



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 278 OF 2014

MARY MUGURE DANIEL KARIUKI.....APPELLANT

AND

RAHAB WARUGURU KARIUKI.....1ST RESPONDENT

MARY NJERI KARIUKI.....2ND RESPONDENT

GLADYS WANJA KARIUKI.....3RD RESPONDENT

FRASIS WANJIKU KARIUKI.....4TH RESPONDENT

EUNICE WANJIRU KARIUKI.....5TH RESPONDENT

**GEORGE KAHARA KARIUKI.....6TH
RESPONDENT**

JAMES KIMOTHOKARIUKI.....7TH RESPONDENT

**LUCY MWIHAKI KARIUKI.....8TH
RESPONDENT**

HANNAH WANJIRU KARIUKI.....9TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi, (Mutungi, J.) dated 14th February 2012

in

ELCC NO. 1339 OF 2005)

JUDGMENT OF THE COURT

By a plaint dated 8th November 2005 and amended on 9th February 2010, the appellant, **Mary Mugure Daniel Kariuki** instituted a suit in the **Environment and Land Court** in Nairobi against the **1st**

respondent, Rahab Waruguru Kariuki and her eight children, the 2nd to 9th respondents. The appellant pleaded that the transfer of the property known as **Land Reference No. Kabete/Nyathuna/301** measuring approximately 2.4 hectares (**the suit property**) by **Daniel Kariuki (the deceased)** to the 1st respondent and the subsequent subdivision and transfer thereof by the 1st respondent to the other respondents was fraudulent, null and void. She further pleaded that the transfer by the deceased to the 1st respondent of his shares in **Kiambu Dairy & Pyrethrum Farmers Co-operative Union Ltd** and **Limuru Dairy Co-operative Society Ltd** was also fraudulent, null and void. Lastly the appellant averred that the 1st respondent had failed to account to her for the proceeds of sale of a property known as **Parcel No. 691 Kambi ya Moto/Menengai Block 1**.

The particulars of the fraud were pleaded in paragraph 4 of the plaint in which the appellant averred, in the main, that the 1st respondent caused the deceased, who she knew to be mentally impaired at the material time, to transfer the suit property and the shares to her. Subsequently, it was averred, the 1st respondent subdivided the suit property and transferred the same to the other respondents so as to defeat the appellant's claim to the suit property. By way of remedies, the appellant prayed for an order to compel the respondents to transfer to her half share of the suit property and to give to her half share of the proceeds of all the other properties of the deceased.

In their joint defence filed on 18th February 2010 the respondents denied that the transfer of the suit property was fraudulent or that at the time the deceased was suffering from any impairment. They further averred that the transfer of the suit property to the 1st respondent was lawful and above board, as was the subsequent subdivision and transfer to the other respondents. It was also averred that the appellant's suit was time-barred under the Limitation of Actions Act.

The suit was partly heard by **Okwengu, J.** (as she then was) who recorded the evidence of the appellant and her two witnesses. Thereafter, by consent of the parties, **Mutungu, J.** concluded the matter after hearing the evidence of the 1st respondent. By a judgment dated 14th February 2014, the learned judge found that although the suit was not time-barred, there was no evidence that the deceased was mentally impaired at the material time and that the transfer of the suit property was not fraudulent. He accordingly dismissed the suit with costs, thereby precipitating this appeal.

The evidence on record is fairly straightforward. The deceased, who died on 16th July 2003, and the 1st respondent, were married under Kikuyu Customary Law before converting the marriage on 16th November 1994 to a monogamous union under the **African Christian Marriage and Divorce Act, cap. 151** (repealed). The 2nd to the 9th respondents were their biological children. By a will dated 9th June 1987, the deceased bequeathed the suit property to the 1st respondent for her benefit and that of her 8 children. On 17th September 1991, the Kikuyu Land Control Board gave its consent to the transaction and on 23rd March 1992, some 11 years before the death of the deceased, he transferred the suit property to the 1st respondent. The 1st respondent later subdivided the suit property into 5 parcels, namely **LR Nos. Kabete/Nyathuna/2749, 2750, 2751, 2752 and 2753**, which she transferred to the other respondents on 30th October 2007.

As regards the relationship between the appellant and the deceased, the evidence was that she was married to the deceased under Kikuyu Customary Law in 1964 while he was working at Kiambu Hospital. They cohabited in Kiambu and later in Nairobi, when the deceased was transferred to Kenyatta Hospital. The appellant and the deceased had 6 children, whose birth certificates bore the name of the deceased as the father. Regarding the suit property, the appellant's evidence was that in 1973 the deceased divided it physically into two portions, one for herself and the other for the 1st respondent. She worked her portion on which she did not have a house, until 1998 when she left for the USA. When she returned in 2005, she found the suit property and the shares specified above, already transferred to the 1st respondent. The deceased however had, on 11th January 1990, transferred to the appellant the property known as **LR No. Dagoretti/Uthiru T 69**.

Specifically on the mental condition of the deceased, the only evidence adduced was by the appellant herself. She testified in her evidence in chief that after the deceased stopped working in 1991, he “**appeared**” to be confused. In her own words:

“He might have transferred the land to Rahab (the 1st respondent) without realising the implication...I think it is this confusion that resulted in his doing things which were not consistent. I am claiming the land against Rahab because she misused my husband when he was in a confused state.”

On cross-examination, she stated as follows:

“The transfers were made by the deceased when he was of unsound mind. The deceased became of unsound mind in 1991. I could not take my husband (to the hospital) as he was no so sick as to be unable to do things, however his way of thinking just changed all of a sudden...I did not consult any psychiatrist.”

Lastly on Parcel No. 691 Kambi ya Moto/Menengai Block 1 and the shares in Kiambu Dairy & Pyrethrum Farmers Co-operative Union Ltd and Limuru Dairy Co-operative Society Ltd, the evidence showed that the deceased was the owner of Parcel No. 691 Kambi ya Moto/Menengai Block 1, which he sold on 16th December 1983 to **Clement Njuguna Mwangi**; that the deceased transferred his shares in Kiambu Dairy & Pyrethrum Farmers Co-operative Union Ltd, and that the 1st appellant was the subscriber and owner, in her own name, of the shares in Limuru Dairy Co-operative Society Ltd, where she was selling and delivering milk.

On 17th August 2016 this Court directed the appeal to be heard and determined by written submissions. We must point out, at the outset, that the suit that led to this appeal was a claim before the Environment and Land Court, in which the appellant was challenging the mental capacity of the deceased to transfer the suit property and the specified shares to the 1st respondent. That is what the parties pleaded and that is what the trial court was required to determine. As this Court stated in **Kenya Commercial Bank Ltd v. Sheikh Osman Mohammed, CA. No. 179 of 2010**:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim.

Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

(See also **Baber Alibhai Mawji v. Sultan Hashim Lalji & Another, CA.No. 296 of 2001** and **Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182**).

The case before the trial court was not a succession cause in which dependants of the deceased were challenging distribution of his property or seeking provision for themselves. The 1st respondent was not sued in her capacity as administrator of the estate of the deceased. Nor was the case before the court a matrimonial property claim. That explains why it was not filed in the Family Law and Succession Division of the High Court. We are constrained to sound this caveat because, with great respect, the appellant’s memorandum of appeal and the bulk of her written submissions, have gone off the rails and purported to present an appeal on distribution of the estate of the deceased under the Law of Succession Act or on distribution of matrimonial property under the Matrimonial Property Act, complete with authorities. As far as this appeal is concerned, we shall not be distracted and will resolutely restrict ourselves to the case as pleaded and determined by the Environment and Land Court.

The appellant’s contention is that the learned judge erred in failing to find that the transfer of the suit property to the 1st respondent and her subsequent subdivision and transfer thereof to her children was

fraudulent. It was contended that three of the respondents, the 6th, 8th and 9th, were living in Boston, USA between 1990 and 1996 and therefore could not have signed the transfers. It was also contended, on the authority of the judgment of the Environment & Land Court in **Olympic Company Trading Ltd & Another v. Said Mohamed & 4 Others, ELCC No 259 of 2012**, that the transfer of the subdivision to the other respondents was in violation of the doctrine of *lis pendens* and was therefore null and void. Without batting an eyelid, it was urged that the learned judge further erred by failing to conclude that because the deceased died of illness, he was not in his right state of mind to transfer the suit property to the 1st respondent.

Lastly the appellant faulted the learned judge for failing to find that she was entitled to half shares of the proceeds of sale of Parcel No. 691 Kambi ya Moto/Menengai Block 1 and half shares in Kiambu Dairy & Pyrethrum Farmers Co-operative Union Ltd, and Limuru Dairy Co-operative Society Ltd.

The respondents opposed the appeal, submitting that it had no merit. They argued that there was no evidence adduced by the appellant to prove fraud as regards the registration of the subdivisions to the 6th, 8th and 9th respondents; that the doctrine of *lis pendens* was not applicable in the circumstances, of this appeal; and that the appellant did not adduce any evidence of the deceased's lack of mental capacity;

This is a first appeal, which is by way of retrial. We are required to re-evaluate and reappraise the evidence adduced before the trial court and come to our own independent conclusions. We will bear in mind that as far as credibility of the witnesses goes, we do not have the advantage that the trial court had of seeing and hearing them as they testified. To that extent we shall defer to the findings of the trial judge, though we remind ourselves in this case that he heard and saw only one of the four witnesses who testified. Accordingly we shall not lightly differ with the trial court unless from the entire evidence we are satisfied that no reasonable tribunal, properly addressing itself on the evidence could have reached the conclusion that the trial court did. (See **Susan Munyi v. Keshar Shiani CA. No. 38 of 2002**).

The burden was upon the appellant to prove that at the time the deceased transferred the suit property to the 1st respondent, he did not have the requisite mental capacity. It was also her burden to prove that the said transfer and the subsequent transfer of the subdivisions were all fraudulent. In **Erastus Maina Gakunu & Another v. Godfrey Gichuhi Gikunu & Another, CA No. 50 of 2015** where it was alleged that the deceased was very ill, not in control of his mental faculties, and unable to comprehend the full import of his actions when he executed his will, this Court stated that the burden was on the appellants to demonstrate that on the date of execution of the will, the deceased was in such a state of mind, due to physical illness, that he did not know what he was doing.

While what was in issue in that case was execution of a will, we are of the view that the same principle must apply in the present case where it is alleged that due to illness, the deceased did not appreciate what he was doing when he transferred the suit property to the 1st respondent.

Regarding the mental capacity of the deceased, we are afraid the appellant did not adduce any cogent or credible evidence that the deceased lacked mental capacity. No medical evidence was adduced.

From the evidence of the appellant, extracts of which we have set out above, her view that the deceased did not have mental capacity was nothing but sheer conjecture and speculation. This is made clear by her testimony that the deceased ***“might have transferred the land to Rahab without realizing the implication.”*** Plainly this is mere speculation, not positive evidence that the deceased suffered from mental incapacity.

The other evidence upon which the appellant relies to prove the deceased's mental incapacity is the fact that he was ailing before he died. With respect, the mere fact that a person is indisposed and hospitalized does not, *ipso facto*, prove mental incapacity. The appellant was obliged to lead evidence on the nature of the deceased's illness and how, if at all, it affected his mental capacity. According to the evidence of the 1st respondent, who readily admitted that the deceased was ill and intermittently admitted to hospital, he was suffering from high blood pressure. The certificate of death, which shows the cause of the deceased's

sudden death to be high blood pressure, supports her assertion. The evidence on record, which also shows the deceased obtaining on 17th September 1991 the sanction of the Kikuyu Land Control Board for the transaction, is inconsistent with a person who did not appreciate what he was doing due to lack of mental capacity.

The fraud that was pleaded regarding the transfer of the suit property to the 1st respondent was founded on the alleged mental incapacity of the deceased, which we have found was not proved. Having pleaded fraud, the appellant was obliged to prove it to a standard above a balance of probabilities. In **R. G. Patel v. Lalji Makanji [1957] EA 314**, the former Court of Appeal for Eastern Africa stated:

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

(See also **Gudka v. Dodhia, CA. No. 21 of 1980** and **Richard Akwesera Onditi v Kenya Commercial Finance Co Ltd, CA. No. 329 of 2009**).

In our view, the quality of evidence adduced by the appellant could not prove fraud to the required standard.

The fraud alleged in the transfer of the subdivisions was that the transfers were calculated to defeat the appellant’s claim because there was a pending suit. Far from proving fraud, we are satisfied that the trial court having ultimately found that the appellant’s claim against the respondents had no basis, the belated attempt to invoke the principle of *lis pendens* in this appeal is equally misconceived. The principle cannot serve to confer upon the appellant title to the suit property. Secondly it was contended that the 6th, 7th and 9th respondents were in the USA between 1990 and 1996 and therefore could not have signed the transfers for their subdivisions. The evidence on record shows that the transfers of the subdivisions were registered on 30th October 2007. There is no evidence on record to show that the 6th, 7th and 9th respondents were not in the country then. The burden was on the appellant to prove that they were in the USA, for it was her who so asserted.

We are also satisfied that the findings of the learned judge as regards the sale of Parcel No. 691 Kambi ya Moto/Menengai Block 1 way back in 1983 and the transfer by the deceased of his shares in Kiambu Dairy & Pyrethrum Farmers Co-operative Union Ltd to the 1st respondent as well as the ownership by the 1st respondent of shares in Limuru Dairy Co-operative Society Ltd is fully supported by the evidence on record and cannot be faulted.

Ultimately we are satisfied that this appeal has no merit and the same is hereby dismissed with costs to the respondents. It is so ordered.

Dated and delivered at Nairobi this 3rd day of March, 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR