



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ELC NO. 233 OF 2017

DAVID WAHOME MBEU.....PLAINTIFF

VERSUS

CATHERINE WANJIRU MAINA.....1ST DEFENDANT

MWANGI MAINA.....2ND DEFENDANT

JUDGMENT

1. The parties to this suit are related. The Plaintiff is the son of Mbeu Gikonyo. Mbeu Gikonyo was the father of the Plaintiff and the Defendants. The Defendants are therefore niece and nephew of the Plaintiff. They are the children of Julius Mwangi Maina who was the brother of the Plaintiff.

2. By a plaint filed on the 2/7/14 the Plaintiff sought the following orders;

- a. An order of permanent injunction restraining the Defendants from entering and inter alia interfering with the suit land LOC14/GAKURWE/775 (suit land).
- b. An order cancelling the title certificate in the name of Julius Maina Mwangi, deceased.
- c. An order for general damages.
- d. Costs of the suit.

3. The Plaintiff claims that the suit land registered in the name of Mbeu Gikonyo was family land. He alleges fraud on the part of the Defendants' father and accuses him of illegally transferring the land without the knowledge and consent of the family and has set out the particulars of fraud under para 6 in the plaint.

4. The Defendants entered appearance through the firm of P K Mureithi & Co Advocates on the 18/7/14 but failed to file defense leading to interlocutory judgement being entered against them.

5. That notwithstanding on the 21/1/19 the Court directed the Plaintiff to serve the Defendants with a hearing notice scheduled for 31/1/19. On the 31/1/19 the case proceeded for hearing exparte.

6. At the hearing the Plaintiff testified and stated that the suit land belonged to his father. That his estate was succeeded vide Succ Cause No 2162/95. That after the demise of his father the Defendant's father fraudulently illegally and transferred the land in his name without the consent of the family, his mother Lilian Wanjiru Wahome included. That his family and that of Julius Maina Mwangi occupy the land each on their designated area. That the Defendants are now engaged in efforts to sell the suit land.

7. The Plaintiff has filed Written Submissions which I have read and considered.

8. The issues for determination are;

- a. Whether the suit land is family land?
- b. Whether the Defendants have locus to be sued?
- c. Whether the Plaintiff has proved fraud on the part of the Defendants?

d. Who meets the cost of the suit?

Whether the suit land is family land

9. The claim of the Plaintiff as can be gleaned from the pleadings is based on fraud. The Plaintiff has raised the issue as to whether the suit land is family or ancestral land in his written submissions. It is trite that parties are bound by their pleadings and cannot be allowed to deviate from them. Submissions are not pleadings and a party must disclose his whole case in his pleadings to enable the opponent to know the case that faces it and also to disclose to the Court the claim and or right and reliefs being sought in the dispute.

10. The Court holds that this claim is not pleaded and is therefore not available to the Plaintiff. It is struck out.

Whether the Defendants have locus to be sued

11. The Plaintiff has sued the Defendants in their own capacity as the children of the late Julius Maina Mwangi. The accusation disclosed against them is that their father committed acts of illegality and fraud in registering the suit land in his name. The Plaintiff has failed to show the nexus between the Defendants and the suit land. They have not been sued as legal representatives of their deceased father. The Plaintiff ought to have taken out letters of representation in the names of the Defendants to give them the legal locus to be sued in the estate of their father. As the case is, the Defendants are not suited in this case and are improperly before the Court. They cannot be able to answer to the deeds or misdeeds of their deceased father if they are not legal representatives and thereby clothe with legal authority to do so on behalf of the estate of the late Julius Maina Mwangi. In any event the Plaintiff has failed to prove that the Defendants are in the process of selling the suit land.

12. The Court answers this issue in the negative.

Whether the Plaintiff has proved fraud on the part of the Defendants

13. **Black's Law Dictionary** defines fraud as follows;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

14. In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR**, the Court held that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427**:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (**Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308**).

The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (**see Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221**). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy V Garrett (1878) 7 ch.D. 473 at 489). “General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice”.

15. Fraud is a serious accusation which must be pleaded particularized and proved in evidence. The Court cannot infer fraud from the pleadings.

16. In this case the Plaintiff has claimed that the father of the Defendants fraudulently illegally transferred and or registered the suit land in his name without the consent and knowledge of the family members including his mother, the late Lilian Wanjiru Wahome. He also accuses him of removing the caution lodged against the title by his mother. I have perused the title of the suit land which shows that the land was registered in the name of Julius Maina Mwangi on the 13/4/2000. I have also perused the certificate of confirmation of grant issued in the estate of Gikonyo Mbeu on the 27/3/97 in which the said Julius Maina Mwangi was granted the suit land as a whole.

17. The particulars of fraud set out in para 6 of the Plaintiff are; transferring the suit land without the consent of the family members; misrepresenting material facts to the Land Registrar that he is the sole beneficiary of the suit land; forging and presenting fake documents to the Land Registrar and concealing material facts with the intention to disinherit other beneficiaries.

18. According to the evidence led by the Plaintiff none of the above stated particulars have been proved. The onus to prove fraud rested on his shoulders. He did not discharge that duty.

19. This issue is answered in the negative.

20. The upshot is that the suit is dismissed. I make no orders as to costs.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANGA THIS 25TH DAY APRIL, 2019.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mrs Kuria HB for Mburu Macharia for the Plaintiff.

Plaintiff is present.

1st & 2nd Defendant: Absent

Kuiyaki and Njeri, Court Assistants