



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 24 OF 2008

1. **PATRICK KENNETH MUTHURI**
2. **MOSES GITONGA M'IKIARA**
3. **HELLEN KANARO M'IKIARA.....APPELLANTS**

VERSUS

RICHARD KARIMI NDERITU.....RESPONDENT

(Appeal from the original judgment and decree in Milimani CMCC No. 10695 of 2005 delivered on 21st December, 2007 by Hon. Mr. Were (R.M.))

JUDGMENT

1. The appellants sued the respondent in the subordinate court claiming interest in land parcel no. Nairobi/ Block 116/429. The matter proceeded to trial and the trial magistrate found in favour of the respondent.
2. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on the following grounds:
 - a. *That the learned trial magistrate erred in law and in fact in entirely arriving at the decision as he did.*
 - b. *That the learned trial magistrate erred in law and in fact in finding that the defendant had exhibited all steps in acquisition of the suit property which to the learned trial magistrate appeared to be above board which was erroneous.*
 - c. *That the learned trial magistrate erred in law and in fact in disregarding the appellants' evidence that pointed to the collusion of the respondent with the land registry officers.*
 - d. *That the learned trial magistrate erred in law and in fact in appreciating that there was fraud when the appellants acquired the suit property and in absolving the respondent from the fraudulent activities.*
 - e. *That the learned trial magistrate erred in law and in fact in having arrived at the decision as he did, failed to appreciate that the balance of convenience tilted in favour of the appellants as to be entitled to eventual possession of the suit property.*
3. It was the appellant's submissions that trial magistrate overlooked many facts in arriving to the conclusion that the respondents went through the requisite steps to acquire the suit property. They contended that the respondent claimed to have bought the property from new Roysambu Housing Company Limited yet no ownership of previous title was produced by the said company to show their interest in the property; that the respondent alleged to have bought the property from new Roysambu Housing Company Limited but the evidence tendered pointed to the property to be owned by Roysambu Housing Co-operative Society and all receipts had the hall mark of the society and how the two entities related was not shown and the respondent purported to produce a

- demand for rent from the lands office being letter dated 22nd June, 2003 for payments of land rent for a property that was not registered. It was not possible for a property not registered to attract land rent.
4. That the appellants attempted to register the land after purchase in vain but five years down the line the respondent obtained a title for the same property. That the respondent testified that he acquired property known as plot no. 247A from the co-operative society but it is unclear how the property came to be Nairobi /Block 116/ 429.
 5. They lament that the trial magistrate failed to address his mind to the fact that the gentleman who sold the property to the appellants was convicted of fraud for interfering with the land file after already selling the land to the appellants. They further lamented that the search they conducted was certified as genuine by DW3 as having emanated from the lands office. That the property having been registered in the year 2005, the lands office could not have received money for transfer of the same property in the year 2000. Relying on the cases of **Trevor Price and Another v. Raymond Kelsall (1957) EALR Page 752** and **Peter v. Sunday Post Limited (1958) EALR Page 424**, the appellants urged this court to re-evaluate the evidence on record and make a finding in their favour.
 6. It was the respondent's submission that the appellants having admitted to being sold to the property by a fraudulent person, Joseph Mwangi Ngunjiri, their title was not clean. That DW1, the registrar of titles at the Ministry of Lands confirmed that the respondent was the registered owner of the suit property and the first allottee of the same. That there was no evidence by the appellants showing that the respondent's title was not genuine.
 7. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. (See: **Peter v. Sunday Post (1958) at pg. 429**).
 8. The 1st appellant testified that he bought the suit property jointly with the 2nd and 3rd appellants from Joseph Mwangi Ngunjiri and claimed that they have a clean title. He produced a sale agreement dated 13th October, 2000 and a title deed dated 4th December, 1997. He stated that a search was conducted and revealed that there was no restriction on the title. A problem arose at the time he was processing a transfer from the seller to themselves. The green card had been removed from the records at the lands office and replaced. The vendor Joseph Ngunjiri was charged with fraud in a criminal offence with respect to the removal and replacement of the green card. He alleged that they have since the purchase of the land been in occupation of the suit land.
 9. DW1, Richard Karimi Nderitu testified that he bought the suit property from New Roysambu Housing Company. He furnished a transfer form dated 28th October, 1997 to that effect. He subsequently applied for lease certificate which he obtained on 25th January, 2005. The said lease is for 99 years from 1st December, 1991.
 10. DW2, Maina Karanja testified to the effect that their company Roysambu Housing Co-op Society Ltd bought the plot from New Roysambu Housing Ltd.
 11. DW3, Rosina Ndila Mule who was the Registrar of Titles testified that the appellants' title was as a result of a forgery and that the respondent was the registered owner of the suit property. She denounced the appellants' search stating that it did not emanate from her office.
 12. The title in this suit was issued under the now repealed Registration of Titles Act (Cap 281) Laws of Kenya. Section 23 (1) of the said Act provides that the certificate of title issued by the registrar to a purchaser under the Act shall be conclusive evidence that the person named therein is the absolute and indefeasible owner and shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party. The respondent furnished evidence that pointed out that the appellants' title was fraudulently acquired. Considering the Court of Appeal's finding which opinion I share in **Dr. Joseph arap Ng'ok v. Justice Moijo Keiwa 7 4 Others, Nairobi C.A. No. 60 of 1997** that in cases of double allocation, a party who has been issued with a good title takes precedence over other equitable rights to the title.
 13. In view of the foregoing, I find that the respondent proved that he had a clean title therefore his title to the property is indefeasible unless otherwise found and properly revoked. In the circumstances, the appeal is dismissed with costs.

Dated, Signed and Delivered in open court this 21st day of November, 2014.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellants

.....for the Respondent