



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAKURU

Civil Appeal 292 of 2005

SIMON TOWETT MARITIM

APPELLANT

AND

JOTHAM MUIRURI KIBARURESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru (Hon. Lady Justice Sarah Ondeyo) dated 7th July, 2003

in

HCCC NO. 253 OF 1996)

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful defendant in the superior court. The respondent herein *Jotham Muiruri Kibaru* as the plaintiff in the superior court filed a suit against the appellant *Simon Towett Maritim* seeking the following reliefs:-

- “i. A declaration that as at the time the Land Control Board Consent, transfer and issue of Title No. Kericho/Chesinende/SS/97 was unlawfully obtained by the defendant, the registered owner, who was the plaintiff’s deceased mother Waithera Githinji; was deceased and therefore no lawful Title could pass in favour of the defendant.*
- ii. A declaration that the Land Control Board consent, transfer and consequent issue of Title No. Kericho/Chesinende/SS/97 was null and void ab-initio for want of owners consent to the purported transaction and that the purported transaction offends section 75 of the Kenya Constitution.*
- iii. That this Honourable Court be pleased to nullify the transfer and issue of Title to the defendant and to order that the same be transferred in the name of the plaintiff within SEVEN DAYS (7) from the date of decree and in default the Deputy Registrar of this Honourable Court be authorised to execute necessary documents on behalf of the defendant.*
- iv. Eviction Order to remove the defendant from Title No. Kericho/Chesinende/SS/97.*

v. **General Damages.**

vi. **Costs of this suit.”**

In order to appreciate the nature of the respondent’s claim in the superior court it may be necessary to set out the relevant paragraphs of the plaint which were as follows:-

“3. At all material times, the plaintiff’s deceased mother Waithera Githinji was the lawful and registered owner of Plot No. 97 Chesinende Settlement Scheme Kipkelion Division of Kericho District having been allotted with the same in 1971.

4. That the said plaintiff’s mother passed away in 1981 and was buried thereon and the plaintiff as the legal representative of the deceased’s Estate took charge of the said Plot No. 97 and built a permanent Stone House thereon and continued to develop the farm.

5. That on or about July, 1992 the defendant, unlawfully and fraudulently purported to have obtained a forged letter of consent from Kericho Land Control Board allegedly signed by the plaintiff’s deceased mother and further obtained forged transfer document allegedly signed by the plaintiff’s deceased mother in his favour.

PARTICULARS OF FRAUD

a) That the defendant made a misrepresentation of a material fact that the consent transfer documents had been signed by the deceased Waithera Githinji 11 years after she had died.

b) That the defendant made a misrepresentation of a material fact the consent and transfer documents had been signed by the deceased, while the deceased was an illiterate deceased lady.

c) That the defendant misrepresented to the Land Control Board that the deceased was before them at the time of hearing of the application while she had died 11 years earlier.

d) That the defendant misrepresented to the Land Control Board and to the Land Registrar that there was a land transaction between him and the deceased capable of being handled by them while he knew there was none.

e) That the defendant misrepresented to the Land Control Board that she was alive while she had died 11 years earlier.

f) That the defendant misrepresented to the Land Control Board that he had an existing purchase and transfer of land transaction with the deceased while there was none which could be transacted by the Land Control Board.

g) That the defendant misrepresented to the Land Registrar that there was a valid Land Control Board Consent for a transaction between him and the deceased Waithera Githinji capable of being acted upon by the Land Registrar.

1. That a consequence to the aforesaid forgery and misrepresentation the defendant unlawfully obtained title No. Kericho/Chesinende/SS/97.

2. And the plaintiff has suffered loss and damage.

3. The cause of action arose at Kericho within the jurisdiction of this Honourable court.”

The appellant (as the defendant in the superior court) through his advocate filed a written statement of

defence. Likewise, in order to appreciate the appellant's defence, we set out the relevant paragraphs of that written statement of defence which were as follows:-

“2. The defendant is a stranger to paragraph 3 and 4 of the plaint.

3. with regards to paragraphs 5 of the plaint the defendant denies content of the same and puts the plaintiff into strict proof thereof.

4. The defendant denies all particulars of fraud set out in paragraph 5 of the plaint and puts the plaintiff to the strict proof of each one thereof

5. The defendant refers to the sixth paragraph of the plaint numbered 1 and admits that he obtained title number Kericho/Chesinende/SS/97 but denies ever obtaining the said title unlawfully through forgery and misrepresentation and will at the hearing hereof adduce evidence in support of his denial.

6. The defendant refers to the seventh paragraph of the plaint numbered 2 and denies content of the same and states that the plaintiff took possession of the defendant's land parcel number 20 measuring 4½ acres the same situated at Lanet within Nakuru District in exchange for the land parcel he now alleges the defendant obtained through fraud. The defendant will at the hearing hereof adduce evidence to prove the same.

7. The defendant denies content of the ninth paragraph of the plaint referred to as 4 and puts the plaintiff to strict proof thereof.

8. Save for what is expressly admitted hereon the defendant denies each and every allegation made and contained in the plaint as if the same were set out and traversed seriatim.”

The hearing of the suit commenced in the superior court before Ondeyo J. on 30th April, 2001 when the appellant was represented by Mr. Orege and the respondent was represented by Mr. Ogolla. The respondent's evidence was that prior to 1992 he and his family lived on the suit land situated at Chesinende Scheme and that this land belonged to his deceased mother one Waithera Githinji. When tribal clashes broke out in 1992 in some parts of Rift Valley this part of Chesinende Scheme was affected. It was as a result of these tribal clashes that the appellant and two other people were introduced by the area Chief to the respondent with a view of exchanging parcels of land since the appellant claimed to have a piece of land in Nakuru which he wished to exchange with the suit land in Chesinende. One of those people who was with the appellant was Kimtai Arap Siele (PW3) who said that he had 4.5 acres of land in Nakuru. The suit land measured 12 acres. The appellant told the respondent that he would exchange his land on Koilel farm in Nakuru with the suit land. As the security was bad at that time the two agreed to exchange their pieces of land temporarily on the understanding that they would go back to their respective parcels, after the tribal clashes.

Following the oral agreement the respondent moved from the suit land to the land which the appellant claimed to be his. The appellant in turn moved to the suit land. It was the respondent's evidence that once the appellant moved to the suit land he started acts of thuggery on the land. For example, he knocked down the workers' house and two other structures. In 1993 the respondent discovered that the suit land had already been registered in the name of the appellant. The respondent in his evidence before the superior court produced a death certificate (Exhibit P2) showing that his mother died on 4th June 1981. He also produced the grant of letters of administration intestate issued to him in respect of the estate of his mother. He further produced a receipt (Exhibit P3) showing that the suit land belonged to his mother. It must be pointed out that the appellant was, indeed, arraigned before the Principal Magistrate's Court at Kericho and charged with two counts of forgery contrary to **section 350** of the Penal Code; two counts of uttering a false document contrary to **section 353** of the Penal Code and one count of uttering a false document contrary to **section 353** of the Penal Code. He was tried on all the five counts but eventually acquitted by the Principal Magistrate at Kericho. It would appear that the appellant was acquitted due to the fact that the charges were not properly framed. In concluding his judgment the learned Principal Magistrate made the following observation:-

“The accused may have acquired the title irregularly but the evidence is not sufficient to prove correct charges against him.

May be the aggrieved party could take up the matter in a civil suit”.

The aggrieved party was, of course, the respondent herein who filed the suit in the superior court. He was successful against the appellant hence this appeal before this Court.

When the respondent discovered that the appellant had been registered proprietor of the suit land he reported the matter to the police for investigation and possible prosecution of the appellant. According to the respondent the appellant had obtained registration of the suit land fraudulently.

In his defence the appellant told the superior court that prior to moving onto the suit land he lived on Koilel farm plot No. 20, which he had bought from one Kiprono Nyangusi. The appellant conceded that there was an agreement to exchange their respective pieces of land but denied that the exchange was to be on a temporary basis. As to why the application for consent (Exhibit P4) approved on 31st July, 1992 was signed by the respondent’s mother Waithera Githinji who was long dead at the time, the appellant said that it was the respondent who gave him the form. But when cross-examined he (appellant) conceded, that during the criminal case proceedings at Kericho he had told the magistrate that when he signed the consent form it was blank. He also conceded that all along he knew that the respondent did not have the grant of letters of administration.

On allegations that the appellant involved himself in acts of thuggery by destroying the respondent’s property the appellant told the superior court that there was no stone house on the suit land and that the stone house which was there had been burnt down prior to his moving into the land.

The learned Judge of the superior court considered the evidence before her and came to the conclusion that the appellant was not entitled to the suit land. In concluding her judgment the learned Judge stated:-

“The plaintiff has on balance of probability shown that the defendant is not entitled to the suit land. I therefore allow the plaintiff’s case and enter judgment for the plaintiff against the defendant as prayed in the plaint. A declaration is issued as prayed in prayers number 1 and 2 of the plaint. The registration of the defendant as proprietor of the suit land is thereby nullified and he is ordered to transfer the title to the plaintiff within 30 (thirty) days from the date of the delivery of this judgment failing which, the Deputy Registrar of this Court shall sign the transfer form in favour of the plaintiff. The defendant shall within 30 (thirty) days remove himself from the land failing which, he will be evicted from there. The defendant shall pay to the plaintiff the costs of this suit.”

Being dissatisfied with the foregoing the appellant filed this appeal citing the following grounds of appeal in his Memorandum of Appeal:-

“1. That the learned Judge erred in law and fact by finding for the plaintiff regardless of fact that the same had failed to prove his case of fraud against the defendant to the higher degree of probability required by law.

2. That the learned Judge erred in law and fact by shifting the burden of proving the fraud alleged upon the defendant, and specifically where she relied upon the defendant’s evidence in the criminal case (KERICHO PMCC CRIMINAL CASE NO. 997 OF 1997) wherein the same was acquitted on charges which formed the purported same cause of action in the civil suit), to prove the same against himself.

3. That the learned Judge erred in law and fact by determining, suo motu, issues neither pleaded by parties nor placed before court for determination and on which basis she found the defendant liable for fraud as claimed.

4. That the learned Judge erred in law and fact by relying upon the proceedings of the Criminal

case aforementioned to infer fraud from the defendant's activities.”

When the appeal came up for hearing on 28th September, 2006 Mr. Ochieng' Akong'o appeared for the appellant while Mr. L. M. Karanja appeared for the respondent. It was Mr. Akongo's submission that the learned Judge failed to direct her mind as to the standard of proof in a case where fraud is alleged. Towards the end of his submission Mr. Akong'o appeared to concede that the registration of his client could not be sustained.

Mr. Karanja, the learned counsel for the respondent, in supporting the judgment of the superior court submitted that the learned Judge was right since the transfer of the suit land was fraudulent. He cited instances of fraud showing that all the documents used in the registration of the appellant were forged.

This being a first appeal it is our duty to re-evaluate the evidence, assess it and make our own conclusions remembering that we have neither seen nor heard the witnesses and hence due allowance must be made for this – see ***Selle v. Associated Motor Boat Company Ltd*** [1968] E.A 1 23 at p. 126 and ***Williamson Diamonds Ltd v. Brown*** [1970] E.A. 1.

We have considered the evidence tendered in the superior court in the light of the above cited authorities and it appears to us that the main issue before that court was whether the appellant's registration as the owner of the suit land was fraudulent. There was evidence to the effect that the parties intended to exchange their respective pieces of land. The appellant moved to the suit land but it would appear that he had no land to exchange with that of the respondent. While the respondent was of the view that the exchange would be on temporary basis the appellant had his own ideas. Within a short period the appellant had already managed to effect the transfer of the suit land from the respondent's deceased mother to himself. The superior court had then to consider the circumstances under which the appellant became the registered proprietor of the suit land. It emerged from the evidence before the superior court that the documents which facilitated the registration of the appellant as the proprietor of the suit land were purportedly signed by the respondent's mother Waithera Githinji. But this lady had died way back in 1981 so that there was no way she could have signed the transfer forms and application for The Land Control Board consent. It also transpired that the said application for consent had no date. In her judgment the learned Judge stated inter alia:-

“The records held by the Settlement Fund Trustees show that the land in dispute was registered in the name of Waithera Githinji who was the mother of the plaintiff and who died in 1981. No transactions could have taken place in respect of this land by the said deceased person after her death in 1981. I have already found that whatever agreement that there was between the parties, the defendant had no land registered in his name in respect of which he could enter into agreement with the plaintiff. I have also earlier found that as the owner of the land in dispute was already dead, she could not have signed the application for consent (exhibit P4) as well as the transfer form dated 31st July, 1992 (Exhibit P5).”

The foregoing are the findings of fact by the learned Judge. In our view they were based on evidence before her. As we understand the facts before that court, it was clear that the appellant had no land registered in his name. Therefore he had no land he could offer for exchange with the respondent. But more importantly, the appellant engineered a scheme in which the suit land was transferred into his name. This was achieved by documents of transfer which falsely showed that the registered proprietor of the suit land and who was the mother of the respondent was not only alive but quite willing to sign the necessary transfer forms in favour of the appellant. This could, of course, not happen since the mother of the deceased had already passed on in the year 1981 well before the tribal clashes of 1992 that led to the idea of exchanging parcels of land. The sum total of all this was that all the documents used in effecting registration of the appellant as the proprietor of the suit land were forgeries. The entire transaction which purported to transfer the suit land from the deceased mother of the respondent to the appellant was fraudulent and hence null and void.

In ***Peters v. Sunday Post*** [1958]E.A. 424 at p. 429 Sir Kenneth O'Connor P. said:-

“As already mentioned, the learned Judge found against the appellant on the issue of whether the respondent company had entered into a binding oral contract to employ him for a four-year-period. It is a strong thing for an appellate court to differ from the finding, on a question of fact of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”

On our part we would say that having considered the evidence before the superior court and evaluating it afresh we have come to the same conclusion as did the learned Judge. We are satisfied that the registration of the appellant as the proprietor of the suit land was tainted with fraud. There was no way the appellant could have been registered proprietor of the suit land when all the necessary documents effecting the registration were all forgeries. No wonder the appellant’s counsel in concluding his submission conceded that it would be difficult to sustain the registration of the appellant as the proprietor of the suit land.

In view of the foregoing we have no hesitation in holding that this appeal is unmeritorious. We accordingly dismiss it with costs to the respondent.

Dated and delivered at Nakuru this 10th day of November, 2006.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E. O. O’KUBASU

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR