



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU & J. MOHAMMED, JJA.)

CIVIL APPEAL NO. 113 OF 2015

BETWEEN

GEORGE KAMAU KIMANI.....1ST APPELLANT

JAMES MUCHORI KIMANI.....2ND APPELLANT

AND

DAVID KILI SAWE.....1ST RESPONDENT

GEORGE WASHINGTON MOSES THUKU.....2ND RESPONDENT

(Appeal from the judgment of the High Court of Kenya

at Kitale (Obaga, J.) dated 22nd June, 2015

in

HCCC NO. 1 OF 2012

JUDGMENT OF THE COURT

[1] This is an appeal arising from the judgment of the Environment and Land Court (Obaga J) sitting in Kitale, in which a suit brought by the appellants George Kamau Kimani and James Muchori Kimani, as administrators of the estate of their late father Geoffrey Kimani Muchori (deceased), was dismissed.

[2] The appellants had claimed that contrary to an agreement entered into with the deceased and pursuant to which the deceased had taken possession of a 5 acre land parcel known as Waitaluk Kapkoi Block 4/Waitaluk/166 (the suit property), 1st respondent David Kili Sawe in collusion with the 2nd respondent George Washington Moses Thuku had fraudulently caused the suit property to be transferred into the name of the 2nd respondent.

[3] The appellants sought to have the registration of the 2nd respondent as the proprietor of the suit property declared null and void, and a prohibitory or inhibitory order issued directing the land registrar to deregister the name of the 2nd respondent and register the names of the appellants in their legal representative capacity.

[4] During the trial only the 1st appellant testified. He stated that the deceased had bought the suit property from the 1st respondent. He produced sale agreements and acknowledgement of payments that were made and explained that the land was bought in small portions that finally amounted to the five acres. The deceased moved onto the suit property and remained therein until his death. The 1st appellant is the one who made the last payment which was for one acre. Later the appellants were surprised to learn that the land was subdivided and registered in the name of the 2nd respondent who was a distant relative of the deceased, and who had been working for the deceased as a farm manager. The 2nd respondent forcefully entered the suit property in 2011 and has remained on the suit property ever since.

[5] Both the respondents filed a joint defence in which they contended that the deceased had made payments to the 1st respondent for the

purchase of the suit property on behalf of the 2nd respondent who had worked for him for a long time. This was pursuant to an agreement made between the deceased and the 2nd respondent.

[6] Both respondents testified. The 2nd respondent explained that the deceased had asked him to look for land so that he could buy it for him. The 2nd respondent identified the 1st respondent who had land to sell and the deceased paid the purchase price for the land and thereafter the deceased was deducting the money from his salary. Later, the 2nd respondent and the 1st respondent went to the Land Control Board and the suit property was sub-divided and registered in his name and he took possession. Both respondents denied the allegations that the suit property was fraudulently transferred to the 2nd respondent.

[7] In his judgment, the trial judge found that the deceased bought 5 acres from the 1st respondent and that he bought the land for the 2nd respondent; that although the deceased had only paid for 4 acres, the 1st appellant paid for the fifth acre “*in accordance with the wishes of his late father.*” The learned judge therefore concluded that there was no fraud committed by any of the respondents.

[8] In their memorandum of appeal, the appellants have raised five (5) grounds contending that the learned judge erred in not finding that the deceased had no agreement or arrangement to purchase five (5) acres of land for the 2nd respondent; that the failure of the 1st and 2nd respondents in involving the appellants in the transfer and registration of the suit property in the name of the 2nd respondent amounted to fraud. Further, that the learned judge erred in not applying the provisions of **sections 107 and 109** of the **Evidence Act** and in awarding the 2nd respondent the five acres without any tangible and cogent evidence and in not finding that the 2nd respondent was not a party nor a witness to the sale agreement.

[9] In their written submissions filed in support of the appeal, the appellants submitted that they produced evidence of written sale agreements showing that the deceased bought and paid for the suit property; while the respondents did not produce any documents or evidence to support their contention that the suit property was sold and or bought for the benefit of the 2nd respondent; that there was no written agreement of sale in favour of the 2nd respondent such that section 3(3) of the Law of Contract Act was not fulfilled and that the finding in his favour was a gross error.

[10] It was pointed out that the 1st respondent admitted that the purchase price for four acres was paid by the deceased whilst the 1st appellant paid for the fifth acre; and that although 1st respondent admitted that his son one Michael Kirwa witnessed the agreements, he did not call the said son as a witness; that there was no collateral agreement between the 1st respondent and the deceased to support the 2nd respondent’s contention that the suit property was being bought for his benefit; nor was evidence adduced of how much the 2nd respondent was earning.

[11] In regard to the Land Control Board Consent, it was submitted that there was no sale agreement between the 1st and 2nd respondents upon which a consent by the Land Control Board to transfer the suit property could be based, nor was the 2nd respondent privy to the sale agreement between the deceased and the appellant such as to benefit from it or enforce it.

[12] In regard to the fraud pleaded against the 1st and 2nd respondents, it was submitted that the fact that the 1st respondent used the agreement of sale between him and the deceased to apply for the Land Control Board Consent and transfer the suit to the 2nd respondent was sufficient evidence of fraud and misrepresentation more so when the same was done without consultation or information to the appellants.

[13] The appellants reiterated that the burden was on the 2nd respondent to prove that the land was bought for his benefit and that the 2nd respondent had failed to discharge this burden. They faulted the trial judge for allowing oral evidence to contradict the written agreement contrary to **section 97(1)** of the **Evidence Act**.

[14] In support of their submissions the appellants relied on: **Ole Nganai vs Arap Bor [1983] KLR 233**; and **Aineah Liluyani Njirah vs Aga Khan Health Services [2013] eKLR**. In their written submissions the respondents urged the Court to dismiss the appeal. The respondents contended that the evidence of 1st and 2nd respondents confirmed that the deceased had an arrangement to buy five acres of land for the 2nd respondent; that he did make payments for the purchase of the suit property; and that the appellant’s suit was properly dismissed as they failed to establish their allegations of fraud.

[15] The respondents argued that the main issue in the appellant’s suit was whether the agreement between the deceased and the 1st respondent was enforceable at the time of the deceased’s death; and that the only recourse the appellants had was to file a civil claim for refund of the money paid to the 1st respondent.

[16] The respondents urged the court to reject the authorities cited by the appellants as they were dealing with enforceability of the contract and not the claim as laid out by the appellants.

[17] In highlighting the written submissions, **Mr. Murgor**, counsel for the respondent urged that the agreement relied upon by the appellants was void as it was entered into in 2000 and the suit was filed in 2012; that the Land Control Board Act was not complied with as no consent was obtained; that the suit as filed did not contain any prayer for enforcement of the agreement, nor did the 2nd respondent file any counter-claim seeking to enforce the agreement.

[18] We have carefully considered this appeal, the record of appeal and the submissions made. In **Kuria Kiarie & 2 others vs Sammy Magera [2018] eKLR**, this Court addressing the issue of fraud stated as follows:

“25. ...The law is clear and we take it from 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.”

[19] The appellants claim was anchored on fraud, particulars of which were clearly given at paragraph 11 of the plaint. The appellants had the responsibility to prove these particulars of fraud to the required standard. It was not disputed that the deceased entered into an agreement for purchasing land from the 1st respondent and that he paid for four acres whilst the 1st appellant paid for one more acre bringing the total acreage to five.

[20] Furthermore, it was not disputed that the five acres of land being purchased was part of the suit property (Waitaluk Kapkoi Block 4/Waitaluk/166). The question was whether the deceased was buying land for himself or whether he was buying the land for and on behalf of the 2nd respondent who was his relative and farm manager. In addition, whether the transfer and registration of the suit property to the 2nd respondent was done fraudulently.

[21] The 2nd respondent's evidence before the trial judge in this regard was as follows:

“I went and found David Kiili Sawe who had 5 acres. I went back to Geoffrey and told him that I had found land. Teacher David Kiili Sawe accompanied me to Geoffrey K. Muchori. Geoffrey agreed with David Kiili on the amount. I do not have a document to show how much I was being paid. I do not have any sale agreement between myself and David Kiili Sawe. We had no written agreement regarding deductions from my salary.”

[22] Under cross examination, he admitted that there was no written agreement that the deceased was buying the suit property on his behalf. He claimed to have entered the land in 2011, but that before this he was using the land jointly with the deceased's son after the deceased died.

[23] As for the 1st respondent, the relevant part of his evidence in this regard was as follows:

“I recall in January, 1999, I was visited by the manager of G. K. Muchori who is the father of the plaintiffs. G. K. Muchori has since died. G. K. Muchori's manager is George Thuku the second defendant. He wanted 5 acres. I told him that I had the 5 acres. Moses Thuku went back and came with G. K. Muchori. G. K. Muchori asked Moses Thuku if he was agreeable to take the 5 acres. Mzee G. K. Muchori then said that he was going to pay the purchase price on behalf of Moses Thuku who was his manager. G. K. Muchori started paying me in instalments. As at the time Mzee G. K. Muchori died he had cleared paying for 4 acres. I went to George Kamau Kimani the first plaintiff and asked him what he intended to do now that his father had died. George Kimani told me that he was going to do as his father wished. George Kimani started paying me by instalments on the one acre. He completed paying me in September, 2000. The plaintiffs did not come for transfer of the land into Moses Thuku's name. In 2011 I approached George Kimani and asked him what they intended to do with the land. George told me to wait.”

[24] Taking the evidence of these witnesses together with the documentary exhibits that were produced, it is evident that although the 1st respondent had five acres for sale, the deceased initially only entered into an agreement for purchase of two acres. If it was true as stated by the two respondents that the deceased bought five acres for the 2nd respondent then he would have entered into an agreement for purchase of five acres, but the initial agreement entered into on 18th January, 1999 was only for two acres at a consideration of 95,000/= per acre; and that it was later on 29th January, 2000 when further payment was made to incorporate another acre, and 31st March, 2000 when further payment was made for yet another acre to increase the acreage to four as at the death of the deceased. The 2nd respondent admits that he only entered the suit property in 2010 or 2011, this was long after the deceased had died. The question is if; indeed the deceased was buying the land for the 2nd respondent why did the 2nd respondent not take possession of the land? Why was the deceased the one cultivating the land before his death and his son after his death? And if it was so clear that the deceased had bought the land for the 2nd respondent, why did the 1st respondent inquire from the 1st appellant after the deceased's death *“what they intended to do with the land.”*

[25] All these questions lead us to the conclusion that the respondents did not speak the truth about the deceased buying the land for and on behalf of the 2nd respondent. It is possible that the deceased may have had an intention of giving the 2nd respondent some land, but that intention if, at all, it was there was not actualized.

[26] We find that the learned judge did not properly consider and analyze the evidence before him but merely accepted the evidence of the respondents without weighing it.

[27] The agreements and acknowledgments that were produced in evidence by the appellants clearly reveal that the deceased was buying land from the 1st respondent. There is no indication that the deceased was buying that land for the 2nd respondent or anyone else. The 2nd respondent appears to have been present when most of the payments were made but his role was clearly only that of a witness.

[28] In their defence, the respondents maintained that the payments were being made by the deceased for and on behalf of the 2nd respondent. However, there was nothing to substantiate this. Even though the 2nd respondent testified that the money was to be recovered

through deductions from his salary, the 2nd respondent offered no evidence in regard to the salary or the deductions. It can therefore be safely concluded that the 2nd respondent had no privity of contract in regard to the agreement for the sale of the suit property between the deceased and the 1st respondent. It is also apparent that the 2nd respondent did not provide any consideration for the transfer of the suit property to him.

[29] The 1st respondent transferred the suit property to the 2nd respondent knowing very well that his agreement for sale of the suit property was with the deceased and that the 2nd respondent was not party to the sale. The circumstances of the 2nd respondent's registration were such that it can be concluded that there was misrepresentation made to the Land Control Board and the Land Registrar that the 2nd respondent was the purchaser of the suit property. Clearly there was collusion between the respondents to confer an underserved benefit on the 2nd respondent by having him fraudulently registered and title to the suit property issued in his name.

[30] We are satisfied that fraud was established to the required standard and the trial judge was wrong in dismissing the appellants' suit. Accordingly, we allow this appeal, set aside the judgment of the trial Court and substitute therefore judgment in favour of the appellants. We declare the registration of the 2nd respondent as the proprietor of the suit property null and void and direct the Land Registrar to cancel the registration and revert the title to the name of the 1st respondent. The 1st respondent shall transfer the land to the appellants in their capacity as administrators of the deceased's estate within sixty (60) days from the date of this judgment failing which the Registrar of the Court shall be at liberty to sign the necessary documents to effect the transfer. Each party shall bear his own costs of the appeal.

DATED and delivered at Eldoret this 17th day of January, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.