



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**ELCA 9 OF 2019 (CIVIL APPEAL NO. 120 OF 2013)**

**REBECCA KAINO MUTWOL.....APPELLANT**

**VERSUS**

**GABRIEL L. BARGECHIR.....1<sup>ST</sup> RESPONDENT**

**PATRICK CHERUIYOT KOMEN.....2<sup>ND</sup> RESPONDENT**

**COUNTY COUNCIL OF MARAKWET.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgment and decree of Hon. M,C Chepseba Senior Principal Magistrate at Iten dated and delivered on 6<sup>th</sup> September 2013 in CMCC No. 28 of 2010.*

**JUDGMENT**

This is an appeal arising from a judgment and decree of Senior Principal Magistrate's court at Iten in CMCC No 28 of 2013 which was delivered on 6<sup>th</sup> September 2013.

The brief background of this case as can be gathered from the record of appeal is that the appellant's claim against the defendants (respondents) vide further amended plaint dated 7<sup>th</sup> July, 2011 was for:

- a) A declaration that the plaintiff is the sole proprietor of all that parcel of land known as Kapsowar Township plot No. 110 and orders for eviction be issued against the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their agents or servants.
- b) A declaration that all the transaction and/or transfer purportedly effected by the 3<sup>rd</sup> defendant in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants or 2<sup>nd</sup> defendants in respect of plot No. 110 are illegal, null and void and that the suit plot remains property of the plaintiff.
- c) An order of permanent injunction restraining the defendants, his servants or agents from encroaching, constructing and trespassing onto the plaintiff's parcel of land known as Kapsowar Township plot No. 110 and in the interim, an order of temporary injunction pending the hearing of this suit. The plaintiff also seeks for Mesne benefits and damage for trespass.
- d) Costs of the suit.
- e) Any other relief this honorable court may deem fit and just to grant.

The trial court heard the case and dismissed the plaintiff's suit stating that the plaintiff did not prove her claim against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

The following background is the one that has triggered the current appeal against the judgment and decree of the Senior Principal Magistrate's Court Iten. The appellant has listed eight grounds of appeal as follows:

1. That the learned trial Magistrate erred in both law and in fact in dismissing the plaintiff's case without due regard to the inconsistencies inherent in the defense's evidence.
2. That the learned trial Magistrate erred in both law and in fact by disregarding the crucial evidence of PW2.
3. That the learned trial Magistrate erred in both law and in fact in inferring that a witness to a sale agreement can legally transfer

the said property as the legal owner.

4. That the learned trial magistrate erred in both law and in fact by disregarding the fact that the suit property initially belonged to one Chepkonga Koilege.
5. That the learned trial magistrate erred in law and in fact by holding that the consent of a spouse is not pertinent when family property is being transferred.
6. That the learned trial magistrate erred in both law and fact by dismissing the Plaintiffs case despite the 1<sup>st</sup> and 2<sup>nd</sup> defendants failing to testify in proof of their case.
7. That the learned trial magistrate erred in both law and fact in dismissing the Plaintiffs case without due regard to the overwhelming evidence in favour of the Plaintiff.
8. That the learned trial magistrate erred in both law and fact in inferring that payment of rates by an individual amounts to ownership by the individual.

Counsel agreed to canvass the appeal by way of written submissions which were duly filed.

### **APPELLANT'S COUNSEL'S SUBMISSIONS**

Counsel for the appellant submitted that the learned trial Magistrate disregarded the inconsistencies which were evident in the defence case and that the 1<sup>st</sup> and 2<sup>nd</sup> defendant's did not call any witnesses which can be presumed that they associated themselves with evidence given by the 3<sup>rd</sup> defendant.

Counsel also submitted that in the said evidence, the 3<sup>rd</sup> defendant could not show why the name of the original allottee was deleted and replaced with of one Francis Mutwol while the plaintiff had proved that there was contractual relationship between her and the original allottee one Chepkonga Koilege as it appears in the list which was not controverted by the 3<sup>rd</sup> defendant. Counsel relied on the case of Martha **Wambui Muchiri v Kanairio Miriti 4 others [2018] eKLR**

On ground two of the appeal Counsel submitted that trial Magistrate did not take into account the evidence given by PW2 who confirmed that the suit property was sold to the plaintiff by his deceased father vide an agreement which he witnessed when it was being executed. Counsel stated that this was crucial evidence as it confirmed how the plaintiff came to be the owner of the suit property and has never ceded her rights to anyone.

On ground three of the appeal Counsel submitted that there was an inference from the judgment that a witness to a sale agreement can transfer said property as a legal owner. It has not been shown how Francis Mutwol who was a witness became a registered owner of the property and passed the ownership to the 1<sup>st</sup> respondent.

Counsel submitted that from the evidence adduced, particularly PExh-3, the same shows alteration to the names of the original allottees to Francis Mutwol and DW1 could not explain how the alterations were done. The root of title was in question and fraud can be established on this. Counsel relied on the case of **Denis Noel Mukhulo Ochwada & Another v Elizabeth Murungari Njoroge & Another** where the court held :

*“This is another case of those cases involving shameless and egregious fraud at the Ministry of Lands. In the not uncommon practice, a total stranger obtains false duplicate documents of title to a title. mostly with collusion of Ministry of Lands officials, surreptitiously and fraudulently transfers the property to another person, who may not be a party to the fraud. That party subsequent/y se/s and transfers the property to a third party who, more often than not has no notice of the fraud that resulted in the transfer of land to him.”*

It was counsel's submission that the learned trial Magistrate erred in both law and fact by disregarding the fact that the suit property initially belonged to one Chepkonga Koilege and that during trial the appellant testified that she bought the said parcel of land in 1975 and the said parcel of land was plot No. 33. The fact that plot No. 33 is now plot no 110 is not in dispute as the records from the Council shows the same. This is confirmed by the plaintiff's exhibit being the letter by the council of Marakwet dated 30<sup>th</sup> June, 2010 (PEXH No. 2). there was nothing tendered to show that there was privity of contract between Chepkonga Koilege and Francis Mutwol.

Counsel further submitted that the trial court erred in inferring that payment of rates by an individual amounts to ownership of the property even though the 3<sup>rd</sup> defendants' evidence was that the land rates of the suit land were paid by one Francis Mutwol which could not confer title to him. Further that the respondents bought the suit land from other persons other than the plaintiff and the said transaction is null and void as the 3<sup>rd</sup> party had no contractual rights to deal with the said property.

That from the plaintiff's exhibit PExh-1 it is clear that the suit property belonged to the late Chepkonga Koilege who sold it to the plaintiff which was confirmed by the evidence of PW2 who witnessed the transaction. Hence, it is clear that Francis Mutwol had no rights over the said parcel of land. That the records at the council show that he owned the property the same cannot be justified as it contains erasures. Francis Mutwol had no capacity to sell the parcel of land.

Counsel therefore submitted that the appellant proved her case in court and the 3<sup>rd</sup> respondent's case was full of inconsistencies and could

not show how Francis Mutwol obtained title to the suit land. He urged the court to allow the appeal as prayed with costs.

### **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENT'S CASE**

The respondents did not file submissions.

### **3<sup>RD</sup> RESPONDENT'S CASE**

The 3<sup>rd</sup> respondent filed submissions on 8<sup>th</sup> November 2018 and listed two issues for determination as to whether the Appellant herein has proved that she is the rightful owner of Kapsowar Township Plot No. 110 and whether the Appellant has proved to the required standard that conveyance of the suit land to the 2<sup>nd</sup> Respondent was tainted by fraud aided by the 3<sup>rd</sup> Respondent

Counsel cited section 107 of the Evidence Act and section 109 on the burden of proof which provides that:

*(1) " whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.*

Additionally, S. 109 states as follows:-

*"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

Counsel further cited section 38 and 27 of the Registered Land Act and submitted that the appellant failed to prove absolute ownership of the suit land as after the drawing of the agreement and execution of the same the transaction never saw the light of day.

The appellant has nothing to her claim which indicates that her name appears on the register as the owner of the suit land. and that the appellant failed to discharge the onus of proof in regard to her claim of ownership of the suit land.

It was counsel's submission that no evidence was adduced by the appellant to prove how the respondents participated in fraudulently aiding the registration of Francis Mutwol became the registered owner of the suit land and as well as the approved transfer of the parcel to the 2<sup>nd</sup> respondent.

Further that the claim of fraud was not particularly pleaded by the appellant in her first pleadings and in her further amended plaint dated 7<sup>th</sup> July 2011. Counsel relied on the case of *Vijay Morjaria v Nansing Darbar & Another (2000) eKLR* where it was held that:

*"It is well established that fraud must be specifically pleaded and that the particulars of fraud must be stated on the face of the pleadings. The Acts alleged to be fraudulent must of course be set out and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to I gave fraud to be inferred from the acts*

In the case of *Martin Nzioka Mutua & 2 others v Mamuco Sacco Ltd (2018) eKLR* it was held that:

*"For a party to plead fraud in registration of land, a party must first prove that fraud was attributable to the transferee. It must be attributable either directly or by necessary implications, that is, the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act. "*

Counsel submitted that the evidence of Mr. Mutwol's appearance as a registered land owner in the land register was sufficient proof to him that the transfer was being carried out by a rightful owner. That the appellant's assertions are woven around PExh-3 which was a list of allottees from Marakwet County Council where the name of the alleged vendor Chepkonga Koilege was cancelled and replaced with Francis Mutwol. She failed to prove the particulars of fraud and to state how the name changes were fraudulently done. The claim of fraud is a mere afterthought. Further, the appellant did not enjoin Francis Mutwol in the suit.

Counsel therefore urged the court to dismiss the appeal with costs to the respondents.

### **ANALYSIS AND DETERMINATION.**

It is the duty of this Court as a first appellate court to reconsider the evidence, reevaluate and make its own conclusions. This duty was set out by the Court of Appeal in the case of **Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212** where the court held inter alia, that:-

*"On a first appeal from the High Court, the Court of Appeal should 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. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"*

I have considered the Record of Appeal, as well as the submissions by Counsel and come to the conclusion that the issue for determination is

as to whether the Appellant herein has proved that she is the rightful owner of Kapsowar Township Plot No. 110 and whether the Appellant has proved to the required standard that conveyance of the suit land to the 2<sup>nd</sup> Respondent was tainted by fraud aided by the 3<sup>rd</sup> Respondent.

The appellant's appeal is premised on the ground that the Magistrate disregarded the inconsistencies which were evident in the defence case. She contended that she was the rightful owner of the suit land and claimed to have purchased the suit land in 1972 vide a sale agreement dated 20<sup>th</sup> May 1972.

The claim arose prior to current land statutes and falls under the purview of the Registered Land Act. Section 38(1) of the RLA provides;

Section 27 of the RLA provides;

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

**(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.**

The appellant produced a sale agreement which is on page 67 of the record of appeal. The appellant further submitted that there was no explanation as to how the suit land was registered in the name of Francis Mutwol. I note that the said Francis Mutwol was not enjoined as a party to the suit in order to defend the root of the title. Further, it is trite law that he who alleges must prove. The appellant did not provide any proof of the alleged fraud that resulted in Francis Mutwol being registered as the proprietor of the suit land in the list of allottees provided as exhibit P3.

There is no evidence that the appellant was registered as the owner of the suit land after the alleged purchase.

The standard of proof for allegations of fraud has been set out by the court in several decisions. In **David Wahome Mbeu v Catherine Wanjiru Maina & another [2019] eKLR** the court relied on the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, where the Court held that; -

***“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”.***

Further, the appellant did not plead the particulars of fraud in the amended plaint even though in the further amended plaint at paragraph 4A the appellant stated the particulars of illegalities but fell short of proving the illegalities against a person who was not enjoined as a party to the suit one Francis Mutwol. Under Order VI Rule 4 (which was in force at the time of commencement of the suit) it was a requirement that a party relying on fraud had to specifically plead it with sufficient particularity. The appellant did not prove fraud to the required standard.

The appellant had submitted that the court made inference that a witness to a sale agreement can legally transfer the said property to a legal owner. The appellant has not illustrated how the trial court made such inference. He has not highlighted which part of the judgment makes this inference. The appellant failed to enjoin Francis Mutwol as a defendant which would have been sufficient to enable him explain the root of title. It is on record that DW1 testified and produced documentary evidence in court outlining how Francis Mutwol became the owner of the suit land at page 141 of the record of appeal.

In conclusion the appellant failed to prove how the erasures amounted to fraud. The absence of the 1<sup>st</sup> and 2<sup>nd</sup> respondents is not proof that the appellant proved his case on a balance of probabilities. She has not proven that she was the owner of the suit land at any point. A person who alleges fraud must specifically plead and lead evidence to prove the same. It is not enough to state that land has been fraudulently acquired. A party must go a step further to prove the same.

I find that the appeal lacks merit and is dismissed with no orders as to costs.

**DATED and DELIVERED at ELDORET this 26<sup>TH</sup> DAY OF FEBRUARY, 2020**

**M. A. ODENY**

***JUDGE***

**JUDGMENT** read in open court in the presence of Mrs.Kogos for the 3<sup>rd</sup> Respondent and Mr. Mathai holding brief for Mr.Omusundi for Appellant in the absence of Miss.Mwathi for 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent.

Mr. Yator – Court Assistant