



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

CIVIL APPEAL NO. 12 OF 2017

(FORMERLY MKS HCCA NO. 146 OF 2016)

HENRY ITUMANGE NZIOKA.....APPELLANT

VERSUS

RACHEL KALENDI NZIOKA.....RESPONDENT

JUDGEMENT

1. The Appellant filed the Memorandum of Appeal dated 6th July, 2016 against the whole judgment of the learned Principal Magistrate arising from the proceedings in Kilungu PMCC No. 8 of 2013. In the impugned judgment, the trial court declined to declare the Appellant as the lawful owner of Plot No. 27 Upete Market in addition to dismissing his suit with costs. There are nine grounds of appeal and it has been sought from this Honourable Court the following prayers:

a) That this appeal be allowed.

b) That the lower court's judgment dated 17th March, 2014 be set aside and be substituted with a judgment in favour of the Appellant.

c) That costs of this appeal and of the Court below be paid by the Respondent to the Appellant.

d) Any other order that this Honourable Court may deem fit and just to grant.

2. Pursuant to the directions of Court issued on 11th October, 2018 the appeal was canvassed by way of written submissions. Only the Appellant who has been participating in these proceedings filed his dated 5th October, 2020. I am satisfied that the Respondent's Advocates were served by the Appellant with court pleadings and notices but did not respond nonetheless.

3. I have perused the Record of Appeal dated 8th September, 2018 together with the Supplementary Record of Appeal dated 5th October, 2020. This being a first appeal, the Court's duty was best outlined in the case of **Okeno –Vs- Republic [1972] 1 EA 32 at 36** where the Court of Appeal set out as follows:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E.A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's

findings and conclusions; it must make its own

findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."

4. I have perused the Complaint dated 4th February, 2013 annexed at pages 5 to 8 of the Record of Appeal. I have also perused the Defence dated 13th February 2012 and the lower court's proceedings annexed from pages 90 to 109 of the Record of Appeal. The Appellant herein was PW1. In his evidence in chief, PW1 stated that in 1998, his late brother, Patrick Edward Nzioka offered to sell to him a portion of 26ft x 100ft on Plot No. 27 Upete Market (the Suit property) for a purchase price of Kshs. 30,000/=. The entire plot measured 30ft x 100ft. On 5th April, 1998, PW1 paid Kshs. 10,000/= as down payment of the purchase price. On 2nd May, 1998, PW1 paid Kshs. 8,000/= instalment. On 26th December, 1998, he paid the final balance of Kshs. 12,000/= and all payments were duly acknowledged by the Vendor. The sale agreement was drawn and the Vendor and PW1's signatures were witnessed by D. Muteti and J. Mwanja.

5. PW1 also stated that it was on the 26th December, 1998 when the Vendor offered to sell to him the remaining portion measuring 4ft x 100ft for Kshs. 4,000/= which he agreed and paid on the same day. PW1 produced the sale agreement as P. Exhibit 1. On 18th December, 2001, the Vendor and PW1 executed transfer forms issued by the Makueni County Council and the requisite fees of Kshs. 3,000/= were paid by PW1 and receipt issued. The transfer form was witnessed by Julius Mwanja and Peter Mwangi. PW1 produced these documents as P. Exhibit 2 and P. Exhibit 3 respectively. The suit property was transferred into his name on 25th November, 2005 and PW1 erected a permanent building therein. The building plans were approved by the County Council of Makueni and PW1 continued to pay the necessary ground rents and rates. PW1 produced the receipts as P. Exhibit 5.

6. PW1 stated that when he undertook construction on the 4ft x 100ft portion of the suit property, Onesmus Nzioki Itumange came in and demolished the structure. That was on 29th November, 2012 and the incident was reported at Kilome Police Station but no action was taken. On 22nd December, 2012 PW1 received a demand notice from Nzioka & Co. Advocates who were acting on behalf of the Respondent/Defendant. The demand notice was produced as P. Exhibit 7. Finally, PW1 produced P. Exhibit 8 which was a copy of an official search from the County Council of Makueni confirming that he was the registered owner of the suit property.

7. In cross-examination, PW1 stated that there was no dispute between him and his late brother, the Vendor. He confirmed that the Vendor signed the agreement voluntarily. He attributed the date of 12th February, 2006 alongside his brother's signature on the transfer form dated 18th December, 2001 to a mistake.

8. PW2, Julius Kikuvi Mwanja in his examination in chief confirmed that he witnessed the signing of the sale agreement between PW1 and his late brother in 1998. That the agreement was in respect of the sale of Plot No. 27 Upete Market at the price of Kshs. 30,000/=. Again he witnessed the signing of the transfer form in the year 2001 and appended his signature thereon.

9. In cross-examination, PW2 stated that he was present on 26th December, 1998 at the time of signing of the sale agreement in respect of the 4ft x 100ft portion. However, he did not append his signature thereon. That there was a structure encroaching on the 4ft x 100ft portion and that the structure had been built by Edward Patrick Nzioka. That he was doubtful that the structure had been there at the time of execution of the sale agreement.

10. PW3, Joshua Kikuvi in his examination in chief stated that he was the former Enforcement Officer, County Council of Makueni. He explained the procedure that had been adopted in the signing of a transfer form. That for the transfer form to be valid, it must have been signed by the parties, the Area Councilor and the Revenue Clerk. Afterwards, the transfer form is tabled before the Town Planning Committee for approval and then adopted by the full Council meeting. That the transfer form herein was approved vide Minute No. 25/WTPM/2003 dated 9th September, 2003. He produced P. Exhibit 9 which was the certified copy of the Minutes. That the Minutes were confirmed and approved by the Full Council Meeting held on 25th November, 2005 vide Minute No. 09/FC/2005B. He then produced a certified copy of the Minutes as P. Exhibit 10.

11. During cross-examination, PW3 confirmed that the signatures of the Area Councilor and the Revenue Officer in the transfer form were genuine. That the variation in date when the transfer form is dated and when the Vendor signed was down to human error. That the transfer was effected by the County Council of Makueni and that he was not aware of any objections. That had there been any objections to the transfer then the same would not have been effected. He also stated that the register in respect of the suit

property does not have a caveat or caution.

12. The Defendant was called as DW1. She stated in cross-examination that the PW1 is her brother in-law. That she did not relate with him well at home. That PW1 trespassed into the 4ft x 100ft portion immediately she buried her husband. That PW1 only purchased 26ft x 100ft while the 4ft x 100ft was left intact. That she was not aware whether the County Council had effected a transfer of the suit property.

13. In cross-examination, she stated that she was not involved in the negotiations to sell the suit property. That she was shown a copy of the agreement by her late husband and that the agreement was signed and witnessed. She however denied that the purchase price was Kshs. 30,000/= as shown on the sale agreement. She stated that the purchase price had been altered from Kshs. 100,000/= . That she was not present when 4ft x 100ft was sold and that her late husband did not tell her about it. She confirmed that P. Exhibit 2 bore the signature of her late husband.

14. DW2, Onesmus Nzioka Itumange stated in his examination in chief that PW1 is his step-brother while the Defendant is his sister in-law. That he was a businessman working on the neighbouring Plot No. 26 Upete Market which belonged to his late brother in-law. That he was aware that his late brother sold 26ft x 100ft of Plot No. 27 Upete Market and that 4ft by 100ft was to be used as an entry point to his late brother in-law's plot.

15. In cross examination, DW2 stated that he was present when 26ft x 100ft of the suit property was sold. However, he did not sign the sale agreement when it was being signed since he was not there after the agreement was reduced to writing. He denied that his late brother sold the latter portion of the suit property.

16. I have re-evaluated the evidence of the parties herein and the judgment that was delivered. It is my view the only pertinent question for determination herein is as follows:

Whether the trial court had sufficient grounds to invalidate the transfer of the suit property"

17. Firstly, it is common ground from the respective cases by the Plaintiff and the Defendant that an agreement was reached for the sale of 26ft x 100ft of the suit property. In fact, DW1 together with DW2 did not deny knowledge of this fact during cross-examination. What then remained was to look at the circumstances surrounding the sale of the 4ft x 100ft.

18. DW1 pleaded seven grounds of fraud against the PW1 under paragraph 5 of her Defence. The lower court acquitted itself honourably in the judgment when it acknowledged as follows:

"In her defence, the Defendant raised the issue of fraud against the Plaintiff and gave out particulars.

Apart from so pleading, no evidence was led on the issue. As a matter of practice, allegations of fraud need not only be particularly pleaded but must also be precisely proved. This was not done here. So the allegations of fraud by the Defendant are hollow as they were not proved."

19. I will proceed to buttress the above finding with the observations of Tunoi JA (as he then was) in the case of **Vijay Morjaria -Vs- Nansingh Madhusingh Darbar & Anor [2000] eKLR (Civil Appeal No. 106 of 2000)** wherein he 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

20. I share a similar view. The Respondent herein did not discharge her burden of proof to establish fraud against the Appellant. On the other hand, not only did the Appellant herein present regular documentation which was corroborated well by PW2 and PW3, no evidence was led to controvert or dislodge the credibility of the witnesses or the authenticity of the documents. I therefore find that the trial court erred in failing to find in favour of the Appellant on the preponderance of evidence. The trial court fell into error

immediately it inferred, without the benefit of evidence, that there was a glaring error in the transfer document produced as P. Exhibit 2.

21. No evidence was led by the Appellant for special damages. Again no evidence was led and proved for trespass by the Defendant.

22. The upshot of the foregoing is that the Appeal is allowed in the following terms:

a) The Judgment of the Lower Court dated 17th March, 2014 is hereby set aside and substituted with Judgment in favour of the Appellant in terms of prayers a) and b) of the Plaintiff.

b) Costs of the Appeal and the lower court to the Appellant.

Signed, dated and delivered at Makueni via email this 5th day of February, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi



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