



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELC APPEAL NO. 45 OF 2021

ZACHARY OMONDI ODONGO.....APPELLANT

VERSUS

BERNARD STEPHEN OMOLLO.....1ST RESPONDENT

MARTIN OMONDI ONGEWE.....2ND RESPONDENT

DISTRICT LAND REGISTRAR UGENYA.....3RD RESPONDENT

(Being an appeal against the Judgment of the Honourable Senior Resident Magistrate Honourable C.N. Sindano dated 16/10/2019 from the Senior Resident Magistrate's Court at Ukwala ELC Case Number 32 of 2018)

JUDGEMENT

Introduction

1. A detailed background of this appeal is of importance. The 1st respondent who was the plaintiff in the lower court filed suit against the appellant, 2nd and 3rd respondents. According to the 1st respondent, on 4/03/2014, he purchased a portion of land parcel **SOUTH/UGENYA/YIRO/2771** (*the suit property*) measuring 0.3 ha from the 2nd respondent at a purchase price of Ksh. 80,000/- which amounts, were paid in full. All due processes were undertaken in excising the purchased portion from the suit property and two new resultant land registration numbers were registered; **SOUTH/UGENYA/YIRO/2836** and **SOUTH/UGENYA/YIRO/2837**. It was the intent of the 1st and 2nd respondent that **SOUTH/UGENYA/YIRO/2837** would be transferred to the 1st Respondent. As the process was ongoing, the 2nd respondent allegedly entered a second Sale Agreement with the appellant on 2/05/2014 and as consequence, the entire suit property was transferred to the appellant.

2. By a plaint dated 22/09/2014, the 1st respondent filed suit against the appellant, 2nd respondent and 3rd respondent on the ground that he had been deprived of quiet enjoyment of his portion of the suit property and he prayed for orders of; cancellation of new entries on the register of the suit property and for the register to revert to the previous entries and an order directing the 3rd respondent to open a new register for land parcel numbers **SOUTH/UGENYA/YIRO/2836** and **SOUTH/UGENYA/YIRO/2837**. He also sought for the Executive Officer or Deputy Registrar to sign the Transfer Form. In the alternative, he sought an order for a refund of Kshs 380,000/-. He also sought costs of the suit and interests.

3. The appellant entered appearance and filed his defence dated 24/10/2014. He stated that on 2/05/2014, he entered into a Sale Agreement with the 2nd respondent and that he had paid a consideration of Ksh 470,000/- towards the purchase of the suit property. The appellant asserted that he was a stranger to the averments in the plaint.
4. The 2nd respondent filed a statement of admission of the plaint dated 8/03/2019. He contended that he had never transferred the suit property to the appellant or appeared before the Land Control Board. He stated that the transfer of the suit property by the 3rd respondent to the appellant was shrouded with fraud.
5. The Attorney General entered appearance on behalf of the 3rd respondent and filed a defence dated 13/02/2017. It generally denied the assertions contained in the plaint and contended the suit contravened the provisions of **Section 13A** of the **Government Proceedings Act**.
6. The 1st respondent filed a reply to defence dated 27/01/2015.
7. Upon hearing the parties and considering all pleadings and evidence tendered, the court by its judgement dated 16/10/2019 allowed the 1st respondent's claim with costs to the 1st respondent.
8. Aggrieved and dissatisfied by the decision of the trial court, the appellant filed a memorandum of appeal dated 11/11/2019 and a record of appeal dated 21/10/2021.

Memorandum of appeal

9. The appellant's memorandum of appeal sets out 3 grounds of appeal;
 - a) *That the Learned Trial Magistrate failed by not holding that the appellant was an innocent purchaser for value without notice of any alleged fraud or misrepresentation on the part of the 2nd respondent;*
 - b) *The Learned Trial Magistrate erred in law and fact by completely disregarding documentary evidence adduced by the appellant regarding the sale of land parcel South/Ugenya/Yiro/2771; and*
 - c) *The Learned Trial Magistrate erred in reasoning by failing to appreciate that the 1st Respondent did not plead or prove any fraud or irregularity on the part of the Appellant.*
10. The appellant prayed; (i) that his appeal be allowed with costs and, (ii) that the judgment of the trial court be set aside and be substituted with one that meets the ends of justice.

Appellant's submissions

11. The appeal was disposed of by way of written submissions dated 25/11/2021. He submitted on the three grounds of appeal.

12. On the 1st ground, the appellant asserted that he conducted due diligence before he purchased the suit property. He submitted that according to his testimony, there was a subsisting Sale Agreement and Transfer Form between him and the 2nd respondent. He stated that he paid Kshs.470,000/= towards purchasing the suit property and that he was not privy to the purported Sale Agreement between the 1st and 2nd respondent and that the 2nd respondent had been charged and convicted for obtaining money by false pretences from the 1st respondent. He placed reliance on **Sections 24(a), 25(1), 26(1) and 80** of the **Land Registration Act**.

13. Relying on the case of **Katende v Haridar & Company Limited [2008] 2 E.AZ.173**, the appellant submitted that his certificate of title could only be challenged if he had fraudulently purchased the suit property or had knowledge of fraud involving the suit property or that the suit property was fraudulently transferred to his name; such fraud had not been proved against him.

14. On the 2nd ground, he submitted that the trial court disregarded his evidence; the Sale Agreement between him and 2nd respondent, receipts for payment of the purchase price, 2nd respondent's Identity Card, application for Land Control Board Consent and Transfer Forms were ignored by the trial court.

15. On the 3rd ground, it was the appellants assertion that contrary to the provisions of **Order 2 Rule 10(1)** of the **Civil Procedure Rules**, the 1st respondent did not specifically plead fraud, misrepresentation, illegality or corrupt scheme and thus he held a valid and genuine title.

The 1st respondent's submissions

16. The 1st respondent filed written submissions dated 14/01/2022 in which he submitted on the 3 grounds of appeal.

17. On the 1st ground, he submitted that the appellant did not carry out due diligence on the suit property and that the Land Control Board Consent was not procured by the appellant. He asserted that the Transfer Form was not executed by a Land Registrar. On this, he placed reliance on the case **Lawrence Mukiri v Attorney General & 4 others [2013] eKLR**.

18. On the 2nd ground, he submitted that the appellant had produced his documents before the trial court.

19. On the 3rd ground, it was his submission that the appellant admitted that the Land Registrar did not execute the Transfer Forms and that it was the appellant's surveyor who had procured the title documents for him. He submitted that contrary to the provisions of **Section 8** of the **Land Control Act**, the appellant had not procured a Consent which was a prerequisite before a Transfer Form could be executed. He contended that fraud must be specifically pleaded and on this, he placed reliance on the case of **Lawrence v Lord Norreys (1880) 15 App. Cas 210 at 221** and **Davy v Garret (1878) 7 ch. D473 at 489**. He submitted that the appellant was bound by the acts of his agent.

The 2nd and 3rd respondents' submissions

20. Despite service, the 2nd and 3rd respondents failed to file written submissions.

Analysis and determination

21. Having considered the original lower court record, memorandum of appeal, record of appeal, rival

written submissions and cited authorities, this court will render its determination on three grounds of appeal.

I will proceed to analyse the legal and jurisprudential framework on the three grounds of appeal in a sequential manner.

22. 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 was well settled in the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, which was quoted 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..."

23. As a 1st appellate court, this court will rarely interfere with findings of fact by a trial court unless it can be demonstrated that the judicial officer misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which he should have taken into consideration and in doing so arrived at a wrong conclusion. I will now proceed on the 1st ground of appeal.

24. **Section 24 (a)** the **Land Registration Act** provides thus;

"the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto"

25. Within the provisions of **Section 25 (1)** of the **Land Registration Act**, a purchaser for valuable consideration or by order of the courts is protected.

26. The appellant has a title deed registered in his name and consequently, the provisions of **Section 24 (a)** and **25** of the **Land Registration Act** applied to him.

27. During cross examination in the lower court, the appellant testified that the Transfer Form was not endorsed by the Land Registrar and that the Identity Card Number of the 2nd respondent was not entered on the Transfer Form. He testified that he did not know how he acquired the title document of the suit property because he had procured the services of a surveyor to carry out the transfer process on his behalf.

28. From the Transfer Form that was produced by the appellant as "**P Exh 6**", it is apparent that the form glaringly contravened the legal framework for registration of land instruments. Contrary to the provisions of **Sections 43 (2), 44, 45 and 46** of the **Land Registration Act**, the form was neither executed by an advocate nor verified. Further, it was not stamped in accordance with the provisions of the **Stamp Duty Act**. Similarly, too, there was no evidence that the Transfer Form was registered by the Land Registrar in accordance with **Regulation 7** of the **Land Registration (General) Regulations 2017**. The manner in which the suit property was registered in the name of the appellant raises more questions than answers.

29. Within the provisions of **Section 6(1)** of **Land Control Act**, a Land Control Board Consent has to be obtained if the parcel of land is agricultural land. The appellant and 2nd respondent appreciated this provision of law in their Sale Agreement when they provided that the 2nd respondent was to obtain the Consent within 6 months from the date they executed this agreement. From the evidence adduced in the trial court, there was no evidence that such a Consent was obtained.

30. As envisaged by **Section 46** of the **Land Registration Act**, it emerged during trial that the 1st and 2nd respondent followed due process in ensuring that they subdivided the suit property before the new

subdivisions could be registered.

31. The provisions of **Section 26** of the **Land Registration Act**, 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.

32. The law is extremely protective of title documents and provides limited circumstances under which a title document may be impeached. It is not enough to waive the certificate of title before court, a party must prove that a title document was lawfully acquired. For this court to cancel a title document, the conditions of **Section 26** of the **Land Registration Act** must be met.

33. In my considered view, this provision of law, lifts the veil of protection that is bestowed upon an innocent purchaser for value. This position of law has been upheld in a line of judicial decisions including the *Court of Appeal decision in the case of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others, Court of Appeal at Nairobi, Civil Appeal No. 246 of 2013 (2015) eKLR*, *Daudi Kiptugen v Commissioner Of Lands Nairobi Lands & 4 others [2015] eKLR*, *Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR* and *Lucio Matingwony (Suing as the Administratrix of the Estate of Kimalel Matingwony (Deceased) v Kipkemoi Rop & 6 others [2018] eKLR*. In the case of *Elijah Makeri Nyangwra _vs- Stephen Mungai Njuguna & Another [2013] eKLR* the court had this to say on **Section 26 (1) (b)** of the **Land Registration Act** as follows;

“It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

34. In the absence of a Land Control Board Consent, proper Transfer Form and evidence of payment of Stamp Duty, I do find that though the appellant is registered as a proprietor of the suit property and therefore **Sections 24** and **25** of the **Land Registration Act** applied to him, the Transfer Form was not capable of transferring any interest on the suit property to him and his title is impeachable for having been acquired by unprocedural means. I uphold the finding of the trial court on the 1st ground.

35. On the 2nd ground, the trial court had this to say on the appellant’s evidence;

“ There was no letter of consent of the land control board...to effect transfer...Its evident from the record that some payments were made to the 1st defendant by 2nd defendant in regard to the purchase of land...its not disputed that indeed a title deed was issued to him by the 3rd defendant...the transfer forms produced indeed confirm that the transfer wasn’t excited [sic] and endorsed by the land registrar...there is no proof of any stamp duty paid on the transfer...”

36. The court record speaks for itself, the trial court considered the oral and documentary evidence adduced before. It is trite that he who alleges must prove. **Section 107** of the **Evidence Act** states as follows:

“(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is

bound to prove the existence of any fact it is said that the burden of proof lies on that person”.

37. It is evident from the trial court record that the appellant did not prove his case to the required standard and the weaknesses in his defence cannot be bestowed upon the trial court which sat as an independent and impartial arbiter. The appellant’s 2nd ground of appeal fails.

38. On the 3rd ground, it is trite law that fraud must be pleaded, particularized and proved to a standard higher than on a balance of probabilities. The settled law has been upheld in several Court of Appeal decisions; ***Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000)***, ***Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR (Civil Appeal No 132 of 2005)*** and ***Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR***.

39. The 1st and 3rd respondents’ pleadings did not specifically plead fraud, or misrepresentation. The 2nd respondent’s statement of admission stated that the appellant acquired title to the suit property by fraudulent means. The question that then arises is whether the trial court made a finding on fraud and misrepresentation.

40. The trial court had this to say on the title document registered in the appellant’s name;

“I agree with the 1st defendant that the transfer was unprocedural, irregular and unlawful...”

41. In my analysis of ground 1 of the appeal, this court upheld the finding of the trial court that the title document was unprocedurally acquired. In the absence of the trial court making a finding that the title document was acquired by means of fraud or misrepresentation, the 3rd ground of appeal fails.

42. This court sympathises with the appellant. Fraudulent land transactions have been persistent in this country and it is unfortunate that the appellant fell into the hands of his agent; the surveyor and the 2nd respondent. Had he conducted proper due diligence prior to purchasing the suit property or procedurally transferred it to his name, he would not have found himself in the circumstances that he found himself in.

43. It is trite law that costs follow the event. Having found the grounds of appeal lack merit and in the absence of special circumstances, I award costs to the respondents.

44. Ultimately, this court finds that the appeal is not merited and is hereby dismissed with the following disposal orders being made:

a) The decision of the Honorable Magistrate delivered on 16/10/2019 in Ukwala SRM ELC NO. 32 OF 2019, is hereby upheld.

b) The appellant shall bear the costs of this appeal.

45. It is so ordered.

Judgment delivered virtually

Dated, signed and delivered this 17th day of February 2022

In the presence of:

Mr. Wangoda for the appellant.

Mr. Mirembe for the 1st respondent.

No appearance for the 2nd and 3rd respondents.

Court assistant: Sarah Ooro.

HON. A.Y KOROSS

JUDGE

17/2/2022