



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT EMBU**

**E.L.C. APPEAL CASE NO. 5 OF 2015**

**JOEL NJIRU RUNDIA.....APPELLANT**

**VERSUS**

**ANTHONY K. NJIRU.....1<sup>ST</sup> RESPONDENT**

**JOHN NJAGI NJIRU.....2<sup>ND</sup> RESPONDENT**

**REBECCA MIRU NJIRU.....INTERESTED PARTY**

***(Being an appeal from the judgement and decree in Embu CMCC No. 260 of 2013***

***delivered on 25<sup>th</sup> March 2015 by Hon. A.G. Kibiru – Ag. Chief Magistrate)***

**JUDGEMENT**

1. This is an appeal against the judgement and decree of Hon. A.G. Kibiru (CM) dated 25<sup>th</sup> March 2015 in *Embu CMCC No. 260 of 2013 – Joel Njiru Rundia Vs Anthony K. Njiru & Another*. By the said judgment, the learned Chief Magistrate dismissed the Appellant's suit against the Respondents. The trial court also directed that the transfer of *Title No. Kyeni/Mufu/3027* (hereinafter the *suit property*) into the name of the Appellant's mother, Rebecca M. Njiru (hereinafter *Rebecca*) be completed as per the consent issued by the relevant Land Control Board (hereinafter *LCB*).

2. The background to the dispute is that the late father of the Appellant and Respondents Njiru Rundia, was the original proprietor of the suit property. It would appear that before his demise he transferred the suit property to his wife Rebecca, who is the mother of the parties herein by way of gift on 7<sup>th</sup> June 1993. Under some unclear circumstances which were said to be fraudulent, the suit property was transferred to the Appellant on 22<sup>nd</sup> February 1994 purportedly as a gift. Rebecca denied having had knowledge of such transfer let alone having facilitated the said transfer.

3. It would further appear that when Rebecca discovered that the Appellant had acquired the suit property she confronted the Appellant who apparently agreed to restore the suit property to her. The material on record indicates that the Appellant even obtained the consent of the LCB for the purpose of re-transferring the suit property to Rebecca.

4. It would also appear from the material on record that the Appellant afterwards refused to restore the suit property to Rebecca in consequence of which she filed *Embu CMCC No. 222/2011 Rebecca M. Njiru Vs Joel Njiru Rundia* for cancellation of the Appellant's title and registration of the suit property into her name. The material on record also indicates that at some point the Appellant chased Rebecca from the suit property and demolished her house thereon.

5. In the meantime, by a plaint dated 19<sup>th</sup> September 2013 in *Embu CMCC No. 260 of 2013 Joel Njiru Rundia V Anthony K. Njiru & Another* the Appellant sued the Respondents who are his brothers seeking a permanent injunction restraining them from entering, cultivating or alienating the suit property, costs, interest, and any other relief the court may deem fit to grant. The Appellant pleaded in the said suit that he was the registered proprietor of the suit property which the Respondents had started interfering with without lawful justification.

6. The material on record indicates that Rebecca was joined as an interested party in the suit filed by the Appellant on 26<sup>th</sup> February 2014 before the suit could be heard. Upon hearing all the parties and their witnesses the trial court vide a judgement dated 25<sup>th</sup> March 2015 dismissed the Appellant's suit in its entirety and further directed that the suit property be restored to Rebecca as the rightful owner. It's against the said judgment that the Appellant filed the instant appeal.

7. By his memorandum of appeal dated 14<sup>th</sup> April 2015 the Appellant raised the following seven (7) grounds of appeal.

- a. *That the learned Magistrate erred in law and fact by giving judgement against the weight of evidence.*
- b. *That the learned Magistrate erred in law by failing to set out issues for determination, the findings thereon and reasons for such findings.*
- c. *That the learned Magistrate erred in law and fact by giving judgment in favour of the Respondents while there was no counter-claim in their statement of defence.*
- d. *That the learned Magistrate erred in law by determining a matter involving land while he lacked jurisdiction to do so.*
- e. *That the learned Magistrate erred in law and fact by not taking into consideration that the appellant was the registered proprietor of L.R. Kyeni/Mufu/3027 and had acquired title deed to the same lawfully.*
- f. *That the learned Magistrate erred in law by shifting the burden of proof of fraudulent registration to the Appellant while it was the Respondent's duty to do so.*
- g. *That the learned Magistrate erred in law by making a finding on fraud while no particulars of fraud had been pleaded.*

8. The Appellant consequently sought the following reliefs in the appeal:

- a) That the appeal be allowed.
- b) That the judgement dated 25<sup>th</sup> March 2015 be set aside and his suit before the Magistrate's court allowed as prayed.
- c) Costs of the appeal and of the suit before the Magistrate's court.

9. The record indicates that when the matter was mentioned before the Deputy Registrar on 10<sup>th</sup> October 2017 it was directed that the appeal be canvassed through written submissions. The record further indicates that the Appellant filed his written submissions on 19<sup>th</sup> April 2018 whereas the Respondents filed theirs on 7<sup>th</sup> June 2018.

10. This being a first appeal, this court is aware of its obligation as a first appellate court. It has a duty to re-consider, analyze and re-evaluate the entire evidence in order to satisfy itself as to the correctness or otherwise of the challenged decision. The principles which guide a first appellate court were summarized in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others [1968] EA. 123 at page 126** as follows;

**“...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”**

11. In the case of **Peters Vs Sunday Post Ltd [1958] EA 424 Sir Kenneth O' Connor, P.** described that jurisdiction at page 429 as follows;

**“...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”**

12. In the same case, **Sir Kenneth O'Connor** quoted **Viscount Simon, L.C in Watt Vs Thomas [1947] A.C 484 at page 485** as follows;

**“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when**

estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

13. The Environment and Land Court at Eldoret in **ELC Appeal Case No. 8 of 2016 Kapsiran Clan Vs Kasagur Clan [2018] eKLR**, the Hon Justice A. Obwayo summarized the applicable principles as follows;

**“The appropriate standard of review established in the cases can be stated in three complementary principles;**

**a) First, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;**

**b) In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and**

**c) It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”**

14. There are two grounds of appeal the court would like to dispose of quickly because they raise pure points of law. The 1<sup>st</sup> is that the trial court had no jurisdiction to try and determine a suit relating to land and the environment in view of the provisions of **Article 162 of the Constitution of Kenya**. The short and crisp answer to this ground is that the relevant provisions of the Constitution were interpreted by the Court of Appeal in **Civil Appeal No. 287 of 2016 Law Society of Kenya Nairobi Branch V Malindi Law Society & 6 Others [2017] eKLR** which held that Magistrates courts had jurisdiction to handle such matters. It is also strange that after filing his suit before the Chief Magistrate’s Court, submitting to its jurisdiction, and fully ventilating his case, the Appellant could turn round and plead that his chosen forum had no jurisdiction after delivery of judgement.

15. The 2<sup>nd</sup> ground relates to the formalities for preparation of the judgement. The Appellant submitted that the trial court had failed to abide by the provisions of **Order 21 Rule 4 of the Civil Procedure Rules** which requires a judgement to contain a concise statement of the case, points for determination, the decision thereon and the reasons for the decision.

16. The court agrees with the Appellant that the aforesaid formalities were not followed. The issues for determination were not framed and a decision made on every issue. However, such anomaly by itself, cannot justify setting aside of a judgement. It must be shown that such failure occasioned a miscarriage of justice. Moreover, this court has a duty to analyze and re-evaluate the entire evidence on record and arrive at its own conclusion in this judgement hence the Appellant shall not suffer any prejudice by reason of such omission by the trial court.

17. The rest of the grounds of appeal can be summarized into three categories. The 6<sup>th</sup> and 7<sup>th</sup> grounds on proof of fraud shall be dealt with together. The 1<sup>st</sup> and 5<sup>th</sup> grounds relating to the weight accorded to the Appellant’s evidence at the trial shall also be handled together. The 3<sup>rd</sup> ground of appeal relating to the reliefs granted by the trial court shall be handled on its own.

18. The court has considered the pleadings, evidence and documents on record on the question of fraud in the Appellant’s acquisition of the suit property. Whereas the Appellant was seeking to assert his proprietary rights over the suit property the Respondents and the Interested Party all pleaded in their defences and witness statements that the Appellant had obtained registration of the suit property fraudulently without the knowledge of the Interested Party was the registered owner at the material time.

19. The court is aware that allegations of fraud are taken seriously by all courts of law. They must be specifically pleaded and particulars thereof provided. They must also be strictly proved by cogent evidence on a standard which is higher than a balance of probability but not as high as beyond reasonable doubt. See **Koinange & 13 Others V Koinange [1986] KLR 23 and Christopher Kagina V Esther Kagina [2016] eKLR**.

20. In the case of **Vijay Morjaria V Nansingh M. Darbar & Another [2000] eKLR**, Tunoi J.A. (as he then was) held, *inter alia*, that:

**“It is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”.**

21. The Appellant’s contention was that no particulars of fraud were pleaded and that the trial court reversed the burden of proof on the issue. The court has perused the respective defences of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. In both defences, it was pleaded at paragraph 5 of each defence as follows:

**“That the Plaintiff took advantage of our mother’s age and illiteracy and caused the suit land to be registered in his names without the knowledge of our mother and us.” (Emphasis added)**

22. It is thus clear what was being alleged against the Appellant before the trial court. It was common ground before the trial court that prior to the Appellant’s registration as proprietor of the suit property, it was her mother (Rebecca) who was the registered proprietor. Thus by pleading that the Appellant caused the suit property to be registered in his name *without the knowledge* of Rebecca constituted at least one particular of fraud. There is no legal requirement in law that there must be a list of several particulars of fraud enumerated in the pleading. The court is of the opinion that even one instance of fraud, once proven, is sufficient to establish that an impugned transaction was fraudulent.

23. The second aspect concerns proof of the pleaded fraud. Although the Appellant contended that the alleged fraud was not proved and that the trial court had shifted the burden of proof to him, the court is unable to agree with that contention. The material on record indicates that all concerned parties before the trial court testified at the trial. The Appellant's own mother, Rebecca, testified at the trial too. It was her evidence that she had no intention to transfer, and had never transferred, the suit property to the Appellant. She stated on oath that the said transfer was undertaken without her knowledge and that she only came to know about it some years later. The trial court was persuaded by the evidence of Rebecca and believed her.

24. The record further shows that the Appellant did not explain how, when, and under what circumstances Rebecca may have knowingly and voluntarily transferred the suit property to him. The Appellant must have confused what is commonly known as the legal burden of proof and the evidentiary burden of proof. Whereas the legal burden of proof constantly rests upon the person legally bound to prove a particular fact, the evidential burden of proof may keep shifting from one party to another depending on the state of evidence before the court.

25. Rupert Cross in his book *Evidence, Butterworth & Co (Publishers) Ltd London (1958)* describes the legal burden of proof at page 63 as follows:

**“The legal or persuasive burden is the onus of proof in the first of the two cases mentioned in Thayer. It is the burden borne by the party who will lose the issue unless he satisfies the tribunal of fact to the appropriate degree of conviction, and it is aptly termed as “risk of non-persuasion” by Wigmore. The phrase “legal burden” is that of Lord Denning, while it is Dr. Glanville Williams who speaks of the “persuasive burden.” Other English writers refer to it as the “burden of proof on the pleadings” or the fixed burden of proof ...”**

26. At page 64 Rupert Cross describes the evidential burden of proof as follows:

**“The evidential burden is the burden of proof in the second of the two senses mention in Thayer. It is the burden of producing sufficient evidence to justify a finding in favour of the party who bears it. The phrase “evidential burden” is employed by Mr. Nigel Bridge and Dr. Glanville Williams, while Phipson spoke with equal accuracy of the “burden of adducing evidence” ...”**

27. The court is satisfied from the material on record that upon the Respondents and the Interested Party adducing evidence of the fraud pleaded against him, the Appellant had an evidential burden of adducing some evidence to demonstrate the propriety of his acquisition of the suit property from Rebecca. If the Respondents had failed to tender any evidence of fraud at all, the issue of evidentiary evidence, of course, would not have arisen at all. The court is not satisfied that the trial court shifted the legal burden of proof as submitted by the Appellant. The court only observed that the Appellant had failed to discharge his evidential burden of proof. The trial court cannot therefore be faulted for believing the evidence of Rebecca and the Respondents.

28. The next two issues relate to the weight of the evidence before the trial court. The Appellant submitted that the trial court erred in law by giving judgement against the weight of evidence on record. It was submitted that the trial court erred in failing to consider that the Appellant had lawfully acquired an indefeasible title to the suit property which was protected under **Article 40 of the Constitution of Kenya 2010**.

29. As a first appellate court, this court has re-considered and re-evaluated the entire evidence on record. The main question for determination before the trial court was the legality or validity of the Appellant's title to the suit property. There is evidence of the land register on record demonstrating that prior to the Appellant's acquisition of the suit property, Rebecca was the registered proprietor. There is also evidence on record to demonstrate that upon being questioned by Rebecca, the Appellant agreed to restore the suit property to her in consequence whereof the consent of the LCB was obtained but later on renegated on that undertaking.

30. There is no evidence on record whatsoever to demonstrate how the Appellant 'lawfully' acquired the suit property from Rebecca without her knowledge and consent. The Defendant did not discharge the evidential burden of proof. In those circumstances, the trial court cannot be faulted for reaching the conclusion that it did. This court is satisfied that any reasonable tribunal properly directing itself to the evidence on record could have reached a similar decision. The court finds no merit in the contention that the judgement was delivered against the weight of evidence.

31. The Appellant must understand that **Article 40 of the Constitution** was designed to protect legally acquired property and not fraudulently acquired property. Similarly, the provisions on indefeasibility of title contained in the **Land Registration Act 2012** were designed to give security of tenure to legally acquired interests. That is why **section 26** of the said Act provides for impeachment of title in cases where a certificate of title is acquired through fraud, illegality, irregularity or some corrupt scheme.

32. In the case of **Chemey Investments Ltd V Attorney General & 2 Others Civil Appeal No. 349 of 2012 [2018] eKLR** the Court of Appeal held, *inter alia*, that:

**“Decisions abound where courts in this land have consistently declined to recognize and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor ... the effect of all these decisions is that sanctity of title was never intended or understood to be a vehicle for fraud or illegalities or an avenue for unjust enrichment at public expense.”**

33. The final ground for consideration is whether the trial court erred in the judgment by directing the restoration of the suit property to Rebecca in the absence of a counterclaim. The court is aware of the general rule of pleadings that a court of law should not grant a remedy which has not specifically been sought. The material on record indicates that Rebecca had filed her own suit, that is, *Embu CMCC No. 222 of 2011* for cancellation of the Appellant's title and restoration of the suit property to her.

34. The record further shows that instead of applying for consolidation of the two suits so that they may be heard and determined together, Rebecca applied to be joined in *CMCC No. 260 of 2013* as an interested party. Rebecca then proceeded to file her witness statement in which she stated her entire grievances as she had stated in *Embu CMCC No. 222/2011*. She even sought nullification of the Appellant's title and the restoration of the suit property to her before the trial court.

35. Although the trial court granted her plea for restoration of the suit property, that relief was not anchored in the pleadings before the trial court. So, what would be the appropriate remedy for such anomaly which would serve the ends of justice? If the order for restoration of the suit property to Rebecca is set aside at this stage, the effect would be to allow the Appellant to keep his ill-gotten gain. It would allow the Appellant to enjoy the fruits of his illegal and fraudulent conduct against public policy.

36. At the hearing of the suit before the trial court, the Appellant informed the court that Rebecca's *CMCC No. 222 of 2011* was dismissed for want of prosecution. However, when this court called for the file it was discovered that the Appellant is the one who had filed a document he called "Application for withdrawal of the above case" dated 30<sup>th</sup> April 2013 which was construed by the Executive Officer of the court as a notice of withdrawal of suit by the Plaintiff. Thus, the suit was marked as withdrawn on the basis of a document filed by the Defendant and not the Plaintiff in the suit. The Appellant's said notice dated 30<sup>th</sup> April 2013 was exhibited at page 24 of the Record of Appeal.

37. The policy of the law in refusing to be used to sanitize illegal or unlawful transactions was expressed by Lindley LJ in the case of **Scott V Brown, Doering, McNab & Co. (3) [1892] 2 Q.B. 724 at 728** thus:

***"Ex turpi causa non-oritur actio. This old and well known legal maxim is founded on good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."* (Emphasis added)**

38. In the circumstances of this case, the court is satisfied that the Appellant ought not to keep or enjoy the fruits of his fraudulent and illegal conduct of grabbing the suit property from his own mother. It would clearly be contrary to the policy of the law to give its stamp of approval to the Appellant's fraudulent conduct, even where there are procedural violations of the rules of pleadings. It must be remembered that procedural rules are handmaidens of justice and not be elevated to the level of a mistress in order to defeat the cause of justice.

39. For the foregoing reasons the court finds no merit in all the grounds of appeal raised by the Appellant. The appeal is hereby dismissed in its entirety. For the avoidance of doubt, any interim orders of stay in place are hereby discharged forthwith. Each of the parties to the appeal shall bear their own costs.

40. It is so decided.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 18<sup>TH</sup> DAY of JULY, 2019**

In the presence of Ms. Kung'u holding brief for Mugambi Njeru for Appellant, in the absence of Respondents and the Interested Party.

Court Assistant Mr. Muinde

**Y.M. ANGIMA**

**JUDGE**

**18.07.19**