



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, G.B.M. KARIUKI & MURGOR JJ, A)**

**CIVIL APPEAL NO. 42 OF 2005**

**BETWEEN**

**KIHURIA KAMURI.....1<sup>ST</sup> APPELLANT**

**JANE WATURI MWAURA.....2<sup>ND</sup> APPELLANT**

**AND**

**JACKSON MAINA MWANGI.....RESPONDENT**

***(Appeal from the decision of the High Court of Kenya at Machakos (Mwera, J) dated 12<sup>th</sup> September, 2003***

**in**

**H.C.C.C. NO. 178 OF 1999)**

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

**JUDGMENT OF THE COURT**

By a sale agreement dated 17<sup>th</sup> August 1997, the respondent **JACKSON MAINA MWANGI** and the 1<sup>st</sup> appellant, **KIHURIA KAMURI** agreed to purchase a parcel of land known as Land Reference Number Mavoko Town Block 2/117 (“*the suit property*”) from **Nzioka Nguku**, who was the registered proprietor. The land was registered under the Registered Land Act, Chapter 300, (now repealed). The agreed purchase price for 10 acres of land was Kshs.402,500/=, which was later increased to Kshs.480,000/= for 12 acres. The registered proprietor was paid Kshs.400,000/= for the suit property. Land Control Board consent was obtained and on 1<sup>st</sup> April 1998, the transfer was lodged and registered, in the names of both the 1<sup>st</sup>appellant and the respondent as joint owners.

Sometime in May 1998, the 1<sup>st</sup>appellant effected a transfer of the respondent’s portion of the suit property into his name and that of the 2<sup>nd</sup> appellant and soon thereafter, subdivided the suit property into two portions namely Mavoko Town Block 2/2822 registered in the name of the 2<sup>nd</sup> appellant and Mavoko Town Block 2823, registered in the 1<sup>st</sup>appellant’s name.

In his plaint, the respondent contended that the transfer was effected illegally, fraudulently, and without his knowledge or consent, and was premised on the uttering of a forged transfer document. The

respondent further averred that he neither applied for nor was he involved in the application for Land Control Board consent to transfer his portion of the suit property to the appellants, and as a consequence, he filed a suit in the High Court for orders against the appellants for an injunction restraining the appellants from transferring, charging, leasing in any way dealing with the titles, and for a declaration that the transfer of the suit property to the appellants was fraudulent, illegal and void, and for rectification of the register to cancel the registration of the appellants as registered proprietors of subdivided portions, and reinstate the registration the 1<sup>st</sup> appellant and the respondent in shares proportional to their contribution towards the purchase price.

In their defence, the appellants responded that the respondent was not a party to the agreement to purchase the suit property and neither had he contributed towards the purchase price. The appellants averred that they were not at any time party to a fraud culminating in the transfer of the respondent's interest in the suit property to themselves.

Upon hearing both parties, the learned trial judge found that the suit property had been fraudulently transferred to the appellants which transaction was null and void and granted the respondent the prayers as pleaded in the plaint.

Being aggrieved by the judgment of *Mwera J*, (as he then was) delivered on 8<sup>th</sup> October 2002, the appellants filed this appeal.

Learned counsel *Mr. Mulei* appeared for the appellants while learned counsel *Mr. Kingara* appeared for the respondent. *Mr. Mulei* set out five grounds of appeal as follows:-

- “1. The learned judge grossly erred in law and misdirected himself when he upheld an alleged land sale agreement against the principles and the provisions of the law of contract Act Cap 23 Laws of Kenya.**
- 2. The learned trial judge erred in law and misdirected himself when he relied on mere verbal allegations from the respondent to arrive at a decision that nullified a lawful Land Control Board Consent and a land transfer and in so doing offended cardinal principles and provisions of the law of evidence regarding the burden of proof in adversarial litigation.**
- 3. The learned Judge grossly erred in law and misdirected himself when he made a decision which was unsupported by the evidence and pleadings and thereby ordered the sharing of the suit premises in bigger ratio in favour of the respondent.**
- 4. The Learned judge erred in law and misdirected himself on the law of admissibility of documents when he disregarded defence exhibit 1 and 2 after admitting them.**
- 5. The learned judge erred in law when he failed to hold that the 2<sup>nd</sup> appellant was a bona fide buyer for value.”**

*Mr. Mulei* contended on the first ground, that the sale agreement was between the 1<sup>st</sup> appellant and the registered proprietor, *Nzioka Nguku* and that the trial court had found that the respondent was involved in the sale, yet there was no evidence to support this contention; that secondly, the respondent undertook to transfer to the appellants his undivided portion voluntarily and without coercion, and as such signed the transfer document and Land Control Board consent; that thirdly, the respondent's contribution was not ascertained, and therefore the trial court erred in the manner in which it distributed the suit property between the 1<sup>st</sup> appellant and the respondent; that fourthly, the trial court ought to have considered the sale agreement and consent, and fifthly, the learned judge failed to consider the 2<sup>nd</sup> appellant as a bona fide buyer for value.

*Mr. Kingara* on the other hand argued that, the Land's Register showed that the 1<sup>st</sup> appellant and the respondent were registered as tenants in common, and that without the consent of the respondent, the appellants had transferred and distributed the suit property amongst themselves. Learned counsel contended that the transfer documents were not signed by the respondent, and further, that the advocate who had purported to attest the transfer denied having witnessed the respondent's signature on the transfer, stating that he did not know the respondent. Counsel further contended that the respondent had not appeared before the Land Control Board, and therefore the documents through which the transfer was effected were null and void and incapable of registration. Counsel finally submitted that the respondent had contributed Kshs. 395,000 towards the purchase price and was therefore entitled to receive his commensurate portion of the suit property.

This being a first appeal, we must consider the evidence adduced before the trial court, evaluate it and draw our own conclusions. We must bear in mind and allow for the fact that we did not have an opportunity to see or hear the witnesses who testified. See **SELLE & ANOTHER VS ASSOCIATED MOTOR BOAT COMPANY & OTHERS (1968) EA 123**, **RAMJIRATNA AND COMPANY LIMITED VS WOOD PRODUCTS KENYA LIMITED, CA NO. 117 of 2001** and **HAHN VS SINGH (1985) KLR 716**. We must also remind ourselves that this Court is not minded to interfere with the findings of fact by the trial court unless they are not based on evidence or are a misapprehension of the evidence or that the trial judge is shown to have acted on a wrong principle in arriving at the findings. Nevertheless, we are entitled to interfere if it seems that the trial judge did not consider a particular circumstance or material evidence or where his or her impression, based on the demeanor of the particular witness is inconsistent with the evidence in the case. See **EPHANTUS MWANGI & ANOTHER VS DUNCAN MWANGIWAMBUGU (1982-88 1 KAR 278)**.

With respect to the first issue on whether the respondent was a party to the sale agreement, it was the finding of the trial court that the 1<sup>st</sup> appellant and the respondent had jointly purchased the land, and were subsequently registered as the proprietors.

**Section 27** of the Registered Land Act (now repealed) provides that,

***“Subject to this Act,***

- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges and belonging or appurtenant thereto.”***

When all the evidence is considered, it is not disputed that the 1<sup>st</sup> appellant and the respondent were the registered proprietors in common of the suit property, as at 1<sup>st</sup> April 1998, both their names were jointly registered in the title of the suit property, as evidenced by entry 4 in the Land's Register. Additionally, the respondent testified that he was invited by the 1<sup>st</sup> appellant to meet with *Nzioka Nguku* during the negotiations for purchase of the suit property. The testimony of ***Peter Musyimi, (DW3)***, also confirmed that the respondent had accompanied the 1<sup>st</sup> appellant and that they had met severally with *Nzioka Nguku*, whilst the negotiations to purchase the suit property were ongoing. This being the case, clearly there must have been some arrangement between the 1<sup>st</sup> appellant and the respondent to purchase the suit property, which culminated in their joint ownership of the suit property. Be that as it may, we in any event find that, whether or not the respondent was a party to the sale agreement is immaterial, what is fundamental is that he was a registered proprietor of the suit property together with the 1<sup>st</sup> appellant as tenants in common.

This then leads us to the next issue, which was whether a fraud was committed on the respondent or whether the respondent voluntarily signed the transfer and Land Control Board Consent to divest himself of his interest in the suit property? In answer to this, the learned judge stated thus:-

***“Maina's suspicion that Kihuria used Paul to get various documents including misleading him that Kihuria was withdrawing from the sale, sounded believable.***

*Maina denied giving authority to such moves and the court believed him. The defendants produced Exh.D2 dated 7.5.98 by which they claimed that Maina got consent to transfer subject land to them. That on the same 7.5.98 Maina appeared in Nyaberi's chambers to sign a "transfer" (Exh. P3). Maina denied both these. A transfer of land document can only be prepared and attested by a lawyer. Mr. Nyaberi denied preparing Exh. P3 and said that none of his partners did. He added that the file for such a transaction or a file on which the letter of 13.8.98 (Exh.P4) was written was not traceable in his Machakos chambers. He strongly suspected forgeries. In the circumstances of this case, this Court is of a similar mind. No valid and or lawful documents were used to transfer the land from Maina to the defendants jointly. Such a move was fraudulent to an extent that the defendants were hard put to even attempt a sensible explanation of the whole thing (see evidence of 1<sup>st</sup> defendant vs. that of 2<sup>nd</sup> defendant regarding attendance before the land control board).*

*So answering issues 5 and 6 together the whole process and transfer to the defendants was not maintainable in law and it has been null and void all the time. Accordingly (Issue 7) the plaintiff is entitled to the prayers as set out in the plaint together with costs."*

From the outset, the 1<sup>st</sup> appellant was fully cognizant of the fact that the respondent was a joint owner of the suit property as evidenced from the entry in the Land's Register. From the evidence, it is clear that the 1<sup>st</sup> appellant's sole objective was to remove the respondent as a co-owner by effecting a transfer of the respondent's portion of the suit property to himself, as sole proprietor. To achieve this, he devised various schemes to extract the relevant transfer documents from the respondent. To begin with, he requested **Joseph Kanyotu Mwangi, (PW2)** to convince the respondent to agree to a refund of Kshs.250,000/-, initially paid for his portion of the suit property which the respondent refused. The 1<sup>st</sup> appellant then attempted to mislead the respondent with the assistance of *Paul Nguku*, the son of *Nzioka Nguku* into believing that he (the 1<sup>st</sup> appellant) was withdrawing from the land transaction and instead would transfer his share to the respondent. The 1<sup>st</sup> appellant later refuted the affidavit, and had the respondent arrested, but subsequently released. The 1<sup>st</sup> appellant then contrived to procure a transfer document purportedly signed by the respondent and attested to by an advocate.

The respondent testified that he did not sign the transfer dated 7<sup>th</sup> May 1998 transferring the suit property to the appellants when he went to *Mr. Nyaberi's* office in Machakos. This evidence was corroborated by **Mr. Justry Lumumba Nyaberi, (PW3)**, who testified that he had never met the respondent, and stated that:-

*"In this matter we had no file and no material was gathered about Exhibit P.3- a transfer. In the absence of files ... I could only term these matters as a forgery... The signature at the back of Exhibit P 3 is not mine or that of any of our partners and associates..."*

Regarding the procurement of the Land Control Board consent, the respondent testified that he did not apply for the consent and neither did he appear before the Land Control Board to seek consent for the transfer of his share of the suit property to the appellants. From the record, there is no evidence to show that the respondent applied to the Land Control Board for consent to transfer his share. Despite this, a letter of consent dated 7<sup>th</sup> May 1998 was produced confirming that the Land Control Board had consented to the transfer and subdivision of the suit property to the appellants.

**Section 8 (1)** and **Regulation 2 (1)** of the **Land Control Act Chapter 302** provides that, the application for consent shall be in the prescribed form and signed by the applicant, in this case the respondent. From the record, there was no evidence produced to show that the respondent applied for consent to transfer his portion. Further, the respondent did not attend the Land Control Board meeting. This is corroborated by the 1<sup>st</sup> appellant when he stated that,

**“On 7.8.98 we went to the board. Present: the seller Nzioka, Musyimi, Jane and myself. The board then passed the matter. The District Officer asked for the plaintiff’s identity card (copy). The Board allowed our request to divide the land into two. Each of us, myself and my wife got separate titles.”**

When we consider all the evidence, it is clear that the appellants devised a scheme to procure the necessary transfer documents from the respondent in order to transfer the respondent’s portion to themselves. It is also apparent that, the respondent was unwilling to transfer his portion to the appellants and therefore the respondent could not have voluntarily signed any of the transfer documentation. Additionally, from the evidence of *Mr. Nyaberi*, the document of transfer was found to be a forgery. As such this document must be considered null and void and cannot be relied on as the basis upon which the respondent’s portion could have been transferred to the appellants. It is also clear that the Land Control Board consent was sought and obtained solely by the appellants without the participation of the respondent, contrary to the specific requirements of the Land Control Board regulations.

Having considered the evidence, and the manner in which the transfer and Land Control Board were procured the question that then arises is whether a fraud was committed against the respondent by the applicants.

To begin with, where fraud is alleged, it is trite law that this should be specific and particularized see **THE TOWN COUNCIL OF OL KALAU VS NG’ANG’A STORE** Civil Appeal No. 269 of 1997. We have considered the defence and are satisfied that the respondent specifically pleaded and particularized the fraud committed by the 1<sup>st</sup> appellant.

It is also the position that, where there is a claim of fraud, it must be strictly proved. In **MUTSONGA V. NYATI [1984] K.L.R. 425** this Court stated thus:-

**“Allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, a high degree of probability is required, which is something more than a mere balance of probabilities, and it is a question for the trial judge to answer.”**

Similarly in **KOINANGE & 13 OTHERS V. KOINANGE [1986] KLR 23**, this Court also stated:-

**“The party alleging fraud .... had the burden of proving it and they had to discharge that burden. Allegations of fraud must be strictly proved.”**

The trial court found the documents used to transfer the land to be fraudulently, and stated thus:-

**“No valid and or lawful documents were used to transfer the land from Maina to the defendants jointly. Such a move was fraudulent to an extent that the defendants were hard put to even attempt a sensible explanation of the whole thing (see evidence of 1<sup>st</sup> defendant vs. that of 2<sup>nd</sup> defendant regarding attendance before the land control board)”**

The trial court did not however specify the degree to which fraud had been proved and which we shall proceed to determine in this case. When the evidence is considered, it is clear that both the transfer and the Land Control Board consent were irregularly procured by the applicants as the respondent denied having signed the transfer document which was considered to be a forgery by *Mr. Nyaberi*. Additionally, the Land Control Board consent was obtained without the requisite documentation and the stipulated procedure being adhered to. The conduct of the 1<sup>st</sup> appellant, leading up to the eventual transfer of the respondent’s portion into his name and that of the 2<sup>nd</sup> appellant was incredible and inconceivable, and aimed at wilfully depriving the respondent of his interest in the suit property.

When the evidence is re-evaluated, we find that fraud was proved well beyond a balance of probability

by the respondent and that indeed a fraud was committed on the respondent by the appellants. The documents that were derived from the fraudulent actions were subsequently used in the fraudulent transfer of the respondent's interest in the suit property into the names of the appellants. As such, we also find that the transfer documents were null and void, and incapable of registration. This ground fails, as does ground five, having regard to the finding of fraud.

The third issue was whether the respondent had contributed towards the purchase price of the suit property. With respect to whether the respondent paid any money towards the purchase price, we consider that the learned judge evaluated and analysed the testimonies of all the witnesses with respect to the contributions by both the 1<sup>st</sup> appellant and the respondent, and came to the conclusion that as the respondent was a party to the transaction which culminated in his registration as a joint proprietor, he must have made some contribution towards the purchase price. The learned judge stated thus,

***“The court will go further in the circumstances of this case and say this: the parcel of land No MAVOKO TOWN BLOCK 2/1156 appears to be approximately 4.83 ha. in the area (Exh. P1). The plaintiff paid some five eighths (sic) (5/8) of the purchase price. Every 1.21 ha. is approximately 7.5 ha. of the land while the rest goes to the 1<sup>st</sup> defendant- 4.5 ha. unless for any other reason, this works in line with prayer (c) of the plaint.”***

Were the contributions from the two parties adequately ascertained? From the evidence it is clear that the purchase price for 10 acres of the suit property was Kshs.400,000/=. This was soon thereafter increased to Kshs.480,000/= when two more acres were included. The respondent contended that he contributed a total amount of Kshs.395,000/=: the amounts of which were paid in various installments and that the balance of Kshs.95,000/= was paid by the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant on the other hand argued that he initially paid Kshs.10,000/=: although he alleges that together with the 2<sup>nd</sup> appellant they paid an amount of Kshs.110,000/=. Nzioka Nguku confirmed that he had received the entire amount of Kshs.400,000/=: whilst the copy of the Land's Register shows that the purchase price was Kshs.220,000/=. Mr. Kanyotu, testified that at the time the 1<sup>st</sup> appellant had sought his assistance to have the respondent accept a refund of the purchase price, the 1<sup>st</sup> appellant showed him a cheque for Kshs.250,000/=. It is therefore difficult to ascertain what specific amounts were paid towards the purchase price by the parties to the transaction, more so, exactly what the 1<sup>st</sup> appellant had contributed.

What is clear is that, the 1<sup>st</sup> appellant attempted to refund Kshs.250,000/- to the respondent through Mr. Kanyotu, which the respondent flatly refused. From this evidence, we can conclude that the 1<sup>st</sup> appellant acknowledged that the respondent had contributed an amount of Kshs.250,000/- out of the Kshs.400,000/- paid to Nzioka Nguku. This left a balance of Kshs.150,000/-, which the learned judge considered could be attributed towards the 1<sup>st</sup> appellant's contribution. In the circumstances, we agree with the computation of the contributions made by each party towards the purchase price, as arrived at by the learned judge, and as such this ground fails.

With respect to grounds four, on whether the learned judge was correct to disregard the defence exhibit 1 and 2 after admitting them, we consider that the learned judge properly analysed the documents in the light of the testimony of all the witnesses, and rightly came to a finding that they were not conclusive evidence upon which to negate the respondent's participation in the sale transaction. Moreover, the property being registered in the joint names of the appellant and the respondent, only lent further support to the respondent's involvement in the transaction. For these reasons, this ground fails.

For the above stated reasons, we find no reason to interfere with the decision of the court below, and dismiss the appeal with costs to the respondent herein.

***Dated and Delivered at Nairobi this 20<sup>th</sup> day of December, 2013.***

**W. KARANJA**

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**JUDGE OF APPEAL**

**G. B. M. KARIUKI**

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**JUDGE OF APPEAL**

**K. MURGOR**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**