



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 9 OF 2014

EDWARD GITHAKA KIANDINGU.....PLAINTIFF

VERSUS

MARY NAOMI MWANGI.....1ST DEFENDANT

LUCY WANGECHI MUTERO.....2ND DEFENDANT

JUDGMENT

BACKGROUND

In a plaint dated 20th January 2014, the plaintiff sought against the defendants the following orders:

(a) An order directing the cancellation of the names of Titus Mwangi and Benson Muriuki as the registered owners of L.R. GICHUGU/SETTLEMENT/SCHEME/674 and GICHUGU/SETTLEMENT/SCHEME/675 on the grounds of fraud and re-registration in the name of Kiura Gacuguma or his legal representative, Edward Kiandingu Kithaka and/or any other beneficiaries nominated by the Court.

(b) Costs of the suit.

(c) Any other relief deemed just and fit by the Court.

On 12th February 2014, the 1st defendant filed her defence denying the plaintiff's claim and on 3rd April 2014, the 2nd defendant also filed her defence denying the plaintiff's claim. The parties also filed their compliance documents pursuant to *Order 3, 7 and II CPR*.

PLAINTIFF'S CASE

The plaintiff testified as PW1 and stated that one Kiura Gacuguma alias Kiura Njia (deceased) was his uncle and that he is the legal representative of his estate. He produced the grant issued by the High Court (Kerugoya) in Succession Cause No. 444 of 2013 as Plaintiff's Exhibit No. 1. He also stated that he knows one Titus Mwangi (deceased). He stated that the said Titus Mwangi together with one Benson Muriuki sub-divided land parcel No. GICHUGU/SETTLEMENT/SCHEME/598 into land parcel Numbers GICHUGU/SETTLEMENT/SCHEME/674 and 675. The plaintiff further testified that the original land parcel No. GICHUGU/SETTLEMENT/SCHEME/598 belonged to Kiura Gacuguma alias Kiura Njia. He produced a green card as Plaintiff's Exhibit No. 2. He stated that the above parcel of land was fraudulently sub-divided to give rise to land parcels No. GICHUGU/SETTLEMENT/SCHEME/674 and 675. He further said that the sub-division was done by Titus Mwangi and Benson Muriuki who are now the registered proprietors of the two parcels of land. He produced the certificate of official search as Plaintiff's Exhibit 3 & 4 respectively. He stated that the sub-division of the suit land was not done by the late Kiura Gacuguma who died on 9th January 1973. He said that the sub-divisions were done in 1974. He produced the death certificate of Kiura Gacuguma as Plaintiff's Exhibit No. 5. He said that he knows the 1st defendant as the wife of Titus Mwangi who is now deceased. The plaintiff also stated that Benson Muriuki is also deceased. The plaintiff further testified that he has an agreement dated 20th April 1975 purported to be signed by Kiura Gacuguma alias Kiura Njia selling the land to Titus Mwangi which is not correct because Titus Mwangi died in 1973. He stated that the agreements for the sale of land parcels No. 674 and 675 cannot be genuine because Kiura Gacuguma alias Kiura Njia died in 1973.

1ST DEFENDANT'S CASE

The 1st defendant gave a sworn testimony and stated on oath that she lives in Muthungara Mwenja in Kirinyaga County. She referred to her statement which she recorded on 12th February 2014 which she adopted in her evidence. According to her statement which also acts as her defence to the claim herein, her late husband Titus Mwangi Benson Muriuki entered into an agreement of land purchase with one Kiura Njia

(deceased) who was the owner of land parcel No. GICHUGU/SETTLEMENT/SCHEME/598. She said that thereafter, the whole purchase price was paid and her late husband booked Mwea Land Control Board where consent was given. She stated that after the consent was given, the land was transferred and subsequently sub-divided into land parcels Numbers GICHUGU/SETTLEMENT/SCHEME/674 and 676. The 1st defendant further stated that the transaction between her late husband and the late Kiura Njia took place in the year 1967 and 1978 and that it is now more than 40 years. She is surprised that for all those years, the plaintiff did not have any interest to trace his father's land as alleged. The 1st defendant also stated that when her husband died on 21st January 1998, she filed Succession Cause No. 71 of 2003 in Karatina and the grant was confirmed on 27th April 2005 and that nobody raised any objection to the said grant.

She stated that the plaintiff has been ill-advised to acquire a land for himself through falsehood in filing the instant suit. She stated that the deceased, Kiura Njia died in 1979 and not 1973 as alleged by the plaintiff.

2ND DEFENDANT'S CASE

The 2nd defendant did not offer any evidence.

ANALYSIS AND DECISION

I have considered the evidence adduced by the plaintiff and the 1st defendant. I have also considered the materials produced and the submissions by the parties. In order to effectually determine the dispute between the parties, it is important to identify the actual issues in controversy. Having looked at the pleadings and the evidence adduced, I find the following are the probable issues for determination:

(1) Whether prove of fraud has been established?

(2) Whether the plaintiff's claim is statute barred?

(3) Who will pay the costs of the suit?

Whether prove of fraud has been established?

It is trite law that fraud must be pleaded particularized and proved. The standard of prove in fraud is above the balance of probability but lower than beyond reasonable doubt. At paragraph 6 of the plaint dated 20th January 2014, the plaintiff made averments and particulars of fraud as follows:

"6. On or about 28/8/1974, one year after the death of the 1st Deceased, the 2nd and 3rd deceased fraudulently caused the sub-division of the original L.R. No. GICHUGU/SETTLEMENT/SCHEME/598 into two portions, Viz L.R. No. GICHUGU/SETTLEMENT/SCHEME/674 and L.R. No. GICHUGU/SETTLEMENT/SCHEME/675; and fraudulently caused these two subsequent portions of land to be transferred and registered in their names jointly".

Under the particulars of fraud, the plaintiff averred as follows:

PARTICULARS OF FRAUD

(a) The plaintiff reiterates paragraph (3) (4) and (5) above to impute mis-representation, falsehood, malicious intend, illegality and/or fraud on the conduct of the 2nd and 3rd deceased whilst sub-dividing and transferring the original land parcel GICHUGU/SETTLEMENT/SCHEME/598.

(b) At the time of the sub-division and transfer, the lawful owner of land parcel GICHUGU/SETTLEMENT/SCHEME/598 (the 1st deceased) was already dead and could therefore not have transacted in anyway with the 2nd and 3rd deceased persons.

(c) In the circumstances, the 2nd and 3rd deceased are deemed to have forged the application to the Land Control Board for consent to sub-divide, the mutation form authorizing the surveyor to sub-divide the transfer of land forms, application for consent, and any other document which ought to have been executed by the 1st deceased to facilitate the sub-division and transfer of ownership.

(d) Impersonating the 1st deceased at the Land Control Board meeting for the approval and issuance of both the consent to sub-divide and consent to transfer the original land parcel GICHUGU/SETTLEMENT/SCHEME/598.

(e) Alternatively, forging all or most of the necessary documents that ought to be signed by the registered proprietor of land to effect sub-division or change of ownership.

(f) Misdirecting the surveyor, the chairman of the Land Control Board, the Land Registrar and the Advocates that the 1st deceased indeed signed the documents stated in (e) above.

(g) Impersonating the 1st deceased before the persons in whose presence the 1st deceased was required to appear to execute the necessary documents to effect the sub-division and transfer of the original land parcel No. GICHUGU/SETTLEMENT/SCHEME/598.

The plaintiff from his averments contained in paragraph 6 of the plaint hereinabove stated that the purported fraudulent acts leading to the transfer and sub-division of the original land parcel No. GICHUGU/SETTLEMENT/SCHEME/598 was committed by Titus Mwangi (1st deceased) and Benson Muriuki (2nd deceased). The plaintiff is also suggesting that there are two deceased persons namely Titus Mwangi (1st deceased) and Benson Muriuki (2nd deceased). The averments also appear to suggest that the alleged two deceased persons (Titus Mwangi and Benson Muriuki) committed fraudulent acts misleading, misrepresenting the surveyor, the Land Registrar and other persons who were presented the documents for registration.

First, fraud is a serious offence which is a personal responsibility. The plaintiff has not shown that the purported deceased persons namely Titus Mwangi and Benson Muriuki were reported for the commission of the alleged criminal acts and prosecuted in accordance with the law. The other players in the commission of the alleged fraudulent acts were named as the surveyors, Land Registrar and members of the Land Control Board who gave consent for the transaction to be complete. They have not been enjoined as parties in this suit. As I have stated elsewhere in this judgment, fraud is a serious offence and is personal and can never be transferred to third parties. The 1st defendant is being accused for the alleged fraudulent acts committed by her late husband who was not even reported to any law enforcement authority for prosecution. I also note from the testimony by the 1st defendant that her late husband was Titus Mwangi Benson Muriuki contrary to the averments by the plaintiff that Titus Mwangi (1st deceased) was different from Benson Muriuki (2nd deceased). It is my finding that the plaintiff has failed to demonstrate how the defendants are linked to the commission of the alleged fraud purportedly committed by deceased persons who were not charged during their live time. The plaintiff has not established a causal link and cannot therefore be held responsible for actions allegedly committed by deceased persons who were not brought to account in their live time.

Whether the Plaintiff's claim is statute barred?

Section 26 of the Limitation of Actions Act provide as follows:

“Where, in the action for which a period of limitation is prescribed, either;

(a) The action is based upon on the fraud of the defendant or his agent, or of any person through whom he claims or his agent;
or

(b) The right of action is concealed by the fraud of any such person as aforesaid; or

(c) The action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered”.

The plaintiff at paragraph 9 of the plaint averred that he became aware of the fraud on 20th November 2012 when he conducted a search at the relevant Land Registry and thereafter filed a succession cause No. 444/2013 and obtained a limited grant ad litem. Though the plaintiff's claim is for the recovery of land whose limitation period is 12 years as provided for in **Section 7 of the Limitation of Actions Act**, the provisions of **Section 26** of the same Act provides that the period of limitation does not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it. On that qualification under **Section 26 of the Act**, I find that this suit is not time barred.

In the case of **Philip Kimutai Langat Vs John Kibet Maina HCCC No. 100 of 2005 (Kericho) (UR)**, the Court held:

“The issue for determination by this Court is whether the plaintiff's suit is time barred. The plaintiff pleaded that the defendant fraudulently transferred the suit land to himself in 1976. He further averred that the defendant fraudulently sub-divided the suit land in 2001 without following the requisite procedure of seeking the consent of the Land Control Board. The plaintiff's suit is based on fraud. Whereas I agree with the defendant that any suit for the recovery of land ought to be filed within twelve years as provided for by Section 7 of the Limitation of Actions Act, Section 26 of the said Act provides that where fraud, mistake or ignorance of material fact is pleaded, time will run from the moment such a litigant discovered the fraud or mistake. It is further evident from the plaint that the plaintiff has brought the suit on behalf of his father Kiplagat Maina who has donated to him a power of Attorney. He did not annex the said power of Attorney to the plaint. However, I have taken into consideration that the subject matter of the suit is land. The Court of Appeal has directed Courts to hear and determine matters dealing with disputes involving land, in so far as possible, on its merits and not on technicalities. In the present case, the fact that the plaintiff did not plead the time when he discovered the fraud is not fatal to this case. He can plead such a time after amending his pleadings. As earlier stated in this ruling, the plaintiff's suit is predicated on allegations of fraud. It is imperative that the plaintiff be allowed to ventilate his case by establishing or otherwise the allegations of fraud against the defendant”.

I agree with the persuasive decision by my learned Judge.

CONCLUSION

From my analysis and evaluation of the issues hereinabove, I find the plaintiff has not proved his claim against the defendants as required. Consequently, this suit is hereby dismissed with costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 19th day of June, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. *Mr. Okwaro holding brief for Eddie Njiru for Plaintiff*
2. *1st Defendant – present*
3. *2nd Defendant – present*
4. *Mbogo – Court clerk*