



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 75 OF 2012

JANE WANGITHI NGIRI

**(Suing as the legal representative of the Estate of BENSON NGIRI
NDURO.....PLAINTIFF**

VERSUS

SAMSON MAGANJO GATEI.....1ST DEFENDANT

DANIEL GATEI NGARI.....2ND DEFENDANT

JUDGMENT

Having obtained leave to file this suit out of time on 12th March 2008 vide **EMBU HIGH COURT MISC APPLICATION No. 137 of 2007**, the plaintiff filed this suit on 26th March 2008 seeking judgment against the defendant in the following terms:-

- (a) That the Honourable Court do order the defendant to transfer the parcels of land No's MWEA/TEBERE/B 616, 624 and 625 to the plaintiff.***
- (b) In the alternative, the Honourable Court do order the defendant to compensate the plaintiff for the said three parcels of land at the current market rates.***
- (c) Costs of this suit.***
- (d) Interest at Court rates.***
- (e) Any other relief that this Honourable Court may deem fit to grant.***

The claim is premised on the pleadings that the deceased **BENSON NGIRI NDURO**, on behalf of whose Estate this suit is filed, was at all material times the registered proprietor of the land parcels No. MWEA/TEBERE/B 616, 624 and 625 (the suit properties). However, in or about the years 1991 and 1992, the defendant fraudulently and unlawfully transferred the said suit properties into his names without the authority, knowledge or permission of the deceased. Particulars of the said fraud are itemized in paragraph 4 of the plaint as follows:-

- (a) Forging the signature of the late BENSON NGIRI NDURO.***
- (b) Failing to get proper Land Control Board consent for transfer of the said parcels of land.***

(c) Presenting to the Land Registrar documents of transfer which documents he knew to be either fake or improper.

(d) Failing to pay the consideration for the alleged purchase of the said parcels of land.

(e) Misleading the Land Registrar into issuing him with Title Deeds in respect of the said parcels of land when he was not entitled to them.

(f) Failing to have the sale agreement if any put down in writing.

In his defence, the defendant **SAMSON MAGANJO GATEI** who also later died and was substituted by his brother **DANIEL GATEI NGARI**, denied the allegations of fraud adding that the transactions in respect to the suit properties was for valuable consideration done with the consent of the deceased and in the presence of the plaintiff. The defendant further pleaded that the leave obtained to file this suit was granted without disclosing relevant issues to the Court. It was also the defendant's case that it is him who has in fact suffered loss and damages due to the various litigation filed against him being **KERUGOYA CRIMINAL CASE No. 2837 of 1993** and **HIGH COURT MISC APPLICATION No. 780 of 2005**. He therefore urged the Court to dismiss the plaintiff's suit with costs.

The trial commenced before me on 9th September 2013 following the transfer of the case from the High Court in Embu.

The plaintiff was the only witness in support of her case. She testified that the deceased **BENSON NGIRI NDURO** was her husband and died in 2007. She then obtained a grant of letters of administration in respect of his Estate (Plaintiff's Exhibit 1) and an order in **EMBU HIGH COURT MISC APPLICATION No. 137 of 2007** to enable her file this suit out of time (Plaintiff's Exhibit 2). She told the Court that the deceased was the registered proprietor of the suit properties although she could only produce the Green Cards for MWEA/TEBERE/B 616 and B 625 (Plaintiff's Exhibits 3A & 3B) adding that the Green Card for MWEA/TEBERE/B 624 could not be traced even at the Lands office.

It was her evidence that in 1991 and 1992, the defendant fraudulently transferred the suit properties into his names. She denied that her husband made the transfer adding that she would have known if her husband had made the transfer since they used to do everything together. She said there was no Land Board Consent and also produced the minutes of the Mwea Land Control Board meeting for 8th May 1991 which showed that it was in respect of transfer of the parcel No. MWEA/TEBERE/B 511 yet her deceased husband never owned such a parcel (Plaintiff's Exhibit 4 & 5). She however said she was not aware of the Criminal Case No. 2837 and 2838 of 1993 involving her deceased husband.

DANIEL GATAI NGARI the defendant herein told the Court that the deceased defendant was his brother but denied that his deceased brother unlawfully transferred the suit properties into his name. He added that his late brother had been charged in Kerugoya Court Criminal Case No. 2837 with charges involving forgery and obtaining registration by false pretences. He was however acquitted as per the judgment produced – Defence Exhibit 1. He also testified that his late brother was involved in Tribunal Case No. 7 of 2015 – Defence Exhibit 2. He also produced a sale agreement between his late brother and the Plaintiff's late husband (Defence Exhibit 3) and told the Court that the land parcel No. MWEA/TEBERE/B 625 belongs to one Gitonga Humphrey. It was his testimony that his deceased brother purchased the suit properties and proceeded to construct his home on parcel No. MWEA/TEBERE/B 616 which neighbours the plaintiff's home. He testified further that his late brother went to the Land Control Board for this transaction. His attempts to produce the register for those transactions was objected to by counsel for the plaintiff **Mr. KATHUNGU** and so they were only marked for identification (**MF1 4, 5 and 6**). He added that the plaintiff used to accompany her deceased husband and so she was aware about these transactions. He therefore urged the Court to dismiss the suit adding that his late brother's family live on the land in dispute.

Submissions have been filed both by the firm of **JOE KATHUGU & CO.** Advocates for the plaintiff and **MUNENE MURIUKI & CO.** Advocates for the defendant.

I have considered the parties oral and documentary evidence as well as the submissions by counsel.

I first need to interrogate the leave granted to the plaintiff on 12th March 2008 by **KHAMINWA J.** to enable her file this suit out of time. It is well settled that once leave is granted to file a suit out of time, the trial Court can consider and accept or reject the leave granted by another Judge. In **ORUTA & ANOTHER VS NYAMATO 1988 K.L.R 590**, the Court of Appeal citing **COZEN VS NORTH DEVON HOSPITAL MANAGEMENT COMMITTEE 1966 2 ALL E.R 799** said:-

“It will be upto the Judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point”

In his submissions, **Mr. MUNENE MURIUKI** addressing the issue of the ex-parte order of leave granted by **KHAMINWA J.** invited me to look at the Originating Summons and the supporting affidavit and find that the said leave was erroneously issued. **Mr. KATHUNGU** did not make any submissions on the ex-parte leave. All that I have with respect to the said leave is the order of **KHAMINWA J.** dated 12th March 2008 and which was annexed to the defence. I do not have the benefit of the application nor the affidavit preceding the said order because they were issued in **EMBU HIGH COURT MISC APPLICATION No. 137 of 2007** which was not availed for my perusal. Further, there is no copy of the ruling that **KHAMINWA J.** made in granting the leave. Secondly, the parties themselves did not lead much evidence with respect to how the said leave was obtained. The plaintiff simply said as follows in her evidence in chief:-

“I also sought and obtained orders to file suit out of time”

The defendant of course could not offer any evidence on how the leave was granted. In the absence of any tangible evidence on which this Court can make a determination on the validity or otherwise of the ex-parte orders of leave granted by **KHAMINWA J.** on 12th March 2008, I can see no basis upon which the said leave can be challenged. I therefore find that the said leave was properly obtained as the onus was on the defendant to demonstrate otherwise.

The plaintiff's suit is based on the claim that the defendant fraudulently and unlawfully transferred the suit properties into his names. Particulars of the said fraud have been reproduced above. An allegation of fraud is a serious one requiring proof on a standard higher than the civil standard of balance of probabilities. In **PATEL VS MAKANJ 1957 E.A 314 at page 317**, the Court of Appeal held as follows:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

In **ARTHI HIGHWAY DEVELOPERS LTD VS WEST END BUTCHERY LTD C.A CIVIL APPEAL No. 246 of 2013 (NBI)**, the following passage in **BULLEN & LEAKE PRECEDENTS OF PLEADINGS 13TH EDITION** 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”

As per the provisions of **Section 107 to 109 of the Evidence Act**, the onus was on the plaintiff to lead evidence that indeed the defendant obtained registration of the suit properties in his names through fraud or other illegal means. Both witnesses who testified in this case were not really privy to the transactions that led to the registration of the suit properties in the names of the defendant. Therefore, while the plaintiff alleged that the defendant fraudulently transferred the suit properties in his names, she couldn't really give evidence of such fraud. In her testimony in chief, she said:-

“My husband never transferred the said parcels of land to the defendant. I would have known

if my husband had done so since we used to do everything together. There was no Land Board Consent yet the Green Cards are in defendant's names. So it was done fraudulently. I can see minutes of the Mwea Land Control Board for 8.5.1991 Minute No. 73/5/91 is for Mwea/Tebere/B511 showing it was transferred to the defendant. My husband never owned a parcel of land bearing that number"

On the other hand, the defendant was emphatic that his deceased brother bought the suit properties from the plaintiff's deceased husband and even produced a sale agreement between the two (Defence Exhibit 3). He also added that his later brother informed him that he went to the Land Board with the plaintiff's deceased husband where the said transactions were considered as per the register. However, the said registers were not available for this Court's perusal as the Land Registrar who was to produce them did not turn up. The defendant also produced the judgment in Kerugoya Criminal Case No. 2837 of 1993 where his deceased brother was charged but acquitted of the offences of forgery and obtaining registration by false pretences relating to the suit properties herein. This Court must of course bear in mind that the standard of proof in a criminal case is beyond reasonable doubt which is well beyond that required in a civil case. But as indicated above, in cases of fraud, such proof must be beyond a mere balance of probabilities. Since the plaintiff's case is that her deceased husband did not enter into any agreement with respect to the suit properties nor attend any Land Control Board, this Court can only rely on what the witnesses in the Criminal trial told the trial magistrate **E.N. MAINA R.M.** (as she then was) in Criminal Case No. 2837 of 1993 (Defence Exhibit 11) in which the defendant's deceased brother faced charges of forgery and obtaining registration by false pretences. In her judgment, the trial magistrate, now **JUSTICE E. MAINA**, made the finding that the plaintiff's deceased husband and the defendant's deceased brother executed a sale agreement before an advocate called **Mr. KARANI**. She continues in her judgment to state as follows:-

"He did so by calling Mr. Karani advocate who told the Court that it was him who prepared those transfer forms and that they were executed in his presence. He told the Court that he did not know the parties but that they identified themselves by production of their Identity Cards. Mr. Karani gave un-shaken evidence. I found him a credible and reliable witness"

The evidence of the plaintiff's deceased husband was that he had agreed to sell the parcel No. MWEA/TEBERE/B 616 to the deceased defendant and they attended the Land Control Board at Wanguru but later, he discovered that his names had been cancelled with respect to the other two parcels No. MWEA/TEBERE/B/624 and 625. With regard to the attendance of the plaintiff's deceased husband and the defendant's deceased brother at the Land Board, the trial magistrate **E.N. MAINA** (as she then was) made the following pertinent findings:-

"It is my finding therefore that it has been proved both by the minutes (D EXB 3) and by the entry in the register 73/8/92 and 74/8/92 that the parties did attend the Land Board on 4/8/92 and that transfer of the 2 plots was consented to"

Clearly, the testimony of the plaintiff has fallen short of what is required to prove fraud in a Civil Case. That is not surprising because she was not privy to the transactions that led to the registration of the suit properties in the names of the deceased defendant. It is in that regard therefore that this Court has referred to the testimony of witnesses in Kerugoya Criminal Case No. 2837 of 1993. I must say that in the absence of the two main protagonists in this matter, it was always going to be difficult for the plaintiff to prove fraud or illegality in the manner in which the suit properties were acquired by the defendant's brother. And in the absence of such proof, this Court is enjoined by the provisions of **Section 26 of the Land Registration Act** to up-hold and respect the sanctity of those titles.

The plaintiff also sought an alternative prayer that she be compensated for the suit properties at the current market rates. No evidence was led as to what the current market rates are and in any event, having found that there is no basis upon which to interfere with the registration of the suit properties in the names of the defendant's deceased brother, there would be no justification in making any order of compensation. That prayer is similarly not merited.

On costs, **Section 27 of the Civil Procedure Act** states that they follow the event unless for good reasons. I have considered the circumstances of this case. The death of the main players. The Criminal Case that the main players went through. I think the interests of justice will best be served with an order that each party meet their own costs.

Ultimately therefore, upon considering all the evidence herein, I find no merit in the plaintiff's suit. It is dismissed. Each party to meet their own costs.

B.N. OLAO

JUDGE

11TH NOVEMBER, 2016

Judgment dated, delivered and signed in open Court this 11th day of November 2016

Mr. Macharia for Mr. Kathungu for Plaintiff present

Mr. Mwangi for Mr. Munene for Defendants present

Right of appeal explained.

B.N. OLAO

JUDGE

11TH NOVEMBER, 2016