



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC CASE NO. 58 OF 2017**

**RAPHAEL KIBUNEI KILACH.....PLAINTIFF**

**VERSUS**

**KENNETH KIPTOO BOIT.....1<sup>ST</sup> DEFENDANT**

**JAMES CHERUIYOT BOIT.....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**THE SETTLEMENT FUND TRUSTEES.....4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR, UASIN GISHU.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

By a plaint dated 15<sup>th</sup> February 2017 the plaintiff herein sued the defendants jointly and severally seeking for the following orders;

- a) A declaratory order that the registration of L.R. NO. UASIN GISHU/SOSIANI SETTLEMENT SCHEME/16 to the name of the 1<sup>st</sup> defendant's father was fraudulently obtained and the same be cancelled and registered in the name of the plaintiff.
- b) A declaratory order restraining the 1<sup>st</sup> defendant from erecting structures or using L.R. NO. UASIN GISHU/SOSIANI SETTLEMENT SCHEME/16
- c) A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
- d) Costs of the suit.

The plaintiff contemporaneously filed an application for temporary injunction restraining the defendants from interfering with the suit pending the hearing and determination of the suit which application was heard and orders granted.

**PLAINTIFF'S CASE**

The plaintiff testified and stated that he was allotted the suit land in 1964 by the 4<sup>th</sup> defendant and that in 1986 the 5<sup>th</sup> defendant colluded and executed transfer documents in favour of the father of the 1<sup>st</sup> and 2<sup>nd</sup> defendants in a fraudulent manner. PW1 listed the particulars of fraud that the 5<sup>th</sup> defendant registered the said Paul Kipkorir Boit as the owner of the suit land without verifying the transfer documents.

The plaintiff stated that this transfer led to the 1<sup>st</sup> defendant inheriting the land from his father via transmission but he admitted in his evidence that he received Kshs. 800/- and a further 2700/ from the deceased and entered into an agreement for sale of land. PW1 further stated that it is the late Paul Boit who was in possession and utilization of the suit land since 1966 and that he left the suit land and moved to Nandi County.

PW1 also testified that he never stayed on the suit land even though it was one of the conditions imposed by the Settlement Fund Trustee. He therefore urged the court to allow his claim as prayed in the plaint with costs.

On cross examination PW1 confirmed that he did not have any payment receipts issued by the SFT in respect of the purchase of the suit land and that he did not know how much he paid for the land. He also stated that he did not carry out a search to find out how the transfer was

done. Further that in 2001 he wanted to register a caution and never filed a case in court then when he realized that the titles had been issued in 2014. The plaintiff further confirmed that he was given Kshs 3500/ for the sale of the plot and he signed the agreement with Paul Boit and the Settlement officer for the sale of the land.

On re-examination by his Counsel, PW1 stated that Paul Boit paid the loan to the Settlement Fund Trustee and that he received Kshs. 800/ from Paul Boit. That was the close of the plaintiff's case.

### **1<sup>ST</sup> AND 2<sup>ND</sup> DEFENDANT'S CASE**

It was the 1<sup>st</sup> and 2<sup>nd</sup> defendants' evidence that they are the legal administrators of the estate of the late Paul Kipkorir Boit of which they produced letters of administration. DW1 stated that the suit property was transferred to him being the beneficiary of the estate of the late Paul Boit vide transmission and was issued with a title deed on 23<sup>rd</sup> February 2016. DW1 also stated that the suit land was allotted to the plaintiff in 1964 by the Settlement Fund Trustees but later sold the same to the deceased at a consideration of Kshs. 3,500/- which was evidenced by the sale agreement dated 6<sup>th</sup> June 1966 produced as exhibit 4 which was executed by all the parties. DW1 also stated that upon execution, the plaintiff gave possession to the deceased and he left the land for Nandi County and never came back until 2001 when he wanted to lodge a caution. The defendant also testified that the parties notified the Settlement Officer of the transaction and the land was reallocated to Paul Boit who upon his acceptance was registered as the allottee. The land was subsequently charged and title issued to the deceased.

### **3<sup>RD</sup> 4<sup>TH</sup> & 5<sup>TH</sup> DEFENDANTS' CASE**

The County Land Adjudication Officer testified and stated that the transfer that was done in favour of Paul Boit was based on the sale agreement dated 6<sup>th</sup> June 1966 from their record and that it led to a charge being registered in the deceased name. He confirmed that from the parcel record new documents were issued in the name of Paul Boit and a title deed issued in 1986 whereby the plaintiff has never lodged any caution on the suit land.

DW3 also stated that at the time the title was issued to Paul Boit there was no complaint from the plaintiff and there has never been any investigations on the said title.

The defendant urged the court to dismiss the plaintiff's case with costs.

### **PLAINTIFF'S SUBMISSIONS**

Counsel gave a brief background to the case and listed there issues for determination by the court as to whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants or their predecessor purchased the land in issue, whether the allegations of fraud against the defendants is valid, and whether the transfer was legal and procedural.

It was Counsel's submission that the entire Settlement Fund Trustee file does not contain any documents of transfer as the appendix A and B mentioned by the Settlement Officer are not in the file. Counsel therefore submitted that the transfer was fraudulent as the file does not show that the Minister exercised such power or that there were minutes to prove this.

Counsel also submitted that the claim that the action is time barred cannot stand as the claim is based on fraud on the part of the deceased and his sons which the plaintiff says was discovered when he went to the 1<sup>st</sup> defendant in 2016. That no land can be transferred without the participation of the proprietor. Counsel therefore urged the court to find that the plaintiff has proved his claim against the defendants and enter judgment as prayed.

### **1<sup>ST</sup> & 2<sup>ND</sup> DEFENDANTS' SUBMISSIONS**

Counsel cited section 26(1) of the Land Registration Act with regards to the certificate of lease being conclusive proof of ownership and that the plaintiff had not demonstrated that the land was acquired fraudulently by the defendants who are beneficiaries of the estate of the deceased. Counsel submitted that the 1<sup>st</sup> defendant holds a title which is indefeasible which was buttressed by the fact that the plaintiff gave possession to the deceased and left the land never to return until 2017 claiming ownership.

Counsel listed three issues for determination by the court being whether the plaintiff had proved fraud, whether the suit was fatally defective and whether a constructive trust and estoppel had been created. Counsel submitted that the plaintiff has failed to prove how the 1<sup>st</sup> and 2<sup>nd</sup> defendants committed the fraud and further that the suit was time barred as per section 7 of the Limitation of Actions Act.

It was Counsel's submission that the case was fatally defective for failing to enjoin the estate of Paul Kipkorir Boit as the estate was not sued in its own capacity. Further, the plaintiff seeks to cancel the title issued to the late Paul Kipkorir Boit yet the same has changed hands and the estate has not been enjoined. Most of the allegations in the plaint are against the deceased and failure to enjoin the estate renders the suit defective.

On the issue of estoppel, Counsel submitted that the plaintiff admitted that he left the property in 1966/67 and that he had never gone back and that the deceased was in possession by having executed a sale agreement therefore the plaintiff is estopped from repudiating the same. Counsel also submitted that constructive trust was created by receiving money from the deceased and entering into a sale agreement. Counsel cited the case of **Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri (2014) eKLR** in support of the defendants case. Counsel therefore urged the court to dismiss the plaintiff's claim with costs.

### **3<sup>RD</sup>, 4<sup>TH</sup> AND 5<sup>TH</sup> DEFENDANT'S SUBMISSIONS**

Counsel for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants listed the following issues for determination by the court, whether the suit is time barred, whether the plaintiff has any proprietary interest on the suit land and whether the case of fraud was proved on a balance of probabilities.

On the first issue as to whether the suit was time barred Counsel submitted that the suit was time barred as the cause of action arose 50 years ago and that Section 7 of the Limitation of Actions Act is clear on time frame for lodging such claims regard. Counsel relied on the case of *Bernard Chomba v Francis Wakaba Wainaina* (2018) eKLR where Olao J held that:

*It is also clear from the Appellant's statement that as far back as 1990, he became aware that the Respondent's agents or tenants were cultivating the land. However, he took no action. Instead, he decided to "build in the side that was not cultivated". If he had exercised "due diligence" and visited the Lands office in 1990 when he found people cultivating it, he would have found that the suit land had in fact been transferred to the Respondent some fourteen (14) years earlier. He did not have to wait until 2006 to visit the Lands office. The Appellant's counter-claim was clearly statute barred.*

Counsel therefore urged the court to find that the plaintiff's claim was time barred as he had lost all interest on the suit land when he vacated the land in 1967 and took no action for over 50 years. Counsel also relied on the case of *Joshua Ngatu v Jane Mpinda & 3 others* (2019) eKLR where Mbugua J. held that :

*The claim of fraud can be considered as a tort; In this case, it would be time barred under section 4 (2) of Limitations of Actions Act. The claim would still be time barred if the 1977 contract was to be taken as the basis of the fraud, pursuant to provisions of section 4 (1) (a) of Limitations of Actions Act.*

*The rationale of the statute of limitation was aptly captured in the East African Court of Justice appeal case No. 2 of 2012, Attorney General of Uganda & Another Vs. Omar Awadh & 6 Others (2013 )Eklr where it was stated as follows;*

*"Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overarching rationale for statutes of limitations, such as the time limit of Article 30 (2) of the EAC Treaty, is to protect the system from the prejudice of stale claims and their salutary effect on the twin principles of legal certainty and of repose (namely: affording peace of mind, avoiding the disruption of settled expectations, and reducing uncertainty about the future)".*

On the issue as to whether the plaintiff had any proprietary interest on the suit and Counsel submitted that from the evidence on record the interest in the suit land had expired as he failed to comply with the terms of the allotment letter. That the defendants were able to explain how the land was allocated to him and how he obtained the title. At no time did the plaintiff adduce evidence that he had complied with procedure to allow the court find that he had acquired interest over the land.

Mr. Kuria submitted that all evidence shows that Paul Boit is the one who had made payments with regards to the land and Counsel cited the case of *Henry Muthee Kathurima v Commissioner of Lands & Anther* (2015) eKLR and submitted that the title holder must demonstrate how the title was acquired.

On the last issue on whether fraud was proved by the plaintiff, Counsel submitted that the plaintiff never tendered any evidence to prove the allegation of fraud. The defendants showed that the deceased acquired the land as per the sale agreement and the plaintiff vacated the suit land. Counsel relied on the case of *Vijay Morjaria versus Nansingh Madhusingh Darbar & anor* (2000) eKLR on the issue of particulars of fraud being specifically pleaded and proved where Tunoi J. A. held that:

*"It is well established that fraud must be specifically pleaded and that particulars of the 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 these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts".*

Counsel therefore urged the court to dismiss the plaintiff's case as he had failed to prove his case on a balance of probabilities.

### **ANALYSIS AND DETERMINATION**

The issues for determination in this case are as to whether the Plaintiff's suit is time barred, whether the plaintiff has proved the particulars of fraud against the defendants and whether the plaintiff has any proprietary interest in the suit land.

On the first issue as to whether the suit is time barred, Section 7 of the Limitation of Actions Act provides that ;

*"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".*

From the evidence on record, the plaintiff admitted that he was allotted the suit land in 1966 and after the allotment he left the suit land in the occupation of the late Paul Boit. He alleged that the 5th defendant colluded with the father of the 1<sup>st</sup> and 2<sup>nd</sup> defendants to transfer the documents to him in 1986. This would therefore mean that the cause of action accrued in 1986 that is more than 30 years or thereabout

before the suit was filed. The plaintiff also stated that he went back to the suit land in 2001 to try and lodge a caution which he never did and later titles were issued in 2014 but he never took any action. The plaintiff woke up from his slumber in 2017 when he had lost his proprietary rights in the suit land. The question is, what triggered the interest in filing this suit too late in the day. He should have continued with the slumber to avoid trying to destabilize the status quo. I find that the suit is time barred in terms of the provisions of Section 7 of the Limitation of Actions Act,

Further Section 26 of the Limitation of Actions Act provides;

*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 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*

The plaintiff cannot rely on this section that there was fraud as the same was not proven. The evidence by the County Adjudication Officer was clear that the transfer was done legally to the late Paul Boit as per the agreement for sale between the plaintiff and the himself therefore the limitation of actions applies as the plaintiff filed this case in 2017 when the suit was already time barred. If fraud was proven, then the limitation would not run to sanitize an illegality.

On the second issue whether the plaintiff has proven the particulars of fraud, the plaintiff fell short of the required standard of proof of fraud. In the case of *Ndolo v Ndolo* (2008) 1KLR (G&F) 742 the court held that:

*“We start by saying 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”.*

The law is very clear that whoever alleges must prove. Section 107 of the Evidence Act Cap 80 of the laws of Kenya states 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”.*

And further according to Black’s Law Dictionary, fraud is defined as

*“Fraud consists of some deceitful practice or wilful 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”.*

In the case of **Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR** the court held;

*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 13<sup>th</sup> 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”. See *Insurance Company of East Africa vs. The Attorney General & 3 Others* Hccc135/1998.*

It is trite law that where fraud is alleged it must be particularized and proven and the standard of proof is slightly higher than that of a balance of probabilities. The plaintiff merely alleged that there was fraud but has not provided any evidence. The plaintiff has no proprietary interest in the suit land of the alleged fraud. The defendants went out of their way to table proof of the legality of the transaction which was backed

by documentary evidence.

I find that the plaintiff has failed to prove his case against the defendants and is therefore dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

**DATED AND DELIVERED AT ELDORET THIS 24TH DAY OF OCTOBER, 2019.**

**M. A. ODENY**

**JUDGE**

**JUDGMENT** read in open court in the presence of Mr.Ngugi Mbugua holding brief for Dr.Chebii for Plaintiff and Miss.Tum for 1<sup>st</sup> and 2<sup>nd</sup> defendants and in the absence of the Attorney General.

Mr.Mwelem – Court Assistant