



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 43 OF 2008

CATHERINE NKIROTEPLAINTIFF

VERSUS

STEPHEN MARETE1ST DEFENDANT

JOSEPH MURITHI MARETE 2ND DEFENDANT

JUDGMENT

Background

1. The dispute herein had been there long before the filing of this suit. It appears that the initial plaintiff Catherine Nkirote had filed a case against the two defendants in 2007 before the lands tribunal where she was claiming entitlement to the suit land No. Nkuene/Kathera/726. She allegedly won the case. The matter went to provincial tribunal where again she won. Then an appeal was filed as Meru H.C.C Appeal No. 19 of 2008 which file is annexed to the present file. There are no records of what became of the proceedings therein but it appears that the appeal was not heard.

2. The present suit was filed on 11.4.2008 and no one raised the issue of the pending appeal even during the hearing of the case. Further, I note that the main issue raised in the plaint is "FRAUD". As such, I will proceed to determine the dispute.

Plaintiff's case

3. The initial plaintiff, Catherine Nkirote is the one who filed the present suit against the defendants where she claimed that on 9.2.1966, the 1st defendant caused the fraudulent transfer of L.R No. Nkuene/Kathera/726 (suit land) from the plaintiff to himself (1st defendant). That on 23.9.1998, the 1st defendant again caused the fraudulent transfer of the suit land from himself to the 2nd defendant.

4. Catherine Nkirote died on 9.5.2013 and in her place came her son Joseph Gikunda who testified as PW 1. He adopted his statement dated 16.9.2015 as his evidence. He avers that the suit land belonged to his mother who had relocated from that land to elsewhere leaving PW 1's uncle to manage the land who later died after being attacked by thieves. PW 1 claims that 1st defendant took possession of the land since there was nobody in occupation of it.

5. Pw 1 and his mother had then made inquiries at lands office where they learnt that the land had been taken by 1st defendant. They also gathered that defendants had fraudulently forged transfer forms and transferred the land to their names.

6. During cross examination, PW 1 stated that he has never been in occupation of the suit land.

Defence case

7. A statement of defence was filed on 6.5.2008 where the allegations of fraud are denied. Instead, defendants aver that 1st defendant lawfully bought the suit land. They also state that plaintiff does not occupy the suit land.

8. The first defendant testified as DW 1 and he adopted his statement dated 19.7.2016 as his evidence. There in, he gives an account of how he bought the suit land from plaintiff's mother as from 17.12.1965 whereby he effected purchase price via various payments in 1967.

9. DW 3, Jacob Gikunda who adopted his statement dated 19.7.2016 was one of the witnesses in the agreement of 17.12.1965. He avers that

he witnessed the payment of Shs.100 as part of payment of the purchase price (Shs.750).

10. DW 4, one Jacob Kaaria is another witness who was there when 1st defendant paid Shs.270 to plaintiff's mother on 9.2.1966 as part of the instalments of the purchase price.

11. Dw 2 is Joseph Muriithi, the 2nd defendant. He is a brother of 1st defendant. He avers that he got the suit land from his brother, 1st defendant as a gift. He is apparently the one who utilizes the suit land.

12. In support of their case, defendants produced the documents in their list dated 1.5.2013 as their exhibits. The documents are a green card for L.R Nkuene/Kathera/726, the land sale agreement of 17.12.1965 with acknowledgement receipts and a certificate of interpretation.

Submissions

In his submissions, plaintiff avers that Catherine was illiterate and could not have signed any documents. It is further claimed that the fraud was discovered in year 2006.

13. Defendants on the other hand have submitted that fraud was not proved. They also aver that the suit is statute barred as 1st defendant was registered as owner of the land on 9.2.1966 and hence 42 years had lapsed by the time this suit was filed on 11.4.2008. To this end, defendants have cited the provisions of section 7 of the Limitations of Actions Act.

Determination

14. I have analyzed the pleadings, the evidence and the submissions proffered by the parties. The issues for determination are:

- i. Whether the suit is time barred.
- ii. Whether there was fraud in the transfer of the land parcel NO. Nkuene/Kathera/726

Limitation

15. It is not disputed that 1st defendant became the registered owner of the land in 1966. It appears that Catherine pursued her claim through litigation before the land tribunal. That dispute was still live by the time this suit was filed since the appeal in Meru H.C No. 19/08 was still pending. I would therefore state that the litigation in the tribunal and the appeal file muddled up the issue of limitation.

Fraud

16. Section 107 of the Evidence Act provides that;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.....”.

17. Thus the burden of proof lies upon the plaintiff to prove that there was fraud in the transfer of the suit land from his mother to 1st defendant in 1966 and from 1st defendant to 2nd defendant in 1998.

18. It has been held over and over again that; **“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 **R.G Patel Vs. Lalji Makanji (1957) E.A 314, Koinange & 13 others vs Koinange (1986) eKLR, Richard Akwesera Onditi vs Kenya Commercial Finance Ltd C.A No. 329 of 2009.**

19. Plaintiff has not adduced any evidence to indicate the nature and extent of the alleged fraud of 1966 and 1998. He has told the court that in 1965, he was a minor. He certainly would not have known the circumstances under which the land was transferred from his mother to 1st defendant. For the 1998 transaction, again PW 1 is mute as how the transfer was effected.

20. I am in agreement with defendants submissions that plaintiff has not proved his case as is required by section 107 and 109 of the evidence act. In the circumstances, I hereby dismiss plaintiff's suit with costs to defendants.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 22ND MAY, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Rimita D holding brief for Kimathi for plaintiff

Kiogora A. for defendant

Plaintiff (Joseph Gikunda)

Defendants

HON. LUCY. N. MBUGUA

ELC JUDGE