



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 71 OF 2018**

**ISAAC MUTHURI MUGAMBI ..... APPELLANT**

**VERSUS**

**SILAS BUNDI MARETE ..... 1<sup>ST</sup> RESPONDENT**

**DARIMA PROPERTIES LTD..... 2<sup>ND</sup> RESPONDENT**

**DOUGLAS K. MURIUKI..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment of Hon. H.N. NDUNGU (C.M.) delivered on 13<sup>th</sup> December , 2018,*

*in Meru CMCC No. 212 OF 2010)*

**JUDGMENT**

1. By an appeal dated **12.2.2021** the appellant faults the judgment made in **Meru CMCC ELC No. 212 of 2020** on the grounds that: there was an error in fact and in law in dismissing the suit leading to miscarriage of justice; the court failed to analyze the evidence hence arriving at a wrong decision; the court erred by not finding the appellant had proved his case to the required standard and lastly based on the facts and evidence no court would have reached such a decision

**A. PLEADINGS**

2. This being a first appeal section 78 of the Civil Procedure Act requires the court to re-evaluate, rehearse and relook at the entire file and come up with its own findings both in law and facts.

3. The appellant had by initial plaint dated **17.5.2010** claimed breach of an agreement made on **30.4.2007** to sell to the respondent part of **Parcel No. Kibirichia/Ntumburi/815** hereinafter the suit land and remain with 2.2 acres or thereabout.

4. The appellant pleaded to his utter shock in 2008 got notice to vacate the entire land in 2008 only to find at the lands office the respondent had fraudulently transferred his entire land to his name. Through leave, there was amendment of plaint on 23.11.2017 bringing on board the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents on account of fraud and collusion. The appellant sought the sale and eventual transfer be declared invalid, cancellation of **Parcels No's Kibirichia/Ntumburi 1794 and 1796**.

5. The 1<sup>st</sup> respondent amended his defence on **8.12.2017**, denied the allegations of fraud, claimed the appellant had willingly sold and transferred **3 acres** for **Kshs. 500,000/=** in 2007 and left out **0.2 acres** which he sold to a third party. He maintained the appellant acknowledged receipt of the consideration and willingly appeared before the Land Control Board for the necessary consents.

6. By defence dated 9.4.2018 the 3<sup>rd</sup> respondent denied any fraud, claimed the appellant voluntarily relinquished vacant possession. He pleaded and averred the suit was statutory time barred as against him.

7. Parties drew out issues as follows:-

- i. Whether or not the appellant sold to the 1<sup>st</sup> respondent three portions totaling to 3 acres.**
- ii. Whether or not the 1<sup>st</sup> respondent procured registration and transfer of the extra two parcels fraudulently**
- iii. Who between the appellant and the 1<sup>st</sup> respondent was entitled to wheat proceed deposited in court.**

iv. What is the order as to costs.

**B. EVIDENCE**

8. On **8.11.2018** the appellant testified he sold to the 1<sup>st</sup> respondent one acre out of his **Parcel No. Kibirichia/Ntumburi/815** at the 2<sup>nd</sup> respondent's office in the presence of his brother PW2 on 30.4.2008 was paid and showed the 1<sup>st</sup> respondent the site where his portion would be excised. He told the court he left the original title deed, copy of I/D card, passport size photographs and PIN certificate with the 2<sup>nd</sup> respondent for subdivision. He later engaged the 3<sup>rd</sup> respondent's services as a surveyor showed him the portion to be excised for transfer to the 1<sup>st</sup> respondent, paid him for his services but unfortunately he did not show up. He maintained he sold **Parcel No. 1794** and not **Parcel No. 1798** as alleged.

9. Upon realizing irregularities he reported to CID offices Meru, his specimen signatures and those of both the respondents and PW2 were taken. The results were never communicated to him. The appellant testified that instead of investigations and action respondents, he was at one stage arrested and locked up by the police.

10. Further the appellant selling and or transferring 3 acres to the 1<sup>st</sup> respondent as per the sale agreements attached to the defence. He maintained that signatures in the sale agreements were forgeries. He adopted his two statements dated **4.6.2013** and that of **17.9.2018** together with the list of documents as **P Exh 1-9**. He blamed the fraud on the respondents and denied ever receiving consideration for the two acres as alleged or at all.

11. Further the appellant claimed PW2's name was missing in the two agreements hence a pointer to the agreements being suspicious. He testified his house, structures and graveyard for his late father were allegedly demolished by the 1<sup>st</sup> respondent in the process of evicting him.

12. In cross examination, the appellant maintained though he went to the C.I.D. offices Meru to report fraud, he did not know the outcome. He however maintained he lawfully brought a claim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents as he believed the case of fraud was not time barred. He testified he engaged the 3<sup>rd</sup> respondent through PW2 to excise and was not forced to go to the 2<sup>nd</sup> respondent for an agreement and that the wheat in issue was his. He claimed his original land No. 815 was divided into 3 portions namely 1794, 1795 and 1796 and he only attended one Land Control Board meeting for the transfer of one acre and not for the other two. He testified he was vehemently opposed to the alleged sale and transfers.

13. Further, the appellant alleged he did not understand why the respondents had not been charged for forgery and lastly admitted the court had visited the locus in quo during which he showed them where his building used to be before demolition by the 1<sup>st</sup> respondent.

14. In re-examination the appellant confirmed he had known the 1<sup>st</sup> respondent before the sale; alleged the CID officers were forcing him to sign some agreement; was categorical he attended only one Land Control Board meeting and not three and stood by his prayers for the cancellation and re-allocation of the one acre which he had sold to the 1<sup>st</sup> respondent.

15. PW2 the appellant testified how he introduced the appellant to DW1, witnessed the sale agreement and transfer of one acre but denied having been involved in the alleged 2<sup>nd</sup> and 3<sup>rd</sup> agreements. He confirmed putting the beacons for the one acre sold, testified he witnessed the 1<sup>st</sup> respondent destroy the appellant's structures and the graveyard and admitted he was present during the court scene visit though he could not verify whose wheat it was between the appellant and the 1<sup>st</sup> respondent. He confirmed visiting the CID offices Meru but was not aware if any action had been taken against the respondents.

16. In re-examination PW2 maintained he showed the 1<sup>st</sup> respondent the area to be excised for the one acre and was certain it was not near the graveyard. He insisted the other two acres were never sold and ought to revert to the appellant.

17. DW1 adopted his witness statement dated 18.6.2012 and produced D Exh 1-9 respectively.

18. In cross examination the 1<sup>st</sup> respondent confirmed the initial sale of one acre which was excised from Parcel No. 815, stated a second agreement was done on 8.10.2007 and a third agreement on 14.12.2007 after which three parcels of land were processed leading to Parcel No. 1794 and eventually 1796. DW1 confirmed the agreements, transfer and mutation forms were lawfully done with full approval of the appellant hence no irregularities or fraud could be attributed to him together with the other respondents.

19. Further DW1 told the court if there were any structures on the land the same belonged to the appellant's mother who voluntarily moved out after the sale. He testified the appellant sold him the land so as to go and purchase a land at Subuiga area. He denied destroying any structures or the graveyard as alleged or at all.

20. In cross examination DW1 denied attending any Land Control Board meetings as that was the role of the appellant though he remembered he went twice to the land office to collect his title deeds. Further the 1<sup>st</sup> respondent held on to his evidence in chief that the signatures in all the supporting documents belonged to the appellant who solely engaged the 3<sup>rd</sup> respondent's services. He confirmed the appellant voluntarily moved out of the suit land after selling and transferring it to him. Further he said he did not defraud the appellant any land and that he had not been charged in any court of law for allegedly forging the appellant's signatures as they appear in the sale agreements and the Land Control Board forms.

21. DW1 further testified the original title deed for Parcel No. 815 had been left at the 2<sup>nd</sup> respondent's offices for the 3<sup>rd</sup> respondent to undertake subdivisions and transfers in conjunction with the appellant. DW1 maintained the 3<sup>rd</sup> respondent was engaged by the appellant,

hence he had nothing to do with his activities.

22. The 3<sup>rd</sup> respondent adopted his statement dated 9<sup>th</sup> April, 2018, admitted surveying Parcel No. 815 into two subdivisions of 50 by 100 feet. Later on he was instructed by the appellant to survey a third portion as per D Exh 7. Further the 3<sup>rd</sup> respondent testified three title deeds were processed and issued to the 1<sup>st</sup> respondent.

23. In re-examination DW2 maintained a Land Control Board consent comes before a mutation form is processed and in the instant transaction all relevant processes and procedures were followed and that the appellant was the one with the foresaid consents since a surveyor is never left with any such documents but the instructing party. He denied there was any fraud as alleged or at all and maintained that all receipts showed he was paid for the services rendered. He had no reason to cause the appellant to be defrauded of his land. Similarly the 3<sup>rd</sup> respondent took the view P Exh 3 was deliberately missing some items at page 2 thereof.

24. DW3 testified she used to work with the 2<sup>nd</sup> respondent, adopted her statement of 30.7.2013, admitted she drew three agreements namely D Exh 1, 2 and 3 on 30.4.2007, 8.10.2007 and 14.12.2007 respectively and witnessed monies being given to the appellant as per D Exh 4, 5 and 6 whereof the appellant voluntarily surrendered the original title deed to her. She testified that title deeds for the three portions were eventually processed as D Exh 8.

25. Further DW3 testified the appellant had voluntarily supplied to her copies of his I/D card, PIN certificate and passport size photographs and signed the transfer forms at their offices. She denied any forgeries or fraud as alleged or at all on her part.

26. Regarding the complaint at CID offices Meru, DW3 confirmed Daniel Riungu went with both agreements and all support documents. In her view all turned out to have been duly signed by the appellant hence no fraud or forgery was ever detected established by the C.I.D offices.

27. In cross examination DW3 insisted she drew sale the agreements as a secretary, the original title deed had been left at their offices; she took the application duly signed to the Land Control Board and eventually submitted the documents to the lands office for the processing of new title deeds.

28. In re-examination, DW3 maintained the responsibility to bring the forensic report fell with the appellant; she had no obligation to insist the appellant brings PW2 as his witness in the last two agreements; admitted the appellant paid them for the services they had rendered to him and insisted there was no forgery or fraud on her part.

29. DW3, DW4 and DW5 adopted their witness statements dated 18.6.2012 respectively insisting the appellant had no home on the suit land save for his mother and that at the time of the sale, the appellant was not living on the suit premises.

30. DW7 adopted his witness statement dated 12.6.2012 insisting the appellant was living in Nanyuki and not at the suit premises. He stated any structure on the suit land was on the portion allegedly sold to one Miriti and that the appellant had no house since he used to live on the one belonging in to his late parents.

31. In re-examination, DW7 insisted the appellant had not worked on the suit land since 2007 unlike the 1<sup>st</sup> respondent who was planting wheat and he was certain three acres had been sold to the 1<sup>st</sup> respondent.

### **C. SUBMISSIONS**

32. Through written submissions dated 11.12.2018, the appellant submitted the agreements made on 8.10.2007 and 14.12.2007 and the accompanying documents were suspicious, hence there was fraud forgery and collusion on the part of the respondents. Further the appellant submitted there was no Land Control Board consent as per **Section 6 of the Land Control Act Cap 302** regarding the transactions produced by the 1<sup>st</sup> respondent. He urged the court to find the transfer void in line with **Sironga Ole Tukai –vs- Francis Arap Munga & 2 Others [2014] eKLR.**

33. Regarding the issue of limitation, the appellant sought refuge under **Section 7 of the Limitation of Actions Act Cap 22** that the period on fraud was 12 years and not three years.

34. The 1<sup>st</sup> and 3<sup>rd</sup> respondents through submissions dated 10.12.2018, urged the court to find the claim time barred based on **Section 4 (2) of Cap 22**; relied on **Watter Joe Mburu –vs- Abdul Shakoob Sheikh & 3 Others [2015] eKLR**; maintained no fraud as per **Black's Law Dictionary, 9<sup>th</sup> Edition** had been strictly proved including forgery, collusion given D Exh 4, 5 and lack of any forensic examination report. He urged the court to find failure to sue and or enjoin the Land Control Board and the Land Registrar, weakened any alleged claim of fraud.

35. Regarding the alleged eviction, the 1<sup>st</sup> and 3<sup>rd</sup> respondents submitted the appellant did not explain how the 1<sup>st</sup> respondent got vacant possession yet he did not allege any forceful eviction. In sum the 1<sup>st</sup> and 3<sup>rd</sup> respondents maintained the appellant had failed to discharge the burden of proof under **Section 107, 108, 109 and 112 of the Evidence Act Cap 80** and relied on **Kinyanjui Kamau –vs- George Kamau Njoroge [2015] eKLR.**

36. As regards damages, the 1<sup>st</sup> and 3<sup>rd</sup> respondents submitted no damage was pleaded and proved in terms of the alleged eviction, assessment of the destroyed property and relied on **African Line Transport Co. & Another –vs- Sylvester Keitany [2017] eKLR.**

37. Lastly on the wheat proceeds, the 1<sup>st</sup> and 3<sup>rd</sup> respondents urged the court to find DW1 evidence corroborated by DW4-DW8 on his

entitlement to the proceeds unlike the appellant. They urged the suit be dismissed with costs at the rate of 14% as per **Section 26 and 27 of the Civil Procedure Act**.

#### **D. WRITTEN SUBMISSIONS TO THE APPEAL**

38. The parties herein agreed by consent to canvass the appeal through written submissions dated 23.9.2021 and 23.9.2021 respectively.

39. The appellant urges the court to look his earlier submissions on page 79-103 of the record of appeal and find there was no Land Control Board consent hence the transfers were unlawful.

40. On the part of the 1<sup>st</sup> and 3<sup>rd</sup> respondents, it is submitted the appeal is incompetent for lack of a decree as per **Order 42 Rule 13 (4)** in line with the holding in ***Kyuma –vs- Kyema [1988]***, ***Kulwant Singh Roopa –vs- James Nzili Maswili [2014] Eklr***; They submit fraud was not proved as per ***Kinyanjui Kamau –vs- George Kamau Njoroge [2015] eKLR***; and that the transfers could not have happened without a Land Control Board consent; there was no denial of signing of transfer forms and reiterated their submission's and list of authorities in the record of appeal.

41. The appellant urges the court to find there was miscarriage of justice in dismissing the suit contrary to the available evidence. His main claim was that he only sold and transferred one acre and not three hence the subsequent agreements and transfer were fraudulent and based on forgeries.

42. In ***Kinyanjui Kamau –vs- George Kamau [2015] eKLR***, the Court of Appeal held any allegations on fraud must be pleaded and strictly proved. The appellant was making a serious charge of forgeries and fraud against the respondents. The standard of proof was above that of an ordinary suit. He claimed the respondents made agreements and proceeded to transfer his land using forged documents. He admitted to have reported to C.I.D officers Meru the police but unfortunately did not avail before the trial court any forensic document examiner's report in support of his allegations. As a result his assertions both in the pleadings and evidence remained merely allegations. The lower court was therefore right in finding the claim unproved to the required standard.

43. On the same vein it has been submitted that over and above the forgeries and frauds there was no Land Control Board consent hence the transactions were void and illegal. The appellant did not make such pleadings. He led no evidence led to that effect. In ***Kuria Kiarie & 2 Others –vs- Sammy Magera [2018] eKLR*** the Court of Appeal held a mere allegation that a sale agreement and a consent for transfer cannot be obtained on the same day is well below the standard of proof set in law. I therefore find the said ground of appeal as an afterthought.

44. Coming to the last issue, the respondents attack the appeal for no-compliance with **Order 42 (13) (4) (f) of the Civil Procedure Rules**. In ***Bwana Mohammed Bwana –vs- Silvano Buko Bonaya & 2 Others [2018] eKLR***, the Supreme Court held that failure to attach a decree from which the appellant was appealing goes to the root of the appeal. In my considered view, the respondents did not raise the issue at the preliminary stage when the matter came for directions. The respondents have not demonstrated the prejudice they have suffered given that they were supplied with the entire record of appeal as well as the judgment. **Section 2 of the Civil Procedure Act** which defines a decree to include a judgment.

45. Going by the case of ***Nyota Tissue Products –vs- Charles Wanga Wanga & 4 Others [2018] eKLR***, I am inclined to find striking out the appeal at this juncture would be draconian and against the letter and spirit of **Section 1A 1B and Article 159 92) 92)** of the **Constitution**. I reject the said ground of appeal.

46. In the final analysis, its my considered view this appeal lacks merit. The same is dismissed with costs to the respondents.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 3<sup>RD</sup> DAY OF NOVEMBER, 2021**

**In presence of:**

Mr. Mwanzia for appellant – present

Mutisya for 1<sup>st</sup> and 3<sup>rd</sup> respondents

Court Clerk: Kananu

**HON. C.K. NZILI**

**ELC JUDGE**