



IN THE COURT OF APPEAL

AT ELDORET

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

CIVIL APPEAL NO. 60 OF 2015

BETWEEN

PETER GICHARU NJIRIRI.....APPELLANT

AND

RICHARD WANYONYI SITATI.....RESPONDENT

(An appeal from the Judgment of the Environment and Land Court

at Bungoma (Anne Omollo J.) dated 16th April, 2015

in

Bungoma HCCC No. 9 of 2008)

JUDGMENT OF THE COURT

[1] This appeal arises from a Judgement given by the Environment and Land Court (ELC) in favour of **Richard Wanyonyi Sitati**, who is the respondent herein. In the said Judgement, the trial Judge (Anne Omollo J), arrived at the conclusion that the respondent lawfully purchased **KIMILILI/KIMILILI/1322** (hereinafter referred to as the suit property), and was therefore the rightful owner; and that **Peter Gicharu Njiriri**, who is the appellant, and who was residing on the suit property, is a trespasser.

[2] The suit in the ELC was initiated by the appellant who was formerly the registered owner of the suit property, as well as another property known as **KIMILILI/KIMILILI/1200**. For ease of reference we shall hereinafter refer to **KIMILILI/KIMILILI/1200** as the first property. The appellant accused the respondent of fraudulently transferring the suit property to himself, instead of the first property as agreed in an agreement of sale dated 22nd September 1992, (hereinafter referred to as the first agreement), which was entered into between the appellant and the respondent, for sale of the first property. The prayers sought were for a declaration that the registration of the respondent as proprietor of the suit property was unlawful, and an order of cancellation of the respondent's title to the suit property, and reversion of the title for the suit property to the appellant.

[3] The respondent filed a defence and a counterclaim, in which he admitted entering into the first agreement with the appellant, but maintained that the agreement was for a plot described as Plot No. 132 KIMILILI at a consideration of Kshs.330,000/=. The defendant pleaded that contrary to the first agreement, the appellant failed to transfer the first property to the respondent; that by an agreement dated 31st May, 1996, the appellant and the respondent entered into another agreement (hereinafter referred to as the second agreement) through which the appellant agreed to sell the suit property to the respondent at a consideration of Kshs.575,000.00 as a replacement for Plot No.132 KIMILILI; that it was agreed that the sum of Kshs.305,000.00 already paid by the respondent in regard to Plot No. 132 KIMILILI would be offset against the agreed consideration for the suit property; and that the respondent would pay the balance of Kshs.270,000.00 in instalments.

[4] The respondent further claimed that in accordance with the second agreement the appellant applied for consent from Kimilili Divisional Land Control Board for the transfer of the suit property to the respondent; that the consent was granted on 12th September 1996; and consequently, the respondent processed the title for the suit property in his name. The respondent maintained that he was the legal owner of the suit property, and had by mutual agreement allowed the respondent to remain on the suit property; that in May 2006, it was agreed that the appellant would continue remaining in the suit property by paying a monthly rent of Kshs 10,000/-; that the appellant paid the monthly rent until October 2006, when he declined to pay any more rent; the respondent therefore denied the allegations of fraud and counterclaimed

for an order of eviction against the appellant as well as payment of mesne profits.

[5] In response to the defence and counterclaim, the appellant denied getting into the second agreement or any agreement with the respondent for the sale of the suit property. He maintained that the remedy for mesne profits over the suit property was not available to the respondent and that the said counterclaim was without any merit.

[6] During the trial, the appellant testified and reiterated the contents of the Plaintiff by denying ever entering into the second agreement with the respondent in regard to the suit property. He explained that the only agreement he entered into with the respondent was the first agreement for the sale of the first property but that he was unable to transfer the title of the first property to the respondent as the respondent failed to comply with the terms of the first agreement as he never finished paying the agreed consideration.

[7] The appellant stated that he was appalled when the respondent's lawyers wrote a letter to him dated 10th September 2007, demanding the title for the suit property, yet he never sold the suit property to the respondent. He denied signing the second agreement and maintained that the signature on the second agreement did not belong to him. He also denied signing the payment vouchers acknowledging receipt of money from the respondent's lawyers between 28th August 1996, and 28th August 2001, totalling to Kshs.95,000/=. He admitted having received a cheque of Kshs.120,000/= from the respondent's advocate in 1998, but claimed that he never deposited the cheque since he did not understand what it was for because the balance for the sale of Plot No. 132 KIMILILI at that time was only Kshs.50,000/=.

[8] Furthermore, the appellant denied signing the Land Control Board application for consent, or appearing before the Land Control Board. He stated that he was not familiar with Bernard Barasa Wafula who acted as the agent of the respondent during the Board meeting, and asserted that he only knew of the alleged fraudulent transfer in 2007, when he received the aforementioned letter dated 10th September 2007, from the respondent's advocates. He claimed that the respondent sent the Chief and the District Commissioner to ask him to vacate the suit property. Under cross examination, the appellant testified that he had sold Plot No. 132 KIMILILI, to one John Gichoi in the year 2012.

[9] In his evidence the respondent testified that he was a tenant of the appellant at Plot No. 132 KIMILILI, when they entered into the first agreement for the sale of the first plot. The appellant however, failed to obtain the necessary consent or to have plot No.132 KIMILILI transferred to the respondent. Following the second agreement the appellant and the respondent agreed to have the suit property sold to the respondent. The respondent maintained that the suit property was lawfully registered in his name pursuant to the second agreement of sale between him and the appellant. He denied having committed any fraud, and maintained that the appellant had never written to him complaining about the alleged fraud. He stated that their agreement for the monthly rent was based on goodwill, and that he accepted the suit property in exchange for Plot No. 132 KIMILILI for the sake of peace.

[10] The respondent called three (3) witnesses who testified in support of his defence and counterclaim. These were one Bernard Barasa Wafula (Wafula) who was working for the respondent as a bookshop attendant, and who testified that on 11th September 1996 on the instructions of the respondent, he signed the Land Control Board Application forms on behalf of the respondent, and attended the Land Control Board meeting. He confirmed that the appellant was present at the meeting and that the Board gave the consent on 12th September 1996. Ruth Nakhoye Sitati, the advocate who prepared the first and second agreements, also testified for the respondent. She confirmed that the two agreements were entered into freely by both parties. She also confirmed that the appellant received the monies as indicated in the payment vouchers and that these payments were made through her office. She maintained that the respondent did not owe the appellant any more money. Under cross examination, she acknowledged that the respondent is her spouse.

[11] Michael Omkundi an Assistant Commissioner for Kimilili and Kibingei ward and formerly a District Officer also testified in support of the defence and counterclaim. He produced the application for Land Control Board Consent dated 11th September 1996, in regard to the transfer of the suit property from the appellant to the respondent. He also produced the Land Control Board Consent dated 12th September 1996, to the transfer, and confirmed that the appellant appeared before the Land Control Board as is the norm and was subsequently granted consent to transfer. Further, the witness also produced minutes that he claimed were for the Board meeting.

[12] As indicated at the outset, the trial judge dismissed the appellant's suit and gave judgment in favour of the respondent on the counterclaim. It is that decision that has provoked the current appeal which is predicated on the grounds, *inter alia*, that the trial judge erred in law and fact by: failing to appreciate that the transfer of the suit property was based on a Land Control Board Consent that was defective null and void as there was contradiction between the application for consent and the letter of consent with regard to the size of the land that was to be transferred. In addition, the consent was null and void, as it was based on an incompetent application that was signed by an agent who was not a recognised agent of the respondent, and who was a conduit to the fraud. The appellant faulted the trial judge: in failing to appreciate that the payment vouchers were falsified; failing to find that no consideration had passed to the appellant in accordance with the agreement of 31st May 1996; and in failing to hold that the appellant had proved his case in regard to the fraudulent transfer of the suit property.

[13] During the hearing of the appeal, Mr. Majune Kraido appeared for the appellant while Mr. George Murunga appeared for the respondent. Each counsel made oral submissions urging the Court to find in favour of his client. The appellant also filed a list of authorities to buttress their submissions.

[14] Mr Kraido identified two main issues in the appeal. Firstly, whether the registration of the respondent as proprietor of the suit property was tainted with fraud; and secondly, whether the registration of the respondent as proprietor of the suit property should be cancelled. Counsel reiterated the position taken by the appellant in the superior court, that the respondent was guilty of fraud. He drew the Court's attention to some alterations made in some documents relied upon by the respondent including the second agreement, and in a letter dated 1st September, 1996, and the fact that the amount written on the consent form as consideration was actually less than the actual amount indicated in the agreement as consideration.

[15] In support of the fraud allegation, counsel submitted that the appellant did not sign the application for the Land Control Board consent; that the respondent had admitted that the signature indicated as that of the Buyer on the application form was not his signature but that of

Wafula his employee; and that in the absence of the signature of the Buyer and the Seller on the application for the Land Control Board Consent, the consent given by the Board was null and void. Counsel relied on the definition of fraud contained in Black's Law Dictionary 5th edition as applied by the High Court of Uganda in Mudima Issa & 5 others v Elly Kayanja & 2 others, High Court Civil Suit 0232 of 2009.

[16] Furthermore, Mr Kraido reiterated that the appellant did not sign the receipts and vouchers produced in evidence by the respondent nor did he receive any monies from the respondent's advocate as alleged. He drew the court's attention to the fact that the vouchers were not authorised by the respondent's advocate. Counsel argued that all the flaws that he had pointed out were evidence of conduct on the part of the respondent that amounted to fraud. He therefore urged the Court to allow the appeal and order the cancellation of the title of the respondent to the suit property.

[17] **Mr. Murunga**, counsel for the respondent urged the Court to dismiss the appeal. He argued that the second agreement reflected the intention of the parties in exchanging the first property that was subject of the first sale agreement, with the suit property as the subject of sale in the second agreement. In regard to the charge that was registered against the title to the suit property, Mr Murunga referred to the respondent's testimony that he undertook to remove the said encumbrance. [18] In regard to the legality of the Land Control Board consent, Mr Murunga submitted that the appellant being the registered proprietor at the time the consent was sought, it was his responsibility to obtain the consent from the Land Control Board; that the appellant appeared in person before the Land Control Board as is the normal procedure; that Wafula attending the Board on behalf of the respondent did not render the Board proceedings or the consequent consent null and void as he was merely sitting in on behalf of the respondent; and that the appellant's denial of knowledge of the transfer of the suit property was counteracted by the evidence produced by the respondent.

[19] Counsel for the respondent relied on **Sections 107-109** of the **Evidence Act** in urging that the *onus* of proving that the registration of the respondent as proprietor of the suit property was procured through fraud was upon the appellant who was alleging so. He relied on Ratilal Gordhanbhai Patel v Lalji Makanji [1957], Civil Appeal 70 of 1956, for the proposition that allegations of fraud must be strictly proved. He maintained that the appellant had failed to discharge this burden and therefore urged the Court to dismiss the appeal with costs.

[20] We have carefully considered this appeal, the record of appeal, the submissions made before us and the authorities cited. This being a first appeal, we are duty bound to apply the principles set in Selle v Associated Motor Boat Co. [1968] EA 123, in which Sir Clement De Lestang V.P. stated as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put are that this Court must 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 this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of witnesses is inconsistent with the evidence in the case generally.”

[21] During the trial in the lower court, the parties filed a statement of agreed issues in which the issues for determination were identified as follows:

- i. whether or not the defendant's registration as proprietor of land parcel No. KIMILILI/KIMILILI/1322 was procured by fraud**
- ii. Whether or not the defendant is entitled to the declaratory orders sought**
- iii. Whether or not the defendant's registration as proprietor of KIMILILI/KIMILILI/1322 should be cancelled.**
- iv. Whether or not the plaintiff is a trespasser on the suit premises.**
- v. Whether or not the defendant is entitled to mesne profits and if so in what sum.**
- vi. Whether or not the plaintiff should be evicted from the suit premises.**
- vii. What are the appropriate orders as to costs.**

[22] Upon evaluating the evidence before her, the trial judge found that the appellant was not entitled to the declaratory orders that he sought, as he had failed to prove his allegation of fraud against the respondent. The finding of the trial judge was premised on the grounds that the oral evidence adduced by the appellant, denying having signed the vouchers, relied upon by the respondent as proof of payment of the purchase price, and the application for consent of the Land Control Board, relied upon for the subsequent transfer of title, was not sufficient. This is because the burden of proof was on the appellant to demonstrate that the signatures on the documents were not his; that the appellant ought to have adduced expert evidence to prove this fact so as to help the Court come to the right conclusion. The trial judge concluded that the appellant had not established any fraud on the part of the respondent; that the appellant was merely trying to use the legal process to doubly enrich himself at the expense of the respondent; that the respondent had regularly and lawfully acquired the suit property; and that the appellant was a trespasser on the suit property.

[23] In our view, the issues that arise for our determination in this appeal are: whether the trial judge erred in finding that the appellant failed to establish that the respondent's registration as proprietor of the suit property was fraudulent (ie the place of oral evidence versus expert evidence – whether fraud can only be proved through expert evidence); whether the appellant was entitled to the order for cancellation of the appellant's registration; whether the respondent established his counterclaim that the appellant was a trespasser on the suit property; and whether an order for eviction of the appellant was proper in the circumstances.

[24] At paragraph 4 of his plaint, filed in the High Court, the appellant pleaded particulars of fraud contending that the respondent's registration as proprietor of the suit property was fraudulent because it was done secretly without the appellant's knowledge; that the respondent fraudulently obtained Land Control Board consent for sale of the suit property instead of the first property which was subject of the first agreement of sale; that the respondent irregularly obtained consent of the Land Control Board in the absence of the appellant; that the respondent concealed the transfer of the suit property to himself from 1996 until 10th September, 2007; and that the respondent irregularly used a consent issued outside the statutory period to have the suit property transferred to him.

[25] Under **section 107** of the **Evidence Act**, whoever desires any court to give judgment as to any right or legal liability dependant on the existence of facts which he asserts, must prove that those facts exist. In this case the appellant was asserting the existence of facts that established his claim with regard to the alleged fraudulent registration of the respondent as the proprietor of the suit property. The respondent was also equally asserting facts that established his counter claim with regard to the alleged trespass on the suit property by the appellant. Both had therefore the obligation of establishing the facts asserted.

[26] As already stated, the appellant's claim was anchored on fraud. Fraud is defined in **Black's Law Dictionary, 8th edition** as:

"1. A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. 2. A misrepresentation made recklessly without belief in its truth to induce another person to act. 3. A tort arising from a knowing misrepresentation, concealment of material fact, or reckless misrepresentation made to induce another to act to his or her detriment. 4. Unconscionable dealing; esp in contract law, the unfair use of the power arising out of the parties relative positions and resulting in unconscionable bargain."

[27] Thus, the appellant who was alleging fraud had to establish the material facts that were misrepresented by the respondent, and the fact that the misrepresentation or concealment was intended to induce the appellant to act to his detriment or intended to induce another person to act on it. Going by the particulars of fraud pleaded by the appellant, the appellant had to establish that the registration of the respondent as proprietor of the suit property was procured through misrepresentation of the truth or concealment of material facts such as the fact that the appellant did not sign or enter into the sale agreement for the sale of the suit property; the fact that the letter of consent of the Land Control Board was irregularly obtained; and the fact that the registration of the respondent as proprietor for the suit property was procured through the use of a void letter from the Land Control Board of consent to transfer.

[28] The respondent rightly drew this Court's attention to the statement in *Ratilal Gordhanbhai Patel v Lalji Makanji* (*supra*) that was applied by this Court in *Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi [2013] eKLR*, that allegations of fraud must be strictly proved and that the standard of proof must be more than mere balance of probabilities.

[29] 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." [Emphasis added].

*The same procedure goes for allegations of misrepresentation and illegality. See **Order 2 Rule 4 of the Civil Procedure Rules.***

26. 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; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...."....In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

[30] In his oral evidence, the appellant denied: having signed the second agreement; having sold the suit property to the respondent; having received any further payment pursuant to the second agreement; or having signed the payment vouchers acknowledging the further payments.

[31] The trial judge dismissed the appellant's evidence stating as follows:

"Therefore, before the plaintiff began his testimony he was aware of the title being in the name of the defendant. (the reason he filed this suit), he was aware consent was fraudulently obtained (as pleaded in paragraph 4 of his plaint). The plaintiff did nothing to challenge these documents such as making a complaint to the CID or engaging a handwriting expert to compare the signatures on this document with his, so as to verify their authenticity. All the documents he complained he did not sign (ExD2, 4(a) and 8(a-d) bears a signature that the defendant said is his. The burden was upon him to prove that these signatures were not his. Such proof cannot just be by his oral evidence only. This Court has no expertise to be able to compare the signatures on the agreement dated 22nd September, 1992, and the other documents complained of to be able to differentiate

them.”

[32] Handwriting expert evidence is opinion evidence that assists the court in determining the authenticity of a document. Under **section 48** of the **Evidence Act**, such evidence is admissible in helping the court form an opinion on the genuineness of the handwriting or signature of the person purported to have made the document. The respondent was registered as the proprietor of the suit property under the Registered Land Act Cap 300 (now repealed). Section 26(1) of that Act provided as follows:

“The certificate of title issued by the registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions, and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

[33] As already stated, it was common ground that at the time of filing suit, the respondent was registered as the proprietor of the suit property. Indeed, a certificate of official search was produced by the appellant, while the respondent produced a copy of the title deed for the suit property and both documents confirmed that the suit property was registered in the name of the respondent on 19th September, 1996. This certificate provided *prima facie* evidence that the respondent was the proprietor of the suit property. The appellant had the burden to establish the grounds of fraud upon which that title could be impeached.

[34] The appellant alleged that the registration of the respondent as the proprietor of the suit property was done secretly without his knowledge, and that he did not sign the second agreement, or the application for the Land Control Board Consent. The appellant did not however, give any explanation regarding the signing of the transfer documents that resulted in the registration of the appellant as the proprietor of the suit property. The transfer and the Land Control Board Consent, that facilitated the registration of the appellant as proprietor of the suit property were documents that were available at the Lands Office and which the appellant could have easily had access to on his own or through the help of the court.

[35] In addition, it is obvious that the registration of the respondent as the proprietor of the suit property could not have been done without the original title deed of the suit property that was in the appellant’s name being surrendered to the Land Registrar. The appellant did not provide any explanation in this regard. These factors create doubt in the appellant’s allegation that he was not party to the transfer of the suit property to the respondent and in the absence of any expert evidence in support of the appellant’s contention that he did not sign the second agreement of sale or the application for consent of the Land Control Board to transfer the suit property, his allegations of fraud cannot hold.

[36] The appellant appears to have relied on the conduct of the respondent during the transaction as casting doubt on the propriety of the transaction resulting in the transfer of the suit property to his name. For instance, the respondent is alleged not to have signed the application for Land Control Board Consent. Secondly, the consent of the Land Control Board and the transfer of the suit property also appear to have been obtained before the respondent paid the full purchase price. However, the second agreement that the respondent maintains was signed by the appellant, apparently provided for the Land Control Board Consent to be obtained by June, 1996, and vacant possession to be given by 30th January, 1997 and yet the payments were to be paid by instalments which were to be completed on or before 30th June, 1997. If therefore, the consent was obtained, and the transfer effected before 30th June, 1997, no fraud can be implied as that was in accordance with the agreement.

[37] Our evaluation of the evidence, reveal many questions and flaws in the transaction. For instance, although the second agreement indicated that the last payment was to be made on or before 30th June, 1997, yet the payment voucher dated 18th September, 2002, that was relied upon by the respondent indicated that as at that date there was a balance of Kshs.190,000/= according to the vendor. Further, it is evident that a sum of Kshs.120,000/= that was according to the agreement due on or before 30th January, 1997, was paid through a cheque dated 11th September, 1998. Therefore, the vouchers relied upon by the respondents, reveal that almost five (5) years after the suit property had been transferred in his name, the respondent was yet to finish paying for the consideration. It is evident the transfer was registered before the full payment of the consideration. However, this did not make the registration of the appellant fraudulent, but only entitled the appellant to a suit for recovery of the consideration.

[38] According to the second agreement the Land Control Board Consent was to be obtained in June, 1996 by the vendor. The Land Control Board Consent was apparently obtained by Wafula from the Board on 12th September 1996. Although Wafula maintains that the appellant was present this was denied by the appellant, but this was the word of the appellant against that of Wafula and the respondent.

[39] The evidence of Omukundi, the DO who produced the minutes of the Land Control Board meeting was another source of concern. While the witness identified and produced the application for the Land Control Board Consent and the letter of consent from the Land Control Board, it is not clear in what capacity he produced the documents. He did not identify the signature of the DO nor did he testify that he was present at the meeting and or state the role if any that he played. Yet in his evidence, the witness refers to the minutes of the Board and confirms that the minutes are genuine.

[40] Omukundi is recorded as producing the minutes as defence exhibit 4(b). However, despite carefully perusing the record of appeal, we have been unable to locate these minutes. Apparently the minutes were not incorporated in the record of appeal. In addition, the witness concedes that Mr. Chepkole was the DO when the transaction was done. This implies that Mr. Omukundi did not participate in the Board Meeting and this is confirmed by the fact that the witness talked generally about what normally happens and was not specific about this particular transaction. In our view, the evidence of this witness was not useful and the minutes were irregularly admitted in evidence.

[41] There was contradictions in the acreage of the land which was to be transferred to the respondent, it being indicated as 0.6 Hectare in the application for the consent of Land Control Board, and 0.7 Hectare in the consent, and certificate of title issued to the respondent. Worthy of note however, is the fact that the second agreement did not indicate the acreage but indicated the land parcel as KIMILILI/KIMILILI/1322 implying that the whole parcel was to be transferred.

[42] Further contradiction was in the amount of the agreed consideration which was indicated as Kshs.50,000/= in the letter of consent and Kshs.575,000/= in the agreement of sale. Without evidence as to what was indicated in the transfer document as the purchase price, this contradiction does not impact the propriety of the registration of the respondent.

[43] Another issue of concern is that there was evidence of a search conducted on 20th May, 1996, which revealed that there was a charge registered against the title of the suit property in favour of Kenya Commercial Bank in the sum of Kshs.325,000/=. Despite another certificate of search being obtained on 17th July, 1996, which showed that the title was now free of any encumbrances, there was no evidence regarding who made the payment and how the payment was made. This was information that was within the special knowledge of the appellant in whose name the suit property was still registered, yet he offered no evidence in this regard.

[44] The sum total of all these contradictions is that there was more than meets the eye in the transaction that led to the registration of the respondent as the proprietor of the suit property. The question is whether fraud could be inferred from the inconsistencies and contradictions. As was stated in **Vijay Morjaria vs Nansingh Madhusingh Dabar & another** (supra) and **Ndolo vs Ndolo (Supra)**, in cases where fraud is alleged it is not enough to simply infer fraud from the facts. The higher standards of proof required in fraud cases that is higher than that of balance of probabilities, must be met.

[45] This is a situation where both parties may not necessarily have spoken the truth. However, the greater burden was on the appellant to establish the alleged fraud to the required standard. Mere suspicion and evidence of omission that both parties appear to have been complicit in, is not sufficient to establish the particulars of fraud that were pleaded by the appellant to the high standard required.

[46] Moreover, by his own conduct the appellant did not seem keen on pursuing the fraud allegations through the criminal justice system as he never reported the matter to the relevant authorities, to enable them conduct investigations. The fact that the appellant admits that he has already sold and transferred the first property to another person, lends credence to the respondent's position that the parties' had agreed on a sale of the suit property instead of the first property that they had originally agreed on.

[47] We come to the conclusion that considering the evidence that was before the court, the burden and standard of proof, the trial judge cannot be faulted for dismissing the appellant's case, as the appellant failed to prove that the respondent fraudulently obtained the registration of title to the suit property in his name. That being the position, and the respondent having given the appellant notice to vacate the suit property, the appellant remains a trespasser.

[48] Accordingly, we find no merit in this appeal. In regard to costs, given the circumstances that obtain in this appeal, the order that commends itself to us is that each party should bear their own costs.

Our final orders are therefore, that **the appeal is dismissed and each party to bear their own costs.**

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

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR