



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC APPEAL NO. 28 OF 2017

LAWRENCE RIMIRI (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF KANAMPIU

MUKABA M'MUKABA.....APPELLANT

VERSUS

THURANIRA CHABARI.....1ST RESPONDENT

THE DIRECTOR, LAND ADJUDICATION & SETTLEMENT OFFICER2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

(BEING AN APPEAL FROM THE JUDGMENT OF MAYAMBA C.A. S.R.M. - GITHONGO IN CIVIL SUIT NO. 7 OF 2015
DELIVERED ON 1ST NOVEMBER 2017)

BACKGROUND

This appeal arises from the judgment of Hon. Mayamba C.A - Senior Resident Magistrate Githongo delivered on 1st November 2017. The Appellant who was the plaintiff in the lower Court case was dissatisfied with the decision of the Court and preferred this appeal on the following grounds:

1. The learned magistrate erred in law and in fact in finding that he had no jurisdiction to handle this suit when in fact he had the requisite jurisdiction to do so.
2. That the learned magistrate erred in law and in fact in finding that the suit was time barred when indeed it was not.
3. The learned magistrate erred in law and in fact in failing to grant the appellant orders sought when he infact found that the appellant had proved his case and was entitled to orders sought.
4. The learned magistrate erred in law and in fact in deciding the whole suit against the weight of evidence.

APPELLANT'S SUBMISSIONS

The Appellant through the firm of L. Kimathi Kiara & Co. Advocates submitted that from the judgment of the lower Court, the learned magistrate agreed that the appellant had proved his case to the required standard and that he is entitled to the prayers sought in the plaint.

The Appellant further argued that the learned magistrate misdirected himself when he choose to dismiss the suit on a technicality. He stated that as the claim is based on fraud, time cannot start running since a claimant can institute a suit any time. The Appellant stated that the Respondent did not raise an issue of time in his pleading but only arose during submissions. He submitted that the suit was not time barred since he approached the Court immediately upon learning of the fraud in his parents land by the defendant.

RESPONDENT'S SUBMISSIONS

The Respondent through the firm of Kiogora Ariithi & Associates submitted that the Appellant did not comply with the provisions of the

Land Adjudication Act (Cap 284) and the Government proceedings which required the plaintiff to obtain the consent before filing the suit. The Respondent also argued that the Appellant did not also serve the requisite statutory Notice to the Attorney General as required by the **Government proceedings Act (Cap 401)** hence the suit was fatally defective and incompetent and that the magistrate was properly informed in dismissing the suit. The Respondent further stated that from the evidence adduced before the lower Court, the Appellant alleged to have discovered the fraud in 1986 and waited until 2015 when he filed before the Magistrate's Court which is well over 29 years. He therefore submitted that the learned magistrate was proper in dismissing the suit for being time barred. He stated that **Article 159 of the Constitution 2010** does not apply. He cited the following cases:

1. **Gatimu Kinguru Vs Muya Gathangi (1976) K.L.R 235.**

2. **Kampala Bottlers Ltd Vs Damanico Co. Ltd 1990 - 1994 E.A at page 141.**

DISPOSITION

I have looked at the record of Appeal and the grounds set out in the Memorandum of Appeal. This being a first appeal, this Court is obliged to reconsider the evidence, re-evaluate and make my own conclusion. I am alive to the fact that as a Court of first appeal, I would not normally interfere with the finding of fact by the trial Court unless it was based on no evidence at all or that it was based on a misapprehension of the evidence as presented or that the trial Court acted on wrong principles in arriving at his decision. Upon perusal of the pleadings contained in the record of Appeal especially the plaint dated 10th February 2014, it is apparent that the Appellant's claim is premised on fraud particulars of which are stated thereunder.

It is now settled law 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. The plaintiff testified before the trial Court and called three witnesses. In his evidence, the plaintiff/Appellant stated that the Respondent took his grandfather's land being registration No. ABOTHUGUCHI/L-KIJIJA/47. The Respondent allegedly took the land after the demise of his grandfather and got registered in the year 2001.

PW2 was Julius M'Mwara who stated that he was the Chairman during Land Adjudication in lower Kijja and upper Kijja. The witness testified that the plaintiff/Appellant's grandfather sold three (3) acres of the suit property to an elder from Kariene leaving a balance of 10 acres. He stated that he does not know if the defendant/Respondent gathered the suit property and how the same was registered in his names.

PW3 on his part stated that sometime in 1985, the plaintiff/ Appellant's grandfather sent him to call the plaintiff/Appellant who wanted to sub-divide his land between his two children. He said that he was surprised to learn later that the land was registered in the name of the defendant.

PW4 was M'Ndatho Anampiu who is a resident of Kijja. He stated that the suit property was originally gathered by one M'Mwari followed by M'Irware and M'Anampiu. He stated that the land belongs to M'Anampiu.

The evidence adduced by the plaintiff/Appellant and his witnesses before the trial magistrate in my view does not establish the commission of fraud or any irregularity by the defendant/Respondent or at all. From the green card produced by the plaintiff/Appellant as Plaintiff's Exhibit No. 2, it clearly demonstrates that the defendant/Respondent was first registered as proprietor of the suit land on 12/8/1988. On 12/7/2001, he was issued with a title deed. The issuance of a title deed is the culmination of a process ascertainment of interest in land under the **Land Consolidation and Land Adjudication Act Cap 283 and 284 Law of Kenya** respectively. Once those interests have been ascertained giving rise to the adjudication register, any party who considers the same to be incorrect or incomplete in any respect may object to the Adjudication officer within sixty (60) days from the date of its publication (see **Section 26 of the Land Adjudication Act, Cap 284**). **Section 27** provides for finalization of adjudication register and the forwarding of the adjudication register to the director of Land Adjudication together with all the determinations of objections who will thereafter forward the same to the Chief Land Registrar who on his part will cause registration to be effected in accordance with the adjudication register (see **Section 28 Cap 284**). **Section 24, 25 and 26 of the Land Registration Act** provides as follows:

"24. Subject to this Act:

- a. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**
- b. The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.**

"25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject :

- a. To the leases, charges, and other encumbrances and to the conditions and restrictions, if any, shown in the register, and**
- b. to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register unless the contrary is expressed in the register.**

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

“26 (1) The certificate of title issued by the Registrar upon registration or to a purchaser or land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.

The plaintiff/Appellant did not establish any commission of fraud or misrepresentation to which the defendant/Respondent is proved to be a party. The plaintiff/Appellant did not also prove that the Respondent obtained the title to the suit property illegally, un-procedurally or through any corrupt schemes. I find that contrary to the observation by the trial magistrate that the family of Mukaba Kanampiu had a strong case as against the defendant, the truth of the matter is that if the plaintiff/Appellant had any interest in the suit property, those interests should have been ascertained during Land Adjudication period and the compilation of the adjudication register. I am sure that being a first registration, the defendant/Respondent must have been named in the Adjudication register as the owner of the suit property. At that point, the plaintiff/Appellant should have raised any objection within sixty (60) days as required under **Section 26 of the Land Adjudication Act**.

As regards the issue that the plaintiff/Appellant’s claim was barred by **Limitation of Actions Act**, I find that the trial Magistrate misdirected himself on that issue. Since the plaintiff’s claim is based on fraud, the issue of Limitation does not arise. I also find that the learned Magistrate erred in law in holding that he had no jurisdiction to handle the suit.

In the final analysis, I find that the evidence presented by the plaintiff could not satisfy the grant of the orders sought. I therefore uphold the dismissal of the plaintiff’s suit on grounds that the plaintiff did not prove his claim to the required standard. I order each party to bear his own costs.

READ and DELIVERED in open Court at Meru this 3rd day of June 2019.

E.C. CHERONO

ELC JUDGE

3RD JUNE, 2019

In the presence of:

1. Mr. Gitonga holding brief for Kiogora Ariithi for Respondents
2. Mr. Ondari holding brief for Kimathi Kiara for Appellant.