



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC APPEAL NO. 16 OF 2017

GICHINGA KIBUTHA.....APPELLANT

VS

CAROLINE NDUKU..... RESPONDENT

JUDGMENT

1. This appeal relates to the decision of Hon. A. Mwangi, Senior Resident Magistrate in Kigumo Senior Resident Magistrate's Court (Lower Court) in Civil Case No. 90 of 2014 delivered on 8/5/15. In the Lower Court, the Appellant's (then the Plaintiff) suit was dismissed for lack of proof on a balance of probabilities. The Appellant has sought orders that the appeal be allowed and that the Respondent's (who was the Defendant in the Lower Court) registration as proprietor of land No. Makuyu/Kiriaini Block 1/208 be revoked and or cancelled and Murang'a Land Registrar do register the same in the name of the Appellant.

2. The Appellant's case at the Lower Court was that he purchased Makuyu/Kiriaini Block 1/208 measuring 1.62 Ha. on 26/4/88 whereupon he has occupied and developed. However in 2013 on conducting a search he realized that the said suit land was registered in the name of the Respondent without his knowledge and consent. He sought an Order for cancellation of title and that instead the suit land be registered in his name.

3. From the record it would appear that the Respondent was served with the suit documents by substituted service through the Daily Nation Newspapers but did not file any defence. The Appellant sought and obtained judgement in default and the matter was heard on formal proof where he gave evidence in support of his case.

4. Upon considering the issues raised before him on trial the Learned Senior Resident Magistrate dismissed the case on the ground that the evidence was insufficient to establish ownership and in totality the Appellant had not proved his case on the required standard that of balance of probability.

5. Aggrieved by the above decision the Appellant filed this appeal and set forth the following grounds: -

- a. The Learned Senior Resident Magistrate erred in law and in fact in failing to appreciate and take into consideration the evidence adduced by the Appellant and made a wrong decision in dismissing the Plaintiff's suit.
- b. The Senior Learned Resident Magistrate erred in law and in fact, in dismissing the Plaintiff's suit on the ground that some other documents were required to prove the case to the required standards, thereby made the wrong decision.
- c. The Learned Senior Resident Magistrate erred in law and in fact in dismissing the Appellant's suit whereas the same was not opposed and therefore made the wrong decision.

The Evidence in the Lower Court and submissions on appeal.

6. The gist of the Appellant's case in the Lower Court was to transfer to himself the registration of the suit property in the name of the Respondent. His claim was that he is entitled to the suit property having been part of the 96 members who bought LR No. 11543 vide a transfer dated 18/9/1967. That he paid Kshs. 353/= for his share of the land. That later the Presidential Commission appointed to deal with the land allocated him 15.2 acres but only got 11.2 acres. That through credible sources he learnt that the Respondent had fraudulently transferred and registered the property to her name without his knowledge and consent. Thereafter he was advised by the police and local administration to take possession of the Makuyu/Kiriaini Block 1/208 which he did in 1988. The copy of Certificate of search for No. Makuyu/Kiriaini Block 1/208 was produced before the Learned Magistrate. It reads the name of the Respondent: Caroline Nduku dated 15.12.88 and the title was issued the same date.

7. The Appellant submitted that he produced as evidence in the Lower Court a transfer of land dated 9/9/68 in which he and 96 others bought

LR No. 11543 from one, Peter Folke. He submitted that the Respondent was not one of the buyers listed in the transfer aforesaid. That the Appellant was entitled to 15.2 acres out of the larger land upon subdivision. In the process he was allocated Plot Nos. Makuyu/Kiriaini Block 1/146, 157 and 155 all totaling 11.2 acres leaving out Makuyu/Kiriaini Block 1/208 which was registered allegedly wrongfully in the name of the Respondent to make it a total of 15.2 acres, his initial entitlement. He faults the Lower Court for stating that the Appellant should have explained why some of parcels are in the names of Government of Kenya. The Lower Court was faulted for being biased in favour of the Respondent when he said:-

“He should have endeavored to produce evidence that these four parcels of land actually neighbour each other and form part of the 13.2 acres. The committee directed they should be in the same area. The fact that the defendant was not amongst the original owners does not mean that she fraudulently had land No. Makuyu/Kiriaini Block 1/208 registered in her name. She should have legally acquired the same from any of the other 96 members. The Plaintiff has failed to prove fraud on the part of the defendant. Mere allegations that he was informed by reliable sources that the transfer was fraudulent won’t suffice to have the defendant’s indefeasible ownership challenged”.

Determination

8. I have considered the findings of the Lower Court, the submissions of counsel and the numerous authorities cited before me. Guided by various authorities, I am aware that this is a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusions in the matter. In the Court of Appeal case of **Selle v Associated Motor Boat Co. [1968] EA 123**, it was put thus:

“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**).

9. In line with the above principles, and having regard to the grounds of appeal, the evidence, everything that transpired before the Lower Court; the impugned judgment and the submissions made before me, the issues I discern for determination are four fold, namely: A; Whether the Respondent obtained the title to Makuyu/Kiriaini Block 1/208 fraudulently; If A above is in the positive, whether the Respondent was a party to the fraud; C. Whether the Appellant’s claim should have been admitted as undefended; D. Costs. The Court shall answer the issues in turn.

10. As to whether the Respondent obtained the title to Makuyu/Kiriaini Block 1/208 fraudulently, the Land Registration Act does not define fraud. Recourse must therefore be had to other sources of law. The Black’s Law Dictionary defines fraud thus: -

“Fraud consists of some deceitful practice or willful 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. Fraud, as applied to contracts, 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’.

11. Fraud is essentially a common law tort of deceit and its essentials are:-

- a. false representation of an existing fact;
- b. with the intention that the other party should act upon it;
- c. the other party did act on it; and
- d. the party suffered damage.

12. With respect to a contract, fraud means and includes any of the acts set out below committed by a party to a contract, or with his connivance or by his agent with the intent to deceive another party thereto or his agent or to induce him to contract:-

- a. the suggestion as a fact, of that which is not true by one who does not believe it to be true;
- b. the active concealment of a fact by one having knowledge or belief of the fact;
- c. a promise made without intention of performing it;
- d. any other act fitted to deceive; and
- e. any such act or omission or the law declares to be fraudulent.

Equity has exercised a general jurisdiction in case of fraud, sometimes concurrent with and sometimes exclusive of common law courts. Fraud would, therefore, consist of deceitful actions which may be made through either positive assertions or concealment of facts.

13. It is settled law 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. At page 427 in **Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition** quoting with approval the cases of **Wallingford v Mutual Society (1880) 5 App. Cas. 685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489** it is stated that:-

“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. 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). 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 (i). “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”.

Locally, the above principles have been stated in **HCCC No. 135 of 1998 Insurance Company of East Africa –vs- The Attorney General & 3 Others** as thus whether there was fraud is, however, a matter of evidence.

14. In **Civil Appeal No. 246 of 2013 between Arthi Highway Developers Limited - Vs - West End Butchery Limited and Others** the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of **Dr. Joseph Arap Ngok – Vs - Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997** where the Court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

The law and the Appellant's pleading in the Lower Court.

15. Section 24 of the Land Registration Act provides that subject thereto:—

- a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.

16. Section 25 of the Land Registration Act states as follows:-

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:—

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

17. Section 26 states as follows:-

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

18. The Respondent is the registered owner of Makuyu/Kiriaini Block 1/208. This is the first registration. Under Section 25(1) stated above, the Respondent’s title ought not to be defeated except among others, fraud to which the Respondent is proved to be a party. In his case in the Lower Court, the Appellant sought to vitiate the Respondent’s title on grounds of fraud.

19. Going by Sections 24, 25 and 26 cited above, and the Respondent’s plea in the Lower Court it is clear that in order for the Appellant to successfully challenge the title of the Respondent he must on appropriate standard proof that:-

(a) the title to Makuyu/Kiriaini Block 1/208 was obtained, procured and/or transferred to the Respondent by fraud;and

(b) the Respondent was a party to the fraud.

20. 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”.

It is, therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.

21. It goes without saying that a party is bound by their own pleadings and the evidence they adduce in court. The purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to ascertain matters for determination.

22. The allegations of fraud in particular called for detailed evidence to reach the threshold of proof. I am well alive to the case of **Koinange and 13 others – Vs - Koinange [1986] KLR 23** where the court restated the cardinal precept of the law of evidence that he who alleges must prove it. In the cases of **Ratilal Gordhanbhai Patel V. Lalji Makanji [1957] EA 314** and **Umlila Mahindra Shah v. Barclays Bank International and Anor [1979] KLR** the courts have stated that Fraud has everything to do with one’s state of mind and intentions, and not the outcome of actions and that the standard of proof for fraud is very high beyond the usual standard of balance of probabilities in civil cases approaching but below proof beyond reasonable doubt.

23. I have subjected the pleadings and evidence together with the submissions made by counsel on behalf of the Appellant to fresh analysis. I am satisfied that in order for the Appellant to successfully defeat the title to Makuyu/Kiriaini Block 1/208 issued to the Respondent he ought in the Lower court to:-

a. have particularized his claim on fraud with sufficient detail;

b. given evidence on the threshold stated above to show that the Respondent by herself and/or with others procured the title to Makuyu/Kiriaini Block 1/208 fraudulently.

24. In the instant appeal, the Lower Court after hearing the Appellant gave oral evidence found that the Appellant made very generalized allegations of fraud and did not prove his ownership or entitlement to Makuyu/Kiriaini Block 1/208. Guided by the principles and law stated above, I do not find anything to cause me to disturb the Lower Court’s finding on the Appellant’s claim based on fraud.

25. In the upshot I will answer issue A in the negative. If A above is in the positive, whether the Respondent was a party to the fraud. By reason of my finding in respect of issue A above, I will consequently answer issue B in the negative.

26. As to whether whether the Appellant’s claim should have been admitted as undefended, the Respondent was served with the Summons to enter appearance in the manner prescribed by law. He did not enter appearance or file a defence in the Lower Court case. The Civil Procedure Rules does not give a definition of formal proof. The Appellant applied for and obtained interlocutory judgment against the Respondent in default to the Respondent entering appearance. He proceeded under Order 10 Rule 9 of the Civil Procedure Rules to have his case heard. The law states that “Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing”.

27. The Appellant’s claim is not liquidated. The hearing referred to above is the one commonly known as “Formal proof”. The Civil Procedure Rules do not define “Formal Proof”. Black’s Law Dictionary defines “Formal” as including “rules established by an institution according to certain processes”. This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.

28. Counsel for the Appellant cited two cases in his submissions which I have dully considered. These are:-

a) Interchemie E.A Limited – versus-Nakuru Veterinary Centre Limited (2001) eKLR.

b) Nakuru Civil Case No. 7 of 2004 – Bornes C. Koskei –versus- Geoffrey K. Korir.

In all the above cases the Court was moved to grant the Plaintiffs prayers on solid proof of the claims. Likewise, the Appellant was bound to proof his claim on fraud against the Respondent. I have held elsewhere in this judgment set out the law on proof of fraud claims and found that the Appellant did not proof his claim.

29. In the circumstances stated above, issue C is answered in the negative.

30. Consequently, the decision of the Lower Court is upheld and the appeal dismissed. The costs of this appeal and that of the Lower Court shall be met by the Appellant.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 8TH MARCH 2018.

J G KEMEI

JUDGE.