



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. MISC CASE NO. 130 OF 2014

FREDRICK NYAGA M'VINYA (*Suing as a personal representative*

of the Estate of MWOGA M'BINYA (Deceased).....**PLAINTIFF**

VERSUS

EUNICE RWAMBA NJIRU.....**1ST DEFENDANT**

NANCY WANJUKI NJIRU (*Sued as a personal representative of*

the estate of EPHRAIM NJIRU M'RUIA (Deceased)).....**2ND DEFENDANT**

JUDGEMENT

A. Introduction

1. By an undated plaint amended on 6th August 2014 and further amended on 6th December 2017 the Plaintiff sought the following reliefs against the Defendants:

- a) *Cancellation of title deed for land parcel No. Kagaari/Kithunguthia/T.70 bearing the names of the 1st Defendant and that of Ephraim Njiru M'Riua and same be registered in the names of the original proprietor Mwoga M'Binya.*
- b) *Compensation for loss of user of parcel of land No. Kagaari/Kithunguthia/T.70.*
- c) *General damages for trespass.*
- d) *Special damages.*
- e) *Costs of this suit with interest at court rates.*
- f) *Any further relief this honourable court may deem fit and just to grant.*

2. The Plaintiff filed the suit as a personal representative of the estate of his late father Mwoga M'Binya (*the deceased*) who was the previous registered proprietor of *Title No. Kagaari/Kithunguthia/T.70* (*the suit property*). The 2nd Defendant was sued as the legal representative of the estate of the late Ephraim Njiru (*late Njiru*) who is currently registered as a co-proprietor of the suit property together with the 1st Defendant.

B. The Plaintiff's case

3. The Plaintiff's case was that at all material times the deceased was the registered proprietor of the suit property but upon his demise the 1st Defendant and late Njiru fraudulently caused the suit property to be registered in their names. The Plaintiff enumerated the following four (4) particulars of fraud in paragraph 6(b) of the further amended plaint:

- a) *Causing (sic) to be registered as the absolute owner of parcel of land No. Kagaari/Kithunguthia/T.70 (sic) was already dead.*
- b) *Willingly and fraudulently misleading the Registrar to alter the names of Mwoga M'Binya to read in (sic) the name of 1st Defendant and Ephraim Njiru M'Riua now deceased.*

c) *Causing changes to be made in the register to affect the change of ownership and proprietorship of the land No. Kagaari/Kithunguthia/T.70.*

d) *Fraudulently causing deletion of the names of Mwoga M'Binya in the register of parcel of land No. Kagaari/Kithunguthia/T.70.*

C. The Defendants' defence

4. By a joint written statement of defence dated 13th February 2018 the Defendants denied all the material allegations pleaded against them and the late Njiru in the further amended plaint. They denied the allegations and particulars of fraud pleaded by the Plaintiff. The Defendants specifically averred that vide a written sale agreement dated 11th February 2009 the deceased sold, during his lifetime, the suit property to the late Njiru for valuable consideration.

5. The Defendants further pleaded that the entire purchase price was paid during the lifetime of the deceased and that he signed the relevant land transfer forms and handed them to the late Njiru. They averred that the sale and transfer process was properly undertaken and a title deed lawfully issued to them. The Defendants considered the suit to be malicious and ill-motivated in the circumstances and consequently asked the court to dismiss the Plaintiff's suit with costs.

D. Summary of evidence at the trial

a) The Plaintiff's evidence

6. When the suit was listed for hearing on 19th December 2019 the Plaintiff testified as the sole witness in support of his case. He adopted his witness statement dated 14th May 2018 as his evidence-in-chief and produced the documents listed in his list of documents dated 15th May 2018 as exhibits, save for minutes of the Land Control Board which were not produced.

7. In his witness statement, the Plaintiff maintained that he was not aware of the sale agreement between the deceased and the late Njiru. He also stated that he was not aware of the payment of the purchase price and that the deceased's family members including his wife were not involved in the sale of the suit property. He, therefore, considered the alleged sale and transfer of the suit property to have been fraudulent.

b) The Defendants' defence

8. The Defendants testified at the trial hereof and called three additional witnesses in their defence. The Defendants' case was that the deceased had sold the suit property to the late Njiru to enable him (the deceased) meet his medical expenses during his last days on earth. They testified as to the making of the sale agreement, the payment of the purchase price and the handing of possession of the portion of the suit property sold.

9. The Defendants called Asena Wanja Mwoga (PW4) who was the wife of the deceased to testify on their behalf. She testified that she was aware of the sale and that the purchase price was used for the payment of the deceased's medical bills. In fact, she stated that the final instalment of the purchase price in the sum of Kshs. 30,000/- was paid to the Plaintiff for the settlement of the deceased's medical bills at Kyeni hospital.

E. Directions on submissions

10. Upon conclusion of the trial on 19th December 2019 the Plaintiff was given 30 days to file and serve her written submissions whereas the Defendants were granted 30 days upon the lapse of the Plaintiff's period to file theirs. The record indicates that the Plaintiff filed her submissions on 29th January 2020. However, the Defendants' submissions were not filed until 12 March 2020.

F. The issues for determination

11. The court has noted that the parties did not file an agreed statement of issues for determination. The record shows that the Plaintiff filed a list of five issues whereas the Defendants filed a list of six issues for determination. As such, the court shall frame the issues for determination as provided for in law. Under **Order 15 Rule 2 of the Civil Procedure Rules**, the court may frame issues from the following:

- a) *The allegations contained with pleadings.*
- b) *The contents of documents produced by the parties.*
- c) *The statements made on oath by or on behalf of the parties.*

12. The court has considered the pleadings, documents and the evidence of the parties. The court is of the opinion that the following issues arise for determination in this suit:

- a) *Whether the suit property was sold by the deceased to the late Njiru during his lifetime.*
- b) *Whether the suit property was fraudulently transferred to the 1st Defendant and the late Njiru.*

c) Whether the Plaintiff is entitled to the reliefs sought in the further amended plaint.

d) Who shall bear the costs of the suit.

G) Analysis and determinations

13. The court has considered the evidence and the submissions on record on the 1st issue. The court has noted that the Plaintiff did not mention the existence of any sale agreement between the deceased and the late Njiru in his plaint, amended plaint, or further amended plaint. In his evidence-in-chief, he maintained that he was not aware of any such sale agreement and the payment of the purchase price since the purported agreement was signed only 16 days prior to the death of the deceased.

14. During the Plaintiff's cross-examination by the Defendants' advocate, however, he admitted the existence of the sale agreement. In fact, he admitted that the final instalment of the purchase price in the sum of Kshs.30,000/- was paid directly to him and that he signed for it! During re-examination, he stated that he was not disputing the existence of the sale agreement but that he was disputing the authenticity of the signature on the transfer form and the process of obtaining the consent of the Land Control Board.

15. The court has also considered the evidence of the Defendants on the issue. In particular, the court has considered the evidence of DW4 who was the wife of the deceased. Although the Plaintiff initially contended that the family of the deceased was not aware of the sale transaction, there is evidence on record to demonstrate that both the Plaintiff and DW4 were fully aware of the sale. As the Plaintiff eventually admitted during cross-examination, he received and signed for the final instalment of the purchase price.

16. The court is satisfied that the suit property was indeed sold by the deceased during his lifetime to the late Njiru. The Plaintiff and his family members were fully aware of the sale and the reason for the sale. The court further finds that the Plaintiff was not a credible and truthful witness. He openly lied to the court when he feigned ignorance of the sale transaction only to concede its existence during cross-examination. The 1st issue is consequently answered in the affirmative.

17. The 2nd issue is whether the suit property was fraudulently transferred to the 1st Defendant and the late Njiru. The Plaintiff's evidence was to the effect that the deceased never sold and transferred the suit property and that even his family members were not aware of the transaction. He enumerated 4 particulars of purported fraud in paragraph 6(b) of the further amended plaint.

18. It has been held that allegations of fraud are serious allegations to make against someone. They must not only be pleaded with particularity but also proved strictly. In the case of **Vijay Morjaria V Nansing M. Darbar & Another [2000] eKLR**, Tunoi J.A. (as he then was) held as follows regarding proof of fraud:

“It is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading. 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.

19. The court has considered the particulars of fraud, the evidence on record thereon as well as the submissions on record. The particulars of fraud accused the Defendants of causing themselves to be registered as proprietors of the suit property after the demise of the deceased. The evidence on record reveals that there was a sale agreement by which the deceased sold the suit property to the late Njiru for valuable consideration. In the circumstances, it could not be said that the change of ownership to the Defendants was fraudulent in law. The mere fact that the transfer documents were lodged or registered after the demise of the deceased could not, without more, constitute evidence of fraud.

20. The court is of the opinion that there was a legal basis for the transfer hence the same could not be termed fraudulent. **Black's Law Dictionary (10th Edition)** defines 'fraud' in the following manner:

“1. A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.

· Fraud is usually a tort, but in some cases (especially when the conduct is wilful) it may be a crime. – Also termed *intentional fraud*.

‘Fraud has been defined to be, any kind of artifice by which another is deceived. Hence, all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat anyone, is to be considered as fraud.’ John Willard, A Treatise on Equity Jurisprudence 147 (Platt Potter ed., 1879).

2. A reckless misrepresentation made without justified belief in its truth to induce another person to act.

3. A tort arising from a knowing or reckless misrepresentation or concealment of material fact made to induce another to act to his or her detriment.

· **Additional elements in a claim for fraud may include reasonable reliance on the misrepresentation and damages resulting from this reliance.**

4. Unconscionable dealing; especially, in contract law, the unfair use of the power arising out of the parties' relative positions and resulting in an unconscionable bargain."

21. There is no evidence of any **misrepresentation, deception or unconscionable** dealings on the part of the Defendants in the acquisition of the suit property. There is nothing on record to suggest that the sale was not on the basis of willing-seller, willing-buyer basis. There was no evidence that the deceased was not aware of the nature of the transaction he was engaging in. There was also no evidence to demonstrate that the signature of the deceased was forged.

22. There was really no evidence tendered by the Plaintiff to demonstrate that the Defendants misled the Land Registrar in any material respect or that they caused the alteration of the relevant land register through fraudulent means. The standard of proof of allegations of fraud was considered in the case of **Koinange & 13 Others [1986] KLR 23 and Evans Otieno Nyakwara V Cleophas Bwana Ongaro [2015] eKLR**. In the latter case, Majanja J held, *inter alia*, that:

"In this case, it is the Respondent who filed the defence and counterclaim and alleged that the document relied upon by the Plaintiff was a forgery. It was therefore incumbent upon him to prove this fact by marshalling the necessary evidence to support his case. The burden of proof to prove fraud lay upon the Respondent. As regards the standard of proof, I would do no better than quote Central Bank of Kenya Ltd Vs Trust Bank Ltd and 4 Others Nai Civil Appeal No. 215 of 1996 (UR) where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

"The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the Appellant in this case than in an ordinary civil case".

23. The court is far from satisfied that the Plaintiff has demonstrated fraud and the particulars of fraud alleged against the Defendants to the required standard. The material on record indicates that the Plaintiff decided to alter the nature of his case at the trial hereof. During the trial, he conceded that the suit property was indeed sold by the deceased but contended that he was only challenging the manner of transfer to the Defendants on two main grounds. First, he contended that the consent of the Land Control Board was not regularly obtained. Second, that the signed transfer form and other completion documents were never handed to the Defendants.

24. The court has noted from the further amended plaint that the Plaintiff did not specifically plead those two particulars of fraud he sought to rely upon at the trial. It was never his pleaded case that the consent of the Land Control Board was improperly obtained or that the completion documents were not transmitted to the late Njiru. It has been held that parties are bound by their pleadings and they cannot expand the scope of controversy through their evidence if the matters sought to be proved were never pleaded in the first place.

25. In the case of **Galaxy Paints Co. Ltd Vs Falcon Guards Ltd [2000] 2 EA 358**, it was held *inter alia*, that:

"It is trite law, and provisions of Order XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings and, unless pleadings are amended in accordance with provisions of the Civil Procedure Rules, the trial court by dint of the provisions of Order XX Rule 4 of the aforesaid rules may only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for the court's determination."

In Gandy Vs Caspair [1956] EACA 139, it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute clearly amounts to an error on the face of the record..."

26. Accordingly, the court shall not consider and determine allegations of fraud which were never pleaded in the further amended plaint. The court therefore finds that the Plaintiff has failed to prove the particulars of fraud as pleaded in the further amended plaint. Accordingly, the 2nd issue is answered in the negative.

27. The 3rd issue is whether the Plaintiff is entitled to the reliefs sought in the suit. The court has already found that the suit property was sold by the deceased during his lifetime. The court has also found that the Plaintiff has failed to prove that the suit property was fraudulently acquired by the Defendants. It would, therefore, follow that the Plaintiff is not entitled to the reliefs sought in the further amended plaint or any one of them.

28. The 4th issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should normally be awarded costs of an action unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons Ltd V Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason to deprive the successful litigants of the costs of the action. Accordingly, costs of the suit shall be awarded to the Defendants.

H) Summary of the court's findings

29. In summary, the court makes the following findings on the issues for determination in this suit:

a) *There is evidence on record to demonstrate that the suit property was sold to the late Njiru for valuable consideration by the deceased during his lifetime.*

b) *The Plaintiff has failed to demonstrate to the required standard that the suit property was fraudulently transferred into the name*

of the 1st Defendant and the late Njiru.

c) *The Plaintiff is not entitled to the reliefs sought in the further amended plaint or any one of them.*

d) *The Plaintiff shall bear the costs of the suit.*

I) Conclusion and disposal orders

30. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove his case against the 1st and 2nd Defendants to the required standard. Accordingly, the court makes the following orders for disposal of the suit:

a) *The Plaintiff's suit against the Defendants be and is hereby dismissed in its entirety.*

b) *The 1st and 2nd Defendants are hereby awarded costs of the suit to be borne by the Plaintiff.*

31. It is so adjudged.

JUDGEMENT DATED and SIGNED in Chambers at **EMBU** this **30TH DAY** of **APRIL 2020**

In the absence of the parties due to the prevailing Covid-19 situation. The Judgement was transmitted to M/s A.P. Kariithi & Co. Advocates for the Plaintiff, M/s Njuguna & Njuguna Advocates for the 1st and 2nd Defendants through the email addresses which they provided.

Y.M. ANGIMA

JUDGE

30.04.2020