IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 41 OF 2014

BETWEEN

PETER GITHINJI ……...……. 1ST APPELLANT

NAHASHON MWANGI MBOGO ……. 2ND APPELLANT

AND

JULIUS KIRUMA KARIUKI ……...…… 1ST RESPONDENT

KAMAU MWANGI …….. 2ND RESPONDENT

THE ATTRONEY GENERAL …..……. 3RD RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Makhandia, J.) dated 18th June, 2009

in

H.C.C.C No. 64 of 2003)

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JUDGMENT OF THE COURT

1. Before us is a first appeal against the judgment of the High Court *(Makhandia, J. as he then was)* dated 18th June, 2009, wherein the 1st appellant's title over ***Loc. 8/Matharite/Kiaheho/698,*** was cancelled and reverted to the 1st respondent.

2. By a Plaint filed in the High Court the 1st respondent sought the following orders:-

> · ***A declaration that the plaintiff (1st respondent) is the bona fide owner of all that parcel of land known as Loc. 8/Matharite/Kiaheho/181 as shown in the original survey of the plot and which parcel includes/compromise the parcel of land known as Loc. 8/Matharite/Kiaheho/698 and further that the purported sub-division/excision of the latter parcel from the former without the knowledge or consent of the plaintiff who is the owner thereof is unjust, illegal, null and void.***

- ***An injunction do issue restraining the 3rd defendant (1st appellant) whether by himself, successors or assigns or any one of them from disposing of, leasing, charging or dealing with the portion of land curved off from the parcel known as Loc. 8/Matharite/Kiaheho/181 and which is specifically referred to as Loc. 8/Matharite/Kiaheho/698.***

- ***The 4th defendant (3rd respondent) be ordered to rectify the register of land by cancelling the sub-division and or allocation or change of ownership of that portion of land that has been renamed Loc. 8/Matharite/Kiaheho/698 and that the same do revert back to the plaintiff so as to form an undivided parcel known as Loc. 8/Matharite/Kiaheho/181 measuring 2.22 Hectares (5.6 acres).***

3. It was the 1st respondent's case that the 2nd appellant sold ***Loc. 8/Matharite/Kiaheho/181*** *(suit property)* measuring 2.22 Hectares (5.6 acres) to the 2nd respondent on 16th December, 1964; thereafter, vide an agreement dated 27th January, 1987, the 2nd respondent sold the suit property to the 1st respondent for a consideration of Kshs. 300,000/=. According to the 1st respondent, he carried out a search and was presented with a map which confirmed the measurement of the suit property as 2.22 hectares (5.6 acres).

4. On or about February, 2000, the 1st respondent obtained consent from the Land Control Board and engaged the services of a surveyor with the intent of sub- dividing the suit property into two parcels. It is then that the surveyor pointed out to the 1st respondent that the suit property measured 1.82 hectares instead of 2.22 hectares as indicated on the map.

5. Subsequently, the 1st respondent learnt that 1 acre had been curved out of the suit property and renamed as ***Loc. 8/Matharite/Kiaheho/698,*** (parcel in dispute); the parcel in dispute was registered in the 1st appellant's name (the 2nd appellant's son). The 1st respondent maintained that he was not aware of the circumstances under which the suit property was altered. According to him, the aforementioned alteration of the suit property amounted to fraud on the part of the appellants hence the 1st appellant was not entitled to benefit from the same.

6. In a joint statement of defence, the appellants denied the allegations by the 1st respondent. They maintained that there was no contractual relationship between the 1st respondent and the appellants. According to them, the 1st respondent ought to have ascertained the measurement of the suit property he had purchased from the 2nd respondent; the 1st respondent only had recourse against the 2nd respondent. The appellants maintained that the 1st appellant's title over the parcel in dispute was legal and absolute.

7. On the other hand, the 3rd respondent filed a defence denying the allegations made by the 1st respondent in his plaint. The 3rd respondent contended that the 1st respondent's suit was incompetent and misconceived having been filed in contravention of the mandatory provisions of ***Sections 13A & 16*** of the ***Government Proceedings Act***. The 3rd respondent also contended that the 1st respondent's suit was time barred.

8. On 23rd October, 2006, the 1st respondent discontinued the suit as against the 2nd respondent. Thereafter, the parties vide a consent order issued on 2nd December, 2008, recorded the following consent:-

- ***The land Registrar be and is hereby directed to have the Murang'a District Land Surveyor visit the lands in dispute herein being Loc. 8/Matharite/Kiaheho/181 and Loc. 8/Matharite/Kiaheho/698 with the annexed maps, titles and green cards to ascertain the boundary between the two parcels and mark it on the ground and amend the map accordingly.***

· ***That upon visitation of the suit lands by the Murang'a District Surveyor a report on the findings be made by him which shall form the basis of the final submissions in this suit upon which the court shall pronounce judgment.***

· ***That the visit by the Murang'a District Land Surveyor be made to the suit land within 30 days of filing and pronouncement of this consent order by the court.***

9. Following the said order, the Land Registrar filed his report on 26th March, 2009 and the parties filed their respective written submissions. Convinced that the effect of the consent order was a waiver by the parties for the matter to be heard by oral evidence, the trial court vide a judgment dated 18th June, 2009 found that the appellants had fraudulently curved out the parcel in dispute from the suit property and proceeded to enter judgment in favour of the 1st respondent. It is that decision that is the subject of this appeal based on the following ground:-

· ***The Honourable learned Judge erred in law and in fact by failing to hold that the 1st respondent had not proved fraud as against the appellants and their title of land parcel Loc. 8/Matharite/Kiaheho/698.***

· ***The Honourable learned Judge erred in law and in fact by blaming the appellants for the reduction of the 1st respondent's land parcel without any evidence and without taking into account other factors that would have caused the 1st respondent's land actual size on the ground not tallying with the size appearing on its land's register and other land documents. Sic***

· ***The Honourable learned Judge erred in law and in fact by failing to take into account the fact that the 2nd appellant's land no. Loc.8/Matharite/Kiaheho/698 had existed on its own for a long period.***

· ***The Honourable learned Judge erred in law and in fact by making several conclusions and findings without evidence particularly the erroneous finding that the suit premises initially belonged to them (appellants) as a whole and that they had sold it to the 1st respondent.***

· ***The Honourable learned Judge erred in law and in fact by making adverse conclusions as against both appellants jointly whereas they had distinct issues noting the 2nd appellant was the current registered owner of land parcel Loc.8/Matharite/Kiaheho with a distinct right of ownership. Sic.***

· ***The Honourable learned Judge erred in law and in fact by failing to appreciate the privity of several land purchase contracts as between the parties in the suit and thus failing to note that the appellants were non-suited and the 1st respondent lacking locus as against the appellants. Sic.***

· ***The Honourable learned Judge erred in law and in fact by making a finding that the suit was res-judicata then proceeding to issue a judgment nonetheless.***

· ***The Honourable learned Judge erred in law and in fact by failing to make any finding as against the 2nd respondent who did not participate in the suit.***

10. Mr. Kangata, learned counsel for the appellants, submitted that the 1st respondent's claim was based on fraud; that the 1st respondent never proved any of the particulars of fraud that were set out in the plaint against the appellants. Mr. Kangata argued that the learned Judge (Makhandia, J.) erred in interpreting the report from the surveyor; the report did not attribute mistake or fraud on any party. According to him, the mistake on the measurement of the suit property could be due to an error on the

title documents or due to fraud on the part of the 2nd respondent.

11. Mr. Kangata urged that there was no privity of contract between the appellants and the 1st respondent; the 1st respondent purchased the suit property from the 2nd respondent; if there was any mistake on the measurement of the suit property only the 2nd respondent could shed light on the same. He submitted that the trial Judge's decision was based on speculation and conjecture. Mr. Kangata faulted the learned Judge's decision on the ground that he had failed to take into account that the parcel in dispute had existed for a very long time.

12. Mr. Kangata also faulted the learned Judge for making a final determination without hearing the parties. He submitted that despite the learned Judge observing that the issue in dispute had been determined by the Kahuro Land Disputes Tribunal he went ahead to determine the suit which was *res-judicata.* Mr. Kangata urged us to allow the appeal herein.

13. Mr. Kuloba, learned counsel for the 1st respondent in opposing the appeal, maintained that the judgment in this case was as a result of a consent order by the parties. The said consent of the parties had never been challenged hence the appeal herein was an afterthought. He submitted that the appellants had never challenged the report by the surveyor. Mr. Kuloba urged us to dismiss the appeal.

14. Mr. Masaka, learned state counsel appearing for the 3rd respondent, supported the findings and judgment of the trial court. He submitted that the parcel in dispute was hived off from the suit property; the trial court observed that there was a relationship between the appellants as father and son; there was evidence that the original land measuring 5.6 acres existed in 1960; the acreage in the year 1987 was still 5.6 acres. According to Mr. Masaka, there was no evidence from the lands office showing how the parcel in dispute came into existence. He urged us to dismiss the appeal.

15. In brief reply, Mr. Kangata admitted that the consent order had not been challenged. However, he argued that the consent was procedural and not substantive.

16. We have anxiously considered the record, the ground of appeal, submissions by counsel and the law. This is a first appeal and this Court has a duty to analyze and re-evaluate the evidence adduced in the superior court and draw its own conclusion. See ***Selle & Another v. Associated Motor Boat Co. Ltd., [1968] 123.***

17. From the record it is clear that the learned Judge delivered the judgment in question pursuant to the following limb of the aforementioned consent order:-

> · ***That upon visitation of the suit lands by the Murang'a District Surveyor a report on the findings be made by him which shall form the basis of the final submissions in this suit upon which the court shall pronounce judgment***.

18. Based on the foregoing consent the learned Judge held that the parties had waived their rights for the matter to be heard by way of oral evidence. The trial court went ahead and delivered the said judgment relying on the report by the surveyor and the written submissions by the parties. The trial court in its judgment dated 18th June, 2009 expressed itself as follows: -

> ***"Subsequently, parties filed and exchanged written submissions over the report which I have carefully read and considered. I have also carefully perused the report. I note however that the Attorney General did not file his written submissions. That notwithstanding my take on the dispute is that following the visit of the surveyor to the suit parcels he concluded thus:-***
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> > ***"Checking from the records held in my office (District Land Office Murang'a) it shows that parcel no. 698 is 0.4 hectares and parcel no. 181 is 2.22 hectares, but this means that parcel no. 181 R.I.M measurement and the ground***

measurements are almost the same but they are less by about 0.4 hectares compared to that which is shown on the green card held in my office".

My interpretation of that finding is that there is a hiving off of 0.4 hectares of the plaintiff's suit (1st respondent) premises. Following those findings therefore it is clear that land parcel No. Loc.8/Matharite/Kiaheho/698 should not exist in the first instance as the same being o.4 hectares is what is curved out from the suit premises. Thus if at all the 2nd and 3rd defendants (appellants)land Loc.8/Matharite/Kiaheho/698 is said to exist the same was brought into being fraudulently as alleged in the plaintiff's amended plaint whose particulars have been given.

The alteration of the suit premises in my view was done regularly and the defendants cannot feign ignorance for the suit premises initially belonged to them as a whole. They sold it as a whole to the 1st defendant who in turn sold it as a whole to the plaintiff. It is only the 2nd and 3rd defendants who may know at which stage they conspired to hive off 0.4 hectares of the suit premises".

19. The issue that falls for our consideration is whether the above findings by the trial court were proper. In our considered view, we find that the trial court erred in finding as it did. Why do we say so? Firstly, the 1st respondent's suit was based on the issue of fraud on the part of the appellants'; the 1st respondent set out the particulars of the said fraud in his plaint. It is trite that allegations of fraud must be strictly proved. In ***Rosemary Wanjiku Murithi –vs- George Maina Ndinwa, – Civil Appeal No. 9 of 2014***, this Court held:-

"Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud."

In ***Ratilal Gordhanbhai Patel –vs- Lalji Makanji, (1957) E.A. 314,*** it was held,

"There is one preliminary observation which we must make on the learned Judge's treatment of this evidence: he does not anywhere in the judgment expressly direct himself on the burden of proof or on the standard of proof required. 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."

20. Secondly, the report from the surveyor merely indicated that the measurement of the suit property on the ground was 1.82 hectares and differed from the measurement indicated on the documents at the lands registry which indicated the measurement as 2.22 hectares; a portion of 0.40 hectares was missing from the suit property and the parcel in dispute measured 0.40 hectares. In our view the said report by itself could not prove or establish to the required standard that indeed the parcel in dispute had been fraudulently curved out of the suit property.

21. Thirdly, we note that on record there is a letter dated 30th November, 2004 from the provincial surveyor addressed to the District Land Registrar indicating that previous records in respect of the parcel in dispute could not be traced. In our view cogent evidence was required to be tendered to show the circumstances under which the parcel in dispute came into existence in order to establish whether or not there was fraud as alleged by the 1st respondent. The onus is on the 1st respondent to prove the allegations of fraud as against the appellants in respect of the parcel in dispute. In our view this can only be done through oral evidence where the testimony of the parties can be tested.

22. Having expressed ourselves as herein above what is the consequence of the consent order that was recorded by the parties? In the case of ***Flora Wasike –vs- Destimo Wamboko, [1982 – 88) 1 KAR 625*** at page 626, Hancox, JA (as he then was) stated as follows:

> ***"It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out, see the decision of this court in J. M. Mwakio –vs- Kenya Commercial Bank Limited - Civil Appeal No. 28 of 1982 and 69 of 1983.In Purcell vs. F. C. Trigell Ltd, (1970) 3 All ER 671, Winn LJ said at 676:***
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> > ***"It seems to me that if a consent order is to be set aside, it can really only be set aside on grounds which could justify the setting aside of a contract entered into with knowledge of the material matters by legally competent person, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."***

23. A consent order can be set aside on certain grounds as set out in the case of ***Brooke Bond Liebig (T) Limited –vs-Mallya, [1975] E.A. 266***, wherein Law JA, stated :-

> ***"The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani –vs- Kassam, (1952), 19EACA 131, where the following passage from Seton on Judgments and Orders, 7th edition, Vol.1 p.124 was approved:***
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> > ***"Prima facie ,any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them..... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court..... or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement".***

Based on the foregoing, we find that the issue in dispute herein could not be justly determined only on the basis of the surveyor's report and written submissions without the parties adducing oral evidence. Consequently, we set aside the consent order issued on 2nd December, 2008, to the extent it restricts/bars the matter from going for oral evidence.

24. We are of the view that whether or not the 1st respondent's suit is time barred or *res judicata* or properly suited as against the appellants can best be determined at the trial court wherein the court will delve and consider the merits of the case.

25. We find that that the appeal has merit to the extent that the trial court entered judgment without giving the parties an opportunity to be heard through oral evidence. Consequently, we set aside the judgment dated 18th June, 2009, and remit the suit for retrial and hearing at the High Court by *viva voce* evidence. We direct that each party bears its own costs.

Dated and delivered at Nyeri this 24th day of February, 2015.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

…….

JUDGE OF APPEAL

J. OTIENO-ODEK

…….

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR