



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT MERU Civil Case 52 of 1998

M'ITIMITU M'MWITHIRWA PLAINTIFF

VERSUS

DMIOCESE OF MERU 1ST DEFENDANT

ROMANO KOBIA 2ND DEFENDANT

JUDGMENT

The plaintiff brought this action against the defendants alleging that the 1st defendant fraudulently transferred parcel No. Tigania/Thagana/252 to the 2nd defendant. He prayed for an order of nullification of that transfer and a rectification of the register to reflect his name. The 1st defendant denied the plaintiff's claim. The 2nd defendant also denied the plaintiff's claim and further counter claimed to the eviction of the plaintiff from the suit property. In evidence, the plaintiff stated that he had a verbal agreement with the 1st defendant whereby he agreed to sell to the 1st defendant 5 acres out of his 15 acres of land. The agreement further provided that the 1st defendant would in turn educate his children. He said that the 1st defendant failed to educate his children and he also refused to transfer the land to them. He was sued by the first defendant in CMCC Meru 180 of 1989 for specific performance of that agreement. By a judgment in that case delivered on 12th August 1992 the court granted an order of specific performance and ordered the plaintiff to sign all the documents of transfer to enable the first defendant acquire title on the suit property. In that judgment, the court further stated that if the plaintiff failed to sign those documents, the Executive Officer could sign the same. The plaintiff said that he filed an appeal against that decision. The appeal was HCCA Meru No. 100 of 1992. The judgment in that appeal which was delivered on 19th July 1995 set aside the lower court judgment on the basis that parties had not obtained consent from the Land Control Board. The plaintiff stated that he then obtained an order in the High Court civil appeal file dated 1st April 1996 which was issued by the Chief Magistrate. In that ruling, the chief magistrate stated as follows:-

“I have listened to the submissions of learned counsels and I am of the opinion that in view of the High Court Judgment which set aside the judgment of the lower court, it is clear that the land Reg. No. TIGANIA/THANANGA/252 reverts to the appellant one M'ITIMITU M'MWITHIA and I therefore order that the Executive Officer of this court do sign the transfer papers and application for consent to facilitate transfer of the said land Ref. no. TIGANIA/THANANGA/252 to the said M'ITIMITU M'MWITHIA.”

Following the issuance of that order, his advocate went to the land office with a view to obtaining a title in his name but he discovered that the land had been transferred to the 2nd defendant. Under cross examination, the plaintiff accepted that he had been paid by the 1st defendant Kshs. 1500/= which money

he said was supposed to be for his own personal use but not for the education of his children. When the first defendant sued him in the lower court for specific performance, he deposited that money into court. He said that in the initial agreement, the first defendant was supposed to educate his children to the highest level they would get. That there was no agreement of the specific amount that was to be paid by the first defendant for that education. He did confirm that he attended the land board with Fr. Gituma, seeking to transfer the land to the first defendant. He however could not recall whether the first defendant had obtained the consent. The 2nd defendant in his defence stated that he knew the plaintiff because he resides near him. He also knew the registered trustees of the Meru Diocese, the 1st defendant. That he worked with them having been seconded by the Ministry of Education from the years, 19985 – 1988. He said that he had purchased the suit property from the first defendant and in that regard; he exhibited an agreement dated 10th February 1993. That agreement was between him and the 1st defendant where it was agreed that he would purchase the suit property for Kshs. 300,000/=. He paid Kshs. 200,000/= on the day they executed that agreement. It was agreed in that agreement that the suit property would be transferred to his name when he paid the total purchase price. After paying the final purchase price, the land was transferred to his name on 21st July 1997. Thereafter, he tried to get in the land but the plaintiff resisted his entrance. He said to date he had not been able to get on to the land. Prior to him purchasing that land, he did not know how the first defendant became owners. He also said he did not know that there was a disagreement between the plaintiff and the first defendant. Had he known, he said, he would not have bought the land. He got interested in the land initially when he noticed that it was idle. He made inquiries of who the owner was and finally made an offer to the 1st defendant which was accepted. He asked the court to order that the plaintiff do vacate the property to enable him enjoy the benefit of that land. He had given the plaintiff notice to vacate by a letter dated 16th September 1997. The plaintiff did not comply with that letter. He said in cross examination that prior to him purchasing the land, the land was idle. He had noted that there were some few plants of tea bushes but the land was mostly bushy. He confirmed that it was him who approached the 1st defendant rather than the other way round. At the time when he made the offer to the 1st defendant, they were the registered owners. When he was cross examined by the plaintiffs advocate, he was adamant that the plaintiff does not have tea on that land. He confirmed that he had worked with the first defendant as a youth programmer at their water department. He was covering the Igembe area of the 1st defendant. On being questioned why it took him so long to make his final payment towards the purchase price, he said that he was looking for money. He confirmed that the final payment was made in May 1997. The first defendant was represented by Fr. Aloise Kabuti Chabari. He is employed by the 1st defendant. He is currently starting a new diocese at Meru South. He got to know the plaintiff in 1986 when he was made the parish Priest. He was the Fr. In-charge of Tigania Parish. The suit property is in that area. The suit property, he said, was purchased by the first defendant after the plaintiff approached the first defendant for financial support. That the plaintiff and the first defendant went through the normal processes at the land board and when he declined to transfer the land, they sued him. Prior to suing him, the plaintiff had often made promises to transfer the land. When the first defendant entered into an agreement of sale with the 2nd defendant, he said that the land was already registered in the name of the 1st defendant. That the plaintiff did not raise any objection with that transaction. He confirmed that the 2nd defendant made payment as per the agreement. He was however unaware whether the 2nd defendant obtained possession. When the plaintiff's counsel cross examined him he said that consent had been given in respect of the transaction between the plaintiff and the first defendant. He denied that the 1st defendant had agreed to educate the children of the plaintiff. He denied that there was an appeal filed against the lower court order for specific performance. He was even unaware that the first defendant was represented by an advocate.

The plaintiff in his action, needed to prove fraud on the part of the 1st, 2nd defendant. After the lower court made an order for specific performance on 12th August 1992, it is clear from the green card of the suit property that the first defendant were registered as the owners of that property on 7th September 1992. There was no evidence that the plaintiff as he sought to appeal against the lower court order obtained stay of execution. The transfer of the suit property was made to the first defendant's name of the suit property in September 1992. That transfer cannot be said to have been fraudulent because it was in accordance with an existing court order. The plaintiff after obtaining a judgment in his favour in the

appeal, that is on 19th July 1995, seems to have sat on his rights. I say so because either he or the 1st defendant, because it is not clear who did moved the chief magistrate on the High Court appeal file, sought for the magistrate to interpret the judgment of the high court. I wish to begin by saying that for the chief magistrate who entertained that application, acted highly irregular and was made the order without jurisdiction. I am aware that the plaintiff argues that this issue cannot be reconsidered by the court because it was brought before the Hon. Mr. Justice Lenaola as a preliminary objection. I beg to differ with such a submission because by the mere reading of the said judge's ruling, one will find that the judge did not make a determination on whether or not the chief magistrate had jurisdiction. My finding is supported by what the said judge stated in his ruling dated 19th September 2007. He said as follows:-

“Whether Solomon Wamwayi Esq. had any right to interpret the judgment of Ong’udi Judge in HCCA 100/1992 will only be one piece of evidence whose value will be considered in evidence.”

What I understand the Hon. Judge to have meant by that statement in that ruling was that the issue of whether or not the chief magistrate had jurisdiction to entertain a matter brought in the High Court file, would be determined at the hearing of the suit. The suit was heard before me. *Res judicata* can only be raised when a suit/matter has been finally determined. See S. 7 Civil Procedure Act. That is not the case here. The powers where a deputy registrar can deal with a high court file are contained under order XLVIII of the Civil Procedure Rules. Those powers do not include the interpretation of a judgment of a high Court Judge. If the said chief magistrate had no jurisdiction, the order he made was of no effect. That was the finding in the case of **Owners of the Motor Vessel “Lilina S’ Vrs. Caltex Oil** (Kenya) LTD (1989) KLR 1, at P. 14 in which the learned Judge authoritatively stated:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

The fact that I make a finding that the chief magistrate had no jurisdiction to make an order on a high court file as he did, it is nevertheless clear that there was inexistence a valid judgment by the high court in the civil appeal which judgment overturned the lower court's order for specific performance for the plaintiff to transfer the suit property to the first defendant. For the plaintiff to prove that the defendants acted fraudulently, he needed to prove that they, the defendants, were aware of the civil appeal judgment. The judgment which was exhibited in this case in that civil appeal did not indicate that the 1st defendant or their advocate were present when the civil appeal judgment was read. In my view, the plaintiff had a responsibility to extract the order of that civil appeal judgment and serve it upon the first defendant for this court to be able to find that the first defendant acted fraudulently. As it has been held in many cases before, a party needs to strictly prove fraud. The standard of proving fraud has to be higher than on a balance of probability although not as high as beyond reasonable doubt. A case in point is **R.G. Patel Vrs Lalji Makanji (1957)** EA 314 where it was held:-

“.....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.....”

I would even go further to say that there is no evidence that the first defendant or their advocates participated in the appeal. It may very well be that the appeal proceeded *ex parte*. Such a contention is supported by the uncontroverted evidence of first defendant's witness. He was unaware that an appeal had been filed and much more was unaware that the appeal had set aside the order of specific performance by the lower court. The plaintiff did not even prove that the first defendant participated in the interpretation of the High Court judgment by the chief magistrate. From the order, it does look like it was only the plaintiff's advocate who was present. The question is therefore, did the plaintiff extract that order and serve it on the first defendant? There is no evidence that that happened. The plaintiff accepted that the 2nd defendant was not involved in the initial case in the lower court. His argument was that the 2nd defendant having been an employee of the first defendant ought to have known of the existence of

that court action. He further argues that the transfer of the land to the 2nd defendant was to defeat the plaintiff's title. There is no evidence to prove that. The plaintiff failed to adduce such evidence. The plaintiff also argued that the first defendant did not have a title that it could transfer to the second defendant. That is far from being true. The green card which was produced by the plaintiff and the defendants shows that the suit property was transferred to the first defendant's names in September 1992. That means by the time the defendant entered into an agreement for sale, the first defendant was the registered owner of the suit property. By virtue of section 27 of the Registered Land Act, Cap 300 provides that on registration, as proprietor of land, a person is vested with absolute ownership of the land together with all the rights and privileges belonging to that land. Further section 39(i) protects a person who deals with a registered owner. That section provides:-

“39. (1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned:-

- (a) to inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous proprietor was registered; or***
- (b) To see to the application of any consideration or any part thereof; or***
- (c) To search any register kept under the land Registration (Special Areas) Act, the Government Lands Act the Land Titles Act or the Registration of Titles Act.”***

The 2nd defendant might not have been protected by that section if he had notice of the plaintiff's claim over the suit property. He had no notice of the dispute in court between the plaintiff and the first defendant. There was no caution in existent over the title by then. It was him who approached the first defendant and made an offer to buy the suit property. He made an offer because the suit property was bushy and unoccupied. So it cannot even be said that he had notice by virtue of occupation of that land by the plaintiff. The plaintiff has failed to prove fraud between the defendants and in my view, the plaintiff's claim fails. The judgment of this court is as follows:-

- 1. The plaintiff's case is dismissed with costs to both defendants.***
- 2. The second defendant's counter claim succeeds with costs being awarded to the 2nd defendant in respect of that counter claim to be paid by the plaintiff. The court further orders the plaintiff to give vacant possession to the defendant of parcel No. TIGANIA/THAGANA/252 within 30 days and in default an order shall issue for the eviction of the plaintiff from that land.***
- 3. The plaintiff shall pay the 2nd defendant Kshs. 20,000/= as general damages for occupation of that land.***
- 4. The order of inhibition issued by this court on 9th June 1998 is hereby vacated.***

Dated and delivered at Meru this 30th day of October 2009.

MARY KASANGO

JUDGE