



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 11 OF 2016

HELLEN WANJA GIKUBI.....1ST APPELLANT

ROSEMARY WAMBUI MUTUGI.....2ND APPELLANT

VERSUS

EMILY NJOKI GIKUBI.....RESPONDENT

**(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 9TH APRIL, 2015 BY HON K.K. CHERUIYOT – P.M AT
KERUGOYA SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL CASE NO. 226 OF 2011)**

JUDGMENT

The Respondent **EMILY NJOKI GIKUBI** (as plaintiff) had filed **KERUGOYA SENIOR RESIDENT MAGISTRATE’S COURT CIVIL CASE No. 226 of 2011** against the Appellants (as defendants) seeking the main remedy that the Appellants registration as proprietors of land parcels No. MUTIRA/KIANJEGE/915 and MUTIRA/KIANJEGE/916 be cancelled for having been done fraudulently and that the two portions of land be consolidated into the former parcel No. MUTIRA/KIANJEGE/852 and be registered in the Respondent’s names.

The Appellants filed separate statements of defence denying any fraudulent dealings with the land in dispute. The 1st Appellant added that the Respondent in fact transferred the whole land parcel No. MUTIRA/KIANJEGE/852 (the suit land) to her as a gift while the 2nd Respondent stated that she purchased land parcel No. MUTIRA/KIANJEGE/916 for valuable consideration and after following all the legal procedures to obtain title.

The case was heard by **HON. K.K. CHERUIYOT Ag. PRINCIPAL MAGISTRATE** (as he then was) who, in a judgment delivered on 9th April 2015, found that the Respondent had proved her case and entered judgment for her as prayed together with costs.

That judgment has provoked this appeal in which the Appellants are seeking to have that judgment and all its consequential orders set aside. They have raised the following grounds:

- 1. The learned trial magistrate erred in law and in fact when he heard and determined the suit outside his jurisdiction as the matter touched on defeasibility of certificate of title.***
- 2. The learned trial magistrate erred in law and fact in failing to evaluate evidence thus making decision against the weight of evidence thus occasioning a miscarriage of justice.***
- 3. The learned trial magistrate erred in law and fact when he misdirected himself in law relating to transfer of land by disregarding presence of authentic Land Control Board minutes and consents thus coming into wrong conclusion.***
- 4. The learned trial magistrate erred in law and fact by mis-interpreting the law on fraud by finding that there was fraud against the threshold of strict evidence required to prove fraud thus coming into a wrong conclusion.***
- 5. The learned trial magistrate erred in law and fact in failing to consider the Appellants defence which was largely uncontroverted by the Respondent thus occasioning a miscarriage of justice.***
- 6. The learned trial magistrate erred in law and fact by ordering cancellation of registration of Appellants parcels No. MUTIRA/KIANJEGE/915 and 916 and consolidating the same to the old number MUTIRA/KIANJEGE/952 without considering presence of a bona fide purchaser for value interest in MUTIRA/KIANJEGE/916, a protected proprietor thus occasioning a miscarriage of justice.***

7. The learned trial magistrate erred in law and in fact in failing to consider the relationship between the 1st Appellant and the Respondent that led to the institution of suit.

By consent of the parties, the Appellants filed a supplementary record of appeal dated 8th May 2017 and a further supplementary record of appeal dated 9th October 2017.

The appeal has been canvassed by way of written submissions which have been filed by **Mr. MAINA KAGIO ADVOCATE** for the Appellants and **Mr. NGIGI GICHOYA ADVOCATE** for the Respondent.

As this is a first appeal, it is my duty to re-evaluate the evidence, assess it and make my own conclusions remembering however that I neither saw nor heard the witnesses and therefore I must make due allowance for that – **SELLE VS ASSOCIATED MOTOR BOAT COMPANY LTD 1968 E.A 123**. An appellate Court will not normally interfere with a finding of fact by the trial Court unless such finding is based on no evidence or on a misapprehension of the evidence or the trial Court is shown to have acted on wrong principles in arriving at the decision the subject of the appeal.

Ground No. 1 of the memorandum of the appeal questions the jurisdiction of the trial magistrate to determine the suit subject of this appeal. It is not however suggested in what manner the suit was beyond the jurisdiction of the trial magistrate and there is nothing in the Appellants submissions upon which this Court can conclude that the trial magistrate had no jurisdiction to determine the suit before him. There is no law barring a Magistrate's Court from cancelling a title to land so long as the value is within the pecuniary jurisdiction of the Court handling the dispute. It has not been suggested that the value of the land in dispute exceeded the pecuniary jurisdiction of **HON. K.K. CHERUIYOT**. I have always held the view that the establishment of the Environment and Land Court never took away the jurisdiction of Magistrates Courts in handling land cases within their jurisdiction – see **PETER MBURU VS ANDREW KIMANI ADAM KERUGOYA ELC NO. 85 OF 2015 (2016 e K.L.R)**. Any lingering doubts over this issue have now been put to rest by the Court of Appeal in the case of **THE LAW SOCIETY OF KENYA NAIROBI BRANCH VS MALINDI LAW SOCIETY & OTHERS C.A CIVIL APPEAL No. 287 of 2016 (2017 e K.L.R)**. And until the Supreme Court decides otherwise, Magistrates Courts will continue to handle such cases so long as they are not prohibited by any other law such as cases on adverse possession and so long as the subject matter is within the Subordinate Courts pecuniary jurisdiction. Ground 1 of the appeal must therefore be rejected.

Grounds 2, 3 and 4 of the memorandum of appeal can be considered together. They take issue with the trial magistrate for failing to evaluate the evidence and mis-directing himself on the law relating to transfer of land as well as disregarding authentic Land Control Board minutes and also misinterpreting the law on fraud. The Respondent's case in the Subordinate Court was founded on fraud on the part of the Appellants' particulars of which were pleaded in paragraph six (6) of the plaint as follows:

- (a) ***The 1st defendant took advantage of the plaintiff's advanced age and illiteracy and caused herself to be registered as the owner of the land parcel No. MUTIRA/KIANJEGE/852.***
- (b) ***Making the plaintiff sign transfer documents unknowingly.***
- (c) ***Making false statements to the plaintiff to induce her sign transfer documents which she did not know.***
- (d) ***Registering transfer without proper and/or valid consents from the Land Control Board.***
- (e) ***The 1st defendant transferred land parcel No. MUTIRA/KIANJEGE/916 to the 2nd defendant while she was aware that she did not have a clear title.***
- (f) ***Conspiring to defraud the plaintiff.***

It is the Appellants case that the trial magistrate erred in law and in fact and by not only misinterpreting the law on fraud but also disregarding the presence of authentic documents such as the consents and the Land Control Board minutes and thereby arriving at the wrong decisions. In his submissions, counsel for the Appellants has addressed these issues as follows:

“It is the 1st Appellants testimony that the Respondent had willingly transferred the said land to her as a gift and that the Respondent had actually appeared before the Land Control Board without any coercion where the 1st Appellant sought consent and the same was granted. In support of her claim and in an effort to rebut the Respondent's claim, the 1st Appellant went ahead to produce minutes of the Land Control Board which clearly indicates that the requisite consent was duly signed before the transfer was done. Though the Respondent claims that the transfer of the said land to the 1st Appellant was fraudulent, there was no direct evidence given in Court linking the 1st Appellant to the alleged fraud. In addition, there was no criminal case instituted against the 1st Appellant relating to the alleged fraud which is the element that formed the basis of the Respondent's claim”.

In response however, counsel for the Respondent has submitted that:

“The Respondent alleged fraud in the transfer of title number MUTIRA/KIANJEGE/852 from herself to the 1st Appellant. Respondent alleged that false statements were made to mis-representing her to sign transfer documents knowing of the Respondent's advanced age and illiteracy level”

What I understand the Appellants to be saying is that in the face of the consents signed by the Respondent and the authentic minutes of the Land Control Board, fraud was not proved. That there was no direct evidence to prove fraud. A fact need not be proved by direct evidence only. It can equally be proved by circumstantial evidence. It has been said that circumstantial evidence can prove a fact with the accuracy of mathematics. The Respondent's case was that the 1st Appellant (her daughter) took advantage of her age and illiteracy and made her sign the documents to facilitate the transfer of the suit land to herself and thereafter sold a portion to the 2nd Appellant. In other words, that the Respondent did not sign the documents voluntarily. Fraud is defined in **BLACK'S LAW DICTIONARY 9TH EDITION** as:

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”

In **THE CONCISE OXFORD ENGLISH DICTIONARY**, the same term is defined as:

“Wrongful or criminal deception intended to result in financial or personal gain”.

The trial magistrate cited the case of **KOINANGE VS KOINANGE 1986 K.L.R 23** on the standard required to prove fraud and, in my view, arrived at the correct decision when he found that fraud had been proved. He said the following in his judgment:

“The plaintiff alleged fraud in the transfer of land parcel number MUTIRA/KIANJEGE/852 from the plaintiff to the defendant. The plaintiff testified that the 1st defendant made false statements to induce her to sign the transfer documents knowing of the plaintiff's advanced age and illiteracy. I found it curious that the plaintiff's other children were not aware of the intention by the plaintiff to gift the land to the 1st defendant. I did see the letter dated 17th May 2006 PEXH 8 where the Chief warned the plaintiff's son Julius Muthike Gikubi to keep away from the family land. Interestingly, this was around the time parcel number MUTIRA/KIANJEGE/827 was sub-divided into land parcel MUTIRA/KIANJEGE/851 and 852 on 17th April 2007. The plaintiff denied making a report to the Chief. Could it have been part of the conspiracy to keep away the plaintiff's other children?”

I am satisfied that the trial magistrate was alive to the standard of proof required in cases of fraud and that he directed himself properly in finding that the threshold required had been met. He cannot be faulted on that.

The trial magistrate also had the advantage of observing the demeanour of the parties. He believed the Respondent and not the 1st Appellant. This is what he said in his judgment:

“I did observe all the witnesses especially the plaintiff and the 1st defendant. The plaintiff struck me as a forthright old lady. On the other hand, the 1st defendant appeared to be consistent and did a lot such as transfer of documents and that she kept the plaintiff away from her siblings during these transactions. She did not behave like a person who the plaintiff would gift land the way she spoke about the plaintiff. I did not believe her”

The trial magistrate therefore made a finding of fact that while the Respondent was a credible witness, the 1st Appellant was not. That finding of fact must be respected unless there are good reasons not to up-hold it. As was held in **PETERS VS SUNDAY POST 1958 E.A 424:**

“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 has 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 that 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”

I am not persuaded that I should fault the trial magistrate on his finding of fact that the 1st Appellant was not a witness to be believed. Grounds 2, 3 and 4 therefore fails.

Ground 5 takes issue with the trial Court for failing to consider the Appellants defence which was largely un-controverted by the Respondent. The trial magistrate having found that the 1st Appellant's evidence was not for believing, there was really nothing left to controvert. That ground also fails.

Ground 6 takes issue with the trial magistrate for ordering the cancellation of the Appellants titles to parcels No. MUTIRA/KIANJEGE/915 and 916 without considering the interests of a bona fide purchaser for interest. Having found that fraud had been proved against the defendants, the trial magistrate had no other option other than to cancel the Appellants titles. That is what **Section 26 (1) of the Land Registration Act** demanded of the trial Court. As to whether or not the 2nd Appellant was an innocent purchaser, she told the trial Court that:

‘I knew that she was gifted the land by her mother the plaintiff’

That can only mean that she was privy to the fraudulent transaction. How else did she know it was a “gift”. The trial magistrate rightly found that the 2nd Appellant could not benefit from a fraudulent transaction. The circumstances of this case showed clearly that the process through which the 1st Appellant obtained her title and thereafter transferred a portion to the 2nd Appellant was fraught with illegalities and could not be allowed to enjoy the protection afforded by **Section 26 (1) of the Land Registration Act**. That ground similarly fails.

Finally ground 7 faults the trial magistrate for failing to consider the relationship between the 1st Appellant and the Respondent that led to the institution of the suit. It is not clear whether the Appellants are suggesting that the suit against them was motivated by malice. All that the 1st Appellant said in her evidence was that she was “*no longer in good terms*” with the Respondent. There was nothing in the 1st Appellant’s evidence to suggest that there was bad blood between her and the Respondent prior to the events leading to the dispute subject of this appeal. And if by this the Appellants want to suggest that there was good relationship between the Respondent and 1st Appellant and therefore the Respondent voluntarily transferred the suit land to the 1st Appellant, the evidence shows that to the contrary, the 1st Appellant abused the trust that her mother had in her and she took advantage of her advanced age and illiteracy to defraud her of her land. That relationship was certainly considered by the trial magistrate. That ground similarly fails.

On the issue of costs, the main protagonists in this dispute are a mother and her daughter. To avoid further setting them up against each other, I will reluctantly direct that each party meets their own costs.

The up-shot of the above is that this appeal is devoid of any merit. It is hereby dismissed. Each party to meet their own costs both here and in the Court below.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018

Judgment dated, delivered and signed in open Court at Kerugoya this 23rd day of February 2018

Mr. Kagio for Appellants absent

Mr. Ngigi for the Respondent present

Respondent present

2nd Appellant present

Right of appeal explained.

B.N. OLAO

JUDGE

23RD FEBRUARY, 2018