



**Ritho v Kinanu (Environment and Land Appeal 3 of 2021)
[2022] KEELC 14889 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14889 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 3 OF 2021
AK BOR, J
OCTOBER 13, 2022
(FORMERLY NYERI ELC APPEAL NO. 12 OF 2018)**

BETWEEN

PETER MURIITHI RITHO APPELLANT

AND

LILIAN KINANU RESPONDENT

*(Arising from the decision of the Learned Principal Magistrate
Honourable Njeri Thuku delivered on September 12, 2018.)*

JUDGMENT

1. Being dissatisfied with the decision of the Learned Principal Magistrate Honourable Njeri Thuku delivered on September 12, 2018 revoking his title over Timau Settlement Scheme/947 (“the Suit Property”) directing that this land be transferred and registered in the Respondent’s name, the Appellant lodged this appeal. The main grounds of appeal are that the Learned Magistrate erred in annulling his title over the Suit Property on account of fraud which was not proved; that she disregarded the provisions of the Land Control Act and applied Section 28 of the Land Registration Act which led her to an erroneous finding.
2. Further, that the trial court misdirected itself when it failed to find that the Appellant was an innocent purchaser for valuable consideration; that the court unlawfully applied the doctrine of constructive trust which was not pleaded or proved by the Respondent; and that there was no privity of contract between the Appellant and the Respondent yet the trial court issued orders without a remedy for the Appellant. The Appellant sought to have the judgment rendered by the Learned Magistrate set aside and for judgment to be entered in his favour in terms of the plaint dated August 15, 2014. He also sought the costs of the appeal and the costs of the suit and the counterclaim before the trial court.



3. The appeal was canvassed through written submissions. The Appellant claims that he bought the Suit Property from John Kimathi Nkanata and was registered as its owner on June 16, 2013. Initially, the land belonged to Charles Muthomi M'Ringera who transferred it to Rosemary Wanja Kabuka, who in turn transferred it to Domisiano Marete Njeru on September 26, 2011. Domisiano Njeru transferred the land to John Kimathi Nkanata on November 29, 2012. On her part, the Respondent contended that she bought the Suit Property from Rosemary Wanja Kabuka on April 14, 2009 but Rosemary refused to transfer the land to her despite her paying the full purchase price of Kshs 160,000/=.
4. The Appellant contended that the Respondent pleaded fraud without proving it yet the law requires fraud to be proved and not to be inferred from the facts. He relied on Sections 107 and 109 of the [Evidence Act](#) and Order II Rule 4 of the Civil Procedure Rules. Further, he cited Section 26 of the [Land Registration Act](#) which provides that the title of a proprietor is not subject to challenge except on grounds of fraud or misrepresentation which the proprietor is proved to have been party to.
5. The Appellant contended that the subject matter of the suit was agricultural land which is a controlled transaction within the meaning of Section 6 of the [Land Control Act](#). That Section 9 of the Act nullifies an agreement if the Land Control Board (LCB) of the area where the land is situated does not give the necessary statutory consent. He relied on the Respondent's evidence that she did not obtain the consent of the LCB. The Appellant relied on Sections 8 and 22 of the [Land Control Act](#) and urged that the sale agreement between the Respondent with Rosemary Wanja dated April 14, 2009 became null upon the expiry of six months. He contended that the Respondent's remedy lay in recovering the consideration she paid as a debt under Section 7 of the [Land Control Act](#).
6. The Appellant contended that he was an innocent purchaser for valuable consideration and that the certificate of title issued to him was absolute and indefeasible under Section 26 of the [Land Registration Act](#). He faulted the Learned Magistrate for finding that based on the sale agreement dated April 13, 2001, the Respondent had proved on a balance of probabilities that she was the rightful owner of the Suit Property. He contended that the Learned Magistrate implied and applied the doctrine of constructive trust which the Respondent neither pleaded nor proved. He pointed out that the Respondent abandoned her claim against Rosemary Wanja Kabuka. The Appellant relied on [Vijay Morjaria v Nansingh Madbusingh](#) [2020] eKLR, [Githu v Katibi](#) [1990] eKLR, [Jacob Gichuki Minjire v Agriculture Finance Corporation](#) Civil Appeal No 61 of 1982 (unreported), [Richard Satia & Partners & another v Samson Sichangi](#) Civil Appeal No 164 of 1995 (unreported).
7. The Respondent submitted that no reasonable grounds of appeal had been put forward by the Appellant to challenge the finding of the trial magistrate. She argued that the appeal was time barred because the record of appeal was filed more than a year later. She contended that in her suit, she pleaded how she acquired the Suit Property from Rosemary Wanja and entered and occupied the Suit Property immediately and constructed a dwelling house. That the Appellant illegally destroyed her property while she was waiting for Rosemary Wanja to return the title over the land to her.
8. The Respondent added that she applied to have a caution registered against the Suit Property in August, 2011 but the Land Registrar failed to register the caution despite her making the necessary payment. She contended that the fraudulent activities on the land were apparent on the green card and the communication from the provincial administration which she had tendered in evidence. She pointed out that when one purchases land they ought to conduct due diligence to ascertain that there were no squatters on the land, that the beacons were in place and there were no third parties claiming the land. She submitted that the Suit Property was sold and it changed hands to defeat her interest yet she was occupying the suit land.



9. The Respondent submitted that she paid the full purchase price to Rosemary Wanja in April, 2009 and that this fact of the sale was within the knowledge of the elders of the Kithithina clan. That the clan even assisted Rosemary Wanja to vacate the Suit Property as the five witnesses she called testified before the trial court. She invited the court to re-evaluate the evidence tendered before the trial court and uphold the judgment. She relied on the definition of fraud in *Black's Law* dictionary where it is described as a knowing misrepresentation of the truth and concealment of a material fact to induce another to act to their detriment.
10. The Respondent contended that the transfer of the Suit Property by Rosemary Wanja to the other proprietors who never occupied the suit land was evidence of fraud and was intended to deny her the right of ownership. She argued that the Appellant concealed knowledge of the fact that the Respondent was in occupation of the land and the fact that there was a dispute regarding the sale of the land to her. She pointed out that the Appellant neither called the vendor who sold him the land nor did he produce any written agreement. She relied on the sale agreement and the payment she made to Roselyn Wanja who allowed her to occupy the land and later tricked her to surrender the title to facilitate the transfer but instead went ahead to sell the land to other parties.
11. The issue for determination is whether the court should allow the appeal and set aside the judgment of the Learned Magistrate. At the trial, the Appellant produced a copy of the title deed issued to him on 20/6/2014, the application for LCB consent dated June 3, 2014 and the letter of consent dated April 30, 2014. He also produced a copy of the stamp duty declaration and the transfer of land dated 9/06/2014 which was not signed by the land registrar. He produced a copy of the demand letter which his lawyers issued to the Respondent dated 4/08/2014.
12. The Respondent produced copies of the sale agreement which she entered into with Rosemary Wanja Kabuka April 14, 2009, minutes of the meeting held in the Chief's Office to discuss the land dispute between her and Rosemary on 3/03/2011, the letter dated 20/6/2014 issued by the Deputy County Commissioner requesting the Land Registrar, Meru County, to restrict dealings in the suit land until the dispute was resolved.
13. The copy of the green card which the Respondent tendered in evidence shows that a title over the Suit Property was issued to Rosemary Wanja Kabuka on July 30, 2008. Entry No 4 is the transfer to Domisiano Njeru on September 26, 2011 who then transferred the land to John Nkanata on November 29, 2012. John Nkanata transferred the suit land to the Appellant on 20/6/2014. She produced a copy of the letter dated 8/09/2014 written by the Chief of Kithithina explaining that the Respondent bought the Suit Property from Rosemary Kabuka and that she constructed a house on the land in 2009 where she lived with her family until 2011 when Rosemary secretly sold the land to other people. She also produced a copy of the notice dated 9/09/2014 from the office of Kithithina clan reiterating that she was the owner of the suit land despite Rosemary refusing to give her the title deed.
14. She produced a copy of the receipt which was issued to her on August, 2011 upon payment of the fees for the registration of a caution against the suit land together with the application for the registration of the caution which was received at the District Land Registry, Meru Central on August 11, 2011. The caution she lodged was received for registration on August 11, 2011. She also produced copies of the demand notice dated March 22, 2012 and 4/08/2014 demanding that she vacates the Suit Property.
15. The Respondent contended that the Appellant never took possession of the suit land. That even the other persons whose names appear on the green card never occupied the land. The court notes that the letter from Mithega & Kariuki Advocates dated March 22, 2012 states that their client Domisiano Njeru had instructed them that the Respondent had pitched camp on the suit land denying their client use and enjoyment of the land. Domisiano Njeru was one of the transferees of the suit land.



Chweya & Associates Advocates who were instructed by the Appellant also wrote to the Respondent on 4/08/2014 demanding that she vacates the Suit Property and removes the illegal structures she had erected on the land.

16. The demand letters confirm that the Respondent was in actual possession of the Suit Property and that it was only the title deed which kept changing hands between the different proprietors while the Respondent remained in possession of the Suit Property. Had the Appellant conducted due diligence and visited the land before purchasing it, he would have discovered that the Respondent was on the land and established that she had purchased the land from the initial owner. Had he also made inquiries from the elders of the Kithithina clan who were aware of the dispute between the Respondent and Rosemary Wanja, he would have become aware of the dispute over the land.
17. The Learned Magistrate based her finding on the evidenced tendered by the Respondent that she bought the Suit Property from Rosemary Wanja, paid the purchase price in full and was deceived by Rosemary Wanja to give the title back to her ostensibly to transfer the land to her name. It is not clear why the Land Registrar failed to register the caution against the Suit Property on August 11, 2011 before Rosemary Wanja effected the transfer to Domisiano Marete on September 26, 2011. Had the caution been registered, any person who wished to purchase the Suit Property would have had notice of the caution and the Respondent's claim over the land.
18. The Appellant contended that the sale by Rosemary Wanja to the Respondent was invalid for want of LCB consent. A purchaser cannot obtain LCB consent without the participation of the seller of the land. Once Rosemary Wanja refused to co-operate and effect the transfer to the Respondent, she could not take any steps to register the transfer since Rosemary Wanja had retrieved the title from her. The witnesses who the Respondent called testified that Rosemary Wanja refused to move out of the Suit Property and that it took the intervention and the assistance of the elders of the Kathithina clan to get Rosemary to move out of the land. It is clear that Rosemary went ahead to transfer the land to another person after retrieving the title from the Respondent who was already in possession and who had paid her the full purchase price.
19. The court notes that the LCB consent which the Appellant tendered in evidence refers to an application dated 15/4/2014 yet the application itself is dated 3/6/2014. It is not feasible that the LCB consent was given prior to the application for the consent being made to the LCB.
20. Section 3(3) of the *Law of Contract Act* stipulates that no suit is to be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing and is signed by the parties and the parties' signatures are attested by witnesses who was present when the parties signed the contract. The court notes that the Plaintiff's list of documents filed before the trial court contained a sale agreement but none was annexed to the list. Without a sale agreement executed in the manner prescribed by Section 3 of the *Law of Contract Act* and payment of valuable consideration, it is not possible to prove that the Appellant purchased the suit land and acquired a good title over the Suit Property.
21. The Appellant contended that he was an innocent purchaser for value but failed to produce the sale agreement that he entered into with John Nkanata. He did not pay any consideration for the land since the transfer of land form indicates that the consideration was a gift.
22. Section 25 of the *Land Registration Act* protects the rights of a proprietor acquired subsequently for valuable consideration or by an order of court. Under section 27, a proprietor who has acquired land by transfer without valuable consideration holds it subject to any unregistered rights or interests subject to which the transferor held it. The Appellant therefore holds the title over the Suit Property subject



to the Respondent's unregistered rights over the land since the land was transferred to him without valuable consideration.

23. The court is unable to fault the decision of the Learned Magistrate. The appeal fails and is dismissed with costs to the respondent.

DELIVERED VIRTUALLY AT NANYUKI THIS 13TH DAY OF OCTOBER 2022.

K. BOR

JUDGE

In the presence of: -

Mr. Amos Chweya for the Appellant

Ms. Stella Gakii- Court Assistant

No appearance for the Respondent

