



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 30 OF 2020

MARTHA WANJA MUGO.....APPELLANT

VERSUS

JOHN MUGONGO.....RESPONDENT

(Being an appeal from the Judgment of Hon. J. Irura (P.M.) delivered on 29th April, 2020,

in Nkubu PM ELC No. 36 OF 2018)

JUDGMENT

1. By an appeal dated 2.6.2020 the appellant seeks to overturn the decree in the lower court on the grounds that the trial court erred in law and fact by finding the land transfer to the appellant illegal, null, void and or fraudulent; shifting the burden of proof of fraud to the appellant; improperly finding the appellant had failed to produce a sale agreement, land control board consent and transfer; misinterpreting the **Land Registration Act** hence coming to the wrong conclusion and lastly reaching a judgment against the law and the available evidence.
2. This being a first appeal the court is required to re-assess rehear and re-appraise itself on the lower court record, come up with its own findings and conclusions. ***See Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123.***
3. At the lower court, the respondent as the registered owner of **L.R No. Igoji/Kinoro/1957** had sued the appellant for fraudulently causing the land to be transferred to herself without his knowledge, approval or consent despite a decree in his favour in **Meru CM LDT Case No. 22 of 2010**. He sought for the rectification of the register, invalidation of the transfer, cancellation of the same and transfer into his name.
4. The appellant denied the claim, admitted there was a LDT case but denied it was settled in favour of the respondent, stated she held an indefeasible title after the respondent lawfully and procedurally sold her the land upon subdivision from **L.R Igoji/Kinoro/1680**.
5. She averred the lodging of the L.D.T. and the subsequent award could not confer title to the respondent under the **Land Registration Act**.
6. Further the appellant averred the alleged fraud had no basis but only came about upon pressure by sons in spite of having followed legal formalities to subdivide and acquire consents to subdivide and transfer the land to her. Additionally the appellant pleaded no fraud could be proved without enjoining the land registrar as a co-defendant.
7. The respondent testified that he was following up the claim for the estate of the deceased vide a limited grant which he produced as **P exh 1** and a green card as **P exh 2**.
8. He told the court the land was obtained without the requisite land control board, transfer and consent forms. He insisted the signatures appearing on the alleged documents did not belong to his late father though he had made no report to the police over forgery but he was certain his father never attended to any lawyer's office to sign the transfer forms.
9. He testified his late father did not report the matter to the police but could not tell how the appellant had accessed a copy of his father's identify card and Pin certificate. He insisted his brother Gitonga could not have filed a caution had he been party to the transfer and the sale agreement.
10. Though the transfer was in 2006, the appellant stated his late father came to discover it in 2010 after the appellant allegedly started looking for a potential buyer, where after his father lodged a Land Disputes Tribunal case No.11 of 2010 against the defendant. He could not tell if the appellant and the deceased were living as husband and wife in Timau.

11. The appellant adopted her witness statement dated 6.4.2014 and produced **D exh 1 – 10** stating he did not fraudulently effect the transfers as alleged for the deceased had voluntarily sold and transferred the land to her. She stated she took vacant possession and used the land for over 6 years when one Njeru chased her away. She urged the court to order she be allowed back to the land.
12. In cross examination the appellant admitted she lived with her husband a distance away who knew of the purchase but denied they were in a relationship with the deceased. She insisted she bought the land in 2002 through an agreement done before B.G. Kariuki Advocate though her copy got burnt. She stated the agreement did not indicate a consideration, though the advocate witnessed the agreement after which they attended a land control board meeting at Igoji. She admitted the deceased was buried on the land.
13. She stated she did not know how to read but someone had assisted them fill in the transfer forms.
14. Further the appellant stated the land was given to her as a gift though at one stage the assistant chief of Kinoro summoned her over the deceased signature.
15. DW2 confirmed the appellant was her mother who had given her a portion of the suit land to utilize.
16. DW3 was the Land Registrar who told the court the transfer in favour of the appellant had been done on 20.4.2006 but was unable to trace the transfer documents. He insisted the consent to transfer must have been obtained as the stamp duty was paid and according to him the transfer looked genuine.
17. Further he stated the green card showed the consideration was a gift which would always attract stamp duty but maintained he had been unable to trace any supporting documents.
18. Through written submissions dated 25.10.2021, it was submitted the appeal was not filed out of time when one excludes weekends as well as the issue of Covid 19.
19. Secondly, it is submitted the issue of change of advocates under **Order 9 rule 5** is curable under **Article 159 2 (2)** of the **Constitution**.
20. Thirdly, it is submitted the respondent did not discharge his burden of proof under **Sections 107 and 109** of the **Evidence Act** relying on **Isaac Adhiambo Okago –vs- Kenya Women Finance Trust [2016] eKLR, Central Bank of Kenya Ltd & 4 Others –vs-....., Evans Kidero –vs- Speaker of Nairobi County Assembly & Another [2015] eKLR** on proof of fraud.
21. On the part of the respondent, it is submitted the appeal was filed out of time and without leave relying on **Sammy K. Kirui –vs- Remmy K. Korir [2015] eKLR and Hamisi Swaleh –vs- Rama Swale [2021] eKLR**.
22. Secondly, it is submitted the appeal is filed by an advocate improperly on record relying on **Stephen Mwangi Kimote –vs- Murata Sacco Society [2018] eKLR**.
23. Thirdly it is submitted the appellant did not produce any genuine documents to show she had been lawfully transferred the land given the deceased had vehemently denied ever selling and transferring the land during the lifetime and immediately before his death after he took the appellant to the Land Dispute Tribunal hence as per **Section 3 of the Law of Contract Act** as read together with **Section 6 of the Land Control Act**, the court was justified in invalidating the sale and transfer.
24. The court has gone through the pleadings, evidence, submissions and the appeal. the issues for determination are:-
 - a) **If the respondent proved his claim to the required standards.**
 - b) **If the trial court applied the correct law in reaching the conclusion.**
25. **Section 79 (g) of the Civil Procedure Act** provides that an appeal to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding such period any time when the low court may certify as having been required for the preparation of delivery of a copy of the decree.
26. This appeal ought to have been filed by 29th May 2020. It was only filed on 11.6.2020 without leave of the court. My finding is that it was filed out of time and hence is defective in law.
27. Secondly **Order 42 Rule 13** requires a record of appeal to include notes of the trial magistrate made at the hearing. The record of appeal lacks the proceedings and the decree appealed against.
28. Thirdly, an issue has been raised as to capacity of the appellant's counsel on record to file and appear in this appeal. **Order 9 rule 5** does not apply to appeals since this is a new proceeding and not a continuation of a lower court suit. **See Wilfred Mbogo & 5 others -vs- Nelson Mwaniki (2016) eKLR**
29. Coming to the merits of the appeal, the respondent had based his claim on both fraud, void or nullity of the contract of sale of land. **Section 3 of the Law of Contract Act** provide the key ingredients for a contract on sale of land. There must be consideration, the agreement must be in writing and with witness. The respondent pleaded there was no legally binding contract which had been entered between the appellant and his deceased father. The appellant did not call the lawyer who witnessed the agreement. Similarly the land registrar did not verify the appellant's exhibits at all and claimed he could not trace the original in his file.

30. As a step to vitiate and challenge the alleged sale and transfer evidence was led that the deceased had during his lifetime lodged the Land Dispute Tribunal claim. In absence of the sale agreement, consent to transfer and the transfer documents, my considered view is the trial court was right in finding the agreement and sale invalid.

31. Given the reasons above, the appeal was filed out of time and also lacks merits. The same is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 20TH DAY OF DECEMBER, 2021

IN PRESENCE OF:

RINGERA FOR RESPONDENT

IGWETA MURIITHI FOR APPELLANT

COURT ASSISTANT – KANANU

HON. C.K. NZILI

ELC JUDGE