



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

E.L.C NO. 6 OF 2013

BENSON WANDERA OKUKU.....PLAINTIFF

VERSUS

ISRAEL WERE WAKHO.....DEFENDANT

JUDGEMENT

1. The Plaintiff – **BENSON WANDERA OKUKU** – filed this suit here on 29th January, 2013 by means of a plaint dated 28th January, 2013. He complained that the Defendant – **ISRAEL WERE WAKHO** – had fraudulently subdivided land parcel L.R NO SAMIA/BUKHANGALA “B”/93 into land parcels NOS SAMIA/BUKHANGALA “B”/238 and SAMIA/BUKHANGALA “B”/239 (All hereinafter variously mentioned as parcels NOS 93,238 and 239 respectively). Parcel NO 93 belonged to the plaintiff’s late father – **JACKSON OKUKU WANDERA** – and when the defendant allegedly subdivided it, he caused parcel No. 238 to be registered in the name of the plaintiff’s late father while parcel No. 239 became registered in his name.

2. All this was fraudulent, the plaintiff pleaded, with particulars of fraud said to consist in the defendant subdividing the land without consent of Land Control Board, presenting forged documents to effect the subdivision, apportioning parcel no. 239 to himself, grabbing parcel No. 239, and being fraudulent perse. The plaintiff desires that the sub-division be nullified so that the land reverts to its original status as parcel No. 93 or, in the alternative, the register of land parcel No. 239 be rectified so that the plaintiff becomes its registered owner.

3. More precisely, the plaintiff is asking for the following prayers:

(a) An order that the registers of L.R NOS SAMIA/BUKHANGALA “B”/238 and 239 be cancelled and the original L.R NO SAMIA/BUKHANGALA “B”/93 be reverted to in the names of the late JACKSON OKUKU WANDERA.

(b) In the alternative, the name of the defendant in the register be removed and instead the plaintiff’s name be inserted.

(c) Costs of the suit

(d) Any other relief deemed fit and just to grant

4. The defendant responded to the suit via a defence dated 15th April, 2013 and filed in court on 13th May, 2013. He denied the plaintiff’s claim and pleaded, inter alia, that he acquired the land through a lawful sale from the plaintiff’s late father. According to the defendant, he acquired the land during the lifetime of the plaintiff’s late father and, pleaded he, it therefore does not form part of the estate of the plaintiff’s late father. The defendant asked that the plaintiff’s suit be dismissed with costs.

5. The court started hearing the matter on 14th February, 2017. The parties did not call witnesses. They only testified against each other. The plaintiff testified as PW1 and reiterated what he stated in his pleadings. According to him, his late father never told him that he had sold the land. He said that the parcel of land still remains as one entity on the ground that that the area land map has never been amended. In the course of hearing, the plaintiff produced a copy of search, (PEX NO 1) showing subdivision of the original land parcel. He also produced the Death Certificate (PEX NO 2) of his late father and a copy of confirmed grant (PEX NO 3) showing him as the personal representative of the estate of his late father.

6. The plaintiff was cross-examined and on the issue of fraud, he said it was there because his late father never told him he had sold the land.

7. The defendant testified on 14th March, 2018. He emphasized that he bought the land. He denied being fraudulent. It is even the plaintiff’s late father, he said, who went to the land control board and applied for subdivision. The Land Control Board gave its consent and the land was subdivided, with the plaintiff subsequently getting his portion. The plaintiff’s late father also signed all the other documents including the transfer form. The defendant produced several documents ranging from IWW – I to I WW – 13, which included land sale agreement, application to Land Control Board, consent given by Land Control Board, mutation form, green cards, transfer form, and title

deed among others.

8. After hearing, both sides filed written submissions. The plaintiff's submissions were filed on 24th July, 2019. He recapitulated the case and then submitted that he *"has established his case on a balance of probability that the defendant herein obtained title by fraud."* The fraud was said to have started with the alleged sale agreement which was said not to have the seller's signature. The signatures alleged to belong to the seller in the other documents were also alleged to be different. They were said to be forged. Then the defendant cited the case of **MWANGI MAINA VS HIRAM GATHIMA (2013)eKLR** where the court emphasized that a title obtained illegally cannot be said to prove ownership. He also cited the case of **MWAURA NJOROGI VS JAMES THUO: HCC NO. 711/1990, NAIROBI** where title was cancelled because forgery was demonstrated to have taken place. This court was urged to allow the plaintiff's case.

9. The defendant's submissions were filed on 30th July, 2019. It was submitted that the land was sold to the defendant and the plaintiff's late father signed the sale agreement by writing his name "WANDERA". According to the defendant, the *"plaintiff prosecuted his case in a manner that showed him as seeking to prove his serious allegations by default of (sic) simply leaving all to the defendant to prove that he is innocent of the fraud and forgery allegations that were made against him"*. The plaintiff was further faulted for not providing his late father's specimen signature for comparison by an expert with the signatures he alleges to be forged.

10. Further, the defendant faulted the plaintiff for seeking to prove his case on a balance of probability while the law requires prove beyond a balance of probabilities where fraud is alleged. The court was asked to dismiss the suit with costs.

11. I have considered the pleadings, the evidence tendered during hearing, and the rival submissions. Though it is clear under **Section 143** of the **Evidence Act** (cap 80) that no particular number of witnesses is required to prove a fact, it is also clear from experience that adequacy of evidence in some kinds of cases may require the evidence of more than one witness. What readily comes to mind are cases where the law itself requires corroboration of evidence. Who would corroborate if not another witness? There are also cases involving transactions. Transactions, by their very nature, require two or more persons for completion. Where a wrong arises, from such transactions, it is more often than not that the sufficiency of evidence to demonstrate such wrong would require some or all the people involved to give evidence. Yet another category would involve cases involving processes where various persons are involved in effectuating the process to completion.

12. In this case itself, the plaintiff alleged fraud. Fraud, by its nature as a legal wrong, involves intentional or blameworthy misrepresentation of truth or concealment of material facts with the end result being that the person targeted to be affected will suffer detriment or harm. Such concealment or misrepresentation is made by a person or persons to another or others. In other words, it involves more than one person. When a person therefore sets out to prove fraud in a court of law, such a person runs the risk of not proving it adequately if the only evidence available is his own. This is more so where, as in this case, the fraud alleged involves a trail that involves handling by various persons none of whom is called to give evidence.

13. The plaintiff would have done well to appreciate that it is also trite law that where the person alleges a fact and the other person denies it, that fact is not proved. As things stand, what the court has as evidence is the plaintiff's word against the word of the defendant. Yet the burden of proof the case did not lie with the defendant. It was the plaintiff's sole responsibility. The defendant did not have to prove that he was not fraudulent. It was the plaintiff who was supposed to prove that the defendant was fraudulent. Yet he only alleged and left it to the court to infer that the defendant was fraudulent. And even the inference itself was supposed to be drawn from the sole evidence of the plaintiff. And all this concerning a transaction involving a lengthy process that obviously involved various actors.

14. When the plaintiff for instance alleges that the land was subdivided without consent of the Land Control Board, what is the court supposed to make of it when the defendant shows an application for that very subdivision made, not by the defendant himself, but by the plaintiff's late father? With the Land Control Board subsequently giving its consent. And when the plaintiff is further asked about fraud, and he responds only by saying that there was fraud because his late father never told him that he was selling land, is the court supposed to take that as an adequate answer to cover the particulars of fraud stated in the plaint? Surely NOT. The plaintiff was supposed to provide better evidence to prove the particulars given in the plaint.

15. And what about the standard of proof? The plaintiff said he has proved the case on a balance of probability. Is that the standard required in law? Certainly NOT. The law has been clear all along. In **RG PATEL VS LALJI MAKANJI (1957) EA 314** the court expressed itself as follows:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required"

16. In **JENNIFFER NYAMBURA KAMAU VS HUMPHREY NANDI: (2013)eKLR**, the court of appeal sitting at Nyeri emphasized that fraud must be proved as a fact by evidence, and, more importantly that the standard of proof is beyond a balance of probabilities. This is the same position found in **KOINANGE & 13 OTHERS VS NYATI (1984) EA 425**, **GUDKA VS DODHIA C.A. NO. 21 OF 1980**, and **RICHARD EKWESERA ONDITI VS KENYA COMMERCIAL FINANCE CO. LTD: CA NO. 329 OF 2009, NAIROBI**.

17. Overall, the position that emerges is that evidence of especially high quality and strength is required to prove fraud in civil matters. It is a daunting and burdensome task to prove fraud in any civil case. The plaintiff in this case seemed not to appreciate this well when he set about the task of prosecuting his case.

18. The upshot, in light of the foregoing, is that the plaintiff did not discharge well the burden of proving fraud in this case. Yet it is a case which, as conceived and framed, is founded on the tort of fraud. I therefore hold that the plaintiff's case is not proved to the standard set by law. I hereby dismiss it with costs.

Dated and signed at Kericho this 16th day of June, 2020.

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A. K. KANIARU

JUDGE

Dated, signed and delivered at Busia this 25th day of June, 2020.

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A. OMOLLO

JUDGE