



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 26 OF 2015

JECINTA WARWINU KARIUKI.....APPELLANT

VERSUS

JULIUS GICHERU MURITU.....RESPONDENT

*(Being An Appeal From The judgment Delivered On 4th November, 2013 By Hon. J.J. Masiga – R.M
At Murang'a Chief Magistrate's Court Civil Case No. 68 Of 2011)*

JUDGMENT

The appellant herein (**JECINTA WARWINU KARIUKI**) was the plaintiff in **MURANGA CHIEF MAGISTRATE'S COURT CIVIL CASE No. 68 of 2011** where she had sued the respondent **JULIUS GICHERU MURITU** seeking a declaration that the respondent had acquired title to land parcel No. LOC 8/GATUYA/403 (the suit land) fraudulently and the same should be cancelled by an order of the Court. The particulars of the respondent's fraud were pleaded in paragraph 5 of the plaint as follows:-

- (a) Causing the land to be transferred to his name on 6th June 1978 long after the death of the original owner KARIUKI GICHURE who died on 10th July 1973.*
- (b) Forging the transfer forms alleging that they have been signed by the deceased.*
- (c) Forging consent for transfer forms alleging that they have been issued by the local Land Control Board.*
- (d) Forging an agreement for sale alleging that it was signed by the deceased.*
- (e) Registering a transfer form in 1978 and acquiring a title to the suit land five years after the death of the deceased.*
- (f) Alienating land belonging to a deceased person without involving and/or acquiring a consent from the appellant or the other survivors.*

In his defence, the respondent denied the allegations of fraud stating that he bought the suit land from the appellant's deceased husband for valuable consideration during his life time but it took time to register the transfer document. The respondent also gave notice that he would be raising a Preliminary Objection that the suit is statute barred.

The suit was heard by **J.J. MASIGA** (Resident Magistrate) and the appellant was the only witness in support of her case. The respondent did not lead any evidence. In a judgment delivered on 4th November 2013, the trial magistrate dismissed the appellant's claim because it was time barred having been filed in

2011 yet the fraud had been discovered way back in 1978.

Aggrieved by that finding, the appellant filed this appeal at the **HIGH COURT MURANGA** on 14th April 2014 raising the following grounds in seeking to have that judgment set aside:-

- 1. The learned Resident Magistrate grossly erred in law in dismissing the appellant's case despite over-whelming and un-disputed evidence by the appellant.**
- 2. The learned Resident Magistrate misdirected himself and failed to note that the respondent never adduced any evidence or called any witness in his defence to the appellant's claim.**
- 3. The learned Resident Magistrate grossly erred in law in finding that the appellant alleged matters in her evidence outside the pleadings contained in her plaint.**
- 4. Having found the appellant's case was not actually time barred, the learned Resident Magistrate erred in finding in his judgment that the case was time barred which finding was clearly contrary to the written pleadings and his earlier ruling.**
- 5. The learned Resident Magistrate failed to appreciate the weight of the appellant's case and thus failed to do substantive justice on the pretext of a mere technicality.**
- 6. The learned Resident Magistrate's judgment was against the weight of evidence.**

The appeal was first placed before **HATARI WAWERU J.** who on 15th July 2015 transferred it to this Court. On 24th February 2016, counsel for the parties agreed that the appeal be canvassed by way of written submissions which were duly filed and which I have considered together with the record herein.

Being a first appeal, my role is to analyze and re-assess the evidence in order to reach my own conclusion though bearing in mind that I neither saw nor heard the witnesses – **SELLE VS ASSOCIATED MOTOR BOAT COMPANY 1968 E.A 132, JABANE VS OLENJA 1986 K.L.R 661** and **MWANASOKONI VS KENYA BUS SERVICES 1982-88 1 K.L.R 870.**

The main ground on which the dispute was determined in the lower Court was that the appellant's suit was time barred having been filed in 2011 yet she had testified that she discovered the fraud leading to the transfer of the suit land, which originally belonged to her late husband (**KARIUKI GICHURE**), in 1978.

Section 7 of the Limitation of Actions Act provides as follows:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first occurred to some person through whom he claims, to that person”

Section 26 of the Limitation of Actions Act provides that:-

“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; or

(b) the right of action is conceded by the fraud of any such person as aforesaid; or

(c) the action is for relief from the consequences of a mistake 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

After citing the above provision; the trial magistrate rendered himself as follows:-

“As already stated above, by dint of her own admission, the plaintiff discovered the fraud way back in 1978. Therefore, time started running as against the plaintiff from the date of discovery. That is way back in 1978. This suit was filed in the year 2011 which is thirty three years from date time as against the plaintiff started running. Clearly, this far (sic) much more than the period stipulated by Section 7 of the Limitation of Actions Act above. Therefore, it is this finding of the Court that the suit is barred by limitation and consequently, the same is dismissed with cost”.

Counsel for the appellant **R.M. KIMANI** Advocate has taken issue with that finding and has submitted as follows:-

“Your Lordship, the plaintiff’s pleading at paragraph 6 of the plaint stated clearly that she discovered the fraud (of the land being transferred from the name of the deceased to the name of the defendant) in the year 2010 as opposed to discovering that the land was being sold as per her evidence”

To answer the question when the appellant **“discovered the fraud... or could, with reasonable diligence have discovered it”**, I have looked at the appellant’s own evidence during the trial. In her evidence in chief, she stated as follows:-

“In 1978 when my husband died I stayed. I was told my land was being sold. Kariuki Karungo told me my land is being sold by my brother in law. I came from Mai Mahiu and found concrete on my land. I went to the village elder, he told me to go the headman. I went because there was ballast on the land. I went to the headman. The headman sent me to the chief. I was sent to the District Officer. I went to the D.O. We decided to go to the tribunal. I was sent to Nyeri”.

When cross-examined by **Mr. KIRUBI** counsel for the respondent, she said:-

“My husband died in June 1973. I knew somebody was on the land in 1977. I went to the tribunal in 1977. I knew somebody was on the land in 1973. I brought the suit in 2011. I had left the matter to the elders. When I first came there was no building on the land. I want the defendant evicted from the land. I don’t know where the green card was filled from. I heard the land was sold to him for Ksh. 32,000. The people who signed for the defendant told me. I was told by Mwangi Gachina. Mwangi Gachina is a nephew to my husband. Mwangi Gachina was a witness to the sale. I heard the land was being sold in 1977”

And when she was finally re-examined by her own advocate, the appellant had this to say:-

“I knew somebody was on the land 4 years after my husband’s death. My husband did not sell the land, the land was sold 4 years after his death”

Among the documents produced by the appellant in support of her case was the abstract of title in respect of the suit land which shows that it was transferred to the respondent on 29th March 1979. By her own testimony, the appellant was certainly aware about the sale of the suit land to the respondent as far back as 1978. She may have pleaded in paragraph 6 of her plaint, as submitted by her counsel, that she discovered the fraud in 2011. However, a pleading is not evidence. Her own evidence, and which the trial magistrate correctly accepted, was that she knew about the sale in 1978. She then complained to the village elder, the headman, the chief and finally the District Officer. By her own evidence, therefore, she could have, **“with reasonable diligence”** have visited the Lands office as early as 1979 to discover the fraud, if any, that led to the suit land being registered in the respondent’s names. In the light of such evidence, the only conclusion that the trial magistrate could have arrived at, and which this Court also confirms, was that the appellant’s suit was clearly statute barred. It is not clear why the appellant was not advised to seek leave to file the suit out of time.

Further, the appellant’s suit was premised on allegations of fraud against the respondent particulars of

which I have cited above. However, no evidence was led to prove those allegations. As was held in the case of **CENTRAL BANK OF KENYA LTD VS TRUST BANK C.A CIVIL APPEAL No. 215 of 1996:-**

“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”

Further on in the case of **ROSEMARY WANJIKU MURITHI VS GEORGE MAINA C.A CIVIL APPEAL No. 9 of 2014 (2014) e K.L.R.**, the Court of Appeal held:-

“Fraud involves questions of fact, simply raising the issue of fraud in a statement of defence or counter-claim is not proof of fraud”

See also the case of **GUDKA VS DODHIA C.A CIVIL CASE No. 21 of 1980** where it was held that the fraudulent conduct must be strictly proved more than on a mere balance of probabilities. In **BULLEN & LEAKE PRECEDENTS OF PLEADINGS 13TH EDITION at Page 427**, the following passage which was affirmed by the Court of Appeal in **ARTHI HIGHWAY DEVELOPERS LTD VS WEST END BUTCHERY LTD C.A CIVIL APPEAL No. 246 of 2013 (NBI)**, is found:-

“It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly proved. 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”

Clearly therefore, whether there was fraud was a matter of evidence. Although the respondent did not testify, that did not lessen the duty on the appellant to lead evidence on fraud which was really the cornerstone of her claim. As per **Section 107 to 109 of the Evidence Act**, the evidential burden was on the appellant because she was the one who desired the Court to believe that the respondent had committed acts of fraud in relation to the suit land. Yet, in her testimony, there is not even a remote reference to fraud on the part of the respondent. It is therefore not surprising that the respondent chose not to testify. There was really nothing to rebut during the trial in the subordinate Court.

In view of all the above and having analyzed and re-assessed the evidence that was placed before the trial magistrate, I am not persuaded that the trial Court erred either in law or in fact in arriving at the decision that he did. It is not correct, as raised in the appeal, that the trial magistrate dismissed the appellant's case despite overwhelming and un-disputed evidence. From my assessment of the evidence, the trial magistrate correctly determined that the appellant's suit was time barred and in the circumstances the suit was properly dismissed on that account. Besides, having pleaded fraud, the appellant did not lead any evidence on that issue. The trial magistrate arrived at a correct decision both on the law and on the evidence and there is therefore no merit in this appeal which must be dismissed.

I have agonized on the issue of costs which the appellant was ordered to pay in the trial Court. In this appeal, I have been asked to make other orders that I may find fit and just.

Under **Section 27 of the Civil Procedure Act**, costs follow the event ***“unless the Court or Judge shall for good reasons otherwise order”***

The award of costs is a discretion of the trial Court and an appellate Court will only interfere with that discretion if it has been exercised unjudicially or on wrong principles. Generally, the rule is that costs should be awarded to the successful party but this can be departed from where there are good grounds for doing so. In determining costs, the Court is entitled to consider the conduct of the parties, the subject of litigation, the relationship of the parties and the circumstances leading to the institution of the proceedings. For example in dispute concerning family members, it is a common practice to order each party to meet their own costs.

In the circumstances of this case, what has weighed in my mind is the advanced age of the appellant. The record shows that when she testified on 14th June 2013, she told the trial magistrate that she was 90

years old. She is therefore 93 years old now. It is not in dispute that the suit land was previously registered in the names of the appellant's deceased husband. The circumstances under which it was transferred to the respondent's names will never be known because he did not testify at the trial. Surely was this not a proper case to order each party to meet their own costs? I think so.

The record also shows that costs have already been assessed at Ksh. 50,025 and an application already filed to have the appellant committed to civil jail until that sum is paid. That would be extremely harsh in the circumstances of this case. I feel that this is a proper case to interfere with the trial magistrate's discretion in costs by ordering that each party meets their own costs both here and in the Court below.

Ultimately therefore and upon considering this appeal, I make the following orders:-

1. The appeal is dismissed.

2. Each party to meet their own costs both in this Court and in the Court below.

It is so ordered.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016

Judgment dated, delivered and signed in open Court this 30th day of September 2016.

Mr. Mwangi for Mr. Kirubi for Respondent present

Mr. R.M. Kimani for Appellant absent

Right of appeal explained.

B.N. OLAO

JUDGE

30TH

SEPTEMBER,

2016