



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT MURANG'A
ELCA NO 23 OF 2018

MARTIN F KANGARA KIMANI.....APPELLANT

VS

SAMUEL MACHARIA KIMANI.....RESPONDENT

JUDGMENT

1. This appeal arises of the Judgement of Learned Chief Magistrate's Court at Murang'a in Civil Case No. 98 of 2011 delivered on 18/10/18. In the Judgement the Lower Court dismissed the Defendant's Counter claim and entered judgment for the Respondent as prayed in the plaint.
2. In the lower Court the Respondent/Plaintiff by a plaint dated 10/14/14 sought judgement against the Appellant/Defendant for the following orders;
 - a. A declaration that the Plaintiffs is the sole owner of Plot Number 24 Kihumbu-ini Market Murang'a (suit land) and the Defendant be ordered to vacate it, and the 2nd Defendant do issue a title to the Plaintiff cancellation of the subdivision effected in 1999 and the restoration of the Plot to the original Plot No 24 , cancellation of the allotment letter issued to the Defendant and the rectification of the Murang'a County Government Register to reflect the Plaintiff as the true sole owner of the Plot No 24 Kihumbu-ini.
 - b. Amount of rent collected from the Plot by the Defendant since 1992 and interest at Court rates paid to the Plaintiff by the Defendants.
3. In brief the Respondents case at the lower Court was based on fraud, the particulars of which are set out in paras 7 a-c of the plaint which particulars are summarized as ; interfering with the documents at the council to fraudulently register himself as co-owner of Plot No 24; fraudulently representing himself to the Murang'a Municipal Lands of office as co-owner of Plot No 24; misleading and colluding with the officer of the said lands office to register the suit land in his name as co-owner while it was solely owner by the Plaintiff; fraudulently causing the subdivision of the Plot 24 into two sub Plots; 24 and 46 by forging the Respondents signature and causing the resultant Plot No 24 to be registered in the name of the Appellant.
4. The Appellant opposed the Respondents suit through his statement of defense filed on the 3/4/14 in which he sought to put the Respondent in strict proof in respect to the allegations of fraud. In addition, he pleaded statutory time bar against the claim of the Respondent. Further, he averred that he is the bonafide owner of the suit land having been allocated in 1999 and issued with a letter of allotment. That the land was purchased by their father, Mr Karaya and caused it to be registered in the joint names of the Appellant and the Respondent after which a subdivision was carried out which yielded two Plots in each of the parties names. That he has been in possession and developed the suit land since 1992 todate.
5. The suit was heard by the learned Chief Magistrate who pronounced herself on the matter on 18/10/18 entered judgement in favour of the Respondent against the Appellant. The case of against the 2nd Defendant was dismissed for want of proof.
6. Aggrieved by the above decision of the lower Court the Appellant filed this instant appeal and set out 8 grounds of appeal in the memorandum of appeal dated 13/11/18. I have summed the grounds as follows; The Learned Chief Magistrate erred in law and in fact;
 - a. By entering judgement in favour of the Respondent in terms of a prayer of the plaint which was ambiguous and inconsistent.
 - b. By ordering that the Respondent be registered as the sole owner of the suit land without any evidence on proprietary interest
 - c. Failure to rule that the Respondent has never been a sole registered owner of the suit land and that as such cancellation and registration of the suit land in his name would not have arisen.

- d. Failure to determine that the Respondent was not party to the agreement and that he was only witness with no proprietary interest
- e. By misdirecting herself that the Respondent had proved fraud on the part of the Appellant whereas the said Respondent did not discharge the burden of proof on balance of probability.
- f. Failure to hold that the cause of action was statute barred under section 7 of the Limitations of Actions Act.
- g. Ordering the cancellation of the name of the Appellant and registering Plot No 24 in the name of the Respondent and ignoring that the said Plot had initially been registered in the joint names of the Appellant and the Respondent.

7. The parties elected to canvass the appeal by way of written submissions.

8. The Appellant submitted that fraud being a serious allegation, the onus is on the party alleging fraud to provide evidence to the Court that meets the threshold of the standard of proof as enunciated in the cases of **Nancy Kahoya Amadiar and Export Credit Limited & John Mutitu Ngacha; Vijay Morjaria Vs Nansingh Madhusingh Darbar & Anor (2000) EKLR and Central Bank of Kenya Limited Vs Trust Bank Limited & 4 Others (1996) EKLR**. The Appellant submitted that the evidence tendered by the Respondent in the lower Court was vague and composed of generalized allegations which remained unproven. For instance, the allegations of forgery were unsupported. That the Respondent did not show any nexus to the suit land. That the Respondent was not privy to the agreement of sale and was a mere witness and hence acquired no proprietary interest. Further that the suit land was not listed as part of the estate of their late father as can be seen in the confirmation of grant dated the 10/10/12. That in any event the Respondent is not a legal representative of the estate of the late Stanley Kimani Kiraya, the purchaser of the suit land.

9. In respect to the issue of limitation, the Plaintiff submitted that the cause of action arose in 1992 when the suit land allegedly came into the possession of the Respondent and therefore in filing suit in 2014, he would have brought a claim 22 years later, which he opines is rendered stale and time barred under section 7 of the Limitation of Actions Act.

10. He impleaded the Court to allow the appeal with costs set aside the lower Courts judgement dated the 18/10/18 and dismiss the Respondents suit with costs.

11. The Respondent on the other hand gave a rendition on the background of his case and set out the twin issues of fraud and statutory time bar.

12. As to whether fraud was proved, the Respondent submitted that fraud must be specifically stated in the face of the pleadings, the acts alleged to be done fraudulently be set out clearly and that fraudulent conduct must be distinctly alleged and proved and it is not allowed to be inferred from the facts of the case. He placed reliance in the cases of **Kuria Kiarie & 2 Others Vs Sammy Magera CA 326 of 2017 and Vijay Morjaria Vs Nansingh Madhusingh Darbar & Anor (2000) EKLR**.

13. The Respondent submitted that other than particularizing the instances of fraud in para 7 of the plaint, he also proved fraud through the evidence tendered by the Respondent and his witnesses who confirmed that the Respondent indeed bought the suit land from one Paul Gitei Kabata. That though the Appellant led evidence that the suit land was acquired by their father through purchase from Kabata after which he caused it to be allocated to them jointly and was later subdivided into two portions each owning a piece, the Respondent submitted that this line of evidence was successfully countered by the evidence of PW1-3 who confirmed that the suit land was sold to the Respondent and not their father. Further he submitted that the Appellant did not deny that the suit land was not part of their father's estate during the succession cause. That it is unclear how documents in respect to the land were issued from two municipal councils. That the Appellant did not dispute the evidence of PW2-4 that he came into the transaction purely on the insistence of their mother to secure the interests of the Respondent.

14. In respect to limitation of actions, the Respondent submitted that he discovered the fraud in 2013 when he realized that the Plot had been subdivided and filed suit in 2014 hence the issue of statutory bar is a non issue.

15. This is a first appeal. In it, this Court is permitted to evaluate the evidence and the pleadings of the lower Court including the conclusions and matters of evidence and the decision taken by the lower Court.

16. There are only two issues in my view for determination in this appeal;

- a. Whether the suit is time barred.
- b. Whether the Respondent proved fraud on the part of the Appellant.
- c. Costs.

The Court will now analyze the issues in turn.

17. The cause of action in the lower Court was based on fraud. Section 4 (1) of the Limitation of Actions Act provides that:

“4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

- (a) actions founded on contract;

(b).....

(c).....

(d).....

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.” (Emphasis supplied).

18. Section 26 (c) of the Limitation of Actions Act provides that:

“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.”

19. Fraud is a tortious offence and the period of limitation is three years. However under Section 26 C the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

20. In this case the Respondent led evidence that in the year 2013 he discovered that the suit land had been registered in the name of the Appellant. That during the previous years the Appellant undertook in vain to release the documents he was holding and it is only in the year 2013 during a meeting called by the family in the company of the church Minister that the Respondent disclosed that the land had been transferred to the Respondent.

21. It is the Courts view that the evidence of the Respondent is plausible and is believable on a balance of probability and that the suit is not time barred.

22. On the issue of long possession of the suit land, the Court is of the view that this claim was not pleaded and the Court cannot grant a relief where a party has not pleaded it.

23. Has fraud been proved? The law is clear and I take it from the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, where **Tunoi, JA. (as he then was)** stated as follows:

“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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

24. As regards the standard of proof, this Court in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See **Ndolo vs Ndolo (2008) 1 KLR (G & F) 742** wherein the Court stated 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....”....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

25. The Respondent pleaded grounds of fraud as set out above. He led evidence that he purchased the suit land from one Kabata. PW1-4 did not lead any evidence that they either witnessed the payment of the purchase price being made or witnessed the agreement of sale. Their evidence is purely hearsay. The Law of Contract is clear in the section 3(3) states as follows;

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness

who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”.

26. There was no evidence led by the Respondent to show that indeed there was an agreement between him and the said Kabata. The agreement on record which was produced by the Respondent and the Appellants has been denied by the Respondent on grounds that the same is a forgery. That his signature on the subdivision letter dated the 22/9/1999 is a forgery. He did not lay any evidence to support this allegation and the same remained a mere allegation. Such evidence would have been a hand writing report from an expert to show that the same is a forgery. None was given. In the impugned agreement.

27. I have seen a change of registration dated the 7/1/90 addressed to the previous owner namely Kabata which changed ownership of the land from Kabata to the Appellant and the Respondent. There is also a letter dated the 21/9/1999 addressed to Mr Kiraya, the father of the parties forwarding to him a copy of the notice of termination of agreement. This may lend credence to the averment by the Appellant that the suit land belonged to their father. Why was this letter being addressed to their father instead of the Respondent if indeed he had bought the suit land. The Respondent did not lead evidence to enlighten the Court on this aspect. It is highly probable that the land belonged to their father.

28. That said the Respondent did not table any evidence to show that their father indeed transferred the suit land to the parties. There are no mutation forms executed by Kiraya and it is not clear how the subdivision was carried out. The minutes of the Thika Municipal Council were neither annexed to support the alleged subdivision.

29. The Court finds that the learned Chief Magistrate fell in error when she determined that the Respondent had proved fraud. My review of the evidence and all the material before the Court does not support proof of fraud. The Court determines this issue in the negative.

30. In the end the appeal succeeds. The judgement of the lower Court is set aside and the lower Court case is dismissed with costs.

31. The Appellant shall have the costs of the appeal and that of the lower Court.

32. It is so ordered.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 3RD DAY OF OCTOBER 2019

J G KEMEI

JUDGE

Delivered in open Court in the presence of;

Mbuthia h/b for Kirubi for the Appellant

Mbugua for the Respondent

Irene and Njeri, Court Assistants