



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCA NO. 122 OF 2011

H J G.....APPELLANT

VERSUS

H H G.....RESPONDENT

JUDGMENT

1. This appeal relates to the decision of Hon. G. Sogomo, Senior Resident Magistrate in Moyale Senior Resident Magistrate's Court in Civil Case No. 06a of 2011 delivered on 16.9.2011 in respect to Plot No [particulars withheld] situate at Manyatta Ward, Moyale (the suit land). In the Lower Court, the Respondent'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 judgement entered on 16.9.2011 be set aside.

2. In the lower Court the Respondent had sued the Appellant together with the then County Council of Moyale seeking orders inter alia that the suit land be transferred to him and costs of the suit be determined in his favour. The respondent's case was that the suit land was allocated to his father, HUKA GOBA in 1988 by the Chief of Manyatta location in conjunction with the land allocation committee of the area. He further stated that his father got the suit land registered in his name at the Moyale County Council and was given a registration Number [particulars withheld] and thereafter continued to pay rent. That at the time of the said registration he was still a minor. That his father developed the plot by constructing a 4-roomed family house. That in the year 2010 on inspection of the register of the suit land he realized that the same was registered in the name of the Appellant and on making inquiries in writing to the office of the Town Clerk, discovered that his name had been cancelled and that of the Appellant was inserted in the same column of the register. That the County Council of Moyale could not render an explanation and states that the transfer of his land was without his consent nor any legal basis. He accused the Appellant and the Moyale County Council of fraud and collusion in transferring his plot to the Appellant.

3. From the record it would appear that the 2nd Defendant, Moyale County Council was served with the suit documents but did not file any appearance or statement of defence. The Respondent sought and obtained judgement in default.

4. The Appellant (1st defendant) opposed the Plaintiffs claim and stated that the Plaintiff was her step son having married the father but now separated. She averred that at her request the suit land was allocated to her by the area Chief, one, Abdi Bando and the land allocation committee. That in 1988 she proceeded to Moyale County Council where the plot was registered as No [particulars withheld]. Later she developed the plot and built a 4- bedroom house out of her resources from her small-scale businesses. That she resided in the said plot initially with her estranged husband and later on her own. She states that in 2010 the respondents father attempted to have the suit land registered in the respondent's name and his request was rejected by the Council. She contends that the Respondents father wanted to change the registration of the plot to his son as she is childless so as to deprive her of her property.

5. Upon considering the issues raised before him on trial the Learned Senior Resident Magistrate gave judgement in the following terms;

“For the reasons the plaintiff's case shall succeed to the extent that it is ordered that the 2nd defendant rectifies its records to reflect the plaintiffs father H G and his step mother H J G as the allottees of the suit property No [particulars withheld] County Council of Moyale.”

6. 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 holding that the Plaintiff had proved his case against the Appellant on a balance of probability.
- b. The Learned Senior Resident Magistrate erred in law and in fact, in ordering for rectification of the register and that the third party which was not a party to the suit be registered as common owner of the subject property.
- c. The Learned Senior Resident Magistrate erred in law and in fact in failing to evaluate evidence tendered by the parties and in

disregarding the defendant evidence as exclusive to the ownership of the subject property.

d. The Learned Senior Resident Magistrate erred in law and in fact in considering extraneous matters as a basis for his judgement.

e. The Learned Senior Resident Magistrate erred in law and in fact in failing to find for the defendant

The Evidence in the Lower Court

7. The gist of the Respondents case in the Lower Court was that the Appellant is his step mother and that he was registered as owner of the suit land by his father while still a minor. That his father paid the land rates of the plot and presented receipts for payment of rents for 1988, 1989 and 1991 dated 19.12.88, 22.2.1989 and 19.4.91 to proof ownership. That in 2000, he discovered that the name on the land register at the county had been changed to the Appellant and he sought an explanation in writing from the county in vain. His father PW2 testified on his behalf and stated that the Appellant is his estranged wife and the Respondent is his son from another wife. That he was allocated the plot in 1988 and had it registered in his son's name. That his son, the Respondent was a minor then aged between 4 and 5 years old. He states that he used to pay rent for the suit land and on return from Mombasa where he was working for 15 years, he found out at the Moyale County Council that the appellant's name had been inserted and his sons name deleted from the register.

8. The Appellant led evidence that she requested for a plot and got allocated by the Chief and the land allocation committee. That she developed the plot using her own resources and she resides and collects rent from the suit land. That the Respondent is her step son, his father was her former husband. That they got married in Mombasa where she was a small-scale business lady and moved to Moyale. That her husband worked as a watchman and did not contribute to the development of the suit land. That she paid Kshs 4000/- for the allocation of the plot. She contended that it is her former husband who is trying to influence the registration of the plot in his son's name as she has no children of her own. DW2 stated that the parties to the suit are his neighbours and confirmed that the Appellant was allocated the suit land in the Manyata area. That he too was allocated at the same time with the appellant. DW3, Abdi Bando stated that he was the chief of the area and was involved in the allocation of the plots. That J the appellants former husband requested him to allocate his wife the Appellant a plot and he obliged. He had earlier allocated another plot to his first wife. That they constructed the plot and he confirmed that the plot was registered in the name of the appellant.

The Submissions

9. The Appellant submitted that the Respondent did not produce any evidence to show that he is the registered owner of the suit land. That the Respondent failed to summon the 2nd Respondents officer – Moyale County Council to produce an extract of the register for plot No [particulars withheld] to support the respondent's claim that his name had been deleted and that of the appellants inserted. The Appellant further submitted that the trial Court erred in finding that the land be registered in the name of the Appellant and her former husband who was not a party in the suit. That there was no such prayer in the plaint either to warrant such a finding. That the evidence placed before the Court shows that the Appellant was the registered owner. That the trial Court misapplied the evidence of DW3 who confirmed that the suit land was registered in the name of the appellant. That this evidence was supported by the letter dated the 21.8.2011 that confirmed the plot was registered in the name of the appellant.

Determination

8. I have considered the findings of the Lower Court and the submissions of counsel. I am aware that this is a first appeal and 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**).

10. 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 Appellant is the registered as owner of the suit land.

B; Whether the Respondent has proved fraud and collusion on the part of the Appellant and Moyale County Council.

C; Whether the trial magistrate erred in finding and ordering that the register be altered to include the Appellants former husband.

D; Costs.

The Court shall answer the issues in turn.

11. The Appellant led evidence that she approached the area chief and the allocation committee for a plot which she was given. She again moved to the County Council who registered her as the owner in the register maintained by the said council. She did produce receipts for payment of rates for the suit land for the years 2004- 2008 and 2009 and 2010. She also informed the trial Court that she developed the suit

land without the help of her former husband.

12. In the case of **M'Mukanya Vs M'Mbijiwe (1984) KLR 761** the Court of appeal held that as long as a plot has been allocated and the allottee has paid rent to the local council the allottee is deemed to be in lawful possession. The Appellant led evidence that was not controverted that she is in possession of the suit land and even collects rent from the rooms that she rents out to tenants. I have seen receipts for payment of rents for 1988, 1989 and 1991 dated 19.12.88, 22.2.1989 and 19.4.91 produced by the Respondent which appear to be overlapping with those of the appellant. The same have not been controverted.

13. Further DW3 clarified that the Appellant was allocated land and the same was registered in her name. This evidence is supported by the letter dated the 21.8.2011 from County Council of Moyale that confirmed that the suit land is registered in the name of the Appellant and that the necessary fees in respect to the plot has been fully paid.

14. From the above evidence, this Court makes the inescapable conclusion that the suit land is registered in the name of the appellant.

15. It was the Respondent's case at the trial Court that the suit land was registered in his name and later transferred to the Appellants name through fraud and collusion with the Moyale County Council, the 2nd defendants. 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’.

16. 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 (j). “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”.

17. Although the Respondent pleaded fraud he neither particularized the same nor adduced evidence to prove it. This Court holds and finds that neither fraud nor collusion was proved by the Respondent on the part of the Appellant and by extension the 2nd Defendant in the lower Court.

18. It is trite law that parties are bound by their pleadings. The parties in the lower Court are the same parties in this appeal save for the 2nd Defendant, Moyale County Council. I fail to follow the reasoning of the Learned Magistrate in granting prayers that were neither canvassed nor sought. The Appellant's husband was not a party to the case at the lower Court and no attempts were made to enjoin him as a party. The Learned Senior Resident Magistrate fell in error in that regard in the face of overwhelming evidence in favour of the appellant. I find and hold that the Respondent did not prove his case on a balance of probabilities.

19. Consequently, the appeal is upheld and the decision of the Lower Court is set aside in its entirety. The Plaintiffs case is dismissed in the lower Court. The costs of this appeal and that of the Lower Court shall be met by the Respondent.

Orders accordingly

DATED, DELIVERED AND SIGNED AT MERU THIS 28TH DAY OF JUNE, 2018.

J G KEMEI

JUDGE.

In the presence of:

C/A Mutua

N/A for appellant

Ms. Kaume for respondent