



**Mutheke v Muthembwa (Environment and Land Appeal 4 of 2020)
[2022] KEELC 4845 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4845 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 4 OF 2020
CA OCHIENG, J
SEPTEMBER 21, 2022**

BETWEEN

UTHASYO MUTHEKE APPELLANT

AND

JAMES MWANTHI MUTHEMBWA RESPONDENT

(Being an Appeal from the Judgment of Machakos Chief Magistrate's Court in Civil Case No. 545 of 2002 delivered on 22nd January, 2020 by Hon. A.G. Kibiru -(CM))

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the February 10, 2020 and amended on May 5, 2021 the appellant appealed against the whole Judgment delivered by Hon. Kibiru (CM). The genesis of this Appeal is the Judgment of Hon. Kibiru in Machakos CMC No. 545 of 2002 Uthasyo Mutheke vs Grace Mwelu Muthembwa delivered on January 22, 2020 where the trial court proceeded to dismiss the Plaintiff's suit.
2. The appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated February 10, 2020 which was subsequently amended on May 5, 2021.
3. The Amended Memorandum of Appeal contains the following grounds:-
 1. The trial court erred in law and fact by dismissing the appellant's suit despite the fact that the Appellant had proved his case on a balance of probabilities.
 2. The trial Magistrate erred both in law and fact by relying on fresh and unauthenticated documentary evidence introduced by the Respondent at the submission stage to dismiss the appellant's suit.



3. The trial Court violated the appellant's constitutional right to fair hearing by denying him an opportunity to challenge the Respondent's unverified new documentary evidence.
4. The trial Court erred in law and fact by failing to find and hold that the Certificate of Confirmed Grant in pursuance of which title number Machakos Konza North Block 1/440 was transmitted to the Appellant was a Judgement in rem.
5. The trial court erred both in law and fact by failing to find and hold that the Appellant was an innocent purchaser for value without notice since the person from whom he acquired title number Machakos Konza North Block 1/440 has a valid confirmed Grant and further that the Appellant was protected under section 93 of the *Law of Succession Act*.

Reasons Wherefore, the Appellant prays:

- a) This appeal be allowed and the entire judgement of the trial Court be set aside.
- b) The Appellant's suit in the subordinate court be allowed in terms of the Plaint and the evidence adduced in support.
- c) Costs of the Appeal.
4. The Appeal was canvassed by way of written submissions.

Submissions

5. The appellant in his submissions contends that he is the registered proprietor of land parcel number Machakos Konza North Block 1/440 hereinafter referred to as the 'suit land', which he purchased from Grace Mwelu Muthembwa, a step mother to the Respondent. Further, that the deceased had also held a valid title to the suit land which was transmitted to her pursuant to a Certificate of Confirmation of Grant in Machakos Succession Cause No 55 of 1996 – In the matter of the estate of Reuben Muthembwa Mukuvi. He states that he sought injunctive orders against the Respondent who failed to tender any evidence to the contrary. He avers that the learned Magistrate erred in dismissing his suit in the lower court. He argues that the learned Magistrate proceeded to dismiss the suit by relying on a Ruling delivered in Succession Cause No 55 of 1996 – in the matter of the estate of Reuben Muthembwa Mukuvi, which never featured anywhere in the Respondent's evidence in chief. Further, that the Respondent had admitted during cross-examination that the Grant issued to the deceased had been revoked. He reiterates that the impugned Ruling was introduced in the submissions stage. He claims to have been an innocent purchaser for value. To support his arguments, he relied on sections 24, 25 and 26 of the *Land Registration Act*, section 93(1) of the *Law of Succession Act* as well as sections 107-109 of the *Evidence Act*, including the following decisions: *Kenneth Nyaga Mwigwe v Austin Kiguta & 2 others* (2015) eKLR; *Erastus Wade Opande v Kenya Revenue Authority & another* (Kisumu) HCCA No 46 of 2007; *Nganga & another v Owiti & another* (2008) 1KLR 9EP 749; *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* (2014) eKLR and *Lawrence Mukiri vs Attorney General & 4 others* (2013) eKLR.
6. The Respondent in his submission insists there was a dispute over the suit land which was determined vide Land Tribunal Case No. 85 of 1997 which was between the deceased and himself. Further, that the Award was made in his favour and adopted as a judgement of the court in Machakos CMC Misc. Application No. 165 of 2001. He avers that the Appellant's attempt to challenge the decision from the tribunal was unsuccessful and evidence was produced in the lower court to this effect. He reiterates that the Appellant's act of filing Civil Suit No. 545 of 2002 was res judicata and as such the trial court was right in dismissing the said suit. He further submits that he produced a copy of the application dated



the 4th December, 2001 challenging the Confirmed Grant in Succession Cause No. 55 of 1996, in the matter of the estate of Reuben Muthembwa Mukuvi and also pleaded allegations of fraud as against the Appellant. Further, that vide a Ruling delivered on September 28, 2012 by Justice Asike Makhandia, the Confirmed Grant was revoked, hence the Appellant cannot be deemed to be an innocent purchaser for value. He argues that section 93 of the Law of Succession Act is not available as a defence to the Appellant. Further, that it was necessary for the trial court to properly inform itself of the outcome of the aforementioned application for revocation of Grant. To support his averments, he relied on section 19(1) of the Environment and Land Court Act as well as the following decisions: John Florence Maritime Services Limited & another v Cabinet Secretary for Transport & Infrastructure & 30 others (2015) eKLR and Daniel Kipruto Metto v Chase Bank (Kenya) Limited (2018) eKLR.

Analysis and Determination

7. Upon consideration of the Amended Memorandum of Appeal, Record of Appeal and the rivalling submissions, the following are the issues for determination: Whether the appellant can be deemed to be a bona fide purchaser for value without notice of land parcel number Machakos Konza North Block 1/440. Whether the Appeal is merited.
8. I will proceed to provide a brief background to the instant appeal. Vide a Plaintiff dated the July 23, 2002, the plaintiff who is the Appellant herein sought the following orders:
 - a. The plaintiff prays for permanent injunction restraining/ restricting the 1st and 2nd defendants, their servants, agents or representatives or anybody else from interfering in any way including changing ownership of the plaintiff's land No. Machakos/Konza North Block 1/440.
 - b. Costs of this suit and interest be provided to the plaintiff.
9. The 1st defendant who is the respondent herein filed his defence dated the January 19, 2007 wherein he denied the averments in the Plaintiff. He insisted that the plaintiff (*appellant*) had obtained the title fraudulently. The 2nd defendant never filed any Defence to oppose the suit. The Plaintiff (*Appellant*) and the 1st Defendant (*Respondent*) each tendered their evidence in the lower court after which the learned Magistrate proceeded to dismiss the plaintiff's (*Appellant's*) suit on the ground that the Grant that enabled him acquire the title was revoked. The Appellant being aggrieved with the said Judgment proceeded to lodge this Appeal where he claims to have purchased the suit land from the deceased Grace Mwelu Muthembwa and obtained a Certificate of Title to that effect. The Respondent who is a step son to Grace Mwelu Muthembwa insists the Appellant fraudulently purchased the suit land as the said vendor fraudulently obtained the Grant that enabled her transfer the title to the Appellant. I have had a chance to peruse certain documents which were produced in the lower court as exhibits and these include: Certificate for Confirmation of Grant in respect to estate of Reuben Muthembwa Mukuvi given to Grace Mwelu Muthembwa dated the April 18, 1997 wherein Grace was indicated as the sole beneficiary and got suit land as indicated therein; Certificate of Title in the name of Uthasyo Mutheke for Machakos Konza North Block 1/440 dated the February 2, 2001; Proceedings of the Land Tribunal Case No. 85/97 held on 28th January, 2001 between James Mwanthi Muthembwa and Grace Mwelu Muthembwa, in respect to land parcel number Konza North 1/440 plot No. 426 wherein the said land was awarded to James Mwanthi Muthembwa vide an Award dated the January 18, 2002; Proceedings in Machakos SPMC Misc. Application No. 165 of 2001 between James Mwanthi Muthembwa vs Grace Mwelu Muthembwa where the Tribunal's Award was adopted; Affidavit of Uthasyo Mutheke sworn on May 30, 2002 in Misc. 165 of 2001 where he objected to adoption of the Award in respect to suit land and Chamber Summons Application dated December 4, 2001 for revocation of Grant in Machakos HCSucc Cause No. 55 of 1996 (*estate of Reuben Muthembwa Mukuvi issued to Grace Mwelu*). From the said documents, I find that the suit land had indeed been subject to a dispute



which was determined vide the Land Tribunal Case No. 85 of 1997 between the Respondent and Grace Mwelu Muthembwa with the Award therefrom being adopted as a Judgment of the court vide Machakos CMC Misc. Application No. 165 of 2001. It is worth noting that the Appellant even swore an affidavit seeking to challenge the adoption of the said Award claiming ownership of the suit land and hence could not turn around and claim that the suit land was different from the land in dispute in the Tribunal proceedings. I note the respondent produced a copy of the Chamber Summons application dated the December 4, 2001 challenging the Confirmed Grant in Succession Cause No. 55 of 1996, in the matter of the estate of Reuben Muthembwa Mukuvi. Further, that vide a Ruling delivered on September 28, 2012 by Justice Asike Makhandia, the Certificate of Confirmation of Grant to Grace Mwelu Muthembwa was revoked.

10. The Appellant contends that the Learned Magistrate should not have referred to the aforementioned Ruling dated the September 28, 2012 revoking the Grant that had been issued to Grace Mwelu Muthembwa since it was not produced as an exhibit. However, the Court takes judicial notice of the fact that there was already an application for revocation of Grant produced as an exhibit, and the Ruling related to the said application. Further, that the said Ruling is a public document which the court cannot ignore. The Appellant has relied on section 93(1) of the Law of Succession Act and insists he is a *bona fide* purchaser for value without notice since Grace Mwelu Muthembwa had a Certificate of Confirmation of Grant before selling suit land to him.

11. Section 93(1) of the Law of Succession Act states thus:

All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

12. While Sections 26(1) (b) of the Land Registration Act states that:

The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”

13. In the case of Adrian Nyamu Kiugu v Elizabeth Karimi Kiugu and anor [2014] eKLR the court held that:

Whereas the above section states that a transfer by person to whom representation has been granted shall be valid notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act, I am of the considered view that such transaction can only be relied upon where the legal representative is entitled to grant of representation but not where one is not and where one has obtained the grant fraudulently. The purchaser in this cause came from the neighborhood of the objector and it is not possible that he did not know of the objector herein. I therefore find and hold the sale to be invalid.”

14. See also the decision in Benson Manani Mabinye v Waiganagana A. Kendi [2016] eKLR.

15. In the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others (2015) eKLR the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice



and held that a party cannot invoke indefeasibility of title where the process of acquisition of the title was irregular.

16. While in the case of *Munyu Maina v Hiram Gatbiha Maina*, Civil Appeal No 239 of 2009, the Court of Appeal while dealing with a dispute surrounding root of title held that:-
17. We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
18. From the evidence presented in the lower court while associating myself with the decisions I have cited, I find that section 93(1) of the *Law of Succession Act* cannot offer protection to the Appellant since the vendor Grace Mwelu Muthembwa got a Certificate of Confirmation of Grant fraudulently which enabled her transfer the suit land to him. Further, even though the Appellant has title to the suit land, it is my considered view that section 26(2) of the *Land Registration Act* does not offer protection over his title. Insofar as I sympathize with his plight, I find that the deceased Grace Mwelu Muthembwa did not pass to him a good title. In the circumstances, I find that the Appellant cannot be deemed as a bona fide purchaser for value without notice as the root of his title was challenged. I opine that whatever losses he will incur, he still has a recourse as against the estate of Grace Mwelu Muthembwa.
19. In the foregoing, I find that the trial court did not err in dismissing the appellant’s suit. I do not find that the appellant’s Constitutional right to fair trial was violated as from the Record of Appeal, he actually participated in the hearing and tendered evidence in support of his case. I find that the trial magistrate was correct in relying on the Ruling annexed to the submissions revoking the Certificate of Confirmation of Grant which was used in transmitting title to suit land to the Appellant and holding that the Appellant was not a purchaser for value without notice.
20. In the circumstance, I find the Appeal unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF SEPTEMBER, 2022.

CHRISTINE OCHIENG

JUDGE

