National Social Security Fund Board of Trustees v Ramu & another (Environment and Land Appeal E033 of 2022) [2025] KEELC 2887 (KLR) (25 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2887 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E033 OF 2022

NA MATHEKA, J

MARCH 25, 2025

BETWEEN

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES .. APPELLANT

AND

ALICE RAMU ..... 1ST RESPONDENT

BENARD NZIOKA ..... 2ND RESPONDENT

JUDGMENT

1. The Appellant, National Social Security Fund Board of Trustees being aggrieved by the above said Judgment, appeals to the Environment and Land Court against the whole of that Judgment on the following grounds that;

    1. The learned Magistrate erred both in law and fact by holding that the Appellant did not prove that the plot number allocated to the 1st Respondent transitioned to a different title number once title deeds were issued despite letters by the 1st Respondent to that effect.

    2. The learned Magistrate erred both in law and fact in ignoring evidence in form of letters to the Respondent informing her that her plot was on a wayleave which she is writing accepted, asked for a prime plot and time to get money to top up.

    3. The learned Magistrate erred both in law and fact in finding that the allocation was done after survey without any evidence by the parties to that effect.

    4. The learned Magistrate erred both in law and fact by failing to hold that the contract of sale between the Appellant and the 1st Respondent was frustrated even though the 1st Respondent had expressly admitted that the initial plot allocated to her lay on a power wayleave and that she was moved for that reason. The trial Magistrate ignored the 1st Respondent's letter stating that she was allocated a plot that had Kenya Power Posts and was a wayleave.

5. The learned Magistrate erred both in law and in fact by declining/failing to consider whether the 1st Respondent accepted re-allocation to the new plots.

6. The learned Magistrate contradicted herself by finding that neither the 1st Respondent nor the 2nd Respondent had given evidence of actual possession and then proceeded to hold that the 1st Respondent is in possession.

7. The learned Magistrate erred both in law and fact in failing to consider the evidence on record wholesomely and finding that the Appellant did not call evidence of survey despite the admissions.

8. The learned Magistrate erred both in law and fact in shifting the burden of proof on the Appellant and finding that the 1st Respondent had proved her case on a balance of probabilities.

9. The learned Magistrate erred both in law and in fact in allowing the 1st Respondent's claim and in holding that the Appellant should meet the costs of both the 1st and 2nd Respondents.

2. The Appellant prays for;

   a. This Appeal be allowed, the Judgment and Decree of Hon. E. Kimaiyo Suter (PM) delivered on 25th August, 2022 in Mavoko ELC No. 73 of 2019 be set aside in their entirety.

   b. There be an order dismissing the 1st Respondent's Plaint dated 13th November, 2019.

   c. The costs of this Appeal and of Mavoko ELC. No. 73 of 2019 be awarded to the Appellant.

3. This appeal was consolidated with ELC Appeal No. E034 Bernard Nzioka vs Alice Ramu and National Social Security Fund Board of Trustees where the Appellant Bernard Nzioka, hereby appeals against the whole of the Judgment and Decree of Honourable E. Kimaiyo Suter (PM) in the above-mentioned case before the Chief Magistrate's Court at Mavoko, dated and delivered on 25th August, 2022 on the following grounds;

   1. The learned Magistrate erred in law and in fact in finding that the 1st Respondent purchased property known as LR. No. 18064/30 (hereinafter 'suit property') from the 2nd Respondent, despite evidence from the Appellant and the Respondents corroborating the fact that the 1st Respondent purchased Plot No. 18064/30 which transitioned to LR. No. 18064/101, while the Appellant purchased Plot No. 18064/81 which transitioned to LR. No. 18064/30 when the Title Deeds were issued;

   2. The learned Magistrate erred in law and in fact in finding that the 1st Respondent was entitled to LR. No. 18064/30, property of the Appellant, despite the 1st Respondent's own admission that she received a letter from the 2nd Respondent advising her that her property lay on a power way leave. The evidence adduced and the 1st Respondent's own admission unequivocally shows that LR. No. 18064/30 is not on a power way leave;

   3. The learned Magistrate erred in law and in fact in finding that the 1st Respondent had proved her case on a balance of probabilities and was thus entitled to LR. No.18064/30, property of the Appellant, despite the 1st Respondent's own admission that she indeed received a letter from the 2nd Respondent informing her that her property, LR. No. 18064/101, was affected by a power way leave, and that she would be allocated another property;

4. The learned Magistrate erred in law and in fact in finding that the 1st Respondent had proved that she purchased the suit property, when the 1st Respondent in her own admission, testified that she visited the site and was shown, by the 2nd Respondent, her property, that is LR. No. 18064/101, which was situated on a power way leave;

5. The learned Magistrate erred in law and in fact in finding that Plot No. 18064/81 could not transition to LR. No.18064/30, and Plot No. 18064/30 to LR. No. 18064/101, without a deed of variation. Nevertheless, and in the absence of such deed of variation, the learned Magistrate found that the 1st Appellant was the rightful owner of LR. No. 18064/30, without any deed of variation and or evidence to demonstrate how the land reference number was generated;

6. The learned Magistrate erred in law and in fact by misconstruing the provisions of Section 107(1) and Section 109 of the *Evidence Act*, thus prematurely shifting the burden of proof from the 1st Respondent to the 2nd Respondent and the Appellant respectively, when the 1st Respondent, pursuant to Section 107(1) of the *Evidence Act*, had not demonstrated to court on a balance of probabilities, that she indeed purchased LR. No.18064/30 (Plot No. 18064/81) and not LR. No. 18064/101 (Plot No. 18064/30)

7. The learned Magistrate erred in law and in fact in finding that the 2nd Respondent had not tendered any evidence, other than letters produced, to show that the suit property transitioned form different numbers despite having acknowledged that the 2nd Respondent was the seller of the suit property and custodian of documentations, thus better placed to account for its (2nd Respondent's) properties, and to whom it sold such properties;

8. The learned Magistrate erred in law and in fact in finding that it was the duty of the 2nd Respondent to prove that Surveyors went to the ground and ascertained that the 1st Respondent's property was on a power way leave, despite the 1st Respondent's own admission (letter dated 23rd May, 2013) that together with Surveyors, she visited the site and was shown the property LR. No. 18064/101 which was on a power way leave;

9. The learned Magistrate erred in law and in fact in finding that the 2nd Respondent did not produce any survey documentations and or reports by Surveyors to illustrate the matching exercise, contrary to the fact that the 2nd Respondent produced a survey map which clearly demarcated the properties, including the 1st Appellant's property LR. No. 18064/101 which was on a power way leave;

10. The learned Magistrate erred in law and in fact in finding that since the 2nd Respondent had included LR before the Plot Number, albeit inadvertently, the suit property had been surveyed. This finding is contrary to the court's own finding that the 2nd Respondent had not tendered any evidence to show that the suit property had been surveyed and no title document had been produced as evidence nor issued to either party;

11. The learned Magistrate erred in law and in fact in introducing, to the detriment of the Appellant, an extraneous concept of issuance of Title Deeds, a concept which was not pleaded by the parties, and which the court had determined that no title documents were issued to either party, but nevertheless ended up taking into consideration that the Appellant had not been issued with any title document and could thus not be the owner of the suit property.

12. The learned Magistrate erred in law and in fact in finding that the Appellant could not claim to be a bona fide purchaser of the suit property since the Certificate of Title was yet to be issued

to him, but nevertheless found the 1st Respondent to be the bona fide purchaser of the suit property even though no Certificate of Title had been issued in her favour;

13. The learned Magistrate erred in law and in fact in finding that the 1st Respondent was in possession of the suit property, when the 1st Respondent had not adduced any evidence in support of this allegation, and the learned Magistrate had actually made a finding that neither the Appellant nor the 1st Respondent had tendered evidence in support of who had actual possession of the suit property;

14. The learned Judge erred in law and in fact in failing to appreciate, comment on or otherwise consider and take into account the pleadings, evidence and submissions by the Appellant, which he had relied upon and sufficiently demonstrated to the court the foregoing, and why a declaration ought to have been issued to the effect that the Appellant is the bona fide purchaser and thus the legal owner of the suit property.

4. The Appellant prays that this Appeal be allowed in the following terms;

a. The Judgment and Decree of the Lower Court dated 25th August, 2022 be set aside.

b. The 1st Respondent's Plaint dated 13th November, 2019 be dismissed with costs of the Lower Court to the Appellant;

c. The Respondents be ordered to bear the costs of this Appeal.

5. This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

> "I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."

6. In the trial court, the 1st defendant/ appellant averred vide a letter of offer dated 21st September 2021, they offered the plaintiff/respondent the sale of plot LR No. 18064/30. That the plots were allocated using plan numbers because at that time the title deeds were not out. Once the title deeds were issued they were matched against the plan numbers and 10 plots among them the plaintiff's were on the power way leave and therefore unavailable for intended use. On the 24th April 2013 they wrote to the plaintiff informing her of the same re-allocated her to plots LR No. 337/1921/51,52,53 and 54 subject to the payment of an additional amount of Kshs. 100,000/=. She replied and asked to be allocated a prime plot and the 1st defendant did not have any other plot and subsequently the plaintiff filed the suit. That plan number 18064/81 allocated to the 2nd defendant/appellant transited to the title number 10864/30 for which the title was issued.

7. It is not in dispute the 1st defendant is the registered owner of the suit property. A certificate of title is conclusive evidence of proprietorship and I find that he is the absolute and indefeasible owner of the suit property. Section 26 of the *Land Registration Act* states;

> "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

8. The plaintiff/respondent PW1 has stated that on the 28th April 2022 the 1st defendant advertised for sale to its members of staff several plot sand she paid kshs 1000/= for application and kshs. 160,000/= as deposit for Movoko plot. On the 21st September 2012 she was informed that her application was successful and was allotted plot number 18064/30 of which she paid the full purchase price of Kshs. 1,600,000/=. She was never given the title but was told her plot would be LR 101 and not 30.

9. The main issue in this appeal is whether the appellants had discharged the burden of proving that the plaintiff purchased a different parcel of land and not the suit land and it was the burden of the appellants to satisfy the court on that issue. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya), which provides:

> 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.

10. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence (See Isca Adhiambo Okayo vs Kenya Women's Finance Trust KSM CA Civil Appeal No. 19 of 2015 (2016)eKLR). That is captured in sections 109 and 112 of the Act as follows:

> 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

11. The well-known aphorism, "he who asserts must prove" was augmented by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010(2013)eKLR as follows

> We have considered the rival submissions on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that

> "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." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.

12. The testimony of DW1 testified that the plots were allocated using plan numbers because at that time the title deeds were not out. Once the title deeds were issued they were matched against the plan numbers and 10 plots among them the plaintiff's were on the power way leave and therefore unavailable for intended use. That the plaintiff informing her of the same re allocated her to plots LR No. 337/1921/51,52,53 and 54 subject to the payment of an additional amount of kshs. 100,000/=. That plan number 18064/81 allocated to the 2nd defendant/appellant transited to the title number 10864/30 for which the title was issued.

13. DW2 the second defendant stated that he was offered for sale the property known as LR No. 10864/30 which he accepted and purchased the same. He was given confirmation by the 1st defendant that plan number 18064/81 allocated to him transited to the title number 10864/30. However, he had not seen plot 81 on the ground.

14. The appellants have not produced any documentary evidence from the surveyor to prove this transition of plots and plot numbers. How did these numbers transit? I find no evidence adduced to confirm this transition.

15. The second issue is whether the doctrine of frustration applied herein. The doctrine of frustration, as I know it, is a complex one in the law of contract. It provides a vent for each party to bear the loss or gains of a contract which cannot be performed at a particular point in time. The Court of Appeal recently in Charles Mwirigi Miriti vs Thananga Tea Growers Sacco Ltd & another (2014) eKLR stated as follows;

> This now leads us to the issue of whether the agreement was genuinely frustrated.
>
> In Halsbury's Laws of England, Vol. 9(1), 4th Edition at paragraph 897:-
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> > "As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be

> due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; nor does the mere fact that a contract has become more onerous allow such a plea."

In the case of;- Davis Contractors LTD -vs- Farehum U.D.C, (1956) A.C 696, Lord Radcliffe at page. 729 held:

> "...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni". It was not what I promised to do".

16. The 1st defendant submitted that the contract of sale between the plaintiff and the 1st defendant in respect of the initially allocated plot LR 18064 was frustrated by virtue of the said plot being on a power way leave. The performance of the contract was rendered impossible. I have carefully perused the letter of offer from the 1st Defendant to the plaintiff dated 21st September 2012 and the land offered for sale is clearly indicated as LR No. 18064/30. This was after the land was surveyed and plots mapped out. In the absence of any evidence to the contrary this plot could not have transitioned to another number. The 2nd defendant is not an innocent purchaser for value as he knew very well he was offered number 18064/81 which he accepted and yet he received plot No. 10864/30. I find that the 2nd defendant did not purchase the suit land in good faith.

17. In the Ugandan case of Katende vs. Haridar & Company Limited (2008) 2 E.A.173 it was held that;

> "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:a.he holds a certificate of title;b.he purchased the property in good faith;c.he had no knowledge of the fraud;d.he purchased for valuable consideration;e.the vendors had apparent valid title;f.he purchased without notice of any fraud;g.he was not party to any fraud."

18. From the evidence adduced and guided by the above authorities and provisions of the law, I find that the contract was not frustrated and the suit land was not available for sale to the 2nd defendant. I find that the appellant did not present enough evidence before the learned magistrate to challenge the plaintiff's proprietary rights to the suit property within the confines of the law. The learned magistrate did not err in finding the plaintiff is the legal owner of the suit property. I find no probable reason to disturb the judgement of the trial court and both the appeals in the consolidated suit are dismissed with costs to the plaintiff/respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 25TH DAY OF MARCH 2025.

N.A. MATHEKA

JUDGE