



IN THE COURT OF APPEAL

AT ELDORET

(CORAM, WAKI, OKWENGU & J. MOHAMMED JJ.A)

CIVIL APPEAL NO. 28 OF 2017

BETWEEN

JEPHTHER O. OPANDE.....APPELLANT

AND

MARY ATEMO GATHIRIGA.....RESPONDENT

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

at Kitale (E. Obaga. J.) dated 16th May 2016

in

ELC No. 54 of 2016)

JUDGMENT OF J. MOHAMMED, JA.

Background

[1] The respondent, **Mary Atemo Gachiriga**, sued **Jephther O. Opande** the appellant at the Environment and Land Court seeking an eviction order out of the subject land parcel known as **Waitaluk/Kapkoï Sisal Block 1/Kibormos 177** (the suit property). The respondent's suit was based on the fact that she was the owner of the suit property, having purchased it from its previous owner, **Saidi Kipkalum Mohamed** vide a sale agreement dated 8th August, 2005 for a consideration of Kshs. 780,000/=

[2] The appellant filed a statement of defence, in which he denied that the suit property belonged to the respondent, and denied having trespassed onto the suit property. He maintained that the suit property belonged to him having bought the same. He added that he registered a caution on parcel **No. Watailuk/Kapkoï Sisal Block 1/Kibormos/20** which upon subdivision resulted to **Waitaluk/Kapkoï Sisal Block 1/90, 171, 172, 173, 178, 179, 180, 181 and 182**.

The appellant complained that the caution was unprocedurally removed on 6th November 2003 and urged the court below to nullify the respondent's title as it was obtained fraudulently.

[3] The learned Judge having considered the evidence before him found that the respondent had proved her case and issued a declaration that she was the sole owner of the suit property and further directed that the appellant be evicted from the suit property. The learned Judge also dismissed the counterclaim lodged by the appellant for lack of evidence.

[4] The appellant is now before us seeking to have the judgment of the trial court set aside and/or the suit referred back to the court below for re-hearing. The appellant's contend that the learned Judge erred in law and fact in finding that the respondent had proved her case to the required standards and that the appellant had failed to prove his case.

[5] The appellant further contended that the learned Judge misapprehended the facts and wrongfully exercised discretion in favour of the respondent; and that the learned Judge failed to consider and evaluate the evidence by the appellant thereby arriving at the wrong decision to the detriment of the appellant.

Submissions by Counsel

[6] The hearing of the appeal, proceeded by way of written submissions that were duly filed by the parties' counsel which they highlighted, with **Mr. Barongo** appearing for the appellant submitting that in the letter dated 27th December, 2006, the Chief Land Registrar had noted and listed all the anomalies in the respondent's title; that the Land Registrar had also indicated that in the event that sufficient evidence was not produced all subsequent transactions would be declared a nullity; and that the respondent was also required to adduce evidence of payment of stamp duty and the Land Control Board's Consent. For those reasons counsel urged us to allow the appeal.

[7] On behalf of the respondent, **Miss Munialo** submitted that the learned Judge did not err in reaching this impugned decision; that it was upon the appellant to prove that there was fraud in the manner that the title was obtained. Counsel urged us to find that the appeal has no merit and to dismiss the same with costs.

Determination

[8] As this is a first appeal, we are cognizant of our duty to re-evaluate the evidence tendered before the trial Court and reach our own conclusions. See **Selle V. Associated Motor Boat Company Ltd [1968] EA 123**, where the Court outlined the duty of a first appellate court 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 they 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 had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence in the case generally.”

[9] I have anxiously considered the record in light of the submissions made on behalf of the parties. In my view the two main but related issues in the appeal are whether the learned Judge erred in finding that the respondent had proved her case to the required standard; and whether the trial Judge erred in finding that the appellant had failed to prove his counter-claim.

[10] On the first issue, it was submitted for the appellant that the Land Registrar had noted that there were anomalies in the registration of the subject title and added that unless evidence was produced all subsequent transactions would be a nullity.

Further, counsel complained that there was no evidence of payment of stamp duty and issuance of the Land Control Board consent.

On the other hand, counsel for the respondent contended, in reply that it was the duty of the appellant to prove fraud in obtaining the title as he who alleges must prove.

[11] The standard or burden of proof where fraud is alleged in civil matters has been held in decided cases to be higher than the ordinary standard of balance of probabilities. See **Kinyanjui Kamau V. George Kamau Njoroge (2015) eKLR**; and **Bruce Joseph Bockle v Coquero Ltd (2014) eKLR**. The particulars of fraud must be specifically pleaded and strictly proved. Indeed, allegations of fraud are of serious nature and may carry with them penal consequences that may further infringe on a person's right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved. In **Emfil Ltd V. Registrar of Titles Mombasa (2014) eKLR**, this Court pronounced itself as follows on the issue:-

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence.”

[12] The cancellation of the respondent's title is precisely what the appellant sought to achieve by his counter-claim in which he alleged that the respondent obtained the suit property through fraud, particulars of which are enumerated below:

- a) That the caution registered by the respondent on 16th March, 2005 was purportedly and curiously removed on 16th November, 2003.
- b) That both entries on removal of caution and closing of the Land Register on Sub-division into new Nos 171 and 173 were done without being signed for;
- c) That no Land Control Board consents or duly authorized mutation forms were prepared or produced to support the sub division;
- d) That no registry Index Maps (R.I.M) were prepared or produced to support subdivision and issuance of titles to “**transferees**”; and
- e) That no evidence of payment of statutory fees in support of all the transactions was produced.

[13] Under **Section 27 of the registered Land Act (repealed)**, the registration of the Respondent as the proprietor of the suit property vested in her the absolute ownership thereof which could only be successfully challenged upon proof of fraud. It is now well settled that where fraud

is pleaded, it must be distinctly proved and the onus of proof is heavier than in ordinary civil cases. In *Vijay Morjaria V. Nansing Darbar & Another (2000) eKLR*, this Court stated that:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud must be stated on the face of the pleadings. 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 acts.” (Emphasis supplied)

[14] In *Central Bank of Kenya Ltd Vs Trust Bank Ltd & Others, (1996) eKLR*, this Court rendered itself as follows:

“The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case.”

Upon the production of the title by the respondent, that was *prima facie* evidence that she had acquired a proper title to the suit property and since that title was being challenged by the appellant on the grounds of fraud, the onus was on him to lead evidence to prove that allegation.

[15] The only evidence the appellant relied on to prove fraud was a letter dated 27th December, 2006 in which the Chief Land Registrar sought evidence of payment of statutory fees such as stamp duty. There was no evidence produced by the appellant to establish whether the evidence of payment was produced or not.

The Chief Land Registrar was also not a party in those proceedings nor a witness. The burden was on the appellant to demonstrate, by evidence that the respondent had not paid statutory fees. The respondent had no burden at all to discharge in respect of what was alleged by the appellant.

[16] From our own evaluation of the evidence on record, the trial Judge cannot be faulted for that finding. The appellant merely alleged fraud but the evidence adduced fell far short of what was required to prove fraud as required in the cases cited above.

The trial Judge was satisfied that upon production of the title showing that the respondent was the registered proprietor of the suit property, the onus shifted to the appellant to demonstrate that such registration was obtained fraudulently. This is what the trial Judge stated in his judgment:

“What the Plaintiff needed to prove is that she is the owner of the suit land and that she bought the suit land after which she processed the title. She has done this. She was not expected to show receipts for payment of stamp duty and other statutory fees. It is the Defendant who is alleging that the title was obtained fraudulently who was expected to adduce evidence that the Plaintiff did do all these. It is the Defendant who is calling for nullification of title who should have proved that the title was not obtained in a lawful way.”

[17] The appellant’s counsel further faulted the trial judge for dismissing the appellant’s counter claim.

In his counter claim, the appellant sought a declaration that the title held by the respondent herein was fraudulently obtained and therefore was a nullity and that the caution registered by the appellant was valid.

[18] The appellant contended that he caused a caution to be registered against title **No. Waitaluk/Kapkoi Block 1/Kibormos/90** on 16th June, 2005. The trial Court noted, however that from the extract of the register it was apparent that the file in respect of parcel **No. Waitaluk/Kapkoi Block 1/Kibormos/90** was closed on sub division on 6th November, 2003 and but it was not clear how the same was registered on 16th June, 2005 yet the file had been closed for sub-division on 6th November, 2003.

]There was no evidence by the appellant to establish that the caution was procedurally lodged and unprocedurally removed. The appellant expected the respondent to provide evidence to prove these facts yet he was the one who made the allegation and asked for the nullification of title.

[19] In conclusion, I find that the respondent proved to the required standard that she is the rightful owner of the suit property having bought it from the previous owner and subsequently being issued with a title deed. On the other hand, the appellant failed to prove that the title was issued fraudulently.

[20] From the impugned judgment it is clear that the learned Judge considered the rival claims and the submissions before he dismissed the appellant’s counter-claim. Having failed to prove fraud on the part of the respondent, the appellant’s counter-claim was clearly for dismissal.

[21] Accordingly, I find no merit in this appeal and accordingly dismiss it with costs to the respondent.

The Judgment is signed under **Rule 32(3)** of the Court of Appeal Rules, since the Hon. Mr. Justice P. N. Waki, JA ceased to hold office of Judge of Appeal upon retirement from service.

Dated and delivered at Kisumu this 30th day of December, 2019.

J. MOHAMMED

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF OKWENGU, JA

[1] I have read the judgment of **J. Mohammed, JA** in draft, and I am in agreement that this appeal has no merit. The respondent who is the registered proprietor of land parcel No. Waitaluku/Kapkoi Sisal /Block1/Kibormos/177 measuring 1.21 hectares (hereinafter referred to as the suit property), sued the appellant who was in possession of the land seeking to have him evicted from the land.

[2] The appellant contended that the respondent's purported title was a nullity as the same was obtained fraudulently. He maintained that he was rightfully in possession of the suit property as he was a purchaser for value. He therefore counterclaimed for a declaration that the title held by the respondent was obtained fraudulently.

[3] During the hearing, the respondent produced a copy of the title which was in his name. The appellant also produced a copy of an agreement of sale signed between him and one **Said Kipkalum Mohammed**, from whom he bought the suit property.

[4] The appellant concedes that the respondent has a title for the suit property but maintains that the title was obtained fraudulently. Section 26 of the Land Registration Act states as follows:

“26. Certificate of title to be held as conclusive evidence of proprietorship

(1) 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.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

[5] This means that the respondent having satisfied the court that she has a Certificate of Title for the suit property issued in her name, there was *prima facie* evidence that she was the proprietor of the suit property and it was for the appellant, who was challenging that title, to prove that the title was obtained fraudulently.

[6] The learned Judge having duly examined the evidence adduced before him, and the documents produced, found that the appellant had failed to prove her allegations of fraud and therefore had failed to discharge the burden of proof.

[7] Having examined the documents, I find that the appellant heavily relied on the communication between the Chief Land Registrar and the District Land Registrar. However, there was no witness called from the Lands office to explain the procedure or how the transaction resulting in the respondent's title could be faulted. The Registered Land Act (now repealed) had appropriate provisions to deal with registration and removal of cautions. These provisions were provided in sections 131 to 135 of that Act. Although the appellant complained that his caution was removed irregularly, he has not satisfied this Court that he invoked any of those provisions or moved the court for appropriate orders. In the circumstances, the appellant failed to prove his counterclaim.

[8] The appellant having failed to satisfy the court that his possession of the suit property was justified, the learned Judge cannot be faulted for dismissing his counterclaim and granting an order of eviction against him as sought by the respondent.

[9] The upshot of the above is that the appeal shall be dismissed with costs. The judgment is delivered under Rule 32(3) of the Court of Appeal Rules, as Waki, JA ceased to hold office upon his retirement from service.

Dated and delivered at Kisumu this 30th day of December, 2019.

HANNAH OKWENGU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.