



**Oduri v Oyuo (Sued as the Legal Representative of Jakobo Oyuo Chacha
- Deceased) & another (Environment and Land Appeal E011 of 2023)
[2023] KEELC 22049 (KLR) (5 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22049 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E011 OF 2023
GMA ONGONDO, J
DECEMBER 5, 2023**

BETWEEN

GEORGE OMOLO ODURI APPELLANT

AND

**BELDINA ATIENO OYUO (SUED AS THE LEGAL REPRESENTATIVE OF
JAKOBO OYUO CHACHA - DECEASED) 1ST RESPONDENT**

ALOISE OCHIENG OYUO 2ND RESPONDENT

(An appeal from the judgment of Honourable J.M Nang'ea (CM) delivered on 15th February 2023 in Homa Bay Chief Magistrate's Court Environment and Land Case Number E021 of 2022)

JUDGMENT

1. On 15th February 2023, the trial court delivered judgment in favour of the plaintiff/1st respondent in terms of prayers (a) (c) and (d) sought in the plaint dated 9th May 2022.
2. The appellant was aggrieved at the judgment and through the firm of G.S Okoth & Company Advocates, lodged this appeal by way of a memorandum of appeal dated 6th March 2023 based on the grounds that;
 - a. The learned trial magistrate misdirected himself on several matters of law and fact.
 - b. The learned trial magistrate misdirected himself on the law governing the rights of a bona fide purchaser for value under the [Land Registration Act](#), 2012.
 - c. The learned trial magistrate erred in law relating to land ownership failing to distinguish between section 24 and 26 of The [Land Registration Act](#) and Section 28(b) of The [Land Registration Act](#) and by failing to note which of the provisions takes priority over the other.



- d. The learned trial magistrate erred in law in failing to take into account that the appellant was a lawfully registered proprietor for value with a title deed lawfully issued on 14th January 2011 after exercising due diligence, effecting a search and obtaining a Land Control Board's consent and that consequently the appellant's title is indefeasible and was not obtained fraudulently.
 - e. The learned trial magistrate erred in law in failing to strictly comply with the provisions of section 26 and 80(2) of The Land Registration Act and ordering for the rectification of the register without any evidence of fraud, mistake, corruption or misrepresentation on the part of the appellant.
3. Wherefore, the appellant prays to this Honourable Court to quash the decision of the trial court and allow the appellant's appeal with costs.
 4. The appeal was heard by way of written submissions pursuant to this court's directions given on 25th September 2023
 5. The appellant's counsel filed submissions dated 12th October 2023 and urged grounds 1, 2, 3, 4 and 5 together. Counsel referred to the particulars of fraud set out in the plaint in the suit and submitted that the appellant bought the suit property, LR No. Gem/Komolo/535 from the 2nd respondent and holds a certificate of title thereof. Further, counsel relied on Sections 24, 26 and 80 (2) of the Land Registration Act, 2016 (2012) (The LRA) as well as the decision in Lawrence P.Mukiri v Attorney General & 4 others (2013) eKLR and submitted that the appellant was bona fide purchaser for value in respect of the suit property. That the trial court's decision be quashed and this appeal be allowed with costs.
 6. The 1st respondent's counsel, Nyakwamba and Company Advocates, filed submissions dated 3rd November 2023 and opposed the issues in the memorandum of appeal. Counsel submitted that the appellant is not a bona fide purchaser for value in light of the decisions in Munyu Maina v Hiram Githiba Maina (2013) eKLR, Dina Management Ltd v County Government of Mombasa & 5 others (2023) eKLR and Katende v Haridar & Company Ltd (2008) 2 EA 173 as well as Section 26 (1) of the LRA. That the plaintiff/1st respondent discharged the burden of proof to the required standard and urged the court to dismiss the appeal with costs to the 1st respondent.
 7. The 2nd respondent did not participate in the appeal.
 8. At the trial court, the 1st respondent sued the 2nd respondent and the appellant by way of the plaint dated 9th May 2022 for, among others;
 - a. An order of permanent injunction against the appellant restraining him, his agents, servants, employees or any other person deriving authority from him from evicting or blocking the 1st respondent from the suit property.
 - b. An order of declaration that the 2nd respondent held the suit property in customary trust for family of the deceased, Jakobo Oyuo Chacha.
 9. The evidence of the plaintiff/1st respondent (PW1) was based on her statement, *inter alia*, that the suit property belonged to her late husband, Jacob Oyuo (Deceased). That the 2nd respondent is her first born son who holds the suit property in trust for his siblings. That the 2nd respondent knows the matter better than her. That she stays on the suit property and relied on a bundle of documents filed on 11th May 2022 (PExhibit 1).



10. John Puong Ochiel (PW2) stated that PW1 was his step mother, relied on his statement dated 9th May 2020 in examination in chief. He told the trial court that the suit property;

“.....is registered in the name of Aloice in trust for his brothers.....He sold the entire land to George Omollo Odondi (2nd defendant).....”
11. PW3 was Henry Odhiambo Oyuo who relied on his statement dated 9th May 2020 as part of his testimony. He stated that PW1 was his mother and that;

“.....The deceased allowed registration of the land in the name of the 1st defendant in trust for his other siblings. He has instead unlawfully sold the land to the 2nd defendant.....”
12. The evidence of the 1st defendant/2nd respondent (PW1) was premised on his statement dated 16th June 2022, his bundle of documents filed on even date (Exhibit 1) and stated that the suit property was ancestral land. That he sold it to the 2nd defendant/appellant but was not aware that he was to hold the same in trust for his siblings. That he just obtained title for the land.
13. The 2nd defendant/appellant founded his testimony upon his statement dated 11th June 2022. He stated that Land Registry records show that DW1 is the owner of the suit property. That DW1 told him that he was its absolute owner.
14. In arriving at the impugned judgment the trial court observed that the 2nd respondent did not know how he obtained ownership of the suit property which he then sold to the appellant. That the 2nd respondent held title to the suit property in trust for his family members inclusive of the 1st respondent/plaintiff as well as his (PW1) siblings. That therefore, the 2nd respondent did not pass good title thereof to the appellant.
15. The instant appeal being the first one from the trial court, I have the jurisdiction to review the evidence of the trial court in order to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution; see *Peters v Sunday Post* (1958) EA 424 at 429.
16. In that regard, the issues for determination are contained in the grounds of appeal which crystallize to proprietorship of the suit property and if bona fide purchaser for value in favour of the appellant, is applicable thereto in the circumstances.
17. This court is not unaware of ownership of land pursuant to Sections 24, 25 and 26 [LRA](#). It is common ground that the suit property is registered in the name of the appellant.
18. It is trite law that fraud and misrepresentation as grounds for impeaching a certificate of title be distinctly pleaded and prove; see [Kuria Kiarie & 2 others v Sammy Magera](#) (2018) eKLR.
19. Indeed, the particulars of fraud against the 2nd respondent and the appellant are set out at paragraph 14 of the plaint, a pleading in the suit; see also *Ndolo v Ndolo* (2008) 1KLR (G & F) 742.
20. [Chitty on Contracts](#) Volume 2, 22nd Edition at 844 reads;

“.....mere exaggeration, however is not conclusive evidence of fraud.....”
21. In [Concise Oxford English Dictionary](#) 12th Edition at page 564, the term “Fraud” is defined, *inter alia*;
 - a. Wrongful or criminal deception intended to result to financial or personal gain



- b. A person or thing intended to deceive.
22. A court may apply Sections 26 and 80 of the *LRA* regarding a title obtained fraudulently upon distinct proof. In *Gladys Wanjiru Ngacha v Treresa Chepsaat & 4 others* (2018) eKLR where the decision in *Lalji Makani* (1957) EA 314 at 317 was applied, Court of Appeal held;
- “Allegations of fraud must be strictly proved.....something more than a mere balance of probabilities is required.”
23. It is instructive that overriding interests, inter alia, trusts including customary trusts are stipulated in Section 28 of the *LRA*. Trust is a question of fact to be proved by way of evidence as recognized in *Wambugu v Kimani* (1992) 2 KAR 58.
24. Moreover, some of the elements that would qualify a claimant as a trustee are well settled; see the Supreme Court of the Republic of Kenya decision in the case of *Isaac M’Inanga Kiebia v Isaaya Theuri M’Lintari & another* (2018) eKLR.
25. This court is guided by the decision in *Katende case (supra)* on the description of 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. The court set out the seven elements of the bona fide doctrine to include; the purchaser holds a certificate of title, he had no knowledge of fraud and the vendor has apparent valid title.
26. In *Lawrence P. Mukiri case (supra)*, the court applied the decision in *Katende case (supra)* and bore in mind literacy, employment and the conduct of a party in deliberately failing to enter into a written sale agreement regarding the land in question. It was held that the doctrine of bona fide purchaser for value would not apply in that scenario.
27. Moreover, in *Munyu Maina case (supra)*, the Court of Appeal noted that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof ownership. That the said proprietor must go beyond the instrument of title and prove that its acquisition was legal, formal and free from any encumbrances.
28. In the instant case, it is evident that the 2nd respondent just obtained title to the suit property which was ancestral land and held it in trust for his siblings. He deliberately registered the same in his name and sold it to the appellant who had knowledge of the state of customary trust thereon as revealed in paragraph 2 of his statement which was adopted as part of his testimony.
29. So, the appellant did not obtain title to the suit property legally, formally and free from encumbrances as held in *Maina Munyu case (supra)* and he was not a bona fide purchaser thereof. The trial court’s judgment is solid at law and I find no reason to disturb it.
30. A fortiori, this appeal originated by a memorandum of appeal dated 6th March 2023 is hereby dismissed with costs to the 1st respondent.
31. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 5TH DAY OF DECEMBER 2023

G. M. A. ONGONDO

JUDGE

Present:



1. P. Odhiambo instructed by G.S Okoth learned counsel for the appellant
2. Mr. Nyakwamba learned counsel for the 1st respondent
3. Luanga, court assistant

