Karanja v Ndungu (Environment and Land Appeal 2021 of 2021)
[2024] KEELC 7053 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7053 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 2021 OF 2021

JG KEMEI, J

OCTOBER 24, 2024

BETWEEN

JACINTA NDUNGI KARANJA ..... APPELLANT

AND

RAHAB NJERI NDUNGU ..... RESPONDENT

JUDGMENT

1. This appeal arises from the decision and Judgment of the Hon. O. Wanyaga, SRM in MCECL NO 762 of 2014, Thika.

2. The Appellant was the Defendant and the Respondent was the Plaintiff respectively in the trial Court.

3. The Plaintiff's claim was contained in the plaint dated the 17/9/2014 in which it was averred that the Plaintiff was the rightful allotee of plot 187 having been allotted to her by Gatundu Nyakinyua Company Limited (GNCL) in 1979. That in 2014 vide a search at the land's office, the Plaintiff discovered that the title had been fraudulently issued to the Defendant in 2002. That the said acquisition was fraudulent and the Plaintiff pleaded the particulars of fraud in para 5 of its plaint. In the end the plaintiff sought the following orders;

    a. That the defendant be ordered to stop interfering with the Plaintiffs title number Gatuanyaga/ Ngoliba/Block1/187 and that her title be cancelled and the land be registered in the name of the Plaintiff.

    b. Costs of the suit.

4. The Defendant denied the Plaintiffs claim in toto and contended that she purchased the suit land from Miriam Wanjiru Kariuki for the sum of Kshs 75,000/- in 2000 and was issued with a title in 2002. That the said Miriam Karanja had been allocated the land by GNCL in 1979. Interalia the Defendant contended that the claim of the Plaintiff was statute barred.

5. Upon hearing the evidence of the parties on 12/5/2021 the trial Court rendered itself as follows;

> " The upshot of the forgoing is that the Court is satisfied that the plaintiff has established on a balance of probabilities that it is more likely that whoever sold the land to the defendant did not have a good title to it and she (plaintiff) is the legitimate owner. Accordingly, the plaintiff's case is allowed in terms of prayer a. Given the nature of the suit and the fact that the defendant appears to have first been a purchaser the Court orders each party to bear their own costs."

6. Aggrieved by the decision of the Court the Appellant filed this appeal on the following grounds;

   a. The learned Magistrate erred in law and in fact in not finding that the Respondent's claim was time barred.

   b. The learned Magistrate erred in law and in fact in not addressing the issue of fraud which was not proved by the Respondent.

   c. The learned Magistrate erred in law and infact in finding that the Respondent had a better title than the Applicant.

   d. The learned Magistrate erred in law and in fact in disregarding the documentary evidence adduced by the Appellant.

7. On the 7/3/224 parties elected to canvass the appeal by way of written submissions. I have read and considered the submissions of the parties on record.

8. The Appellant submitted that it presented evidence in support of her ownership of the title. That interalia she provided the history of the suit land having acquired the same through purchase from the previous allotee, occupied the land and obtained title in 2002. That it is only in 2014 that unknown people started constructing a house on her land which she quickly stopped. She faulted the trial Court by holding that the Respondent proved her case and yet there was a draw in the balance of probabilities given that none of the parties established ownership of the land.

9. The Appellant further submitted that the trial Court erred in shifting the burden of proof to the defendant instead of the Plaintiff. She relied on the case of Kirugi & Anor Vs Kabiya & 3 others (1987) KLR 347 where the Court held that the burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard on formal proof.

10. In summary the Appellant faulted the Court on two fronts; declaring the Respondent the owner of the land and secondly shifting the burden of proof to the Appellant on a balance of probabilities.

11. The Respondent in opposing the appeal submitted that the Respondent proved her case on the required standard by presenting all the ownership documents unlike the Respondent who wields a certificate of title which was obtained unprocedurally and fraudulently. She urged the Court to dismiss the appeal.

Analysis and determination

12. Having considered the appeal, the record of appeal, the Judgement of the trial Court, the grounds of appeal, the rival submissions and the authorities relied on, the issues that commend themselves for determination are; whether the suit was time barred; whether fraud was proven; whether the trial Court disregarded the evidence of the Appellant in arriving at its decision and who bears costs.

13. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court which is to: '... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.'

14. Besides, that duty has been affirmed in numerous decisions of the superior Courts. Notably in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was pronounced thus:

> " ... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this 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 ...."

15. It is not in dispute that there are two contestants claiming the suit land. It is not in dispute that the Appellant was issued with a title in 2002 and the Court will be called upon to inquire whether the root of title has been proven and whether fraud has similarly been proven.

16. It is a principle of law that whoever lays a claim before the Court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:

> " 107
>
> (1) 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.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

17. Reliance is made on the case of Muriungi Kanoru Jeremiah Vs. Stephen Ungu M'mwarabua [2015] eKLR where the Court held as follows with regard to the burden of proof:

> " .... As I have already stated, in law, the burden of proving the claim was the Appellant's including the allegation that the Respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the Appellant.....The Appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the Respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial Court magistrate held that the Respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein."

18. The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it as follows :

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the Court to take action; thus a claimant must satisfy the Court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."(16)The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence."

19. The Appellant has faulted the trial Court for shifting the burden of proof to her and yet the Respondent failed to proof her case.

20. The evidence led by the Respondent was that she became a member of the GNCL in the 1970's and through her membership acquired the suit land vide Share Certificate No 2008 issued on the 23/12/1979 for 50 shares. Two sets of payment receipts dated the 31/3/1978 and 14/9/1983 for the purchase of the land and survey fees were adduced in evidence by the Respondent. That she balloted and got a ballot No 187 for the land. She was shown the land and took possession as she awaited the issuance of titles. The evidence on record shows that the Respondent is a fairly old lady as she could not even remember the ballot off head. She stated that she gave the land to her daughter and son in law to farm in the meantime whereupon they constructed a house which house was demolished partly by the Appellant who was claiming ownership. This prompted her to carry out a search which revealed that the Appellant had been registered as owner of the land in 2002. It is this registration which she faults as fraudulent. To further secure her interests she went to the GNCL where she obtained a clearance certificate which showed that according to the register and the records in the company she was the rightful allottee and owner of the suit land. She further demonstrated that she was in possession of the land through her daughter and son in law who led evidence in support of her averment.

21. The Appellant on the other hand led evidence that she purchased the suit land from Miriam Kariuki vide a sale agreement in 2000. That Miriam Kariuki handed to her the share certificate No 0850 of 50 shares and a ballot No 187. That thereafter she obtained a title for the land. She informed the Court that she found the Respondent's son in law had trespassed onto the land and constructed a building.

22. The Court has considered the evidence of the Respondent as against the Appellant and it is clear that the Respondent has a better title than the Appellant. I say so because the Appellant failed to proof the root of title. The Appellant failed to produce a clearance letter from GNCL, evidence of payment of the shares and or land/ survey and registration fees, members register to support that Miriam Karanja was indeed a member of the GNCL. If indeed the Appellant purchased the land, there was no evidence of interalia the Land Control Board consent for the transfer, transfer of the land and stamp duty payments.

23. It is now settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in Bullen

& Leake & Jacobs, Precedent of pleadings 13th Edition quoting with approval the cases of Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489 it is stated that: -

> " Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (|). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice".

24. As regards standard of proof in respect to a charge of fraud, the law is quite clear. In R.G. Patel Vs. Lalji Makanji(1957) EA 314 the former Court of Appeal for Eastern Africa stated thus:

> " 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."

25. In the case of Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Another [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

26. Section 26 of the *Land Registration Act* provides two instances where a title can be challenged. The first is on the ground of fraud and/or misrepresentation to which the person is proved to be privy to and/or a party and secondly where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

27. The Court finds that the acquisition of the title by the Appellant was wrought with deceit and unprocedural and corrupt scheme intended to disposess the Respondent of her valid entitlement.

28. Taking the facts of this case, I find that the Respondent has proved fraud against the Respondent

29. The Appellant contended that having been registered as owner of the suit land in 2000, this suit was filed in 2014, way beyond the statutory period of 12 years. She urged the Court to overturn the verdict on this issue.

30. Section 7 of the Land Acquisition Act states as follows;

> " An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

31. The purpose of the Law of Limitation was stated in the case of Mehta Vs. Shah [1965] E.A 321, as follows;

> " The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case."

32. In Gathoni Vs. Kenya Co-operative Creameries Ltd [1982] KLR 104, the Court of Appeal held as follows;

> " ... The Law of Limitation of Actions is intended to protect Defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending Plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

33. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of Iga Vs. Makerere University [1972] EA, the Court had this to say on the Law of Limitation;

> " A Plaint which is barred by limitation is a Plaint barred by law. Reading these Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought."

34. In this case the Respondent led unchallenged evidence that she discovered the land was registered in the name of the Appellant in 2014 when there was interference of the land by the Appellant in demolishing part of the house. It is then that she filed the case in the year 2014. The Court finds that the objection of limitation of time therefore is unfounded.

35. The Court has carefully considered the evidence and the Judgement of the trial Court and is not satisfied that the trial Court disregarded the evidence of the Appellant.

36. In the end the appeal is unmerited. It is dismissed with costs in favour of the Respondent.

37. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mzame Tony for the Appellant

Karuga Wandai for the Respondent

Court Assistant – Phyllis