REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC APPEAL NO. 24 OF 2015

BERNARD CHOMBA.....APPELLANT

VERSUS

FRANCIS WAKABA WAINAINA.....RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT DELIVERED

ON 13TH FEBRUARY 2015 BY HON Y.M. BARASA – R.M AT

KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S COURT

CIVIL CASE NO. 149 OF 2009)

JUDGMENT

BERNARD CHOMBA (the Appellant herein) was the 2nd defendant in **KERUGOYA PRINCIPAL MAGISTRATE'S CIVIL CASE No. 149 of 2009** (the 1st defendant was **JAMES GIKUNJU** (now deceased). That suit had been filed by the Respondent **FRANCIS WAKABA WAINAINA** (as plaintiff) seeking judgment in the following terms:

> ***1. An order for the removal of the restriction lodged against the title of land parcel No. MWERUA/KAGIO/1069.***
>
> ***2. A permanent injunction do issue restraining the defendants by themselves, servants, agents and/or anybody else claiming through them from cultivating, wasting or in any other way interfering with the land parcel No. MWERUA/KAGIO/1069.***

The basis of that claim was that the Respondent was the registered proprietor of land parcel No. MWERUA/KAGIO/1069 (hereinafter the suit land) but on 2nd April 2007, the Appellant and the deceased had, without the knowledge of the Respondent and without any colour of right, caused a restriction to be lodged on the title to the suit land and had even chased away the persons who had leased it from the Respondent and threatened to invade it.

The Appellant and the deceased filed a joint defence and counter-claim in which they averred that they are strangers to the Respondent's claim adding instead that the suit land was a sub-division of land parcel No. MWERUA/KAGIO/145 which belonged to their father **MURAGE MBITI** and that the Respondent had had the same registered in his names fraudulently. Particulars of that fraud were pleaded in paragraph six (6) of the plaint as follows:

> ***(a) Failing to obtain Land Control Board consent to sub-divide land parcel No. MWERUA/KAGIO/145.***
>
> ***(b) Failing to obtain consent of the family members of MURAGE MBITI to purchase the land.***
>
> ***(c) Failing to pay consideration for land parcel No. MWERUA/KAGIO/1069.***
>
> ***(d) Failing to get the registered owner of the land to transfer the same to him.***
>
> ***(e) Failing to disclose to the family members of MURAGE MBITI of his legal transactions.***

The Appellant and the deceased therefore counter-claimed for a declaration that the Respondent had obtained registration of the suit land

wrongly and the Court should facilitate its re-transfer to the Appellant and the deceased and that the Respondent's suit should be dismissed.

In a reply to the defence and defence to the counter-claim however, the Respondent pleaded that having purchased the suit land in 1976, he immediately took possession and leased it to some people who were cultivating it until sometime in 2007. The Respondent pleaded further that Appellant's claim was time barred by virtue of the ***Limitation of Actions*** since the Respondent became the registered owner in 1976 and took possession some 34 years ago and no leave was sought to file the counter-claim.

The case was heard by **Hon. Y.M. BARASA** (Resident Magistrate) who, in a judgment delivered on 13th February 2015, dismissed the Appellant's counter-claim with costs and entered judgment for the Respondent permanently injuncting the Appellant and the deceased by themselves, their servants, agents and/or anybody else claiming through them from cultivating, wasting or in any other way interfering with the suit land. The trial magistrate also awarded the Respondent costs of his suit.

That judgment provoked this appeal in which the Appellant has raised the following nine (9) grounds of appeal in seeking to have the said judgment set aside by dismissing the Respondent's suit and allowing the Appellant's counter-claim:

> ***1. The learned magistrate erred in fact and in law in holding that the Respondent had proved his case which he had not.***
>
> ***2. The learned magistrate erred in fact and in law in proceeding to lift the encumbrance over the land parcel No. MWERUA/KAGIO/1069 when the Respondent had not made such a prayer.***
>
> ***3. The learned magistrate erred in fact and in law in allowing the prayer of permanent injunction without taking into account that the Appellant resides on the land and there were no orders of eviction being sought.***
>
> ***4. The learned magistrate erred in fact and in law in allowing the Respondent's claim solely on the basis that he had dismissed the Appellant's counter-claim without going into the merits of the Respondent's case.***
>
> ***5. The learned magistrate erred in holding that the Respondent had proved he bought the land parcel when the Respondent had not produced a sale agreement or proved he paid any consideration for the land and when he had not proved that he attended the Land Control Board for consent to transfer and when he stated he did not even know the whereabouts of the land.***
>
> ***6. The learned magistrate erred in failing to pay attention to the Appellant's defence.***
>
> ***7. The learned magistrate erred in fact and in law in failing to hold that the Respondent's conduct was unsatisfactorily (sic) as he did not involve the family members in the transaction with MURAGE MBITI.***
>
> ***8. The learned magistrate erred in fact and in law in failing to hold that the Appellant was restrained from entering the land yet he did not specify the particular portion and failed to take into account the evidence tendered that it is not the applicant (sic) who lives on the land alone.***
>
> ***9. The learned magistrate erred in allowing the Respondent's suit with costs and dismissing the counter-claim with costs.***

The appeal was canvassed by way of written submissions filed both by **Ms THUNGU ADVOCATE** for the Appellant and **Mr. KAGIO ADVOCATE** for the Respondent.

Ground No. 2 of the appeal has been abandoned and rightly so since the trial magistrate made no orders in his final judgment with regard to the prayer for an order seeking the removal of the restrictions on the suit land.

I have considered the record of appeal and the submissions by counsel.

This is a first appeal and my duty is to analyze and re-assess the evidence that was placed before the trial magistrate and reach my own conclusion in the matter. In doing so, however, I must remind myself that I neither saw nor heard the witness and I should make due allowance in that respect – ***SELLE VS ASSOCIATED MOTOR BOAT CO. 1968 E.A 123.***

Ground 1, 4, 5, 6, 7 and 9 were canvassed together. It is the Appellant's case that the trial magistrate erred both in law and fact in holding that the Respondent had proved his case when he had not done so and in particular, in the absence of the sale agreement or evidence of attendance at the Land Control Board or involvement of the family members of **MURAGE MBITI**. In particular, counsel for the Appellant has submitted that the Respondent's evidence was scanty and he did not produce evidence that he had paid the full purchase price nor call witnesses who were present when he bought the suit land from the Appellant's father.

I have perused the record. Both the Appellant and the Respondent gave very brief oral testimony in support of their respective cases in which they were the only witnesses. Infact the Appellant's oral evidence was the shortest of the two. However, both adopted their written statements and I do not consider the Respondent's statement to be scanty as submitted by the Appellant's counsel. In his written statement which he asked the trial Court to adopt as his evidence, the Respondent has narrated how **MURAGE MBITI** the father to the Appellant visited him in Mombasa in June 1976 and offered to sell part of his land to raise money to construct a home following his retirement. The Respondent agreed to purchase four (4) acres at a consideration of Ksh. 4,000 per acre. The Respondent was to meet the costs of the sub-division and survey and the original land parcel No. MWERUA/KAGIO/145 was thereafter sub-divided and the suit land was transferred to the Respondent after he paid the full purchase price of Ksh. 16,000 and the requisite consent for sub-division and transfer had been obtained. The suit land was then transferred to him on 21st September 1976 and since he was living in Mombasa, he instructed one **ELISHIBA**

WANJIKU NDUNYO to be cultivating it which he did for ten (10) years. Thereafter, the suit land was leased to other persons but **ELISHIBA WANJIKU NDUNYO** would collect the money and remit it to the Respondent in Mombasa. And upto 1980 when **MURAGE MBITI** died, no issue was raised about the suit land. The Respondent continued leasing the suit land and even when he arranged to have the boundary marked, the Appellant who was his neighbour raised no issue. It was only later that he was informed that the Appellant had gone to **KERUGOYA POLICE STATION** to complain and had even chased away the Respondent's tenant. That led to the filing of this suit. That statement cannot be described as scanty by any standards. It covers the salient issues that the Respondent placed before the trial Court.

It is common ground that the Respondent is the registered proprietor of the suit land since 21st September 1976. He produced as part of his evidence, the Green Card showing that he paid a sum of Ksh. 16,000 to **MURAGE MBITI.** The Green Card shows that the Appellant placed a caution thereon on 2nd April 2007. The Respondent's registration as proprietor of the suit land is under the now ***repealed Registered Land Act***. As the registered proprietor of the suit land, the Respondent was entitled to all the rights and privileges belonging or appurtenant thereto subject only to the interests stipulated in ***Section 30 of the repealed Act*** and any obligations to which the Respondent was subject as a trustee. That title could however, as provided under ***Section 143 of the repealed Act***, be cancelled by the Court where there was evidence that it was obtained through fraud or mistake. Similar provisions are found in ***Sections 24 and 25 of the new Land Registration Act***.

That cancellation is precisely what the Appellant sought to achieve by his counter-claim in which he alleged that the Respondent obtained the suit land through fraud particulars of which I have already enumerated above. Under ***Section 27 of the repealed Act,*** the registration of the Respondent as the proprietor of the suit land vested in him the absolute ownership thereof which could only be successfully challenged upon proof of fraud. It is now well settled that where fraud is pleaded, it must be distinctly proved and the onus of proof is heavier than in ordinary civil cases. In ***VIJAY MORJARIA VS NANSING DARBAR & ANOTHER 2000 e K.L.R,*** the Court of Appeal stated that:

> ***"It is well established that fraud must be specifically pleaded and that particulars of the fraud must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the acts".*** Emphasis added

In ***CENTRAL BANK OF KENYA LTD VS TRUST BANK LTD & OTHERS 1996 e K.L.R***, the Court of Appeal rendered itself as follows:

> ***"The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case".***

Under ***Section 37 of the repealed Act***, once the Respondent produced the Green Card, that was prima facie evidence that he had acquired a proper title to the suit land and since that title was being challenged by the Appellant on the grounds of fraud, the onus was on him to lead evidence to prove that allegation.

So what was the Appellant's evidence to prove fraud? In his written statement which he also adopted during the trial, he recorded that the original land parcel No. MWERUA/KAGIO/145 measuring 10.4 acres belonged to his father **MURAGE MBITI** who died in 1980 before sub-dividing it though he was buried in another parcel of land. He stated that he used to cultivate it and it was not until 2006 that he discovered that the original land had been sub-divided and a portion sold to the Respondent and so the matter was reported to the Criminal Investigations Department (CID) since the consent to sub-divide and transfer could not be found. The Appellant therefore filed a suit against the Respondent which was however dismissed for want of prosecution. Later, the Appellant learnt about this suit. In his statement, he states that in 1990, he found people cultivating the land and when he enquired, he was informed that they had been authorized by the Respondent and so he reported the matter to the Chief and took over the land.

Much premium appears to have been placed by the Appellant on the fact that the Respondent did not avail the sale agreement and Land Control Board consent for the transfer of the suit land. The Respondent's response to this was that the transaction took place some thirty eight (38) years ago and he did not expect this dispute to end up in Court. This is what he said when he was re-examined by his counsel:

> ***"I bought land in 1976. Its 38 years ago. I didn't know there would be nay (sic) complications when I was buying".***

The transaction took place quite a while ago. The Respondent says he paid a purchase price of Ksh. 16,000 to **MURAGE MBITI** and although they entered into a sale agreement, he didn't have it during the trial. The Green Card shows that indeed the Respondent paid a sum of Ksh. 16,000 in consideration. The Land Registrar could only have picked this figure from the sale agreement. In any case, no evidence was produced by the Appellant to suggest that **MURAGE MBITI** had no capacity to enter into any such agreement. It must also be remembered that **MURAGE MBITI** was the proprietor of the original land parcel No. MWERUA/KAGIO/145 and therefore he had the absolute right to deal with it as he wished. Similarly, the Registrar of Land was not enjoined in these proceedings and this Court is entitled to presume that if he was, he would have confirmed that he was presented with the necessary consents from the Land Control Board before transferring the suit land to the Respondent. As is clear from the case of ***VIJAY MORJARIA*** (supra), fraud must be "***distinctly proved***" and not left "***to be inferred from the acts***". In any event, even if the trial Court was allowed to infer fraud, it would not have been proper to do so in the face of other evidence showing that the suit land was transferred after payment of the consideration of Ksh. 16,000 and the other requirements having been satisfied. That transfer could only have been done by the registered proprietor and clearly, no evidence of fraud was placed before the trial Court which, as is clear from the impugned judgment, was alive to the duty cast upon the Appellant to prove fraud. After correctly citing the case of ***R.G PATEL VS LALJI MAKANJI 1957 E.A 314*** on the standard of proof in cases of fraud, the trial magistrate stated as follows:

> ***"As we have already seen, for one to succeed in a claim of fraud, he has to go beyond proving on a balance of probability reason being that such a claim is serious. The defendant in my view has merely alleged fraud. The grounds he has raised have not been substantiated at all. In my view, it is unsafe to say that the plaintiff's title was obtained by fraud in view of the defendant's***

evidence".

From my own evaluation of the evidence on record, the trial magistrate cannot be faulted for that finding. The Appellant merely alleged fraud but the evidence adduced fell far short of what was required to prove fraud as required in the cases cited above.

It is not correct to submit that the trial magistrate allowed the Respondent's case solely on the basis that he had dismissed the Appellant's counter-claim or that the trial magistrate failed to pay attention to the Appellant's case. The trial magistrate was satisfied that upon production of the Green Card showing that the Respondent was the registered proprietor of the suit land, the onus shifted to the Appellant to demonstrate that such registration was obtained fraudulently. This is what the trial magistrate stated in his judgment:

> ***"The Land Registration Act No. 3/12 S 24 (9) (sic) provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with land rights and privileges belonging or appurtenant thereto".***

He then went on to add:

> "***In view of Section 24 (a), therefore all that one tried to do is to prove that he/she is a registered owner. The plaintiff has been able to do so as per PEX 1, the copy of the Green Card. But since the defendant claims the plaintiff acquired the land fraudulently, I must address my mind on this issue".***

The trial magistrate then proceeded to consider whether fraud had been proved and having found that it had not, was left with no other option but to dismiss the Appellant's counter-claim. It is not correct therefore that the trial magistrate only found for the Respondent after dismissing the Appellant's counter-claim. The judgment shows that he considered both cases before he dismissed the Appellant's counter-claim. Having failed to prove fraud on the part of the Respondent, the Appellant's counter-claim was clearly for dismissal.

But that was not the only hurdle that the Appellant failed to surmount. In his defence to the counter-claim, the Respondent pleaded that since he purchased the suit land in 1976 and took possession the same year, the Appellant's counter-claim was barred by the provisions of ***Section 7 of the Limitation of Actions Act*** as the cause of action arose some 34 years from the time the suit was filed. This issue was addressed by the trial magistrate who however took the view that the suit was not time barred. He said:

> ***"That the defendant's counter-claim is not time barred as the defendant came to discover that the plaintiff has wrongly been registered over the suit land in 2007 when he met Elishiba on the land and told her to vacate"***

Section 7 of the Limitation of Actions Act provides that an action may not be brought to recover land after the end of twelve years from the date when the cause of action arose. The cause of action in this case arose in 1976 when the Respondent purchased the suit land and it was transferred to him and a title was issued. The Respondent's suit was filed on 18th May 2009 and the Appellant's counter-claim was filed on 4th November 2013 apparently with leave of the Court. This issue was addressed by the trial magistrate in his judgment in the following words:

> ***"That the defendant's counter-claim is not time barred as the defendant came to discover that the plaintiff had wrongly been registered over the suit land in 2007 when he met Elishiba on the land and asked her to vacate. That is only a period of 7 years ago and a claim for land can be brought within 12 years under Limitation for Actions Act ..... That throughout (sic) this matter was filed in 2009, the plaintiff did not serve the defendant and it is in 2013 that the defendant learnt of it and got leave to file defence out of time together with the counter-claim with leave of the Court on 2.10.14".***

The issue of limitation was therefore determined by the trial magistrate in favour of the Appellant on two grounds. Firstly, that the Appellant only learnt about the fraud in 2007 and secondly, that leave of the Court had been obtained before filing the defence and counter-claim. ***Section 26 of the Limitation of Actions Act*** provides as follows:

> "***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***
>
> ***(b) –***
>
> ***(c) –***
>
> ***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".*** Emphasis added.

Although the trial magistrate found that the Appellant discovered the fraud in 2007, the evidence on record shows that, ***with due diligence***, the Appellant could have done so earlier. In his own statement which was adopted by the trial Court as his evidence, the Appellant said as follows:

> "***On the ground when I came to Court (sic) on the land in the year 1990, I found people cultivating maize and beans of (sic) the upper part of the farm. I built in the side that was not cultivated. I found John cultivating and he told me he was leased by***

Elishiba. I know Elishiba and when I asked her she said she was authorized by Wakaba. They stopped cultivating after I took the issue before the Chief Kadongu and she was summoned".

The Respondent had in his statement said the following:

"I became the registered owner of land parcel number MWERUA/KAGIO/1069 on 21st September 1976. I then instructed Elishiba Wanjiku Ndungo to be looking after the land and to be cultivating since I was staying in Mombasa".

It is clear that having obtained registration of the suit land in his names in 1976, the Respondent immediately went into occupation albeit through his agent Elishiba and others, who were cultivating it and remitting money to him in Mombasa. That is clear from his statement. It is also clear from the Appellant's statement that as far back as 1990, he became aware that the Respondent's agents or tenants were cultivating the land. However, he took no action. Instead, he decided to ***"build in the side that was not cultivated***". If he had exercised "***due diligence***" and visited the Lands office in 1990 when he found people cultivating it, he would have found that the suit land had infact been transferred to the Respondent some fourteen (14) years earlier. He did not have to wait until 2006 to visit the Lands office. The Appellant's counter-claim was clearly statute barred.

Secondly, the Appellant told the trial Court that he obtained leave to file his counter-claim out of time. I could not trace such order in the record but since the trial magistrate found as a fact that such leave was obtained on 2nd October 2014, he must have seen the order. Such leave, however, could only have been issued in error because under ***Section 27 of the Limitation of Actions Act,*** leave can only be granted in cases of tort relating to negligence, nuisance or breach of duty where the damages claimed are in respect of personal injury to the plaintiff as a result of the tort. This was considered in the case of ***WILLIS ONDITI ODHIAMBO VS GATEWAY INSURANCE CO. LTD 2014 e K.L.R*** where the Court of Appeal held as follows with regard to ***Section 27 of the Limitation of Actions Act:***

"This section clearly lays down the circumstances in which the Court would have jurisdiction to extend time. That action must be founded on tort and must relate to tort of negligence, nuisance or breach of duty and the damages claimed are in respect of personal injuries to the plaintiff as a result of the tort. The section does not give jurisdiction to the Court to extend time for filing suit in cases involving contract or other causes of action other than those in tort". Emphasis added.

See also ***MARY OSUNDWA VS NZOIA SUGAR COMPANY LTD C.A CIVIL APPEAL No. 244 of 2000*** where the Court of Appeal held that:

"Section 27 (1) of the Limitation of Actions Act clearly lays down that in order to extend time for filing a suit the action must be founded on tort and must relate to the torts of negligence, nuisance or breach of duty and the damages claimed must be in respect of personal injuries to the plaintiff as a result of the tort". Emphasis added

The Appellant's counter-claim was not in respect of the tort of negligence, nuisance or breach of duty and neither was it for damages claimed in respect of personal injuries. The leave granted on 2nd October 2014 to file the counter-claim was therefore in excess of jurisdiction and could not assist the Appellant. It is clear that not only did the Appellant fail to prove that the Respondent obtained registration of the suit land through fraudulent means. The counter-claim was also filed well out of time and was bound to fail. That was the only error on the part of the trial Court but it did not affect the final decision of the trial magistrate. On the issue of consent, counsel for the Appellant has made the following submission:

It is trite law that one's spouse is required to give personal spousal consent to a sale of land".

No evidence was however adduced that the transaction required spousal consent. Grounds 1, 4, 5, 6, 7 and 9 of the appeal must therefore be dismissed.

Ground 3 takes issue with the trial magistrate for granting an order of permanent injunction without taking into account that the Appellant resides on the land and no orders of eviction were sought. In my view, nothing really turns on that. The Respondent's evidence was that he leased the suit land to various people soon after he purchased it and it was only in 2007 that the Appellant entered the suit land. The trial magistrate could not grant a remedy that was not sought by the Respondent in his plaint. Ground 8 of the appeal must therefore fail.

Ground 9 faults the trial magistrate for allowing the Respondent's suit with costs and dismissing the Appellant's counter-claim with costs. From what I have stated above, the trial magistrate was not in error in allowing the Respondent's claim and dismissing the Appellant's counter-claim on the evidence before him. Having done so, it was within the trial magistrate's discretion to award costs to any party. ***Section 27 of the Civil Procedure Act*** makes it clear that ordinarily, costs follow the event unless the Court, for good reasons, decides otherwise. I see no reason to interfere with the trial magistrate's order on costs. That ground similarly fails.

Ultimately therefore, this appeal lacks merit and is hereby dismissed. The Appellant shall meet the costs both here and in the Court below.

B.N. OLAO

JUDGE

29TH MAY, 2018

Judgment dated and signed at Bungoma this 29th day of May 2018.

To be delivered at Kerugoya on notice.

Ruling read and Signed on 26th June 2018

S.N.MUKUNYA

JUDGE

26TH JUNE, 2018