



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELCA NO. 11 OF 2019

MALEWA FARMERS CO-OPERATIVE SOCIETY LTD.....APPELLANT

VERSUS

SETTLEMENT FUND TRUSTEES.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

PETER KINYUAMACHARIA.....3RD RESPONDENT

DAVID NDIRANGUMURAGE.....4TH RESPONDENT

GODFEYNDIRANGUMURIITHI.....5TH RESPONDENT

JUDGMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the judgment and decree of the Hon. S. N. Mwangi (SRM) dated 3rd July, 2019 in *NyahururuMCE&L Case No. 249 of 2018 – MalewaFarmers Co-operative Society Ltd v Commissioner of Lands and 5 Others*. By the said judgment, the trial court dismissed the Appellant’s suit with costs to the 3rd- 5th Respondents and upheld their ownership of the suit property. The 3rd, 4th and 5th Respondents were the 4th, 5th and 6th Defendants respectively in the suit.

2. The record shows that by a plaint dated 14th October, 2013 and amended on 20th February, 2014, the Appellant sued the Respondents seeking recovery of Title No. Nya/Malewa/173 (*the suit property*) from the 3rd, 4th and 5th Defendants together with costs of the suit. The Appellant pleaded that sometime in 1967 it applied for allocation of parcel No. Nya/Malewa/173, 177 and 178 (original Nos. 801,805 and 806 respectively) from the 2nd Respondent (SFT) and that the 3 parcels were allocated to it in 1969. It was further pleaded upon completing payment of the purchase price in 1994 the SFT issued it with a discharge of charge for those parcels. The Appellant also pleaded that it had constructed a cattle dip for its members on the suit property and that the 3rd – 5th Respondents were merely its managers.

3. The Appellant further pleaded that sometime in 2012 when it sought processing of title documents for the 3 parcels it was discovered that the 3rd, 4th and 5th Respondents had fraudulently obtained registration of the suit property in collusion with the 1st Respondent and SFT. The Appellant pleaded that despite demand and notice of intention to sue, the Respondents had failed to remedy the situation hence the suit.

4. As a result, the Appellant sought the following reliefs in the amended plaint:

- (a) *A declaration that the Plaintiff is the legal owner of LR. No. Nya/Malewa/173 and the same to be registered in its name.*
- (b) *A declaration that the 1st Defendant having received consideration on LR. Nya/Malewa/173 from the Plaintiff had no other Title to pass to the 4th, 5th and 6th Defendants.*
- (c) *An order cancelling the Title deed issued to the 4th, 5th and 6th Defendants in respect of LR. Nya/Malewa/173 with an order to the 1st Defendant to cancel the same and issue a new Title to the Plaintiff as the legal owner of the same.*
- (d) *A permanent/mandatory order of injunction to be issued against the 4th, 5th and 6th Defendants by themselves their agents or*

servants restraining them from remaining, entering, selling, charging, transferring or in any way interfering with LR. Nya/Malewa/173.

(e) *Costs of the suit be borne by the Defendants jointly and severally.*

(f) *Any other relief that this honourable court may deem fit and just to grant.*

5. The 1st and 2nd Defendants entered appearance through the Attorney General and filed a defence dated 5th March, 2014 in which they made a general denial of the Appellant's claim. They denied that the Appellant ever sought or obtained allocation of the suit property. They denied that SFT ever issued a discharge of charge and that they ever colluded with the 3rd - 5th Respondents to allocate the suit property to them. They also denied the fraud and particulars of fraud pleaded against them and put the Appellant to strict proof thereof. They contended that the suit was bad in law and prayed for its dismissal with costs.

6. The record further shows that the 3rd - 5th Respondents filed a joint statement of defence dated 17th December, 2014 in which they denied the Appellant's claim in its entirety. They pleaded that they were merely trustees of *Munyaka (Gordon) Cattle Dip* which was the holder and owner of the suit property. They denied that SFT had allocated the suit property to the Appellant or that it had issued any discharge of charge to it. They further denied the fraud and particulars of fraud pleaded against them and put the Appellant to strict proof thereof.

7. The 3rd - 5th Respondents further denied that it was the Appellant who had constructed the cattle dip on the suit property. They contended that they were the ones who had constructed the cattle dip on the suit property as chairman, treasurer and secretary respectively of Malewa Settlement Scheme. They consequently prayed for dismissal of the Appellant's suit with costs.

8. The record further shows that vide a reply to defence dated 20th March, 2014 the Appellant joined issue with the 1st and 2nd Respondents on their defence. By another reply to defence dated 10th March, 2015 the Appellant similarly joined issue with the 3rd - 5th Respondents on their defence. In addition, the Appellant specifically denied that the 3rd - 5th Respondents were trustees of *Munyaka Cattle dip* and put them to strict proof thereof.

9. The material on record shows that the suit proceeded to full hearing before trial court whereby the Appellant and the 3rd - 5th Respondents tendered their evidence. However, it is evident from the record that the 1st and 2nd Respondents did not tender any evidence at the trial since they did not call any witness. By a judgment dated and delivered on 3rd July, 2019 the trial court dismissed the Appellant's suit with costs to the 3rd - 5th Respondents on various grounds as set out in its judgment.

B. THE GROUNDS OF APPEAL

10. Being aggrieved by the said judgment and decree, the Appellant filed a memorandum of appeal dated 2nd August, 2019 raising the following grounds of appeal:

(a) *The learned trial Magistrate erred in law and fact in holding that the Appellant did not establish exactly when the suit land ceased to be Settlement Fund Trustees Land in spite of documentary evidence to the contrary.*

(b) *The learned trial Magistrate erred in law and fact in holding that the Appellant did not discharge the burden of proof of fraud against the Respondents.*

(c) *The learned trial Magistrate erred in law and fact by invoking Section 39 (1)(c) of the repealed Registered Land Act, Cap. 300, Laws of Kenya which did not apply and proceeded on a misapprehension of the law to protect the fraudulently acquired title to the suit land.*

(d) *The learned trial Magistrate erred in law and fact by holding that there was double allocation of the suit and proceeded on a misapprehension of the law to uphold the subsequent allocation of the suit land to the 3rd, 4th and 5th Respondents.*

(e) *The learned trial Magistrate erred in law and fact in misapprehending the provisions of Section 26 of the Land Registration Act, 2012 and proceeded on wrong principles of law to uphold the irregularly and illegally acquired title deed over the suit land.*

(f) *The learned trial Magistrate erred in law and fact by failing to uphold the equitable maxim that "between equal equities, the first in order of time shall prevail" and proceeded to uphold the second allocation of the suit land to the 3rd, 4th and 5th Respondents.*

(g) *The learned trial Magistrate erred in law and fact in giving a judgment that was against the weight of evidence.*

11. The Appellant consequently sought the following reliefs:

(a) *That the appeal be allowed.*

(b) *That the Appellant's suit before the trial court be allowed with costs.*

(c) *That the court do grant any other or better relief as it may deem fit.*

C. THE RESPONDENTS' RESPONSE

12. The 3rd - 5th Respondents filed 'grounds of objection' to the appeal dated 6th September, 2019 in response to the appeal. They contended that they were not properly served with the memorandum of appeal. The 3rd - 5th Respondents essentially supported the judgment of the trial court dismissing the Appellant's

suit and upholding their registration as proprietors of the suit property. They consequently prayed for dismissal of the appeal and for an injunction against Silas KarugaNduhiu who was not party to the appeal or the proceedings before the trial court.

D. DIRECTIONS ON SUBMISSIONS

13. When the appeal was listed for directions on 1st March, 2021 it was directed that the same shall be canvassed through written submissions. The Appellant was granted 21 days to file and serve its submissions whereas the Respondents were granted 21 days upon the lapse of the Appellant's period to file theirs. The record shows that the Appellant filed its submissions on 12th May, 2021 and the 3rd - 5th Respondents on 27th April, 2021. There is, however, no indication of the Attorney General having filed any submissions on behalf of the 1st and 2nd Respondents.

E. THE ISSUES FOR DETERMINATION

14. Although the Appellant raised 6 grounds as stated in the memorandum of appeal, the court is of the opinion that the appeal may effectively be determined on the basis of the following issues:

(a) *Whether the trial court erred in law and fact in holding that the*

Appellant had failed to prove fraud against the Respondents.

(b) *Whether the trial court erred in law in holding that the Appellant had failed to prove its claim against the Respondents.*

(c) *Who shall bear costs of the appeal.*

F. THE APPLICABLE PRINCIPLES

15. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA. 123** at page 126 as follows:

"...Briefly put they are that this 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 that respect. In particular, this 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 on the demeanor of a witness is inconsistent with the evidence in the case generally."

16. Similarly, in the case of **Peters v Sunday Post Ltd [1958] EA 424** Sir Kenneth O'Connor, P. rendered the applicable principles as follows:

"...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion..."

17. In the same case, Sir Kenneth O'Connor quoted Viscount Simon, L.C in **Watt v Thomas [1947] A.C 424** at page 429-430 as follows:

"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance

can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

G. ANALYSIS AND DETERMINATION

(a) Whether the trial court erred in law and fact in holding that the Appellant had failed to prove fraud on the part of the Respondents

18. The court has considered the submissions and material on record on this issue. Whereas the Appellant submitted that it had demonstrated fraud against the Respondents, the latter contended otherwise. In the case of **Kibiro Wagoro Makumi v Francis Nduati Macharia and Another [2018] eKLR** the court defined fraud as follows:

13. As to whether the 1st Defendant's title to the suit land was fraudulently acquired, the term fraud is defined in Black's Law Dictionary as follows:

“Fraud consists of some deceitful practice or wilful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

19. The court has noted that in paragraph 12 of its amended plaint the Appellant pleaded the following particulars of fraud against the Respondents:

(a) *The 1st Defendant in collusion with the 3rd, 4th, 5th and 6th Defendants had the Title deed to the suit property issued to the 4th, 5th and 6th Defendants despite the fact that the 1st Defendant had not no title deed to pass to the said defendants or any other party having sold the suit property to the Plaintiff in 1997 and received full purchase price.*

(b) *The 4th, 5th and 6th Defendants fraudulently caused the 1st and 2nd Defendants to issue them with the Title of the suit property despite full knowledge that the suit property belonged to the Plaintiff and that they were merely entrusted by the Plaintiff with the management of the cattle dip constructed by the Plaintiff on the suit land, thereby abusing the trust given to them.*

(c) *The 4th, 5th and 6th Defendants acted fraudulently by soliciting for the Title of the suit property from the 1st and 2nd Defendants despite full knowledge that the suit property belonged to the Plaintiff.*

20. The material on record shows that the Appellant was allocated the suit property in 1969 or thereabouts. Although the 3rd - 5th Respondents denied being members of the Appellant, the 5th Respondent conceded that his parents were. The court is satisfied that the 3rd - 5th Respondents knew all along that the Appellant had a claim upon the suit property since they had even protested the sale of a portion of the suit property by the Appellant to one Silas Karuga Nduhiu in 1992 or thereabouts. In fact, in their grounds of objection to the appeal they asked the court to issue a mandatory injunction against him to vacate the suit land.

21. An examination of the material on record reveals that the 3rd - 5th Respondents were weary of the Appellant's intention to sell the suit

property hence they deliberately caused it to be registered in their names as a means of securing it from sale. Their intentions may well have been noble but they certainly employed unlawful and fraudulent means to deprive the Appellant of the suit property and have it registered in their names as trustees of *Munyaka (Gordon) Cattle Dip*. The fraudulent means were clearly particularized in paragraph 12 of the amended plaint and the court is of the opinion that they were well proved on the basis of the material on record.

22. The court is thus satisfied from a re-evaluation of the evidence on record that the 3rd - 5th Respondents knowingly employed deceitful means to obtain registration of the suit property in 2014 whereas they knew that the Appellant had been in possession of the suit property for many years and had established a cattle dip thereon as far back as 1992. The court consequently agrees with the Appellant's submission that the trial court erred in law and fact in holding that the Appellant had not proved any fraud on the part of the Respondents. It is also noteworthy that the 1st and 2nd Respondents did not tender any evidence at the trial to demonstrate how they ended up allocating the suit property to the 3rd - 5th Respondents long after a discharge of discharge for the same property had been issued to the Appellant.

(b) Whether the trial court erred in law in holding that the Appellant had failed to prove its claim against the Respondents

23. Whereas the Appellant faulted the trial court for holding that it had not proved its case against the Respondents to the required standard, the 3rd - 5th Respondents supported the decision of the trial court. The Appellant submitted that the SFT having allocated to it the suit property in 1969 and having issued a discharge of charge in 1994, it had no authority to allocate the suit property to the 3rd - 5th Respondents afterwards. The Appellant cited the cases of **Cecilia Nyambura Ndungu v Oikalou Famers Co-operative Society [2018] eKLR** and **M'Rinkanya v M'Mbijewe [1984] KLR 761** in support of its submissions.

24. In the case of **Cecilia Nyambura Ndungu vs Oikalou Farmers Co-operative Society (supra)** the court held, *inter alia*, that:

“71. There was however no evidence on record to show that either party had acquired the allotment letters illegally, unprocedurally or through a corrupt scheme. Going by the above analysis of evidence tendered by both parties, it is clear that the Defendant was the initial allottee of the suit land. It therefore follows that by 12th September, 1972, when the Plaintiff’s deceased husband applied for allocation of P.I. 841, the same was not available for allocation.

72. In essence therefore I find that there was double allotment of the suit land and the blame therefore lay squarely on the Settlement Fund Trustee. This notwithstanding, in the case of M’ikiaraM’Rinkanya& Another v Gilbert KabereM’Mbijiwe (1982-1988) 1KAR 196, the court held that where there was a double allocation of land, the first allotment would prevail. That therefore there was no power to allot the same property again...”

25. On the other hand, the 3rd - 5th Respondents submitted that a letter of allotment was merely a letter of intention to allocate land and that it did not have the force of a title deed. They cited the case of **Lilian WaitheraGachuhi v David ShikukuMzee [2005] eKLR** in support of that submission. They further submitted that having acquired a title document first, their title was unimpeachable at the instance of the Appellant. They relied upon **Section 26 of the Land Registration Act, 2012** and the case of **MargaretNjeriWachira v EliudWaweruNjenga [2018] eKLR** in support of the latter submission.

26. The court is satisfied on the basis of the material on record that the SFT having allocated the suit land to the Appellant in 1969 and having charged it to secure payment of the relevant purchase price it had no legal interest therein to pass to the 3rd - 5th Respondents especially after issuing a discharge of charge in 1994. A discharge of charge is the clearest evidence and declaration that SFT had been paid all its dues and that it had no further claim on the suit property. It could not lawfully turn round several years later and purport to allocate the same property to different parties. The action of SFT in purporting to grant the suit property to the 3rd - 5th Respondents was patently illegal and irregular and accordingly impeachable under **Section 26 of the Land Registration Act, 2012**.

27. **Section 26(1) of the Land Registration Act** stipulates as follows:

“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.”

28. The court is satisfied that on the basis of the material on record that the 3rd - 5th Respondent’s title to the suit property was issued illegally and unprocedurally since the suit property was lawfully the property of the Appellant. Accordingly, the court finds and holds that the trial court erred in law in holding that the Appellant had failed to prove its case against the Respondents.

29. The court is thus of the opinion that the 3rd - 5th Respondent’s title was legally impeachable on at least two grounds. First, there is abundant evidence on record to demonstrate that they obtained the title through fraud as defined in law. Second, there is clear evidence to demonstrate that the title was obtained illegally and unprocedurally since SFT had no legal interest in the suit property which it could pass to the 3rd - 5th Respondents.

(c) Who shall bear costs of the appeal

30. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed& Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the appeal. Accordingly, the Appellant shall be awarded costs of the appeal against the 3rd - 5th Respondents.

G. CONCLUSION AND DISPOSAL

31. The upshot of the following is that the court finds merit in the Appellant’s appeal. Accordingly, the court make the following orders for disposal of the appeal:

(a) The appeal is hereby allowed.

(b) The judgment and decree of the trial court dated 3rd July, 2019 is hereby set aside in its entirety.

(c) The Appellant’s suit before the trial court in NyahururuMCE&L No. 249 of 2018 be and is hereby allowed in terms of prayers (a), (b), (c), (d) and (e) of the plaint amended on 20th February 2014.

(d) The Appellant is hereby awarded costs of the appeal to be borne by the 3rd - 5th Respondents jointly and severally.

32. It is so decided.

Judgment dated and signed at Naivasha and delivered via Microsoft Teams platform this 22nd day of July 2021.

In the presence of:

No appearance for the Appellant

No appearance for the Attorney General for the 1st and 2nd Respondents 3rd - 5th Respondents present in person

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Y. M. ANGIMA

ELC JUDGE