



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MERU

HCA NO 4 OF 2015

CIARUKUNGA IGWETA.....APPELLANT

VERSUS

STANLEY LIIRI IGWETA.....RESPONDENT

(Appeal from the Judgment of J.W. Gichumu P.M. in

Tigania S.R.M..C.C No. 63 of 2010 delivered on 27.01.15).

J U D G M E N T

The Appellant was the Plaintiff while Respondent was the defendant in lower Court. Plaintiff, a step mother of defendant had filed a suit claiming that she owned Land Parcel No. Kianjai Adjudication Section No. 330 measuring 4. 21 acres. She had subdivided the land into 3 portions and gave the land to her sons as follows:-

- Julius Mururu 1.31 acres.
- Wilson Kairikia 1 acre.
- Joseph Murungi 1 acre.

She had remained with a balance of 0.90 acres. She later came to learn that for the 0.90 acres, and defendant had fraudulently caused the land to be transferred to himself and the land was registered in his names as L.R. Kianjai Adjudication Section No. 4741. She had sought to have the Register reflect that land No. 4741 was hers and not defendants.

Defendant on the other hand avers that the subdivisions mentioned by Plaintiff were done by his father who died in 1994. He also stated that it is his father who gave him the land No. 4741 which was registered in defendant's names in 1989. When the Judgment was delivered in the lower Court, Plaintiff lost the case hence this appeal.

There are 3 grounds set out in the Memorandum of Appeal.

1. The Learned Magistrate erred in Law and in fact in failing to find that the respondent fraudulently transferred the appellants land to himself.
2. The Learned Magistrate erred in Law and in facts in failing to appreciate the evidence of the

appellant and as consequence he arrived to the wrong finding.

3. The Learned Magistrate erred in Law and in facts in deciding the case against the weight of evidence.

When the matter came for directions, it was agreed by both counsel that the appeal be canvassed by filing and exchanging submissions. The submissions were duly filed.

Determination.

This Court is conscious of its role as the first appellate court as stated in **SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD. [1965] E.A. 123**, has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter. This court must, however bear in mind the fact that it neither saw nor heard the witnesses and to make due allowance for that.

The first ground to consider is whether the trial magistrate failed to consider the issue of fraud.

It is averred by the Appellant that Respondent colluded with the land Committee to have her 0.9 acres transferred from her to the Respondent. As rightly submitted by the Respondent, he who alleges must prove. It was incumbent upon the Appellant to demonstrate that indeed forgery had accrued for the land to be transferred from her name to Respondent. I find that the trial Magistrate clearly evaluated this issue when he stated that:-

“The Plaintiff did not produce any evidence to prove that her thumb print had been forged. No document and or records from land office were produced to prove the alleged fraud”.

Its trite law that he who alleges must prove. The onus was on the appellant to prove that Respondent had fraudulently transferred the suit land to himself. I find no reason to interfere with the lower courts finding on this issue. The appeal fails on ground no. 1.

Ground 2 and 3 concern the weight of the evidence and I will therefore deal with the two grounds simultaneously. It has been submitted by Appellant that the Trial Magistrate failed to appreciate the Appellants evidence that the parcel No. 0.90 acres belonged to appellant, the same having emanated from L.R 330 Kianjai Adjudication Section, and that this evidence remained uncontroverted.

On the other hand, Respondent has submitted 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”.

I find that the trial Magistrate had taken into account the fact that Respondent was able to avail documentary evidence of his claim to the land. Respondent became the registered owner of Parcel No. 4741 in 1989 and he had a letter of confirmation of ownership. It also emerged that Respondent is the one who had lived on the Suitland since he was born.

I also find that when Appellant was giving her evidence in Chief she had stated that:-

“It is defendant who lives on the suit land. I also live on the same land. I have also developed the land together with my son”.

However while being cross examined, Appellant had stated that.

“The defendant is the one who lives on the Suitland. He has lived on the land for a long time. That is where he was born. He has developed the land----my land borders the Suitland. I don't live on the suit land”.

The weight of the evidence clearly tilts in favour of the Respondent then and even now. It is therefore clear that the trial Magistrate had analyzed the evidence properly.

I conclude that the Appeal is not meritorious. It is dismissed with costs to Respondent.

SIGNED, DELIVERED AND DATED AT MERU THIS 21st DAY OF SEPTEMBER, 2017 IN THE PRESENCE OF:

CA: Janet

Kiongo h/b for Murango for Respondent.

E. Kimathi h/b for L.Kimathi for Appellant

Hon. L. N. MBUGUA

ELC JUDGE