



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. EO35 OF 2021

JANE GAKII MIRITI.....APPELLANT

VERSUS

EQUITY BANK LIMITED.....RESPONDENT

(Being an appeal from the Judgment of Hon. S. Ndegwa (S.P.M.)

delivered on 1st February, 2021, in Githongo SPM ELC No. 9 of 2020)

JUDGMENT

1. The appellant seeks to overturn the lower court decree on the basis the court failed to appreciate the appellant's pleadings, issues for determination, evidence and submissions; failed to evaluate the law on the facts as presented and lastly considered extraneous issues, misapplied the law on the facts and hence reached at the wrong decision.

2. This being a first appeal the court is expected to rehearse, re-evaluate and re-assess the lower court record and come up with its own findings and conclusions while aware the trial court had benefit of hearing and seeing the witnesses **See *Selle & Another –vs- Associated Motor Board Company Ltd [1968] EA 123.***

3. The appellant as registered owner of Parcel No. Abothuguchi/Githongo/3125 had sued the respondent for fraudulently registering a charge over the suit land without her consent or approval with a view of defeating her legal rights. She prayed for a discharge of charge, release of the title documents and costs.

4. The respondent failed to enter appearance upon service hence the matter went for formal proof.

5. PW1 adopted her witness statement dated 28.8.2020 and produced her list of documents dated 28.8.2020 namely a certificate of official search, land control board consent, as P exh 1 and 2 respectively.

6. The appellant faults the lower court for dismissing the suit contrary to her pleadings and evidence tendered.

7. Having looked at the pleadings, evidence tendered and the appeal, the written submissions dated 28.10.2021 and 27.9.2021 respectively, the issues for determination are:-

a) If the appellant had proved her claim to the required standard.

b) If the trial court erred in fact and in law in dismissing the appellant's claim.

8. **Order 2 rule 4** requires matters of fraud and illegality to be specifically pleaded and proved. In the instant matter, the appellant's case was based on fraud, forgery and illegal entry of a charge to her title deed without her consent or approval. No particulars were made on when she gave out her title and date she discovered there were entries to the title deed, if she had reported a missing title deed, under what circumstances and conditions she gave out her title deed and lastly if she ever made a report to the police for investigations to commence and the outcome if any.

9. In **Vijay Morjaria –vs- Nausingh Madhusingh Darbar & Another [2000] eKLR** the court held particulars of fraud acts alleged to be fraudulent must be set out and proved since fraud is never inferred from facts.

10. On the same vein the standard of proof as held in *Kinyanjui Kamau –vs- George Kamau [2015] eKLR* is higher than that of ordinary suits. The onus was therefore on the appellant to plead the fraud, forgery and illegality specifically and proceed to prove it other than a search and land control board consent application form, the appellant produced nothing in terms of a forensic report showing she reported the fraud, investigations were commenced and a report made to the effect that the respondent had conspired with her late brother to charge her property without her knowledge or approval.

11. Similarly the appellant did not produce any single letter that she made a complaint with the bank, enquired when the loan was advanced and under what circumstances and lastly if there were any outstanding loan obligations against the title.

12. Under **Section 107** of the **Evidence Act** the onus was on the appellant to prove fraud and forgery. The trial court in my considered view rightly looked at the law as to the burden of proof as held in *Kuria Kiarie & 2 Others –vs- Sammy Magera [2018] eKLR and Central Bank of Kenya Ltd –vs- Trust Bank Ltd & 4 Others [1996] eKLR*.

13. The court found the appellant had failed to give particulars of the deceased brother and the manner she came to establish that the title deed she had left in his custody was charged with the respondent. The trial court also looked at the pleadings, which it established were contradictory at paragraphs 3, 6 and 11 of the plaint as against her evidence in court and the written statements.

14. The appellant did not state when she handed over the title deed to the brother. Whereas she says her brother passed on in 2014 and started to recover the title deed it is not clear when she discovered the fraud and why she would await until 2020 to file the suit.

15. Assuming she discovered the fraud when she made a search on 2.8.2020, **P exh 2** indicates the charge had been made on 12.8.2005. In line with **Sections 4 and 7** of the **Limitation of Action Act**, the suit if any based on account of contract or recovery of land by the appellant was already statute barred as held in *Gathoni –vs- Kenya Cooperative Creameries Ltd [1982] KLR 104 and in Rawal –vs- Rawal [1990] KLR 275, Dickson Ngige Ngugi –vs- Consolidated Bank Ltd (formerly Jimba Credit Cooperative Ltd & Another [2020] eKLR*.

16. Further the appellant did not produce the green card to show when she was registered as the title holder. The appellant appears to have left everything to the court to infer fraud. She made general allegations on fraud and forgery without making any efforts to procure vital documents so as to sustain her claim.

17. She did not explain her reasonable diligence in discovering the fraud if any and whether she was in occupation of the suit land or not to give credence to her claim. She called no independent witnesses from her brother's family at the very least to shed light on how the land was charged. *See Kibiro Wagoro Makumi –vs- Francis Nduati Macharia & Another [2018] eKLR*.

18. If at all the appellant's claims the title deed was in the custody of her brother similarly she was extremely silent and gave no evidence if she ever enquired from her late brother's family if they may have been aware of the alleged loan or circumstances leading to the respondent charging the property.

19. Given the foregoing it is therefore my considered view the trial court was right in reaching the decision that the appellant had failed to prove her case to the required standards.

20. The appeal lacks merit and is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 15TH DAY OF DECEMBER, 2021

In presence of:

Karanja for appellant

Miss Njenga for respondent

Court Assistant – Kananu

HON. C.K. NZILI

ELC JUDGE