



**Moly Credit Limited & another v Kahuro & another (Civil Appeal  
E001 of 2020) [2023] KEELC 22035 (KLR) (4 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22035 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
CIVIL APPEAL E001 OF 2020  
MN GICHERU, J  
DECEMBER 4, 2023**

**BETWEEN**

**MOLY CREDIT LIMITED ..... 1<sup>ST</sup> APPELLANT**

**SAMUEL W. MUGO T/A SANNEKX AUCTIONEERS ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOSEPH KAHURO ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH KAHURO KIGIO ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This judgment relates to Ngong Magistrate's Court ELC Case No. 56 of 2018 and the memorandum of appeal dated 27<sup>th</sup> October 2020 filed by the Appellants' counsel. In the said memorandum, the appellants seek three prayers as follows.
  - a. That this appeal be allowed.
  - b. That the judgment delivered on 30/9/2020 by Honourable Ruguru N, Principal Magistrate, be set aside and in its place, there be judgment in favour of the appellants dismissing the 1<sup>st</sup> respondent's suit with costs.
  - c. That the costs of this appeal be borne by the respondents.
2. The memorandum of appeal contains twenty grounds as set out herein below. That the Learned Magistrate erred in law and in fact in,
  - i. Failing to give due regard and consideration to the appellants' evidence and submissions on the subject matter thereby reaching a finding that the 1<sup>st</sup> respondent had discharged his burden of proof.



- ii. Considering the evidence placed on record by the 1<sup>st</sup> respondent which evidence was inadmissible in law and incapable of proving his case to the standard required by the law.
- iii. Failing to find fault in the respondent's failure to produce original documents in court despite notice to do so having been issued by the appellants.
- iv. Placing a higher burden of proof upon the first appellant to defend the sanctity of the charge created over L.R. Ngong/Ngong/36238 and a lesser burden upon the 1<sup>st</sup> respondent to prove his case on fraud, illegality and misrepresentation as set out in the pleadings.
- v. Failing to address the contradictory nature of the evidence tendered by the respondents on their respective transactions for the purchase of the property and thereby reached a finding that the 1<sup>st</sup> respondent had proved ownership of the property in priority to the 2<sup>nd</sup> respondent.
- vi. Making a finding that the 1<sup>st</sup> respondent had established that he had handed over completion documents to the second respondent yet the existence and contents of the completion documents was not proved.
- vii. Making a finding that the property was fraudulently registered in the name of the second respondent in the absence of any evidence to establish the material fact that the 1<sup>st</sup> respondent had indeed placed the said documents in the hands of the second respondent for purposes of registration of the suit land in his name and not in the name of the second respondent.
- viii. Making a finding that the second respondent had taken advantage of the 1<sup>st</sup> respondent who was old and illiterate yet the 1<sup>st</sup> respondent had exhibited a copy of a written and signed agreement of sale which negated the finding of the court on his personality.
- ix. Making a finding that the second respondent had inserted his identity card number and affixed his photographs in the transfer forms thereby illegally, procedurally and through misrepresentation had the title to the suit land registered in his name which finding was not supported by any material evidence.
- x. Failing to appreciate that the 1<sup>st</sup> respondent had taken too long to establish the alleged anomaly in the registration of the property in the name of the 2<sup>nd</sup> respondent.
- xi. Failing to appreciate the evidence on collusion between the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the circumstances under which the property was registered in the name of the second respondent who subsequently created a charge in favour of the 1<sup>st</sup> appellant.
- xii. Overlooking the appellants' documentary evidence in form of a demand letter dated 18/12/2013 by G.M. Nyambati and company advocates addressed to the first appellant whose contents had established the fact of common interest by the respondents in the suit property and which evidence contradicted the respondents' case.
- xiii. Failing to dissect through the dealings between the first and second respondents and identify their complicity in the registration of the suit land in the name of the 2<sup>nd</sup> respondent and therefore in consideration for the registration of the title did not necessarily need to be in monetary form in the circumstances of the transaction.
- xiv. Validating the respondents' scheme of collusion to defeat the 1<sup>st</sup> appellant's rights lawfully created by the charge over the suit land and thereby prejudiced her right to recover the loan sums advanced to the second respondent.



- xv. Reaching a finding that the 2<sup>nd</sup> respondent had no capacity to create a charge in favour of the 1<sup>st</sup> appellant over the suit land which finding was against the weight of evidence placed on record.
  - xvi. Reaching a finding that the charge registered by the 1<sup>st</sup> appellant over the suit land was fraudulent and a nullity ab initio which finding was against the weight of evidence placed on record.
  - xvii. Placing a higher burden of proof upon the appellant to defend the sanctity of the charge created over the suit land and a lesser burden upon the 1<sup>st</sup> respondent to prove his case.
  - xviii. Making a finding that the search and due diligence conducted by the 1<sup>st</sup> appellant over the suit land as presented by the second respondent was not sufficient to protect her as a bona fide purchaser of value under the circumstances of this case and the law.
  - xix. Creating a precedent that a person in the position of the 1<sup>st</sup> appellant would be defeated in exercising her rights under an instrument of charge lawfully created over a property on grounds of past history in relation to the property with the consequence of substantial loss and prejudice.
  - xx. Misapprehending the interests of justice in the case by proposing alternative remedies to the parties which were neither pleaded nor appropriate in the circumstances of the case.
3. The 1<sup>st</sup> respondent filed his action in the lower court alleging fraud on the part of the 2<sup>nd</sup> respondent. Both had a similar name, Joseph Kahuro Kigio, and they were only to be differentiated by their ages and their identity card numbers. The 1<sup>st</sup> respondent is older than the second who is his nephew and one holds Identity Card Number 68xxxxx while the second respondent has number 216xxxxx. While the first respondent claimed to have bought the suit land from Joseph Solei Ntore in the year 2005 and to have been defrauded by the 2<sup>nd</sup> respondent when he sent him to register the land for him, the second respondent also claims to have been the true purchaser and not his uncle.
- At the trial, the 1<sup>st</sup> respondent was convincing to the court because he was able to call Joseph Solei Ntore as his witness while the second respondent had no witness to support his ownership of the suit.
- It is not in dispute that the suit land was charged to the appellant by the second respondent, that he defaulted in repaying the loan advanced to him as a result of which the appellant sought to exercise its statutory power of sale against the 2<sup>nd</sup> respondent.
4. Counsel for the parties filed written submissions dated 20/1/2023 and 20/3/2023 respectively and identified three issues for determination.
- a. Whether the 1<sup>st</sup> respondent has proved his case on fraudulent registration in the name of the 2<sup>nd</sup> respondent.
  - b. Whether there was evidence of collusion between the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the registration of the title to the suit land in the name of the 2<sup>nd</sup> respondent.
  - c. Whether there was a valid charge registered over the title in favour of the 1<sup>st</sup> appellant and whether the 1<sup>st</sup> appellant had a remedy in her interest over the property.
5. I have carefully considered the memorandum of appeal and the twenty (20) grounds therein, the record of appeal, the submissions by the learned counsel for the parties and the law cited therein. I agree this being a first appeal, this court must reconsider the evidence from the lower court, evaluate it itself, draw



its own conclusions bearing in mind that it neither saw nor heard the witnesses and should make due allowance in this respect.

See *Selle –versus- Associated Motor Bout Co.* 1968 E.A. 123.

6. On the first issue, I find that the 1<sup>st</sup> respondent was able to prove fraud on the part of the second respondent. He called the person who sold the suit land to him as his witness in the trial court. He also called a neighbor by the name of Gideon Sane who was a witness to the sale. The second respondent had no witness to the sale. He was not convicting that he bought the land from Joseph Solei Ntore. It was therefore obvious that he got the land fraudulently. The learned trial magistrate was right in making this finding.
7. On the second issue, I find that even though paragraph 9 of the appellants’ written statement of defence and the witness statement by Moses Anyangu mention that the first respondent’s conduct as having abetted the fraud of the second respondent, this is only in passing. There was no serious attempt at the trial to prove any collusion. Failure by the appellants to investigate the occupation by the first respondent of the suit land before advancing the loan to the second respondent was their greatest undoing. Collusion between the respondents was not proved at the trial. Having not been proved at the trial stage, it cannot properly be brought up abruptly on appeal.
8. Coming to the third and final issue, I find there is no valid charge registered over the title to the suit land in favour of the first appellant. I also find that the only remedy that the first appellant has is against the lawfully owned property of the second respondent. In the case of *Dina Management Limited –versus- The County Government of Mombasa* Petition No. 8 (E010) of 2021, the Supreme Court of Kenya held that under Article 40(6), the protection of the right to property does not extend to unlawfully acquired property. It reads in part as follows at paragraph 111.

“...Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under Article 40 of the *Constitution*. The root of the title having been challenged as we have already noted above the appellant could not benefit from the doctrine of bona fide purchaser”.

Similarly in this case, since the second respondent acquired the suit land unlawfully, the charge by the appellant is not protected by Article 40 of the *Constitution*.

9. For the above stated reasons, I find no merit in the appellants’ appeal and I dismiss it with costs.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 4<sup>TH</sup> DAY OF DECEMBER 2023.**

**M.N. GICHERU**

**JUDGE**

