



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL APPEAL 2287 OF 2007

NYAGATE GUTO ALIAS
WATSON MOGERE MOGOKO..... APPELLANTS

VERSUS

MAXWELL OKEMWA MOGERE..... 1ST RESPONDENT
NATINAL BANK OF KENYA LIMITED 2ND DEFENDANT

JUDGMENT

At the centre of this dispute is a property known as LR No. 209 Section situate in Eastleigh in Nairobi. The said property is said to have been owned by the plaintiff herein, which however was on 30th December, 1995 transferred to the 1st defendant by an Indenture of the said date allegedly executed by the plaintiff in favour of the 1st defendant at a consideration of Kshs. 200, 000/= The said property was subsequently charged to the 2nd defendant by a mortgage dated 21st September, 2004 and a further mortgage dated 14th March, 2005.

The plaintiff brought this suit against the defendants claiming among other things that the transfer of the said property from himself to the 1st defendant was fraudulent because he never executed any document to facilitate the said transfer. It is also his case that the mortgage to the 2nd defendant was also fraudulent.

In all, this case is based on fraud, forgery and misrepresentation on the part of the 1st and 2nd defendant. The orders sought against the defendant are captured in the plaint dated 14th and filed on 15th November, 2007. These are;

- a) A declaration that the plaintiff is the legal owner of the said property as contained in the Indenture dated 1st February, 1973.
- b) A declaration that the Indenture dated 30th December, 1995 and registered on 17th April, 1996 was obtained through fraud and misrepresentation on the part of the 1st defendant and is therefore null and void *ab initio*.
- c) A declaration that the mortgage dated 21st September, 2009 and registered on 24th September, 2004 and the further mortgage dated 14th March, 2005 and registered on 24th March, 2005 were created

through fraud and misrepresentation on the part of the part defendants and are therefore null and void *ab initio*.

- d) An order directing the defendant to deliver to the registrar of government lands the Indenture dated 30th December, 1995, the mortgage dated 25th September, 2004 and a further mortgage dated 14th March, 2005 for cancellation and the Registrar be directed to cancel the entries appearing on the Register in respect thereof.
- e) An order directing the 1st and or the 2nd defendants to deliver to the plaintiff the Indenture dated 1st February, 1973 between Sutanali Aladin Ramji and the plaintiff and in default thereof, the Registrar of the Government Lands do issue a certified copy of the Indenture to the plaintiff.
- f) A permanent injunction be issued to restrain the defendants whether by themselves, their agents, servants or otherwise howsoever from trespassing upon, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning and or otherwise dealing with the suit property.
- g) General damages for fraudulent misrepresentation against the 1st defendant.
- h) General damages for trespass against the 2nd defendant.
- i) Costs of the suit and interest at court rates.

The 1st defendant filed a defence dated 26th November, 2007 and filed on 23rd January, 2008 in which he denied all the allegations raised by the plaintiff in his plaint and asks that the plaintiff 's suit be dismissed with costs.

The 2nd defendant also filed a defence dated 13th and filed on 14th December, 2007 in which it denied the plaintiff's claim and asked that the plaintiff's suit be dismissed with costs. In particular the 2nd defendant pleaded that it dealt with the 1st defendant as the owner of the suit property and that it had no reasonable cause for doubting the 1st defendant's ownership thereof. It is also its case that the two mortgages at the instance of the 1st defendant were valid and lawful and as such it was entitled to all rights and protection accorded to a mortgagee under the law.

Finally it is the 2nd defendant's case that the plaint does not disclose any reasonable cause of action against it and as such its joinder to this suit is misconceived.

The parties herein have called evidence to advance their respective positions and at the end of the trial counsel appearing herein made their respective submissions and cited several authorities which I have on record.

It is not necessary to recap the respective testimonies of the witnesses herein, except to point out the salient points. The alleged transfer of the suit property from the plaintiff to the 1st defendant is said to have taken place in December, 1995. This is evidenced by the indenture produced in this court as exhibit No. 10. However, it was not until July, 2007 that it was discovered the property had been transferred to the 1st defendants. There is an application for a search produced in evidence by PW 4 Josephine Obaga Mogere who is the wife of the plaintiff confirming that an application for a search was made. The application was signed by the plaintiff. A copy of the extract of the search was produced in evidence as exhibit No. 9.

It was the evidence of this witness the plaintiff has never executed indenture dated 30th December , 1995. To protect the plaintiffs property PW. 4 Josephine Obaga Mogere applied to register a caveat which she produced as exhibit No. 17. The plaintiff gave evidence in these proceedings which I shall revisit shortly herein below.

The 1st defendant also gave evidence as D.W. 4 alongside his mother D.W. 2 and his uncle D.W. 3 among others. It is his evidence that his interest in the suit property is as a representative of his mother. He signed the Indenture exhibit 10 and the plaintiff also signed the same. He paid his father the plaintiff herein a sum of Kshs. 250,000/= to help him offset a debt he had with ICDC in respect of the same property. The father then transferred the property to him and there was nothing fraudulent in that transaction. He did not forge his father's signature and since 1995 there has not been any claim about the ownership of the suit property. He has never been summoned by the police in respect of this transaction and added that his father is not an adversarial person and would not want to be involved in a case of this nature. After this case was filed the parties went to the elders and the plaintiff swore that he would never bring any of his children to court and none would bring him to court. He concluded that the allegations made in this court are not true at all.

The position of the 1st defendant was supported by his mother and his uncle. At the instance of the court, Mr. Stephen Wanyoike Kinuthia, the advocate who drew the indenture, appeared to give evidence. He confirmed that he prepared the said indenture exhibit No. 10 on instructions of the parties herein and witnessed their signatures. He confirmed that the signatures and the dating were not forgeries.

He knew the instructing client when he started practice as a very polite man. He was then working at the law courts. It was not the first time to he met him. He went further to state that the indenture is itself an agreement and was not aware that it must be preceded by an agreement. The consideration of Kshs. 200,000/= was not paid in his presence. Both parties told him that it was paid. He was also not sure who registered the indenture but thought that he did. Clearance of rates must have been there otherwise this document would not have been registered. If he were to meet the vendor today he would not be able to know him. He cannot recall him.

I said earlier that I shall revisit the evidence of the plaintiff. I consider it necessary to set out his entire evidence in chief. The following is what he told the court.

“My name is Watson Mogere Mogoko, Nyangate Guto is also my old name which was discarded long time ago. I am the only one referred to by that name in my family. No one else. There are instances or businesses the name of Nyangate Guto has been used but they are not in this issue. I was born in 1927, I used to live in Eastleigh and still leave there. I know the first defendant Maxwell Okwemwa Mogere. He is one of my sons.

I used to own some small properties but I sold them and went away. I do not still own any property in Eastleigh. I sold what I had. I brought this case to court so that I can be assisted in case of complains. I know why I brought my son to court. This is my property. I have never transferred my property to my son or anybody. Sometimes I collect the rent from the property sometimes I send my sons”

Under cross examination the plaintiff said that he did not remember that the property was given out as security to ICDC and that he has never given anybody his property. He never took any loan on this property and the tittle thereto is with him somewhere but cannot say where. It has never been lost. With the same breath he said he lost some tittles much earlier about five or six years ago. He added that Nyangate Nguto is his name since he was born but he does not have any property registered in that name. He does not know that the suit property was not registered in his name.

It will be noted from the foregoing evidence that the plaintiff has not given any evidence alleging fraud, misrepresentation or forgery attributed to either the 1st or the 2nd defendant or any other party. The plaintiff gives the foundation of the plaintiffs' case. Pleadings must be proved by evidence to justify any orders that have been sought in the plaintiff. I noted that the plaintiff is an old man and indeed most of the evidence relating to the documents in respect of the suit property was given by P.W. 4 Josephine Obaga Mogere who is his wife. P.W. 4 however did not swear the verifying affidavit annexed to the plaintiff and therefore cannot play the role of the plaintiff in establishing and proving the contents of the plaintiff. The burden of proof lies with the plaintiff.

With that in mind, I note that the alleged fraud was noted in the year 2007. An issue has been made out

on whether or not the plaintiffs claim is statute barred under Section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya. I have read the submissions of counsel in respect of that issue and the provisions of law in that regard. The plaintiff's case is founded on the tort of fraud. Section 4(2) of the Limitation of Actions Act provides

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued”

Section 136 (1) of the Government Lands Act provides as follows;

“All actions, unless brought on behalf of the government, for anything done under this act shall be commenced within one year after the cause of action arose and not afterwards.”

I have looked at the decision of the court of appeal in **Civil Appeal No. 11 of 2001 (unreported) – Javed Iqub Abdul Rahman and Another versus Benard Alfred Wekesa Sambu and Another**. Kwach JA (As he then was) stated as follows.

“It is clear from that part of his evidence that the plaintiff conducted a search on the title in 1988 and found that the suit land had been sold and transferred to the 2nd and 3rd defendants and these defendants had been registered as proprietors. That was all he needed to know in order to assert his claim. He did not need a file. So the time started to run for purposes of limitation from that date in 1988 when he found that the suit had been sold and transferred to the 2nd and 3rd defendants. And since his claim against these two defendants was based on the tort of fraud the suit should have been brought within three years. It was not. So the claim was clearly time barred and the plaintiff should have been none suited for ever”

The fact that the property was said to have been transferred by the Indenture dated 30th December, 1995 by the plaintiff to the 1st defendant was discovered in July, 2007. This suit was filed in November, 2007. It cannot therefore be said to be time barred.

The foregoing notwithstanding, the question is whether or not the plaintiff executed the Indenture in favour of the 1st defendant in 1995. The plaintiff's evidence cited above is of no assistance to the court neither is the evidence of P.W. 4 who said she did not know when the title to the suit property disappeared and also could not tell if the plaintiff executed the Indenture. In any case, the plaintiff was supposed to prove fraud and forgery on the part of the 1st defendant. The burden and standard of proof lies entirely within the province of the plaintiff. A standard of proof approaching proof beyond any reasonable doubt is required to establish fraud. And allegations of fraud must be strictly proved. Although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required. See- Ratilal **Gordhanbhai Patel versus Lalji Makanji (1957) EA 314**. In the case of **Koinange & 13 others versus Koinange 1986 (KAL 23)** the court held as follows;

- 1) It is a well established rule of evidence that whoever asserts the fact is under an obligation to prove it in order to succeed. The party alleging fraud, in this case the plaintiffs, had the burden of proving and had to discharge that burden.
- 2) Allegations of fraud must be strictly proved and although the standard of proof may not be as to require proof beyond any reasonable doubt, it ought to be more than on a balance of probabilities.
- 3) Much of the plaintiffs' evidence of the alleged fraudulent intent and forgery on the part of the defendant was hearsay or, at best, circumstantial and not conclusive. The evidence therefore fell short of the required standard of proof.

I have looked at the evidence on record both for the plaintiffs and the defendants. With respect I am unable to say that the plaintiff has proved any fraud or forgery on the part of the 1st and 2nd defendants. I hasten to add that the plaintiff had the time and opportunity to engage an expert to probe the authenticity

of the signatures in the Indenture dated 30th December, 1995 but did not do so. The said Indenture according to Mr. Kinuthia advocate is an agreement in law. It was a contract for disposition of an interest in land, it was in writing, it was signed by both parties and their signatures were attested by a witness who was present when both parties signed. With respect, I agree and the said document cannot be said to be fraudulent.

It has been alleged that the plaintiff is still the ratiabale owner of the suit property as he still pays the rates and also the utility bills. the term “ratiabale owner” is not a byword for ownership of any property.

The same assessment goes to the plaintiff’s claim against the 2nd defendant. The 2nd defendant was persuaded that the 1st defendant was the owner of the said property. The records showed as much and it had no reason to doubt the same. No fraud can be attributed to such a party. Whether or not the plaintiff is known by the names Watson Mogere Mogoko or Nyangate Guto or both names is neither here or there. The point is that the plaintiff’s suit falls short of the required standard and burden of proof against both defendants.

It will be noted that I have not referred to most of the authorities cited by counsel. This is because, the facts of the case are sufficient to address the issues herein. In the end I find that the plaintiff has not proved his case against both defendants jointly and severally and therefore the same must be dismissed with costs to both defendants.

Orders accordingly.

Dated, signed and delivered at Nairobi this 8th day of March, 2011.

**A. MBOGHOLI MSAGHA
JUDGE**