself without following due process of the law, unlawfully causing subdivision of the suit property into parcel numbers 1149 and 1150 and transacting on the suit property with the full knowledge that it belonged to her.

14. To the extent that the appellant was the registered proprietor the parcel of land known as L.R No North Wanga/Kholera/701 and to the

extent that the appellant and Abdalah Watako Akwanalo were later the registered proprietors of L.R No North Wanga/Kholera/1149 and L.R No North Wanga/Kholera/1150 respectively, their certificates of title could only be interfered with upon satisfying conditions laid in the law.

15. Under **Section 26** of the **Land Registration Act**, the court is ordinarily required to accept a certificate of title as proof of ownership. That said, a title can be nullified if it is demonstrated that its acquisition is tainted by fraud or misrepresentation to which the registered proprietor is a party. Equally, a title can be nullified if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme. The section provides:

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

16. The appellant's case was that through the mediation of his mother Marisella Salasia Namajanja, he reached an agreement with the respondent pursuant to which he would provide for the respondent's basic lifetime needs including food, health, clothing, shelter, subsistence and repayment of debts in exchange for the respondent transferring ownership of L.R No North Wanga/Kholera/701 to him. I note that in the minutes of a meeting held on 5th January 2019 which the respondent produced as plaintiff's exhibit 1, she is captured as stating "*I entered into a memorandum of understanding with Mercella Salasia Namajanja/Videncio Nacheri Namajanja that they be tilling/cultivating my land and we share the proceeds equally: supply of basic needs i.e providing shelter constructing a house... That they have failed, neglected to abide by our agreement ...*"

17. Thus, the respondent conceded that they had some arrangement with the appellant in regard to the parcel of land known as L.R No North Wanga/Kholera/701. The consideration was that the appellant would take care of her, construct for her a house and provide for her basic needs for the entire length of her life. She stated at paragraph 5 of her witness statement that the arrangement which started sometime in the year 1989 was also to the effect that the appellant would grow sugarcane on the plot and that they would share the proceeds equally.

18. I found the appellant's version of the agreement more credible. For starters, what would be the motivation of constructing for the respondent a house and taking care of literally all her needs for life despite sharing the proceeds of the sugarcane farming equally? If the appellant did not honour the agreement which was entered into way back in 1989, why did the respondent not take any action or raise complaints until 2019 which was 30 years later? Since the respondent moved the subordinate court with serious allegations of fraud, it was her obligation to offer valid explanations for all those questions, a task which she failed to do.

19. The respondent denied ever signing any transfer in favour of the appellant and further maintained that no valid consent of the land control board was obtained. The appellant on the other hand maintained in his witness statement that the respondent affixed her thumb print on the transfer and application for consent. The learned magistrate stated thus in the judgment:

... 1st defendant also admitted that he obtained consent to subdivide and transfer the land from Lurambi. I note that Lurambi is in Kakamega while the land herein is in Mumias. Mumias has land control board which govern parcels within Mumias. This makes the transaction very suspect as no explanation was given why the consent was not obtained in Mumias where the land is situated. The applications for consent to transfer and subdivide the land (PMFI 7, and 19) were marked but not produced. Letters of consent to transfer the land to 1st defendant and to sub-divide (PMFI 20 & 16) the same were also not produced but were merely marked.

20. The conclusion by the learned magistrate that applications for consent to transfer and subdivide the land were marked but not produced is not supported by the record. A perusal of the record reveals that on 3rd November 2020 the parties recorded a consent pursuant to which documents which had earlier been marked as DMFI 7 to 20 were produced as defence exhibits 7 to 20. I have perused defence exhibits 7 and 20. Defence exhibit 7, which is certified by the Land Registrar Kakamega as a true copy of the original, is an application dated 15th June 1990 and made to Mumias Land Control Board seeking consent to transfer the parcel of land known as L.R No North Wanga/Kholera/701 from Tofiko Waliaro Mombo and the respondent herein to the appellant herein. The appellant signed the form and there are two thumb prints on the space allocated for the signature of the registered owner. Following the said application, Mumias Land Control Board issued a letter of consent dated 27th June 1990. I have not seen any application for consent made to Lurambi Land Control Board or letter of consent issued by Lurambi Land Control Board. Further, no evidence was tendered as to the identity and territorial jurisdiction of the correct Land Control Board. The learned magistrate's conclusion that the consent could only be obtained from Mumias Land Control Board is not supported by any evidence on record.

21. I have also perused defence exhibit 17, which is also certified by the Land Registrar Kakamega as a true copy of the original. It is a transfer the parcel of land known as L.R No North Wanga/Kholera/701 from Tofiko Waliaro Mombo and the respondent herein to the appellant herein. There are two thumb prints on the space allocated for the signature of the transferor. All the signatories' signatures were attested by the District Officer Mumias who certified that Tofiko Waliaro Mombo and the respondent herein appeared before him and acknowledged that they had freely executed the transfer.

22. Among the particulars of fraud that the respondent levelled against the appellant was that he purported that she gifted the suit property to him. Since I am satisfied that there is evidence that the respondent executed the transfer, I have not found it necessary to enquire into whether the consideration was a gift or otherwise.

23. All the foregoing documents were provided to the respondent, as part of pre-trial procedures. As a party with the greater burden of proving fraud, it was incumbent upon the respondent to take steps, including obtaining forensic document analysis as well as calling a witness from the office District Officer Mumias to demonstrate that no such documents were ever executed. The respondent did not do so. Instead, the learned magistrate seemed to shift the burden of proof to the appellant.

24. I have said enough to demonstrate that the learned magistrate did not properly analyse the evidence on record and did not properly apply the principles applicable to proving fraud. Clearly, the respondent did not prove fraud to the required standard of proof which is proof above a balance of probabilities but not beyond reasonable doubt. It follows therefore that the respondent did not prove that the appellant fraudulently obtained registration of the parcel of land known as L.R No North Wanga/Kholera/701 in his name. Also, to the extent that the said parcel was properly transferred to the appellant, it is not necessary to enquire into whether its subsequent subdivision into L.R No North Wanga/Kholera/1149 and L.R No North Wanga/Kholera/1150 was proper. I further note that the registered proprietor of L.R No North Wanga/Kholera/1150 did not raise any complaint in the matter as to the acreage that he got.

25. The next and last issue for determination is whether the reliefs that were sought by the respondent were available. The respondent prayed in the plaint for judgment against the appellant for '*cancellation of the transaction leading to the subdivision of the former plot 701 in to plots 1149 and 1150*' and for costs of the suit. Having failed to prove fraud, which was the cornerstone of her case, the respondent could not in any way be entitled to the reliefs that she sought in the plaint. I also note that the prayer for '*cancellation of the transaction leading to the subdivision of the former plot 701 in to plots 1149 and 1150*' was rather vague since it leaves a lot of doubt as to what exactly was to be nullified or cancelled.

26. In view of the foregoing, I find merit in this appeal. As I conclude, I recall that the appellant himself described the respondent in his witness statement as an elderly and childless widow. He further detailed some of his obligations to the respondent at paragraph 9 of his witness statement. Despite the outcome of this appeal, his obligations to the respondent remain and he must discharge them if he is to claim a position among responsible citizens and honourable men.

27. In the result, I make the following orders:

a) This appeal is allowed.

b) The judgment of the subordinate court is set aside and replaced with an order dismissing the respondent's suit in the subordinate court.

c) Considering the close family relationship between the parties, each party shall bear own costs of this appeal as well as own costs of the suit in the subordinate court.

Dated, signed and delivered at Kakamega this 15th day of March 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Appellant present

Ms Ikhumba for the respondent

Court Assistant: E. Juma