



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCA 55 OF 2019

TITUS MITHIKA GICHUNGE.....APPELLANT/APPLICANT

VERSUS

CYPRIAN KABERIA M'IBUTU.....RESPONDENT

JUDGMENT

1. By a memorandum of appeal amended on **19th November 2020 Titus Mithika Gichunge** hereinafter the appellant seeks to overturn the judgment delivered on **21st March 2019** by **Hon. G.N. Wakahiu Chief Magistrate** in **Maua Law Courts CMCC No. 123 of 2014**, on the following 13 grounds of appeal:

(i) That the learned chief magistrate erred in law and facts in granting orders of injunction against the appellant when the respondent had not satisfied the condition upon which such orders could be granted.

(ii) That the learned chief magistrate erred in law and in facts in failing to hold that the suit property land parcel no. Ithima/Antuamburi/8016 which was as a result of sub-division from parcel number Ithima/Antuamburi/6825 did not belong to the appellant but to his deceased father one Victoriano Gichunge M'Ibeere and despite the appellant together with his mother and siblings having been in occupation of the same since 1978 and the same being family land and which indeed was confirmed by the chief and there being fraud to sub-divide and acquire the deceased land illegally.

(iii) That the learned chief magistrate erred in law and in facts in failing to hold that the transfer was fraudulent acquired and ignoring the pertinent documents produced by the appellant during trial including medical records and invoices together with the testimony of the in-charge records from Chogoria hospital indicating/confirming that the appellant's deceased father one Victoriano Gicunge M'Ibeere could not have signed the transfer on 8th October 2012 in the office of the advocate as alleged as he was admitted in hospital contrary to the respondent claims that the said transfer was signed in the offices of Mbogo & Muriuki company advocates and this indeed shows the kind of illegalities which were committed.

(iv) That the learned chief magistrate erred in law and in facts in allowing the advocates who represented the respondent in the suit to testify as a witness to the respondent during trial in contravention to the advocates practice rules.

(v) That the learned chief magistrate erred in law and in facts in ignoring the fact that the seller William Maore who purports to have sold the appellants deceased father land to the respondent had illegally acquired the deceased land fraudulent as he did not produce the sale agreement between him and the appellant's deceased father and no surveyor would alert the appellant that the land is being sold and all the process was done illegally and secretly because the appellant was busy taking care of his deceased father who was suffering from cancer and the respondent and the alleged seller William Maore took advantage of the sickness of the appellant's deceased father to illegally and fraudulently acquire the land and then sold the same to the respondent herein to defeat the justice.

(vi) That the learned chief magistrate erred in law and in facts in ignoring the fact that the appellants deceased father could not be able to walk alone and go sign the transfer or attend the land control board without the accompany or in the presence of the appellant who was taking care of his deceased father throughout his sickness till his death.

(vii) That the learned chief magistrate erred in law and in facts in ignoring the fact that the seller William Maore's wife was a witness to the transfer and she being the wife was the only witness to the transfer and not independent.

(viii) That the learned chief magistrate erred in law and facts in ignoring the fact that the person who claims to have sold the land one William Maore to the respondent herein did not have a sale agreement showing that the same was sold to him by the appellants deceased father one Victoriano Gichunge M'Ibeere.

(ix) *That the learned chief magistrate erred in law and facts in relying on the minutes of the land board for 28th August 2012 as the authenticity of the said minutes are in question as the same were not executed or stamped by the land control board.*

(x) *That the learned chief magistrate erred in law and facts in relying on the minutes of the land board as no witness testified to having seen the appellants deceased father one Victoriano Gichunge present at the board meeting. Further, the board requires that the seller's witnesses attends the meeting and that was not the case in this instance.*

(xi) *That the learned chief magistrate erred in law and in facts in ignoring to consider that even the respondent had illegally and unlawfully not served the appellant properly with the summons to enter appearance till the eviction orders were issued/granted on 18.11.2014 whereby the appellant filed application under certificate of urgency to set aside the said orders of eviction which were indeed illegally and unlawfully granted against the appellant herein.*

(xii) *That the learned chief magistrate erred in law and in facts in ignoring to consider that when my father passed, he had left three wives the appellant's mother and his two step mothers who were alive at the time of instituting the suit and even to date and thus in this regard the appellant was not the right person to be sued on behalf of the appellant's entire family and at this point the learned magistrate should have dismissed the case from the beginning.*

(xiii) *That the learned chief magistrate erred in law and in facts in ignoring to consider that when appellant's father passed, he had left three wives appellants mother and his two step mothers who were alive at the time of instituting the suit and even to date and thus in this regard the appellant was not the right person to be used on behalf of the appellant's entire family and at this point the learned magistrate would have dismissed the case from the beginning.*

2. Following directions by this court parties opted to dispose of the appeal by way of written submissions dated 7th April 2021 and 17th May 2021 respectively.

3. This being a first appeal it is the duty of the court to review, re- evaluate and re-appraise the evidence before the lower court and satisfy itself that the decision was well founded, both in law and facts.

4. In *Selle and another vs associated motor boat Co. Ltd and others (1968) E.A 123*, this principle was annunciated thus:-

“.... This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. However this court is not bound necessarily to follow the trial judgments findings of fact if it appears either that he had clearly filed on some point to take into account 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”.

Pleadings

5. The respondent by a plaint dated 26th June 2014 and amended on 14th April 2015 alleged he was the owner of **Parcel No. Ithima/Antuamburi/8016**. That in December 2013 the appellant wrongly and unlawfully and without any reasonable cause trespassed into his land and erected two semi-permanent timber houses and continued to do so hence damaging some miraa plants. He pleaded further that before the interlocutory judgment was set aside, he evicted the respondent on 19.11.2014, spent **Kshs.40, 000** as costs and fenced off the land with barbered wires and posts.

6. However the said fencing posts were destroyed by the appellant between 20.11.2014 – 27.11.2014 leading to a criminal case against the appellant for malicious damage in **Maua Law Courts**.

7. Further the respondent pleaded he leased out the suit land to a third party but due to acts of the appellant he was forced to refund **Kshs. 28,000/=** hence sought for mesne profits. Under **paragraph 6 (d) and (e)** the respondent further pleaded he had lawfully acquired the subject land from one William Maore who had bought it from the appellant's deceased parents after which he was transferred the land at a Land Control Board meeting held on 28.8.2012.

8. Similarly the respondent pleaded the appellant was purporting to claim the land as family property yet he knew his late father had regularly transferred it to him during his lifetime. Further it was pleaded the (appellant) was harassing their father and went to an extent of being taken to court by his late father so as to allow the conveyance to proceed.

9. The respondent therefore sought prayers against the appellant for the removal of the illegal structures in default eviction; permanent injunction; Kshs.90,050 being costs of eviction and the destroyed fence and lastly mesne profits. In support of the amended plaint the respondent attached seven exhibits.

10. On the other hand the appellant opposed the respondent's case through a defence and counterclaim dated 2nd March 2015 and amended on 8th July 2015. In his pleading the appellant denied the respondent was a registered owner of the suit property; that he had trespassed into the alleged land; that there was any expense over alleged eviction and destruction of a fence; that the respondent had allegedly leased the premises; that there was any sale transfer and purported appearance by his late father before the Land Control Board and specifically pleaded that the purported registration in favour of the respondent was fraudulent and stated;

“That one William Maore purported to sell the suit parcel to the plaintiff upon getting transfer through fraudulent means. The transfer of the land to plaintiff. He admitted jurisdiction of the court but denied receiving any demand notice.”

11. Concerning the counterclaim the respondent averred that the “parcel” is family land where he was born, brought up and has other 7 siblings. He did not name them but averred they were in occupation of the suit land. He further pleaded that the respondent had allegedly acquired the suit premises fraudulently from one William Maore and under paragraph 14 of the counterclaim averred his deceased father Victoriana Gichunge M’Ibeere was holding the suit parcel in trust for the family”.

12. In his prayer the appellant sought for:-

(i) A declaration that parcel no. 8016 belonged to his father and the land registrar be ordered to revert and restore the said parcel and in his names.

(ii) Permanent injunction restraining the respondent from entering or interfering with parcel no. Ithima/Antuamburi/8016.

(iii) General damages for properties.

13. The respondent made a reply to defence and defence to counterclaim dated 17th January 2016 and maintained;- the appellant had destroyed his fence which had value; that the appellant had no locus standi to file a counter claim; there was no fraud as alleged in acquiring his land and that the appellant was a busy body.

14. The respondent filed a list of issues for determination dated 27th April 2015 listed as follows:-

(a) Whether or not the said Victoriano Gichunge signed the transfer documents at the time of transfer.

(b) Whether or not the said Victoriano Gichunge attended the lands control board which is a mandatory procedure for controlled transactions.

(i) Whether or not the said William Maore had a good title to give the plaintiff herein.

(ii) Whether or not the land parcel subject of this suit should revert to the original owner Victoriano Gichunge

(iii) Whether the land registrar should be ordered to delete the name Cyprian Kaberia and replace it with Victoriano Gichunge.

15. Similarly the appellant filed a case summary stating as follows; ***“The defendant family has lived on the suitland Ithima/Antuamburi/6825 since 1978..... The family home is situated on this parcel.”***

Plaintiff’s testimony

16. The respondent testified on 19th April 2018 adopted his witness statement and produced **P. Exh 1 a copy of title deed, Land Control Board meeting minutes** as **P. Exh. 2**, pleadings in **Civil Case No. 157 of 2013** between the deceased and the appellant as **P. exhibit 3, lease agreement 3, P. exhibit 3 a refund receipt as P. exhibit 4 copy of charge sheet** for Court Case No. **4670/2014** as **P. exhibit 5**. The respondent also produced **Mutation Form No. 6827** showing excision of **Parcel No. 816 – 817**.

17. The record shows there was no objection at all to the production of these above exhibits nor were there any specific questions put to the respondent whether they were forgeries, fraudulent, illegal or obtained through corrupt means.

18. **PW 2, William Maore** testified that he purchased land from the appellant’s late father. Though he admitted he did not have the agreement in court he clarified they both attended a Land Control Board meeting on 28.8.2012; denied the appellant’s father was in hospital but stated he is the one who had earlier on taken him to hospital. He maintained the said late father signed transfer documents, produced by PW1.

19. Further **PW2** denied the signature in PW1’s exhibits was a forgery. He also admitted selling the subject land to the respondent herein. The record is clear there were no specific questions posed to the witness over fraud, illegalities, corruption and misrepresentation.

20. In **re-examination the PW2** confirmed he had never been served with any complaint on account of forgery or uttering false documents. He also confirmed he was a witness in **Criminal Case No. 4170 of 2104 (P. Exh 4)**.

21. **PW3, David Meme** testified and adopted his witness statements dated 1st April 2015 in which he admitted receiving a refund of **Kshs. 28, 000** from the respondent after his lease with him was frustrated by the appellant. He confirmed he was a witness in the **Criminal Case No. 891 of 2015 (P Exh 4)**.

22. **PW4, Peter Kirimi Mbogo** was summoned by the court. He testified that the transfer was indeed prepared, witnessed and executed in his office in the presence of both the transferor and transferee. He told the court the two were known to him and came with consents from the land control board.

23. In **cross examination PW4** maintained it was possible one to visit Kenyatta National hospital in the morning and attend to his office for signature the same day. He clarified the transfer was on 8.10.2012. Further the witness told the court the appellant's late father was not bed ridden, was of sound mind, was his friend, he knew he was sickly, and had told him he needed money for medication. He confirmed the signature and stamp on defence exhibit 1 was his. Again there was no question put to the said witness in cross examination that he was party to any fraud, forgery, misrepresentation and or illegality.

Defence testimony

24. **DW 1** the appellant told the court in **2014** the **chief Antuamburi** summoned him claiming he should vacate the suit land since **Parcel No. 6825** had been subdivided into **8016 and 8017**, the former in favour of the respondent. He stated that he vehemently opposed the notice since the land was family property. Later on he was charged in **Criminal Case No. 4670 of 2014** but was eventually acquitted of the charges.

25. **DW1** testified it was not true the respondent had allegedly bought any land from his late father and maintained his late father was in hospital on the day he is alleged to have appeared before the land control board. He produced **Defence exhibit 1 the transfer form, Defence exhibit 3, invoice from PCEA Chogoria hospital as Defence exhibit 4, green card as Defence exhibit 5, lease agreement as Defence exhibit 6** . He denied William Maore (PW3) ever got a consent to buy his parent's land nor did he have any sale agreement to that effect. He claimed they lived on the suit land with his five siblings and wondered why it was only him who was sued by the respondent.

26. **DW1** claimed he was with his late father in Kenyatta National Hospital a day before the alleged appearance before the land control board. He stated there could not have been any valid transactions between his late father and PW 2 and maintained if there was any, the same was fraudulent. He did not give any specific details or particulars of the alleged fraud. His prayer was the land be released to the estate of the deceased.

27. In **cross examination, DW1** maintained the land could not be sold without a family consent, was not there when his late father bought the property; denied having heard of case no. 157 of 2013 but admitted he had written a witness statement on behalf of the family; admitted he had placed a caution against the land; he suspected fraud and hence reported to the CID though he produced no documents to that effect; said he had no documents to prove his father was of unsound mind; admitted the alleged lease agreement showed no parcel number; agreed his late father had sued him in 2013; said he was unable to not tell if his father could be barred legally from selling his land; alleged he was not the author of the transfer document he produced as D.Exh 1 though it had some cancellations and errors.

28. In **re-examination DW1** admitted D.Exh 1 was signed by his late father and PW 2, and that it had been certified by the firm of Kirimi Mbogo Advocates. DW2 told the court that he was a brother in law of the deceased and witnessed D. Exh 6 but was not aware of any land sale.

29. **DW 3** was the wife of the deceased. She told the court his late husband had two other wives. Regarding **Parcel No. 6825** she said she was not aware of any purchase by the respondent .She adopted her statement made on **28.4.2015**.

30. In **cross examination DW3** maintained the subject matter was **Parcel No. 6825** where she lived. She confirmed she was aware of a court case between her husband and the appellant over **Parcel No's 6825** when her late husband wanted to dispose of the same to third parties. She told the court she neither knew of the sale to the respondent nor did she give any spousal consent and wondered why only the appellant had been sued.

31. In **re-examination DW3** confirmed her marriage to the appellant's late father was customary: they had no dispute over land with her co-wives. She told the court she only came to know of case no. 157/2013 recently.

32. **DW3 Lydiah Kageni Nkonge** a Clinical Officer **PCEA Chogoria Mission Hospital** testified on behalf of **Dr. Grace Kanyi** and produced medical reports relating to the appellant's late father; she denied knowing the deceased nor could she confirm the date of his alleged admission to the hospital.

33. In **re-examination DW4** stated she only had photocopies of the admission notes indicating the date as 3.10.2012.

34. **DW 4** testified a neighbor of the deceased he was not aware of the alleged sale. He confirmed the deceased would engage him in his transactions and it was strange he did not notify him of any intended sale to the respondent. He confirmed the appellant was the one living on the land.

35. After the of defence testimony parties filed written submissions dated 14th February 2019 and 13th February 2019 respectively.

36. In his submissions the respondent maintained that the process of acquiring property from William Maore as per exhibits produced; was above board and the appellant fell short of proving any fraud on the part of the respondent. He submitted the appellant did not challenge the genuineness, correctness, authenticity and legality of **P. Exhibits No's 1, 2, 3, 4, 5 & 6** and relied on **Lawrence vs Lord Norray (1880) in 210 at page 221, Insurance Co. of East Africa vs AG & 3 others HCCC No. 135 of 1998 (unreported) and Arithi Highway Developers vs West end (2015) eKLR** on the proposition that fraud could not be inferred but must not only be pleaded but also proved.

37. On the other hand the appellant submitted that any purported sale and transfer was fraudulent on account his late father's sickness and state of mind. Reliance was made on **Section 3 (3) of the Law of Contract Act** that in absence of any sale agreement between his late father and PW2, no good title could be passed to the respondent. He urged the court to rely on the strength of doctor's testimony as opposed to that of PW 4 to show the deceased was sick and unable to be available to execute D Exh1.

38. The appellant further submitted that the maker of D. exhibit 1 was the owner and proprietor of the plaintiff's (respondent's) law firm and urged the court to take judicial notice hence find his testimony unbelievable. The appellant relied on the cases of **Alice Chemutai Soo vs Nickson Kipkurui Kipkorir and Another, ELC No. 51 of 2014 (no citation) Elijah Mokeri Nyangwara vs Stephen Mungai Njuguna & another (2013) eKLR, Arthi Highway Developers Ltd vs West End Butchery Ltd (2015) eKLR** on the proposition that the transaction was fraudulent and hence the title held by the respondent ought to be cancelled so as to revert to the estate of the deceased.

Analysis of trial court findings and determination.

39. It is trite law that issues flow from the pleadings as presented by the parties. Having gone through the pleadings, it is my considered view that the trial court was correct in stating the five issues for determination namely:

- (1) If the suit property was sold to William Maore,*
- (2) Whether the said transfer to William Maore was fraudulent,*
- (3) If the plaintiff is entitled to the orders sought,*
- (4) Whether the defendant is entitled to the prayer sought in the defence and counterclaim,*
- (5) Which party to bear costs likewise,*

Grounds of Appeal

40. **On ground 1** of the appeal the appellant submits the trial court erred in law and in fact by granting injunctive orders. The evidence tendered by the respondent was clear and cogent. He produced before the court a title deed Under **Section 25 (1) & 26** of the **Land Registration Act**.

41. Whereas it is the appellant who produced D. exhibit 1, the pleadings on fraud fell short of what is provided for under **Order 2 Rule 4** of the **Civil Procedure Rules**. The particulars of fraud were not pleaded and it is not clear what role the respondent played in the alleged fraud and who he allegedly colluded with. It is the law that a title deed is issued by a land registrar. The land registrar was not called to testify and confirm if indeed the said title deed was a forgery. Similarly the court was correct to make a finding that failure to enjoin the land registrar was fatal in the appellant's case. No attempt was made to summon the office of Land Registrar to testify or clarify when and how the transaction was undertaken.

42. Allegations were made by the appellant on the condition of the deceased at the time of the transaction.. No medical report was produced to show he was suffering a mental disease, that his mental faculties were not working and lastly that he was under bed rest or could not attend the land control board meeting.

43. Similarly the chair of the land control board meeting or any other official for that matter, was not called to testify. Moreover there was no objection to the production of respondent's

P. exhibit 1 – 6. The appellant never insisted they be produced by their makers. Further there was no question during trial raised as to the genuineness, authenticity and or legality of the said exhibits. So grounds ten and 11 of the appeal are an afterthought and are hereby rejected.

44. Additionally, there was no suggestion that the signature, thumbprint and or photos used or attached to D. Exhibit 1 were procured illegally and through misrepresentation. The appellant did not also testify as to how and when he came to be in possession of D. exhibit 1.

45. The inference is that the appellant knew of its existence either through his late father or was privy to the exhibit. PW 4 testified and confirmed D. exhibit 1 genuineness and stated he personally attended the deceased and PW2 who were known to him. There was no specific question posed to pw 4 that he forged the documents, uttered false documents, had no capacity to execute the documents and or was privy to any collusion so as to deprive the appellant his land. Again as at the time of testifying the appellant did not put it to PW 4 that there was a pending investigation over his manner of handling the transaction and the level the said investigations if any, had reached.

46. It has been submitted as a ground of appeal No. 4 of the appeal that there was malpractice on the part of PW4. The record shows the appellant was duly represented in court right from inception of the case. There is no record that his advocates objected to the said law firm representing the respondent. If anything the said lawyer came to testify to produce D. exhibit 1 and clarify the position. At the time the said witness came to testify the record shows there was prior notice to the appellant. Similarly there was no objection to his taking a witness stand.

47. **Regarding ground 5 & 6** of the appeal, the record indicates the appellant had not sought to enjoin William Maore, as an interested party if at all he had any claim against him for indemnity. Further the evidence shows there were no such specific questions posed to PW2 during cross examination for the alleged collusion, complicity, misrepresentation, fraud or illegality. The record shows there was only one allegation against William Maore in the counterclaim. It is not pleaded who PW2 colluded with to perpetuate the alleged fraud. Similarly the specific allegations herein are not pleaded in both the defence and counterclaim. A party is bound by his pleadings and statement of issues. There was nowhere in the counterclaim the appellant has mentioned from which Parcel No. 8116 was created.

48. Though the appellant pleads he occupies Parcel No. 8635, he did not produce any title deed or search to show such parcel exists and how it was related with Parcel No. 8116.

49. The burden of proof was always on the appellant to prove his counterclaim, which is slightly higher than on a balance of probability.
50. Further the respondent produced before the court a title deed which prima facie is to be taken as proof of ownership accompanied by, a transfer form and a Mutation Form. PW2 was not a party to the proceedings between the appellant and the respondent, but a witness. With respect the respondent had no obligation in law to produce any sale agreement between PW2 and the appellant's father. Similarly PW 2 rightly confirmed he purchased the land for value from the deceased and subsequently lawfully passed over the property to the respondent.
51. The trial court was therefore in order to believe the testimony of both the respondent and PW2. There is no bar in law that one's spouse cannot witness a sale agreement or transfer, hence ground 7 of the appeal is rejected.
52. Regarding the issue of prior knowledge that the deceased was intending to dispose of his land, evidence was tendered that the appellant was opposed to any transaction during the lifetime of his late father to the extent that he was sued before the same court. The appellant has not come out clearly to deny those facts. It also not clear from his evidence when exactly he discovered the sale agreement and the transfer. Needless to say, his pleading was that, it was when the chief summoned him to vacate the land.
53. The appellant did not disclose to the trial court when his father passed on and why he did not take out letters of administration yet he pleaded the suit property to revert to either himself or the estate of the deceased.
54. The appellant admitted both pleadings and in his testimony that he had not taken out letters of administration hence the court should have reached a finding that he lacked standing to plead a counterclaim for and on behalf of the deceased estate.
55. The respondent was categorical in the reply to defence and defence to the counterclaim that the appellant lacked **locus standi** to counter claim. Instead of regularizing the position the appellant took no action until the matter was heard and determined. He is yet to do so even before this court and has given no plausible explanation.
56. As concerns ground 2 of the appeal the court takes judicial notice that the trial court rightly set aside the ex parte judgment and gave the appellant an opportunity to be heard.
57. Due to the foregoing, this court comes to the conclusion that the respondent proved his case on a balance of probability before the trial court and the learned trial magistrate decision is hereby upheld.
58. The appeal herein therefore lacks merits and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 6TH DAY OF OCTOBER, 2021 IN PRESENCE OF:

MISS GITONGA HOLDING BRIEF FOR MBAABU FOR APPELLANT

MBOGO & MURIUKI FOR RESPONDENT

Court Clerk: Kananu

HON. C.K. NZILI

ELC JUDGE