



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO 104 OF 2017

MWENJERI KIBUBA.....PLAINTIFF

VS

WILFRED WARUI KIBUBA.....1ST DEFENDANT

DISTRICT SURVEYOR, MURANGA.....2ND DEFENDANT

DISTRICT LAND REGISTRAR, MURANGA.....3RD DEFENDANT

JUDGMENT

1. The suit was filed on 16/8/16 and amended on the 9/11/16. The Plaintiff's cause of action is based on fraud. That vide an oral agreement between him and the Defendant, he agreed to excise 0.5 acres from his parcel of land namely LOC 14/KAIRO/885 (suit land) and give it to the 1st Defendant in exchange of 0.5 acres from the Defendant's parcel No LOC14/KAIRO/1023. In furtherance of the said agreement, the 1st Defendant fraudulently sub divided his land parcel LOC 14/KAIRO/885 into half and transferred to himself 3 acres instead of 0.5 acres.

2. Under Para 9 the Plaintiff has pleaded fraud and particularized it as follows;

- a. Forged the application to subdivide the suit land.
- b. Obtained consent to transfer and subdivide the suit land into two equal portions fraudulently.
- c. The Muranga Land Registrar registered the resultant subdivision LOC14/KAIRO/1193 and 1194 without ascertaining whether the alleged transferor was the rightful owner of the land.
- d. The Plaintiff avers that the main perpetrator of this crime is the main beneficiary of this unlawful transaction.

3. The Plaintiff sought judgment against the 1st Defendant for;

- a. The purported subdivision of LOC 14/KAIRO/885 to LOC14/KAIRO/1193 and 1194 was illegally and fraudulently done.
- b. The title deeds issued on LOC14/KAIRO/1193 and 1194 be cancelled and the register be rectified and the name of the Plaintiff be reinstated and the Plaintiff be allowed to repossess his 2.5 acres which is in excess of what the 1st Defendant is entitled to.
- c. Costs of the suit.

4. The 1st Defendant denied the Plaintiffs claim vide the statement of defense filed on the 7/12/16 where the 1st Defendant averred that though the suit land was registered in the name of the Plaintiff it was in trust for the family and that the subdivision into half share and transfer thereof was done with the consent and concurrence of both the parties and their mothers who were alive then.

5. The 2nd and 3rd Defendants did not enter appearance nor file any statement of defense to the Plaintiff's claim.

6. At the hearing, the Plaintiff testified solely and stated that he verbally agreed with the 1st Defendant to exchange 0.5 acres from their respective parcels of land, that is to say LOC14/KAIRO 1023 and LOC 14/KAIRO/885 registered in the name of the 1st Defendant and Plaintiff respectively. The reason was that the Plaintiff wanted land near the road as he claims his land was landlocked. It is his evidence that he was duped into signing away half share of his land by the 1st Defendant instead of 0.5 acres agreed. That the 1st Defendant is only entitled to 0.5 acres and the 2.5 acres in his name should be transferred back to him as this was excess of what they had agreed.

7. The witness further stated that the 1st Defendant is his stepbrother being the sons of Gichinga Kibuba who had 3 wives and died in 1952. That he is older than the 1st Defendant having been born in 1941 and the 1st Defendant in 1947 or thereabouts. He stated that his father had many parcels of land some of which were LOC14/KAIRO/884 and 885 registered in the name of the 1st Defendant and Plaintiff respectively according to the houses of his polygamous father. LOC14/KAIRO/884 measured 1.5 acres while LOC14/KAIRO/885 measured 6 acres. That the 1st Defendant sold parcel LOC 14/KAIRO /884 on grounds that there was a believe that the land carried with it a curse and purchased LOC14/KAIRO/1023 measuring 1 acre. That he sold his 0.5 acre out of LOC 14/KAIRO/1023 to finance the current case but the 1st Defendant resides on the remainder 0.5 acres.

8. He informed the Court that LOC 14/KAIRO /885 was subdivided into LOC 14/KAIRO/ 1193 and 1194 registered in the name of the 1st Defendant and Plaintiff respectively. That he was issued with a title in 1990. He informed the Court that he was not aware when the subdivision took place nor when the 1st Defendant got his title. That he signed the subdivisions documents without knowing what he was signing, as he is illiterate. He believed that he was signing off 0.5 acres and not 3 acres of his land to the Defendant. He refuted the Defendant's statement that the land was subdivided following consent of their mothers and the parties. That the 1st Defendant has planted tea on LOC 14/KAIRO /1193 and he himself lives on LOC 14/KAIRO /1194 while the 1st Defendant lives on parcel 1975 (original LOC 14/KAIRO /1023) measuring 0.5 acres.

9. In conclusion, the Plaintiff clarified to the Court that parcel LOC 14/KAIRO /884 and 885 belonged to their mothers but registered in their names.

10. The 1st Defendant stated that parcel LOC 14/KAIRO /884 and 885 belonged to their late father and were registered in their respective names. That parcel No LOC 14/KAIRO /885 was subdivided into 2 portions LOC 14/KAIRO /1193 and 1194 in 1982 and registered in the names of the 1st Defendant and Plaintiff respectively during the lifetime of their both mothers. That the Plaintiff was fully involved in the subdivision and signed all the necessary documents. Thereafter they both took possession and planted tea on their portions.

11. Further, he stated that parcel 884 was registered in his name and was near the road though no one settled on it because it was believed that it had a curse. That he sold the land with the approval of his mother and bought parcel No LOC 14/KAIRO /1023. That he did not inform the Plaintiff about the sale. The subdivision of LOC 14/KAIRO /884 yielded two parcels to wit; No 1975 and 1976, which were, registered in the names of the 1st Defendant and the Plaintiff measuring 0.5 acres respectively. Each got half share of the original land.

12. He stated that the agreement was such that each would get half share from parcel Nos. LOC 14/KAIRO /885 and 1023 respectively and not 0.5 acres as alleged by the Plaintiff. Challenged to produce the exchange agreement, he stated that there was none as it was an oral agreement. He also did not produce the Land Control Board consent or the mutation forms for the Court to peruse. That the subdivision of parcels LOC 14/KAIRO /1023 and 885 was with the knowledge and consent of their mothers and the Plaintiff. That since 1982 the Plaintiff did not raise any issue with the arrangement until 2005 when the dispute was referred to the Land Disputes Tribunal, whose decision was overturned on appeal on account of want of jurisdiction.

13. The Plaintiff submitted that being the heir of the third house, he became registered as owner of parcel LOC 14/KAIRO /885 in 1962 and held the land devoid of any trust for any of the stepbrothers least of all the Defendant. That each lived on their distinctive lands as given by their father until the Plaintiff discovered the fraud and illegality committed by the 1st Defendant taking advantage of an oral agreement of exchange of 0.5 acres of land from each other's parcels. Maintaining that any dealings in land held under absolute ownership without the requisite consent of the owner is illegal and void ab initio, he contended that the subdivision of the parcel LOC 14/KAIRO /885 and the issuance of two titles, one in the name of the 1st Defendant was unprocedural, illegal and through a corrupt scheme with the 1st Defendant as an active participant. **See ELC No 56 of 2014- Pauline Chemutai Chirchir Arap Sang & 3 others (2015) ECLR and Alice Chemutai Too Vs Nickson Kipkurui Koprir & 2 others (2015) ECLR** where the Court held that quoted extensively section 26 (a) and (b) of the Land Registration Act . In the latter case Munyao J stated that;

“...the deceased herein died in the year 1987. It has not been shown how the 1st respondent had himself registered as proprietor of the suit property 25 years after the death of the previous registered owner. No succession proceedings have ever been filed in respect of the estate of the deceased and it follows that the estate of the deceased has not been distributed. I do not think it necessary to belabor the point that the title of the 1st respondent was improperly acquired. It does not need space science to bring one to the conclusion that the 1st respondent must have acquired registration of the suit property by way of fraud. Having acquired title by way of fraud, the title could not have been used as collateral and the bonafide purchaser's respondent's title cannot be protected .The applicable law is **Section 26 of the Land Registration Act.**”

14. Consequently, the Court was urged to order for the rectification of the title of the suit land under section 80 of the Land Registration Act, 2012. He urged the Court to revoke the two titles 1193 and 1194 and revert the title to LOC 14/KAIRO /885 after which the 1st Defendant will get his 0.5 acres of the land in compliance of their oral agreement.

15. The 1st Defendant submitted that the suit is statute barred. That the Plaintiff concealed the exact time as to when he discovered the fraud but from the evidence adduced on trial it came out that the Plaintiff took his title in 1982 and the 1st Defendant in 1988. The 1st Defendant wondered why he waited for 35 years to claim the land on the basis of fraud. He submitted that this is an afterthought.

16. On the issue of fraud, the 1st Defendant submitted that the Plaintiff has failed to prove fraud at all or to the standard of above the balance of probability in civil cases. It is his case that none of the particulars of fraud was proved. He relied on case law inter-alia as follows;

“**James Gichure Kionga Vs Samuel Wanderi CA No 156 of 2012** where the Court held that on proof of fraud where the Court of appeal set aside the lower court's judgment on the ground that certificate of title is prima facie evidence of title and may only be set aside on cogent evidence.

Kinyanjui Kamau -Vs- George Kamau Njoroge (2015) Elr that is the *locus classicus* on matters of proof of fraud. In that case,

the Court of Appeal held that fraud cannot be imputed on the part of the respondent by mere facts that the record in relation to the subject property was missing at the Lands Registry. The appellant need to plead and particularize it lay basis by way of evidence upon which the Court would make a finding”.

17. From the pleadings, the evidence, the submissions and the totality of the materials presented before the court, the issues that fall for determination and disposal of the suit are as follows;

- a. Whether the subdivision and transfer was fraudulent.
- b. Whether subsequent the titles should be cancelled.
- c. What orders may issue and who meets the costs of the suit.

18. The background of this case is that the Plaintiff and the 1st Defendant are related, being step brothers. Their father was polygamous with three wives. Each house was given land during the demarcation of lands in the area. The three wives were Wanjiku Kibuba (4.5 acres), Waithera Kibuba (1.5 acres) and Wanjiru Kibuba (6 acres). Wanjiru and Waithera were mothers to the Plaintiff and the 1st Defendant respectively. Wanjiru died in 1992 while Waithera died in 2001. Their father died in 1952 before land demarcation. The parties have stated that at that, time land was not registered in the names of women and so it fell that the lands were registered in the names of the sons of each house according to their entitlement. The 1st house is not involved in the dispute. It is not in dispute that their mothers were alive during the claimed sale and exchange in 1982.

19. It is not in dispute that the original parcels LOC 14/KAIRO /884 and 885 were family lands. LOC 14/KAIRO/884 was sold and the 1st Defendant bought parcel LOC 14/KAIRO /1023 which was subdivided to yield 1975 and 1976 registered in the names of the 1st Defendant and the Plaintiff respectively each measuring 0.5 acres. The Plaintiff led evidence that he sold his portion and that the 1st Defendant lives on 1976 to date.

20. Parcel No LOC 14/KAIRO /885 was subdivided to yield two parcels to wit; LOC 14/KAIRO /1193 and 1194 measuring 3 acres each and registered in the names of the 1st Defendant and the Plaintiff. The Plaintiff lives on LOC 14/KAIRO /1194 and the Defendants son lives on LOC 14/KAIRO /1193.

Whether the subdivision and transfer was fraudulent.

21. **Black’s Law Dictionary, 9th Edition** defines fraud as;

“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”.

22. In the case of **Ndolo vs Ndolo (2008) 1 KLR (G & F) 742** the Court stated that:

“..... it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”.....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

23. 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”.

24. In this case, the Parties are agreed that there was an oral agreement between them to exchange lands. The point of departure is that according to the Plaintiff the exchange was for 0.5 acres in LOC 14/KAIRO /1023 and 885 and according to the 1st Defendant, it was half

share of each parcel. The Plaintiff does not deny that he signed the necessary documents but argues that he believed he was signing for 0.5 acres and not 3 acres. It is his case that the action of subdividing and transferring 3 acres out of LOC 14/KAIRO /1193 to the 1st Defendant was fraudulent as it was done without his consent and knowledge albeit his signing the documents and attending the Land Control Board to obtain consents. He contends that the Plaintiff took advantage of his illiteracy. The 1st Defendant on the other hand has explained that the Plaintiff was involved and actively participated in the transaction including signing the documents, attending land control board until getting his title in 1982. That he did not raise any objection until 2005 when he filed a dispute with the Land Dispute Tribunal whose decision was overturned on appeal on account of want of jurisdiction. The 1st Defendant contends that there is no fraud. In any event, he averred that the lands were held in trust for the family and they only held them in their names because at that time their mothers could not be registered. He further averred that the exchange was done with the consent and knowledge of the mothers who were alive at the time.

25. The Court has noted that none of the parties has tabled the documents referred to above. That notwithstanding the Court notes that the said documents are not in dispute as even the Plaintiff admits that he indeed signed them. The Plaintiff has not proved any forgery in the application of the subdivision of the land. He admitted attending the Land Control Board and signing the documents. Neither did he present any evidence oral or documentary to show that the consent to subdivide and transfer LOC 14/KAIRO/ 885 into two portions was obtained through fraud. It is the Courts finding that there is no evidence of duress, threats, inducement, misrepresentation or fraud proved on the part of the 1st Defendant on account of the admission of the Plaintiff. Neither has the Court found any reason to find for fraud on the part of the 2nd and 3rd Defendants in the subdivision transfer and issuance of titles LOC 14/KAIRO /1193 and 1194 and further transfer to the Plaintiff and the Defendant.

26. I have perused the copies of official searches, the green cards and the copies of titles for LOC 14/KAIRO/885 and note that it was registered in the name of the Plaintiff in 1962 and the titles issued in 1971. In 1982, the title was closed on subdivision that yielded LOC 14/KAIRO/1193 and 1194 and it is on record that the title of the Plaintiff was issued in 1982 while that of the 1st Defendant was issued in 1988. The Plaintiff has not disclosed to the Court in his pleadings or at all the time within which he discovered the fraud. Going by the record, the Plaintiff stated that he picked his title in 1990. He did not lead evidence to support this averment. It is on record that the Plaintiff was registered as owner of LOC 14/KAIRO/1194 and title issued on even date of 22/12/1982. It is also on record that the Plaintiff settled on LOC 14/KAIRO /1194 upon being issued with the title and planted tea thereon. There is no evidence that he raised any issue. Even if the Court was to assume (which it does not) that he is illiterate, surely, he could have noticed the size of the land on the ground, which the record states that it had a boundary. There is a big difference between 0.5 acres and 3 acres even to a naked eye.

27. It is on record and uncontested that the Plaintiff filed a dispute at the Land Dispute Tribunal in 2005 based on the same cause of action and seeking similar prayers. This was 23 years later. This suit being filed in 2016 is coming 34 years later. Going by the evidence above it is beyond the period of limitation set out under Section 7 and Section 26 of the Limitation of Actions Act. It is manifestly clear that this suit is filed way out of the statutory period within which claims should be made. Section 7 of the Limitations of Actions Act states as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

28. Section 4(2) of the Limitation of Actions Act provides that an action founded on tort may not be brought after three years. However, Section 26 of the Limitation of Actions Act reads thus:

“ Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the 1st 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”.

It is clear that the Plaintiff has neither stated when he discovered the fraud nor applied for extension of time giving exemptions as provided for under part ii or section 22 of the Limitations of Actions Act.

29. Given that a cause of action is a set of facts sufficient to justify a right to sue to obtain money, property, or the enforcement of a right against another party, the term also refers to the legal theory upon which a Plaintiff brings suit. According to Section 26 of the Limitation of Actions Act, the cause of action accrues when the fraud is discovered. Even if 2005 was to be taken as the time of discovery of fraud, the cause of action having been filed in 2016 would still have been urged out of time. This cause of action matured in 2008 at the very least. In the case of **Gathoni -Vs.- Kenya Co-Operative Creameries Ltd. [1982] KLR 104**, Potter, JA at page 107 expressed himself thus:

“The law of limitation of actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

30. It is trite that the issue of limitation goes to the jurisdiction of the Court to entertain claims and therefore if a matter is statute barred the Court has no jurisdiction to entertain the same. In the case of **Ngatuni Murugu –Vs- Mukinda Mugambo & 4 others (2013)Eklr** where the Court of Appeal also held registration effect of Registered Land Act the person becomes the absolute owner and his rights could only be defeated as provided by the Act . A first registration could not be rectified for fraud or mistake; the Appellant had to lodge complaint before the Land Adjudication Officer during consolidation and adjudication. What is relevant to us is their holding that a suit for fraud must be filed within statutory period immediately it is discovered with due diligence.

31. The Court finds that the suit was filed beyond the statutory period.

Whether subsequent titles can be cancelled

32. Upon satisfaction that a title is tainted with fraud either under section 26 (a) and or (b) of Land Registration Act, the Court is empowered under section 80 of the Land Registration Act to cancel and or rectify a title. In this case having held that the Plaintiff has not proved fraud either under section 26 (a) and or (b), the Court finds that cancellation and or rectification of titles of the suit land is not available to the Plaintiff. The Plaintiff had a duty to prove his claim. He is bound by his pleadings.

33. As stated in the preceding para the Plaintiff's case does not meet the threshold that would necessitate cancellation of the titles in this suit .The Court cannot declare that the subdivision was fraudulent .This is fortified by the fact that there is undisputed evidence that requisite conveyancing documents were executed and the relevant consents were also obtained before the disposition in the land.

34. The upshot is that the Plaintiff's suit is dismissed with costs in favour of the 1st Defendant.

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:

Plaintiff is present. Advocate is absent.

1st Defendant present in person but Advocate is absent.

2nd & 3rd Defendants – Absent

Kuiyaki and Njeri, Court Assistants