



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MARAGA, AZANGALALA & KANTAI JJ.A)**

**CIVIL APPEAL NO. 55 OF 2013**

**BETWEEN**

**PAMBA ONG'WENO AMILA..... APPELLANT**

**AND**

**JOHN JUMA KUTOLO..... RESPONDENT**

*(An Appeal from a Judgment of the High Court of Kenya at Busia (Kimaru, J.) dated 25<sup>th</sup> July, 2013*

**in**

**H.C.CA. NO. 34 OF 2010)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. The appellant, **Pamba Ong'weno Amila**, sued the respondent **John Juma Kutolo** in Busia Principal Magistrate's Court seeking three main reliefs: - rectification of the register in respect of Land parcel number **Samia/Luanda-Mudoma/1537** (*hereinafter "the suit land"*) by deleting the names of the respondent and inserting those of the appellant; eviction of the appellant from the suit land and a permanent injunction restraining the appellant from using the same land. The case was heard by the Principal Magistrate at Busia who made the following order:

***"I find that the plaintiff has failed to prove his case against the defendant on a balance of probabilities. The same is hereby dismissed with costs to the defendant."***

2. The appellant was aggrieved by the dismissal of his case and therefore appealed before the High Court at Busia. The appeal was heard by Kimaru, J. who found that all the grounds of appeal put forward by the appellant lacked merit and dismissed the appeal with costs.
3. The appellant did not give up hence the appeal before us premised upon some nine (9) grounds in the Memorandum of Appeal dated 28<sup>th</sup> November, 2013 which were reduced to two when learned counsel **M/S Kirenga** and **Nyanga** argued grounds 1 and 4 together and grounds 2,3,5,6,7,8 and 9 together. In the first cluster the issue raised was that the appellant lacked capacity to sell the suit land to the respondent as the land belonged to one **Oundo Ngweno**

**Namulakha** who was deceased at the time the suit land was purportedly sold to the respondent and in respect of whom succession proceedings had not been commenced. To buttress that argument Mr. Kirenga invoked this Court's decisions in the cases of **Troustic International & Another -V- Mbeyu & Another** [2008] 1KLR 730 and **Suleiman Bahemtulla Omar & Another -V- Musa Hersi Fahiye and 5 Others** [Nairobi CA No. 245 of 2011] (UR). Mr Kirenga further invoked the decision of the Privy Council in **Mistry Amar Singh -V- Kulubya** [1963] EA 408 for the proposition that where an illegality is proved the law should be given effect to even if both parties participated in the illegality.

4. The second cluster of grounds argued before us raised the issue of fraud which, according to Mr. Nyanga, was demonstrated by the different considerations allegedly paid by the respondent; dealing in the property of a deceased person without obtaining a grant of representation; assuming the issuance of title of the suit land to the appellant before the alleged transaction even when no title was indeed in existence and obtaining registration of the entire suit land when only one acre thereof was sold.
5. **Mr. Manwari**, learned counsel for the respondent, countered that the appellant was the registered proprietor of the suit land when the respondent purchased the same and therefore had capacity to enter into the sale transaction with the respondent over the suit land. In his view, if there was any fraud, with respect to the transfer of the suit land from the deceased, Oundo Ngweno Namulakha, then the same was perpetrated by the appellant alone. It was further learned counsel's view that the respondent purchased the entire suit land as evidenced by the sale agreement which the respondent produced at the trial. On alleged different figures of consideration, learned counsel submitted that the smaller figure was indicated for purposes of paying less stamp duty.
6. We have considered the record of the proceedings in both the subordinate court and those of the High Court. We have also considered the grounds of appeal argued before us, the submissions of learned counsel and the applicable law. This being a second appeal, only issues of law fall for consideration (***See Section 72(1) of the Civil Procedure Act***). We think the issues identified above are issues of law.
7. On the issue of the capacity of the appellant to sell the suit land to the respondent, both courts below found that he indeed had such capacity. An extract of title of the suit land was produced at the trial and shows that the appellant was registered as proprietor of the suit land on 1<sup>st</sup> August, 1996. The sale agreements admitted in evidence were dated 21<sup>st</sup> November, 1996. Clearly by that date the appellant had capacity to sell the suit land.
8. On this issue, the learned Principal Magistrate held:

***“The plaintiff had capacity to transfer the suit land which had been legally registered in his name as per copy of the register produced before court.”***

9. And the learned Judge of the High Court found:-

***“At the time the Respondent entered into the agreement with the Appellant, the suit parcel of land was registered in the name of the Appellant. The allegation by the Appellant that the land was registered in the name of a deceased person is not therefore supported by evidence.”***

10. In the premises we think the grounds of appeal challenging the capacity of the appellant to sell the suit land are obviously without merit and we reject them. Given our conclusion on the issue of capacity of the appellant to sell the suit land, our decisions in **Troustic International & Another -V- Mbeyu and Another** (supra) and **Suleiman Rahemtulla Omar & Another -V- Musa Hersi Fahiye & 5 Others** (supra), do not advance the case of the appellant. In the two cases, we found clear want of capacity to transact unlike in the case before us.
11. On the second issue of fraud, the learned Principal Magistrate found:-

***“It was upon him to prove that his name as owner of the suit land before sale was fraudulently put on the register. It was not upon the defendant to prove that the name was on the register fraudulently or that plaintiff had not undertaken***

**succession. It may as well be that it is the plaintiff was (sic) committed the fraud if any so as to pave way for sell of his deceased brother's land."**

12. The learned Judge of the High Court found:

**"The document that the Appellant relied on in support of his claim which was to the effect that he had sold part of the parcel of land is an obvious forgery meant to dupe the court. The trial court, and this court too, is not persuaded that the document that the Appellant relied on to support his claim that he had sold part of the suit parcel of land to the Respondent is genuine. The Appellant on his volition signed the application for consent to the Land Control Board at Funyula. He attended the Land Control Board Meeting. Consent for the transaction was issued by the said Land Control Board. The Appellant signed the transfer form transferring the suit parcel of land to the Respondent....."**

**It is this court's determination that the Respondent was properly registered as the owner of the suit parcel of land."**

13. Having considered the record and the material relied upon by the appellant to demonstrate fraud, we cannot fault the two courts below. Fraud is a conclusion of law. The facts alleged to be fraudulent must be set out and evidence led thereon to prove fraudulent intent. The appellant did not demonstrate that the respondent fraudulently caused him to be registered as the proprietor of the suit land. To the contrary, it was the appellant who, on the evidence, sold the suit land to the respondent. He did so as the registered proprietor of the suit land. He duly obtained consent of the relevant Land Control Board to sale and transfer the suit land to the respondent. He executed a transfer in favour of the respondent in respect of the suit land. All the relevant documents were availed to the Principal Magistrate who accepted them as valid documents. The learned Judge of the High Court considered the same documents and also accepted them as valid. We cannot interfere with those findings of fact by the two courts below.
14. Those facts, in our view, did not disclose fraudulent intent on the part of the respondent. We also bear in mind that allegations of fraud must be proved to a standard above balance of probabilities but below beyond reasonable doubt. See the case of **Gudka -V- Dodhia [Civil Appeal No. 21 of 1980]** where Law, JA (as he then was) stated:

**"the respondent was in effect being accused of fraudulent conduct and allegations of fraud must be strictly proved. The fraudulent conduct must be strictly proved more than a mere balance of probabilities as required in RG Patel Lalji Makanji [1957] EA 314."**

In **Central Bank of Kenya Limited -V- Trust Bank Limited & 4 Others [Civil Appeal No. 215 of 1996] (UR)**, this Court stated, on allegations of fraud:-

**"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."**

15. In the matter before us, the two courts below found no proof of fraud at all against the respondent. There was therefore no basis of finding in favour of the appellant on the issue of fraud. We are of the same view. The appellant fell far short of leading evidence to meet the above threshold required in law to prove fraud. In the premises, the case of **Mistry Amar Singh -V- Kulubya (supra)** which the appellant relied on is clearly distinguishable from the case before us. There, illegality was demonstrated against both parties. However, the Court also found that the respondent had not based his claim on illegality. The case is of no relevance to the case before us.
16. In the end, we are satisfied that the learned Principal Magistrate and the learned Judge of

the High Court reached findings which cannot be faulted and find this appeal without merit. The appeal is accordingly dismissed with costs.

Judgment accordingly.

**DATED AND DELIVERED AT KISUMU THIS 5<sup>TH</sup> DAY OF FEBRUARY 2015.**

**D.K. MARAGA**

.....

**JUDGE OF APPEAL**

**F. AZANGALALA**

.....

**JUDGE OF APPEAL**

**S. ole KANTAI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy

of the original.

**DEPUTY REGISTRAR**