



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 766 OF 2013

REV FRANCIS WANGUNYU NYORO.....PLAINTIFF

- VERSUS -

RUTH NDUTA WANGUNYU.....DEFENDANT

JUDGMENT

Background

1. The plaintiff is the biological father of the defendant. He initiated this suit through a plaint dated 1/7/2013. His case was that, he owned **Land Parcel Number Gatamaiyu/Gachoiri/52**, measuring approximately 2.56 hectares and situated in Kiambu County (**the suit property**). In 2011, he decided to give half portion of the suit property to the defendant as a gift. He contended that in March 2011, the defendant procured a surveyor and directed the surveyor to fraudulently partition the suit property into two portions, with the result that the portion registered in the defendant's name contained a larger share of the arable part of the land compared to the one half portion retained in his name. The two sub-divisions are: (i) **Gatamaiyu/Gachoiri/1830** retained in the plaintiff's name; and (ii) **Gatamaiyu/Gachoiri/1831** registered in the defendant's name.

2. Terming the said transaction as fraudulent, the plaintiff itemized the following particulars of fraud on part of the defendant:

- a. Caused the subdivision of the suit property into Land Reference Number Gatamaiyu/Gachoiri/1830 and Land Reference Number Gatamaiyu/Gachoiri/1831 without obtaining consent for the same from the Land Control Board.**
- b. Forged the consent to transfer the suit property without the plaintiff's knowledge.**
- c. Forged the mutation forms and caused the erroneous subdivision of the suit property into Land Reference Number Gatamaiyu/Gachoiri/1830 and Land Reference Number Gatamaiyu/Gachoiri/1831 without the plaintiff's knowledge and consent.**
- d. Allocated to herself Land Reference Number Gatamaiyu/Gachoiri/1831 containing the greater share of arable land without consulting the plaintiff.**
- e. Forged the transfer document causing the transfer Land Reference Number Gatamaiyu/Gachoiri/1831 into her name and the transfer of LR No Gatamaiyu/Gachoiri/1830 into the plaintiff's name.**
- f. Transferred the said Land Reference Number Gatamaiyu/Gachoiri/1831 into her name and obtained a title deed thereof when she knew it was unlawful to do so.**

3. Consequently, the plaintiff sought the following orders against the defendant:

- a. A declaration that the subdivision of Land Reference Number Gatamaiyu/Gachoiri/52 into Land Reference Number Gatamaiyu/Gachoiri/1830 and Land Reference Number Gatamaiyu/Gachoiri/1831 was fraudulent, null and void.**
- b. A declaration that the transfer of Land Reference Number Gatamaiyu/Gachoiri/1831 to the defendant was fraudulent, null and void.**
- c. An order of cancellation of the register in respect of Land Reference Number Gatamaiyu/ Gachoiri/1830 and Land Reference Number Gatamaiyu/Gachoiri/1831 and consolidation of the two properties back to Land Reference Number**

d. An order for the reinstatement of the name of Francis Wangunyu Nyoro into the register as the proprietor of the consolidated property LR No Gatamaiyu/Gachiri/52.

e. Costs.

4. The defendant filed a statement of defence dated 22/8/2013 in which she denied the plaintiff's claim. Her case was that the plaintiff was duly informed when the surveyor was procured; and was present during the partition which was conducted as per his wishes. She denied fraud and averred that the survey and transfer of the land were done lawfully and with the full knowledge, participation and consent of the plaintiff. She urged the court to dismiss the plaintiff's suit.

Evidence

5. At the hearing, the plaintiff testified as PW1. He adopted his witness statement filed on 1/7/2013 as his sworn evidence-in-chief. He testified that he was the registered owner of Parcel Number **Gatamaiyu/Gachoiri/52**. He decided to gift his daughter a half portion of the land. The defendant engaged the services of a surveyor by the name **J R R Aganyo** who sub-divided the land into two halves. He was not satisfied with how the surveyor sub-divided the land because he was allocated a bigger sloppy area whereas the defendant got a bigger share of the arable part of the land. He raised concern with the surveyor and the surveyor promised to come back the following week and resurvey the property. The surveyor left behind blank forms on which he (the plaintiff) appended his signature and gave to the defendant's son in law, David Karera. He also gave Mr Karera his KRA pin certificate, Photographs and National Identification Card. The defendant promised that the resurvey would be done. He visited Kiambu Lands Registry to confirm the status of the suit property and that is when he found out that the suit property had been subdivided without the resurvey being done. The defendant was issued with a title to her half portion of the land registered as Parcel Number **Gatamaiyu/Gachoiri/1831** on 20/12/2012. The title for the other half portion, registered as **Gatamaiyu/Gachoiri/1830**, was in his name and was ready for collection. He wanted this particular title issued in his name and that of his grandson, Francis Nicholson Muturi Wanjiku. At the Lands Registry, he was shown a copy of the mutation form. PW1 added that he subsequently pleaded with the defendant on two occasions to surrender her title and have the suit property resurveyed but she declined. He then lodged a caution against Parcel Number 1831 on 22/2/2013. He produced 8 exhibits.

6. During cross-examination by Mr Maina, counsel for the 1st defendant, the plaintiff stated that the application for consent marked as PExh No 4 reads **Gatamaiyu/Gachoiri/1830**. The register for 1830 was opened on 3/5/2011. He paid for his title after he discovered that the defendant had collected her title. His parcel of land has a tea plantation. According to him, "arable" meant gentleness of the land. He signed the documents voluntarily. Consent to transfer was forged. He went to the board once. He was not interested in the rectification. He wanted the whole parcel of land back. The defendant had been on the suit property for 15 years. He did not report the fraud to the police. He did not report the surveyor to the relevant authorities.

7. In re-examination, he stated that the instructions to the surveyor and to the defendant were specific; the upper part of the sub-divisions were supposed to measure 50 meters each; but they currently measure 56 Meters and 44 Meters respectively. The lower part is suitable for trees.

8. The defendant testified as DW1. She adopted her written statement dated 15/8/2015. Her evidence was that she lived on Land Parcel Number **Gatamaiyu/Githunguri/52** before 2011 when the suit property was sub-divided into two halves. She installed electricity on the land. The plaintiff never objected to her staying on the suit property. She added that she sent her son-in-law, David Karera to book a date at the Land Control Board. The plaintiff was in attendance on the two occasions they attended the Board. The second attendance at the Land Control Board was a month later and was attended by both the plaintiff and his wife. Consent was obtained on 7/5/2011 and the sub-division was carried out by a surveyor in the presence of the plaintiff, the defendant and some village elders. She gave the defendant application forms to facilitate the transfer of the suit property and the plaintiff filled them. The titles were processed and she was issued with title for Parcel Number **Gatamaiyu/Gachoiri/1831** while the plaintiff was issued with title for Parcel Number **Gatamaiyu/Gachoiri/1830**. She was shocked when the plaintiff called her to Kiambu Lands Registry and demanded that she surrenders her title. She contended that both parcels of land are equal in terms of fertility and sloppiness. No fraud was involved in the sub-division and transfer of the suit property. Due procedure was followed. She produced 5 exhibits.

9. During cross-examination by Mr Chege, counsel for the plaintiff, she stated that the plaintiff voluntarily gave her 3 acres of the suit property. The upper part of the suit property fronted the road and measured 100 meters while the lower part was sloppy. The plaintiff preferred the upper part to be subdivided into two equal portions of 50 meters each. The surveyor is the one who prepared the mutation forms. The upper part reads 44 Meters and 56 Meters respectively. The lower part reads 110.2 meters and 56.78 meters. The plaintiff was allocated Plot A while she was allocated Plot B on the mutation form. The surveyor went beyond the instructions given by the plaintiff because the permanent structures owned by her went beyond the 50 meters mark on the upper part. The surveyor explained to the plaintiff what transpired before the mutation was registered. She had no objection to a revision of the mutation. There was consent to sub-divide the suit property.

10. During re-examination, she stated that the plaintiff was shown the mutation bearing the dimensions of 44 Meters and 56 Meters respectively. The plaintiff approved the sub-division and the explanation given by the surveyor. She was not agreeable to revision of the mutation because the plaintiff authorized the mutation.

11. Harun Nganga Karera testified as DW2. He adopted his written statement dated 19/12/2017 as his sworn evidence-in-chief. He stated that the plaintiff and the defendant were father and daughter and they were his neighbors. The plaintiff was the owner of Parcel Number **Gatamaiyu/Gachoiri /52** before it was subdivided into Parcel Number **Gatamaiyu/ Gachoiri /1830** and **1831**. The defendant had been residing on the suit property since 1996 with the knowledge of the plaintiff. He was present during the sub-division of the suit property. The surveyor demarcated the suit property as per the plaintiff's wishes. The boundaries are still in place and each party is in possession of their respective portions. Parcel Number **Gatamaiyu/Gachoiri/1830** and **1831** are both arable and sloppy in equal portions.

12. During cross examination by Mr Chege, counsel for the plaintiff, he stated that the plaintiff sent the defendant to call him to witness the sub-division. He did not know how the plaintiff wanted the suit property to be subdivided and the precise measurements. He did not know the dimensions the surveyor came up with. The plaintiff did not protest on the day of the sub-division. The defendant had developed the suit property. He did not know if the developed structures will be affected if the boundaries were to be reviewed. The lower part of the suit property was sloppy.

13. In re-examination, he stated that the plaintiff pointed out where the beacons were to be fixed. The defendant had lived on the suit property since 2007.

Submissions.

14. The plaintiff filed written submissions dated 16/10/2019 through the firm of Mwangi Chege & Company Advocates. Counsel submitted that no witness contested the fact that the part of the suit property fronting the road was more arable and less sloppy. He added that the mutation form showed that Plot 1830 was 44 Meters wide while Plot 1831 was 56 Meters wide. Counsel submitted that during cross-examination, the defendant could not explain why the upper part of her portion was larger than the plaintiff's portion. It was further submitted that the unequal width at the frontage; getting the plaintiff to sign blank forms; and the refusal to resurvey the land, were actions constituting fraud. It was submitted that this court should order cancellation of the titles.

15. The defendant filed written submissions dated 2/3/2020 through the firm of Kiiru Chege & Company Advocates. Counsel submitted that the plaintiff had failed to demonstrate fraud on part of the defendant. It was further submitted that the plaintiff was present during the subdivision, duly executed applications for consents and duly executed the transfers. Counsel submitted that the plaintiff's suit was actuated by malice and was meant to disinherit the defendant. He argued that parties to this suit should have resolved their dispute through alternative dispute resolution mechanisms.

Analysis and Determination

16. I have considered the pleadings, evidence and submissions presented in this suit. I have also considered the relevant legal framework and jurisprudence. Parties did not agree on a common statement of issues. Taking into account the pleadings, evidence and submissions before me, the following, in my view, are the key issues falling for determination in this suit: (i) whether the partition of **Parcel Number Gatamaiyu/Gachoiri/52** into **Parcel Numbers Gatamaiyu/Gachoiri/1830 and 1831**, and the registration of the defendant as proprietor of **Parcel Number Gatamaiyu/Gachoiri/1831** were procured fraudulently by the defendant; and (ii) whether the plaintiff is entitled to the particulars of reliefs sought in the suit.

17. Courts have consistently held that where a claim is predicated on the tort of fraud, the particulars of fraud must be specifically pleaded and proved if the claim is to succeed (see (i) **R G Patel v Lalji Makanji [1957] EA 314**; (ii) **Arthi Highway Developers Ltd v West End Butcher Ltd & others 92015) eKLR**; and (iii) **Katende v Karidas & Company Limited [2008] 2 EA**). The plaintiff, therefore, had the duty of specifically proving the allegation of fraud as specifically particularized in paragraph 6 of the plaint. What is to be answered in this judgment is whether the pleaded particulars of fraud have been specifically proved.

18. The titles which the plaintiff seeks to nullify were products of partition, and transfer. The partition and transfer entailed survey and preparation of mutation forms. The exercise required consent of the Land Control Board. What emerges from the plaintiff's own evidence is that he was privy to the exercise. He confirmed in his oral evidence-in-chief that he went to the Land Control Board for necessary consents. He further confirmed that he signed the mutation forms and gave them to one Mr Karera. Further, he confirmed that he gave his Identity Card. He further stated that he subsequently went to the Lands Registry and collected the title for the portion retained in his name. He added that he did not have the opportunity to choose either of the two sub-divisions. His evidence was that the mutation culminating into the two impugned titles did not reflect the instructions he had given to the surveyor because the portion allocated to his daughter (the defendant) was more arable than the portion retained in his name. The plaintiff was categorical that his complaint was that his instructions were not strictly followed by the surveyor.

19. In my view, what emerges from the above evidence does not constitute fraud on part of the defendant. The defendant was not the surveyor. The surveyor carried out the survey on behalf of the plaintiff. The plaintiff executed the mutation forms which generated the impugned titles. The plaintiff procured necessary consents. He executed the necessary transfers. His only gravamen is that there was a slight variation on the ground in that the part which he considers to be more arable was partitioned into 56 Metres and 44 Metres respectively, instead of 50 Metres and 50 Metres respectively.

20. In **R G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows regarding proof of fraud:

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

21. In light of the above evidence, I do not think the plaintiff has discharged the burden of proving fraud on part of the defendant to the required standard. The plaintiff was required to prove the particularized elements of fraud on part of the defendant. What he has demonstrated is that he was privy to the partition but the surveyor deviated from the instructions he had given him. The defendant was not the surveyor.

22. It is therefore my finding that the partition of Parcel Number **Gatamaiyu Gachoiri/52** into Parcel Numbers **Gatamaiyu/Gachoiri/1830** and **1831** and the registration of Parcel Number **Gatamaiyu/Gachoiri/1831** into the defendant's name were not procured fraudulently by the defendant. Consequently, the reliefs sought by the plaintiff against the defendant are not available.

23. The net result is that the plaintiff's suit against the defendant is dismissed for lack of merit.

24. The plaintiff and the defendant are father and daughter. The land that the defendant now has was a gift given to her by the plaintiff. I will not, in the circumstances, condemn the plaintiff to pay costs of the suit.

25. During trial, the court implored parties to this suit to sit down and try to amicably resolve their dispute. They did not. It is not too late for father and daughter to sit down and resolve any existing issue between them. The court encourages them to do so.

Disposal Orders

26. In light of the above findings, I make the following disposal orders in this suit:

a. The plaintiff's suit is dismissed for lack of merit

b. Parties shall bear their respective costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JULY 2020

B M EBOSO

JUDGE

In the presence of: -

Mr Kiiru for the Defendant

Court Clerk - June Nafula