



IN THE COURT OF APPEAL

AT NYERI

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

CIVIL APPEAL NO. 342 OF 2010

BETWEEN

JENNIFER NYAMBURA KAMAU APPELLANT

AND

HUMPHREY MBAKA NANDIRESPONDENT

(An appeal from the decree and judgment of the High Court of Kenya

at Nyeri (Sergon, J.) dated 14th May 2010

in

H.C.C.C NO. 42 OF 2009)

JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (Sergon, J.) dated 14th May 2010 in which the learned judge made the following orders against the appellant as the personal representative of the estate of Moses Kamau O. Mwangi (deceased):
 - a. ***THAT the Land Registrar, Murang'a is directed to cancel the name of Moses Kamau O. Mwangi (deceased) from the register as proprietor of L.R. No. NGINDA/SAMAR/BLOCK 2/315 and in its place the name of Humphrey Mbaka Nandi be inserted.***
 - b. ***THAT cost of this suit to be met by the estate of Moses Kamau O. Mwangi (deceased).***
2. The respondent filed a suit in the High Court seeking *inter alia* the cancellation of Moses Kamau O. Mwangi (deceased) as the registered proprietor of LR No. NGINDA/SAMAR/BLOCK 2/315 and his reinstatement as the registered proprietor of the suit property. The ground for seeking the cancellation is that on or about 15th October 1998, Moses Kamau O. Mwangi fraudulently and without the plaintiff's knowledge did transfer the aforesaid property to his name which property was then registered in the respondent's name. That the said Moses Kamau O. Mwangi did forge

- the respondent's signature to purport that the property had been transferred to him and he proceeded to apply and obtain a Land Control Board consent again forging the respondent's signature in the application form.
3. The learned Judge upon hearing the case delivered judgement on 14th May 2010 cancelling the registration of Moses Kamau O. Mwangi (deceased) as the registered proprietor of the suit property. Aggrieved by the judgement, this appeal was filed.
 4. The appellant cited 10 grounds of appeal which can be condensed as follows for brevity and to avoid repetition:
 - a. ***That the learned Judge erred in failing to specifically determine if there was forgery of any document and the cause of action was time barred.***
 - b. ***The learned Judge disregarded crucial evidence regarding possession and cultivation of the land by the appellant and the expulsion of the respondent's workers from the land in 1998.***
 - c. ***That the learned Judge failed to make any comment that no handwriting expert was called to testify.***
 - d. ***That the learned Judge shifted the burden of proof to the appellant to prove that the title of the late Moses Kamau O. Mwangi was clean.***
 - e. ***That the learned Judge's decision went against the weight of evidence.***
 5. At the hearing of the appeal, learned counsel J. N. Mbutia appeared for the appellant while learned counsel G. M. Gori appeared for the respondent.
 6. Counsel for the appellant elaborated on the grounds of appeal and submitted that the learned Judge erred in framing only one issue for determination to wit that *"the main issue is whether or not the late Moses Kamau O. Mwangi acquired the suit premises by fraudulent means."* It was submitted that the learned Judge erred in failing to address the issue of limitation and to make a specific determination on forgery. It was also submitted that the learned Judge erred in entering judgment in favour of the respondent and overlooking that the respondent had filed and withdrawn an earlier suit being Nyeri HCCC No. 49 of 2001. Counsel submitted that by overlooking the issue of limitation, the appellant was prejudiced and this lowered the threshold for dealing with matters of forgery. The appellant submitted that forgery had not been proved as the transfer form used to convey the property was attested by an Advocate who gave evidence and stated that both the transferor and transferee appeared before him at the time of attestation. Counsel submitted that the learned Judge erred in shifting the burden of proof to the appellant when he stated that:

"The defendant on her part testified alone without summoning the evidence of independent witnesses. She merely produced the copy of the register and official search to show that Moses Kamau O. Mwangi (deceased) was the registered proprietor of the land in dispute. She claimed her deceased father had acquired the land lawfully. The defendant did not tender any evidence to show how the deceased acquired the land."

7. Counsel for the respondent submitted that at all material time, the respondent was the registered proprietor of the suit property until 15th October 1998 when the deceased using forged documents and signature transferred the suit property to his own name. The respondent submitted that fraud was proved beyond doubt and it was unfortunate that the deceased died before giving evidence. Counsel submitted that evidence tendered on record illustrated how the respondent purchased the suit property from Mboi Kamiti Farmers Company and became the registered proprietor. The respondent denied ever entering into a sale agreement with the deceased; he denied signing the transfer form and also denied signing the form applying for consent of the Land Control Board. The respondent denied ever appearing before PW3, Patrick Maina Muiruri, the attesting Advocate to sign any transfer form. Counsel submitted that the national identity card of the respondent bearing his signature was produced in court and the signature thereon was markedly different from the one on the transfer form and the form for application for consent of the Land Control Board.

Counsel submitted that limitation period had not started to run since the issue at hand relates to fraud and when the fraud was detected, the respondent took action and initiated the present civil suit. In relation to the Nyeri HCC No. 49 of 2001 which was withdrawn, the respondent submitted that the suit was never decided on merit and the parties in that case were different from the parties to the present suit.

8. We have considered the rival submissions by learned counsel and examined the record of appeal. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. It was put more appropriately in *Selle v Associated Motor Boat Co. [1968] EA 123*, thus:

“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 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 demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E. A. C. A. 270*).”

9. This Court further stated in *Jabane – v- Olenja, [1986] KLR 664*, thus:

“This Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular *Ephantus Mwangi v Duncan Mwangi Wambugu (1982-88) 1 KAR 278* and *Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870*.”

10. The relief and prayer sought by the respondent in his plaint was cancellation of title in the name of Moses Kamau O. Mwangi (deceased) as the proprietor of the suit property. The prayer is grounded on the allegation of fraud. It is trite law that the registration of a person as proprietor of any property (other than a first registration) can be cancelled on the basis of fraud. The evidence on record shows that the registration of Moses Kamau O. Mwangi as the proprietor of the suit property was not a first registration and hence that registration could be cancelled if fraud was proved. The appellant submitted that the learned Judge erred in framing only one issue for determination. With due respect, we do not agree with this submission. The prayer sought in the plaint sought cancellation of title and the relief can only be granted if fraud is proved or disproved. The learned Judge did not err in identifying and framing this main issue as a determination of whether or not the late Moses Kamau O. Mwangi acquired title to the suit premises by fraudulent means. The learned Judge did not err because from the pleadings, the success or failure of the entire suit depends on whether fraud on the part of the deceased was proved.

11. The appellant further submitted that the learned Judge erred in not making a specific finding of fraud and determining whether forgery was actually committed by the deceased. In *R. G. Patel vs. Lalji Makani (1957) E.A. 314*, the predecessor of this Court at pg 317 held:

“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.”

12. In the present case, it is not enough for the respondent to have pleaded fraud; he must tender evidence that prove the particulars of fraud to the satisfaction of the trial court. In *Mutsonga vs. Nyati (1984) KLR 425*, at pg 439, this Court held: ***“Whether there is any evidence to support an allegation of fraud is a question of fact”***. In the present case, the learned Judge in dealing with the issue of fraud

expressed himself as follows:

“The evidence tendered by the plaintiff clearly establishes the fraudulent steps undertaken by the deceased and his accomplices in unlawfully grabbing the plaintiff’s property.”

13. What evidence is available on record to support the conclusion by the learned Judge that fraudulent steps were undertaken by the deceased? The learned Judge summarized the evidence available as follows:

“The plaintiff alleged that he visited the Lands Office in the year 1994 to collect his title deed but was told it was not ready. He kept on checking until he discovered that the land had already been transferred to the deceased. He denied having executed any of the documents which conveyed his proprietary interest to the deceased. The copy of the register produced by both sides shows that the title to the suit premises was issued to the plaintiff on 26th January 1994. The same register also shows that title was issued to Moses Kamau O. Mwangi on 15th October 1998. There is evidence showing the title issued to the plaintiff was cancelled. It is not clear when the aforesaid title was cancelled. It is, however, obvious from the cancelled title that the same was issued on 1st February 1994. The date of issue stated in the register does not tally with the one stated on the face of the cancelled title deed. The application for consent of Land Control Board allegedly made by the Plaintiff is not dated. The letter of consent does not also state the date of the application. The letter of consent is dated 8th September 1998. The transfer was signed on 9th October 1998.... The title allegedly cancelled by the Land Registrar was issued on 1st February 1994 yet the register indicates it was issued on 26th January 1994. This anomaly was not properly explained by the Land Registrar (PW4). There is no cogent evidence that the plaintiff ever applied for the Land Control Board Consent. The application is not dated and the letter of consent indicates the application was also undated. The overall picture disclosed by the evidence is that the late Moses Kamau O. Mwangi did not genuinely obtain title in respect of LR No. NGINDA/SAMAR/BLOCK 2/315.”

14. This being a first appeal, we have examined and re-evaluated the testimony of PW1, PW3 and PW4. PW1 testified he did not sell the suit property. PW3 who is an advocate of the High Court testified that he attested the instrument of transfer that allegedly conveyed the suit property from the respondent to the deceased; he stated that the signatures on the transfer do not appear to be the same as that contained in the national identity card of the respondent. PW4 the District Land Registrar in Murang’a produced documents showing how the respondent purchased the suit property from Mboi Kamiti Farmers Company Limited and became registered as proprietor of the suit property on 26th January 1994. We have re-evaluated the evidence on record and find that the learned Judge did not err and drew the correct inference from the evidence adduced. We find no error of interpretation of the fact by the learned Judge.

15. The appellant contends that the learned Judge did not make a specific finding of fraud. We do not agree with this submission. The learned Judge explicitly states in the judgment that the overall picture disclosed by the evidence is that the late Moses Kamau O. Mwangi did not genuinely obtain title in respect of **LR NO.NGINDA/SAMAR/BLOCK 2/315.**” This is a finding that fraud was proved.

16. The appellant’s other contention is that no handwriting expert was called to verify the signature on the transfer form and the one on the application form for consent of the Land Control Board. Counsel for the respondent submitted that in as far as the respondent’s case goes; the respondent had testified that he neither signed the transfer form nor did he sign the application form for consent of the Land Control Board. The respondent submitted that the oral and direct evidence that he did not sign these forms was proof that he did not sign the forms and this fact was corroborated through comparison of the respondent’s signature as contained in his national identity card and the documents submitted by Mboi Kamiti Farmers Company Limited. We have considered the rival submissions on this point and state that

Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. **Section 107 of the Evidence Act** provides that “*whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*” **Section 109** stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as **Section 108 of the Evidence Act** provides, the burden lies on that person who would fail if no evidence at all were given on either side.

17. The appellant’s other contention is that she has been in possession of the suit premises since 1998 and the learned Judge erred in failing to give adequate consideration to the fact that the appellant has been cultivating the suit land since 1998; that the trial court should have paused to ask the question how come the appellant took possession of the suit premises in 1998 without any protest from the respondent. In reply, the respondent testified that he used to cultivate the suit property from 1994 until 1998 when his worker was chased away; that he reported the matter to Maragwa Police Station in the year 2000 and no action was taken as Moses Kamau O. Mwangi was dead. The appellant testified that though she does not live on the suit premises, she cultivates the land which is registered in the name of the deceased.

18. We have taken note of the appellant’s submission on this issue and we agree that the learned Judge ought to have addressed the issue of possession by the appellant in the judgment. Being the first appellate court, it is our duty to evaluate this item of evidence and apply the law. It is trite law that possession is nine-tenths ownership; it is also trite law that possession is not title and it is not proof of ownership. Ordinarily, proof of ownership is prima facie proof of possession but where there is a dispute, the presumption is that the person having title to the land is in possession (**See Canvey Island Commissioners – v- Preedy {1922} 1Ch. 179 § 17-26**). A person with a superior title can challenge the title of one who is in *de facto* possession of land. A person claiming as against the true owner cannot be said to have possession unless the true owner has been dispossessed. A *de facto* possession gives a right to retain possession as against all wrongdoers; it is not however sufficient as against the lawful owner. The issue in the present case revolves around two titles to the suit property and the court is to determine which of the two titles is superior and overrides the other. The respondent’s case is premised on the ground that the title registered in the name of the deceased was acquired fraudulently and cannot supersede and cancel the respondent’s prior registration as proprietor of the suit property. It is our considered view that when the root of title and legality of the process of acquisition of title is in issue, possession of the suit property is not a defence. We hold that although the learned Judge did not give consideration to the issue of *de facto* possession by the appellant, such possession is not a defence when the root of title is in issue.

19. It is the appellant’s submission that in 1998, the respondent’s worker was chased from the suit property and the learned Judge erred in failing to take this into account. To this, it is our considered view that a person who enters and expels another who is in possession of land does not obtain possession so as to enable him to maintain possession and acquire title against the evicted person seeking re-possession unless the person expelled has submitted to the expulsion by delaying to re-expel the intruder within a reasonable time. The evidence on record shows that the respondent reported the chasing away at the Maragua Police Station in the year 2000; subsequently, the respondent filed Nyeri High Court Civil Case No. 49 of 2001 which was later withdrawn; he then filed Nyeri High Court Civil Suit No. 42 of 2009 which gave rise to this appeal; these actions have been undertaken with a view to recover title and possession of the suit property. In the present case, the *de facto* possession by the appellant is no defence to an action to recover land as against an alleged true owner taking into account that the root of title is in issue.

20. We note that the appellant’s contention is that the respondent’s cause of action is founded on tort and the limitation period under **Section 4 (2) of the Limitation Act** is three years and since the deceased was registered as proprietor of the land in October 1998, three years had lapsed before the present suit was filed on 5th March 2009. We do not agree, and equity does not allow a person to benefit from his own fraud or illegality. The respondent’s suit is for recovery of land. On the issue of limitation, if the respondent’s worker was chased away in 1998, under **Section 9 as read with Section 7 of the**

Limitations Act, Cap 22 of the Laws of Kenya, a suit for recovery of land has a limitation period of twelve years. Twelve years from 1998 is the year 2010. We find that the limitation period in this matter had not lapsed when the suit was filed on 5th March 2009. As regards the contention that the cause of action is founded in tort, the appellant did not specify which tort was committed, was it trespass to land and if so; is this an admission that the entry to the suit property by the appellant was tortious? If the cause of action is trespass to land and the appellant is still in possession of the suit property, then trespass to land continues to exist and the limitation period has not started to run. For avoidance of doubt, we state that fraud cannot be the basis of a cause of action and the appellant is debarred from stating that the cause of action and limitation period commenced when the alleged fraud was committed.

21. The appellant did raise the issue that the learned Judge erred in shifting the burden of proof. The gist of the appellant's contention is the statement in the judgment to the effect that "*the legal representative did not attempt to explain the lawful steps the deceased took to obtain title*" and the statement that "*I am convinced the defendant has failed to establish how the deceased obtained title.*" **Sections 116 and 112 of the Evidence Act** provides an answer to the appellants concern. **Section 116 of the Evidence Act** provides that "*when the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.*" However, **Section 112** stipulates that "*in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.*" It is our considered view that **Section 112** is applicable in this case and the lawful steps or otherwise as to how the deceased came to be registered as proprietor of the suit property is a fact especially within the knowledge of the deceased and by extension the appellant as his personal representative. We hold that the learned Judge did not err by requiring the appellant to lead evidence as to how the deceased came to be registered as proprietor of the suit property.

22. In totality, our re-evaluation of the evidence and applicable law to the facts of this case shows that the respondent did indeed prove fraud on the part of the deceased and accordingly, the appeal herein has no merit and is dismissed with costs.

Dated and delivered at Nyeri this 25th day of July, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR