



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAKURU**

**Civil Suit 135 of 1998**

**AVTAR SINGH CHAUHAN.....1<sup>ST</sup> PLAINTIFF**

**DICKSON MWANGI T/A ELIMU HIGH SCHOOL.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**RUTH WANJIRU SHADRACK.....1<sup>ST</sup> DEFENDANT**

**SHADRACK MURAYA MIROBI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**PLEADINGS**

By way of background information this suit was instituted by **Avtar Singh Chauhan** and **Dickson Mwangi** in their capacity as proprietors of New Elimu High School. The suit was originally against **Ruth Wanjiku Shadrack** the 1<sup>st</sup> defendant *i.e.* before **Shadrack Muraya Mirobi** joined as a co-defendant. The plaintiff sought for an order of permanent injunction against the defendant by herself, her agents and/or servants restraining her from entering, removing and in any way interfering with the plaintiff's quiet possession of their parcel of land **LR. Nos. 12795, 12792/8 and 12792/9** the running and the management of New Elimu High School built on the foresaid parcels of land adjoining Nakuru Municipality.

By way of an amended statement of defence and counterclaim the 1<sup>st</sup> defendant denied having entered into a sale agreement with the plaintiffs. The 1<sup>st</sup> defendant alleged acts of forgery, fraud and misrepresentation by the 1<sup>st</sup> plaintiff regarding the transaction. In particular the 1<sup>st</sup> defendant alleged that the 2<sup>nd</sup> plaintiff was not a party to this suit, and thus the suit was without authority by the 2<sup>nd</sup> plaintiff. Further the 1<sup>st</sup> plaintiff contended that the purported transfer of the suit premises and the change of name of the school from that of the defendant to the plaintiffs at the Registrar of Business Names were done without the defendants' knowledge or authority. The 1<sup>st</sup> defendant therefore by way of counterclaim sought for orders of eviction of the plaintiffs from the suit premises and an order for the rectification of the register in respect of the suit premises and the cancellation of the plaintiffs names as the legal owners of the school.

On 12<sup>th</sup> May 2006 the 2<sup>nd</sup> defendant sought leave of the court to be enjoined in these proceeding, and to file a defence and counterclaim. By the consent of the parties which was recorded on 16<sup>th</sup> May 2006

the 2<sup>nd</sup> defendant was granted the leave and he therefore filed his defence and counterclaim. The 2<sup>nd</sup> defendant denied as the first registered proprietor of the suit premises having signed any agreement of sale of the suit premises or the documents of transfer. It was the 2<sup>nd</sup> defendant's view that the school which is built on the suit premises belongs to the 1<sup>st</sup> defendant and the transfer by the plaintiffs was through forged documents. The 2<sup>nd</sup> defendant enumerated the particulars of fraud and he sought for orders of the cancellation of the titles over the three suit premises and the rectification of the register to restore his name as the legal owner.

## THE EVIDENCE

In support of his claim, the plaintiff gave evidence and relied on the evidence of **Jafferson Mwakio Mwatabu[PW2]** who is also the headmaster of the New Elimu Secondary school. **Avta Singh Chauhan PW1** testified that on, or about 1988, he was introduced to the defendants by Dickson Mwangi the 2<sup>nd</sup> plaintiff who was his former student. The co-plaintiff confided in him that his parents who were running Elimu High School were in dire financial straits. The school was facing eminent danger of being sold by way of public auction by the bank where the defendants had taken a loan. The plaintiff met the defendants, they negotiated the sale of the school and the suit premises. An agreement was signed on 10<sup>th</sup> November 1988. It was agreed that the 1<sup>st</sup> plaintiff would purchase the three parcels of land for Kshs 920,000/-. A sum of Kshs 450,000/- was to be paid when the sale agreement was signed that is 10<sup>th</sup> November 1988 and the balance of Kshs 470,000/- was to be paid on 30<sup>th</sup> June 1989. It was agreed that the sum of Kshs 450,000/- would be utilized to pay the outstanding debt with National Bank of Kenya

The same day another agreement was signed this time with the name of the two plaintiffs and the reasons advanced by the plaintiff for the two agreements was because the first agreement was erroneously entered between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant whom they realized was not the registered proprietor and this necessitated the preparation of the second agreement. The plaintiff said that the second agreement was executed later but it was backdated by his advocates. The plaintiff produced several receipts for the monies he claimed he paid towards the purchase price to M/s Patel & Kagucia Advocates. A receipt dated 11<sup>th</sup> November 1988 for Kshs 370,000/-. It is indicated the payment is being in respect of Ruth Shadrack LR. No.s. 1279/5/8/9 by K. M. Patel and J. G. Kagucia. The second payment was by the 1<sup>st</sup> plaintiff and Sarwan Singh for Kshs 80,000/- which was paid on 15<sup>th</sup> November 1988 for Kshs 80,000/- being on account of Ruth Shadrack. There was also a payment on 21<sup>st</sup> October 1988 of Kshs 70,000/- paid to the said firm of advocates being payment to Shadrack Muraya.

On 22<sup>nd</sup> March 1989 the plaintiffs paid Kshs 30,000/- which is indicated as disbursement in Shadrack Muraya. On 27<sup>th</sup> June 1989 the plaintiff paid Kshs 234,000/- and it is indicated being the payment of Ruth Shadrack. There is also a handwritten note which indicates that Shadrack Muraya received a sum of Kshs 184,000/- from his son Dickson Mwangi Muraya in respect of the partnership with the 1<sup>st</sup> plaintiff and Sarwan Singh who were trading as New Elimu Secondary School. From the bundle of documents produced by the plaintiffs there are transfers of the three plots which are dated 13<sup>th</sup> April 1989 for plot No. 12792/8 which was registered on the 21<sup>st</sup> April 1989 in favour of the plaintiffs. Similarly, the transfer of LR. No. 12792/9 was registered on the same day and also transfer of LR. No. 12795 was registered in favor of the plaintiff.

The 1<sup>st</sup> plaintiff further testified that from 1988 he continued running the school without any major events until the year 1998 when the 1<sup>st</sup> plaintiff started interfering with the operations of the school. When the plaintiff took possession of the school he made improvements by adding classrooms, water tank, kitchen, dormitories, bathrooms, toilets, computer room, laboratory as well as library and gates. The school enrolment also increased from the original 34 students to about 500 students. The 1<sup>st</sup> defendant started interfering by bringing students to school to learn for free. The defendant also started visiting the school to interfere with the running of the school. On one occasion the 1<sup>st</sup> defendant brought a letter by an advocate by the name of Lawrence Mwangi demanding to be given the accounts of the

school and demanding to introduce an auditor to audit the school accounts. The 1<sup>st</sup> defendant also brought a group of Christians to stay in the school and carry out a conference without authority from the plaintiff. The 1<sup>st</sup> defendant also attempted to conduct a fundraising event ostensibly for the school and printed cards without the involvement of the plaintiff. The 1<sup>st</sup> defendant would also carry out radio announcements that she had been swindled of the school by the plaintiff and therefore calling upon the students not to report to school and she attempted to lock the gates of the school. All these acts were disrupting of the smooth running of the school and the plaintiff sought for the order of injunction.

These incidences of interferences by the 1<sup>st</sup> defendant were also reiterated in the evidence by PW2. In further testimony the plaintiff stated that he acquired the 20% shares from Dickson Mwangi who executed an agreement of sale of shares and transfer of the property for Kshs 1.4 million. The sale agreement was signed on 14<sup>th</sup> January 2003.

On the part of the defendants, they both denied having sold the suit premises. The 1<sup>st</sup> defendant was categorical that she had hired the 1<sup>st</sup> plaintiff as a teacher to take over the management of the school and pay the loan with the bank. There was no time she ever entered into the sale agreement of the land that belonged to her husband. The 1<sup>st</sup> defendant testified that she discovered when she visited the National Bank that her titles had been transferred to the plaintiff to her utter dismay and shock. She started demanding for the school from the plaintiff and also the accounts for the period that the plaintiff had been running and managing the school. The 1<sup>st</sup> defendant denied that any money was paid to her although she was the owner of the premises which was carrying on a business by the name and style of Elimu Secondary School. The reason why she was sending children to school without school fees is because she knew the school belonged to her.

On the part of the 2<sup>nd</sup> defendant he denied having signed the sale agreement of the suit premises or the transfers. He however admitted that the titles had been given to the 1<sup>st</sup> defendant to obtain a loan from the bank to build the school. That is when the 1<sup>st</sup> defendant employed the plaintiff as the manager and his mandate was to run the school and pay the outstanding debt. All the parties made extensive submissions, in support of their respective positions, the plaintiff's counsel, and the 2<sup>nd</sup> defendant's counsel made some reference to case law.

## ANALYSIS OF THE EVIDENCE

I have read the submissions and I will make reference to the case law in the cause of the analysis of the evidence as I seek to resolve the issue of whether the plaintiff has established his case to the required standard and whether the defendants have established their respective counterclaims, or whether the counterclaim by the 2<sup>nd</sup> defendant is statute barred, and the issue of whether the plaintiff transferred the titles over the suit premises fraudulently.

The issue of whether the 2<sup>nd</sup> defendant's counterclaim is time barred should be determined first. Counsel for the plaintiff submitted that the transfers were affected in 1988, thus, the 2<sup>nd</sup> defendant coming after 18 years to file a suit claiming the same premises, the claim should be struck out as being time barred. Counsel made reference to **section 4 of the Limitation of Actions Act** which provides that actions founded on contract may not be brought after six (6) years from the date of the cause of action.

On the part of the 2<sup>nd</sup> defendant it was Mr. Githui's view that there was fraud in the transfer and for that reason, where an action is based upon fraud the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake. See the case of **Nzoia Sugar Co. vs Kenya Ports Authority [1990] KLR 319**. Similar principles are also articulated in a persuasive authority in the case of **Archer vs. Moss [1971]1 All ER 750** where Lord Denning MR held as follows:

***“It has long been settled that ‘fraud’ in this context does not necessarily involve any moral turpitude: see Beaman v. ARTS Ltd. It is sufficient if what was done was unconscionable: see Kitchen v Royal Air***

***Forces Association, a test which was applied in the case of a building contract in Clark v Woor. Those cases show that 'fraud' is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be 'against conscience' for him to avail himself of the lapse of time. The section applies whenever the conduct of the defendant or his agent has been such as to hide from the plaintiff the existence of his right of action, in such circumstances that it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim. Applied to a building contract it means that if a builder does his work badly, so that it is likely to give rise to trouble thereafter, and then covers up his bad work so that it is not discovered for some years, then he cannot rely on the statute as a bar to the claim. The right of action is concealed by 'fraud' in the sense in which 'fraud' is used in this section.***

***It is plain that the right of action here was concealed by the fraud of someone. The builder put in rubbishy foundations and then covered them up. But was it the fraud of the 'the defendant or his agent'? The defendant says that it was not his fraud; and that the builder was not his 'agent' for the purpose. The judge found that it was both. So far as the defendant himself was concerned, the judge felt that the defendant must have indicated to the builder at some stage before the foundations were laid that he did not mind what was the nature of the foundations, provided that the house were saleable."***

As the analysis of the evidence here below will show, the 2<sup>nd</sup> defendant was perhaps not aware that his property had been transferred. Therefore, the fraud was concealed by the fact that he had given his titles to the 1<sup>st</sup> defendant to secure a loan to run the school and was not aware his titles were transferred.

According to the plaintiff, he was introduced by the 2<sup>nd</sup> plaintiff to both the defendants who were his parents. This was for the sole purpose of salvaging the school which was being threatened to be sold by way of public auction. The defendants deny that they entered into a sale agreement and contend that the plaintiff was taken as a manager with the sole purpose of running the school and paying the outstanding loan with the bank. It was the plaintiff's evidence that the condition of sale was that the 2<sup>nd</sup> plaintiff Dickson Mwangi would be given 20% shares in the partnership.

The sale agreement was entered into on 10<sup>th</sup> November 1988 for the suit premises. The partnership between the two plaintiffs was entered into on 24<sup>th</sup> February 1989 and the change of particulars of the business name was registered on 28<sup>th</sup> August 1998. Apparently this partnership agreement was entered into after the sale agreement although that was a condition precedent to the sale agreement. Be that as it may, the 2<sup>nd</sup> plaintiff who could have shed some light in this matter did not testify. According to the plaintiff's evidence the 2<sup>nd</sup> plaintiff eventually sold his shares and transferred his interest in the year 2003 for a consideration of 1.4 million and so was the 3<sup>rd</sup> partner who also did not testify.

The evidence adduced in this case, is intriguing and the issues raise some serious challenges to my mind. It is significant that I list those questions that have not at all been answered by the evidence. Firstly, it is not contested that the school Elimu High School belonged to the 1<sup>st</sup> defendant. It was her business that she used to run until she met the plaintiff. Yet there is no evidence that was produced, to show that she signed the transfer of the school as a business. What the plaintiff produced as exhibit 32, is the certificate of registration of the change of particulars. Who signed the change of particulars in favor of the plaintiff is not found in evidence.

Secondly, why the co-plaintiffs did not testify in this matter. The plaintiff testified that Dickson Mwangi was his student when they met. This student introduced him to his parents who were in serious financial difficulties, in November 1988. They were trying to get money to pay an outstanding and harassing debt. Dickson Mwangi is incorporated as a partner and a note is produced whereby he is paying the 2<sup>nd</sup> defendant Kshs 184,000/- as the purchase price. The question that comes to mind is whether this was actual payment or mere paper work. Most importantly, all these transfers were prepared by a firm of advocates. The agreement is said to have been drawn in the presence of an advocate Patel & Kagucia. There are correspondences that, the firm of Patel & Kagucia acted for the parties in this sale transaction.

Apparently these advocates did not testify in court. Their evidence would have been crucial to determine whether the 2<sup>nd</sup> defendant executed the sale agreement and the transfer. Whether they received money from the plaintiff on account of the defendants, being sale proceeds of the suit premises, or of the business, or to pay the outstanding loan. Why they received money in the name of the 1<sup>st</sup> defendant in respect of the sale of parcels of land which did not belong to her. Why they backdated a sale agreement and whether indeed the agreement was signed by the 2<sup>nd</sup> defendant. Whether Dickson Mwangi paid the 2<sup>nd</sup> defendant Ksh 184000, and I believe the questions would have been more.

As these questions continue to linger in my mind, counsel for the plaintiff submitted that his client proved to the required standard, that he purchased the suit premises and by producing the documents of transfer the burden of proving the fraud of forgery shifted to the defendants and he relied on the provisions of **Section 64 and 65 of the Evidence Act**. Further counsel argued that a document can be proved in various ways. He put forward an authority in the case of **Koinange and 13 others [1986] KLR 23** where it was held:

***“1. It is a well established rule of evidence that whosoever asserts a 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 it and they 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 reasonable doubt, it ought to be more than on a balance of probabilities.”***

I respectfully agree with the above correct principal of the law although articulated in a different set of circumstances in a succession matter. In the case before me, the 2<sup>nd</sup> defendant who was said to be the author of the signatures in the sale agreement and in the transfer, denied having signed them. His wife who was familiar with the signature too, denied that the signatures belonged to 2<sup>nd</sup> defendant. This still leads me to another question on whether the plaintiff did not similarly share the burden of proving that the transfers were signed by the 2<sup>nd</sup> defendant and that he paid the purchase price.

Another test to bear in mind is what is articulated in the text **the Law of Evidence** by Batuk Lal page 225;

***“Proof of signature and handwriting of person alleged to have signed or written document produced. – If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person’s handwriting must be proved to be in his handwriting.”***

In the same text the modes of proving a signature are as follows;

- 1. By calling a person who signed or wrote a document.***
- 2. By calling a person in whose presence the document was signed or written.***
- 3. By calling a handwriting expert.***
- 4. By calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written.***
- 5. By comparison of the court the disputed signature or writing with some admitted signature or writing.***
- 6. By proof of an admission by the person who is alleged to have signed or written the document that he signed or wrote it.***
- 7. By the statement of a deceased professional scribe, made in the diary in course of business, that***

*the signature in the document is that of a particular person.*

**8. A signature is proved to have been made if it is shown to have been made at the request of a person by some other person e.g., by the scribe who signs on behalf of the executant.**

**9. By the other circumstantial evidence.”**

I have considered the allegation of forgery against the above tests in my endeavor to resolve the issue of whether the plaintiff discharged his burden of proof. The 2<sup>nd</sup> defendant denies having signed the document. His wife also the 1<sup>st</sup> defendant denied that the 2<sup>nd</sup> defendant signed the documents. The plaintiff who sought to rely on the transfers and sale agreement to prove his case had a duty of at least calling the person who witnessed the signatures. One would imagine since the documents were drawn at the instigation of the plaintiff he would avail the witness who witnessed the signing. The plaintiff did not also call a handwriting expert, or a person familiar with the 2<sup>nd</sup> defendant's signature. In the circumstances I make a finding that on a balance of probabilities these documents of title were not signed by the 2<sup>nd</sup> defendant. The plaintiffs said that the agreement dated 10<sup>th</sup> November 1988 was back dated when they realized that the 1<sup>st</sup> defendant was not the registered proprietor. When the 2<sup>nd</sup> agreement was signed the plaintiff was not present. The plaintiff does not also seem to have given evidence on when the transfers were signed or whether he was present when they were signed.

This is a transaction that was shrouded with mystery, and it is not clear whether there was a convergence of minds between the parties. It is my considered view, with tremendous respect, that this was perhaps a contract that was entered into, by parties without a convergence of minds or one which was contrived to look like one. As stated earlier in this judgment it is not clear whether the 1<sup>st</sup> defendant was entering into an agreement over the management of the school where money would be paid to the advocates for purposes of clearing the loan. Whether the plaintiff and the 1<sup>st</sup> defendant were trying to transfer the property of the 2<sup>nd</sup> defendant without his knowledge or whether the documents were forged and presented for registration.

Another issue to consider is whether the 2<sup>nd</sup> defendant has committed the acts of interference with the school, while staking her claim over what she claims to be her property that is the school or just to spite the plaintiff.

All in all, I find that the evidence by the plaintiff has not proved his case that he lawfully acquired the school as a business and purchased the suit premises. Accordingly I dismiss the plaintiff's claim with no orders to costs for reasons that even the claim by the 1<sup>st</sup> defendant against whom he sought injunctive orders has no merit. The 1<sup>st</sup> defendant is not the registered proprietor of the suit premises and thus cannot seek for the orders. Her counterclaim is also dismissed with no order as to costs. The 2<sup>nd</sup> defendant's counterclaim is allowed. The 2<sup>nd</sup> defendant will also have the costs of the counterclaim.

**Judgment read and signed on 5<sup>th</sup> day of October 2007**

**M. KOOME**

**JUDGE**