REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL CASE NO. 27 OF 2017

ISAAC MUTHINE M'IMANIA...APPELLANT

VERSUS

KABERIA M'ITHIUKI..1ST RESPONDENT

JEREMIAH MUTURIA MIT..2ND RESPONDENT

JUDGMENT

(Being an appeal from the Judgment and Decree of Hon. Mayamba C. A. Senior Resident Magistrate Meru Civil Case No. 688 of 2003 delivered on 23rd October 2017)

Summary of facts

By a plaint dated 20th August 2003, the Appellant herein (then Plaintiff) sued the Respondents (then Defendants) for fraudulent subdivision of Parcel No. Antubetwe/Njoune/1039 (herein after referred to as the suit property) purchased by the Plaintiff at a public auction. The Plaintiff thus approached the court seeking the following orders:

> ***a. A declaration that the Defendant's dealings and transfer of LR. No Antubetwe/Njoune/ 2464 and 2465 from original parcel number 1039 was null and void ab initio;***
>
> ***b. An order that LR. No Antubetwe/Njoune/2464 and 2465 be registered in the name of the Plaintiff;***
>
> ***c. Alternatively, a refund of Ksh. 68,000/= and general damages for fraud;***
>
> ***d. Costs and interest at court rates.***

The 2nd Defendant filed his defence and denied the averments contained in the plaint and prayed for the suit to be dismissed.

The matter was heard and determined in the Chief Magistrate's court at Meru in civil case no. 688 of 2003. In the judgment delivered on 23rd October 2017, the trial court found in favour of the Plaintiff and granted orders (c) and (d) of the orders sought.

Issues for Determination

Aggrieved by the judgment of the trial court, the Appellant herein mounted the present appeal, lodging his memorandum of appeal on 23rd November 2017. The Appellant set out five grounds of appeal as follows:

> *1. That the learned trial Magistrate erred in law by holding that subdivision and transfer of original parcel No. Antubetwe/Njoune/1039 was valid;*
>
> *2. That the learned trial Magistrate erred in law and fact by holding that the ownership of land 2464 by the 2nd Defendant was valid despite the evidence to the contrary;*

3. The learned trial Magistrate erred in law by holding that the Plaintiff was entitled to a refund of Ksh. 68,000/= plus interest despite the Plaintiff having lawfully bought the suit land pursuant to a valid court decree;

4. The learned trial Magistrate further erred in law and fact in that she disregarded the evidence on record and the judicial authorities which were tendered before the Honourable court by the Appellant's advocates which were relevant;

5. The learned trial Magistrate's judgment is against the weight of evidence and the same is bad in law.

Submissions of counsels for the Appellant

The Appellant filed his submissions on 11th September 2020. The Respondents did not file any submissions in the matter.

The Appellant's submissions reiterated the issues raised in the memorandum of appeal. He repeated that the sole purpose the subdivision of land was undertaken by the Respondents even in the face of a pending civil suit (Civil Suit No.174 of 1999) was to defeat the course of justice and to deny the Appellant of the right to enjoy the fruits of judgment. The case of ***Mbugua Njuguna Vs Elijah Mburu Wanyoike & Another Nairobi HCCC No.2694 of 1993***was cited in support of the Appellant's position. He prayed for the decision of the trial court be set aside and for an award of LR. Nos. Antubetwe/Njoune/ 2464 and 2465 to be made to the Appellant.

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 judgment delivered therein, the grounds of appeal, and submissions by the Appellant. Whereas the Appellant has set out five grounds of appeal, to the mind of the court, the real question for determination is whether the trial court erred in dismissing the Plaintiff's allegation of fraud on the part of the Defendants calculated to deny the Plaintiff's ownership and enjoyment of the suit property.

It is not contested that the Appellant purchased Land Parcel No. Antubetwe/Njoune/1039 at a public auction on 8th March 2001 at Maili Tatu Market in Antubetwe. The land was on sale as a consequence of the decree issued in Civil Case No. 174 of 1999. The Appellant supplied copies of the notice to the public auction, a payment receipt of part of the purchase price being Seventeen Thousand shillings, the memorandum of sale between the auctioneers and the Appellant, a certificate of sale of land certified by the court on 26th July 2001 and the transfer of land effected by the Executive Officer Meru Law Courts on 19th November 2001.

The Appellant was unable to take possession of the parcel of land he had purchased at the auction because at the time the court made the order conferring ownership of the parcel of land in the Appellant on 26th

July 2001, the parcel of land No. Antubetwe/Njoune/1039 had been subdivided into two parcels, being LR. No Antubetwe/Njoune/2464 and 2465 and had therefore ceased to exist as purchased by the Appellant. By this time on 26th July 2001, LR. No Antubetwe/Njoune/2464 had already been transferred by the 1st Defendant to the 2nd Defendant for value. It is the Appellant's case therefore that the subdivision undertaken was done fraudulently, with the aim of defeating the course of justice. It is trite law that the onus of proving fraud rests on the person alleging its existence and that that onus is heavier 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 question of whether the subdivision of the suit property was shrouded in fraud turns on the matter of the respective date on which the subdivision was done *vis a vis* the date of filing of the civil case and the date of the consequent judgment.

From the green card filed and marked "IMIO", it is clear that the subdivision of Land Parcel No. Antubetwe/Njoune/1039 was undertaken on 17th June 1999 and it was on that date that the title to LR. No Antubetwe/Njoune/2464 was issued to the 2nd Respondent. While it is also discernible that Suit no Civil Case No. 174 of 1999 (which precipitated in an order directing for Land Parcel No. Antubetwe/Njoune/1039 to be registered in the name of the Appellant on 26th July 2001) was filed sometime in the year 1999, the exact date of filing was not established by the Appellant. This court agrees with the trial court's finding that in the absence of the filing date of the suit, which very well could have been after the June 1999 subdivision, the court cannot conclude that the subdivision was calculated at frustrating the judgment and decree of the court. Further, and even if the subdivision was done after the case was filed, the Appellant has failed to draw the courts attention to a prohibitory order barring the 1st Respondent from dealing with the suit property pending final determination of the suit. In the case of ***Mbugua Njuguna Vs Elijah Mburu Wanyoike & Another Nairobi HCCC No.2694 of 1993*** cited by the Appellant, the court found that the Respondents had gone against a prohibitory order issued by the court in proceeding to subdivide the suit property. The effect, even as the trial court found is that the Appellant has not ably demonstrated fraud on the part of the Respondents and as such, the title issued to the 2nd Respondent is indefeasible. It is also clear that as at the date of the order conferring the suit property in the Appellant, that parcel of land had ceased to exist as far back as 17th June 1999.

The Court notes that the Appellant was awarded a refund of the Ksh. 68,000/= plus interest and finds nothing in the appeal to warrant a disturbance of the judgment and decree issued by the trial court on 23rd October 2017.

The appeal therefore fails and the same is hereby dismissed with costs to the Respondents.

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. Appellant/Advocate- Absent

2. Respondent/Advocate- Absent

3. Fardowsa ; Court Assistant- Present