



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 27 OF 2019

M' TWAMWARI M' IMANYARA.....1ST APPELLANT

GEDION KABAKA MBUI.....2ND APPELLANT

VERSUS

DAVID MUKORONIA MUTWAMWARI.....1ST RESPONDENT

STEPHEN KOOME M'TWAMARI.....2ND RESPONDENT

DICKSON KIRIMA IMANYARA.....3RD RESPONDENT

(Being an appeal from the judgement of Hon. S. Abuya SPM in Meru CM

ELC Case Number 53 of 2017 delivered on 13th December 2018.)

JUDGMENT

1. The background to this case is that the 1st appellant M'Twamwari M'Imanyara is the father of David Mukoronia (deceased) 1st respondent, Stephen Koome, 2nd respondent and Martin Kimathi Paul (PW1). 1st appellant is also a grandfather to the 3rd respondent. The 2nd appellant was registered as the owner of the land **L.r. No. Kirimara/Kithithina Block 1/197 (here and after- the suit land)** on 22.5.2009, having bought the land from the 1st appellant.

2. In the course of the trial, the 1st plaintiff died on 12.11.2016. An application for his substitution dated 16.11.2017 was filed and allowed on 23.11.2018, where Martin Kimathi stepped in the shoes of his deceased brother.

3. This matter was instituted at the **High court Meru** as **case no. 56 of 2010**, but was transferred to the magistrate's court, where it was registered as **Meru CM ELC NO. 53 OF 2017**.

4. The respondents herein sued the appellants vide a plaint dated 20th April 2010 seeking a declaration that the appellants held **L.r. No. Kirimara/Kithithina Block 1/197** in trust for the respondents and that the transfer of the suit land to the 2nd appellant was in breach of trust and was unlawful. They also sought an order for cancellation of the 2nd Appellant's name from the register of **L.r. No. Kirimara/Kithithina Block 1/97** so as to have the suit land registered in their (respondents) names.

5. It was the claim of the respondents that the suit land **L.r. No. Kirimara/Kithithina Block 1/197** was family land bought with family resources but registered in the name of the 1st appellant as trustee to the respondents. That in the year 2009, the appellants fraudulently conspired to have the suit land transferred from the 1st to the 2nd appellant. That upon learning of the unlawful deal between the appellants, the respondents filed a land dispute case at Land Disputes Tribunal Case No. 42 of 2009 before Imenti North District wherein the 2nd appellant was ordered to transfer the suit land to the respondents but the 1st appellant filed Misc Application No. 81 of 2009 in the High Court at Meru.

6. The appellants filed a joint statement of defence on 7/5/2010 denying the averments in the plaint. The 1st appellant averred that the land was sold following due procedure while the 2nd appellant stated that the land was vacant at the time of purchase. The two appellants contended that there was a subsisting suit in Cmcc No. 251 of 2009.

7. The trial Court upon considering the evidence on record listed issues for determination as follows; Whether the suit is Res judicata, Whether the suit premises was ancestral land, whether the suit land was registered in the name of the 1st appellant as a trustee of the respondents, whether the 1st appellant fraudulently sold and transferred the suit land to the 2nd appellant and whether the respondents were entitled to the prayers sought in the plaint.

8. The trial court found that the issues raised by the respondents were not res judicata since the judgement of the Magistrate court emanating from the award of the Land Dispute Tribunal was decided by an incompetent court devoid of jurisdiction. The trial magistrate also found that the suit premises was family/ancestral land, that the 1st appellant was registered as a trustee of the respondents hence the title to the 2nd appellant was acquired fraudulently. The trial magistrate ordered the cancellation of the suit premises in the name of the 2nd appellant and in its place the 1st appellant be registered as the proprietor of the same. She also issued a declaration that the 1st appellant holds the suit land in trust for the respondents.

9. Aggrieved by the trial courts decision, the appellants filed their memorandum of appeal on 25/1/2019 raising six grounds of appeal enumerated as follows;

a) The learned Magistrate erred in law and fact in holding that the 1st appellant held land parcels No. Kirimana/Kithithina Block 1/197 in trust for the respondents when there was no evidence tendered by the respondents to support the same.

b) The learned Magistrate erred in law and fact in declaring that land parcel No. Kirimara/Kithithina/ Block 1/197 should revert to the 1st appellant who had not given evidence, a verdict not known in law.

c) The learned Magistrate erred in law and fact in not perusing the whole file and find that land parcel No. Ntima/Igoki/165 has never been sold and that the same had been sub-divided to the respondents, therefore L.r. No. Kirimara/Kithithina/Block 1/197 could not be ancestral land or purchased through ancestral land.

d) The learned Magistrate erred in law and fact in terming the 3rd respondent as a brother to the 1st respondent while in fact he was a grandson of the 1st appellant and he would not have known about any ancestral land or the suit land herein.

e) The learned Magistrate erred in law and fact in ordering the cancellation of a title basing her decision on allegations and without the respondents meeting the threshold on fraud and illegality.

f) That the judgement of the Magistrate is against the weight of the evidence.

10. On 26/11/2019 the court directed the parties to canvass the appeal through written submissions. The appellants submitted that there was clear evidence on record that the respondents resided in Parcel No. Ntima/Igoki/165 and the same was not sold as stated by the respondents. That the respondent's averment that the suit premises was their ancestral land was a mere statement which was not supported by evidence. That the trial magistrate decision to order the registration of the suit land in the name of the 1st appellant was inconsistent to the prayers sought by the respondents in the plaint. That there was clear evidence that the 3rd respondent was a grandson of the 1st appellant and the elements of fraud were not ascertained by the respondents.

11. The respondents submitted that the evidence of sale of parcel Ntima/Igoki/165 to purchase parcel Kirimara/Kithithina Block 1/197 was not disputed during the trial. That it is clear from the evidence on record that the suit land was obtained fraudulently and illegally. That the process of registration cannot be used to expropriate family land and leave it in the hands of the 2nd appellant and that the trial court considered all the evidence. The respondents relied on the cases of; **Lawrence Gachau Kihu & 4 others v Mary Wangui Maina [2018] eKLR, Watenya wa Murambi Ramadhan v Mohammed Juma Ponda [2019] eKLR.**

Analysis and Determination

12. The duty of the 1st appellate court was explained in the case of **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] EA 123**, where it was observed thus:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial Judges findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally.”

Also see; **Mary Wambui Njuguna vs. William Ole Nabala & 9 Others (2018)eKLR.**

13. **Pw1 Martin Kimathi Paul**, the legal representative of the 1st Respondent (now deceased) adopted his statement as his evidence. He stated that the parcel Lr. No. NTIMA/IGOKI/ 165 was sold in the 70's and early 80's and from its proceeds the 1st appellant bought the suit land and had it registered in his name but as a trustee of other family members. That the 1st appellant without their consent sold the land to the 2nd appellant in the year 2009. That at the time it is only Dickson Kirima Imanyara who had constructed a house on the suit land, but the other respondents had however planted and cultivated crops on the land. That the 2nd appellant would later destroy the crops and as a result they reported the matter to the police station vide OB No. 20/8/2/2010. That he equally attempted to register a caution on the land but the Registrar refused to register the same. In January 2010, the 2nd appellant started depositing building materials on the suit land prompting the

respondents to file this suit whereby they obtained injunctive orders on 25.7.2010 which were extended on 20.8.2010.

14. Both **Pw2 Stephen Koome M'Twamwari** and **PW3 Dickson Kirima Imanyara** corroborated the evidence of Pw1. Both added that PW3 was evicted from the suit land on 2.7.2009. Pw3 also stated that Pw1 has land which is separate from the suit land. He also stated that his grandfather had bought the suit land, and he is not aware if the latter had other land measuring 32 acres in Kiirua.

15. **Dw1 Gideon Kabaka Mbui** the 2nd appellant herein stated that he bought the suit land from the 1st appellant for a sum of Kshs. 1.2 million. That he did not obtain the land fraudulently. That the ancestral land is 15 acres which is in the possession of Pw.1 (Martin) and 32 acres in Kiirua.

16. The main issue for determination revolves around the question of trust that is; whether the appellants held the suit land in trust for the respondents, whether the 1st appellant fraudulently transferred the said land to the 2nd appellant and whether the trial magistrate was correct in upholding the claim of the respondents. In the circumstances, I will deal with all the grounds of the appeal at the same time.

17. However, before delving into the merits or demerits of this appeal, there are two preliminary issues which I must first deal with. The first issue is in respect of a claim raised by the appellants counsel on 24.6.2020 to the effect that the suit before the trial court was dismissed on 29.11.2018 and was never reinstated and that this averment has not been rebutted. I have perused the record and indeed the suit was dismissed on 29.11.2018 at 12.30 pm for none attendance by all parties. However, 2 seconds later, the court on its own motion vacated the orders of dismissal as parties were present. Thus the contention that the case was dismissed has no basis. The other issue touches on another file ELC NO. 61 of 2019. Again it was not until 24.6.2020 when the matter was coming up to give a judgment date that both parties through their advocates brought to the attention of this court the existence of the other appeal matter where parties are the same, and so is the subject matter. This court was urged to look at all the submissions. I have done so. The outcome of this appeal will determine the orders to be made in the other appeal file.

Trust

18. The nature of the undefined land-interests including customary trust which had appeared under Sections 28 and 30 of the Registered Land Act (repealed) are currently covered under Section 28 of the Land Registration Act. (See **Isack M'Inanga Kiebia v Isaya Theuri M'Lintari & another [2015] eKLR**). Section 28 of the Land Registration Act provides as follows;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a)

(b) Trusts including customary trusts”

19. In **Phillicery Nduku Mumo v Nzuki Makau [2002] eKLR**, the court of Appeal held that it is trite that trust is a question of fact and has to be proved by evidence. In the case of **Susan Mumbi Waititu –VS–Mukuru Ndata & 4 others (19 of 2007) eKLR** Justice M.S.A Makhandia stated that:-

“As for trust, the plaintiffs must prove with cogent evidence that the suit premises was ancestral land and thus family land..... Trust cannot be imputed. It must be proved”.

20. In **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal similarly held that:

“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act.”

21. The basis of the respondents claim before the trial court was that their initial ancestral land was LR. Ntima/Igoki/165 which was sold off by their father (1st appellant) way back in the 1970s and the proceeds thereof were utilized in buying the suit land. The suit land was therefore registered in the name of the 1st appellant in trust for the respondents and all their family members. However, save for the averment made by the respondents, no tangible evidence was adduced to support this claim.

22. The records captured on pages 44 to 48 in the record of appeal shows that parcel 165 (the alleged ancestral land) was subdivided to give rise to parcels 3779, 3780, 3796, 3795 and 3794 all in the name of 1st appellant.

23. It was also incumbent upon the respondents to bring themselves into the ambit of claimants of ancestral land as was set out in the case of **Isack M'Inanga Kiebia v Isaya Theuri M'Lintari & another [2015] eKLR**. In particular, it was paramount for the respondents to demonstrate that the land in question was before registration, family, clan or group land. No evidence was adduced to indicate that parcel number 165 was derived from ancestry and that the respondents were entitled to such land. It is interesting also to note that the timeline of the sale is not specific as the same puts it in the 70's and 80's.

24. My conclusion is that the respondents did not prove any entitlement to the suit land by way of trust.

Fraud

25. The respondents contend that the appellants conspired to have the suit land transferred from 1st appellant to the 2nd appellant clandestinely, secretly, stealthily and fraudulently (*see paragraph 8 of the plaint*). 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. *See - Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others (2015 eKLR, David Mwangi Murathi vs. Samuel Mbuthia Thuo (2018) eKLR.*

26. The trial magistrate's finding in so far as the issue of fraud was concerned is that the 2nd appellant was deceived by the 1st appellant into buying family/ancestral land which the latter was holding in trust for the respondents. However, this court has already made a finding that the respondents did not prove existence of any family/ancestral land, nor did they prove that their father held the suit land in trust for the family. What is apparent is that the 1st appellant was the registered owner of the suit land when he sold the same to the 2nd appellant. The respondents did not point out the aspects of fraud that were manifested in the transaction which gave rise to the transfer of the suit land to the 2nd appellant.

Conclusion

27. Having analysed the evidence adduced before the trial court, it is my view that the learned trial magistrate misapprehended the evidence and applied the wrong principles of law in finding that ancestral land was sold to buy the suit land, that the 1st appellant held land parcels No. Kirimara/Kithithina Block 1/197 in trust for the respondents, that 2nd appellant acquired the suit land through fraud, that the suit land was family land and ordering the cancellation of title held by the 2nd appellant to revert to 1st appellant.

28. It is therefore this court's determination that the appeal herein has merits and I allow the same in its entirety. The trial court's determination dated 13/12/2018 is hereby set aside such that the suit filed by the respondents before the trial court is hereby dismissed. The costs of this appeal and costs before the trial court are awarded to the appellants.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Judgment was given to the parties' advocates on 24.6.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Judgment has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE