



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: OUKO (P), NAMBUYE & KARANJA, J.J.A)

CIVIL APPEAL NO 138 OF 2018

BETWEEN

DEMUTILA NANYAMA PURURMU.....APPELLANT

AND

SALIM MOHAMED SALIM.....RESPONDENT

*(Being an Appeal from the Judgment of the Environmental & Land Court at Bungoma (S. K. Mukunya, J) delivered on 29th November 2016*

*in*

*E.L.C. No. 52 of 2012)*

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**JUDGMENT OF THE COURT**

1. This is an appeal arising from the judgment and decree of S.K. Mukunya J. delivered on 29th November, 2016 at the Environment and Land Court (ELC) in Bungoma. A short background will help place this appeal in perspective.
2. Demutila Nanyama (the appellant) filed a suit against Salima Mohamed Salim (the respondent) claiming , *inter alia*, that the respondent fraudulently caused the transfer of land parcel **E. BUKUSU/SOUTH KANDUYI/381** in his names, having coerced the land officers at Bungoma to transfer the land into his names, that he manipulated the transfer documents and took advantage of the appellant's illiteracy.
3. The appellant prayed that the court orders the Land Registrar to cancel the registration of the respondent as the owner and reinstate the ownership to her.
4. The respondent filed a memorandum of appearance, defense and an amended defense. He averred that he was the registered owner of the suit land since the year 1991 having bought the same from the appellant herein. He denied all the particulars of fraud.
5. During the hearing, the appellant testified that the respondent demolished her house in 2012. She testified that she went to the lands office and found out that the respondent had transferred the suit property to his name; that she was not living on the suit land and she did not report this incident to the police. Thereafter she simply denies everything, more so;
  - i. Ever taking the respondent to the Land control Board;
  - ii. Ever selling the suit land to the respondent;
  - iii. Ever taking any money as purchase price (Kshs. 70,000);
  - iv. She said she was illiterate;
  - v. Ever having thumb printed any documents in favour of the respondent;
6. She filed a list of documents containing; copy of green card, official search results, photos and demand notice.

7. In her evidence the appellant only produced the green card and relied on the documents filed by the respondent. It is noteworthy that in the course of the hearing, learned counsel for the appellant asked for an adjournment twice to verify the thumbprint on the documents of transfer. The court granted the adjournments on both occasions but counsel never presented their report on the issue.

8. On his part, the respondent testified that he knew the appellant was illiterate; that she sold the property to him though there was no Sale agreement; that the appellant did not accompany him to the land control board though a letter written by the chief allowed him to proceed without her and he produced Exhibit 1; a letter written by the appellant confirming that she sold the suit land to him.

9. It was the respondent's position that he did not forge the letter to the Land Control Board and that the appellant voluntarily signed the transfer forms in the presence of the area chief. The chief was nonetheless not called as a witness.

10. The respondent relied on and produced the following documents as exhibits:-

- i. Exhibit 1: the letter the appellant allegedly wrote to the Land Control Board confirming that she had sold the suit land to the respondent, which is thumb printed;
- ii. Exhibit 2: photocopy of the appellant's national ID (which the appellant said the respondent's friend had once asked her for a copy to enable him get her a copy of the Kenya gazette since her case had apparently been listed there – a case she previously had on the suit land with one Pascal);
- iii. An application to the Land Control Board duly thumb printed by the appellant;
- iv. Consent by Kanduyi Land Control Board allowing the transfer of the suit property;
- v. A receipt of Ksh. 5,450 the respondent paid for registration of the suit land.

11. The Court framed the issues for determination as follows;

- i. Whether the appellant sold the suit land to the respondent;
- ii. Whether the Land Control Board granted it's consent;
- iii. Whether the transfer of the suit land to the respondent was fraudulent;
- iv. Whether the respondent holds the suit land (in trust) for the appellant.

12. Having looked at the documents adduced as exhibits, the court was convinced that the appellant had sold the suit land to the respondent voluntarily and received consideration for the same. The learned Judge in his judgment made the following findings of fact:-

- i. *The appellant sold the whole suit land to the respondent voluntarily and received consideration for the same.*
- ii. *That the Land Board granted it's consent on 29/8/91 after an application by the appellant dated 27/8/91.*
- iii. *That the transfer dated 2/8/91 was executed by the appellant before Mr. Ibrahim Joseph Onyinkwa Advocate and the same was registered in the District Land Office in Bungoma on 19/9/91 and the stamp duty paid on the same of 10 pounds.*
- iv. *That the land is truly owned by the Respondent;*
- v. *That counsel for the appellant was accorded time to establish that the thumb prints on the Letter of Consent to the Land Board, the application to the Land Control Board and the transfer documents produced herein, but they failed to do so.*

13. Aggrieved by the above findings, the appellant proffered the instant appeal by filing the memorandum of appeal dated 1st November, 2018. The appeal is premised on five (5) grounds, *inter alia*, that the Judge erred in law in: finding that the Land Control Board granted it's consent to the land transaction between the appellant and the respondent; in not finding that the respondent obtained transfer of title through fraud; failed to find that the appellant did not sell the land to the respondent; failing to find that the appellant had proved her case on a balance of probabilities and lastly, that the Judge erred in law when he believed the evidence of the respondent and dismissed the evidence of the appellant without assigning any reasons.

14. The appellant filed submissions and a list of authorities dated 16th November, 2020 giving a brief history of the facts and reiterating the grounds of appeal. The respondent has not filed submissions.

15. This being a first appeal, our duty as stipulated under rule 29(1)( a) of the rules of this Court is to re-evaluate and consider afresh the evidence tendered before the trial court and come to our own conclusion one way or another. This duty was reiterated in **Abok James Odera t/a A. J. Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR**, where this Court pronounced itself as follows: -

***“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-***

**analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.**

16. From a careful perusal of the record of appeal, parties' submissions and the authorities, the issues arising for determination can be discerned to be: ***Whether the learned Judge misdirected himself in not interrogating whether the Land Control Board granted its consent, whether the respondent obtained transfer of the suit property through fraud, whether the appellant sold the suit property to the respondent and whether the appellant proved her case on a balance of probabilities.***

17. On whether the learned Judge misdirected himself by not holding that the respondent obtained the suit property fraudulently, it was important for the appellant to prove on a balance of probabilities that the thumb print on the documents used to effect transfer was indeed not hers as she claimed. Being aware of the importance of proving this point, learned counsel asked for adjournments severally to have the document examiner establish whether the said prints belonged to his client. Ultimately, without explaining to the Court why they had abandoned that course of action, the appellant's counsel appears to have abandoned the issue and proceeded with the hearing without offering any evidence in rebuttal.

18. **Sections 109 and 112 of the Evidence Act** provide that:

***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

...

***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.***

19. The law is clear as buttressed in the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR**, where **Tunoi, JA.** (as he then was) stated as follows:

***“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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”*** (Emphasis ours)

20. As regards the standard of proof, this Court in the case of **Kinyanjui Kamau vs George Kamau [2015] eKLR** expressed itself as follows:-

***“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities: In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”*** (Emphasis ours)

21. The onus was therefore on the appellant who sought to rely on fraud on the part of the respondent and alleged forgery on his documents to prove to the court that she did not sign any of the documents relied upon by the respondent in support of his case. The trial court on application by the appellant's counsel issued orders directed at the District Land Registrar Bungoma for the originals of the disputed documents to be released to appellant's counsel for purposes of authentication by the documents examiner. The court was not told whether that was ever done. The appellant was evidently given ample opportunity to prove fraud on the part of the respondent but she failed to discharge that burden.

22. We have perused the said documents and considered the contents afresh as we are enjoined by law to do. These documents bear the signatures and official rubber stamps of the government officers who made them. We note further that the copies presented to Court were certified copies as required by law. In absence of any credible evidence to the contrary, we are inclined to agree with the learned Judge's conclusion that:-

***“That counsel for the appellant was accorded time to establish that the thumb prints on the Letter of Consent to the Land Board, the application to the Land Control Board and the transfer documents produced herein, but they failed to do so. I consequently believe the evidence of the respondent and dismiss the allegations by the appellant.”***

23. As the appellant was the one claiming that the documents were forgeries, the burden was on her to prove that the documents were not authentic government documents as claimed by the respondent. **Section 107 of the Evidence Act**, provides as follows:-

***“(1) 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.***

***(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”***

24. The appellant throughout her pleadings and testimony denied everything. More particularly, she denied ever taking the respondent to the Land Control Board, ever selling the suit land to the respondent, ever taking any money as purchase price (Kshs. 70,000) and ever having thumb printed any documents for the respondent.

25. In her testimony, in an apparent bid to explain how a copy of her national identity card ended up in the hands of the respondent, the appellant claimed that a friend of the respondent had once asked her for a copy of her identification card to enable him get her a copy of the Kenya gazette which had something to do with her land. This person was not called to rebut the evidence adduced by the respondent. There was also the chief who is said to have been present when the appellant wrote the letter authorising the respondent to appear before the Land Control Board. It was the same chief who was said to have persuaded the respondent to add 30,000/= to the purchase price after the appellant complained that the 70,000/= she had received earlier was not enough. He too did not testify nor did the appellant's son and daughter and one Boniface who the respondent claimed were present when the disputed transaction was entered into.

26. The determination of this appeal revolves around the question whether the appellant proved her case on a balance of probabilities. That the burden of proof was on the appellant to prove her case is not in doubt. From the sum total of the evidence, it is clear that the appellant's lone evidence fell too short of establishing fraud on the part of the respondent.

27. Inasmuch as there was no sale agreement in respect of the transaction produced in court by either the appellant or the respondent, the appellant cannot claim there was no sale. There was no rebuttal of the respondent's testimony that he had paid the appellant the purchase price of Kshs. 70,000.00 in the presence of her daughter Agnes and son Boniface and another witness going by the name Boniface, and a further 30,000/= before the chief . As found by the learned Judge, the transfer was signed by the parties in the presence of Onyinkwa advocates. The appellant also signed the application for the consent of the Land Control Board in the presence of the chief.

28. Ultimately, we find no grounds on which we can fault the learned Judge. We come to the conclusion that the appeal lacks merit and dismiss it with costs to the respondent.

**Dated and delivered at Nairobi this 19th day of May, 2021.**

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**R. N. NAMBUYE**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original.*

*Signed*

**DEPUTY REGISTRAR**