



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: GITHINJI, HANNAH OKWENGU & J. MOHAMMED J.J.A)

CIVIL APPEAL NO. 46 OF 2014

BETWEEN

SELINA MECCA WEKESA.....APPELLANT

AND

KENNEDY ELLAM (Sued as the Personal Representative

of the estate of George Ellam Wekesa (deceased).....1ST RESPONDENT

PROTUS MAKENZI2ND RESPONDENT

JARED WANJALA MMASABA.....3RD RESPONDENT

SHIKANGA BENJAMIN WAMBUYA.....4TH RESPONDENT

ATTORNEY GENERAL (Sued on behalf of the LAND REGISTRAR

BUNGOMA DISTRICT).....5TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya

at Bungoma (Omollo J.) dated 6th June, 2014

In

H.C.C.C No. 54 of 2006)

JUDGMENT OF J. MOHAMMED, JA

BACKGROUND

1. This is a first appeal from the decision of the High Court (Omollo J) dated 6th June, 2014 dismissing the suit filed by **Selina Mecca Wekesa** (the appellant) who had sought a declaration that the subdivision of L.R No. NDIVISI/MUCHI/1086 (the suit property) into L.R Nos NDIVISI/MUCHI/6454, 6455, 6456, 6457, 6458, 6459, 6460, 6461, 6462 and 6463 and their subsequent transfers to **Kennedy Ellam Wekesa** (sued as the personal representative of the **Estate of George Ellam Wekesa** (the 1st respondent), **Protus Makenzi** (the 2nd respondent), **Jared Wanjala MMasaba** (the 3rd respondent), **Shikanga Benjamin Wambuya** (the 4th respondent) and the Attorney General (sued on behalf of the Land Registrar, Bungoma District) (the 5th respondent) is null and void; nullification or cancellation of the subdivision of the suit property into NDIVISI/MUCHI/6454, 6455, 6456, 6457, 6458, 6459, 6460, 6461, 6462 and 6463 and the subsequent transfers plus title deeds thereto and restoration of the suit property; eviction orders to remove the 4th respondent's structures from land parcel numbers NDIVISI/MUCHI/6457, 6458, 6459 and costs and interest.

2. The background of this appeal as can be gleaned from the Further Amended Plaintiff filed on 16th July, 2007 is that this dispute centres on land identified as **L.R No. Ndivisi/Muchi/1086** (the suit property) originally registered in the name **George Ellam Wekesa** (deceased). The appellant claimed to have been married to the deceased on or about 9th January 1964 under Luhya Customary Law. Before his death on 26th

July, 2006, the deceased subdivided the suit property into ten (10) plots **L.R Nos. Ndivisi/Muchi/6454 to 6463** and sold eight (8) of the plots to third parties, including the 2nd, 3rd and 4th respondents. The appellant, filed suit contesting the subdivision and subsequent sale of portions of the suit property claiming part ownership of the suit property by virtue of contribution pursuant to the Married Women's Property Act of 1882.

3. The appellant, claiming to be the deceased's widow, averred that the High Court in **Mombasa H.C.C.C No. 457 of 2002 (O.S)** on 23rd December, 2002 had issued injunction orders restricting dealings in identified titles (including the suit property) to protect all properties acquired during her marriage to the deceased. An extract of the order was to the effect that:

“ ... orders so AND ARE HEREBY ISSUED inhibiting the Registrars of Lands concerned from registering any transfers, charges or any other disposition or dealing with the pieces of parcels of land the subject of this suit, namely

.....and L.R NO. NDIVISI/MUCHI/1086, situated at or near Webuye in Bungoma District, pending the final determination of this suit and or further orders of the court. ...”

4. The appellant claimed that these orders were registered against the title in respect of the suit property by the Land Registrar, Bungoma as a prohibition on 8th January, 2003. The register also reflected a charge in favour of Trans-National Bank Ltd as security for a loan of Kshs.1.3 million which charge the appellant claims was never discharged. During trial the appellant produced a search against the suit property dated 18th March, 2005 which revealed the prohibition and charge registered and reflecting against the title. She also produced another search dated 7th August, 2006 which did not indicate the existence of any encumbrances to the title. In essence therefore, the appellant's claim was that the deceased in collaboration with the respondents had fraudulently removed the prohibition which was registered against the suit property without a court order and had the suit property subdivided and subsequently sold portions thereof. The appellant sought orders to nullify the subdivision and restore the original title.

5. The appellant's main witness was **George Obondo Omoti** (George), the Land Registrar at Bungoma who testified that to his knowledge the registry had never received a court order to lift the prohibition that had been registered against the suit property; and that the surrounding circumstances of the case brought up the possibility of there being two green cards which would explain why two searches reflected different entries. **George** opined that the 2 searches evidenced many discrepancies but he could not confirm which of the searches before the court record was genuine or who was responsible for the anomaly.

6. From the record, the 1st respondent, **Kennedy Eliam**, the son of the deceased and administrator of his estate, did not defend the suit. The 2nd respondent, **Protus Makenzi**, relied on his pleadings which denied the existence of the prohibitory order and the existence of **Mombasa H.C.C.C No. 457 of 2002 (O.S)**. The record reveals that he purchased plot No.6461 from the deceased. The 3rd respondent, **Jared Wanjala Mmasaba**, testified that he purchased three plots Nos. 6457, 6458 and 6459 from the deceased after conducting a search and confirming that the appellant was the registered owner thereof and that there were no encumbrances registered against the titles. The 4th respondent, **Shikanga Benjamin Wambuya**, stated that he purchased two plots, plot Nos. 6462 and 6463 from the deceased after a search which revealed no encumbrances registered against the titles. The 5th respondent, the **Attorney General** who was sued on behalf of the **Land Registrar**, Bungoma relied on documents adduced on his behalf and the evidence of **George**. Two other parties before the High Court who purchased plots Nos. 6455 and 6456 conceded the suit in the High Court and entered into consents with the appellant which were later adopted by the court.

7. The learned Judge considered the pleadings, evidence and submissions before her and held that the appellant had failed to discharge the burden of proof as against the 2nd, 3rd and 4th respondents who were innocent purchasers for value without notice of any fraud. The learned Judge went on to add that if there was any fraud committed then the same was committed by the deceased and the lands office (the Land Registrar) who together with the 1st respondent, as administrator, ought to bear any liability arising.

8. The learned Judge found that there was fraud on the part of the 1st and 5th respondents and held that the deceased caused the subdivision. The learned Judge found that there was no tangible evidence to show that the inhibition was fraudulently removed and it was incumbent upon the appellant to demonstrate that there was an order entered in the register in respect of the suit property but she had failed to discharge that burden. The learned Judge further found that the prohibitory order registered against the title in respect of the suit property was removed before the suit property was subdivided and was effected by the deceased as there was no evidence to directly link the 2nd, 3rd and 4th respondents to the removal of the prohibition or fraud thereof since they obtained titles to their respective portions in 2006 after subdivision had been effected and the prohibition had been removed. The court further held that the appellant's claim fell under section 26(a) and not section 28 of the Land Registration Act (LRA) which allows for titles to be cancelled on grounds of fraud or misrepresentation when a person is proved to be a party to the fraud. The learned Judge found that the remedies sought by the appellant were untenable as they were against the 2nd, 3rd and 4th respondents while the case against them had not been proved to the required standard. As the appellant had failed to seek alternative remedies and no specific prayer was made against the Land Registrar, the suit was dismissed with an order that the Land Registrar bear the appellant's costs of the suit.

9. Aggrieved by that decision, the appellant has brought this appeal raising grounds *inter alia* that the learned Judge erred in fact and law in: despite finding that the 1st and 5th respondents were guilty of fraud, declined to cancel the subdivisions procured by fraud by the two respondents; in finding that there was no proof that the prohibitory order obtained by the appellant was not registered when there was sufficient evidence to the contrary; in finding that the 2nd, 3rd and 4th respondents were innocent purchasers for value without notice when there was no such evidence produced by the 2nd, 3rd and 4th respondents; in failing to admit documents presented by the Land Registrar when the said documents originated from the Lands Office and the Land Registrar was the only competent witness to produce the same thereby arriving at a wrong conclusion.

10. It was the appellant's further claim the learned Judge erred in making a determination that unjustly enriched the 2nd, 3rd and 4th respondents who were beneficiaries of the fraud and letting the 1st and 5th respondents go scot free despite having been found to have acted fraudulently; in failing to appreciate the evidence presented and in failing to apply the applicable legal principles to the evidence on record; ignoring the fact that if indeed the 2nd, 3rd and 4th respondents were innocent purchasers for value without notice then they had recourse as

against the 1st and 5th respondents; making a decision allowing the 1st respondent who did not have a good title to purportedly pass on a good title to the 2nd, 3rd and 4th respondents; and dismissing the appellant's suit against the weight of the evidence on record.

11. The appellant sought the following orders: that the judgment of the High Court be set aside and that judgment be entered for the appellant as sought for in Bungoma HCCC No 54 of 2006 together with costs.

SUBMISSIONS BY COUNSEL

12. At the hearing of this appeal, the appellant was represented by **Mr. Tsimonjero**; the 1st respondent appeared in person; the 3rd respondent was represented by **Ms Wakoli** while **Mr. Odongo** appeared for the 5th respondent. There was no appearance for the 2nd and 4th respondents despite service of the hearing notices.

13. Mr. Tsimonjero faulted the learned Judge for relying on **Section 26(1)(a)** of the **Land Registration Act** (the LRA) and failing to apply Section 26(1)(b) thereof which provides that a certificate of title can be challenged where it has been acquired illegally, unprocedurally or through a corrupt scheme. Counsel relied on the decision of this Court in **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v AG & 4 others [2017] eKLR** for the proposition that Section 26(1)(b) of the LRA removed the protection given to an innocent purchaser where the transaction leading to the title is fraudulent or illegal; that there was evidence before the court that a prohibition was registered against the title; and that the removal of the prohibition was done fraudulently. Counsel argued that the learned Judge having found that there was evidence of fraud ought to have cancelled the subdivisions in respect of the suit property.

14. The 1st respondent, who was acting in person, did not oppose the appeal conceding that the subdivisions should not have been done contrary to the prohibition against the title and that the titles to the 2nd, 3rd and 4th respondents were issued irregularly.

15. **Ms. Wakoli** for the 3rd respondent opposed the appeal. Counsel submitted that the appellant's entire case was based solely on fraud allegedly committed by the respondents which restricted the learned Judge to only consider the provisions of **Section 26(1)(a)** of the LRA; that the appellant produced two conflicting certificates of search and the Court was unable to conclusively determine which of the two was genuine without the original green card; or to determine that a prohibition had indeed been registered against the title to the suit property; that the appellant had failed to demonstrate what role the 3rd respondent had played in the alleged fraud that led to the subdivision of the suit property or indeed any illegal action; that the 3rd respondent purchased three (3) plots in 2006 after the suit property had already been subdivided and a search carried out prior to the sale transaction did not reveal any encumbrances on the suit property; and that the 3rd respondent followed due process in the transfer process in respect of the subdivisions which was not challenged.

16. Counsel submitted that the evidence on record pointed to the 3rd respondent being an innocent purchaser for value without notice. Counsel distinguished the case of **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v AG & 4 others (supra)** on the ground that the transferring party in that case did not possess a good title and further that the respondents were held not to have followed the proper procedure in the acquisition of title. Counsel urged us to dismiss the appeal.

17. **Mr. Odongo** for the 5th respondent opposed the appeal and filed a cross-appeal against the finding that the Land Registrar had fraudulently removed the prohibition and that the 5th respondent had committed fraud. In submissions similar to the 3rd respondent, counsel added that a certificate of search was a secondary document and that in order to prove her claim to a subdivision of the suit property, it was necessary for the appellant to have brought into evidence the register, being the primary document; that the appellant had failed to prove the particulars of fraud raised in her further amended plaint; that the appellant had failed to substantiate her allegation of registration of a prohibition order by not producing an official receipt to prove that the requisite registration fee had been paid.

18. Counsel reiterated the evidence of **George**, who was unable to identify which of the two certificates of search was genuine and failed to produce any evidence that there existed two green cards or to prove that there was collusion between any of the Land Registry officials and the respondents. Counsel submitted that the appellant had failed to prove to the required standard any evidence of fraud on the part of the Land Registrar; and that any evidence of fraud was based on probabilities and circumstantial evidence. Counsel relied on this Court's decision in **Kinyanjui Kamau v. George Kamau Njoroge [2015] eKLR** that fraud must be strictly proved. Counsel argued that the learned Judge breached this principle and lowered the standard of proof as against the 5th respondent. Counsel urged us to dismiss the appeal and allow the cross-appeal.

DETERMINATION

19. This is a first appeal and this Court is mandated to re-evaluate, re-assess and re-analyse the evidence on record to come to an independent conclusion and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way. It was held by this Court in **Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2 EA 212** that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

20. On the issue whether fraud was proved to the required standard, the appellant has imputed fraud on the part of the respondents jointly and severally in the removal, without a court order of the prohibition and subsequent subdivision of the suit property.

21. Blacks Law Dictionary Ninth Edition defines fraud as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her

detriment.”

22. The appellant imputed fraud on the part of the respondents jointly and severally. As stated by this Court in **Kinyanjui Kamau V George Kamau Njoroge, (supra)**, fraud must be strictly proved. Fraud must be specifically pleaded and proved. The appellant was therefore under an evidential duty to prove the existence of fraud and to specifically prove the role of every respondent in the alleged fraud.

23. From the record, the appellant produced two search certificates in respect of the suit property. One indicating the existence of the prohibition and the charge registered against the suit property in favour of Trans National Bank Limited and the other without the encumbrances registered against the suit property. Further, the appellant’s witness, **George**, the Land Registrar was unable to conclusively determine which of the 2 searches was genuine. We note that the appellant did not produce a copy of the register in respect of the suit property to conclusively indicate the status of the suit property.

24. From the record, there is no conclusive evidence that the prohibition was registered against the suit property and that the same was removed fraudulently or otherwise. The standard of proof required in allegations of fraud is more than a mere balance of probabilities.

25. It is notable that **George** who was the Land Registrar filed a bundle of documents on 11th November, 2009 including a copy of the green card in respect of the suit property. At the hearing of the suit, his attempt to produce a green card with totally different entries was objected to by the 2nd, 3rd and 4th respondents and the Court.

26. On the standard of proof required to satisfactorily convince the court of existence of fraud, this Court in **R. G Patel v. Lalji Makanji [1957] EA 3114 at 317** held that:

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

27. From the record and evidence available, the 2nd, 3rd and 4th respondents entered into sale transactions in respect of the suit property after the subdivision was effected on 25th November 2005 a time when the registered owner was still alive. The learned Judge found that there was no evidence connecting them to any illegal or fraudulent removal of the prohibition, if any; that the entire process from the purchase to transfer of the subdivisions to their respective names has not been challenged and no evidence has been put forward to illustrate any unprocedural, illegal or fraudulent steps; and that for all intents and purposes, the 2nd, 3rd and 4th respondents are innocent purchasers’ for value without notice.

28. The use of inference of facts was well cautioned by Tunoi JA as the wrong approach in **Vijay Movjaria vs. Nansigh Madusingh Darbar & Another [2000] eKLR** when he stated 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 those 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.” (Emphasis supplied)

29. In the instant appeal, fraud cannot be imputed on the part of the 2nd, 3rd, 4th and 5th respondents by the mere fact that there existed two search certificates, one which indicated a prohibition registered against the suit property and one without a prohibition. It is not clear who removed the prohibition and the appellant imputed fraud on the part of the 2nd, 3rd, 4th & 5th respondents. To succeed in the claim for fraud, the appellant was required to not only plead and particularize fraud, but also lay a basis by way of evidence upon which the court could make a finding. In the instant appeal, there is no such evidence and the High Court rightly concluded that the appellant had not made out a case for the grant of the orders sought.

30. The 5th respondent opposed the appeal and filed a cross appeal dated 30th October 2015 seeking that the judgment and the consequent decree dated 6th June 2014 be varied or reversed only to the extent and manner and on the ground specified therein. The 5th respondent was aggrieved with the learned Judge’s finding that it committed fraud by removing or causing to be removed an inhibitory order lodged against the suit property in the absence of evidence of the existence of registration of the order and on the basis that the appellant failed to prove her case against the 5th respondent.

31. The learned Judge held that the appellant failed to discharge the burden of proof placed upon her as regards whether a prohibitory order was registered or removed from the register in respect of the suit property. The learned Judge held that the appellant failed to produce the register she alleged was tampered with.

32. In the instant case the contents of the search which was produced were disputed. It was therefore incumbent upon the appellant to produce a register in respect of the suit property. The appellant failed to do so. The appellant also failed to produce a receipt to evidence payment of registration of the prohibitory order. It is therefore not clear whether the prohibitory order was registered against the suit property or served at the Bungoma Lands Registry. **George** alleged that there may have been two parallel registers for one parcel of land. His evidence was however not corroborated and none of the assumed registers were produced to crystallize his opinion. **George** did not also lay any basis to support his belief that the respondents may have colluded with the Land Registry officials to remove the prohibitory order or tamper with the register in respect of the suit property.

33. Further, there was no evidence tendered to support the entries allegedly made on the register in respect of the suit property or that the said register was closed on sub division when encumbrances were subsisting. The appellant failed to produce the alleged register to support her contention. From the evidence adduced, at the time of sub-division was effected, there was no subsisting encumbrance. Further, the registered proprietor (the deceased) was still alive. The learned Judge did not therefore err when she found that the appellant did not avail evidence to prove the existence of the encumbrances.

34. The learned Judge found that there was no fraud committed by the 2nd, 3rd and 4th respondents. The learned Judge however stated as follows:-

“It is my finding that if at all there was any fraud, the same was committed by George Ellam Wekesa (deceased) and the Lands Office...”

35. It was the 5th respondent’s contention that the learned Judge did not expound on the basis for her finding and that there was no evidence of collusion between the deceased and the 5th respondent as the appellant had not tendered any evidence to that effect.

36. Allegations of fraud must be distinctly pleaded and distinctly proved with specificity. The finding of the court must be based on the evidence on record. The learned Judge stated:- ***“.....if at all there was any fraud...”***, with respect, the learned Judge arrived at the decision to implicate the 1st and 5th respondent without any concrete evidence. Accordingly, I find that in the circumstances of this case, there was no legal basis for the finding of fraud against the 5th respondent.

37. The upshot is that the appeal herein is devoid of merit and I would hereby dismiss it with costs to the 2nd, 3rd, 4th and 5th respondents. I find merit in the 5th respondent’s cross appeal and allow it with costs to the 5th respondent.

Dated and Delivered at Nairobi this 3rd day of April, 2020.

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF HANNAH OKWENGU JA

I have read the judgment of J. Mohammed JA in draft. The facts leading to this appeal have been well captured and I therefore do not need to repeat the same.

The appellant’s suit was anchored on fraud and this placed a high burden upon her to prove the alleged fraud. Secondly, the appellant needed to prove that the 2nd, 3rd, 4th and 5th respondents who had titles to the subdivisions were party to the fraud and therefore their titles were tainted. I concur with Mohammed JA that for reasons that she has given, the appellant failed to prove fraud to the required standard, nor was she able to establish anything that could taint the respondent’s title.

In addition, the appellant’s claim was anchored on her right to matrimonial property. This required her to prove that the suit property which was subdivided was actually matrimonial property to which she was entitled. The appellant seemed to have relied on the mere fact that before the subdivision, the property was registered in the name of the deceased and that she was a wife to the deceased, but that was not sufficient to prove that the property was matrimonial property. Under the Matrimonial Property Act she had to prove that the property was either used as the family home or that it was jointly owned and acquired during the marriage. There was no evidence to lead to any such conclusion.

For these reasons, I am in agreement that the appellant’s suit was properly dismissed and that this appeal has no merit. The final orders shall therefore be as proposed by J. Mohammed JA that the appeal is dismissed with costs.

This judgment has been delivered in accordance with **Rule 32 (3)** of the Court Rules, Githinji JA having retired from service.

Dated and delivered at Nairobi this 3rd day of April, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL