



**Magugu & another v Thendu & 2 others (Environment and Land Appeal
13 of 2021) [2023] KEELC 18541 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18541 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL 13 OF 2021**

**A OMBWAYO, J
JUNE 29, 2023**

BETWEEN

MARGARET WAIRIMU MAGUGU 1ST APPELLANT

EDWARD MATHU KAMAU 2ND APPELLANT

AND

JOSEPH THENDU 1ST RESPONDENT

SAMUEL KIMANI MUCHAI 2ND RESPONDENT

NAIVASHA DISTRICT LAND REGISTRAR 3RD RESPONDENT

*(Being an appeal from the judgment of Honourable Joseph Karanja
(SPM) dated and delivered at Naivasha on 7th May 2021)*

JUDGMENT

Brief Facts

1. By a Plaint dated June 19, 2012 the respondents herein instituted a suit before the lower court to wit Nakuru CMCC No 217 of 2012 which was later transferred to Naivasha CM ELC NO 44 OF 2019 where it was averred that the respondents were bringing the suit as the representatives of a self-help group known as Naivasha Tunza Punda Youth Group.
2. It was also averred that the appellants were the bona fide purchasers of land parcel No Naivasha/ Mwachiringiri Block 4/3505 while the 1st appellant allegedly acquired the title to the suit property irregularly. The respondents claim was that the title deed registered in the name of the 1st appellant be cancelled and the restriction registered on the suit property be lifted.
3. The respondents therefore prayed for judgement against the appellants for;



4.
 - a. Invalidation/nullification/cancellation of title deed known as Naivasha/Mwichiringiri Block 4/3505 issued.
 - b. Orders of declaration that the suit land known as Naivasha/Mwichiringiri Block 4/3505 is legally purchased by the plaintiffs hence issuance of requisite title deed to plaintiff.
 - c. A permanent injunction restraining the defendants and or their agents, associates etc from interfering, dealing, trespassing on subject land.
 - d. Costs and interest of this suit.
9. The appellants filed their statement of defence dated October 14, 2019 where they denied the respondents claim and sought that their plaint be dismissed with costs.
10. The trial court in its judgement delivered on May 7, 2021 issued the following orders;
 - a. The plaintiffs are the bonafide purchasers of Naivasha/Mwichiringiri Block 4/3505.
 - b. The 2nd title re-issued to the 2nd defendant on May 24, 2011 is hereby invalidated/nullified and/or cancelled.
 - c. The 3rd defendant is hereby ordered to amend the register and include in the register the plaintiffs as the proprietors of the suit property within 14 days of getting the consent from the Land Control Board.
 - d. An order of permanent injunction is hereby issued restraining the 1st and 2nd defendants from further trespassing into Naivasha/Mwichiringiri Block 4/3505.
 - e. The plaintiffs are awarded costs of this suit and interest at court rates.

Grounds of Appeal

11. Aggrieved by the judgement in the lower court, the appellants herein filed a Memorandum of Appeal on June 14, 2021 which was based on the following grounds;
 - a. The learned trial magistrate grossly erred in not finding that the respondents had failed on a balance of probability to prove the alleged purchase of land especially given the fact that the 2nd Respondent disowned their claim, and clearly stated that he sold the land and received a consideration from the 1st Appellant.
 - b. The learned magistrate erred in entering judgement in favour of the respondents despite glaring evidence that the 1st and 2nd respondents were holding a fake title and that the suit land was never sold to them by the 2nd appellant, who denied in his evidence entering into the alleged sale agreement and further denied executing the transfer documents.
 - c. The learned magistrate erred in law and in fact by failing to note that the appellant had reported his title to the suit land lost and a gazette notice issued by the land Registrar Naivasha to have it replaced and issued to him by Naivasha Land Registry on May 24, 2011, upon which he sold and transferred the said land to the 2nd Appellant as per the 1st Appellant's testimony and evidence.
 - d. The learned magistrate erred in law and in fact by failing to note that the respondents unlawfully and fraudulently obtained a parallel title allegedly from Nakuru Land Registry on



the same date as one issued to the 2nd Appellant above despite the gazette notice for its loss being issued by Land Registrar Naivasha and not Nakuru.

- e. The learned magistrate failed to observe that there was a criminal offence committed by the respondents in the manner that they obtained the title purportedly issued at Nakuru Land Registry on May 24, 2011, despite the gazette notice being issued by a Registrar in Naivasha Sub County Registry.
 - f. The learned magistrate erred in law and in fact by ordering the cancellation of the 1st appellant's title despite failing to satisfy himself of conditions to be fulfilled before such cancellation under Section 80 of the Land Registration Act No 3 of 2012, whereby in this case the proprietor of the suit land was not found culpable to have been involved in any omission, fraud or mistake while obtaining her title or that she substantially contributed to the omission, fraud or mistake by her act or neglect.
 - g. The learned magistrate failed by not holding that the 1st appellant was an innocent purchaser for value without notice and cancellation of title cannot suffice in her case.
 - h. The learned magistrate erred in law and in fact by failing to appreciate that the impugned respondents documents of title allegedly issued at Nakuru and the payment acknowledgement note were disputed by the 2nd appellant and cannot be used as a basis for cancellation of a genuine title as they stand disputed by the 2nd appellant.
 - i. The learned magistrate misconceived the facts of the case by misapplying the law regarding cancellation of titles thereby occasioning gross injustice to the appellants.
 - j. The learned magistrate exhibited open bias for the respondents as he treated their testimony as gospel truth and disregarded the appellant's testimony.
 - k. The learned magistrate erred in law and in fact by misdirecting himself on the triable issues and specifically targeting the 1st applicant's title for cancellation without observing the conditions set out under Section 80 of Act No 3 of 2012 and failing to appreciate that the appellants title was genuine from the roots up.
 - l. The learned magistrate failed to observe that the respondents had failed to prove payment of consideration to the 2nd appellant, and that the acknowledgement note shown to the court was not sufficient enough to guide the court especially after the 2nd appellant had disowned it.
 - m. The learned magistrate erred in law and in fact in failing to appreciate the fact that the 1st appellant, obtained a clean title from the 2nd appellant and the recourse in law for the respondents (if any) was to claim under the default clause provided in the alleged sale agreement.
12. The Appellants sought for orders that;
- a. The appeal be allowed.
 - b. The judgement of the honourable Joseph Karanja (SPM) dated and delivered on May 7, 2021 be set aside.
 - c. The costs of this appeal be awarded to the appellants.



Submissions

13. The appeal was canvassed by way of written submissions. The appellants filed their submissions dated January 20, 2023 on January 24, 2023 while the respondents filed their submissions dated February 1, 2023 on the same date.
14. The appellants in their submissions identified the following issues for determination;
 - a. Whether the 2nd appellant had a proper title to the suit land to effect transfer to the 1st appellant.
 - b. Whether the 1st appellant was a bonafide purchaser for value without notice.
 - c. Whether the 1st appellant's title should be cancelled.
 - d. Whether the appeal should be allowed
 - e. Who should bear the costs.
15. On the first issue the appellants relied on Section 33 of the *Land Registration Act* and submitted that the 2nd appellant is the rightful owner of the suit property as he had acquired its title on December 29, 1989. The appellants further submitted that when the 2nd appellant discovered that his certificate of title was missing, he reported the loss of title and was issued with a police abstract dated February 23, 2011 which was submitted to the Naivasha Land Registry together with his application for replacement of the title dated March 1, 2011.
16. Upon receipt of the said application by the 2nd appellant, the District Land Registrar in Naivasha forwarded a Gazette Notice and requisite money order to government printers on March 3, 2011 and the same was gazetted on March 18, 2011 vide Gazette Notice No 2705. The appellants also submitted that upon lapse of sixty days, the District Land Registrar Naivasha issued a Certificate of Title to the 2nd appellant on May 24, 2011. They further submitted that the appellants have clearly demonstrated to the trial court through documentary evidence that the 2nd Appellant followed the proper procedure for re-issuance of his Certificate of Title and therefore maintained the rights and privileges as the owner of the suit land.
17. The appellants submitted that the 1st and 2nd respondents failed to demonstrate before the trial court how a title reported missing by the 2nd Appellant and gazetted by the Naivasha Land Registrar ended up being issued by the Nakuru Land Registry on May 24, 2011, the same date that the Naivasha Land Registry re-issued the Certificate of Title to the lawful owner of the 2nd Appellant herein. They relied on the case of *Hubert L Martin & 2 Others vs Margaret J Kumar & 5 Others [2016] eKLR* and submitted that the trial court failed to recognise that there was an element of criminality and illegality in the manner in which the parallel title was obtained by the 1st and 2nd respondents.
18. On the second issue, the appellants relied on the Ugandan case of *Katende v Haridar & Company Limited [2008] 2EA 173* and submitted that there is documentary evidence that shows that the 1st and 2nd respondents entered into a land sale agreement over the suit property with the 2nd appellant receiving the sum of Kshs 2,100,000/=. They also submitted that the trial court failed to consider that the 2nd appellant denied knowledge of the respondents herein and that he also denied that he signed any of the documents produced by the respondents. They relied on Section 7 of the *Land Act*, Section 107(1) of the *Evidence Act* and submitted that the 1st appellant's title is absolute and indefeasible and the said title should be shielded from being defeated as provided by Section 25 of the *Land Registration Act*.



19. On the third issue, the appellants submitted that the 1st appellant is a bona fide purchaser for value with a legitimate title to the property and thus the orders for cancellation cannot apply in her case.
20. On the fourth issue, the appellants sought that the appeal be allowed and the court makes a finding that the property belongs to the 1st appellant and relied on the case of *Child Welfare Society of Kenya vs Republic, Ex parte Child in Focus Kenya & AG & Others [2017] eKLR*.
21. The appellants concluded their submissions by seeking that their appeal be allowed and the judgement delivered by the trial court on May 7, 2021 be set aside and the costs be borne by the respondents.
22. The respondents in their submissions admit that the 1st appellant confirmed that she did not sign any sale agreement dated November 22, 2011 between her and the 2nd respondent to demonstrate a sale. The respondents also submitted that the appellant failed to demonstrate to the lower court that they went to the land board as required by law to get the requisite consents. The respondents relied on the case of *ELC Appeal No 002 of 2020 Lilian Mosonik & Another versus the Management Committee of AGC Riverside Church* in support of their arguments. The respondents also submitted that the learned trial magistrate correctly observed that that the appellants did not challenge the validity of the title deed held by the respondents.
23. The respondents further submitted that the appellants should have demonstrated before the trial court why they think that the title deed issued on May 24, 2021 was not valid instead of raising the said issues on appeal. The respondents concluded their submissions by seeking that the appeal be dismissed with costs.

Analysis and Determination

24. After considering the grounds of appeal, the following issues arise for determination;
 - a. Whether the learned trial magistrate erred in finding that the 2nd appellant had sold the suit property to the respondents.
 - b. Whether the learned trial magistrate erred in finding that the 1st appellant was not a bonafide purchaser for value.
 - c. Who should bear the costs of this appeal.
25. This being a 1st appeal, it is the duty of this court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. The jurisdiction of a 1st appellate court was well settled in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123*, which was quoted with approval by the case of *Barnabas Biwott v Thomas Kipkorir Bundotich [2018] eKLR* as 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.'

a. Whether the learned trial magistrate erred in finding that the 2nd appellant had sold the suit property to the respondents.

26. The 1st appellant's case before the trial court was that she had purchased the suit property from the 2nd appellant through her agent known as Paul Muya Mboche. It was also her case that she had gone to



the land control board before obtaining title to the suit property. She admitted that she did not sign the land sale agreement and neither did she give the said Paul Muya Mboche a power of attorney to sign on her behalf. She further admitted that she did not have evidence of payment of consideration of the suit property.

27. The 2nd appellant's case before the trial court on the other hand was that he had bought the suit property from Mirera Farmers in the 1970's and 1980's and was issued with a title deed on December 29, 1989. It was also the 2nd appellant's case that he lost his title and was issued with another one on May 24, 2011 and 6 months later he sold the suit property to the 1st appellant. He denied selling the suit property to any person other than the 1st appellant and claimed that the documents relied upon by the respondents were forgeries.
28. The respondent's case before the trial court was that they bought the suit property from the 2nd appellant for Kshs 780,000/= and upon payment of the purchase price, the 2nd appellant gave them an acknowledgement. It was also the respondents case that the 2nd appellant gave them his original title deed but when they went to do the transfer they realised that a restriction had been placed by the 1st appellant Margaret Wairimu Magugu.
29. The learned trial magistrate held as follows in his judgement;

' I will start with the plaintiff's claim of ownership since they are in possession of the original title deed. The sale agreement clearly shows that he entered into a sale agreement with Edward Mathu and he does not object that the ID number in the sale agreement is his. The 2nd defendant further stated that there was fraud and the signature was not his but he did not report to the police this aspect of fraud because if that was not his signature then it would be something of concern to him.

The plaintiffs produced the acknowledgement of payment signed by Edward Mathu. The Certificate of Search produced by the plaintiff clearly shows that the 2nd plaintiff was the legal proprietor of the suit land. The plaintiff also produced the application to the land control board for consent so that transfer would be effected. This evidence was necessary to prove that they had the intention to appear before the Land Control Board for consent to transfer the same as is required under Section 6 and 7 of the Land Control Act Cap 302 Laws of Kenya.

On the 1st defendant's claim of ownership, the sale agreement entered into on November 23, 2011 was produced which showed that one Paul Muya Mboche signed the agreement on behalf of the 1st defendant but on cross examination she said that they did not have any power of attorney conferring the power to Paul Muya to sign the sale agreement on her behalf. The 1st and 2nd defendant did not produce any bank transfer showing that the purchase price was transferred to the 2nd defendant.

The 1st and 2nd defendants produced the green card showing that the suit property had been transferred to the 1st defendant and the title deed issued to her on November 28, 2011 and on February 17, 2012 a restriction was put that prevents any dealings until the 1st defendant appears in person.

What raises doubt is that the 1st defendant and the 2nd defendant entered into an agreement for the sale of the property on November 23, 2011 and on November 28, 2011 the title deed was issued to the 1st defendant. That is 5 days apart. It is thus presumed that within 5 days



they applied for consent to transfer the land which was issued within 5 days, registration done and a title deed issued within the same time frame. This in itself is absurd,'

30. The appellants in support of their case before the trial court produced an agreement for sale dated 2 November 3, 2011 between Edward Mathu Kamau and Margaret Wairimu Kamau who was indicated to be represented by Paul Muya Mboche for sale of the suit property. As pointed out before and as indicated by the learned trial magistrate, the 1st appellant Margaret Wairimu Kamau admitted that she had not given the said Paul Muya Mboche a power of attorney to sign the agreement for sale on her behalf.
31. The respondents on the other hand produced a sale agreement entered into between the 2nd appellant and the respondents for the sale of the suit property for a consideration of Kshs 780,000/=. The respondents also produced an acknowledgement signed by the 2nd appellant indicating that he received the purchase price. As aforementioned, the 2nd appellant denied signing the said sale agreement and claimed that it was a forgery. Further, the respondents also had in their possession the original title deed that they alleged was given to them by the 2nd appellant to enable them facilitate the transfer.
32. Considering the totality of the evidence that was adduced before the trial court, I am inclined to agree with the findings of the learned trial magistrate who held that it was evident that the 1st appellant did not enter into a land sale agreement with the 2nd appellant as it was signed by an individual who did not have the authority to do so and further that the 2nd appellant merely alleged forgery of his signature on the documents produced by the respondents but did not make any report to the relevant authorities.
33. Therefore, the learned trial magistrate did not err in finding that the 2nd appellant had sold the suit property to the respondents.

b. Whether the learned trial magistrate erred in finding that the 1st appellant was not a bonafide purchaser for value.

34. The appellants argued that the learned trial magistrate erred in finding that the 1st appellant was not a bonafide purchaser for value. The learned trial magistrate held as follows;

' Due to the fact that the 1st and 2nd defendants did not produce any evidence challenging the genuineness of the title deed of the plaintiffs and the irregularities that are noted in the process of the purchase and transfer of the suit property to the 1st Defendant, then this court is inclined to hold that the plaintiffs are the bonafide purchasers for value'

Black's law Dictionary 8th Edition defines 'bona fide purchaser' as:

' One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.'

35. In the Ugandan case of *Katende v Haridar & Company Limited [2008] 2 EA 173* it was held:-

' 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.
36. Given my finding on issue (a) above that the 1st appellant did not demonstrate that she entered into a land sale agreement with the 2nd appellant to purchase the suit property and given the absence of evidence of any payment of the purchase price or consent of the land control board before the suit property was transferred to the 1st appellant's name, I am inclined to also agree with the findings of the learned trial magistrate that the 1st appellant was not a bonafide purchaser for value.
37. Having carefully considered this appeal, it is my view that the learned trial magistrate did not commit any error in its judgement to warrant interference by this court. Consequently, the appeal is hereby dismissed.

c. Who should bear the costs of the appeal?

38. Section 27 of the [Civil Procedure Act](#) provides that costs follow the event and given that the appellants' appeal lacked merit, the costs of the appeal shall be borne by the appellants.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 29TH DAY OF JUNE 2023.

A. O. OMBWAYO

JUDGE

