



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 19 OF 2018

PAUL KINOTI ANAMPIU.....APPELLANT

VERSUS

MWIKA KANAMPIU M' AKWALU.....1ST RESPONDENT

MICHAEL MUIRURI MWAURA.....2ND RESPONDENT

JUDGMENT

(Being an Appeal from the judgment by Hon. S. Abuya Senior Principal Magistrate in CMCC No. 385 of 2014 Delivered on 16th May, 2018)

Introduction

This Appeal arises from the judgment in CMCC No. 385 of 2014(meru) where the 1st Respondent who was the Plaintiff in the dispute before the trial Court had sued the Appellant and the 2nd Respondent for an order of a declaration that the transfer of land parcel No. NTIMA/NTAKIRA/4975 from the names of MWIKA KANAMPIU M' AKWALU to PAUL KINOTI ANAMPIU and subsequently to Michael Muiruri Mwaura was unlawful, illegal and therefore untenable in law. The 1st respondent/plaintiff had also sought an order directing the Rectification of the Land Register in respect of Land Registration No. NTIMA/NTAKIRA/4975 by cancelling the title deed and the land Reverting back to the name of MWIKA KANAMPIU M' AKWALU.

The appellant and the 2nd respondent filed their respective statement of defence denying the 1st respondent's/plaintiff's claim.

The trial magistrate heard the parties and their witnesses and rendered herself on 16th May 2018. Being aggrieved by the decision, the appellant/1st defendant preferred the present appeal on the following grounds:-

- (1) The learned trial magistrate erred in law and in fact in that she decided the said suit against the weight of the evidence.*
- (2) The learned trial magistrate erred in law and in fact in that she declared that the transfer of land parcel No. NTIMA/NTAKIRA/4975 from the 2nd respondent to the appellant was unlawful, illegal and untenable in law yet the District Registrar in respect therefore was not a party to the suit.*
- (3) The learned trial magistrate erred in law and in fact in that she did not take any regard, or sufficient regard, to the evidence and the submissions tendered by the appellant and as such she arrived at the wrong decision.*
- (4) The learned trial magistrate erred in law and in fact in that she ordered that the title deed in respect of land parcel No. NTIMA/NTAKIRA/4975 be cancelled without any ground or sufficient reasons, under the law to warrant the same.*
- (5) The learned trial magistrate erred in law and in fact in that she failed to appreciate that the 1st respondent failed to prove his case to the required standards.*
- (6) The judgment of the learned trial magistrate is bad in law.*

Appellant's written Submissions

The appellant filed written submissions through the firm of Ngunjiri Michael & Co. Advocates dated 4th September 2020. On the first ground of Appeal, the appellant submitted that the plaintiff/1st respondent did not prove his case before the trial Court to the required standard. He argued that the plaintiff's/1st respondent's main prayer was for cancellation of the 2nd respondent's title deed on grounds that the process of sub-division and transfer of the plaintiff's main land parcel No. 1442 into parcels Nos. 4975 and 4976 was tainted with fraud.

He submitted that the Court ought to have examined whether the requisite standard of proof in case based on fraud had been reached/attained. He cited the case of *Gichinga Kibutha Vs Caroline Nduku (2018) e K.L.R.* He also cited another case of *Koinange Koinange & 13 Others Vs Charles Karuga Koinange (1986) at page 23.* The appellant therefore contends that the plaintiff (1st respondent) failed to prove his case to the required standard for the following reasons:-

- (i) The instruments/documents of sub-division and transfer were neither scrutinized nor produced in Court.
- (ii) Failure to sue the Land Registrar and/or call him as a witness.
- (iii) Admission of the plaintiff's involvement in the sub-division of land.
- (iv) 1st respondent's witness testimony that the 1st respondent entered into an agreement to sell land to the appellant.

According to the appellant, the 1st respondent merely alleged that the sub-divisions and transfer with regard to the suit land were fraudulent but did not produce particular documents/instruments of transfer and sub-divisions in Court. He cited the case of *Laban Omuhaka Otumbula Vs Truphosa Okutoyi (2019) e K.L.R.*

Respondent's written Submissions

The respondent did not file written submissions within the time lines as directed by this Honourable Court.

Legal Analysis

I have carefully considered the submissions by the appellant. I have also looked at the impugned decision of the learned trial magistrate which is the subject of this Appeal. It is trite law that the role of this Honourable Court as the first appellate Court is to re-evaluate, re-assess and re-analyze the

extracts on the record before making a determination on the appeal. The plaintiff (1st respondent) had commenced the dispute in the trial magistrate's Court vide a plaint dated 4th November 2014 and amended on 31st August 2015. In the said amended plaint, the 1st respondent/plaintiff had sought an order for declaration that the transfer of land registration No. NTIMA/NTAKIRA/4975 from the names of MWIKA KANAMPIU M' AKWALU to PAUL KINOTI M' ANAMPIU and subsequently to MICHAEL MUIRURI MWAURA was unlawful, illegal and therefore untenable in law. The 1st respondent/plaintiff also sought an order directing the rectification of the Land Registrar in respect of the said land parcel No. NTIMA/NYAKIRA/4975 by cancelling the title deed and reverting back into the name of MWIKA KANAMPIU M' AKWALU. The plaintiff/1st respondent had also sought an order of permanent injunction against the defendants/2nd respondent and the appellant, their servants, agents, employees, successor in title or anybody acting at their behest from encroaching, evicting and/or interfering with the plaintiff/1st respondent's occupation, user business or in any other manner dealing with the proprietary interest. In his sworn testimony given on 20th January 2016, the plaintiff confirmed knowing the 1st defendant/appellant Paul Kinoti Anampiu as a good friend. He stated that land parcel No. NTIMA/NTAKIRA/1642 belonged to him having bought the same in 2006. He produced a copy of the green card as Plaintiff Exhibit No. 1. He stated that in the year 2013, he had a problem of fees for his children and approached the appellant with an intention of leasing and/or selling the same. The appellant advised him to sub-divide the land. He offered to hold in sub-dividing the land. The appellant assessed the fees for sub-dividing at Ksh. 200,000. He agreed to pay him the charges upon sub-division and he even gave him his Identity Card, P.I.N and original title in order to undertake the sub-division exercise. He agreed to pay the appellant upon selling one of the sub-divided portions. He stated that the appellant managed to sub-divide the land into two portions namely NTIMA/NTAKIRA/4975 and 4976. He also produced the green card for the two parcels as Plaintiff's Exhibit No. 2 and a certificate of official search as Plaintiff's exhibit No. 3. The plaintiff stated that the appellant/1st defendant changed one of the parcels and caused it to be registered in his name. He was not aware of the changes made by the 1st defendant/appellant until the 2nd defendant/respondent came to his land and wanted to fence. He ran to the Lands office where he realized that one of the two parcels had been sold to the 2nd defendant/respondent. He was shown an agreement entered between the 1st and 2nd defendant dated 16th January 2014 indicating that the land was sold for Ksh. 913,500/=. He denied having been paid a single cent for the land. He said that the defendants used fraud to take his land. He even denied attending before the Land Control Board for consent. He also denied selling the land to the 1st defendant/appellant for Ksh. 200,000/=. The plaintiff/1st respondent stated in Re-examination that he did not know how to read or write. He said that he was utilizing the disputed land.

PW2 was one STANLEY MURIUKI MAGIRI who was also sworn and stated that he knew the plaintiff/1st respondent as a friend. He stated that he took MWIKA KANAMPIU M' AKWALU to Paul Kinoti M' Anampiu to receive some money for sub-division of land. He said that Paul gave Mwika a sum of Ksh. 30,000/= and later Ksh. 170,000/= plus other expenses. Mwika also gave Paul his National Identity Card, PIN and Transfer. The witness stated that the agreement was that Paul Kinoti (appellant) was to sub-divide the original land parcel No. 1642 into two portions in the plaintiff's names. Thereafter, the plaintiff (Mwika) was to sell one portion and refund the 1st defendant/appellant his Ksh. 200,000/=. He stated that in breach of the agreement with the plaintiff, the 1st defendant transferred and registered one portion in his name. He further stated that during the time of sale, he signed the agreement for the sale of one parcel No. 4975 to the 2nd defendant at a consideration of Ksh. 913,500/= and that Paul Kinoti (1st defendant) was to recover his Ksh. 200,000/= and hand over the balance of Ksh. 713,500/= to the plaintiff Mwika Kanampiu M' Akwalu.

PW3 was one Joseph Thurairu who testified on oath and stated that he knew the plaintiff Mwika Kanampiu M' Akwalu as his immediate neighbour. He stated that land parcel No. NTIMA/NTAKIRA/1642 belonged to the plaintiff. He also knew the 1st defendant as a businessman. He stated that the plaintiff requested the 1st defendant to assist him to sub-divide the land at a consideration of Ksh. 200,000/=. He further stated that after sub-dividing the said land, the 1st defendant was to register the portions in the plaintiff's name and that the plaintiff was to sell one portion to recover money to reimburse the 1st defendant but the 1st defendant registered one portion in his own name contrary to the agreement with the plaintiff.

The Defence also called three witnesses.

DW1 was Paul Kinoti M' Anampiu. He gave a sworn testimony and stated that by an agreement made in the year 2013, the plaintiff agreed to sell him part of his interest in land comprising L.R. No. NTIMA/NTAKIRA/1642. He conducted due diligence and confirmed that the land was registered in the name of the plaintiff. However, there was a caution registered against the land at the instance of his son but he prevailed upon his son to have the same removed. They obtained the relevant consent and the land was sub-divided into two portions to wit NTIMA/NTAKIRA/4975 and 4976. He signed the mutation and they presented the necessary documents. Parcel No. NTIMA/NYAKIRA/4975 was registered in his name while parcel No. NTIMA/NTAKIRA/4976 was registered in the name of the plaintiff. He stated that the sale was done openly and the plaintiff tendered the necessary documents to facilitate sub-division and transfer of the land. He took possession of the land and later sold it to the 2nd defendant/respondent. He produced the sale agreement dated 13th June 2013 as Defence Exhibit No. 1.

DW2 was Samuel Mutuma. He stated that on 13th June 2013, he witnessed the signing of an agreement for sale of land between the plaintiff MWIKA KANAMPIU M'AKWALU and PAUL KINOTI M'ANAMPIU in the office of V.P. Gituma Advocate in Meru town. He said that the subject of the agreement was land parcel No. NTIMA/NYAKIRA/1642 registered in the name of MWIKA KANAMPIU M'AKWALU. The witness also stated that the parties gave out the terms of the agreement to the advocate in his presence and that of the other witness Stanley Muriuki M'Magiri. Thereafter, the parties signed the agreement in his presence and he also signed his part. He confirmed that the agreed sum of two hundred thousand shillings only paid to the seller by the purchaser in his presence.

DW3 was Michael Mururi Mwaura. He gave sworn testimony and stated that on 16th January 2014, he bought land from the 1st defendant at Ksh. 913,000/= after confirming through search that the land in question belonged to the 1st defendant. They wrote a sale agreement and was later given the title deed which he kept until October 2014 when his friend Thurania (PW3) told him that he saw the plaintiff's son cutting down his trees. He went and asked the plaintiff's son why he was cutting the trees and he told him that the land belonged to his father and that his father had not sold it to anyone and pushed him out of the land.

He went to the Chief's office to report and the chief said he knew the history of the land and that he had put a caution to prevent sale and sub-division when the plaintiff's son had requested him but he did not know when the caution was removed. The chief advised him to report at Meru Police Station and the OCS advised him to fence off the land. He then fenced the land but the plaintiff cut the wires and uprooted the posts. He reported at Meru Station. Later, he was served with a Court order and he instructed his current advocates to defend the case.

Upon considering the evidence adduced and the applicable law, the learned trial magistrate entered judgment for the plaintiff against the defendants. The claim by the plaintiff in the trial Court was for cancellation of a title deed based on fraud. It is trite law that the burden of proof in a claim based on fraud is on the plaintiff which must be strictly proved on a standard which is not so heavy as to require proof beyond reasonable doubt but something more than the balance of probabilities.

The appellant who was the 1st defendant in the trial Court testified on oath and explained that he bought the suit land from the plaintiff/1st respondent vide a sale agreement dated 13th June 2013. The said sale agreement was produced as Defence Exhibit No. 1. Upon perusal of the sale agreement, the seller, Mwika Kanampiu M' Akwalu (1st respondent) duly executed the agreement. His witness Stanley Muriuki M' Magiri also signed. The purchaser Paul Kinoti M' Anampiu and his witness Samuel Mutuma also appended their signatures. The sale transaction complied with the statutory provisions under Section 23 of the Law of Contract where the same was attested by a lawyer namely Victor P. Gichima who also signed the same. The property being sold is land parcel No. NTIMA/NYAKIRA/142 at a consideration of Ksh. 200,000/= which was duly acknowledged upon signing of the same. The agreement is a contract between the parties and will remain valid and binding unless it is set aside. **Lord Denning LJ in *Lole Vs Butcher (1949) All E.R 1107*** held as follows:-

"..... Once a contract has been made, that is to say, once parties, whatever their innermost state of mind have to all outward appearances agreed with sufficiently certain in the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some conditions or implied in it or for fraud or on some equitable grounds"

Again in ***Ismail Surnderji Hirani Vs Noorali Kassam (1952) 19 E.A.C.A 131***, the Court of Appeal for Eastern Africa while dealing with the contractual nature of a consent order which is similar to an agreement had the following to say on the binding nature of contracts:-

"..... cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement

contrary to the policy of the Court or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the Court to set aside agreement"

The plaintiff/1st respondent is not disputing the sale agreement dated 13th June 2013 between himself and the appellant. The plaintiff/1st respondent did not even produce minutes from the relevant District Land Control Board or the Land Registrar showing that the suit property was transferred to the appellant without the appropriate statutory consents.

Section 107 of the Evidence Act Cap. 80 Laws of Kenya provides as follows:-

"(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person".

The plaintiff/1st respondent merely asserted that his land was transferred by the appellant by fraud. He did not prove the allegations to the required standard. The learned trial magistrate erred in law and in fact by finding that the plaintiff/1st respondent had proved the existence of fraud when the sale agreement produced by the appellant as Defence Exhibit No. 1 shows that he signed the same in the presence of witnesses and an advocate namely Victor P. Gichima.

Disposition

The upshot of my findings is that this Appeal has merit and the same is allowed in the following terms:-

(1) The judgment delivered on 16th May 2018 by Hon. S. Abuya, Senior Principal Magistrate be and is hereby set aside and substituted with an order dismissing the same.

(2) The costs of the suit in the lower Court and this Court shall be borne by each party.

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. Respondents/Advocate- Absent
3. Fardowsa ; Court Assistant- Present