



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

**Civil Appeal 63 of 2002**

**M'IMWITHIA M'IMATHIU.....  
..... APPELLANT**

**VERSUS**

**JERUSHA KAYATHI GAKAMU as legal representative of**

**HENRY GAKAMU(DECEASED) .....  
.....RESPONDENT**

**JUDGEMENT**

1. The Appeal herein raises only two question for determination:-

- (a) Whether the Appellant proved his case on a balance of probabilities at the trial before the subordinate court.
- (b) Whether the trial in the subordinate court was conducted fairly and properly and was there reason to dismiss the suit for being non-compliant with s.13A of the Government Proceedings Act.

2. What triggered the Appeal was the decision of M.N. Gicheru Esq., Senior Resident Magistrate made on 12.6.2001 whereby he dismissed the Appellant's suit with costs. In the suit itself, the Appellant was seeking orders that 0.50 acres of land be excised out of land parcel number Njia Chia/Mwendwa/2944 and the said land be transferred to the Appellant. He also sought general damages for alleged fraud, costs of the suit plus interest. It was his case that he was entitled to 4.10 acres of land out of Mwendwa Adjudication Section and that during the adjudication and demarcation process popularly known as "**gathering**", 2.37 acres was taken away as a result of objections by other parties and the Appellant was eventually entitled to 1.73 acres of land. It was his case further that in 1996 he went to the Lands Registry to share out his land to his two (2) sons but was surprised to find that his 1.73 acres of land had further been reduced by 0.50 acres which had been transferred to the Respondent through objector proceeding that he was unaware about. That when he went to complain to the District Land Adjudication Officer, Meru North, he was turned away and that is when he sought the consent required to file the suit in the subordinate court.

3. The Respondent's answer to the claim by the Appellant was that whereas it was true that she got 0.50 acres through her late husband., Henry Gakamu, out of land originally allotted to the Appellant the Appellant was compensated by another portion measuring 0.50 acres and that he suffered no loss, prejudice or inconvenience as a result. In any event he was not entitled to the 0.50 acres given to the Respondent's husband and the award upon objection was fair and just. It was also her case that there was no fraud in the acquisition of the 0.50 acres and the Appellant had no claim to the land.

4. Having heard both parties, the learned trial magistrate dismissed the suit and found that the Appellant had no good claim to the 0.50 acres and no fraud was committed by the Land Adjudication Officer in awarding that land to the Respondent's husband. He also dismissed the suit for not being in compliance with s.13A of the Government Proceedings Act.

5. Did the Appellant prove his case on a balance of probabilities? I have seen the evidence tendered before the subordinate court. I have also seen the Plaint as amended on 18.12.1997. At paragraph 6A thereof are averments of fraud allegedly on the part of the Respondent's husband i.e. Henry Gakamu. For avoidance of doubt the paragraph reads as follows:

**“PATRICULARS OF FRAUD (sic)**

**(a) Fraudulently in incorporating 0.50 acres of plaintiff into 2944**

**(b) Appropriating plaintiff's parcel 0.50 acres**

**(c) Annexing plaintiff's 0.50 acres without objection being filed.**

**(d) Taking plaintiff's portion without consideration”.**

6. If read closely, there is only one allegation; fraudulently taking 0.50 acres without consideration and without any objection proceedings being heard in respect thereof. Fraud is defined as **“a false representation by means of a statement or conduct made knowingly or recklessly in order to gain a material advantage.”** (Oxford Dictionary of Law 5<sup>th</sup> ed. 2002)

7. I have seen the evidence of the Appellant before the subordinate court. Save for stating that he found that the 1<sup>st</sup> Defendant is the one who had taken his land, there is no absolutely no evidence showing any statement or conduct of the Respondent's husband which can remotely be termed fraud. P.W.3 Benjamin Karemu, Demarcation Officer did not point out any specific act on the part of the Appellant which led to him acquiring the 0.50 acres by means of fraud. The records he produced showed that the Appellant was compensated with other land for the loss of 0.50 acres. Where then is the material advantage to the Appellant for that action to constitute fraud? In any event paragraph 6 of the plaint is worded in terms that connote an allegation of fraud against the Respondent's husband only and not the Land Adjudication Officer who in any event effected the orders granting the 0.50 acres to Henry Gakamu and compensating the Appellant with land elsewhere. No evidence of fraud on the part of either of the two was pleaded and strictly proved to the required standard.

8. I am satisfied from my analysis above that without strict proof of the particulars of fraud, the allegations in that regard cannot stand. I am in total agreement with the learned magistrate when he stated that he saw no proof of fraud on the part of the Defendants to the suit.

9. Without proof of fraud, the case by the Appellant had to fall as it did and in answer to my first question earlier set out, the Appellant failed to prove his case on a balance of probabilities and the dismissal by the learned magistrate cannot be faulted.

10. On my second question, I see no basis for saying that the subordinate court failed to grant the Appellant a chance to be heard. There may well have been a case that the Land Adjudication Officer in the objection filed by Henry Gakamu failed to give a hearing to both parties. I have however seen the plaint and the evidence of the Appellant and I am satisfied that once he predicated his suit on alleged fraud and failed to prove such fraud, the issue whether he was heard or not gets lost in that failure to prove fraud as one of his allegations of fraud was that no objection was filed. P.W.3 aforesaid said that in fact an objection was filed and an order issued by the Land Adjudication Officer. Again, the Appellant's contention to the contrary thereof must fail.

11. The only issue left for me to address is S.13A of the Government Proceedings Act which provides as follows:

**(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.**

**(2) The Notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars-**

**(a) the full names, description and place of residence of the proposed plaintiff;**

**(b) the date upon which the cause of action is alleged to have accrued;**

**(c) the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;**

**(d) a concise statement of the fact on which it is alleged that the liability of the Government and of any such servant or agent has arisen;**

**(e) the relief that will be claimed and , so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim”.**

12. To my mind whether or not this aspect of the case was raised or not, a court of law has the jurisdiction to apply the law whether parties point it out to court or not. It is not denied that the Appellant did not comply with this section and that is all there is to say on the matter. On all facts in any event with or without S.13A aforesaid, the Appeal would still lack merit, as did the case in the subordinate court.

13. I have no choice but to now proceed and dismiss the Appeal herein.

14. Costs thereof to the Respondent.

15. Orders accordingly.

**DATED SIGNED, AND DELIVERED AT MERU THIS 4<sup>th</sup> DAY OF July, 2006**

**I. LENAOLA,**

**JUDGE**

In the presence of:

Mr. Kariuki Advocate for the Appellant

Mr. Kirubua (absent) Advocate for the Respondent

**I. LENAOLA,**

**JUDGE**