



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 29 OF 2020

ARITHI MUNGANIA.....APPELLANT

VERSUS

JAMES MWORIA (suing as the Legal Representative of the estate of

MURITHI MUNGIRIA (Deceased).....RESPONDENT

(Being an appeal from the Judgment of Hon. S. Ndegwa (P.M.) delivered

on 4th May, 2020, in Githongo PM ELC No. 1 OF 2018)

JUDGMENT

1. The appeal dated **3.6.2020** seeks to overturn the judgment delivered on **May 4th 2020** in **Githongo P.M. ELC No. 1 of 2018** on the grounds that:

a) The court was wrong in finding the respondent entitled to 4 acres of L.R No. Nkuene/U-Mikumbune/972 on account of ownership in common while there was no such evidence in support and

b) By failing to allow the counterclaim.

2. This being a first appeal, the court is expected to rehear, rehearse and review the lower court pleadings, facts and evidence and come up with its own findings and conclusions while aware that the trial court had the benefit of seeing and hearing witnesses and observing their demeanor. See ***Selle & Another -vs- Associated Motor Boat Co. Ltd [1968] EA 123***

3. The parties herein agreed by consent to canvas the appeal through written submissions. The court on 22.9.2021 directed the applicant to file and serve within 14 days thereafter the respondents to file and serve within 14 days upon service. The applicant filed on 13.10.2021 which was outside the timelines leading the respondents to file and serve theirs on 27.10.2021. An application under certificate of urgency dated 28.10.2021 was filed explaining the delay. Having considered the application and exercising its inherent powers the court allowed both submissions outside the set timelines.

4. Through a plaint dated 12.1.2018 the appellant was sued by the respondent, claiming co-ownership with the respondent's late father over **L.R No. Nkuene/U-Mikumbune/973** in shares of 4 acres and 4.20 acres respectively. He prayed for the Meru District Registrar & surveyor to partition the land, register each portion to the respective parties and a permanent injunction restraining the appellant from interfering with the respondent's 4 acres.

5. By defence and counterclaim dated 12.4.2018 the appellant averred he solely acquired Parcel No. Nkuene/Mikumbune/657 on 23.3.1965, subdivided it into two parcels No. 962 and 963 alleged if the deceased ever acquired any land from the original number, such must have been fraudulent, illegal and must be cancelled. By way of counterclaim the appellant pleaded he had subdivided the land into Parcel No. 962/963.

6. Further, the appellant pleaded the respondent was a trespasser, sought for his eviction and removal of his name from the register as a co-owner.

7. PW1 adopted his witness statement dated 12.1.2018, produced certificate of title to the suit land, search certificate dated 9.11.2017, copy of a green card, land control board letter dated 26.8.93, a joint letter with the appellant dated 2.12.2011 and a Land Registrar's letter dated 2.12.2011 as P Exh 1-9 respectively. He told the court his family and the appellant's family had been occupying the suit land since 1967,

each with a portion till the appellant chased his mother away. Thereafter the area chief wrote a letter dated 27.12.2017 seeking for alignment of the existing boundaries.

8. The appellant testified he was shocked by the appellant to deny co-ownership and to disown them only after his late father passed on, yet during his lifetime he did not seek to evict them.

9. In cross-examination PW1 maintained each family had been growing tea harmoniously, and insisted P Exh 5, 6 and 7 were voluntarily signed by both the appellant and his late father.

10. In re-examination, PW1 testified the appellant's counterclaim was brought over 47 years after the title deed was issued in 1967; maintained the possession and occupation had been voluntary and continuous since 1967. He held on to the view that the parties willingly sought the surveyor to subdivide and effect RIM changes.

11. The appellant adopted his statement dated 12.4.2019 and a list of documents dated 20.4.2019. He produced a copy of register for **L.R No. Nkunene/U-Mikumbune/657**, copy of 963, map for upper Mikumbune, letter from the area chief dated 24.11.2017 as D Exh 1-5 respectively.

12. In cross examination, the appellant admitted to have known the respondent's deceased parents since childhood though they were not related; claimed out of the sub-division of **Land Parcel No. Nkuene/U-Mikumbune/657** he sold a portion to a third party; accepted writing to the surveyor and the Land Registrar but denied he was the signatory to P Exh 7; admitted the Land Registrar visited the land and prepared a report; agreed the deceased's wife cultivated and planted tea on the suit land but had never sued her for eviction.

13. Further the appellant admitted some exhibits described him alongside the respondent as complainants, denied the signatures in P Exh 5 and 7 were his even though he had not reported the author(s) to the police. Further he admitted there was a claim against one Maingi at the Land District Tribunal in which he had jointly sued him with the respondent's son one Japhet Kiriimi Mbui. He denied promising the son a portion of the land once they were successful in the dispute.

14. In re-examination the appellant denied he signed any agreement with the deceased, or authorized the respondent to keep P Exh 1.

15. DW2 and DW3 adopted their written statements dated 12.4.2018 and 21.3.2019 respectively.

16. DW3 in cross examination admitted knowing the late Justus Mugira and his wife who had a tea farm on the appellant's shamba, which she had been harvesting over the years; claimed it was unusual for a stranger to come into another person's land and harvest tea.

17. In his written submissions dated 11.12.2019, the respondent relied on Section 24 and 26 of the Land Registration Act 2012 on sanctity of a title, cited ***Kiplagat Shelisheli Mutarakwa –vs- Joseph Rotich Kones [2018] eKLR*** over sanctity of P Exh 1 there was a good title, submitted no evidence was tendered to show P Exh 5, 6 and 7 were not authored by the appellant; urged P Exh 5 and 6 are clear proof the appellant knew the respondents' rights and interest over the suit land; relied on ***John Mburu –vs- Consolidated Bank Ltd [2018] eKLR*** to say the appellant was estopped from denying the deceased rights given P Exh 8 acknowledged receipt of a letter dated 2.12.2019.

18. Regarding D Exh 4, the respondent urged the court to find the letter affirmed co-ownership and asked the court to find that the defence testimony had acknowledged both possessory and user rights of the respondent's mother; maintained the appellant had failed to prove any fraud and relied on ***Kinyanjui Kamau –vs- George Kamau Njoroge [2015] eKLR*** on the proposition that one had to plead and prove fraud at a higher standard.

19. On the other hand the appellant's written submissions dated 16.1.2020 urged the court to be guided by **Law of Contract Act** Cap 23 and find the respondent had no agreement to prove acquisition of a share through purchase; sought refuge under **Section 6 (1) of the Land Control Act**, and the court to find the lack of Land Control Board consent vitiated any alleged sale and transfer to the respondent.

LEGAL ANALYSIS AND FINDINGS

20. The court has gone through the record as well as the written submissions filed on 13.10.2021 and 27.10.2021 respectively and proceeds to determine the grounds of this appeal.

21. On ground 3 & 7, the appellant blames the trial court for finding the respondent entitled to a portion of the suit land without supporting documents and against the evidence tendered.

22. Looking at the respondent's pleadings and the exhibits there was no objection by the appellant to their production. No specific questions were ever directed at the respondent on the acquisition, authenticity and validity of the said documents.

23. Further there were no specific questions by the appellant on alleging said documents to be forgeries. Additionally, the documents were filed alongside the plaint, and served upon the appellant. He did not insist the makers of the said documents to produce them and establish their authenticity.

24. Similarly the appellant did not demand the documents be subjected to any forensic examination if at all he believed they were forgeries. The appellant did not ask the court to compare his known signature with the one appearing in the said exhibits. In absence of such questions, objections and a forensic report to the contrary, my considered view is the trial court was correct both in fact and in law in admitting the said documentary evidence and subsequently finding them genuine, reliable and authentic.

25. Secondly the appellant under ground 2 blames the trial court for not finding the respondent's father to have secretly and fraudulently obtained a portion of Parcel No. 967. The appellant pleaded fraud in the counterclaim. It was his duty to lead evidence to that effect. P Exh 1 was issued on 20th June 1976 in joint names with identity card numbers indicated. No evidence was led to show the respondent was the one who inserted the two names in 1967 and not the Land Registrar. The appellant did not insist on the District Land Registrar as well as the members of the Land Control Board who authored P Exh 4, 5, 6 and 7 come to court and demonstrate to how his name appeared in those exhibits without his involvement.

26. Regarding the issue of fraud by way of a succession cause **No. 376 of 1998**, it is common knowledge succession matters are not done in secrecy but through public gazettement. There was no evidence that the appellant raised such claims during the lifetime of the deceased. The inference and given their joint letters, is more probable than not that the said claim was an afterthought.

27. As concerns paragraphs 12, 13, 14 and 15 of the counterclaim, the appellant did not produce any green card to show Parcel No's 657 and 972 were initially in the name of one Murithi Mungania as alleged so as to demonstrate any fraudulent transactions.

28. PW1's cross-examination by the appellant was clear. No questions were asked on the alleged fraud at all. Neither the appellant nor any of his witnesses, led any evidence to demonstrate fraud on the part of the respondent or the deceased touching on Parcel No. 972. Instead the appellant's evidence was largely on Parcel No's 657 and 963 without demonstrating how the two were related with Parcel No. 972 the subject matter herein.

29. In *Vijay Moraria –vs- Nausingh Madhusingh & Another [2000] eKLR* the court held thus

“it is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

30. In the instant case the appellant left it to the court to infer and impute fraud on the part of the respondent's and his deceased father. There was not even a single pleading or allegation that the respondent or his brother participated in the fraud together with the Land Control Board members or the Land Registrar/Surveyor.

31. Even though written submissions were made on the applicability of both the Law of Contract and Land Control Act. There were no pleadings or evidence tendered along these lines. Parties are bound by their pleadings. The lower court was right in ignoring such submissions as held in *IEBC & Another –vs- Stephen Mutinda Mule & 3 Others [2014] eKLR*.

32. Lastly the trial court having found the respondent to have proved co-ownership, and there being no evidence to impeach the title deed, it is my considered view the learned trial court properly applied **Section 103** of the **Registered Land Cap 300** now repealed and found the respondent entitled to half share of the suit land.

33. Given the forgoing it is my finding the learned trial magistrate rightfully considered the evidence and the law applicable in the circumstances of this case and reached a lawful decision. The same is upheld. The appeal is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 3RD DAY OF NOVEMBER, 2021

In presence of:

Mukanguru for appellant

Mwirigi for respondent

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE