



**Karanja v Matheka & 5 others (Environment and Land Appeal
25 of 2019) [2023] KEELC 21706 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21706 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 25 OF 2019
CA OCHIENG, J
NOVEMBER 21, 2023**

BETWEEN

SUSAN ANNA KARANJA APPELLANT

AND

FRANCIS MUOKA MATHEKA 1ST RESPONDENT

BENEDICTA SYOMBUA MUSEMBI 2ND RESPONDENT

CRAWFORD KIOKO MATHEKA 3RD RESPONDENT

LYDIA MWIKALI MUTHYA 4TH RESPONDENT

BERITA MBITHE MUANGE 5TH RESPONDENT

MARTHA MWIKYA MUTISO 6TH RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the 19th June, 2019, the Appellant appealed against the Judgment of Hon C A Ocharo, Senior Principal Magistrate made on the 11th June, 2019 in Machakos CMCC No 552 of 2013 *Crawford Matheka & Others v Francis Muoka Matheka & Another & Susan Anna Karanja, Interested Party*. The genesis of this Appeal is the Judgment by Hon C A Ocharo, Senior Principal Magistrate where she dismissed the 3rd to 6th Respondents' suit and entered Judgment in favour of the 1st and 2nd Respondents as per their Counter-claim.
2. The Appellant(Interested Party) being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the 19th June, 2019 which contains the following grounds:
 1. That the Learned Magistrate erred in law and in fact in awarding Judgment in favour of the 1st and 2nd Respondent and in ordering a cancellation of the Applicant's title whereas no sufficient



evidence was adduced by the 1st and 2nd Respondents in strict proof of any illegal and fraud dealings by the Appellant.

2. That the Learned Magistrate erred in law and in fact in awarding Judgment in favour of the 1st and 2nd Respondents whereas the particulars of fraud had not been distinctively proved and no sufficient evidence was adduced by the 1st and 2nd Respondents in strict proof of the fraud allegations.
3. That the Learned Magistrate erred in law and in fact in failing to weigh and evaluate the testimony and evidence placed before the court and in finding that the sale and transfer in favour of the Appellant was null and void.
4. That the Learned Magistrate erred in law and in fact in declaring the sale and transfer of the suit property in favour of the Appellant null and void whereas all the requisite consents for the transfer of the suit property in favour of the Appellant were obtained.
5. That the Learned Magistrate erred in law and in fact in failing to appreciate the serious triable issues raised in the Appellant's Defence to the Counter-claim and in allowing the 1st and 2nd Respondent's Counter-claim.
6. That the Learned Trial Magistrate erred in law and in fact in failing to appreciate that the Appellant was the registered proprietor of the suit property who holds an absolute and indefeasible title that cannot be defeated unless on grounds of fraud, illegality which the proprietor is proved to be a party.
7. That the Learned Magistrate erred in law and in fact in failing to appreciate that the Appellant was an innocent purchaser for value of the suit property with no notice of any defects in title whose title to the suit property is sacrosanct.

The Appellant sought the following orders:

- a. The Appeal be allowed.
 - b. The Judgment and Decree delivered on 11th June, 2019 by the Chief Magistrate's Court at Machakos in Civil Suit No 552 of 2013 be set aside.
 - c. That the costs of this Appeal and of the Civil Suit No 552 of 2013 be awarded to the Appellant.
4. The Appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

5. The Appellant in her submissions provided a background of the dispute herein and explained that she entered into an Agreement of Sale dated the 16th December, 2012 together with the 1st and 3rd Respondents in respect to land parcel number Athi River/Athi River Block 1/208 hereinafter referred to as the 'suit land'. Further, that the purchase price which was Kshs 3,400,000 was paid to the 1st and 3rd Respondents' as trustees of the other Respondents. She submitted that she was therefore a bona fide purchaser for value since all the relevant consents were obtained from all the Respondents for the sale and transfer of the suit land. It was her submission that on the 6th of February, 2013, the 2nd Respondent lodged a caution against the title which was later lifted vide a court order dated the 19th July, 2013 allowing her to complete registration of the Title and transfer was issued in her favour, giving her an indefeasible title. She insisted that the 1st and 2nd Respondents neither had locus to seek for an order



of cancellation of the Title of the suit land nor could they be issued with injunctive orders barring her from selling it. She further submitted that the previous registered co-proprietor Crawford Kioko who was one of the Plaintiffs in the Lower Court suit together with the other Co-plaintiffs named herein as the 3rd to 6th Respondents did not support the 1st and 2nd Respondents' prayer for cancellation of title but instead wanted the sale enforced. The Appellant referred to Section 107 of the Evidence Act and argued that the allegations of fraud were not proved as no evidence was availed to disprove the signatures of the 1st and 2nd Respondents since no expert was brought before court to prove otherwise. To support her arguments, she relied on the following decisions: Daniel Keenga Katana & 4 others v Dzitu Toko Bokole & 3 others [2020] eKLR; Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123 and Kuria & another v Njau & 3 Others (Environment and Land Case 255 of 2018) [2022] eKLR.

1st and 2nd Respondents' Submissions

6. The 1st and 2nd Respondents in their submissions referred to Sections 107 and 108 of the Evidence Act on the burden of proof and insisted that it shifted to the Appellant to prove that her registration as proprietor of the suit land was not obtained by fraud and misrepresentation by the 3rd to 6th Respondents. They argued that the Appellant was the author of her own misfortunes as she purchased the suit land without involving all the beneficiaries whom the land was being held in trust for, by two administrators. They insisted that the 3rd to 6th Respondents could always refund their share of the purchase price as they never took any monies. They further submitted that the sale and transfer were vitiated since the purported Sale Agreement was not signed by any of the sellers meaning there was no sale. They contended that the sale was not authorized by all the beneficiaries and the administrators lacked authority to sell since the consents had been forged in an elaborate scheme of fraud. To buttress their averments, they relied on the following decisions: ELC No 1472 of 2014 (Nairobi) Esther Muiruri Kamau v Mary Mwihaki Kamau; ELC No 51 of 2014 (Kericho) Alice Chemutai Too v Nickson Kipkirui Korir & Others; ELC No 215 of 2017 (Nyahururu) James Mathonge Munyiri v District Lands Registrar & Others; Morris Njagi & another v Beatrice Wanjiru Kiura (2019) eKLR and Selle & another v Associated Motor Boat Co. Ltd & Another [1968] EA 123.

Analysis and Determination

7. I have considered the Memorandum of Appeal, Record of Appeal and rivaling submissions and the following are the issues for determination: Whether the Appellant legally purchased the suit land from the Respondents and can be deemed as a bona fide purchaser for value without notice. Whether the Appellant's Certificate of Title to the suit land should be cancelled. Whether the Appeal is merited.
8. I will deal with all the issues jointly. These being a first Appeal, the role of this court is to re-evaluate the evidence to a fresh analysis so as to arrive at an independent conclusion as to whether or not to uphold the decisions of the trial Magistrate. This Court will rely on the case of Selle v Associated Motor Boat Co. [1986] EA 123 where it was held as follows:

The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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.”

9. The background of this Appeal emanates from a suit filed in the Lower Court being Machakos CMCC No 552 of 2013 where the Appellant was an Interested Party while the 3rd to 6th Respondents were



Plaintiffs and the 1st and 2nd Respondents (Defendants). The Plaintiffs therein sought the following Orders:

1. An Order that the caution registered by the 2nd Defendant against Land Parcel Number Athi River/Athi River Block 1/208 be removed and the Machakos Land Registrar to effect the court order purchase price.
 2. An Order that the Defendants do receive their payment cheques being their respective share of the purchase price.
 3. Costs of this suit and interest.
 4. Any other or further relief as this Honourable Court may deem fit and just to grant.
10. The 1st and 2nd Respondents (Defendants) in their Amended Defence including Counter-claim sought for the Plaintiffs' suit to be dismissed with costs and Judgment entered as per the Counter-claim in the following terms:
- a. The cancellation of the Title Deed over land parcel number Athi River/athi River Block 1/208 registered to one Susan Anna Karanja.
11. The Appellant who was the Interested Party filed her Defence to the Counter-claim where she explained how she acquired the suit land and confirmed that she has a Title Deed issued in her name.
12. The matter hence proceeded for hearing and the trial Magistrate after analyzing the evidence presented, in her Judgment held that:
- Having found that the sale is null and void the plaintiffs' prayer that the defendants be ordered to receive their payment cheques being their respective share of the purchase price cannot issue. The upshot is that the Plaintiff's suit and Interested Party's claims are dismissed with costs to the defendants whose counterclaim shall be allowed with costs."
13. I will proceed to analyze the evidence presented in the lower court before making a determination of the issues above. PW1 confirmed that they sold the suit land to the Interested Party for Kshs 3,400,000 who paid the full purchase price. He explained that they had a Sale Agreement dated the 4th December, 2012. He further confirmed that together with Francis Muoka Matheka (DW2) they had been holding the suit land in trust for the beneficiaries who all gave their consent to sell it. He insisted that Benedicta Musembi (DW1) signed consent on 18th January, 2013 which was witnessed by F. M. Mulwa Advocate. He contended that Benedicta filed a caution and consent in a span of two (2) weeks. PW2 Lydia Mwikali confirmed that the suit land was sold to the Interested Party. Further that they authorized Crawford Matheka (PW1) and Francis Matheka (DW2) to sell it. She confirmed that she received Kshs 400,000 as her portion of the purchase price. She insisted that Benedicta Musembi (DW1) signed consent on 18th January, 2013. DW1 Benedicta Musembi denied signing a consent to allow sale of suit land. She however admitted that she went to F. M. Mulwa Advocates offices to register a caution and that the family had incurred expenses when Katelembo Society gave them another parcel of land. She was aware of the Misc. Case No 38 of 2013. DW2 Francis Muoka Matheka who was a retired teacher denied being present when the suit land was sold. He admitted giving his photograph to Crawford Matheka (PW1) but claims he was conned to do so. In cross-examination he confirmed signing the Transfer Form without knowing. He further denied giving his PIN to Crawford Matheka (PW1). He claimed his sisters did not know the suit land was being sold and insisted that his consent was obtained through forgery. The Interested Party (Appellant) confirmed she purchased the suit land, paid the full purchase price and later obtained a Certificate of Title to that effect. She admitted not being present when the family members signed consent. F.M. Mulwa Advocate in his testimony



admitted that he prepared the Transfer Documents and that the Sale Agreement bore his office stamp. Further, that he witnessed Transferors execute Transfer and Consents. He claimed he knew Plaintiffs and Defendant very well as they were from his clan. He insisted that Benedicta Musembi (DW1) signed the consent as he identified her with her ID. He further confirmed that he wrote a letter to DW1 and DW2 to collect their share of the purchase price amounting to Kshs 400,000 from his office, but was not sure if they collected it.

14. From the evidence analyzed above, I note it is only DW1 and DW2 who have not collected their respective portions of the purchase price as they are the only ones disputing the sale of suit land to the Interested Party. Further, none of the other beneficiaries have disputed the sale of the suit land to the Interested Party. From the testimony of Francis Matheka (DW2), who is a retired teacher, he claims he signed certain documents including the Transfer Form without knowing but he did not indicate what action he took when he realized he was conned. I note he signed the Transfer Form which also has his photograph and this is the key document in the disposition of land and as a literate person, I wonder why he did so. I note all the beneficiaries except DW1 and DW2 wanted the sale of suit land to the Interested Party enforced. Insofar as the trial magistrate discredited the evidence of F.M. Mulwa Advocate when he said all family members signed the consent, I beg to disagree with her on this point. To my mind, I have no reason to doubt that all the family members signed the consent. DW1 claimed she went to the firm of F.M. Mulwa Advocate to register a caution. If indeed she was challenging participating in the sale of the suit land, then why did she admit going to the law firm of F.M. Mulwa Advocate three (3) times and did not explain what she went to do in one of the visits. Further, DW2 could not claim forgery and yet he signed the transfer form, his photos were thereon and he did not say how consent of the Land Control Board was obtained yet, he was a co proprietor of the suit land. Another point to note, is why Benedicta Musembi (DW1) and Francis Matheka (DW2) who claimed forgery failed to avail an expert to dispute their signatures appended to the consents as well as other documents. From the documents which were produced by the Appellant, I note she indeed adhered to the due process of the law to acquire her title. I further note Minutes were produced confirming the Respondents had agreed to sell the suit land. If indeed Francis Matheka (DW2) was opposed to the Sale how come he signed all the documents as a co-owner. Since he was a literate man and the elder brother to Crawford Matheka (PW1), is it possible he was severally conned to sign all the documents, appear before F.M. Mulwa Advocate as well as Land Control Board. Further, why would F.M. Mulwa Advocate (late) insist that Benedicta Musembi (DW1) who was identified using an ID sign the Consent if she did not, and that he prepared consents which all the beneficiaries signed in his presence. I note these consents were executed prior to obtaining consent of the Land Control Board. It is trite that particulars of fraud have to be proved by the person who alleges it and in this instance it was the 1st and 2nd Respondents duty to do so. I opine that they could not shift that burden to the Appellant since they were the ones disputing the sale. On validity of title, I wish to make reference to Section 26(1) of the [Land Registration Act](#) which provides as follows:-

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.”

15. Section 24(a) of the *Land Registration Act* further stipulates as follows:-

Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto....”

16. In the case of *Arthi Highway Developers Limited V West End Butchery Limited & 6 others* (2015) eKLR the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. Further in the Uganda Court of Appeal Case of *Katende v Haridar & Company Ltd* cited with approval in the Kenya High Court Case of *Lawrence Mukiri v Attorney General & 4 others* ELC 169 of 2008, on what amounts to bona fide purchaser for value it was held thus:-

...a bona fide purchaser for value is 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 the following:

- a. He holds a certificate of Title
- b. He purchased the Property in good faith;
- c. He has no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.”

See also the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others* [2015] eKLR.

17. In relying on the evidence before the Lower Court including the exhibits presented while associating myself with the decisions cited above, insofar as the typed Sale Agreement had no signatures of the vendor, I note the handwritten one at page 63 of the Record of Appeal was signed by the vendors and beneficiaries. I note as per the document at page 70 of the Record of Appeal, addressed to the Chairman of the Land Control Board, Benedicta Musembi (DW1) signed it. Further, PW1 and DW2 signed the Application for Consent to the Land Control Board. I find that since PW1 and DW2 held a good title to the suit land, received consents from the beneficiaries to sell it, while DW2 and PW1 signed the transfer forms including obtained consent to transfer from the Land Control Board, after which transfer was effected to the Interested Party (Appellant), she indeed acquired a good title to the suit land. I hence deem her to be a bona fide purchase for value without notice since all the beneficiaries except only two, took purchase price. It is my considered view that DW1 and DW2 only refused to pick their share of the purchase price which was at the Law firm of F.M. Mulwa Advocate as an afterthought.

18. In the circumstances, I find that the trial Magistrate erred in law by entering Judgment in favour of the 1st and 2nd Respondents and ordering cancellation of the Appellant’s title since there was no sufficient evidence adduced of any illegal and fraudulent dealings she undertook. Further, I find that the Learned Magistrate erred in law and in fact in declaring the sale and transfer of the suit land in favour of the Appellant was null and void, yet she obtained the requisite consents for the transfer of the suit land in



her favour. I further find that the learned trial Magistrate erred in law and in fact in failing to appreciate that the Appellant was the registered proprietor of the suit land and held an indefeasible title that cannot be defeated unless on grounds of fraud, illegality which she is proved to be a party. I also hold that the learned Magistrate erred in law and in fact in failing to appreciate that the Appellant was an innocent purchaser for value of the suit land with no notice of any defects in title.

19. It is against the foregoing that I find the Appeal merited and will proceed to make the following final orders:
- a. The Appeal be and is hereby allowed.
 - b. The Judgment and Decree delivered on 11th June, 2019 by the Chief Magistrate's Court at Machakos in Civil Suit No 552 of 2013 be and is hereby set aside and the title in favour of Appellant upheld.
 - c. That the costs of this Appeal and of the Civil Suit No 552 of 2013 be and is hereby awarded to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF NOVEMBER, 2023.

**CHRISTINE OCHIENG
JUDGE**

