



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.LC APPEAL NO. 34 OF 2019

SAMWEL GISIORA OGOTI.....APPELLANT

VERSUS

SEVENTH DAY ADVENTIST CHURCH EAST AFRICA UNION.....1ST RESPONDENT

COUNTY LAND REGISTRAR, NYAMIRA.....2ND RESPONDENT

COUNTY LAND ADJUDICATION SETTLEMENT OFFICER.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. This Appeal is in respect of the judgment of Hon B.M Kimtai - Principal Magistrate dated 11th December, 2019 in Keroka PMCC No. 26 of 2018. By way of background, the Appellant filed suit against the Respondents seeking inter alia an order for cancellation of the title in respect of L. R No. GESIMA SETTLEMENT SCHEME /482 and reversion thereof to L.R No. GESIMA SETTLEMENT SCHEME /299 registered in the Appellant's name.

2. It was the Appellant's case that the 1st Respondent had colluded with the 2nd and 3rd Respondents and illegally sub-divided the land parcel known as L.R No. GESIMA SETTLEMENT SCHEME /299 resulting in a reduction of the acreage of the said parcel from 2.5 Ha to 2.1 Ha.

3. The 1st Respondent filed a Defence and Counterclaim denying the Appellants claim and alleging that the Appellant had trespassed onto parcel 482. In the Counterclaim he sought a declaration that he was the registered owner of L. R No. GESIMA SETTLEMENT SCHEME /482 and an order for the eviction of the Appellant from the said parcel of land as well as order of injunction restraining the Appellant from interfering with the said parcel of land.

4. When the suit came up for hearing, the Appellant testified and produced various documents. The Defendant also testified and produced his documents. After hearing both parties, the court rendered its judgment dated 11th December 2019 dismissing the Appellant's case and entering judgment for the 1st Respondent on the Counterclaim. He declared that the 1st Respondent was the registered owner of land parcel No. GESIMA SETTLEMENT SCHEME/482, issued an order of eviction against the Appellant evicting him from parcel 482 and issued a permanent injunction restraining the Appellant from entering, trespassing, cutting down trees, cultivating or interfering with L.R No. GESIMA SETTLEMENT SCHEME /482.

5. Aggrieved by the said judgment, the Appellant filed this Appeal citing 20 Grounds of Appeal. This being a first appeal, the court has a duty to analyze the evidence afresh and reach its own conclusion bearing in mind that it did not have the benefit of seeing the witnesses testify. (See *Selle v Associated Motor Boat Company Ltd. [1968] EA 123*).

6. One of the main complaints raised in the Grounds of Appeal relate to the Report by the Senior Land Registrar, Nyamira dated 12th November 2018. The Appellant contends that the said report was inconclusive and the trial magistrate should not have relied on it in arriving at his decision. The impugned report indicates that land parcel No. GESIMA SETTLEMENT SCHEME/482 (P.I 808) measures approximately 0.8 Ha (2 acres) and the boundaries were marked on the ground. It further states that the proprietor of parcel No. (sic) a Mr Samwel Gisiora Ogoti has encroached into parcel No. 482. The Land Registrar stated that he did not give a judgment on the dispute since the matter was before the Chairman National Land Commission. He therefore directed that the parties to maintain the status quo so that no new developments or any new activities should be initiated until they get a directive of the Chairman. The area Chief and the Security Officers who were present were directed to ensure that the part belonging to parcel No. GESIMA SETTLEMENT SCHEME/482 was secured awaiting the directive of the National Land Commission.

7. The said report was prepared by the Land Registrar before the suit in the lower court was filed. The report was produced by the Respondent as Defence Exhibit 16. The Appellant did not object to the production of the said report nor did he request that the maker of the same be called for cross-examination on his report. Nothing stopped the Appellant for requesting that another visit to the suit property be made by the County Surveyor and Land Registrar so as to come up with a more comprehensive report. In as much as this court has the leeway to revisit and re-evaluate the evidence and come to its own conclusion, it cannot re-open the case so as to fill the gaps in the Appellant's case.

8. The Appellant has also complained that the trial court erred in believing that the 1st Respondent's assertion that the Appellant was in possession of an extra 3 acres of land thereby issuing an eviction order against the Appellant from his own land. Once again, the trial magistrate's findings were based on the Senior Land Registrar's report which clearly stated that the Appellant had encroached on the 1st Respondent's land. This is a claim that the 1st Respondent had articulated in its Counterclaim and which the Appellant responded to in his Defence to Counterclaim and was required to controvert through cogent evidence.

9. In the case of **Hellen Wangari Wangechi v Carumera Muthoni Gathua (2015) eKLR** the Court of Appeal held that:-

*“Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in **BritestonePte Ltd vs Smith & Associates Far East Ltd** :-*

“The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

With the above observation in mind, the starting point is that whoever desires any court to give judgment as to any legal right or liability, dependant on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall be on any particular person.

It is a well-established rule of evidence that whoever asserts a fact is under an obligation to prove it in order to succeed. As observed above, the appellant made allegations in the plaint, hence she was under an obligation to support of the allegations.

10. Having failed to support the allegations made in his Reply to Counterclaim, the court had no better evidence to rely on than that adduced by the 1st Respondent.

11. On the question of fraud alluded to by the Appellant, it is trite law that fraud must not only be specifically be pleaded and particularized but it must also be proved. There is a plethora of authorities on this principle. See the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**. In considering the issue of fraud the Court observed as follows:-

*“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:***

*“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 (**Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308**).*

*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 (see **Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). 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 (**Davy V Garrett (1878) 7 ch.D. 473 at 489**). “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”.*

*see **Insurance Company of East Africa vs. The Attorney General &3 Others Hccc135/1998**.*

Whether there was fraud is, however, a matter of evidence.”

12. The Appellant alleged that L.R No. GESIMA SETTLEMENT SCHEME/482 was fraudulently curved out of L.R No. GESIMA SETTLEMENT SCHEME/299. However, in his testimony at page 11 of the Record of Appeal he states as follows_

“I am telling the court that my parcel 299 has been sub-divided and created 482 and 481. The mutation is showing that. I know that if land is sub-divided it shows in the Green Card and search. I don't have any document showing my land has been sub-divided and that parcel 482 emanated from it”

13. It is therefore clear that the Appellant did not prove fraud on the part of the 1st Respondent.

14. The last criticism against the judgment of the trial magistrate relates to the failure to consider the exhibits particularly the Registry Index Map which was produced as Defence Exhibit 22. Had the Appellant expected the map to be interpreted for the court's understanding, he ought to have called the Surveyor who is the expert concerned with the drawing and interpretation of Survey Maps. Having lost the opportunity to do so, he cannot be heard to complain that the court failed to rely on the said map. I have tried to scrutinize the said Registry Index Maps that were produced by the Appellant and the title numbers are faded and difficult to read. I therefore cannot blame the trial court for having been unable to consider them. At any rate, Appellant himself admitted in his evidence at page 110 of the Record of Appeal that he did not understand the ingredients of the RIM (Registry Index Map) since he is not a Surveyor.

15. In conclusion, I am not persuaded that the Appellant has made out a case for reversal of the judgment of the trial magistrate. As I have pointed out earlier in this judgment, the Appellant's evidence fell short of the required standard to prove his case. Additionally, he lost the opportunity to sufficiently challenge the 1st Respondent's Counterclaim with the result that the same was found to be successful. Accordingly, the Appeal lacks merit and I dismiss it with costs to the 1st Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 15TH DAY OF JULY, 2021.

J.M ONYANGO

JUDGE