



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERICHO

ELC APPEAL NO. 6 OF 2018

CHIRCHIR PAUL KIPSANG (Suing as the personal

representative of the estate of Tabsabei –Deceased).....APPELLANT

VERSUS

DAVID RONO.....RESPONDENT

Being an Appeal against the Ruling of Hon S.K Ngetich Senior

Resident Magistrate at Kericho Chief Magistrate's Court in CMCC

No. 375 of 2013 delivered on the 26th July 2018)

JUDGEMENT

1. What is before me for determination on Appeal is a matter which was heard substantially by Hon L. Kiniale Ag Senior Resident Magistrate and concluded by *Hon S.K Ngetich Senior Resident Magistrate in Kericho Chief Magistrate's Court in CMCC No. 375 of 2013* where the learned trial Magistrate, dismissed the Appellant's suit on the 26th July 2018 on the ground that he had not proved fraud allegations as against the Respondent.
2. The Appellant, being dissatisfied with the judgment of the trial Magistrate has filed the present Appeal before this Court.
3. The Grounds which the Appellant has raised in his Memorandum of Appeal include:
 - i. That the learned trial Magistrate erred in law and in fact in dismissing the Appellant's case in spite of substantial evidence both oral and documentary, that the Respondent had altered the position of the portion he purchased from the deceased in the mutation forms presented for registration.
 - ii. That the learned trial Magistrate erred in law and in fact in holding that the deceased was bound by her signatures affixed on the impugned mutation forms notwithstanding the evidence of the eyewitnesses that the Respondent had hived off a different site from the one initially surveyed and the fact that the deceased swore an affidavit prior to her demise, in support of her application for injunction dated 19th September 2013 wherein she averred that she had executed the said mutation form under the mistaken impression that the portion indicated therein was the one earlier agreed on the ground.
 - iii. That the learned trial Magistrate erred in law and in fact in holding that there was a reasonable chance that the surveyor who had surveyed the subject parcel was not qualified and therefore the Respondent was forced to procure the services of a qualified surveyor to draw the mutation forms whereas the Respondent had not even called the so called qualified surveyor as a witness to confirm as much.
 - iv. That the learned trial Magistrate erred in law and in fact in holding that PW2 was not a qualified surveyor and therefore relying on a mutation form purportedly signed by (sic) surveyor who apparently never visited the suit property and whose evidence and credentials were in fact never submitted in Court.
 - v. That the learned trial Magistrate erred in law and in fact in that he totally failed to take into account the Appellant's case and placed undue weight on the Respondent's case
 - vi. That the learned trial Magistrate erred in law and in fact in entering judgment in favor of the Respondent when there were no cogent grounds to sustain the findings.

4. The Appellant thus sought for the judgment and Decree of the trial Court to be set aside with costs to the Appellant and for this Court to make any further orders as may deem just and expedient.

5. The Court directed for the Appeal be heard by way of written submissions wherein the Appellant filed his submissions on the 8th March 2020 and the Respondent filed his submissions on 30th October 2020.

Appellant's submissions

6. The Appellant's Submissions was to the effect that in the year 2009 his deceased mother entered into a verbal agreement with the Respondent for the sale of land measuring 0.04 hectares ('50 by 100' feet) for Ksh 400,000/=, to be excised from LR No Kericho/Silibwet/1964.

7. That his deceased mother had then executed the mutation and transfer forms in favour of the Respondent after the survey exercise wherein land No. LR No Kericho/Silibwet/1964 had been subdivided resulting into LR No Kericho/Silibwet/2528 and LR No Kericho/Silibwet/2713 and registered in the names of his mother and the Respondent respectively.

8. That subsequently the Respondent had forcefully taken occupation of a different portion of land from the one that had been sold to him to wit LR No Kericho/Silibwet/2713 wherein on or about 15th August 2013, the Respondent purportedly erected temporary structures thereon. That this was done after the Respondent had taken advantage of the deceased's ignorance and had connived with a different surveyor to alter the entries made in the mutation forms with a view of switching the physical positions of their respective portions on the ground.

9. The matter had been reported to the district Land Registrar and the District Surveyor who had called for a meeting wherein the actual position of the Respondent's land had been pointed out to him but he had refused to have the matter settled amicably and had continued developing on the wrong parcel of land.

10. The Appellant thus framed his issues for determination as follows;

i. Whether the learned trial Magistrate erred in disregarding the evidence of PW1, PW2, PW3 and PW4 regarding the actual position of the land purchased by the Respondent;

ii. Whether the learned trial Magistrate erred in law and in fact in holding that the Appellant had not proved his assertion that the Respondent procured registration of parcel of land known as LR No Kericho/Silibwet/2713 by fraud

iii. What remedies are available to the parties herein.

11. On the first issue for determination, the Appellant submitted that despite there having been uncontroverted evidence by PW1, PW2, PW3 and PW4 to the effect that the Respondent had taken possession of a different portion of land from the one that had been and sold to him, the trial Magistrate disregarded this evidence and surmised that the deceased could only have been the one who could have convinced the Court that she was mistaken as to the signatures exhibited in her mutation form. The Appellant submitted that the issue before the trial Magistrate had been that the mutation forms had been fraudulently drawn to reflect a different Respondent's portion of land on the ground and not whether the deceased had executed the mutation forms. That further, the trial Magistrate decided to rely on the contents of a mutation form prepared by a surveyor who never visited the suit properties and whose credentials were never proved in Court.

12. On the second issue for determination, the Appellant herein relied on the provisions of Section 26(1)(a) of the Land Registration Act submit to that the Respondent's title to LR No Kericho/Silibwet/2713 was impeachable for reasons that he had caused the transfer and subsequent registration of the said property in his name relying on suspicious mutual forms which had not been prepared by PW2 who had visited the suit land, surveyed and excised the Respondent's portion of parcel of land.

13. Secondly, that although the Respondent had averred that the Appellant's deceased mother had voluntarily transferred the property known as LR No Kericho/Silibwet/2713 to him and that she had even appeared before the Land Control Board, there had been no evidence submitted of the said application, the Consents of the Land Control Board, and the duly registered transfer forms.

14. That the fact that the Respondent asserted that he had a valid title over the property in dispute could not preclude him from the requirement to prove that the said property had been acquired lawfully and procedurally. Reliance was placed on the decided case of **Munya Maina vs Hiram Gathina Maina [2013] eKLR**.

15. The Appellant urged the Court to find and hold that the Respondent procured the registration of the property known as LR No Kericho/Silibwet/2713 un-procedurally with the intent of defrauding the Appellant and thereafter to set aside the orders of the learned trial Magistrate accordingly and enter judgment for the Appellant as prayed in the amended Plaintiff dated 13th September 2013.

Respondent's Submission

16. The Respondent's submission after giving brief facts of the case before the trial Court and in response to the Appellant's Appeal was that it was not in contention that the Respondent had purchased a piece of land from the Appellant's deceased mother herein where the requisite documents were properly executed. That the bone of contention was on position of the said suit land on the ground.

17. That at the time the matter had come up for hearing, the original proprietor of the suit land was deceased and none of the witnesses who testified had been present during the negotiation, sale and transfer of the impugned portion of land to the Respondent. Further, that PW2 who

is said to have taken the initial measurements did not draw the mutation and was not part of the process in the preparation of the mutation or its execution thereof.

18. That the evidence to support the allegation of fraud was lacking. The facts to demonstrate what constituted fraud in the circumstances were not brought forth or substantiated. That apart from allegations that the Respondent switched positions on the ground, no other evidence had been tendered to support the allegation of fraud which was defined in the decided case in **Kibiro Wagoro Makumi vs Francis Nduati Macharia & Another [2018] eKLR**.

19. That the trial learned Magistrate in his judgment dated 26th July 2018 had considered all the evidence on record whereby he had rendered himself on each and every issue brought forth. That the Court needed not have agreed with the evidence of the Appellant's witnesses to be seen to have considered the evidence. In the alternative, he had considered the said evidence but had taken a different view.

20. That the Appellant's authority in the case of **Munya Maina (supra)** herein relied upon was distinguishable and did not support this case as it dealt with the issue of trust whereas the issue of the Respondent's acquisition of a good title was not in question. That the issue before the trial Court was on the position of the Respondent's parcel of land on the ground.

21. The Respondent submitted that the evidence tendered in the lower Court did not support the Appellant's case and that the Appellant was now re-inventing the wheel by trying to buttress the evidence on record with fresh evidence through submission without seeking the leave of Court. That the Appeal was unmeritorious and the same ought to be dismissed.

Determination.

22. I have considered the record, the Ruling by the trial Magistrate, the written submissions by the Appellant as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence. (*See Seascales Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384*).

23. I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (*See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278*).

24. By an amended Plaintiff of 13th September 2013, the Appellant herein sought for;

- i. A declaration that the Defendant obtained registration of LR No Kericho/Silibwet/2713 by fraud.
- ii. An order directing the defendant to execute the necessary documents so as to effect a valid transfer of the said land to the plaintiff.
- iii. Injunction restraining the defendant from using, developing, trespassing, selling and/or howsoever interfering with the said land.
- iv. General damages for trespass and denial of easement.
- v. Damages for breach of contract
- vi. Interest on (d) and (e) at Court rates.
- vii. Any other relief that this honorable Court may deem fit and just to grant.

25. The Respondent filed his defence dated 7th August 2014 in which he denied in toto the averments in the plaint to the effect that they were vague. That the serialized particulars of the fraud as pleaded were not true and that he was a bona fide purchaser of the suit land for value, the requisite process for processing the title documents having been strictly adhered to.

26. The matter proceeded for hearing before the Trial Magistrate on 24th November 2014. The plaintiff/Appellant testified as PW1 and as a personal representative of the estate of his deceased mother Tabsabei, to the effect that around late 2008 early 2009 the Respondent herein had brought land measuring '50 by 100' from his deceased mother for a consideration of Ksh. 400,000/= That the Respondent was shown his portion of land wherein parties sought for the services of a surveyor one Mr. Otieno, and had the Respondent's portion of land measured.

27. That later in the year 2013, PW1 who worked in Sudan was summoned back home by his mother, whom we shall refer to as the 'deceased' for the purpose of his judgment. That upon his arrival back home, the deceased had informed PW1 that the Respondent had apportioned himself a portion of land she had not sold to him. That the matter had been reported to police who had informed him that since the Respondent had already obtained title to the disputed piece of land, and that it was now a land dispute. That they then went to the land registry in Bomet wherein they had obtained a copy of the title deed to the suit land LR No Kericho/Silibwet/2713 as well as a copy of a mutation form herein produced as Pf exh 1 and 2 respectively.

28. That the mother title to LR No Kericho/Silibwet/2713 was LR No Kericho/Silibwet/1964 which had been divided into LR No 2528, 2529 and 2713. That LR No. 2528 was registered to the deceased while No. 2713, measuring 0.04 ha was registered to the Respondent. He produced the search certificate as Pf exh 4.

29. That upon realizing that the mutation form showed a different portion of land from the one the Respondent was fencing, the matter was

reported to the Land Registrar and surveyor who then called for a meeting with the affected parties.

30. That present at the meeting were the affected parties, the area chief and the two surveyors, Mr. Otieno who measured the Respondent's portion of land and one Ritah Mutai who drew the mutation but who had neither visited nor measured the portion that was to be excised for the Respondent. That it was whilst they were on site that Mr. Otieno, had shown them the position of the Respondent's land. It was thus when the Land Registrar and Surveyor proposed to change the position that the Respondent had refused and instead sought that the matter be resolved by the Court.

31. That subsequently the matter was filed in Court where there were interim injunctive orders issued to the Respondent to stop fencing the disputed portion of land. The Respondent instead threatened the Appellant and his family and continued with the construction which led to the deceased suffering a stroke wherein she later succumbed to the same and passed away. It was the Appellant's evidence that the Respondent had taken possession of 1¹/₂ times the size of land he had bought and in the process he had erected a fence that had blocked the Appellant's access to their gate.

32. The Respondent confirmed that he had neither been present during the sale transaction nor when the Respondent had been shown his portion of land. He also confirmed that although there was no written transaction, yet the deceased did not deny having sold a portion of land to the Respondent. The only issue was the position of the said portion of land.

33. The next Plaintiff witness Joseph Otieno Ombere, a licensed surveyor with Nyadiwo & Associates testified a PW2 to the effect that once the Respondent, had approached him to do a survey on a piece of land he had bought, he had gone on the site wherein in the company of the owner the deceased, one Rose, Joseph Ngetich and the Respondent, he had proceeded to measure a '50 by 100' portion of land which had been pointed out to them by the deceased. That they had then used four posts as beacons to mark the said portion but had not used concrete.

34. That later in the year 2013 he had been called again for a meeting by the Land Registrar on the suit land as there had been a dispute. That that had been when he had realized that the Respondent had fenced off a different portion of land from the one they had initially measured. He also confirmed that he had not been the one who had drawn the mutation form and that professionally, that it was important that the person who took the measurement was the one placed with the responsibility of drawing the mutation so as to know the exact position of the land. PW2 also testified that the Respondent was wild at the meeting thus causing the same to end prematurely

35. The evidence of PW2 which was taken in situ clearly demonstrated the position on the ground whereby he had taken measurements of '50 by 100'. The said evidence then went ahead to further point out that the Respondent had constructed a one storey building which fell partly outside the '50 by 100' portion of land

36. The next witness PW3 one M/s Rose Chebwogen, a neighbor and who testified on site, stated that she had been present when the land was sold to the Respondent and the measurements by the surveyor had been taken of '50 by 100' (from the toilet which she showed the Court) That there had been trees which had been cut on the Respondent's part of land (the Court was shown the tree stamps) by the deceased at the behest of the Respondent. She also confirmed that the Respondent had put up a fence closing the access road and built on a portion of land that he had not been shown. That upon being questioned, he had threatened to burn the witness who reported the matter to the police.

37. PW4 Richard Kiprono testified to the effect that while working as the deceased's employee, the Respondent had asked for a place to put his materials wherein the deceased had asked him (PW4) to accompany her to the site. That he (PW4) had seen the '50 by 100' portion of land that had trees, stones and concrete wherein he had cleared the same by cutting down the trees thereon. That the Respondent had then put up a fence and later constructed on the wrong portion of land which was the front part which was not on sale as the deceased had told him that one of her sons, Jeremiah would put up a posho mill there.

38. At the close of the Appellant's case, the Respondent had testified, and called no witnesses, to the effect that he worked with the Kenya Defence Forces (KDF) and that he had been informed by one Rotich that the deceased had wanted to sell a piece of land wherein he had approached the deceased. They had negotiated and agreed upon the price wherein he had engaged a surveyor from the firm of Nyadiwo & Associates whom he later learnt was not licensed. That after 9 (nine) months, he had paid for the survey, had been given the land, wherein the surveyor had gone with the mutation.

39. His evidence was that the deceased had consented to the subdivision and was present in the Board meeting wherein in the year 2009 he had fenced out his portion of land and put up a storey building with the consent of the deceased. It was his evidence that there had been no fraud, the title deed was in his name and that he had not trespassed on anyone's land.

40. He further testified on cross examination that parties had entered into a written sale agreement although he did not have the same in Court and that although the deceased was elderly yet she understood the terms of the transaction and had personally appeared before the Board.

41. He also confirmed that it had been Mr. Otieno whom they had both agreed upon to survey the land and who had taken the measurements and put beacons. That he had also put a permanent fence on the same day. His further evidence was that when Mr. Otieno delayed submitting the mutation form, he (Respondent) had gone back to their office wherein he had learnt that Mr. Otieno was not a surveyor but a clerk and someone else had been instructed to finish the work.

42. He also confirmed not having paid Mr. Otieno for the survey work and therefore did not have a receipt. That he neither knew who had drawn the mutation form nor one Ritah and was not aware that fresh measurements had been taken. That he also did not know if the mutation form had an error but that at the time the deceased was showing him his portion of land, there were other people PW 2 inclusive and further that there was only one tree on his portion of land. (At this juncture, the Court had noted that he was a very difficult witness.)

43. By consent, the Respondent produced his copy of the title deed to parcel No LR No Kericho/Silibwet/2713 as Df exh 1, a copy of the mutation form as Df exh 2 and a copy of the Land Register as Df exh 3.

44. The Respondant on re-examination testified that he had fallen out with Mr. Otieno because he was drunk and had not received him. That further he could not have been issued with a title deed in the absence of a sale agreement. That the deceased had signed everything regarding the transfer and consent and since she was known to the Board Members, she had done most of the processing.

45. Having considered the pleadings, the evidence on record and the submissions filed, the following issues stand out for determination:

- i. Whether the title held by the Respondent was obtained through fraud.
- ii. Whether the Appellant is entitled to the orders sought.

46. From the evidence herein adduced, I find that it is not in dispute that the deceased did sell to the Respondent a portion of land measuring '50 by 100' to be excised from the original parcel of land No. LR No Kericho/Silibwet/1964. It is also not in dispute that the position of said portion of land was identified by the deceased to the Respondent in the presence of PW2, PW3 and PW4.

47. What is in dispute however is the subsequent position of the portion of land that the Respondent took possession of and decided to put up his structure.

48. The Appellant's issue is thus that the Respondent herein caused the transfer and subsequent registration of No Kericho/Silibwet/2713 in his name relying on fraudulent mutation forms which had been drawn by a person who had not visited the suit land irrespective of the fact that PW2 had visited the suit land, surveyed measured and excised the Respondent's portion of parcel of land. That the Respondent herein then used the fraudulent mutation forms to obtain title with the effect that he ended up settling on the wrong portion of land. The Appellant thus sought for the impeachment of the Respondent's title.

49. It was **held in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR, that the** statutorily, the sanctity of title to land is assured and protected under **Section 24, 25 and 26 of the Land Registration Act 2012. It is also trite that one of the ingredients of impeaching the title of an owner of property is on the grounds of fraud or misrepresentation.**

50. The standard of proof on the issue of fraud was very clear in law wherein a party pleading the same is expected to go a notch higher than the mere balance of probability threshold as was held in the cases of **Mahendra Shah vs Barclays Bank International Ltd & Another [1979] eKLR** and in the case of **Davy vs Garrette [1978] Ch.473 at pg 469**, where it had been held that it was not allowable to leave fraud to be inferred from the facts.

51. The Appellant herein having pleaded fraud and illegality on the part of the Respondent in the manner in which he obtained the suit land, the onus was on him to prove those allegations.

52. From the Appellant's pleadings and the evidence herein adduced, it is clear and without doubt that the deceased herein had pointed out to the Respondent the position of the portion of land that she had intended to sell to him. It is also clear that the land had measured '50 by 100' which is an equivalent of 0.100 acres.

53. Further I find that the Court visited the locus in quo on the 23rd January 2015 where the evidence of PW2 was taken in situ and wherein he had demonstrated to the trial Court the measurements of the Respondent's portion and position of land measuring '50 by 100' he had taken. He had even pointed out to the trial Court that the Respondent had constructed a one storey building which fell partly on the '50 by 100' portion of land.

54. PW3, Rose Chebwogen, a neighbor who had also testified in situ, stated that she had been present when the deceased had sold the land to the Respondent. That the measurements by the surveyor had been taken as '50 by 100'. She had also demonstrated that the measurements had been from a certain toilet, which she showed the Court. Her evidence was that later in the year 2013, the Respondent had gone on the suit land where he had asked the deceased to cut down trees growing on his land. This was done but he had built on a different portion from the one he had been shown. PW4's evidence was that after he had cut them down the trees as asked by the deceased, the Respondent had constructed his building on the wrong portion of land. The trial Court had been shown the tree stamps that had remained, on the land that had been identified for Respondent.

55. From the evidence of the eye witnesses herein, it is clear that the Respondent did not take possession of the land initially identified and sold to him but constructed on another portion of land. In fact from the evidence adduced herein, it came out clearly that PW2 who had taken the measurements of the portion of land to be excised from the original land was not the same person who drew the mutation forms. The evidence is that the Mutation was drawn by one Ritah Mutai, a person who neither visited the site nor was known to the parties herein and which drawing then placed the Respondent on the wrong position of the portion of land. The Appellant's evidence was thus that the mutation culminating into the impugned Respondent's titles did not reflect the terms of the sale agreement between the Respondent and the deceased because the portion he subsequently took possession of was different. In the Respondent's own admission, he had testified that after PW2 delayed forwarding the mutation, he (Respondent) had gone back to their (PW2's) office wherein someone had been instructed to finish the work. He also testified that he did not know Ritah and was not aware that there had been fresh measurements taken.

56. I find this piece of evidence wanting for reason that the evidence herein adduced by the Appellant and his witnesses was that after the Land Registrar and the Surveyor had called a meeting, the Respondent had been informed that he had taken possession of a different portion of land. Parties had then tried to solve the issue amicably but the Respondent had become very harsh wherein had told the persons present to file the matter in Court instead. In fact one witness (PW3) had even testified that when she had questioned the Respondent as to why he was trespassing, he had threatened to burn them. He therefore could not now come to Court and feign innocence. The Respondent's assertion that he was in possession of the correct parcel of land as against the evidence received by the Court, I find was dishonest and ought to have been dismissed in the first instance.

57. It is trite that once the boundaries are marked, both the land owner and the surveyor are required to sign three copies of the [Mutation Form](#), which are further signed by a more senior surveyor, known as the [Licensed Surveyor](#). The mutation forms, together with the search document, the consent form from the Land Control Board, the [PPA1](#) and the [PPA2](#) forms are then deposited with the district survey office, where a cartographer allocates new plot numbers to the subdivided plots. The same documents are then taken to the respective land county registries to allow the land registrar to register the titles.

58. The term fraud is defined in **Black's Law Dictionary** as follows;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

59. From the above captioned definition of fraud, as well as the stated procedure regarding the drawing of mutation to the end result of issuance of the title, I find that the impugned mutation forms, which formed the basis of the allocation of plot numbers to the subdivided plots and subsequent issuance of titles to parcel No Kericho/Silibwet/2713 were not executed lawfully but were intentionally drawn with a design to obtain some unjust advantage over the deceased. I therefore find that the learned trial Magistrate erred in law and in fact in holding that the deceased was bound by her signatures affixed on the impugned mutation forms notwithstanding the evidence of the eyewitnesses that the Respondent had hived off a different site from the one initially surveyed.

60. I also find that despite there having been sufficient evidence adduced in Court to the effect that the mutation form was not drawn by a person who had visited the suit land but by someone else who had been instructed to finish the work, after the respondent had visited the surveyor's office, which evidence, although circumstantial had been corroborated by eye witnesses, the trial Magistrate had decided to rely on the contents of a mutation form which had been prepared by the purported surveyor who never visited the suit properties, whose credentials were never proved in Court and which Mutation was the bone of contention in the matter.

61. The end result on my own evaluation of the evidence in totality is that I have no difficulty holding that the learned trial Magistrate erred in his evaluation of the evidence presented before him wherein he made an erroneous finding and conclusion. I find in favour of the Appellant to the effect that the Appeal herein succeeds. The judgment of the Trial Magistrate's Court dated the 26th July 2018 is herein set aside. The Appellant shall have the costs of the Appeal.

DATED AND DELIVERED AT NAKURU THIS 18TH DAY OF MARCH 2021 (VIA TEAMS MICROSOFT CONFERENCE)

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE