



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 43 OF 2019

JOSEPH MWEGA NCOOROAPPELLANT

VERSUS

M'MUNGANIA M'ERINGURU1ST RESPONDENT

JULIUS KOBIA M'MUNGURU.....2ND RESPONDENT

SAMUEL MEME3RD RESPONDENT

CIOMUNORU MURUJU4TH RESPONDENT

NTONGAI M'IMATHIU5TH RESPONDENT

NYAMBENE DISTRICT LAND

ADJUDICATION OFFICER..... 6TH RESPONDENT

THE ATTORNEY GENERAL.....7TH RESPONDENT

(Being an appeal from the Judgment of Hon G.N WAKAHIU CM delivered on 27th December 2018 in MAUA PMCC No. 117 of 2009)

JUDGMENT

1. The appellant was the plaintiff in the lower court where he instituted the suit vide a plaint dated and filed on 01/07/2009 and amended on 14/08/2014 seeking a declaration that the transfer of the plaintiff's 16 acres out of parcel no. 362 to the 1st to 5th defendants/respondents was illegal, fraudulent and therefore null and void, an order compelling the defendants to transfer back their respective parcels within AKIRANG'ONDU 'B' ADJUDICATION SECTION to the plaintiff and in default, the Igembe District Land Adjudication and Settlement Officer be empowered to effect the said transfer. The appellant had also sought for costs of the suit.

2. It was his case that in the early 1970's he gathered several land parcels in AKIRANG'ONDU 'B' ADJUDICATION SECTION totaling to 41.31 acres which was then registered as P/no 362 within Akirang' Ondu 'B' Adjudication Section. He has occupied and developed the land and resides there with his family. That at some unspecified year, the 1st, 2nd and 3rd respondents claimed that appellant had transferred 2 acres to each of the 3 respondents of which they were given parcel numbers 1045, 1046 and 1047 which were registered in their names respectively. Again on an unspecified year, the 4th and 5th respondents were also given 5 acres each out of the appellant's parcel 362, where the said respondents were issued with registration numbers P/NO. 535 and 1286 respectively.

3. The appellant had contended that he never at any time transferred and/or sold any piece of land to the 1st to 5th defendants/ respondents, hence any such transfer is fraudulent and illegal. He further pleaded that the defendants/respondents have never occupied the suit parcels of land.

4. The 1st to 5th defendants/ respondents filed their statement of defence dated and filed on 10/09/2009 and amended with a counterclaim on 2/05/2011. The amended defence excluded the 3rd defendant/respondent who had passed on. The case for these respondents was that they bought their respective parcels of land at a consideration of Kshs. 10,000 per acre, which amounts were paid in full. The 1st and 2nd Respondents bought their parcels in 1987, the 5th respondent bought in 1991, while the 4th one bought his in 1992. That all the transactions were done before the District Land Adjudication Officer and were reduced in writing.

5. They denied the allegation of fraud and averred that the identity card numbers appearing on the transfer application were supplied by the appellant and the fingerprints are his. That upon purchase they surveyed, demarcated and took possession of their respective parcels. In the counter claim, these respondents averred that the appellant had trespassed on their land. They therefore sought an order of permanent injunction restraining the appellant from interfering with their respective parcels.

6. The 6th and the 7th respondents were brought on board the suit via the amended plaint of 14.8.2014. They filed their statement of defence dated 18.12.2014 denying the claim of the appellant, but they did not tender any evidence.

7. The suit proceeded to hearing and on 27/12/2018, the trial court delivered its judgment holding that “***the allegation of fraud have not been proven by the plaintiff to the required standard,that plaintiff’s case is without merit and the same is accordingly dismissed with costs to the defendants***”.

8. The appellant being aggrieved by the decision filed his memorandum of appeal dated 14/02/2019 basing his appeal on three (3) grounds as follows:-

i. That the learned trial magistrate erred in law in making a finding that the appellant had not proven his case to the required standards in fraud cases.

ii. That the learned trial magistrate erred in law and fact in failing to find that except for the fraudulent transfers of the suit parcels of land the respondents

a) Have never taken possession of the suit lands which have been fully occupied by the appellant,

b) The suit parcels have never been surveyed nor divided on the ground,

c) The respondents don’t know where their parcels are on the ground.

iii. The judgment/decree is against the weight of evidence on record.

9. The appeal was canvassed by way of written submissions. The Appellant submitted that there was no valid agreement between himself and the 1st to 5th respondents, that the respondents never produced the sale agreements to support the allegations of purchase as provided for in the law of contract and that the burden to do so was theirs.

10. He also submitted that it was the 6th respondent who deceived him into signing the transfer without his knowledge. He submitted that he never received any monies from the respondents in respect of the aforementioned sale. He contends that if there was any transfer, the same was fraudulent. The appellant further submitted that the respondents have never been in possession of the suit parcels.

11. The appellant urges the court to allow his appeal dismissing the respondents counter-claim with costs. He relied on the case of **Leo Investment Ltd V Estuarine Estate Ltd [2017]eKLR.**

12. The 1st to 5th respondents submitted that the onus to prove fraud was on the appellant as he was the one who alleged fraud, that during the trial, the appellant admitted to having signed the transfer and the CID witness confirmed that the thumb print on the transfer forms was his and as such he did not prove his allegation of fraud. The appellant cannot allege fraud when he willfully effected transfer in favor of the 1st to 5th respondents.

13. The 1-5th respondents submitted that the lower court properly evaluated the evidence before it in concluding that the appellant’s version was unbelievable and its judgment was proper. They urge the court to find the appeal unmeritorious and dismiss it with costs to them. They relied on the cited cases of; **Gichinga Kibutha V Caroline Nduku [2018]eKLR** and **HCCC NO 135 of 1998 Insurance Company East Africa V The Attorney General & 3 others.**

Analysis and determination

14. As the first appellate court, this court has the duty to evaluate, assess and analyze the extracts on record and make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123, Kenya Ports Authority vs. Modern Holdings (E.A.) Limited (2017) eKLR.**

15. **Pw1 Joseph Ncooro Mwega** testified and he adopted his statement recorded on 2.9.2015 as his evidence. The said statement is to be found on page 46 of the record of appeal. There in, he stated that he gathered his land in 1970 and the same was registered as parcel no. 362 consisting of 41.31 acres. He contended that the 1st -3rd respondents acquired parcels 1045, 1046 and 1047, each of them 2 acres, while 4th and 5th respondents acquired parcels 535 and 1286 each having 5 acres all from his parcel 362. Thus in total, 16 acres were transferred from his land illegally and unlawfully.

16. In his testimony in court, the appellant stated that he only sold one parcel to 1st respondent but he was not paid for it. The land officer had asked him to sign and gave him his contacts, so that if he was not paid, he would call this land officer. He stated that the alleged transfers were fraudulent as he only signed one transfer and he never signed the rest of the transfers. Further, the ID used was not his.

17. In cross-examination, **PW1** stated that he wrote to the land officer to summon the respondents and they never showed up. He never

reported the fraud to the police. His wife however did write a letter of complaint to the land officer but he does not know which lands the letter was referring to. The signature on the documents was his and the officer who asked him to sign explained to him the contents of the document before signing. He stated that he did not know whether the land had been sub-divided and he got the new land numbers from the land office.

18. **PW2 Moses Mwithimbo (CIP)** introduced himself as an officer from CID Headquarters Nairobi Criminal Records office. His testimony was that he received exhibits from an officer known as Christopher Njue from DCI Igembe South which were:-

- i. H1 a letter of land transfer of 5 acres to the 4th defendant.
- ii. H2 letter of land transfer to the 1st to 3rd defendants 2 acres each.
- iii. H3 letter of land transfer of 5 acres to the 5th defendant.
- iv. C1 and C2 elimination finger prints of the Appellant.
- v. Identification report from National Registrar of Persons of the Appellant.
- vi. Identification report of Charity Wangu Mwangi from the Registrar of Persons being in a sealed envelope.

19. The officer prepared a report which was produced as an exhibit.

20. **PW3 Stanley Imiri** adopted his statement recorded on 3.9.2015 as his evidence. He contends that he is a neighbour of the appellant where their parcels are separated by a road. He would know if a neighbour is selling land. In this case, he has never heard that respondents had bought land from the appellant, nor has he ever seen the said respondents on the said land.

21. **DW1 Ntongai M'Mathiu** adopted his recorded statement dated 26.9.2012 as his evidence. The same is to be found on page 25 of the record of appeal. There in, he states that he is the recorded owner of parcel 1286 which he bought from the appellant on 20.6.1991. In his evidence in court, DW1 stated that he was aware of the CID report of 27.11.2018. He avers that he never forced the appellant to sign any document. It was his brother who told him there was land for sale in 1981 and the appellant sold the land to him at the lands office on 20/06/1991 when the same was transferred to him. The land officer, himself, his late brother, another brother and the appellant were the ones who were present.

22. On cross examination he testified that there was no sale agreement but the land was being sold at Kshs. 10,000 per acre and he paid Kshs. 50,000 in cash to the appellant. A survey was conducted but he did not have the documents. He was in occupation and use of the land but the fence was destroyed, so he is no longer in occupation.

23. DW1 is aware that the CID report indicated that the ID Numbers in the transfer did not match, but that the said ID indicated there is the one the appellant had put.

24. Upon re-examination he stated that he was not occupying the land as the appellant evicted him and that's why he filed a counter-claim.

25. **DW2 M'Mungania M'Eringuru** testified and adopted his statement filed on 26.9.2012 as well as the statements of 2nd and 4th defendants as their evidence.. The said statements are to be found on pages 22-24 of the record of appeal. He contends that he is the registered owner of parcel 764 which is two acres which he bought from the appellant. For the 2nd respondent, his statement indicates that he bought the 2 acres from the appellant. As for the 4th respondent, her statement states that she bought 5 acres of land from appellant's parcel 362 in 1990. Her parcel became no. 535, of which she had paid sh.100 000. She is a stranger to the allegations of fraud.

26. On cross examination, DW2 stated that there was no written agreement nor any receipt to show that the money was paid because the same was done at the lands office. He never complained to the police upon being chased away by the appellant.

27. From the memorandum of appeal, the record of appeal and the rival submissions, I deem it fit to frame the issues for determination as follows;

a) Whether the transfer of the various parcels of land in favor of the respondents was fraudulent?

b) Whether the various parcels of land amounting to 16 acres (2 acres each for the 1-3 respondents and 5 acres each for the 4th and 5th respondents) should be cancelled and revert back to the appellant?

28. From the onset, it is apparent that the claim against the 3rd respondent abated years ago. The proceedings indicate that at the initial stages of the trial in Maua case no. 117 of 2009, precisely on 27.5.2010, counsel for the respondents informed the court and the parties that the 3rd respondent had died. He was never substituted. Thus there is no appeal against the 3rd respondent.

29. On the issue of transfer of the suit parcels, I find that the appellant has challenged the same on the basis that there was no valid agreements exhibited by the respondents and that the transfers were fraudulent. This being an appellate court, the court can only consider the issues which were the subject of contest before the trial court. A keen look at the amended plaint indicates that the appellant's claim was anchored on fraud, particulars of which are set out in paragraph 10 of the said amended plaint. The claim maintained by the appellant in his

pleadings and in the trial was that he never sold his land to the respondents.

30. The appellant has rightly cited the relevant law in regard to the burden of proof, where by Section 107 of the evidence Act provides as follows;

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

While section 108 thereof provides that;

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side”.

And section 109 of the said act provides that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”.

31. Thus it is trite law that he who alleges bears the burden of proving, see - ***Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR***. In the circumstances, the onus was upon the appellant to prove his claim of not having entered into any agreements for sale of land with the respondents and not to shift this burden to the respondents.

32. Further, the submissions of the appellant regarding the application of section 3 (3) of the law of contract, and section 38 (2) of the land Act are misplaced as they do not arise from what was placed before the trial court for determination. In the case of ***Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2015]***, the Supreme Court had this to say regarding an issue which had not been subjected through the judicial hierarchy;

“It is clear from the foregoing account that, at no time were the substantive issues now framed in the application before this Court, ever considered, or determined by the superior Courts. The issues now being associated with “matters of general public importance”, have clearly not evolved through the judicial hierarchy, in the mode contemplated by this Court in the Peter Oduor Ngoje case. Suffice it to say that if this Court were to admit and determine such issues, the Court would be determining them in the first instance which would be contrary to established principle, and to the design of the judicial system”.

33. In light of the foregoing analysis, I find that the appeal cannot succeed on the basis that the respondents did not produce the sale agreements in line with the law of contract.

34. The other issue to determine relating to the transfer of the suit parcel is on fraud. Was the transfer of the suit parcels to the respondents fraudulent. The appellant has correctly submitted on what amounts to fraud as defined in the Black’s law dictionary as follows;

“Fraud consist of some deceitful practice or wilful device resorted to with intent to deprive another of his right or in some manner to do him an injury...”

35. In the case of ***Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR***, the court stated that;

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt”.

Also see ***Kuria Kiarie and 2 Others vs Sammy Magera (2018) eKLR***, ***David Mwangi Murathi v Samuel Mbuthia Thuo [2018] eKLR***, ***Dennis Noel Mukhulo Ochwada & another vs Elizabeth Murungari Njoroge & another (2018) eKLR***.

36. In the instant case, the appellant has pleaded and given particulars of what he alleges were acts of fraud committed by the 1st to 5th respondents, (See paragraph 10 of the amended plaint). It was upon the appellant to adduce tangible evidence to support what he pleaded. In ***Gandy v. Caspair [1956] EACA 139*** it was held that;

“Unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record....”

37. The question is did the appellant adduce evidence which was in tandem with his pleadings?

38. As rightly observed by the trial magistrate, the appellant presented two versions of what was his truth. The first one is that he only sold one land to 1st respondent. In the second version, he claims that he never sold land to any of the respondents. The two versions are a manifestation of contradiction in the appellant’s case. He either sold some land to one of the respondents or he didn’t but he cannot peddle both scenarios as the true state of affairs.

39. Secondly, the appellant admitted during cross examination that he signed some documents; An extract of this evidence on page 76 of the

record of appeal reads as follows;

“The signature on the document is mine. The officer who asked me to sign the document. The officer had explained to me the contents of the documents before asking me to sign it”.

40. This evidence was in reference to the transfer of the appellants land to the respondents. It is a tell-tale sign that indeed the appellant was aware of the transfer.

41. Thirdly, I find that although the alleged transfers occurred years ago, the appellant never reported the fraud to the police.

42. In the case **Mary Mukami Mbachia v Land Registrar, Thika & 7 others [2021] eKLR**, the plaintiff was claiming that her title acquired in 1988 had fraudulently been transferred of which she discovered the fraud in year 2012. In that case, I rendered myself as follows:

“It is not fathomable that the plaintiff made a discovery of such great magnitude but did not find it serious enough to warrant the input of investigating agencies”.

43. Likewise in the instant matter the reference to the police was only made for purposes of this suit.

44. Fourthly, I find that the appellant has omitted crucial documents in the record of appeal. I am referring to PW 2’s report which was produced as an exhibit and appears to have guided the court immensely in arriving at a determination. I have indeed avoided an in-depth analysis of pw2’s evidence in absence of such an annexure in the record of appeal. To this end, I can state that the Record of Appeal is defective for want of the requisite documents.

45. In the case of **Bwana Mohammed Bwana vs Silvana Buko Bonaya & 2 others (2015) eKLR**, it was stated that;

“If the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law.....

An incompetent appeal divests a court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues”.

46. Suffice to say that the trial court had analyzed the said report and had stated as follows:

“There is clear evidence from the documents examiner Moses Mwithimbu that Joseph Ncooro Mwege the plaintiff herein is the one who signed transfer documents to the 1st – 5th defendants. The said documents examiner produced a report as exhibit “1” which clearly stated that the plaintiff was the executor of the transfer letters which enabled the DLASO to record the respective owners of the parcels in question”.

47. Thus even if I have not seen the report of Pw 2, the evidence of the said witness does capture that the thumbprint of the appellant was identical to what was in H1 and H3. These are the transfers to 4th and 5th respondents.

48. To this end, I find no fault in the verdict of the trial court that the evidence to prove fraud or mis-representation was inadequate.

49. I therefore conclude that this appeal is not merited. The same is dismissed with costs to respondents (save 3rd respondent who is deceased).

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 21ST DAY OF APRIL, 2021 IN PRESENCE OF:

C/A: Kananu

M. Kariuki for respondent

M/S Muriithi for appellant

HON. LUCY. N. MBUGUA

ELC JUDGE