



REPUBLIC OF KENYA



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Ngari v Ireri (Civil Appeal 235 of 2018)
[2024] KECA 1714 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KECA 1714 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 235 OF 2018
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
NOVEMBER 28, 2024

BETWEEN

HORINDA WANJUKI NGARI APPELLANT

AND

EDWIN NJERU IRERI RESPONDENT

(An Appeal against the Judgment of the Environment and Land Court at Embu (Y.M. Angima, J.) delivered on 1st March 2018 in ELC Case No 75 of 2015, formerly ELC Case No 792 of 2013 formerly Embu Civil Case No.256 of 1991)

JUDGMENT

1. The appellant has challenged the decision of the Environment and Land Court (ELC) dated 1st March 2018 following a suit in which Silvester Kimotho (deceased) sued Obadiah Ireri (deceased) by a way of a plaint dated 22nd August 1991 and filed at the Resident Magistrates Court at Embu vide Civil Case No. 256 of 1991. The suit was later transferred to the High Court sitting in Embu where it was registered as HCCC NO. 729 of 2013 and eventually transferred to the Environment and Land Court at Kerugoya and given the number ELC No. 75 of 2015.
2. In the suit, Silvester sought in the main transfer of parcels of land L.R. Nos. Nthawa/Riandu/1947 and 1948 as granted to him by clan elders and the Chief and his elders. The record shows that over the years, both the original appellant and the original respondent died and the appellant was substituted with his wife Horinda Wanjuki Ngari as his personal representative whereas the respondent was substituted with Bertha Mbuya Ireri. Later on, Bertha Ireri also passed on and she was substituted with her son Edwin Njeru Ireri.
3. The appellant pleaded that sometime in 1984, he was allocated a parcel of land by his clan which land comprised Title No. Nthawa/Riandu/1800 (herein after known as “Parcel No. 1800”). It was further



- pleaded that the clan chairman one Timotheo Makenge, was to facilitate transfer of the appellant's portion to him, but Timotheo died before finalizing the process.
4. It was the appellant's case that upon the demise of the said chairman, his son, Obadiah Ileri (the original defendant), took over as chairman of Kere clan. It was pleaded that when parcel No. 1800 was subdivided into 6 parcels in 1989, the appellant was to get Title No. Nthawa/Riandu/1947 and 1948 (hereinafter known as "the suit properties") but the respondent allegedly obtained title deeds for the suit properties through fraudulent means.
 5. The appellant further pleaded that sometime in 1989 he referred the matter to the Location Chief and some elders who resolved the dispute in his favour but the respondent had, nonetheless, refused to transfer the suit properties to him.
 6. In response the respondent filed a defence and counter claim in which he refuted the appellant's claim and counter claimed for an order of eviction against the respondent and for removal of the caution placed against the suit properties. The respondent denied, in particular, that he was ever chairman of Kere clan as alleged by the appellant.
 7. The appellant testified that her late husband, Silvester Kimotho, ("Kimotho") was a member of Kere Clan and as such was entitled to allocation of clan land. According to her, before land demarcation was concluded the clan chairman, Timotheo Makenge, ("Timotheo") showed Kimotho a portion of land to cultivate and develop. It was her further evidence that Timotheo died before he could transfer the land to Kimotho.
 8. She testified that upon the death of Timotheo his son, Obadiah Ileri ("Obadiah") secretly transferred to himself the land they were to receive. It was her case that they were entitled to parcel Nos 1947 and 1948. When the respondent refused to transfer the suit properties to her, they lodged cautions against the land.
 9. The appellant further testified that when the dispute was referred to the Location Chief and the elders, the dispute was resolved in their favour and the respondent was directed to transfer the suit properties. However, when the dispute was later on referred to a panel of elders chaired by the D.O Siakago, it was decided that the land belonged to Obadiah.
 10. Alexander Nyaga (PW2) testified that he was a member of Kere clan just like Kimotho. He testified that as a member of the clan, Kimotho was entitled to a share of clan land. He stated that Timotheo had shown him a parcel of land during his lifetime but that Timotheo died before he could transfer the land to Kimotho. It was his evidence that upon the demise of Timotheo, his son, Obadiah, transferred all the remaining parcels into his name without the knowledge of the Clan.
 11. Peterson Kimotho (PW3) stated that he was the son of the late Kimotho. He testified that he was brought up on the suit property and that he did not know of any other home. He stated that during his father's lifetime some elders used to visit to discuss how they would be given their land. Jackson Kimotho (PW4), Pw3's brother testified in similar vein.
 12. Anjelimo Mbanda (PW5) who was the location Chief for Nthawa Location between 1987 and 1999 testified that both Kimotho and Obadiah were his cousins. He testified that the land dispute was reported to him in February 1990 and he teamed up with 4 elders to resolve the dispute. He stated that it was resolved that Obadiah should transfer the suit properties to the appellant. He produced a copy of the verdict in court. According to him, Obadiah who took over the clan chairmanship after the demise of his father was supposed to transfer some parcels of land to deserving clan members but instead of doing so, he started selling some parcels to third parties and transferred others to himself.



13. The defence called 4 witnesses. DW1 Edwin Ireri, testified that when land was being demarcated and allocated to clan members, Mr. Kimotho was allocated L.R. No. Nthawa/Riandu/1449 by Timotheo but he declined the allocation. He was later on given alternative land being L.R. No. Nthawa/Riandu/271 which he declined again. Finally, he was offered parcel No. 1378 which he was to share with one Shadrack Ngari but he declined to take it once more.
14. He testified that parcel No. 1800 was given to Obadiah by Timotheo and he obtained a title for it on 9th Jan 1989. He further stated that all members of the clan were given land openly and publicly through the Land Control Board and that his father Obadiah obtained the land through the same process. His father later on subdivided parcel 1800 into six portions and that the suit properties, parcel Nos. 1947 and 1948 were sub-divisions thereof. He asked the court to dismiss the plaintiff's suit.
15. Justino Mbogo (DW2) testified that he was a member of Kere clan. He stated that the appellant's husband was allocated parcel No. 1449 by the clan but he refused to accept it. He further testified that parcel No. 1800 was allocated to Obadiah Ireri through the Land Control Board. The allocation was done by the clan chairman, Timotheo.
16. Johnson Njiru Kaumbuthu (DW3) testified that he was a member of the Kere Clan and he gave evidence similar in every respect to that of DW2. According to his evidence, parcel 1800 belonged to Obadiah whereas the appellant's husband was offered parcel No. 1449 which he declined to take.
17. John Mwaniki Makenge (DW4) testified that he was the uncle of the respondent and brother of Obadiah. His evidence was similar to that of DW 1. He confirmed that the late Kimotho rejected three different allocations of clan land by Timotheo. He also testified that parcel No. 1800 was solely allocated to his elder brother, Obadiah.
18. The trial Judge dismissed the suit after concluding, inter alia, that:
 - a. There is no evidence on record to demonstrate that the Plaintiff's late husband Kimotho was allocated the suit properties ie Nthawa/Riandu/1947 and 1948.
 - b. It was not established that the original Defendant, Obadiah, was fraudulently registered as proprietor of the suit properties.
 - c. It was not established that Obadiah took over the chairmanship of Kere clan upon the death of his father, Timotheo.
 - d. The land dispute between the parties was referred to alternative dispute resolution mechanisms with varying decisions but they were of no legal consequence.
 - e. The Plaintiff is not entitled to the reliefs sought in the plaint or any of them.
 - f. The Defendant is entitled to the reliefs sought in the counterclaim.
19. The appellant was aggrieved by the judgment and filed an appeal to this Court on grounds, inter alia, that the Judge erred in law and fact: in holding that the appellant's husband was not allocated land parcels L.R. No. Nthawa/Riandu/1947 and 1948 when there was clear evidence that he was; by not considering that the appellant's husband did not know when the Land Control Board was sitting so that he could appear and demonstrate his ownership of Land parcels L.R. No. Nthawa/Riandu/1947 and 1948 and that the family has been in occupation of the said parcels since 1989; in holding that there was no legal obligation on the part of the clan chairman or allocation committee to allocate any clan member the particular portion they had cultivated or settled on when it was clear that the appellant's



- husband had been allocated the land in issue; in holding that the decision of the elders was purely informal and in holding that the original defendants lawfully acquired the suit property.
20. When the appeal came up for plenary hearing, learned counsel Mr. Momanyi Gichuki, appeared for the appellant while learned counsel Mr. M.K. Kiminda appeared for the respondent. Both counsel adopted their written submissions which they had filed earlier and made brief oral highlights.
 21. It was submitted that in the Minister's Appeal case number 22 of 1976 the late Timotheo represented the Kere Clan in their case against Mururi clan which the Kere Clan won and land parcel L.R. No. Nthawa/Riandu/268 measuring approximately 400 acres was awarded to the Clan. Further that the whole clan land was registered in the name of Timotheo Makenge as the chairman of the clan who could later sub-divide it and allocate to clan members including the appellant's husband.
 22. It was submitted that after Timotheo died his son Obadiah took over as chairman of Kere Clan and as chairman he was to subdivide the clan land and give the clan members since Timotheo died before the process was complete. Further it was submitted that there was evidence that the appellant was entitled to clan land and that the appellant's husband was allocated L.R. No. Nthawa/Riandu/1947 and 1948 which evidence the trial Judge disagreed with. Counsel submitted that the trial court erred by believing and holding that the late Kimotho was shown some alleged two parcels which he rejected. The trial court was accused of failing to appreciate that the appellant had been in occupation of the said parcels even before they were registered in the names of Obadiah.
 23. It was submitted that there may well be no legal obligation on the part of the chairman to allocate any land according to occupation but common sense dictated that a person should be allocated a portion already occupied by them and since the appellant had occupied L.R. No. Nthawa/Riandu/1947 and 1948 over a long time he was, therefore, entitled to parcels he had already developed.
 24. Finally, it was submitted that the trial Judge erred in allowing the counter claim, since there is evidence that the appellant has been in occupation of the suit properties for about 50 years without interference from the respondent and that the respondent did not move or evict the appellant from the said parcels despite the fact that he got registered as proprietor in 1989. Counsel added that there was no evidence that the appellant had alternative land. We are urged to allow the appeal.
 25. On his part, counsel for the respondent submitted that the court having found that L.R. No. Nthawa/Riandu/1800 was registered in the respondent's name on 9th January, 1989 during the clan chairman's lifetime, the allegation that the appellant's husband was entitled to the parcels of land long before they were registered in 1984 was wanting and not backed by evidence.
 26. It was submitted that amongst the exhibits produced by the respondent was an order issued by Siakago Magistrate's Court injunctioning the appellant from burying her husband in the suit land. That the appellant did not contest the order. It was submitted that the allegation that the respondent had assumed the clan chairmanship when he had not was wrong.
 27. According to learned counsel, there was no evidence of fraud, and the trial court was right in rejecting the clan and the Elders' decisions because the same had no legal backing and could not be enforced and that the right forum to hear the matter was the court. We are urged to dismiss the suit with costs.
 28. This is a first appeal where this Court is required to conduct an independent appraisal and analysis of the facts and the law and arrive at its own independent conclusion, as prescribed under rule 31(1)(a) of the Court of Appeal Rules, 2022. In so doing, the Court is required to take into consideration that unlike the trial court, it did not have the advantage of seeing and hearing the witnesses testify to be in a position to assess their demeanour. See Kenya Ports Authority -vs- Kuston (Kenya) Limited [2009] 2



EA 212 as reiterated in *Mugwe -vs- Waititu Babayao & another; Speaker, Kiambu County Assembly & 2 others (Interested Parties) (Civil Appeal 245 of 2018) [2023] KECA 1422 (KLR)*.

29. The main issue for determination is who is the rightful owner of the suit properties and related to that is the question whether the appellant established fraud as against the respondent to the required standard to impeach the respondent's title to the property.
30. It is trite that he who alleges must prove. Section 107 of the *Evidence Act* provides that he or she who asserts must prove that the facts alleged exist. The burden of proof lay with the appellant to establish his right to the subject plot. See *Swaleh Mohamed Waziri & 3 others -vs- Houd Mohmoud Athman & another [2020]eKLR*; and *Monica Wangu Wamwere -vs- Attorney General [2019] eKLR*.
31. In the case of *Anne Wambui Ndiritu -vs- Joseph Kiprono Ropkoi & another [2004] eKLR*, this Court held:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80...There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act...The two sections carry forward the often- repeated evidential adage: ‘he who asserts must prove’”.

See also *Chief Land Registrar & 4 others -vs- Nathan Tirop Koech & 4 others [2018]eKLR*.

32. As is clear from the record, it was the appellant's claim that the subject properties, L.R. No. Nthawa/Riandu/1947 and 1948 were allocated to her deceased husband, Kimotho by the Kere Clan wherein he was a member and whose chairman was Timotheo and that Timotheo died before he could transfer the land to Kimotho. She testified that upon the death of Timotheo his son, Obadiah Ireri (“Obadiah”) secretly transferred to himself the land they were to receive. It was her case that they were entitled to parcel Nos. 1947 and 1948 and that when the respondent refused to transfer the suit properties to her, they cautioned the land. The appellant did not adduce any documents or evidence to prove that the land had been allocated or belonged to her, or to prove that the respondent had fraudulently transferred the same to himself.
33. On the other hand, the respondent through the evidence adduced by his witnesses clearly demonstrated that the appellant's husband had been allocated four different parcels of land including L.R. Nos. Nthawa/Riandu/1449, Nthawa/Riandu/271, and 1378 which he had rejected and that the respondent had been allocated parcel Nos 1947 and 1948 which were sub divisions of parcel Nos. 1800. It was contended that the subject properties were given to the respondent by the Kere Clan and were registered in his name on 2nd October,1989.
34. Without any evidence that demonstrated ownership of the subject plot by the appellant, the appellant failed to discharge the burden of proof that her husband Kimotho was allocated parcel Nos. 1947 and 1948 by the Kere Clan. On the contrary, the evidence adduced by the respondent together with the chronology of events coupled with the title document, explained how the respondent came to be in ownership of the subject properties.
35. From the evidence adduced before the trial court, it was clear that the land in question belonged to the Kere Clan before subdivision. The same was sub- divided amongst the clan members later but the exercise involved movement of the clan members on the ground as not all members could remain on the portions they occupied on the ground before the allocations. The appellant's late husband did not want to be moved from the plots they occupied before the exercise, which plots fell on the area allocated



to the respondent's family. The appellant's husband adamantly refused to take up the plots allocated to his family elsewhere insisting that the land he occupied should be transferred to him instead. From these circumstances, it can be said he was the author of the situation his family now finds itself in.

36. The appellant claimed that the registration of the two parcels of land was done secretly, and was thus imputing fraud on the part of the respondents. Be that as it may, it is an established legal principle that fraud must not only be specifically pleaded but strictly proved. For instance, in *Vijay Morjaria -vs- Nansingh Madhusingh Darbar & another*, Civil Appeal No. 106 of 2000 [2000]eKLR, Tunoi, JA (as he then was) expressed that:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these 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 facts”. See *Davy -vs- Garrett* (1878) 7 Ch. D 473 at 48...”

37. Having failed to plead the particulars of fraud in her pleadings and, to specifically prove them in court, the appellant cannot fault the trial court for not finding the transfer of the suit property to Obadiah fraudulent.
38. We agree with the learned Judge that the appellant did not successfully challenge the respondent's title to Parcel Nos. 1947 and 1948. The fact that the appellant and her family had lived on the suit land for many years, was immaterial as the claim was not based on adverse possession. It is our finding that the respondent's proprietary interest on the suit premises was properly and lawfully registered, and in the absence of prove of fraud, his title cannot be impeached.
39. Ultimately, we find the appeal is without merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 28TH DAY OF NOVEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a the true copy of the original.

Signed

DEPUTY REGISTRAR

