



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL CASE NO. 34 OF 2018

ASENATH KANJIRU.....APPELLANT

VERSUS

PAUL KITHINJI IKIUGU.....1ST RESPONDENT

MARTIN KIUGU.....2ND RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. M.K.N.N Maroro Principal Magistrate

Meru Civil Case No. 61 of 2014 delivered on 31st August 2018)

JUDGMENT

Summary of facts

By a plaint filed on 27th September 2012, the Appellant herein (then Plaintiff) sued the Respondents (then Defendants) for fraudulently altering Land Parcel No. Nyaki/Thuura/3715, belonging to the Plaintiff, to read Land Parcel No. Nyaki/Thuura/3716 in the name of the 1st Defendant). The Plaintiff thus approached the court seeking the following orders:

- a. An order of permanent injunction restraining the Defendants, their agents and or person claiming under their name from entering, interfering or transacting in any way with land parcel No. Land Parcel No. Nyaki/Thuura/3716;**
- b. An order of rectification of the title Land Parcel No. Nyaki/Thuura/3716 to reflect the Plaintiff's name;**
- c. Costs of the suit and incidentals thereto;**
- d. Any other remedy that the court deemed fair and just to grant.**

The 1st and 2nd Defendants filed their respective defences and denied the averments contained in the plaint and prayed for the suit to be dismissed. It was the 1st Defendant's case that the Plaintiff was the original registered owner of Land Parcel Number Land Parcel No. Nyaki/Thuura/1449 measuring 5 Ha. That pursuant to a sale agreement between the Plaintiff and the 1st Defendant, dated 8th March 2004, the Plaintiff agreed, for a consideration of Ksh. Nine Hundred Thousand (Ksh. 900,000) to excise 5 Acres out of Land Parcel No. Nyaki/Thuura/1449 and to sell the same to the 1st Defendant. In order to effect the transfer, Land Parcel No. Nyaki/Thuura/1449 was subdivided into two portions: Land Parcel No. Nyaki/Thuura/3715 and Land Parcel No. Nyaki/Thuura/3716 in the names of the Plaintiff and 1st Defendant respectively. Consequent to the processing of the new titles, the Plaintiff and the 1st Defendant discovered that on the ground, the party in occupation of Land Parcel No. Nyaki/Thuura/3715 was the 1st Respondent and the party in occupation of Land Parcel No. Nyaki/Thuura/3716 was the Plaintiff. They sought to have the position rectified on the titles so that the actual occupation would find expression in the resultant titles. To this end, and as a first step towards the intended rectification, the parties on 21st April 2008 executed an affidavit averring to the incongruence between the titles and the actual ownership of the two parcels of land on the ground. It is the 1st Defendants case that shortly afterward, the Plaintiff, being in dire need of money approached him to help her sell off bits of her parcel of land, being Land Parcel No. Nyaki/Thuura/3715. He explains that his help was necessitated by the fact that potential buyers were reluctant to purchase the property from the Plaintiff, even though she was the owner, because they could see that it is the 1st Defendant who was in occupation of the property and who had carried on the various developments thereon. It is the 1st Defendant's testimony that he, acting as agent of the Plaintiff, based on an oral agreement to that effect, sold Land Parcel No. Nyaki/Thuura/3715 to three buyers as follows: 1 Acre to Dancan Kathurima for Ksh. 220,000/= on 21st April 2008; 2 Acres to Kaimenyi M'twaruchiu vide a sale agreement dated 25th October

2008 for Ksh. 380,000/= and 2 Acres to Janet Kathambi Kithinji in exchange of a loan of Ksh. 380,000 advanced to the Plaintiff. It is the 1st Defendant's case that the Plaintiff was aware of the transactions and had even witnessed the signatures to the two sale agreements. The Land Parcel No. Nyaki/Thuura/3715 was thus subdivided between the three purchasers resulting in Land Parcel Nos. Land Parcel No. Nyaki/Thuura/3881; 3882 and 3883 respectively. The 1st Defendant thereafter sold his parcel of land, being Land Parcel No. Nyaki/Thuura/3716 to the 2nd Defendant vide a sale agreement dated 6th July 2012 for a consideration of Kenya Shillings One Million, Six Hundred and Fifty Thousand (Ksh. 1,650,000/=). The 2nd Defendant was however disabled from having a title processed in his name, on account of a caution filed over the property by the Plaintiff. The 2nd Defendant averred that he was an innocent purchaser for value and ought not to have been dragged into the suit.

The matter was heard and determined in the Chief Magistrate's court at Meru in civil case no. 61 of 2014. In the judgement delivered on 31st August 2018, the trial court found that the Plaintiff had failed, on a balance of probabilities to prove her case and thus dismissed the suit.

Issues for Determination

Aggrieved by the judgement of the trial court, the Appellant herein mounted the present appeal, lodging her memorandum of appeal on 31st August 2018. The Appellant set out four grounds of appeal as follows:

1. That the learned trial Magistrate misdirected herself in failing to make a finding against the 1st Defendant;
2. That the learned trial Magistrate erred in law and fact by failing to appreciate the evidence tendered with regard to the ownership of the Plaintiff's parcel of land;
3. The learned trial Magistrate misdirected herself in totally disregarding the evidence by the Plaintiff's witnesses on the issue of ownership;
4. The learned trial Magistrate further erred by failing to appreciate that the Plaintiff had proved her case on a balance of probabilities which was uncontroverted by the Defendant.

Submissions of counsels for the Appellant

The Appellant filed his submissions on 22nd September 2020. The 2nd Respondent filed his submissions on 28th September 2020. The 1st Respondent did not file his submissions.

The Appellant's submissions reiterated the issues raised in the memorandum of appeal, but narrowed the questions for consideration into two key issues: first, whether the Trial magistrate erred in fact and law by failing to appreciate the evidence tendered with regard to the Appellant's ownership of 5 acres from parent land Land Parcel No. Nyaki/Thuura/1449 and secondly, whether the Trial magistrate erred in fact and in law by failing to make a finding that the title in the hands of the 2nd Respondent was obtained illegally/ fraudulently. The gist of the Appellants submission dwelt on the fact that the sale of three portions of land out of Land Parcel No. Nyaki/Thuura/3715 orchestrated by the 1st Defendant was done so fraudulently and illegally. She submits that the 1st Respondent managed to get hold of her title, being Land Parcel No. Nyaki/Thuura/3715 from the land registry where she had taken the same for rectification, after which the 1st Respondent proceeded to effect the sale of land without the Plaintiff's knowledge. In relation to the 2nd Respondent, it is the Appellant's case that he is unable to hold a clean title, where the title was acquired fraudulently and illegally by the seller, being the 1st Respondent. She has quoted several authorities in support of the position, including: *Elijah Makeri Nyangw'ra Vs Stephen Mungai Njuguna & Another (2013)e KLR*; *West End Butchery Limited Vs Arthi Highway Developers Ltd & 3 others (ELC case 167 of 2007)*; *Arthi Highway Developers Ltd Vs West End Butchery Limited & 6 others (Civil Appeal 246 of 2013)*.

The 2nd Respondent reiterates that he is an innocent purchaser for value, without notice of irregularities and ought not to be barred from registration as the proprietor of Land Parcel No. Nyaki/Thuura/3716. He further submits that the Appellant has failed to prove fraud against the 1st Respondent, pointing for support at the subdivisions of land effected by the Appellant in favour of the three purchasers, effectively destroying the initial intention to have the titles rectified. The 2nd Respondent cited the case of *Joyce Wanjiku Madsen & Ano Vs Daniel Kairu Kiaraho & 3 Others [2014] e KLR* in support of his position. He prayed for the decision of the trial court be upheld and title to Land Parcel No. Nyaki/Thuura/3716 be registered in his name.

Legal analysis and opinion

Before getting into the substance of the appeal, it is instructive to call to remembrance the duty to be borne by a court invited to consider a first appeal.

In **Selle Vs Associated Motor Boat Co. [1968] EA 123**, the legal parameters and considerations for guiding a court of first appeal were set out as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the

evidence in the case generally.”

Further guidance is given by the Court of Appeal decision in *Ephantus Mwangi and Another Vs Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278*:

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, to analyze them and to arrive upon its independent conclusion, but always bearing in mind that the trial court had the advantage of seeing and hearing the parties.

Now, to the substance of the appeal. The Court has anxiously considered the proceedings before the trial court, the judgement delivered therein, the grounds of appeal, and submissions by the Appellant and 2nd Respondent.

Whereas the Appellant has set out four grounds of appeal, to the mind of the court, there are two questions for determination: first, whether the Appellant has been successful in proving fraud on the part of the 1st Respondent in relation to his dealing with Land Parcel No. Nyaki/Thuura/3716 and second, whether the 2nd Respondent ought to be registered as the proprietor of Land Parcel No. Nyaki/Thuura/3716.

It is not contested that the 1st Respondent purchased 5 acres of land to be excised from Land Parcel No. Nyaki/Thuura/1449 belonging to the Appellant. It is also not contested that in order to effect the sale and transfer, the said from Land Parcel No. Nyaki/Thuura/1449 was subdivided into two parcels of land, being Land Parcel No. Nyaki/Thuura/3715 and Land Parcel No. Nyaki/Thuura/3716 in the names of the Appellant and the 1st Respondent respectively. Also agreed by both the Appellant and the 1st Respondent is that consequent to the processing of the new titles, the Appellant and the 1st Respondent discovered that on the ground, the party in occupation of Land Parcel No. Nyaki/Thuura/3715 was the 1st Respondent and the party in occupation of Land Parcel No. Nyaki/Thuura/3716 was the Appellant. Both parties admit to being desirous of having the position rectified on the titles so that the actual occupation would find expression in the resultant titles. To that end, and as a first step towards the intended rectification, the parties on 21st April 2008 executed an affidavit averring to the incongruence between the titles and the actual ownership of the two parcels of land on the ground. It is at this point that the two accounts diverge.

The Appellant avers that the 1st Respondent went to the registry, took possession of the Appellant’s title and proceeded to sell and subdivide land to three strangers (1 Acre to Dancan Kathurima for Ksh. 220,000/= on 21st April 2008; 2 Acres to Kaimenyi M’twaruchiu vide a sale agreement dated 25th October 2008 for Ksh. 380,000/= and 2 Acres to Janet Kathambi Kithinji in exchange of a loan of Ksh. 380,000 advanced to the Plaintiff) without her consent or knowledge.

The 1st Respondent’s account is that the Appellant, being in dire need of money approached him to help her sell off bits of her parcel of land, being Land Parcel No. Nyaki/Thuura/3715. He explains that his help was necessitated by the fact that potential buyers were reluctant to purchase the property from the Appellant, even though she was the owner, because they could see that it is the 1st Respondent who was in occupation of the property and who had carried on the various developments thereon. It is the 1st Respondent’s testimony that he, acting as agent of the Appellant, sold Land Parcel No. Nyaki/Thuura/3715 to three buyers as follows: 1 Acre to Dancan Kathurima for Ksh. 220,000/= on 21st April 2008; 2 Acres to Kaimenyi M’twaruchiu vide a sale agreement dated 25th October 2008 for Ksh. 380,000/= and 2 Acres to Janet Kathambi Kithinji in exchange of a loan of Ksh. 380,000 advanced to the Appellant. It is the 1st Respondent’s case that the Appellant was aware of the transactions and had even witnessed the signatures to the two sale agreements. The Land Parcel No. Nyaki/Thuura/3715 was thus subdivided between the three purchasers resulting in Land Parcel Nos. Land Parcel No. Nyaki/Thuura/3881; 3882 and 3883 respectively. The 1st Respondent thereafter sold his parcel of land, being Land Parcel No. Nyaki/Thuura/3716 to the 2nd Respondent vide a sale agreement dated 6th July 2012 for a consideration of Kenya Shillings One Million, Six Hundred and Fifty Thousand (Ksh. 1,650,000/=). The 2nd Respondent was however disabled from having a title processed in his name, on account of a caution filed over the property by the Appellant. The 2nd Respondent avers that he is an innocent purchaser for value, having conducted the necessary search and satisfied himself that the 1st Respondent was indeed the registered proprietor of Land Parcel No. Nyaki/Thuura/3716.

There is no question that Land Parcel No. Nyaki/Thuura/3716 is registered in the name of the 1st Respondent having obtained the same through a sale of part of the Appellant’s land, originally being Land Parcel No. Nyaki/Thuura/1449. A copy of the official search undertaken on 6th July 2012 explicitly shows that the registered owner of Land Parcel No. Nyaki/Thuura/3716 is the 1st Respondent. A copy of the Title was also filed reveals that the 1st Respondent was so registered as the sole proprietor on the 3rd Day of March 2006. The assertion by the Appellant that the title was thus acquired illegally is a serious allegation.

It is trite law that the onus of proving fraud rests on the person alleging its presence and that that onus is weightier than the burden in ordinary civil cases. See - The decision in *Central Bank of Kenya Ltd Vs Trust Bank Ltd & 4 Others Civil Appeal No. 215 of 1996* where the Court of Appeal in considering the standard of proof required where fraud is alleged stated that fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof is much heavier on the person alleging than in an ordinary Civil Case.

Again in *Gladys Wanjiru Ngacha Vs Theresa Chepsaat & 4 Others (2013) e KLR*, the Court of Appeal held that allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than a mere balance of probabilities is required and that it is not enough for the appellant to have pleaded fraud. The appellant ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court.

Lastly the decision in *Christopher Ndaru Kagina Vs Esther Mbandi Kagina & another [2016] e KLR* cited with approval the case of *Paragon Finance Plc Vs D B Thakerar & Co*, where the court stated that it is well established that fraud must be distinctly alleged and also distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the court to find fraud. The burden is always on the claimant to prove fraud on the part of the Respondent. The standard of proof where fraud is alleged is high. Though it is the same civil standard of proof on a balance of probabilities, it is certainly higher than the ordinary proof on a balance of probabilities but lower than proof beyond reasonable doubt. It all depends on the nature of the issue and its gravity. Evidence of especially high strength and quality is required to meet the civil standard of proof in fraud cases. It is more burdensome.

The Appellant's allegation of fraud in fact relate to Land Parcel. Nyaki/Thuura/3715 and not to Land Parcel No. Nyaki/Thuura/3716. Even then, the ingredients of fraud alleged by the Appellant is the disposal of Land Parcel No. Nyaki/Thuura/3715 to three buyers without the knowledge or consent of the Appellant. In relation to the first transaction, involving a sale of 1 Acre to Dancan Kathurima for Ksh. 220,000/= on 21st April 2008, the sale agreement records the Sellers of the parcel of land as the Appellant and the 1st Respondent. The Appellant has even appended her signature in execution of that sale agreement. The question of the Appellant's ignorance of the transaction cannot stand especially because she does not allege that the 1st Respondent forged her signature and does not also dispute receipt of the purchase price. As noted by the Trial Court, parties to a contract are indeed bound by their signatures. In relation to the second sale agreement involving the sale of 2 Acres to Kaimenyi M'twaruchiu vide a sale agreement dated 25th October 2008 for Ksh. 380,000/=, only the 1st Respondent is listed as the seller of the land. While this is improper, as the 1st Respondent is not the owner of the land under sale, the 1st Respondent has explained his involvement in the sale as an agent of the Appellant and further on the basis of the incongruence in occupation of the parcels of land. That said, the Appellant is listed as a witness to the transaction and has appended her signature to the sale agreement as such. Again, the Appellant does not allege that the 1st Respondent forged her signature and does not also dispute receipt of the purchase price.

The Court of Appeal decision in *Mbuthia Macharia Vs Annah Mutua Ndwiga & another [2017] e KLR* noted as follows in relation to the shifting evidential burden:

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”

The last transaction involves the sale of 2 Acres to Janet Kathambi Kithinji in exchange of a loan of Ksh. 380,000 advanced to the Appellant. No sale agreement was presented to support the transaction. There is however an entry in the register showing registration of a subdivision of the title deed, being Land Parcel No. Nyaki/Thuura/ 3883 respectively in favour of Janet Kathambi Kithinji from Land Parcel. Nyaki/Thuura/3715. Janet Kathambi later sold the land to Jonah Kiruja. All the three subdivisions in favour of the three purchasers of various portions of Land Parcel Nyaki/Thuura/3715, being Land Parcel No. Nyaki/Thuura/ 3881; 3882 and 3883 are registered as being sub divisions from Land Parcel. Nyaki/Thuura/3715, registered in the Appellant's name. The assertion therefore that the 1st Respondent stole the Appellant's title to Land Parcel. Nyaki/Thuura/3715 and fraudulently had it registered as Land Parcel. Nyaki/Thuura/3716, remains unsupported. Further, it has been demonstrated that the Appellant at the very least knew of the transactions, her signature appearing on the two sale agreements, so that on a balance of probabilities, the 1st Respondent's account of acting as an agent of the Appellants carries more weight than the Appellant's outright theft of title and illegal conversion of a title to read Land Parcel. Nyaki/Thuura/3716. In the end, it appears that the Appellant has not succeeded in piercing the indefeasibility of title over Land Parcel. Nyaki/Thuura/3716.

In *Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others (Civil Appeal No. 246 of 2013)* the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of *Dr. Joseph Arap Ngok Vs Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997* where the Court categorically declared thus:

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

Similarly, Hon Justice Munyao Sila in *Elijah Makeri Nyangw'ra Vs Stephen Mungai Njuguna & Another (2013) e KLR*, while considering the application of *Section 26(1) (a) and (b) of the Land Registration Act* rendered himself as follows: -

“... the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme... Is the title impeachable by virtue of section 26(1) (b)? First, it needs to be appreciated that for section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of section 26(1) (b) is to remove protection from an innocent purchaser of innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26(1)(b) in my view is to protect the real title holders from being deprived of the titles by subsequent transactions”.

From the foregoing, it is clear that the title transferred to the 2nd Respondent has not been impeached and that therefore he ought to be registered as the proprietor of Land Parcel. Nyaki/Thuura/3716.

The appeal therefore fails and I hereby issue an order lifting the caution on Land Parcel No. Nyaki/Thuura/3716. In addition, I also issue an order that land Parcel. Nyaki/Thuura/3716 be and is hereby registered in the name of the 2nd Respondent. The costs of this Appeal shall be borne by the Appellants.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 28TH DAY OF JULY, 2021

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Mwirigi for 2nd Respondent
2. Appellant/Advocate-Absent
3. Fardowsa-Court Assistant