



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 133 OF 2011

MOSES MURIUNGI JULIUS.....APPELLANT

VS

JULIUS M'RIMBERIA.....RESPONDENT

(Being an appeal from the Judgment of Hon KWK Kiarie in CMCC NO. 343 of 2003-Meru)

JUDGMENT

1. On 19/5/2003 the Respondent filed suit in the Chief Magistrates Court at Meru (CMCC NO. 343 of 2003) against the Appellant seeking orders that the Appellant be compelled to return his original title LR No. NKUNENE/UKUU/932 and that the same be retransferred to him. He also sought general damages for fraud and wrongful conversion of the parcel of land. The title L.R NO NKUNENE/UKUU/932 measuring 0.30 Ha was previously registered in the name of the Respondent until 11/2/2003 when it is alleged that the Appellant fraudulently obtained it from the Respondent and transferred it to his name. The Respondent claims that the transfer was unlawful and illegal. That he obtained the Land Control Board (LCB) fraudulently, uttered false documents to the District Land Registrar thus depriving him of his rightful ownership of the said land. He particularized fraud, damage and malice for which he claimed damages for fraud, detinue and conversion.

2. As expected, the Defendant filed a defence in which he denied the Plaintiff's claims and that the Plaintiff is not the owner of the land and that he indeed transferred the land to him voluntarily after obtaining the Land Control Board (LCB) consent and urged the Court to dismiss the Plaintiff's claims as untenable in law.

3. At the hearing of the suit in the lower Court, the Plaintiff testified that the Land Parcel NO NKUNENE/UKUU/932 belonged to him, having inherited it from his father. That the original title was L.R NO NKUNENE/UKUU/325 which was subdivided into L.R NO NKUNENE/UKUU/932, 933, 934, 935 and 936 and registered in his name. That he has six children and the Defendant is not one of them. That the defendant's father is one Jakubu M'Imanene. That though the Defendant resides on L.R NO NKUNENE/UKUU/932, it does not belong to him. On how the land was conveyed to the Defendant's name, it is his testimony that he did not sign the transfer, attend the LCB Board nor obtained consent; that the signature on the transfer document does not belong to him. That he did not know nor appeared before Stephen Kaume Advocate who allegedly attested his signature; that he is illiterate and his way of signing documents is by thumbprinting and therefore denied signing the documents; that the signature appearing on the documents does not belong to him.

4. He admitted that the Defendant's mother, Zipporah Mberanya is his wife; that Zipporah came into the marriage with the Defendant; that the defendant lives on L.R NO NKUNENE/UKUU/932 and has constructed a house thereon.

5. The Land Registrar, Meru Central, Mr. Kamanya informed the Court that he could not trace the Land Control Board consent and the transfer forms in respect to Parcel L.R NO NKUNENE/UKUU/932. He however confirmed that from the copy of the register in his custody the Plaintiff was the first legal owner of L.R NO NKUNENE/UKUU/932 and the title was issued on 6/6/2002. That the record shows the parcel was transferred as a gift to the Defendant on 11/4/2003. He produced a certified copy of the presentation book to support his testimony. He however observed that the Land Control Board consent had no signature nor thumb print, only the name of Julius Mberia which was hand written.

6. The Defendant testified that the Plaintiff is his father and Zipporah Mberenya is his mother; that the Land Parcel L.R NO NKUNENE/UKUU/932 belongs to him, having been gifted to him by the Plaintiff. That he and the Plaintiff applied for consent in 2002 and filled and signed the transfer forms. He produced the Land Control Board consent and transfer forms as exhibits. He denied forging the signature of the Plaintiff. On cross-examination, he informed the Court that his father is literate and he produced an application for Land Control Board consent which the Plaintiff purportedly appended his name. He however did not produce any evidence to show payment fees for Land Control Board claiming he did not bring the receipt.

7. DW2 Zipporah Mberenya, testified that the Plaintiff was her husband and that the Defendant was his son. That she and the appellant attended to the LCB severally to obtain consent and saw him sign the documents. She however states that she is unsure if the Plaintiff knows how to write. That she and her son live on L.R NO NKUNENE/UKUU/932 while the Plaintiff lives in Isiolo with another wife.

8. On the 29/9/2011 the Learned Senior Principal Magistrate, Mr. K. W. Kiarie delivered his judgment in the lower Court case. The Learned Magistrate observed that the Plaintiff's case is that the Defendant fraudulently transferred his land to himself without his consent which allegation the Defendant has denied and contends that it is indeed the Petitioner who transferred the land to him willingly and voluntarily as a gift. The issues that the Learned Magistrate determined were: -

- a) Who was the original owner prior to the Disputed transfer?
- b) Whether or not the Plaintiff transferred the land to the Defendant or not.

The Learned Magistrate observed that the identity card of the Plaintiff as well as his Court documents bears a thumb print and he relied on the case of **Karukenya vs Republic 1982 - 88 KAR 540, 557** which stated that on an issue, whether or not an accused wrote or signed a document, a Judge is entitled in the absence of expert evidence to examine and compare what is said to be his writing and his signature on it with those the accused admits was his own or another and draw his conclusions.

He further observed that the application of consent form bears on the owner's signature part the name Julius Mberia. Based on that evaluation, he drew his finding that it could not be that the Plaintiff signed the transfer form and the application of consent and ordered that the title be transferred to the Plaintiff and in default the Executive Officer of the Court to sign the transfers to effect the order.

9. Aggrieved by the decision of the Learned Senior Principal Magistrate, the Defendant appealed to this Court and filed 9 grounds of appeal as follows: -

- a) The learned Senior Principal Magistrate wrote his Judgement in a way to misconstrue the facts and evidence in order to arrive at a predetermined conclusion.
- b) The learned Senior Principal Magistrate purported to set out issues for determination which issues were absolutely spurious and were basically no issues whatsoever.
- c) The learned Senior Principal Magistrate misdirected himself in considering irrelevant evidence and issues so that he could arrive at a predetermined conclusion.
- d) The learned Magistrate went out of his Judicial Role in constituting himself an expert in Thumb

Printing and an expert in hand writing and further mischievously pretended to get his support from a criminal Judicial Authority which had no application whatsoever in the civil process.

e) The learned Magistrate refused to follow the Law, evidence or even Common-sense when he did not consider the process of land transactions involved many players (like the Land Control Board, Advocates who attesting the signing of transfers, Land Registrar and several other players).

f) The learned Magistrate was further ready to import extraneous evidence which did not exist on record to assist him to reach a pre-determined conclusion.

g) The learned Magistrate, without any evidence whatsoever, was ready to find evidence of fraud so that he could corruptly cancel the Appellant's Title to enable the respondent to acquire the land which he had no right whatsoever to acquire.

h) The learned Magistrate even gave orders which even the plaintiff/respondent did not claim or request.

i) The appellant proposes to request this Honourable Court to set aside the Magistrate Judgment by ordering the dismissal of the plaintiff's claim against the defendant with costs.

Appellant's Written Submissions

10. In his submissions, the appellant challenged the manner in which the Respondent pleaded his case by claiming that forgery and uttering false documents are criminal concepts while fraud and malice are civil concepts which cannot be pleaded together in a civil pleading. That the land was a family land which was transferred willingly and voluntarily by the Respondent to the Appellant.

11. The Appellant further submitted that the Learned Magistrate contravened order 21 Rule 4 that he framed issues which was contradictory to his final submissions in his findings. In that regard, he has relied on Mulla of Civil Procedure at page 1421/1422 Paragraph 5 and 7 and Barker on Civil Procedure at page 1173 1 CP (2) where it was held that if the trial Court tries wrong issues, the Appellate Court should form proper issues and remove the case back to trial Court.

12. Further that the Magistrate erred in converting himself to a handwriting expert without calling one. Relying on the case of ***Dholla vs Mariah & Shah vs Padamshi***, he posited that this contrary to the law and did not reflect a good picture on the Learned Magistrate. That the Learned Magistrate did not appreciate the process of land transfer and went ahead to expound on the same.

13. He further submitted that the Magistrate misinterpreted the facts of the case. That the standard of proving fraud was not met. Cited the case of ***Rohil & Patel vs Lalji Mukungi*** that the standard of proof is not beyond reasonable doubt but higher than the balance of probabilities. Relying on the case of ***Nairobi City Council vs Thabiti Enterprises Ltd***, the appellant castigated the Magistrate for deciding on the issue that was not pleaded.

Respondents Written Statements

14. The Respondent submitted that he did not transfer the land to the Defendant. That his names are Julius M'Rimberia and not Julius Mberia. That the issues framed by the trial Magistrate were appropriate and no cause to disparage the Learned Magistrate on that account. That all his Court documents were thumb-printed and not signed. That the lower Court did not decide the case on fingerprints alone but evaluated the entire evidence.

Analysis and determination

15. The Respondent was the registered owner of the Plaintiff was the owner of the L.R NO NKUNENE/UKUU/325 and subdivided it into 6 parcels L.R NO NKUNENE/UKUU/932 -936 and

registered them in his name. In 2003 it came to his knowledge that the Appellant had registered L.R NO NKUNENE/UKUU/932 in his name. He maintains that the registration was false because he did not give consent for the transfer of the land to the Appellant and he did not release the title to him either. He states in his pleadings that the title was at the District Officers Office. It is not explained why and how the title was at that office.

16. At the hearing of the case, both parties gave evidence and presented two witnesses each. The Land Registrar says that he could not trace the original documents submitted for registration of the title in the name of the Appellant in his records. However according to the register in his possession the Respondent was the registered owner of the suit land before it was transferred to the Appellant and when he was shown copies of the transfer form and the consent to transfer documents on cross examination he admitted that neither application for consent and the transfer forms bore a signature nor a thumbprint. There is evidence on record by the Respondent that he cannot sign documents except by thumbprint because he is illiterate. When the Learned Magistrate looked at the documents which allegedly bore the name of the Respondent as having applied for, obtained consent or the transfer forms they were all in one person's name – Julius Mberia. The Respondent submitted that his name is Julius M'Rimberia and not Julius Mberia. The Appellant in his evidence had alleged that the Respondent appeared before an Advocate – Stephen Kaume Akwalu and signed the documents. The said Advocate was not alleged to give evidence and neither do the documents bear the signature of the Respondent.

17. It is significant to note that the parties did not submit any issues for the determination by the learned Magistrate either jointly or separately. However, the Magistrate did draw two issues which on answering granted the orders in favour of the Respondent which aggrieved the Appellant and hence this appeal. In his appeal the Appellant as stated above set 9 grounds which I have condensed into three. The first ground is that the Magistrate skewed his judgment to misconstrue the facts and evidence, set out issues which are spurious, misdirected himself on the evidence and purported to determine evidence relating to thumbprinting. I have gone through the proceedings and submissions made on behalf of the appellant and I do not see any matter adverted stated or set out to support such general allegations. No evidence has been presented before this Court and I am satisfied that the magistrate did not in any imaginable or known situation fall victim of the allegations set out in grounds 1 -4 of the Memorandum of Appeal. Such matters are clearly not borne out of evidence given during the trial of the case in the lower Court. The learned Magistrate had the privilege of seeing and determining the demeanor of the witnesses. As such I do not see a basis of the allegations made to interfere with the learned Magistrate's determination. Further the Magistrate compared the documents of the Respondent filed in the case and the signature on the identity Card and came to the conclusion that they differed with the hand-written name on the documents allegedly signed by the Respondent. In my view the path the learned magistrate took on the face of it is sound if you examine documents with the naked eye. Since it is the Appellant who sought to rely on the documents to prove his case, the onus of proving that the handwriting/handwritten name of Julius Mberia belonged to the Respondent lay squarely on him and ought to have brought a handwriting expert to prove that the said signature/handwriting on the documents indeed belonged to the Respondent. He failed to so discharge that duty.

18. In respect to grounds 5-7, that the Magistrate did not follow the law relating to conveyance of land, imported extraneous evidence and gave orders that the Respondent had not asked for. My findings are that these grounds were settled by the evidence of the Land Registrar and the Respondent. The Respondent denied having signed the documents evidencing transfer of the land to the Appellant. The Land Registrar on cross examination admitted that the documents evidencing transfer of the suit land to the Appellant did not bear the signature or thumbprint. Infact, it is on record that what appears on the said documents are the names Julius Mberia, as evidencing the signature or consent of the Respondent while the names of the Respondent are Julius M'Rimberia. The Respondent has stated that it is not his signature and that indeed he did not sign or consent to the transfer to the Appellant. Such actions constitute fraud. It is the Respondents evidence that the Appellant obtained the title, applied and obtained consent of the Land Control Board to transfer the land to himself; presented the documents Registrar of Lands to facilitate the transfer of the suit land to himself. The Appellant is in possession of the documents of title to the land which the Respondent did not release to him/ consent and neither caused the said suit land to be transferred. All these actions by the Respondent constitute an illegality on his part for which he is

aware and part of. He cannot therefore be held to be in possession of a good and valid title in the circumstances.

19. The onus was on the Appellant to show that he lawfully obtained the original title from the registered owner. He must show the circumstances under which he derives a right to L.R NO NKUNENE/UKUU/932. Such a right would be derived from an agreement in writing between the Appellant and the Respondent signed by both of them in the presence of a witness or witnesses even if it was by way of gift. That is the law in Kenya in respect to transactions in land are concerned. The Appellant did not submit any such evidence. He must also demonstrate the circumstances under which he came to be in possession of the title to L.R NO NKUNENE/UKUU/932 whilst it was registered in the name of the Respondent. The Appellant has not explained where he got the original title in his evidence. It is the Respondents evidence that the title had been taken to the District Officers office. The onus was on him to demonstrate that he obtained the title bonafides. He did not do so.

20. Section 26 of the Land Registration Act No 3 of 2012 states as follows;

“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—on the ground of fraud or misrepresentation to which the person is proved to be a party;”

I am satisfied that in this case the Appellant has not dispelled or proved that he indeed has an absolute and indefeasible title to the suit land, the same having been vitiated by fraud and illegality.

21. Ground number 3 which is that the Magistrate gave orders that the Respondent did not request. I have examined the prayers in the plaint which are majorly that the defendant to return the title and transfer it to the plaintiff. The learned Magistrate made orders in the judgment that the land be transferred back to the plaintiff which in my view are consistent with part two of the prayers in the plaint. The claim being a proprietary interest would not have been satisfied by a mere return of the title to the Respondent whilst the interest in ownership would be in the name of the Appellant. In my considered view the mere return of the title to Respondent would not have met the justice of the case. I do not have any grounds to fault the orders made by the learned Magistrate in this case. I hold that he was right.

22. In conclusion the Appeal is not merited and must fail. It is hereby dismissed with costs to the Respondent.

DATED THIS 2ND NOVEMBER 2017

J.G. KEMEI

JUDGE

DATED, DELIVERED AND SIGNED THIS 6TH DECEMBER 2017 AT MERU

L. MBUGUA

JUDGE