



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**  
**AT NAKURU**

**CORAM: OMOLO, SHAH & O'KUBASU, J.J.A**

**CIVIL APPEAL NO. 265 OF 1999**

**BETWEEN**

**KIPROP ARAP CHESULUT .....APPELLANT**

**AND**

**TIMOTHY S. SONGOK .....RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of  
Kenya at Eldoret (Nambuye, J) delivered on 4th October, 1999**

**in**

**H.C.C.C. NO.61 OF 1991)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellant ***Kiprop Arap Chesulut*** is the registered proprietor of a parcel of land known as ***NANDI/NGECHEK/433*** the area whereof is approximately 6.0 hectares. He was first registered as proprietor of the said parcel of land on 8th May, 1975 and the Land Certificate in regard thereto was issued on 24th October, 1985.

By a plaint dated 10th April, 1991 the respondent ***Timothy S. Songok*** alleged that he (the respondent) was at all material times the owner of 10 acres out of the said parcel of land. He alleged further that his wife who died on 1967 was buried on that parcel of land and that it was only in 1985 that he came to know that the appellant was on that parcel of land. The first registration of the parcel of land refers to 6 hectares whereas the respondent claimed 10 acres thereof. The reason why the said parcel of land is more than 10 acres in area is that the appellant had bought 4½ acres of adjoining land from one Arap Mutai and had consolidated the two parcels into one title, that is to say, the said parcel of land consisted of the land allegedly bought by the appellant from the respondent (10 acres) and the land bought by the appellant from Arap Mutai (4½ acres). The respondent claimed 10 acres of the said parcel and we will refer to the said acres as "the suit land".

The appellant stated in the superior court that he purchased the suit land from the respondent at an agreed price of Shs.2,000/= or Shs.200/= per acre. This was before Kenya became independent, he said. He said that the transaction was in writing but the written agreeent was no longer available. It 'got lost', he said. The appellant insisted that he bought the suit land from the respondent; that he had an employee staying

thereon from the time he bought it and that since 1988 his son James has resided on the suit land. He denied obtaining the land fraudulently.

On the other hand the respondent claimed he never sold any land to the appellant; that he only found the appellant on the suit land after the appellant had registered it in his name. He said that he had resided on the suit land since 1940. He inherited the land from his father along with two other brothers. One of the brothers sold his share of the inherited land and left. The respondent's share was left with his wife known as Tamaina who died in 1967. Since 1968 he had been visiting the suit land but saw nobody on it. After he came to know of the appellant's possession of the suit land in 1985 he went to the District Officer's office to complain. He was told to go to court. He did not do so for almost six years. He went on further to say that he was told in 1975 that the appellant was using the land.

This being a first appeal, it is by way of a re-trial and this Court is in as good a position as the learned Judge to make findings of facts and to draw inferences from those facts, bearing in mind that we have neither seen nor heard the witnesses and should make due allowance in this respect; see **Selle vs. Associated Motor Boat Co. Ltd** [1968] E.A. 123. With this caution we approach grounds 8, 9 and 10 of the memorandum of appeal which read as follows:

***"8. The learned Judge erred further in law and facts in disbelieving the evidence of the appellant having bought the suit premises for a valuable consideration and failing to take note that the appellant's title was protected, even if it were subsequent registration, by the provisions of section 143(2) of the Registered Land Act, supra.***

***9. The learned Judge further erred in law in failing to take into consideration or at all the evidence of D.W.5. David Kiamba Kilungu the Nandi District Land Registrar and exhibits D.2. and D.3 showing that the appellant was lawfully registered as the proprietor of NANDI/NGECHOK/433.***

***10. The learned Judge also erred in law and facts in failing to note that if the respondent who is a former Army and Prison Officer and lives barely 30 kilometres from suit land had any objections to registration of the appellant thereof he would have lodged objections thereto under the provisions of the Land Adjudication Act (Cap. 284 of Laws of Kenya)"***

We revert to what the respondent said in the superior court in his cross-examination. He said:

***"The person who was residing in the land died. I have a wife and I have many children. They require land. The first wife had 2 sons. I have only 12 acres here. It is not true that I have changed my mind after getting children. The land was mine. It is correct the boys are married. Since I have filed a case I told them the court will rule on it. I had fenced the land. If I tell them to remove him by force they can do so. I went and found him cultivating in 1985. In 1975 I was told the defendant Chesulut was using the land. It was in 1985 not 1975."***

We believe that a person deprived of his land, assuming such to be the case, will not sit around doing nothing for 16 years or even 6 years. He would take immediate action to recover his land. Although the respondent denied selling the suit land the action of the respondent or rather the inaction suggests that he must have parted with the possession of land and that it is only when the land became a better asset that he laid claim thereto.

The appellant says he bought the suit land prior to independence and that the agreement for sale was mislaid or lost. It is quite probable that an agreement for sale of land which becomes otiose after registration of land in the buyer's name may really be lost or mislaid. It is unreasonable to expect a person in the appellant's position to keep such document for 30 years or even 20 years.

A farmer and a village elder Chepsiror Busienei (PW2) confirmed that the appellant had come to buy the respondent's land. He witnessed the first payment of Shs.1,000/=. He confirmed that the agreed price was Shs.2,000/=. He is a neighbour of the appellant. He never saw the respondent since he left after selling the

land. Paul Chepkwony Terar (PW3) also stated that the respondent sold the suit land to the appellant for Shs.2,500/=. Both Busieneri and Terar confirmed that the respondent was looking for a buyer. We think that the evidence of Terar as regards the sale price (Shs.2,500/= as opposed to Shs.2,000/=) does not make him untruthful. After all these years there are bound to be some discrepancies in oral evidence.

The learned Judge whilst evaluating the evidence adduced on behalf of the litigants said this:

***"On the court's evaluation of the evidence adduced it is clear that there is no evidence of a sale agreement having been produced. This is what the defendant is relying on as his first limb of the claim. The plaintiff and his witnesses denied the sale. The evidence of sale by the defence is contradictory. There is no sale agreement and there is no transfer, no consent to the sale or consent for transfer. The defendant tried to go around this requirement by saying that he purchased the land at independence but at the same time he does not recall the year. All the witnesses called to confirm the transaction also said they do not recall the year."***

The learned Judge laid too much emphasis on minor discrepancies in evidence to find that there was no sale. As pointed out earlier versions of evidence given some 25 years or so after the event can vary. In fact, if there is no such variance after such a long interval of time a judge could even say that the evidence could well have been rehearsed. The learned Judge went on further to say:

***"In the absence of a sale and adverse possession the only logical conclusion to the facts herein is that as it is stated that the plaintiff went away long time ago and that at the time of adjudication he was not there. It is possible that the defendant took advantage of his absence and had the land registered in his name. DW5 the adjudication officer said that there was no objection lodged within the prescribed time by the defendant to adjudication and registration in respect of the said land. If the plaintiff was not aware and he says he even went there in 1985 and found the defendant using the land he could not have complained earlier. He used to go and then find nobody on the land and found that it was not being used. The logical conclusion is that the defendant had the land registered secretly with what he had purchased because there was no owner available."***

We think that the learned Judge erred in concluding that the appellant had secretly registered the suit in his name. It is not easy to have land so registered secretly. There are elaborate provisions under the **Land Adjudication Act** (Cap. 284, Laws of Kenya) for parties to object even if staying afar. We will soon come to these provisions. The learned Judge found the alleged fraud (secret registration) proved. It is trite law that allegations of fraud are not to be proved on a balance of probability. The burden of such proof lies somewhere between balance of probability and beyond reasonable doubt. The learned Judge found fraud on the part of the appellant on the mere fact that the appellant was the registered owner and yet the respondent denied selling the land to him. That is not enough. The appellant said that he was occupying the land. The respondent said that he used to regularly visit the land. Is it probable in these circumstances that the respondent did not take any action? The respondent is an ex-army as well as an ex-prisons officer. All these factors lend credence to the fact that the respondent must have sold his land to the appellant and that was at a time when land was not expensive and the respondent had no need of it. Although the respondent allegedly buried his wife on the suit land in 1967 there was no tangible evidence, to show that she was actually buried there.

We come now to the **Land Adjudication Act** (the Act). Section 5 of the Act enables the adjudication officer to establish adjudication sections within his jurisdiction area and further enables him by a separate notice to fix a period within which persons claiming interest in land within the adjudication section must make their claim, pointing out the boundaries of the land. He establishes a committee of not less than 10 persons. The adjudication officer can hear any objections or petition made in writing. The Act spells out the functions of survey officers, demarcation officers, recording officers and the said committee as well as the functions of arbitration board established under section 7 of the Act. The adjudication officer upon completing the adjudication register displays the original adjudication register for inspection at a convenient place within the adjudication section and then gives notice that the adjudication register has been completed and that it may be inspected at the place within the next 60 days within which time any

person affected by the adjudication register may record his objections in writing pointing out where and how the adjudication register is incomplete or incorrect. When the objections etc, if any, are heard the Chief Land Registrar upon receiving the adjudication register causes registrations to be effected.

It cannot be in dispute that prior to the appellant being registered as proprietor of the suit land all proper adjudication process was carried out. For the respondent to say that he was not aware of the adjudication process is clearly unbelievable. He comes from the area in question. Adjudication is not a secret process. The conclusion or inference we must draw and which the learned Judge ought to have drawn, is that having parted with the possession of the suit land he was really not interested in the adjudication process in the area.

We have come to conclusion that the respondent actually sold the suit land to the appellant and that the respondent had not objected at any stage to the adjudication in question and that although aware of the appellant's occupation at least in 1985 he took no action until 1991. These circumstances lead us to believe that the appellant was properly registered as proprietor of the suit land. Having said so we see no need to consider whether or not there was any fraud in the appellants registration and if there was whether the fraud entitled the respondent to claim the land back under a resulting trust or any trust. Mr. Sego for the appellant vigorously argued that a finding of fraud cannot be the basis of a declaration of trust as fraud and trust are two separate and entirely unconnected causes of action and that a fraudster cannot be equated to a trustee holding the land in trust for the party deprived of land by such fraud. The appellant's registration was a first registration and under section 143(1) of the Registered Land Act, Cap, 300 Laws of Kenya, such registration could not be defeated by proof of fraud.

The upshot of all this is that this appeal is allowed with costs. The judgment and the decree of the superior court dated 4th October, 1999 is set aside and the respondent's case in the superior court is dismissed with costs. These are our orders.

**Dated and delivered at Nakuru this 22nd day of March, 2002.**

***R.S.C. OMOLO***

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***JUDGE OF APPEAL***

***A.B. SHAH .***

.....

***JUDGE OF APPEAL***

***E.O. O'KUBASU***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR.**