



**Kililo v Mwachuga (Environment and Land Appeal E037 of 2022)
[2023] KEELC 19003 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19003 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E037 OF 2022**

NA MATHEKA, J

JULY 26, 2023

BETWEEN

DELPHINA WAKESHO KILILO APPELLANT

AND

BARSIL KIUNGU MWACHUGHA RESPONDENT

JUDGMENT

- 1 The appellant having been aggrieved and dissatisfied with the judgment of the learned trial Chief Magistrate Court at Voi appeals against the entire judgement on the following grounds;
1. That the learned trial Magistrate erred in law and fact in reaching a conclusion that the respondent had proved his case on a balance of probability despite the respondent's evidence being wanting for a court to so conclude.
 2. That the learned trial Magistrate erred in law and fact in reaching a conclusion that the evidence of the appellant was not enough to rebut the respondent's evidence.
 3. That the learned trial Magistrate erred in law and fact in reaching a conclusion that the appellant did not follow due process and procedure to acquire the suit property.
 4. That the learned trial Magistrate erred in law and fact in reaching a conclusion that the appellant had no proper sale agreement of the suit property.
 5. That the trial Magistrate erred in law and fact in not considering in totality the evidence adduced by the appellant and her witnesses.
 6. That the learned Magistrate erred in law and fact in ordering that the appellant title which is first registration be revoked or cancelled without the Respondent proving fraud or misrepresentation.



- 2 It is proposed to ask the court for the following orders that:
- a. This Appeal be and is hereby allowed.
 - b. The Judgment of the Honorable Chief Magistrate be set aside.
 - c. Costs of this appeal and the costs of the lower court be to the Appellant.
- 3 This court has carefully considered the appeal and the submissions therein. This being a first appeal, this court has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. In the case of *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR, the Court of Appeal held that;
- This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High 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 allowances in this respect.”
- 4 A bonafide purchaser of value is a purchaser who buys a parcel of land for value without notice of another’s claim to the property and without actual or constructive notice of any defects in the seller’s title. A bonafide purchaser was defined by the Court of Appeal of Uganda in *Katende v Haridar & Company Ltd* (2008) 2 EA 173, where 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.
- 5 For a purchaser to successfully rely on the bona fide doctrine as was held in the case of *Hannington Njuki v William Nyanzi* High Court Civil Suit Number 434 of 1996, he must prove that:
1. he holds a certificate of title;
 2. he purchased the property in good faith;
 3. he had no knowledge of the fraud;
 4. he purchased for valuable consideration;
 5. the vendors had apparent valid title;
 6. he purchased without notice of any fraud; and
 7. he was not party to the fraud.
- 6 A bonafide purchaser for value of a legal estate without notice has absolute, unqualified and answerable defence against the claims of any prior equitable owner. The burden to establish or prove the plea lies on a person who sets it up.
- 7 The Appellant maintained that together with her husband, Muthama Kithuku bought the land from Peter Makau on December 21, 2003. I have perused the said agreement and I do note that the agreement does not describe the suit property it simply states that Peter Makau is giving Muthama Kithuku his parcel of land located in Marungu. The agreement also does not indicate the purchase price, and from



- the wording of the agreement it seems that Peter Makau did not seek any consideration for this parcel of land in Marungu from Muthama Kithuku, the Appellant's husband. It is the view of this court that this said agreement does not demonstrate that the Appellant purchased the suit land for valuable consideration.
- 8 Following the said agreement, the Appellant was allocated Plot 1782 at Maungu Buguta Squatter Settlement Scheme by the Director of Land Adjudication and Settlement Officer. The offer was conditional to paying Kshs 37,263.14, failure to which the offer would be cancelled. The Appellant pleaded that she was allocated the suit land after she purchased the same from Peter Makau. In my view, the same cannot be said to be valid, for the reason that the sale agreement was between the appellant's husband and Peter Makau and not with the appellant. Secondly, the agreement was in reference to land in Marungu and made no reference to Plot 1782. The Court therefore cannot infer that the allotment letter was in any way connected to the sale agreement, which was not for any valuable consideration.
 - 9 Further to that, the allotment letter dated March 22, 2011, was offered on one condition, which was a payment of Kshs 37,263.14 as the outright purchase price failure to which the offer would be cancelled. The appellant, on cross-examination claimed that her husband made the payments and retained the receipts. However, on cross-examination the husband admitted that he only paid Kshs 2,500 and was to pay the rest in instalments but never completed the payment required. He claimed that the Government later stopped further payments and was informed that the land was allocated freely. However, no evidence was adduced to support this claim. The appellant did not also demonstrate that they were allocated the suit land within the settlement scheme for valuable consideration since it admitted that the required payment was never completed. The appellant therefore never completed the condition necessary for the allotment of land within the settlement scheme. The allegations by DW3 that the respondent sold the suit land to Peter Makau, who sold it to the appellant was not supported by any evidence, even so the appellant herself stated that she did not know how Peter Makau acquired the suit land.
 - 10 The respondent on the other hand, stated that he occupied the suit property around 1980 where he was allocated the suit land by the then elders. He stayed at the suit land until 1985, where he was transferred to Taveta and left PW2, his neighbor as the caretaker until 1995 when he retired and returned to the suit land to conduct farming. The respondent maintained that the appellant trespassed on his land and when he raised a complaint to the area chief and later resolved by the ADR committee that the appellant was the owner of the suit land. However, by the time the respondent's complaint was being resolved in 2017, the appellant was already issued with a title deed in 2014 hence the reason the committee found that the appellant was the owner of the suit land.
 - 11 Nevertheless, from the evidence adduced, it is clear to the court that the appellant was a stranger in the settlement scheme area, she admitted that she lived in Maungu and not Marungu where the suit land is situated. She also acknowledged that there was a house built by the respondent when they moved into the suit land and that together with her husband, they have not built any house. The Appellant also disclosed that she did not know how Peter Makau acquired the suit land. It is evident that the appellant moved into the suit land, which was being occupied by the respondent, both her and her husband admit that at the time of purchase, there was a house, granary, latrine and crops on the suit land. The evidence of the appellant, somewhat confirmed the respondent's, since it was an admission that there was residency on the suit land, by the respondent.
 - 12 It was not enough for the appellant to dangle a title deed and claim that she has good title, the mere possession of a title document does not prove its valid, especially when the same title document is called



into question. The Court of Appeal in *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR, held that;

We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony. We find that a trust exists in relation to the suit property."

- 13 The appellant ought to have demonstrated to the court through evidence that the title deed was validly acquired, which in my view, she failed to do. The appellant failed to give a satisfactory explanation to the trial court as to how she became the registered owner of the suit land, situated in a settlement scheme, which she confessed to have never resided on. The trial court, therefore, did not err in law or in facts when it found that the appellant's title was questionable and that the respondent had proved his case on a balance of probabilities. I find that the Memorandum of Appeal dated August 19, 2022 is not merited and is dismissed with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE

