



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL CASE NO. 10 OF 2019**

**JOHN KIRIANYONI.....APPELLANT**

**VERSUS**

**PAUL NTOMIAKA M'MUJURI.....RESPONDENT**

**JUDGMENT**

***(Being an appeal from the Judgement and Decree of Hon. A.G. Munene***

***Senior Resident Magistrate Maua in CMCC No. 59 of 2013***

***delivered on 31<sup>st</sup> December 2018)***

**Summary of Facts**

By an amended plaint dated 10<sup>th</sup> September 2013, the Respondent herein (then Plaintiff) sued the Appellant (then Defendant) for unlawful entry and occupation of his Parcel of land No. Amwathi/Maua/6235 (herein after referred to as the suit property) and for cutting down trees and harvesting miraa thereon without the permission of the Respondent. The Respondent thus approached the trial court seeking the following orders:

- a. A permanent order of injunction barring the Defendant from cutting trees or harvesting miraa from the Plaintiff's parcel of land No. Amwathi/Maua/6235;***
- b. An order of eviction of the Defendant from parcel No. Amwathi/Maua/6235;***
- c. Compensation for converting miraa and trees;***
- d. Costs of the suit and interest.***

The Defendant therein filed his amended statement of defence and counterclaim on 2<sup>nd</sup> July 2018. The Defendant denied the matters pleaded in the plaint and raised the following counterclaim:

- a. That the suit property was gathered by his late father M'Mailutha Mailutha;**
- b. That he had never sold or executed any transfer documents in favour of the Plaintiff;**
- c. That the Plaintiff had fraudulently, unlawfully and illegally caused the suit property to be registered in his name.**

The Defendant thus sought orders dismissing the Plaintiff's suit; a declaration that the suit property has been placed to overlap land parcel No. Amwathi/Maua/6247 belonging to the Defendant's deceased father; that the land registrar Igembe be directed to cancel the title deed issued to the Plaintiff and to cause the title deed to revert to the Defendant's deceased father.

The matter was heard and determined in the Chief Magistrate's court at Maua in civil case no. 59 of 2013. In the judgement issued on 31<sup>st</sup> December 2018, the trial court found in favour of the Plaintiff and granted orders (a) (b) and (d) of the orders sought.

## **Issues for Determination**

Aggrieved by the judgement of the trial court, the Appellant herein mounted the present appeal, lodging his memorandum of appeal on 14<sup>th</sup> January 2019. The Appellant set out nine grounds of appeal as follows:

1. That the learned Magistrate erred in law and fact by finding that the Plaintiff had proved his case to the required standard;
2. The learned Magistrate erred in law and fact by disregarding the Defendant's counterclaim;
3. The learned Magistrate erred in law and fact by not expounding on what he meant by "maintenance" in his ruling;
4. The learned Magistrate erred in law and fact by not finding that the disputed ground position belongs to the Defendants Parcel No. Amwathi/Maua/6247 though also the Plaintiff has a No. Amwathi/Maua/6235 which has no ground position (hanging);
5. The learned Magistrate erred in law and fact by not considering the Defendant's submissions;
6. That the learned Magistrate erred in law and fact by not finding that the lower court case was *res judicata*;
7. The learned Magistrate erred in law and fact by not finding that the Respondent has put himself in a "catch 22 situation" as far as the Maua CMCC No.6 of 2001 and Meru HCCA No. 93 of 2003 are concerned by filing of CMCC No. 59 of 2013;
8. The learned Magistrate erred in law and fact by not finding that the basis of the Respondent case was an "irregular agreement"
9. The learned Magistrate erred in law and fact by not taking into consideration the fact that the ground position of the two parcels of land belonged to the Appellant's grandparents (ancestral land).

## **Submissions of counsels for the Appellant and Respondent**

The Appellant filed his submissions on 3<sup>rd</sup> March 2020, while the Respondent filed his on 18<sup>th</sup> May 2020.

The Appellant's submissions reiterated the issues raised in the memorandum of appeal. He prayed that the decision of the trial court be set aside and that judgement instead be entered against the Respondents on the grounds set out in the counterclaim.

The Respondent's submissions revisited the fact that the Respondent was the registered proprietor of the suit property, as evidenced by the Title deed filed in court. He submitted that the orders handed down by the trial court were in order, one of which orders was for the eviction of the Appellants from the suit property. He further submitted that the Appellants were introducing new issues in the appeal that were never pleaded in the defence and counterclaim and pointed to grounds 6, 8 and 9 in the Memorandum of Appeal.

## **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. There are numerous authorities on the subject, a few of which are set out below:

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 Appellant has set out nine grounds of appeal. Three of the grounds set out in the Memorandum of

Appeal do not form part of the Appellant's pleadings before the trial court and essentially seek to introduce new matters.

While an appellate court has discretion to allow for the introduction of new matters at the appellate stage, that discretion cannot be exercised where the matters to be introduced are disputed facts; were never investigated at the trial and whose effect would be to prejudice the opposing party. See - The Court of Appeal decision in *Securicor (Kenya) Ltd v. EA Drappers Ltd and Anor. (1987)KLR 338* is instructive:

“..... the Court of Appeal has a discretion to admit a new point at appeal but the discretion must be exercised sparingly, the evidence must all be on record, the new point must not raise disputes of fact and it must not be at variance with the facts or case decided by the court below.”

Similarly, in the Court of Appeal decision in *Attorney General Vs Revolving Tower Restaurant (1988) KLR 462*, the court reiterated the principles to be taken into account in exercise of the discretion:

“..... an appellate court has discretion to allow an appellant to take a new point before it if full justice can be done to the parties but in the case the facts bearing upon the new point have not been fully explored to show the relevance of the new point of law and the court would therefore not allow that new point.”

Three of the grounds set out in the Memorandum, to wit:

6. That the learned Magistrate erred in law and fact by not finding that the lower court case was *res judicata*;
8. The learned Magistrate erred in law and fact by not finding that the basis of the Respondent case was an “irregular agreement”
9. The learned Magistrate erred in law and fact by not taking into consideration the fact that the ground position of the two parcels of land belonged to the Appellant's grandparents (ancestral land).

It is instructive that the three grounds were not raised in the Appellant's pleading, were never investigated at trial and raise disputed facts and therefore cannot be considered. It is also worth mentioning that the Appellants, then Defendants in the lower court had raised a preliminary objection that the Plaintiff's plaint was *res judicata* and a ruling was delivered on 16<sup>th</sup> April 2014 in which the Resident Magistrate found that the preliminary objection could not stand. In arriving at the decision, the court noted that while there was an earlier suit, Maua CMCC No.6 of 2001 and Meru HCCA No. 93 of 2003 between the parties, the Plaintiff's suit was not *res judicata* because the earlier suits were delivered before the finalization of the Amwathi Adjudication Section and in light of the fact that at the time of filing the Plaint, the Plaintiff had been registered as the proprietor of the suit property. The court agrees with the ruling delivered.

The first ground that the learned Magistrate erred in law and fact by finding that the Plaintiff had proved his case to the required standard will be considered.

The orders sought and granted to the Respondent with the effect of permanently barring the Appellant from entry or occupation of the suit property and evicting the Appellant from the suit property are grounded on the Respondent's assertion that he is the registered owner of the suit property. In support of that assertion, the Plaintiff produced a title deed in which he is the sole registered proprietor of the Land Parcel No. Amwathi/Maua/6235, the suit property herein.

**Sections 24 and 27 of the Land Registration Act (No. 3 of 2012)** obligate the Court to take cognizance of the indefeasibility of title afforded to a person registered as the proprietor of a parcel of land. The Sections provide as follow:

**Section 24(a)** Subject to this Act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

**Section 26(1)** The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The Respondent having presented a title deed over the suit property in which he is registered as sole proprietor has discharged the burden of proof in so far as his claim of ownership over the suit property is concerned. **Section 26** however sets out certain limited situations in which a proprietor's title is open to challenge, that is, on the grounds of fraud; misrepresentation or where the title is demonstrated to have been acquired illegally; unprocedurally or through a corrupt scheme.

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 N'gok 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”.

The Appellant has ascribed fraud on the part of the Respondent in transferring the suit property to himself. It is trite law that allegations of fraud are considered serious accusations, requiring the asserting party to prove, to a standard above a balance of probabilities the existence of the allegations.

At page 427 in **Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition** quoting with approval the cases of **Wallingford Vs Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune Vs Occident [1989] 1 Lloyd’s Rep. 305, 308, Lawrence Vs Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy Vs Garrett (1878) 7 Ch. D. 473 at 489** it is stated that:-

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved. General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

Again in **Christopher Ndaru Kagina Vs Esther Mbandi Kagina & Another [2016] e KLR** the court stated that -

“It is trite law that he who alleges fraud must prove fraud. Allegations of fraud must strictly be proved. Great care needs to be taken in pleading allegations of fraud or dishonesty. In particular, the pleader needs to be sure that there is sufficient evidence to justify the allegations. In the case **Central Bank of Kenya Ltd -Vs- Trust Bank Ltd & 4 Others**, 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. The burden of proof lies on the applicant in establishing the fraud that he alleges. In **Belmont Finance Corporation Ltd. v. Williams Furniture Ltd Buckley L.J.** said: “An allegation of dishonesty must be pleaded clearly and with particularity. That is laid down by the rules and it is a well-recognized rule of practice. This does not import that the word ‘fraud’ or the word ‘dishonesty’ must be necessarily used. The facts alleged may sufficiently demonstrate that dishonesty is allegedly involved, but where the facts are complicated this may not be so clear, and in such a case it is incumbent upon the pleader to make it clear when dishonesty is alleged. If he uses language which is equivocal, rendering it doubtful whether he is in fact relying on the alleged dishonesty of the transaction, this will be fatal; the allegation of its dishonest nature will not have been pleaded with sufficient clarity.”

In his counterclaim before the lower court, the Appellant particularized the elements of fraud as follows:

- a. Illegally, unlawfully transferring land Amwathi/Maua/6235 into his names;
- b. Dealing secretly;
- c. Stealing the Defendant’s land.

As was observed by the Trial Court, no evidence was led to demonstrate how the Respondent perpetrated the alleged fraud and the pleadings are painfully deficient in capturing the manner and the circumstances surrounding the alleged fraud. Curiously, in the previous suit referred to by the Appellant in his memorandum of appeal, being HCCA No. 93 of 2003, the Appellant, then Respondent adduced evidence to the fact that he had transferred the suit property to the Respondent, then Appellant and had received the agreed consideration for the transaction. Now in the case before the trial court, the Appellant changed the story and averred in his defence and counterclaim that he had never sold the suit property to the Respondent and that in fact the suit property belonged to his deceased father.

On the whole, it is clear that the burden of proof on the allegation of fraud remains a mere allegation, completely unsupported through pleadings or evidence.

The trial court extensively considered the Appellants counterclaim and submissions and noted, as this court does, that ground 4, relating to

the issue of a disputed ground position with reference to Parcel Nos. Amwathi/Maua/6247 and Amwathi/Maua/6235 are unsubstantiated. No map was tendered in court nor was evidence from the lands registry department called in support of the allegation. See - the Court of Appeal decision in **Mbuthia Macharia Vs Annah Mutua Ndwiga & another [2017] e KLR:**

*“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?”*

It is noted that the Appellant is misled in his interpretation of the judgement and decree given by the trial court as evidenced by ground 7 of the memorandum of appeal for not appreciating that the orders entail an order of eviction of the Appellant from the suit property, and that therefore the ‘*catch 22 situation*’ referred to does not exist.

In the end, it is my view that there is nothing in the Appeal to cause the present court to disturb the judgement and decree given by the trial court and that therefore the appeal must fail. Costs are awarded to the Respondents.

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

.....

**E.C. CHERONO**

**ELC JUDGE**

**In the presence of:**

1. Appellant/Advocate- Absent
2. Respondent/Advocate- Absent
3. Fardowsa ; Court Assistant- Present