



**REPUBLIC OF KENYA**

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

**ELC APPEAL NO. 3 OF 2019**

**MOGUSU OKWOGO..... APPELLANT**

**VERSUS**

**NYAKUNDI MOMANYI ..... RESPONDENT**

**(Being an appeal from the Judgment and Decree of Hon. Makila (SRM) dated and delivered on 25<sup>th</sup> January 2019 in Kisii ELC No. 21 of 2018)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant has preferred the instant appeal against the decision of the trial court in ELC No. 21 of 2018 on the following grounds;
  - a. That the learned trial magistrate erred in law and fact in failing to find that the Appellant had proved his case on a balance of probability;
  - b. That the learned trial magistrate erred in law and fact in failing to disregard the Respondent's evidence;
  - c. That the learned trial magistrate erred in law and fact in failing to properly analyse the evidence before her and thus reached a wrong conclusion; and
  - d. The learned magistrate decided the case without giving full consideration to the submissions by Appellant's counsel.
2. The Appellant had sued the Respondent claiming that the Respondent had caused his plot number 22 Eronge market to be subdivided and had a portion thereof fraudulently registered in his name. The Appellant averred that he discovered the fraud when he sold a portion of his plot to one Lameck Bogita and upon visiting the county offices to effect transfer of the sold portion, he discovered that his plot number 22 had been subdivided into plot number 22A and 22B. He also learnt that plot number 22B ("the suit land") had been registered in the name of the Defendant and one John Momanyi Livingstone (deceased). He stated that despite notifying the Respondent of his intention to sue, the Respondent remained adamant. He therefore sought judgment against the Defendant for a declaration that he was the rightful owner of the suit land. The Appellant also sought an order cancelling the plot card for the suit land bearing the Respondent's name and issuance of a new plot card in his name together with costs of the suit.
3. The Respondent denied the claim that he was fraudulently registered as the owner of the suit land. He averred in his statement of defence that the land had initially been registered in the name of Momanyi Mouko and was later transferred to him and Livingstone Nyakundi Momanyi (deceased). He denied the particulars of fraud alleged against him by the Appellant and put him to strict proof of his assertions.

**THE PARTIES' EVIDENCE**

4. When the matter came up for hearing before the trial court, the Appellant (PW1) produced a copy of minutes by the market committee of Eronge dated 27<sup>th</sup> November 1973, to prove that he was the owner of plot number 22 Eronge market. He testified that in the year 2011, he sold his land to the Respondent's father, Momanyi Mouko. They later on met with elders and he refunded the money to Momanyi Mouko who demolished the structures he had put up on the plot and took away his iron sheets.
5. The Appellant testified that he had thereafter sold the plot to one Lameck Bogita and when he wanted to transfer the land, he found that the County Council records showed that his plot was registered in the names of John Momanyi Livingstone and Nyakundi Momanyi. He stated that he had complained to the County Council of Kisii and that they had been summoned severally by the county but the Respondent and his co-owner had not attended meetings. He testified that he was still in occupation of the land and urged the court to declare him the owner of plot number 22B.

6. During cross examination, the Appellant stated that he had been given his plot number 22 together with his son but denied that they had subdivided the land into plot numbers 22A and 22B. He testified that he had lost his plot card and had reported the matter to the police. He also clarified that in 1975 he had sold the land to the Respondent's father for Kshs. 1,300/= but admitted that they had not reduced the agreement into writing. He had later on returned the money when the Respondent's father demanded a refund. The Appellant stated that he had been living on the plot since 1973 and had not realized that the plot had been subdivided.

7. Enock Mouko Nyangena (PW 2) testified that he knew that the Plaintiff was the owner of plot number 22B. He stated that the Plaintiff had sold the land in 1975 to Momanyi Mouko but he rejected the plot and demolished his structures with PW 2's help and had his money refunded to him. He testified that when the Plaintiff sold the land sometime in 2011, he realized that the land had been stolen from him by the sons of Momanyi Mouko. PW 2 testified that the Plaintiff was still in occupation of the land and told the court that the Respondent had never occupied the land. In cross examination, PW 2 stated that the Appellant and the Respondent were both the sons of his brothers. He also testified that the Plaintiff had been given plot number 22 together with his brother Okwogo Nyamora who had passed on.

8. The Respondent, John Momanyi Nyakundi (DW 1) maintained that plot number 22B belonged to him and Livingstone Nyakundi Momanyi. He testified that they had been the owners of the plot since 1975. He stated that plot number 22A had initially belonged to the Appellant but he was unable to pay rates and the council sold his land to another person. He urged the court to dismiss the suit since his co-owner had not been made a party to the suit.

9. When probed during cross examination, the Respondent stated that his co-owner was his deceased brother. DW 1 also testified that he, his father and his brother had jointly purchased plot number 22B in 1975 from the Plaintiff. He claimed that his father had recorded an agreement with the Appellant but he did not have a copy of the agreement. He also claimed that the plot had been subdivided through council minutes but he did not have a copy of the said minutes in court. He admitted that he was not in occupation or use of the subject land although he insisted that he used to pay land rates for the plot and produced a land rate receipt for May 2018 in support of his claim.

### **THE PARTIES' SUBMISSIONS**

10. Pursuant to the court's directions to canvass the appeal by way of written submissions, counsel for the Appellant filed her submissions on 19<sup>th</sup> December 2019. She contended that there were inconsistencies in the process of acquisition of title by the Respondent, which would be identified if the court bore in mind the following questions as it re-analyzed the evidence before the trial court;

- a. How the plot was subdivided when the plot card was in the possession of the Appellant?
- b. Why had the Appellant remained in possession of the land when the property allegedly belonged to the Respondent since 1975?
- c. Why had the Respondent only began to pay rates in 2018, long after the suit had been filed?
- d. Why did the Respondent's plot card indicate that it had been issued on 15/01/2001 whereas the original card from the county indicated that it was issued on 2/8/77?
- e. Where are the copies of the minutes that allocated the suit land to the Respondent?

11. Counsel also submitted that the Respondent's defence did not tally with his evidence, since he had alleged that the suit property was acquired by 3 persons in 1975 whereas his pleadings only indicated two people.

12. The Respondent's counsel argued that when the matter was heard before the trial court, the Appellant did not produce any document to prove that he was the owner of Plot Number 22. He also told the court that he owned the plot with his son but his son had not been made a party in the proceedings. It was counsel's submissions that the Plaintiff lacked *locus standi* to bring the suit without the consent of his co-owner. In contrast, the Respondent had produced his plot card which showed that the suit land was registered in his name and the name of Livingstone Nyakundi. He complained that the Appellant had intentionally left out the 2<sup>nd</sup> registered owner or his beneficiaries from the suit.

13. The Respondent's counsel also pointed out that the decree appealed against was not certified and that failure to file a certified copy of the decree appealed against rendered the appeal unmerited.

14. Counsel also contended that the Appellant was aware of the registration of plot number 22 B in 1975 but did not seek redress until 2017. He argued that there was no proof that plot number 22B was a subdivision of plot number 22 or that the Respondent had obtained plot number 22B through fraud. In his view, all issues had been dealt with properly and exhaustively by the trial court and therefore the appeal lacked merit and ought to be dismissed.

### **ISSUES FOR DETERMINATION**

15. Having analysed the evidence before the trial court as is required of a first appellate court, giving due deference to the findings of the court since it heard the witnesses testify. Having also analysed the record and memorandum of appeal as well as the parties' submissions, I find that the main issue arising for determination is whether the Appellant proved that the Respondent acquired title to the suit land fraudulently.

### **ANALYSIS AND DETERMINATION**

16. In his written submissions, counsel for the Respondent raised also preliminary issues which I will dispense with first before I deal with

the main issue.

17. It was contended by the Respondent's counsel that the Appellant had taken an inordinately long time to file the suit against the Respondent who had been registered as the owner of the suit land in 1977. The Respondent seemed to imply that the suit before the trial court was time barred.

18. The Appellant's case against the Respondent was based on fraud. Under **section 26** of the **Limitation of Actions Act**, the period of limitation for an action based on fraud is computed from the time when the Plaintiff discovers the fraud or could with reasonable diligence have discovered it. In the present case, the Appellant testified that he discovered that his plot no. 22 had been subdivided and a portion thereof registered in the name of the Respondent sometime in 2011. According to the aforementioned provision, time began to run from the year 2011. The Appellant filed his suit in 2017 thus it cannot be said that his case was filed out of time.

19. The second preliminary issue raised by the Respondent's counsel is that this appeal is incompetent for the reason that the Appellant attached an uncertified decree to his record of appeal. To answer the Respondent's contention, I am guided by the finding of the Court of Appeal in the case of **Emmanuel Nyaga Nyoka v Kitheka Mutisya Ngata Civil Appeal No. 63 of 2016 [2017]Eklr** where it was held;

“Starting with the first issue, it is true that the record of appeal before the first appellate court at the time of filing did not contain the decree appealed from. This omission brought into focus the provisions of **Order 42 rule 2** of the Civil Procedure Rules ...

... the respondent did not take advantage of this provision to subsequently file a certified copy of the decree so that the appeal proceeded to hearing in the absence of the decree appealed from. Was this omission fatal to the appeal? The Appellant thinks so as according to him the requirement is couched in mandatory terms. The Judge did not agree with him reasoning that:

*“The word “Decree” has been defined by the Civil Procedure Act, Cap 21 to include judgment. In fact, the Civil Procedure Act has provided at section 2 that the judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgment may not have been drawn up or may not be capable of being drawn up”.*

*This is the essence of the proviso to the definition of the term “decree.”*

*According to the Judge, the record of appeal before him had a certified copy of the judgment of the trial court. Consequently, he reasoned, the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record.*

*We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was a mere technicality that could not have sat well with the current constitutional dispensation that calls upon courts to go for substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in **sections 1A and 1B** of the Civil Procedure Act. Finally, one would ask what prejudice did the Appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any”.*

20. Although the Appellant failed to annex a certified copy of the decree, he did attach a certified copy of the judgment which would suffice in the absence of a certified copy of the decree. Further it has not been shown what prejudice the Respondent suffered by failure to annex the certified copy of the decree. I therefore find that the Appellant's failure to annex the certified copy of the decree cannot be the basis for dismissing this appeal.

21. Turning to the substantive issue herein, I agree with the trial court's position that acts of fraud must not only be clearly set out in the pleadings but must also distinctly proved for such a claim to succeed. I would also wish to add that the standard of proof required of a person alleging fraud is higher than that required in ordinary civil cases, namely proof upon a balance of probabilities but is not one beyond a reasonable doubt as in criminal cases. (See **Kinyanjui Kamau vs George Kamau Civil Appeal No 132 of 2005 [2015] eKLR** ).

22. The Appellant accused the Respondent of fraudulently causing his plot no. 22 Eronge Market to be subdivided and caused plot number 22B, which had been excised from the Appellant's plot to be registered in his name without his permission.

23. There was sufficient proof before the trial court that plot no. 22 had initially been allocated to the Appellant. The Appellant produced minutes dated 27<sup>th</sup> November 1973, which showed that plot no. 22 had been allocated to him and one Okwogo Nyamora. The Respondent did not dispute the Appellant's claim that he owned plot no. 22. His evidence before the trial court was that he had bought the suit land from the Appellant jointly with his father and brother in 1975. Oddly, the Respondent could not produce the agreement or the minutes by which plot number 22 was subdivided into plot number 22 A and 22 B.

24. For his part, the Appellant testified that the Respondent's father Momanyi Muoko purchased the land from him in 1975 but demanded a refund of the money. He produced a copy of minutes from Eronge Market dated 5<sup>th</sup> March 2012 and letters from officers of the County Government of Kisii dated 26<sup>th</sup> August 2011 and 24<sup>th</sup> July 2014 to back his claim that he had refunded the money, cancelling the sale agreement. In my view, the Appellant proved to the required standard that the Respondent's father Momanyi Mouko had refunded to him the purchase price for the plot. The circumstances under which the Respondent and his brother Livingstone Nyakundi Momanyi got registered as proprietors of the suit land in 1977 are however unclear. The Respondent testified that they had purchased the land from the Appellant but failed to produce any documentary proof of this. That said, I am in agreement with the trial court that the Appellant did not prove that the Respondent acquired title to the suit land through fraud.

25. It is clear from the evidence that the land in question was issued by Gusii County Council (as it then was) for commercial purposes. Under section 144 (5) of the repealed Local Government Act, local authorities had the power to let, or grant to any person a licence to occupy, any land which it possessed. The procedure for allocation and subdivision of town plots was set out in the repealed Government

Land Act.

26. In the case of *Wreck Motors Enterprises vs The Commissioner of Lands & 4 others C.A No. 71 of 1997 [1997]eKLR* the Court of Appeal held;

*“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.”*

27. Applying the principle in the above case, a plot card is not a document of title and one cannot rely on it to assert their right to property. From the evidence adduced, it is clear that neither the Appellant nor the Respondent has ever been issued with a letter of allotment or certificate of lease.

28. Further it was admitted by the Appellant that he had been issued with the plot card jointly with his son referred to as Okwogo Nyamora who was not a party to the suit. Although failure to enjoin his son was not fatal to his case, the Appellant sought orders that would have the effect of taking away his son’s property rights without him being heard.

29. In the case of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others CA ELD Civil Appeal No. 51 of 2016 [2018] eKLR* it was held;

*The fact that a co-owner, co-proprietor or other beneficiaries are not co-petitioners in this matter does not disentitle, prevent or non-suit other co-owners from filing suit. There is no rule or principle of law that co-owners can only file suit if all of them join as plaintiffs or petitioners. There is also no principle of law that a registered proprietor of a parcel of land, even if registered as a trustee, cannot file suit unless all beneficiaries are enjoined or disclosed in the suit. It is trite law that a suit should not in principle be struck out or defeated for joinder or non-joinder of a party. Except where there is a legal bar to maintainability of a suit by reason of non-joinder of a party or where in his absence, the decree that may be passed might become infructuous or in executable, a court cannot dismiss a suit for non-joinder of a person. [Emphasis added]*

30. However, as I have held above, a plot card, and in this case one issued as far back as 1973, cannot be the basis for asserting property rights.

31. Consequently, this appeal is found lacking in merit and is dismissed. Each party shall however bear his own costs of the appeal.

**Dated, signed and delivered** via zoom this 20<sup>th</sup> day of May, 2020.

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**J.M. ONYANGO**

**JUDGE**