



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT EMBU**

**E.L.C. APPEAL NO. 9 OF 2020**

**JOHN MURITHI OBADIAH.....APPELLANT**

**VERSUS**

**RUDIA KINA KURIA.....RESPONDENT**

**(Being an appeal against the judgment and decree of Hon. M.N GICHERU (C.M)**

**dated 03.06.19 in Embu Civil Suit No. 136 of 2015)**

**JUDGEMENT**

1.This appeal is a contestation of the outcome of the lower court's suit (Hon. M.N. Gicheru, CM, Embu) in Embu Civil Suit No. 136 of 2015. The appellant – **JOHN MURITHI OBADIAH** – was the defendant in the suit while the respondent in this appeal – **RUDIA KINA KURIA** – was plaintiff. The suit in the lower court related to ownership of two parcels of land viz: **Nos. KAGAARI/GICHICHE/T.140** registered in the name of the appellant, and **KAGAARI/GICHICHE/T.289** registered in the name of Kiura Mwaririre, the respondent's late husband.

2.The two parcels were said to have been owned by the respondent's late husband Kiura Mwaririre. It was averred that during his lifetime in the year 1993, he gifted the appellant land parcel No. Kagaari/Gichiche/T.289 as he was his close relative and friend. The respondent's husband is said to have been illiterate and that he had trusted the appellant to process the transfer to land parcel number Kagaari/Gichiche/T.289. But the appellant had caused himself to be registered as owner of land parcel Kagaari/Gichiche/T.140. The respondent is said to be in occupation and cultivating land parcel Kagaari/Gichiche/T.140 for over 40 years while the respondent is in occupation of Kagaari/Gichiche/T.289.

3.The respondent alleged fraud in the transfer and according to her, she had discovered the fraud while in the process of administering the estate of her husband. The respondent wanted the lower court to order the land registrar to rectify the records and have land parcel number Kagaari/Gichiche/T.140 registered in her name and for the appellant to be registered as owner of land parcel Kagaari/Gichiche/T.289.

4.The appellant denied the respondent's claim. By way of defence and counterclaim, he pleaded that the respondent had been in occupation of land parcel Kagaari/Gichiche/T.140 without his consent as the registered proprietor. He denied being in occupation of land parcel Kagaari/Gichiche/T.289 which he averred to have relinquished to the respondent and her sons in 2013. He also denied having been given the property as a gift but that he had bought it from the respondent's husband for Kshs. 60,000/-. The allegation that the respondent's husband was illiterate was disputed, with the appellant claiming that the respondent's husband had conducted the transfer and had experience in land transactions.

5.The allegations of fraud were equally denied with the respondent being put to strict proof of the same. It was argued that the respondent had made an admission that parcel of land Kagaari/Gichiche/T.289 was part of her late husband's estate and that she was in occupation of the wrong parcel. The discovery of fraud was termed as a lie as it was argued that the respondent had included land parcel Kagaari/Gichiche/T.289 in her late husband estate and had it registered in her name. In the counterclaim the appellant maintained that he was the registered proprietor of parcel number Kagaari/Gichiche/T.140 and that the respondent had been in occupation of the land without his consent. He prayed for the court to dismiss the plaintiff's suit and further for the plaintiff to be ordered to vacate his land. Further orders for cost of suit and counterclaim were prayed for.

6.The submissions filed before the lower court relied on the pleadings filed by the parties. The court in its judgment felt it was called upon to determine whether the respondent's husband had intended to transfer to the appellant L.R No. Kagaari/Gichiche/T.289 or Kagaari/Gichiche/T.140. The lower court made a determination that the respondent's husband had intended to sell land parcel Kagaari/Gichiche/T.289 and not T.140 for reasons that; the respondent was in possession of that land and by having explained how the respondent came to be registered as owner, then the burden of proof had shifted to the appellant; that the appellant had occupied the land

since he bought it and had never claimed the land the respondent occupied until the suit in the lower court was filed. Further that the evidence of the respondent had been corroborated by her witness and finally that it was probable that the respondent's husband had made an honest mistake and transferred the wrong title.

7. Ultimately, the suit was determined in favour of the respondent with the counterclaim being dismissed with costs to the respondent. The outcome of the judgment is what gave rise to this appeal.

8. The appeal before this court has four (4) grounds, which are as follows:

- 1) *The learned magistrate erred in law and fact in ignoring the submissions by the appellant and his written statement.*
- 2) *The learned magistrate erred in law and fact in accepting and believing the respondent's averments.*
- 3) *The learned magistrate erred and in fact in taking extraneous and unsubstantiated information when dealing with the case at hand.*
- 4) *The learned magistrate erred in law and in fact in granting the respondent costs of the suit.*

*The appellant therefore intends to urge this Honourable Court to:*

- a. *Set aside the judgment delivered on 3<sup>rd</sup> June 2019 and consequential orders in the EMBU CIVIL CASE NO. 136 OF 2015;*
- b. *Dismiss the respondent's suit in EMBU CIVIL CASE NO. 136 OF 2015 as having no merit; and*
- c. *Award the appellant costs for this appeal and of the suit in the lower court.*

9. The parties argued the appeal by way of written submissions. The appellant's submissions were filed on 9.09.2020. On ground 1 of the appeal, the trial magistrate was faulted for ignoring the appellant's submissions and his written statement. It was argued that in his pleadings and statement he had detailed the particulars of the sale transaction, the purchase amount for the land, the transfer process undertaken and the plot he was shown to settle in, which was Kagaari/Gichiche/T.289 which is said to have been the wrong plot, but all these are alleged to have been ignored by the trial magistrate. The court was invited to look at the statements and submissions in making a fair determination of the appeal.

10. On ground 2 of the appeal, the trial magistrate was faulted for believing the respondents averments. It was submitted that the particulars of fraud detailed by the respondent were alleged but not proven.

11. It was argued that Section 107 of the Evidence Act required the respondent to prove the allegations of fraud and in support of this, reliance was made on the case of **Ratilah Patel Vs Lalji Makanji 1957** which cited with approval the case of **Koinange Vs Koinange**. The burden of proof in fraud was said to be higher than that of balance of probabilities.

12. Doubt was cast on the respondent's narrative that she had discovered fraud while undertaking the succession process. It was argued that she had filed the suit in 2015 after filing for succession in 2013 to which she is said to have inherited land parcel Kagaari/Gichiche/T.289 and had it registered in her name. The suit has been termed as an afterthought as the applicant claims to have notified the respondent to vacate from the land via a letter dated 10<sup>th</sup> January 2015, before she filed the present suit

13. On the issue of fraud, the respondent is said to have abandoned that prayer based on her averments in her witness statement that her husband had erroneously transferred the parcel of land to the respondent. The trial magistrate in his judgment is said to have held that the appellant did not perpetrate any fraud and that the mistake was on the part of the respondent's husband. In view of this, the trial magistrate is said not to have had any reasons to cancel the appellant's registration of title as per the provisions of Section 26 of the Land Registration Act as, according to the appellant, none of the grounds stipulated in the said section had been proven. The trial magistrate is therefore said to have erred in believing what the appellant terms as the respondent's unsubstantiated averments.

14. On grounds 3 and 4 the trial magistrate is said to have erred in making a determination that the deceased had intended to transfer Land parcel Kagaari/Gichiche/T.289 to the appellant. He is said to have ignored the appellant's statements and further it was reiterated that he erred in shifting the burden of proof concerning land parcel L.R No. Kagaari/Gichiche/T140 to the appellant whereas the said land was not in dispute. According to the appellant, there was no reason for the court to render judgment in favour of the respondent or to order him to pay cost of suit while holding that no fraud was committed by the appellant. It is argued that the respondent cultivates the land and she will suffer no prejudice as according to the appellant she has no permanent development on the land.

15. The court was urged to allow the appeal, dismiss the respondent's case and allow the appellant's counterclaim with costs.

16. The respondent on her part argued that the trial magistrate had considered all the evidence adduced by the parties and made reference to pages 53 and 54 of the record of appeal to demonstrate this. According to her, that ground of appeal should fail as the court evaluated the evidence on record.

17. On the issue that the trial magistrate had believed the respondent's averments, it was submitted that there was no legal and valid transfer of the suit land without a sale agreement and neither was there proof of payment of the purchase price produced by the appellant. The

appellant is said to have confirmed not having taken possession of the suit land or establishing a proprietary interest over it.

18. The respondent's husband is said to have gifted the appellant land parcel Kagaari/Gichiche/T.289 and this is said to be confirmed from the Green Card where the entry indicated that the land was a gift. The respondent's husband is said to have intended to gift the appellant land parcel Kagaari/Gichiche/T.289 which the appellant took possession of and occupied to date.

19. According to the respondent, the burden of proving ownership was upon the appellant who is alleged to have legally acquired ownership of the suit land. In support of this reliance was made on Section 109 of the Evidence Act and the case of *Munya Miana Vs Hiram Gathiha Maina*, (2013) Eklr.

20. Further, it was submitted that the respondent's husband was illiterate and was not aware that he had picked the wrong title deed though he is said to have understood the nature of transaction he was getting into. It is argued that the respondent's husband intention was clear as the appellant took possession of the land and never complained until the year 2013 when the respondent is said to have discovered the title held was for the suit land.

21. The trial magistrate is said to have been right in ordering cancellation of the appellant's registration of the suit land and in granting the respondent cost of the suit. It was argued that the respondent's husband made an honest mistake in the title number he intended to transfer to the appellant. Further it was argued that the respondent's husband could not have given him land which was and still is in cultivation of his wife. It is said that the appellant had not explained why he did not take possession of the suit land since 1993 if the respondent's husband had intended to transfer it to him. The court was invited to uphold the trial court's judgment and dismiss the appeal with costs.

22. I have considered the appeal as filed, the lower court record, and the rival arguments proffered by both sides. The duty of an appellate court is stipulated under Section 78 of the Civil Procedure Act which states as follows

*“Subject to such conditions and limitations as may be prescribed, an appellate court shall have power;*  
(a) to determine a case finally;  
(b) to remand a case;  
(c) to frame issues and refer them for trial;  
(d) to take additional evidence or to require the evidence to be taken;  
(e) to order a new trial.  
(2.) *Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”*

Further, the Court of Appeal in the case of **Peter M. Kariuki v Attorney General [2014] eKLR**, on the duty of the appellate court, stated as follows:

*“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence”.*

23. The appellant has raised four (4) grounds of appeal. However, I am of the view that there are three issues that will best dispense with this appeal which are:

- i) Whether the trial magistrate considered the evidence and material on record in determination of the case.*
- ii) Whether the trial magistrate erred in ordering rectification of the records to have land no. Kagaari/Gichiche/T.140 registered in favour of the respondent and land parcel no. Kagaari/Gichiche/T.289 registered in favour of the appellant.*
- iii) Whether the trial magistrate erred in ordering the appellant to meet the costs of the suit.*

**i) Whether the trial magistrate considered the evidence and material on record in determination of the case?**

24. On the first issue, the trial magistrate is said to have ignored the appellant's written statements, submissions and instead relied on the respondent's averment. The appellant claims to have detailed the particulars of the sale in his pleadings and to have submitted on the grounds of fraud attributed to him but that the trial magistrate ignored the said pleadings. The respondent on her part has argued that the trial magistrate had considered all the evidence adduced by the parties. I have looked at the judgment delivered by the learned magistrate and it is evident that the court considered the evidence presented by all parties. The court in its analysis stated that it considered all the evidence before it and in my view it need not replicate the averments of the parties in its judgment. Needless to state, in its judgment the lower court was doubtful of the claims on fraud levelled against the appellant, a clear indication that the court indeed considered the pleadings and submissions by the appellant. I find that ground 1 of the appeal has no merit.

**ii) Whether the trial magistrate erred in ordering rectification of the records to have land no. Kagaari/Gichiche/T.140 registered in favour of the respondent and land parcel no. Kagaari/Gichiche/T.289 registered in favour of the appellant?**

25. In the suit before the lower court, both parties submitted that land parcels no. Kagaari/Gichiche/T.140 and Kagaari/Gichiche/T.289 belonged to the respondent's husband, who is said to have then transferred land parcel No. Kagaari/Gichiche/T.140 to the appellant. The genesis of the suit is centered on the contention of the said transfer. According to the appellant, he purchased land from the respondent's husband for value in the year 1993, and in the year 1994 he was shown the plot which he states that none of the parties was aware that it was the wrong one. He occupied the said land from the time of purchase and claims that in the year 2013, the respondent brought to his attention

that he was occupying the wrong plot.

26. According to the appellant, the respondent's husband had been the one who oversaw the registration and is said to have obtained Land Control Board's

Consent and even given out the title to land parcel Kagaari/Gichiche/T.140 at the land's office for registration in favour of the appellant.

27. The respondent on her part submitted that her late husband had gifted the appellant land parcel number Kagaari/Gichiche/T.289. However, she alleges that her husband was illiterate and he had allowed the appellant to carry out the transfer of land parcel number Kagaari/Gichiche/T.289 but instead he is said to have fraudulently registered land parcel number Kagaari/Gichiche/T.140 in his favour. The respondent submitted that the appellant has since the year 1993 been in occupation of land parcel number Kagaari/Gichiche/T.289 and only became concerned when the respondent informed her that he was registered as owner of plot number Kagaari/Gichiche/T.140 yet he occupied land parcel Kagaari/Gichiche/T.289. The respondent had pleaded fraud on the part of the appellant and sought rectification of the land records.

28. From the evidence before the lower court, and the submissions by the parties, they are both in agreement that the respondent's husband transferred land to the appellant in the year 1993, and in the year 1994 showed the appellant the land he was to occupy, which the appellant subsequently occupied and developed. Unknown to both parties, the land that the appellant occupied was different from the land of which he had been registered as owner, a fact discovered by the respondent in the year 2013. The appellant had occupied land parcel Kagaari/Gichiche/T.289, yet he had been registered as owner of land parcel Kagaari/Gichiche/T.140, which land was and still is occupied by the respondent, who claims to have resided in it for over 40 years.

29. According to the appellant, the respondent should be evicted from land parcel Kagaari/Gichiche/T.140 of which he is registered as owner as she is occupying it without his consent. It is his view that the respondent's husband had transferred to him land parcel Kagaari/Gichiche/T.140 and that, that is the land he should occupy. However, the appellant in his pleadings and submissions acknowledges not knowing at the time of purchase that the land he was occupying was the wrong parcel. On his own admission, he confirms that he occupied land parcel Kagaari/Gichiche/T.289 from the year 1994 to the year 2013 which land he was shown by the respondent's husband's to occupy. During this period he has not adduced any evidence that he disputed being in the wrong parcel of land. He admits to only have come into possession of this knowledge when the respondent informed him in the year 2013.

30. In my view, at the time of purchasing the land it appears that there was a meeting of the minds in which the appellant bought land from the respondent's husband, was shown the land, and occupied it. For over 20 years, he had occupied that land without raising any dispute. I reckon that if he had an issue regarding the location of the specific plot or the land he was purchasing, he would have disputed immediately at the time of purchase of the land yet this was never done. His willing and continued occupation of the land parcel Kagaari/Gichiche/T.289 shows the intention of both parties and is a clear testament of the appellant's satisfaction with the transaction he engaged with the respondent's husband. I therefore agree with the trial magistrate that land parcel Kagaari/Gichiche /T.289 is the land that the respondent's husband intended to sell to him.

31. The respondent pleaded that the registration of the transfer of land parcel Kagaari/Gichiche/T.140 in favor of the appellant was a result of fraud. Despite the fact that the respondent stipulates the particulars of fraud, the said particulars were not proven. It is trite law that allegations of fraud need not just be stated but must be strictly proven and I agree with the trial magistrate that there was no fraud perpetrated by the appellant. What I find, instead, is that this was a clear case of a mistake with the respondent's husband producing the wrong title to be registering in favour of the appellant.

32. In the case of **Kiplangat Arap Biator v Esther Tala Cheyegon [2016] eKLR** the court relied on the writing on Paragraph 1670 of 26 Halsbury's Laws of England, 3rd Edition where the law on the subject is stated thus:-

*“Where there exists a real common intention between the two parties to a transaction, but mistake occurs in the expression of that intention, the court may correct the mistake in order to give effect to the real intention. To justify the court in so doing, it must appear that there has been a mistake common to both the contracting parties, and that the agreement purports to have been expressed in a deed or instrument in a manner contrary to the intention of both”.*

33. As alluded to above, the intention of the parties was clear on the land that the respondent was to acquire, which was the plot that he occupied. The mistake was a common mistake by both parties and the court has the powers to give effect to the real intention of the parties. And this the court will do by rectifying that error. Section 80 of the Land Registration Act gives courts powers to rectify a title in case of a mistake. The said section provides;

*“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.*

*(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default”.*

34. In the case of **Mary Ruguru Njoroge –Vs- Hon. The Attorney General (Supra)** the court held thus;

*“The court too has powers to order the rectification of the title or register in appropriate circumstances. The court will under Section 80(1) of the Land Registration Act order the cancellation or amendment of an entry or any registration when it is satisfied*

that the registration was obtained made or omitted by fraud or mistake. Registration under the said Section, in my view, refer to and includes a title or entry in the register or on the title itself. It is however upto the party seeking rectification to prove to the court's satisfaction that there has been fraud or a mistake in the registration. In my view, the mistake referred to under section 80(1) includes both a slip like a typographical error and a substantive mistake like the registration of a wrong or erroneous name. In equity, the court also has powers to rectify in suitable circumstances any written instrument to conform with the agreement between the parties, where the instrument, by mistake, does not express the agreement and the mistake justifies the intervention of the court."

35. It is evident from the above case law and the provisions of Sections 80 of the Land Registration Act that courts have powers to rectify errors to reflect the intentions of the parties in a transaction. The trial magistrate in his judgment ordered rectification of the land records to have the appellant registered as owner of land parcel Kagaari/Gichiche/T.289, and the respondent as owner of land parcel Kagaari/Gichiche/T. 140, on account of mistake. I do not see the need to interfere with the findings of the trial magistrate as I have held that this was a case of mistake and the parties had intended to enter into a transaction for land parcel Kagaari/Gichiche/T.289 and not Kagaari/Gichiche/T.140.

**36. Whether the trial magistrate erred in ordering the appellant to meet the costs of the suit?**

The legal framework on costs is provided under Section 27 of the Civil Procedure Act, which provides that

*"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order".*

37. From the provisions of Section 27 of the Civil Procedure Act, it is clear that a court has full discretion to award costs provided the said costs follow the event. The trial magistrate was right in my view in ordering the appellant to pay costs of suit. He exercised his discretion judiciously as the appellant had filed a defense and counterclaim which the respondent successfully defended. I also see no need to interfere with the award of costs.

38. The upshot of this is that the appeal has no merits and is hereby dismissed with costs to the respondent.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 7TH DAY OF FEBRUARY, 2022.**

**IN THE PRESENCE OF KATHUNGU JOE FOR RESPONDENT AND NJERU ITHIGA FOR M/S MUTHONI NDEKE FOR APPELLANT.**

**CA: LEADYS**

**A.K. KANIARU**

**JUDGE**

**07/02/2022**