



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

CIVIL APPEAL NO. 20 OF 2019

(FORMERLY NAIROBI CIVIL APPEAL NO.440 OF 2013)

JOSEPH PATRICK WANG'ANG'A.....APPELLANT

VERSUS

PATRICK KIMETHU.....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate's Court

at Kiambu delivered by Hon. L.D Ogombe (Resident Magistrate on 12th August 2013)

JUDGMENT

The Respondent herein **Patrick Kimethu** prosecuted **Kiambu CMCC No.132 of 2012**, which was initially filed by his father (**deceased**) filed on **1st July 1996**, at the **Chief Magistrates Court, Kiambu**. The claim was against the Appellant herein and he sought for;

a) An order declaring that the transfer of L.R Komothai/Kiratina/

217 to the 1st Defendant on 31st January 1996 was obtained fraudulently, and/or through misrepresentation.

b) An order directing the 2nd Defendant to rectify the register for L.R Komothai/Kiratina/217 by deleting the 1st Defendants name and reverting to the Plaintiff.

c) Costs of this suit and interests thereon.

d) Any other relief as this Honourable Court may deem fit.

In his statement of claim the Plaintiff(deceased) averred that he was the father of the 1st Defendant(Appellant) and the registered owner of the suit property, That in **1994** the 1st Defendant(Appellant) sought to install electric power supply in his home situated in the suit property and sought authority from him. The Plaintiff was then made to sign some forms allegedly for the power supply but in **March 1996**, he discovered the suit land had been transferred to the 1st Defendant(Appellant) on the **31st January 1996**, without his knowledge and or consent. It was therefore averred that the transfer was done fraudulently and or through misrepresentation as the Plaintiff had the original title.

In his statement of Defence, the 1st Defendant(Appellant) denied the allegations made in the Plaintiff. He also denied procuring the suit land fraudulently and/or through misrepresentation and stated that he would raise a preliminary objection on the grounds that the Plaintiff did not set out particulars of fraud and that the Court lacked Jurisdiction.

Viva Voce evidence was taken wherein **PW1 Patrick Ndungu Kimethu** testified that his father was the original owner of the suit land and that the title deed was in the name of **Kimethu Wabau**, He told the Court that his father had given the 1st Defendant(Appellant) authority to reside and construct on the suit property. However, he later discovered that the 1st Defendant(Appellant) had transferred the suit property without his knowledge when he received a notice from the **land registry** that the title deed would be issued.

On the **6th of March 1996**, he wrote a letter of protest to the Land Registrar. The Land Registrar then responded indicating that the land was

transferred to the 1st Defendant in **1974**, and his father was urged to surrender the original title but he failed to do so. Further that his father's name has been incorrectly spelt in the transfer form and the Identity Card Number has been indicated as **698490/68** and denied that the signature was his father's. He further testified that his father was illiterate and had denied executing the transfer or attending the **Land Control Board**. It was his testimony that the land had a restriction imposed on it until the old title was surrendered.

PW2 Oscar Crispus Opiyo, a fingerprint officer based at the Department of National Registration Bureau, testified that **Kimethu Wabau Kanyi** was issued with identity **Card number no.5698490/68**, and that it was impossible for the number to be issued to more than one person. Further that he was able to distinguish one fingerprint from another and that the fingerprint on Exhibit 7 was unverifiable as it was unclear for comparison.

PW3 Martin Esakina Papa, a Forensic Document Examiner with Global Forensic Security Services, stated that he prepared a report **dated 23rd November 2012**, after he examined the signature impressions and compared with other specimen signatures and also compared it with the signature in the Identity card. That he did not find any agreement of common origin. He therefore concluded that the transfer form was signed by a different person and the signatures were not identical. Further that there is a lot of tremor and wavering of strokes that shows the writer was not the genuine one. He further testified that the impression (thumbprint) on the transfer compared with the Identity Card showed that the 2 marks were not fit for comparison.

The Defence witness **DW1 Joseph Patrick Wanganga** testified that he has lived on the suit property from birth and that his father gave his family the disputed land. That his father transferred the property to him through **Advocate Rose Simba**, and that they went to the **Land Control Board** with his father, his mother, step mother and step brother **Lucas Wanyanya**. That his father only filed the suit upon pressure from his step family. That he was given a green card and the land registrar demanded the old title which he did not have. That they had a family meeting wherein his father informed them that his step family would take **1.7 acres** land while the 1st Defendant's (Appellant's) family would have the suit property and as siblings they agreed that the land would be in his name. Further that though his father's name is **Hosea Kimethu Kanyi**, the transfer indicates **Kimethu Wabau** as the registered owner. That they went to **Rose Maina Advocate** who is the same person as **Rose Simba** for signing of the transfer form at **Loita House 4TH Floor** though the record of the Law Society shows that she was based in **Unafic House** at that particular time. Further that the mistakes in the transfer form were by the typist and that his father gave him the land as a gift.

It was his testimony that he mixed up dates in his witness statement wherein it states that they signed a document in **1994**, whereas it was a year later and that he did not have any documents countering the arguments by his father that the transaction was fraudulent.

DW2 Samuel Wanganga Ndangi adopted his witness statement and testified that in **1994** his Uncle the 1st Defendant's (Appellant's) father was discharged from hospital and they had a feast. He then informed them that his properties would be divided with **Njeri getting 12.7 acres** at **Githioro and Wanjiku getting 4.8 acres**. That though he stated in his witness statement that the meeting was in **1995**, it was actually in **1994**. However there was no written record for the meeting.

After the *viva voce* evidence, the Parties filed their written submissions, the trial Court entered Judgment in favour of the Plaintiff (Respondent herein) plus costs and interest.

The Appellant was aggrieved by the above determination of the Court and Decree thereon and he has sought to challenge the said Judgment through the **Memorandum of Appeal** filed on **15th August 2013**. The Appellant sought for the setting aside of the Judgment delivered on **12th August 2013** by **Hon. L.D Ogombe Resident Magistrate Kiambu**.

The grounds upon which the Appellant sought for the Appeal to be allowed are THAT;

- 1. The learned Resident Magistrate erred in law and in fact by holding that the transfer of the suit property in favour of the appellant was obtained through fraud.**
- 2. The learned Magistrate erred in law and fact by failing to hold that failure by the Respondent to set out particulars of fraud in the Plaint was fatal to the case.**
- 3. The Learned Magistrate erred in law and in fact by holding that the requirement set out in Order 2 Rule 4 of the Civil Procedure Rules requiring a party to specifically plead particulars of fraud is procedural and not substantive requirement and by so doing arrived at a wrong conclusion.**
- 4. The Learned Magistrate erred in law by misinterpreting and misapplying Article 159(2) of the constitution of Kenya and ignored the Respondents authority which the authority the appellant also relied on and further the authority was binding on her and in so doing arrived at the wrong decision.**
- 5. The Learned Resident Magistrate erred in law and in fact by failing to hold that the Respondents witness and in particular PW3 was not an expert witness within the meaning of the evidence Act.**
- 6. The Learned Magistrate erred in law and in fact by holding that the transfer document had discrepancies when in essence there was no substantive discrepancies to warrant such a finding and / or render the said transfer irregular/improper and by so doing arrived at a wrong decision**
- 7. The Learned Resident Magistrate erred in law by shifting the burden of proof to the Appellant when in essence the Appellant had adduced evidence to proven that there was a family meeting in Nakuru and not under any obligation to call any of his brothers as witnesses**

8. The Learned Resident Magistrate erred in Law and in fact by relying substantively on the exhibits produced by the Respondent and in so doing arrived at a wrong decision.

9. The Learned Resident Magistrate erred in law by failing to hold that the Respondent had not proved his case on a balance of probabilities as required in law.

10. The Learned Magistrate erred in law by awarding costs and interest to the Respondent

The Appeal was canvassed by way of written submissions and the Appellant through the **Law Firm of Oyugi & Company Advocates** submitted that the Respondent failed to specifically plead the particulars of fraud but made a blanket claim that the suit land was fraudulently transferred in contravention of **Order 2, Rule 4(1)** of the **Civil Procedure Rules**. Further that since the same is a legal requirement, the learned magistrate was wrong in holding that the requirement is only procedural and therefore the suit was defective. It was further submitted that the respondent did not prove their claim on a balance of probability as they did not provide proof to substantiate their claim of fraud as the expert witness did not meet the threshold required in **Section 48** of the **Evidence Act**. The Appellant relied on various decided cases and implored upon the Court to set aside the Judgments in the lower Court.

The Respondent through the **Law Firm of N.K Mbae Associates** filed his submissions on **2nd July 2019**, and submitted that the particulars of fraud were clearly set out in paragraphs **4,5,6 ,7 and 8** and the Appellant in his Defence in paragraphs **3,4,5 and 6** substantially responded with denial to each of the particulars of fraud and cannot later claim that the fraud was not pleaded. It was further submitted that the Respondent proved that he was in possession of the title deed and the Appellant had no explanation as to why the title deed was retained. It was further submitted that the Appellant failed to call any material witness and that the Respondent's allegation of fraud was supported by overwhelming evidence and proved according to the required standard of balance of probabilities and therefore the Appellant's grounds of Appeal have not provided any reason for interfering with the Judgment of the lower Court. The Respondent relied on various decided cases and submitted that the appeal has no merit and the Court was urged to dismiss it with costs.

As the Court embarks on the determination herein, it takes cognizance of the fact that it neither saw nor heard the witnesses and must therefore give allowance to that. The Court has also carefully considered the findings of the trial court, the submissions by the Counsels and finds as follows:-

As this is a first Appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123**, where the Court held that;

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 this 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 based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Mbogo...Vs...Shah (1968) EA 93 at 96**, where the Court held that:-

“An appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”.

Having considered the available evidence at the Lower Court and the written submissions, the Court finds the issues for determination are:-

1. Whether the Respondent (Plaintiff) did not particularly plead Fraud and therefore the suit is fatal.

2. Whether the Respondent proved his case at the Lower Court.

1. Whether the Respondent (Plaintiff) did not particularly plead Fraud and therefore the suit is fatal.

The Respondent (Plaintiff) had alleged that the transfer was done without his consent and that there was fraud and misrepresentation. The Appellant had alleged that the Respondent did not present the particulars of fraud as required by law. In their Defence the Appellant had urged the Court to dismiss the suit based on these assertions. This has also been the contention of the Appellant in this appeal in which they have strongly alleged that the trial Court wrongly invoked **Article 159** of the **Constitution**.

In his submissions the Appellant submitted that the Respondent merely pleaded fraud and let him figure out what **fraud** without setting out the particulars of the fraud. However this does not seem to be the case. This Court agrees with the trial Court that the Plaintiff indicated the acts and omissions of fraud that had been perpetrated by the Appellant. The allegations by the Appellant that he was not afforded an opportunity to answer the allegations of fraud, are not founded. It is clear that the Plaintiff specifically stated that the suit was transferred without the Plaintiff (deceased's) knowledge and consent, the land was transferred through fraud as he still kept the original title. It is this Court's

opinion that the Respondent did not merely mention fraud as alleged by the Appellant but he went further and explained how the fraud was perpetrated. From the **Plaint**, it is clear that the acts and omissions by the Appellant were clearly set out and therefore the Appellant had been given an opportunity to respond to the allegations and in his Defence he stated as much by denying the acts of fraud and misrepresentation as has been alleged by the Plaintiff in the **Plaint**.

In the case of **John Mbugua Getao ... Versus... Simon Parkoyirt Mokare & 4 others (2017) eKLR** relied on by the Appellant, it is clear that the Court had in that instant suit found that the party in that case had not particularized the alleged acts or omissions. However in this instant suit, the acts or omissions by the Appellant were clearly particularized in the **Plaint**. Maybe not in the normal way that is the usual practice but the best way for the Appellant to have understood what acts of fraud he was being accused of. The Court also acknowledged that it may be swayed by that argument and invoke **Article 159**. However that party ought to have put in evidence to prove fraud.

The Court finds and holds that the particulars of fraud being the acts and omissions by the Appellant were correctly pleaded in the **Plaint** and therefore this is not a case in which fraud was merely mentioned but the acts and omissions were clearly set out for the Appellant to have responded. See the case of **Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & another [2018] eKLR** where the Court of Appeal held that;

“A holistic reading of the summons and the supporting affidavit by the 1st respondent leaves no doubt that the fraud alleged against the appellants was clearly set out. It was pleaded that the 1st appellant, a person claiming to be the deceased, and officers at the Land Registry, conspired to illegally transfer the suit property from the deceased to the 1st appellant by use of a fake identity card; that when the deceased lodged a caution on the suit property, the 1st appellant colluded to have it removed without notifying the estate of the deceased, and that to defeat the claim by the estate of the deceased, the 1st appellant transferred the suit property to the 2nd appellant.

*For our part, we are satisfied that the respondents pleaded fraud on the part of the appellants with sufficient particularity for them to know what was alleged against them and the case they had to rebut. As this Court stated in **Mohamed Fugicha v. Methodist Church in Kenya**, CA No. 22 of 2015:*

“We apprehend that the primary purpose of pleadings is to communicate with an appreciable degree of certainty and clarity the complaints that a pleader brings before the court and to serve as sufficient notice to the party impleaded to enable him to know what case to answer.”

In their replying affidavits, the appellants went to great lengths to deny involvement in any fraud as regards the sale and transfer of the suit property, and in our view, the claim that the respondents did not particularize fraud cannot fall from their mouths. Indeed, when the trial court framed the issues, one of the issues for determination was

“Whether the transfer of the suit property to the 1st defendant and subsequently to the second defendant was fraudulent and tainted with forgery and collusion.”

We are satisfied that there is absolutely no merit in the claim that fraud was not particularized as by law required.”

2. Whether the Respondent proved his case at the Lower Court.

The Appellant submitted that PW3 did not prove that he was an expert and therefore the Court had erred in finding that he was an expert witness and from the record, the witness testified that he worked with Global Forensic Security Services and produced his report in Court. The respondent did not object to his testimony or at the very least ask for his credentials in Court or challenge and or controvert the report he had presented. It has been acknowledged by the Appellant that the said witness was a police officer. The said witness testified that he had been trained as a Forensic Document examiner at CID training school and the allegations by the Appellant that he is not qualified have not been proved. *It is trite that the Allegations of fraud must be strictly pleaded and proved. See the case of **R.G. Patel v. Lalji Makanji [1957] EA 314**, the Court held 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.”

*This Court has already held that the Respondent (Plaintiff) properly pleaded fraud in his **Plaint**. **Were these allegations of fraud proved?** In his affidavits, the deceased who was the owner of the suit land deponed that he still held the original title to the suit land. The Appellant did not explain why the deceased still held the original title if he indeed had transferred the land to him. Further the deceased had contended that he never gave the consent to transfer the suit property and that his signature and the thumbprints were not his. **Oscar Cripus Opiyo PW2** a finger print officer with department of National Registration Bureau and an expert in his field testified that the fingerprint on the transfer form was unclear for comparison and it was impossible to verify the finger prints. Further PW3 also testified that the transfer form was signed by a different person with the letter written by the deceased and the Identity card of the deceased and that the thumbprints on the transfer were impressions.*

From the evidence of the witnesses, the Court’s finds that the trial Court correctly held that allegations of fraud were proved as the witnesses confirmed that the transfer was fraudulent and hence the transaction was fraudulent and the trial Court’s Judgment cannot be faulted.

According to the **Black’s Law Dictionary, 10th Edition**, fraud is defined as follows;

“A knowing misrepresentation or know concealment of a material fact made to induce another to act to his or her detriment.”

The fact that the Appellant misrepresented facts to get registration of the suit property, amounts to fraud.

Having now carefully re-evaluated and re-assessed the available

evidence before the trial court and the Memorandum of Appeal together with the written submissions, the Court finds that the trial Magistrate arrived at a proper determination and therefore finds no reason to upset the said Judgment and Decree thereto.

The upshot of the foregoing is that the Appellant’s Appeal is not merited and consequently the said Appeal is dismissed entirely and the Judgment and Decree of the trial court is upheld. On the issue of costs, the Court finds the same is granted at the discretion of the court. The

Respondent being the successful litigant is accordingly awarded costs of this Appeal.

It is so ordered.

Dated, Signed and Delivered at Thika this 29th day of November, 2019.

L. GACHERU

JUDGE

29/11/2019

In the presence of

No appearance for the Appellant

Mr. Mbae for Respondent

Lucy - Court Assistant.

Court – Judgment read in open court in the presence of the above advocate.

L. GACHERU

JUDGE

29/11/2019