



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C.A CASE NO. 6 OF 2019

ELIJAH NJERU MUGO.....1ST APPELLANT

PATRICK KINYUA SAMWEL.....2ND APPELLANT

VERSUS

NJERU SAMWEL M'RWINGO.....RESPONDENT

(Being an appeal from the judgement and decree in Runyenjes SRMCC No. 3 of 2018 delivered on 14th February 2019 by Hon L.K. Mwendwa – Senior Resident Magistrate)

JUDGEMENT

1. This appeal now under consideration arose from the judgement and decree of the lower court at Runyenje's (L.K. Mwenda, SRM) in SRMCC No. 3 of 2018. The two appellants – **Elijah Njeru Mugo and Patrick Kinyua Samwel** – were the plaintiffs in the case while the respondent – **Njeru Samwel M'Rwingo** – was the defendant. The suit in the lower court related to ownership of land parcel No. Kagaari/Kanja/1011 registered then as now in the name of the respondent. This appeal is essentially a contestation against that registration.

2. The parties had a common father, one Samwel Ibrahim, who was the owner of the disputed land. Samwel Ibrahim had two wives. One of the two, the respondent's mother, pre-deceased him. The other, the appellant's mother, survived him. The appellants mother got married elsewhere and went with the appellants, who were still young then. The respondent continued staying on his father's land. The father then passed on in the early 1960s. Then at some point respondent decided to do a formal succession of his late father's estate. He went to court at Runyenjes and did so. Consequent upon conclusion of the succession proceedings at Runyenjes, the respondent became the sole owner of the disputed land.

3. The appellants got to know later that the respondent had become the registered owner of the disputed land. They got to know too that their deceased biological father had expressed his wish that they too would have a share in the disputed land. Their suit in the lower court was essentially a claim of their share. According to them, the respondent was dishonest and fraudulent in the manner he filed and prosecuted succession proceedings. The Runyenjes court allegedly made him the sole heir of the deceased's estate because of mis-representations made to it. The appellants are protesting against their exclusion from the proceedings. They allege that through the proceedings the respondent appropriated to himself their share of the land.

4. The fraud surrounding the whole issue was said to consist in secretly filing succession proceedings; failing to disclose to the succession court the existence of the appellants; failing to share the estate of the deceased with the appellants; and appropriation of the disputed land by the respondent.

5. The appellants averred that they made efforts to ensure amicable settlement of the problem with the respondent but they were not successful. They asked the lower court to make a finding that the respondent holds a portion of the disputed land in trust for them. They sought justification for their position by pleading that the disputed land was ancestral and was in any case registered in the name of their deceased father. They pleaded that their father had made it clear during his lifetime that the disputed land was for all his three sons, the two of them included. The respondent was also said to have some other land.

6. In the appellants view, the respondent is in breach of trust, with manifestations of such breach allegedly shown by failure by him to honour his late father's wishes, failing to share the disputed land equally among the three sons, secretly filing and concluding succession proceedings; and refusing the plaintiffs to take possession of their entitlement.

7. In the lower court, the appellants sought, inter alia, a declaration that the respondent holds 2/3 of the disputed land in trust for them; that the respondent be ordered to transfer two acres to each of the appellants; that the respondent facilitate transfer of the land to them failing which the deputy registrar of the court be ordered to play that role; and that the court be pleased to grant any further or better relief.

8. The respondent filed his defence in the lower court and denied the appellant's entire claim. He pleaded, inter alia, that after the death of his father, the appellant's mother got married elsewhere and went with the appellants. The respondent was left as the only child of his father. When he did succession in 1977, the appellants whereabouts were not known and the appellants only emerged in the year 2001, and started claiming part of the disputed land. The respondent faulted the appellants for not challenging the succession process. He denied being fraudulent as alleged or at all and averred that the fact that he allowed the 1st appellant to use a portion of the disputed land is not of itself an indication that the appellants are entitled to the land. He pleaded that he allowed the 1st appellant to use the land on humanitarian grounds.

9. The respondent further denied that one Njagi Nyaga was a confidant of his late father. According to him, had that been the case, the said Njagi would have brought the issue of the appellants alleged entitlement to the disputed land in the succession proceedings. In the respondents view, the disputed land is his own and he does not hold it in trust for the appellants.

10. The lower court heard the matter and dismissed the appellants claim in a judgement delivered on 14/2/2019. The dismissal of the claim is what provoked this appeal.

11. In the judgement, the lower court felt that it was called upon to determine whether the suit was statute-barred; whether the respondent was fraudulent in the manner he conducted succession proceedings and got registered as owner of the disputed land; whether the respondent holds a portion of the land in trust for appellants; and, finally, which way for costs?

12. The court addressed itself to the issues and found that the suit was not statute barred as it was one based on trust; that there was no fraud proved by the appellants; and that no trust was established. The appellants were also condemned to pay costs.

13. The appeal before me came with five (5) grounds as follows:

1. The learned trial magistrate erred in fact and in law in making a finding that the respondent did not act fraudulently in failing to disclose to the Runyenjes Succession Court the existence of the appellants YET;

a. The respondent and his witnesses readily agree that the appellants were step brothers of the respondent.

b. *Ipsa facto* therefore, failure to disclose to the succession court the existence of the appellants in this world was sufficient evidence of fraud.

c. The appellants and their witnesses clearly proved fraud on the part of the respondent in filing Runyenjes Succession Cause, failing to include them as their common father's beneficiaries and getting land parcel No. Kagaari/Kanja/1011 solely registered in his name.

2. The learned trial magistrate further erred in law in failing to find that the particulars of fraud as pleaded were proved to the required standards in law.

3. The learned trail magistrate further erred in law in failing to make a finding that the respondent held land parcel No. Kagaari/Kanja/1011 in trust for them to the extent of two acres each (2/3 of the entire land parcel which measured 6.25 acres) YET;

a. There was proof by way of evidence that it was mzee Samwel Ibrahim's (deceased's) estate.

b. The appellants had no other parcel of land or property flowing from their late father's estate.

c. In 1999, the respondent allowed the 1st appellant to plant 3000 tea bushes on part of land parcel No. Kagaari/Kanja/1011 which he utilize to date.

d. Trust naturally applies in the circumstances and it is *res ipsa loquitor*.

4. That the learned trail magistrate gave a wide berth and ignored the pleadings and the supporting evidence, both oral and documentary, of the appellant's witness.

5. The judgement is against the weight of evidence on record and the law.

14. The court was invited to allow the lower court's suit and award costs both in the lower court and here to the appellants.

15. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on 10/11/2020. According to the appellants, the court needs to consider whether the respondent was fraudulent in the manner he filed succession proceedings without disclosing to the court that there were other beneficiaries apart from him. They also submitted that the court would need to consider whether the respondent holds 2/3 of the disputed land in their trust and whether the respondent is in breach of that trust.

16. Further, the court was invited to consider whether the appellants are entitled to the prayers they are seeking and ultimately decide who is to bear costs. The appellants then submitted that evidence was made available showing that the parties late father wanted the land inherited by all his three sons, the appellants included. But the respondent then went ahead to institute succession proceedings and misrepresented to the court that he was the sole heir. The respondent was said to have acknowledge during trial that he knew the appellants were his step brothers and even knew their whereabouts before the original owner of the disputed land died. He was therefore fraudulent in the manner he

filed and prosecuted succession proceedings. The appellants would wish that the court makes a finding the respondent holds 2/3 of the disputed land in trust for them.

17. The appellants laboured hard to make the point that the trust does not need to be shown on the land register. In this regard, they cited the case of **Isack M'inanga Kiebia Vs Isaanya Theuri M'Lintari & Another [2018] eKLR**. The point made is that such trust is an overriding interest which require no noting on the land register. The respondent was further said to have breached the trust by failing to disclose to the succession court that the appellants were his brothers and in also failing to honour the wishes of the original owner of the disputed land.

18. Ultimately, the appellants submitted that they had proved their case in the lower court and they should therefore have the appeal allowed with costs to them.

19. The respondent's submissions were filed on 21/12/2020. The respondent submitted that the appellants whereabouts were not known at the time the succession proceedings were filed. They had gone with their mother who had gotten re-married when the original owner of the land died. The succession took place in or around 1977 and the appellants only emerged in the year 2001 and have never challenged the succession proceedings. The respondent said that the law that applied at the time was correctly followed.

20. The respondent submitted further that at the time succession was done, the appellants were with their mother in their new home where their mother got married and he couldn't therefore commit fraud or misrepresentation against them. He obtained registration legally and/or in accordance with the law applicable at the time. He conducted succession to inherit the land in accordance with provisions of **Section 120 of the Registered Land Act, 1963**, which, *inter alia*, provided that the Land Registrar, upon being made aware of the death of a registered owner of land, was required to apply to court for determination of the rightful heirs.

21. The respondent reiterated that he could not have informed the appellants of succession as they were not there. They were with their mother in their new home at Kiriari and that is where they were brought up. There was therefore no fraud in the circumstances.

22. As regards trust, the appellants were said to have no overriding interest over the disputed land. They were said to have failed to offer evidence that the land was held in trust for them. It appears to be the position of the respondent that at the time succession was done he was the only known legitimate heir. The respondent also expressed the view that the appellants have never challenged the succession that was done. No customary trust exists, the respondent submitted. The form to transmit the disputed land to the respondent was said to have been filed by the area chief who was aware that the appellants belonged to their new home where their mother was married. The appellants only came back 36 years after succession and they started laying claim to the land.

23. In the respondent's view, the lower court correctly evaluated the evidence and made the right decision. This court was asked to dismiss the appeal.

24. I have considered the material before me, which essentially comprises the lower court proceedings, record of appeal, and rival submissions. As the first port of call in the appeal process, the law enjoins that this court looks at the entire evidence adduced at the trial, evaluate it itself, and make its own conclusions. But that has to be done with caution bearing in mind that it is the lower court that heard and saw the witness and therefore enjoyed an advantage that this court itself does not have. The cases of **Selle Vs Associated Motor Boat Company Limited [1963] EA 123, Mbogo & Another Vs Shah [1968] EA 93, and/or Otieno Ragot & Company Advocates Vs Kenya Airports Authority: CA No. 34 of 2012, Kisumu as consolidated with C.A. No. 35 of 2012 Kisumu**, are among a long line of cases making this legal position sufficiently clear.

25. To my mind, the appellants case in the lower court was founded on fraud and trust. More precisely, the respondent was said to have perpetrated fraud in the manner he registered the disputed land in his name. He was also said to have breached trust, the disputed land not having been meant as solely his but for the appellants as well. Grounds 1 and 2 relate to fraud. Ground 3 focuses on trust while grounds 4 and 5 relate to the general character of the lower court evidence particularly regarding the attention and weight given by the lower court.

26. To prove their case in the lower court the appellants called one Rahab Rwamba as PW1. Rahab testified, *inter alia*, that the deceased father of the parties in the case had expressed his wish that the parties should share the disputed land. The 1st appellant testified as PW2. He said that he got to know of succession proceedings in 1998 but didn't take action immediately. He however approached the respondent sometime later asking to be allowed to plant tea on a portion of the disputed land, and was allowed to do so. It appears clear to me that its only two witnesses who gave evidence on the appellants side in the lower court. This is also the same position regarding the respondent's side. The respondent himself testified as DW1. He maintained his position that the disputed land is his own and that he does not hold it in trust for the appellants. He called Eunastasia Wangare Njue as DW2. This one generally maintained her position that the land was not for sharing. The appellants, she said in her statement, had a new home in the place where their mother got married. They were not part of the home left behind by their mother.

27. It is this evidence that the lower court evaluated and found that it failed to prove fraud or establish trust. That is why the case was dismissed.

28. According to the appellants, the lower court was wrong. Fraud was readily shown by the demonstrated failure by respondent to disclose to the succession court that the appellants were his step-brothers and therefore beneficiaries of the estate. The filing of the succession proceedings without including them was said to be clear proof of fraud.

29. The tort of fraud is taken seriously by courts of law. In terms of proof, it is not like negligence where you can assert facts and then invoke the doctrine of **Res Ipsa Loquitor** (facts speak for themselves). The proof of fraud requires a higher standard. It is required that you plead and particularize it. That should be followed up with very clear evidence proving the particulars pleaded. In **Jennifer Nyambura Kamau Vs Humphrey Nandi: CA No. 342 of 2010, Nyeri [2013 eKLR]** the Court of Appeal sitting at Nyeri emphasized that fraud must be proved as a fact by evidence; and, more importantly, that the standard of proof is beyond a balance of probabilities. The court observed

that evidence of especially high quality and strength is required to prove fraud in civil cases. Any notion or suggestion therefore that fraud can stand proved as pleaded is incorrect and/or fallacious.

30. In this particular matter, the appellants seem to be of the view that fraud, as pleaded by them in the lower court stood proved. They are wrong. The succession proceedings in the lower court were not a matter solely of the respondent alone. In fact, from the papers provided by the appellant's themselves, there were other actors, more crucially the area chief and the Land Registrar, who seemed to be more important to the succession court than the respondent himself. I do not see it alleged or suggested that these two were also fraudulent or that they acted in cahoots with the respondent. The papers themselves do not show any misrepresentations by the respondent.

31. It seems clear to me from evidence that the appellants got to know of their deceased biological father sometimes in 1978. Evidently, by this time, succession had taken place one or two years earlier. The respondent himself is not shown to have known about the appellants. When the appellants allege then that there was secrecy surrounding the succession proceedings, I expected to be shown, that he knew about them but nevertheless chose to exclude them. When mis-representation is alleged, I expected documents or proceedings that clearly show the alleged misrepresentation. There was nothing of the sort. The appellants are instead suggesting misrepresentation by inference.

32. It seems to me that one may choose to argue that one Rahab Rwambo testified of being told by the deceased owner of the land of the desire to have all the parties inherit the land. But this begs the question: Was the respondent himself told this by the deceased? Did Rahab tell this to the respondent? These are questions without ready answers. In my view, there was not enough effort put in the case by the appellants to prove fraud. The evidence to prove fraud should be actual and/or positive, not one that only makes inferences or insinuations.

33. Apart from paucity of evidence, there is also need to mention another aspect of the alleged fraud. By the appellants own account, they got to know of the succession proceedings sometimes in 1998. It is at that time when they got to know that the succession proceedings were surrounded by secrecy and/or stealth. This case itself was filed in the year 2013. The fraud alleged in this matter consists in the alleged secrecy and/or stealth. The tort of fraud has a statutory time limit of three years (see **Section 4(2) of the Limitation of Actions Act (Cap. 22)**). The suit in the lower court was certainly filed outside this time limit.

34. In **Muigai Vs Housing Finance Company (K) Ltd & 2 Others [2003] KLR 618**, Ombija J (as he then was) held, inter alia, that the time when the cause of action arises is determined by the knowledge of the facts constituting the cause of action. In **Javed Iqbal Abdul Rahman & Another Vs Benard Alfred Wekesa Sambu & Another: CA No. 11 of 2001**, the Court of Appeal held, inter alia, that in a claim of land on the basis that registration was done by fraud, the time starts running when the said registration is discovered and the Limitation period is three years.

35. Given these positions in law, it appears to me clear that even had the appellants demonstrated fraud, they still would be hard pressed to explain why they came to court over ten (10) years after they discovered it. Their claim would still hit a dead end on this ground.

36. Finally however, one more concern about fraud. This is related to a point raised by the respondent but apparently not deemed important enough to be responded to by the appellants. The respondent questioned why the appellants have not challenged the succession proceedings. This is a crucial and pivotal point. The fraud alleged or even the breach of trust all occurred in relation to the succession proceedings. It is the succession process that gave the respondents his rights as the sole heir of the disputed land. It is that very process that was said to have been done secretly and/or stealthily. That process still stands intact and unchallenged today. It is a legal process that still has its force. Neither the case in the lower court nor the appeal case now before me is a challenge to the succession proceedings that took place. The succession proceedings can only be challenged in the manner provided for in law. More particularly, the orders made in the succession proceedings would need to be overturned or changed as a result of a direct challenge mounted precisely to overturn or change them.

37. The appellants seem to assume that a decision made in a separate suit like this one can supplant or replace the orders made in the succession proceedings. They are wrong. It behoved them to appreciate that the basic premise of their claim was in fact based on heirship. The fraud they are alleging or even the trust they claim are directly linked to that denied heirship. Neither the lower court to which the dispute was originally filed nor this appellate one is the appropriate forum to prove heirship. The proper court is the succession court. Yet they overlooked or skipped that court. I think the appellants blundered. Their case in the lower court was essentially a flawed approach to the problem they were seeking to resolve.

38. I now come to the next aspect of the case namely: The appellants alleged violation or breach of trust. Trust is always proved by evidence. The respondents have invoked a customary trust. May be that can work. But I am not so sure that I would call it so myself. As I pointed out earlier, the appellants claim is first and foremost based on heirship. They pleaded that their late father expressed his wish to have them inherit the land. Their claim is that the respondent fraudulently shortchanged them and made the land his own. In my view, had the appellants challenged the succession proceedings timeously and succeeded, the succession court would have to infer a constructive trust in their favour in order to have the records at the land office changed.

39. A constructive trust is a remedy in equity. It is not based on customary law. It is imposed by the court against a party who has obtained ownership of property by fraud or other wrongdoing. In the circumstances of the disputing parties here, the appellants would be required to have successfully demonstrated fraud. Since the respondent is already registered as the sole owner of the land, the court would have to infer a constructive trust in order to direct or command the relevant Land office to effect the necessary changes in the land register to effectuate the appellant's entitlement. But if, on the other hand, the appellants demonstrated that the deceased owner of the land had indeed given the respondent the responsibility to ensure that they got their entitlement, I would have no problem seeing the relevance of a customary trust if the respondent tried to avoid or run away, from that responsibility. Customary trust arises in various other ways but the circumstances of this case seem to suggest that a constructive trust would be the more appropriate one. A customary trust to me would also lie if it was shown that a responsibility was bestowed upon the respondent by his late father or by custom to hold the disputed land as family land. A customary trust would be inferred if the respondent tried to avoid that responsibility. That, however, does not seem to be the case here.

40. It seems plain to me that prove of trust in this matter was dependent on prove of fraud. In fact it is clear that the appellants are alleging that the respondent fraudulently breached the trust that he owed them. As fraud has not been found to be proved, the existence of trust or

even its breach has also not been demonstrated. Ultimately, the appellants have not proved grounds 1 and 2 concerning fraud or even ground 3 relating to trust. The lower court was also not wrong in the manner it appreciated the evidence before it.

41. The upshot, when all is considered is that the appeal before me has no demonstrated merits. I therefore dismiss it. The respondents will get costs of the lower court matter and the appeal.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 30TH DAY OF MARCH, 2021.

A.K. KANIARU

JUDGE

30.03.2021