



Kingsbond Investments Limited v Homelane Properties Limited & 3 others (Environment & Land Case 18 of 2019) [2022] KEELC 133 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 133 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 18 OF 2019**

**JO OLOLA, J
JUNE 16, 2022**

BETWEEN

KINGSBOND INVESTMENTS LIMITED APPELLANT

AND

HOMELANE PROPERTIES LIMITED 1ST RESPONDENT

PAUL NTHINWA MUMBI 2ND RESPONDENT

NYERI COUNTY LAND REGISTRAR 3RD RESPONDENT

NYERI COUNTY SURVEYOR 4TH RESPONDENT

JUDGMENT

1. This is an Appeal arising from the decision of the Honourable R. Kefa, Senior Resident Magistrate, Nyeri delivered in Nyeri CMELC Case No. 160 of 2018 on 6th May, 2019. By its Memorandum of Appeal dated 28th May, 2019 as lodged herein on 30th May 2019, Kingsbond investments Limited (the Appellant) urges this Court to set aside the entire Judgment and to declare itself the legal and bona-fide owner of the suit properties on the following 15 grounds:

1. That the Learned Magistrate erred in law and fact when she reached a finding that the Plaintiff had proved its case of fraud on a balance of probabilities yet the law is very clear that allegations of fraud must be strictly proved to the required standards, a different standard which is higher than beyond a balance of probabilities, which burden the 1st Respondent failed to discharge;
2. That the Learned Magistrate further failed to appreciate the principle of law which requires that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts like she did when she alleged that since the documents used to transfer



the suit property from the Plaintiff to the 1st Defendant were missing and that the 1st Defendant had disappeared after selling the suit properties to the 2nd Defendant, then both acts were indicators of fraud;

3. That the Learned Magistrate erred in law and fact by ignoring and failing to take caution of the contradictions in the testimony of Susan Mwanzawa, the Nyeri County Land Registrar, as in the 3rd and 4th Defendant's Statement of Defence filed in Court, the 3rd and 4th Defendants had categorically denied the Plaintiffs' allegations of fraud and further stated that the issuance of the title processed in favour of the 1st and 2nd Defendants was lawful, regular and procedural and undertaken in exercise of their statutory mandate, yet the Learned magistrate went ahead to rely upon the evidence of Susan Mwanzawa which was contrary to that position and which flies against the principle that a party is bound by its pleadings;
4. That the Learned Magistrate erred in fact and in law by overlooking and disregarding critical issues which should have been addressed and determined before a decision could be reached on whether the 2nd Defendant was a bona-fide purchaser for value as otherwise the Learned Magistrate disregarded the 2nd Defendant's evidence wherein the 2nd Defendant had successfully relied upon the bona-fide doctrine and managed to prove that it holds titles to the suit properties, purchased the same in good faith and for valuable consideration, had no knowledge or notice of any fraud and that from the official search results issued by the 3rd Defendant, the 1st Defendant had apparent good title;
5. That the Learned Magistrate further misdirected herself in failing to find that there was no evidence on record to demonstrate that there was a fraudulent transfer of the suit property in favour of the 1st Defendant;
6. That the Learned Magistrate further failed to appreciate that it is trite law that everyone who purchases any property in a bona-fide manner and for value from a registered proprietor and enters his deed of transfer or mortgage on the property register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title;
7. That the Learned Magistrate generally misapprehended the facts pertinent to this matter and the applicable law when she reached a finding that the 2nd Defendant failed to exercise due diligence by not establishing how the 1st Defendant acquired ownership of the suit properties, yet from the land register produced by the 3rd Defendant in her evidence, it was clear, that the 1st Defendant was the registered proprietor of the parent title from which the suit properties were excised from, a fact which the 2nd Defendant acquainted itself with on conducting the necessary due diligence and background checks, and was further issued with official search results by the 3rd Defendant;
8. That the Learned Magistrate erred in law by relying on her own surmises, conjectures, presuppositions and theories in so casually and adversely dismissing the Appellant's equitable rights of ownership over the suit properties;



9. That had the Court not committed the aforementioned alleged breaches it would not have so casually upheld the 1st Respondent's case since it did not render the land answer within the realm of the law, regulations and procedures, but rather drove the Appellant away from the Judgment seat when the facts of the matter called out for the obvious righting of a wrong omitted against the Appellant;
 10. That in all the circumstances of the case, the decision of the Learned Magistrate did not serve the interests of justice as the Learned (Magistrate) ended up unilaterally tilting the scales of justice in favour of the 1st Respondent;
 11. That the Learned Magistrate generally misapprehended the facts pertinent to this matter and the applicable law;
 12. That the Learned Magistrate failed to appreciate and weigh evenly the various issues of fact and law so as to do justice and equity to the parties before her;
 13. That the Learned Magistrate failed to consider and take into account the extensive material placed before her, touching on pertinent and substantial points of fact and law so as to arrive at a just and fair decision;
 14. That the decision in its entirety is bad and unjust and cannot be supported either on the facts or the law pertinent to the various issues before the Superior Court (sic); and
 15. That the decision offends all notions of justice, equity, fairness and rationality and as such ought to be quashed and set aside.
2. Following directions issued herein on 6th December, 2021 it was agreed that the Appeal be disposed of by way of written submissions. I have accordingly perused and considered the Record of Appeal as well as the rival submissions and authorities placed before me by the Learned Advocates representing the Appellants and the 1st Respondent M/S Homelane Properties Limited. Paul Nthinwa Mumbi, the Nyeri County Land Registrar and the Nyeri County Surveyor named herein as the 2nd, 3rd and 4th Respondents respectively did not take part in these proceedings.
 3. By a suit filed in Nyeri Chief Magistrates Court as Environment and Land Court Case No. 160 of 2018, Homelane contended that the property known as Thegenge/Karia/1081 belonging to itself was fraudulently transferred to the 2nd Respondent who thereafter sub-divided the same and thereafter disposed the resultant parcels being Title Nos. Thegenge/Karia/4470, 4471 and 4472 (the suit properties) to the Appellant - Kingsbond Investments Limited. On account of that contention the 1st Respondent sought the intervention of the Court to have those titles cancelled.
 4. In rebuttal, the Appellant who was sued as the 2nd Defendant in the said case challenged the 1st Respondent's claim to the suit properties and asserted that it was the legal, bona-fide and absolute owner thereof having lawfully and properly acquired the same. it was further the Appellant's position that the 1st Respondent had in its claim made vague and general allegations of fraud against the Appellant and that the claim was hence without basis and that it ought to be dismissed with costs.
 5. The 2nd Respondent herein who was sued as the 1st Defendant in the Magistrates Court neither entered appearance nor did he participate in the said case.



6. On the other hand, the 3rd and 4th Respondents denied the 1st Respondent's accusations of fraud and stated in their Statement of Defence that any action taken by themselves in the transfer, sub-division, registration and issuance of titles was undertaken in the exercise of their statutory duties and were therefore lawful, regular and procedural.
7. In her decision rendered on 5th May 2019, the Honourable R. Kefa, Senior Resident Magistrate found for the 1st Respondent and ordered as follows:
 - (a) That the title deed issued in LR. Thegenge/Karia/1081 in favour of the 1st Defendant (2nd Respondent herein) is hereby declared illegal, null and void;
 - (b) A declaration that the Plaintiff (1st Respondent) is the rightful owner of LR No. Thegenge/Karia/1081;
 - (c) The Land Registrar is hereby ordered to cancel the sub-divisions of LR No. Thegenge/Karia/1081 namely Thegenge/Karia/4470, 4471 and 4472 and the same to revert back to LR Thegenge/Karia/1081 in the name of Homelane Properties Limited;
 - (d) A permanent injunction restraining the 2nd Defendant (the Appellant) from trespassing or otherwise dealing with the sub-division of LR Thegenge/Karia/1081 namely Thegenge/Karia/4470, 4471 and 4472.
8. Aggrieved by the determination which also awarded costs to the 1st Respondent herein, the Appellant lodged the present Appeal. In their submissions filed in support of the Appeal, the Appellants have reduced the issues raised in their lengthy Memorandum of Appeal to a determination of three issues, namely:
 - (i) Whether the 1st Respondent managed to prove that the Appellant was indeed involved in the fraudulent transfer of Title No. Thegenge/Karia/1081;
 - (ii) Whether the Titles held by the Appellant are tainted with illegalities and are thus impeachable; and
 - (iii) Whether the Appellant was a bona-fide purchaser for value in respect of the parcels of land known as Thegenge/Karia/4470, 4471 and 4471.
9. Those three are therefore the issues that shall guide this Court in the determination of this Appeal. As was stated in *Selle & Another v Associated Motor Boat Company Limited & others* [1968] EA 123:

“... 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 ...”
10. From my review and evaluation of the evidence placed before the trial Court, it was apparent that the original parcel of land Title No. Thegenge/Karia/1081 measuring some 0.61 Ha was initially on 10th July, 1989 registered in the Name of a Company known as Bullians Property Consultants Limited. By



- a Sale Agreement dated 16th November 2010, the said Company sold the land to the 1st Respondent who was subsequently issued with a title therefore on 16th June, 2011.
11. Testifying before the trial Court as PW1, Antony Gichu Wahome, a director of the 1st Respondent told the Court that Bullians Property Consultants Limited was actually a company that was owned by his parents – Ngatia Wahome and Alice Wahome. It is those two Directors who in 2011 sold the land and transferred it to the 1st Respondent Company in which PW1 and his wife are co-directors.
 12. PW1 told the Court they fenced off the property after acquiring it and leased out some semi-permanent structures that were thereon. Sometime in January, 2017 when he visited the land with a contractor intending to carry out some works thereon, he was told that the property was now owned by someone else. PW1 then visited the Land Registry at Nyeri from where he discovered from the Green Card that the land was apparently transferred to one Paul Nthindwa Mumbi (the 2nd Respondent) before being sub-divided into three portions being Nos. 4470, 4471 and 4472 Thegenge Karia.
 13. Copies of the Green Cards referred to by PW1 are at Pages 213 to 221 of the Record of Appeal. A perusal thereof reveals that on 7th December 2011, the 2nd Respondent had himself registered as the owner of land parcel No. Thegenge/Karia/2018 and that subsequently on 27th October, 2014 the said title was closed upon sub-division of the land into the three parcels being Thegenge/Karia/4470, 4471 and 4472.
 14. The record for the sub-divisions is at Page 216 to 220 of the Record of Appeal and they reveal that the 2nd Respondent – Paul Nthinwa Mumbi was registered as the proprietor thereof on 28th October, 2014. Some four (4) months later on 26th February 2015, the 2nd Respondent is shown to have transferred the three parcels of land to the Appellant herein.
 15. As it turned out, the said 2nd Respondent could not be traced for service of summons and following an application made in Court, he was served through substituted service in a newspaper. He did not however file any appearance or Statement of Defence. That being the case and given that the 1st Respondent herein denied having sold or transferred the land to the 2nd Respondent, it was unclear how the 2nd Respondent had come to be in possession of the land.
 16. While the Appellant herein denied any knowledge of fraud and insisted that it was a bona-fide purchaser for value without notice of any defect in the 2nd Respondent's title, the Appellant too did not call the said 2nd Respondent as a witness at the trial to demonstrate his bona-fide ownership of the property.
 17. Through its director King'ori Mwangi (DW1) the Appellant told the trial Court that they purchased the suit property from the said 2nd Respondent at the sum of Kshs.4.2 Million after conducting due diligence on the same and that an official search on the title revealed that the same belonged to the 2nd Respondent.
 18. While that may be true, the official records of the suit property were held by the 3rd Respondent herein – the Nyeri County Land Registrar. The 3rd Respondent produced those records through one Susan Mwanzawa (DW2). In her testimony as contained at Page 22 to 25 of the Record of Appeal, DW2 was categorical that the transfer to the 2nd Respondent was fraudulent. At Page 24 of the Record,



DW2 is captured by the trial Court stating as follows during cross-examination by the 1st Respondents Advocate:

“In the purported transfer between Homelane (the 1st Respondent) and the 1st Defendant (the 2nd Respondent), in my records, I do not have documents of transfer from the Plaintiff to the 1st Defendant. I have no documents supporting that transfer. I would categorise it as a fraudulent transfer in view of the title deed being in possession of one of the Directors of the Plaintiff. The 1st Defendant then would not have a legal title to pass to the 2nd Defendant.”

19. That having been said, it was apparent that the Appellant did not deal with the registered proprietor of the land in dispute. It was also difficult to agree with the contention that they are innocent purchasers of the land for value without notice of defect in the 2nd Respondent's title. I say so because at Page 27 of the Record, it is clear from the testimony of the Appellant's director that they knew the whereabouts of and were in contact with the said 2nd Respondent whom they told the Court was in the United Kingdom. No reason was given for their failure to call him as a witness to come and defend the authenticity of the title he purported to transfer to the Appellant.
20. The evidence of the 1st Respondent is that they remain in possession of the original title deed to land parcel Thegenge/Karia/1081 and that the said land was never transferred to either the 2nd Respondent or to the Appellant. There were no documents in support of any such transfer in the 3rd Respondents records and it is evident no such transfer took place.
21. The law is now settled that a bad title has no property that can pass to a purchaser. It is the duty of that purchaser to conduct full and effective due diligence to ensure that the person purporting to sell the property is indeed the true owner of the same and that when push comes to shove, the person purporting to sell would be in a position to defend the authenticity of his title. A Party who falls prey to fraudsters by failing to conduct effective due diligence cannot wave his dubious title in the face of the Court and claim to hold a good indefeasible title. It would be absurd if the Courts were to hold that such titles are impeachable.
22. The upshot is that I did not find any basis upon which to disturb the Judgment of the Learned Trial Magistrate as delivered on 6th May, 2019. This Appeal fails and it is dismissed with costs to the 1st Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 16 TH DAY OF JUNE, 2022.

In the presence of:

No appearance for the Appellant

No appearance for the Respondents

Court assistant – Ndung'u

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J. O. Olola

JUDGE

