



Mutua (suing as the legal representative of the Estate of Raymond Mutua Kikwasuing as the legal representative of the Estate of Raymond Mutua Kikwa) v Kithinji (Environment and Land Appeal 35 of 2019) [2022] KEELC 14704 (KLR) (9 November 2022) (Judgment)

Neutral citation: [2022] KEELC 14704 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 35 OF 2019
CA OCHIENG, J
NOVEMBER 9, 2022

BETWEEN

MAINGI MUTUA APPELLANT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF RAYMOND
MUTUA KIKWASUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE
OF RAYMOND MUTUA KIKWA)**

AND

RICHARD MUTISYA KITHINJI RESPONDENT

(Being an Appeal from the Judgment of the Machakos Chief Magistrate's Court in Civil Case No. 80 of 2015 delivered on 16th December, 2015 by Hon. C.K. Kisiangani - (RM))

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the July 3, 2016 the Appellant appealed against the Judgment of Hon CK Kisiangani, Resident Magistrate delivered on December 16, 2015 in Machakos CMCC No 80 of 2015. The genesis of this Appeal is the Judgment of Hon CK Kisiangani where she dismissed the Appellant's (*Plaintiff's*) suit.

The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the July 3, 2016 which contains the following grounds:

1. That the learned trial Magistrate erred in law when she dismissed the Appellant's suit against the weight of the evidence provided by the Appellant and thus occasioned a serious miscarriage of justice.



2. That the learned trial Magistrate erred in law and in fact when she found that the Respondent was a bona fide purchaser for value while the Respondent admitted in his testimony that he purchased the land knowing that the owner was deceased and his transfer documents were executed by brokers and thus occasioned a miscarriage of justice.
3. That the learned trial Magistrate erred in law and in fact in finding that the Respondent was not an intermeddler as envisaged under Section 45 of the [Law of Succession Act](#) and that the seller of the land alone was the intermeddler as such occasioned a miscarriage of justice.

Reasons wherefore the Appellant prays that:

1. The Judgment delivered on December 16, 2015 be quashed and set aside.
 2. That Judgment be entered in favour of the Appellant as prayed in the Plaint dated December 10, 2015.
 3. The Respondent do bear the costs of this Appeal and below.
2. The Appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

3. The Appellant submitted that the trial Magistrate erred when she dismissed the suit against the weight of the evidence he had provided. He argued that during the hearing, he produced a Green Card showing that land parcel number Athi River/Athi River Block 5/346, hereinafter referred to as 'the suit land', belonged to his late father, Raymond Mutua Kikwa, and that the same was transferred to Richard Mutisya post-humously, yet Letters of Administration Intestate had not been taken out. He contended that the Respondent had admitted to have bought the land vide a Sale Agreement dated the December 11, 1999 yet the deceased died on June 5, 1992, hence there must have been an element of misrepresentation. Further, that the Respondent failed to conduct due diligence and was aware and part of the fraud with the seller. He contended that the Respondent does not qualify as an innocent purchaser for value. He reiterated that the wife and children of the deceased had inchoate rights over the property of the deceased and that the learned Magistrate erred in law in failing to address this issue. He averred that the Court had powers to order for rectification of a title where it is satisfied that the title was acquired through fraudulent means.
4. To buttress his averments, he relied on Section 79 of the [Law of Succession Act](#) and Section 80 of the [Land Registration Act](#) as well as the following decisions: *Katende V Haridar & Company Limited (2008) 2 EA 173*; [Elijah Mutboka Daniel vs Justus Mutua Musyimi](#) and *Gitau and 2 Others Vs Wandai & 5 Others (1989) KLR 23*.

Respondent's Submissions

5. The Respondent in his submissions confirmed that on December 11, 1999, he purchased the suit land from John Kikwa Mutua who was a son to the deceased on the strength of a family agreement dated the November 27, 1997. Further, that upon purchase, the suit land was transferred to him by the Appellant's brother, mother and other family members and a Title Deed was later issued in his name. He stated that the Appellant had not challenged the Sale Agreement nor the authority of sale by Felista Mbesa Mutua who was his mother. He insisted that the Appellant was a liar as he had lied to the court that he did not know the whereabouts of his brother (*the vendor*) and that he is dead yet no Certificate of Death was produced. He further argued that he obtained the transfer by transmission upon non-



attendances of the relevant parties to the Land Control Board, hence the Appellant cannot claim, he obtained title by misrepresentation. He reiterated that the Appellant had failed to prove any fraud, forgery or intermeddling to the required standards and that the Appeal should be dismissed for being incompetent, devoid and unmerited.

Analysis and Determination

6. Upon consideration of the Memorandum of Appeal, Record of Appeal and rivalling submissions, the following are the issues for determination: Whether the Respondent is a bona fide purchaser for value of the suit land or not. Whether the Certificate of Title to the suit land, in the name of the Respondent should be cancelled and reverted to the deceased estate. Whether the Appeal is merited.
7. The background against which the Appeal is brought was a suit filed by the Appellant (Plaintiff) being Machakos CMCC No 80 of 2015 seeking for the rectification of the title to the suit land on allegations that the same was not properly obtained. The matter proceeded to full hearing and Judgment was delivered on December 16, 2015, dismissing the Appellant (Plaintiff's) suit for lack of sufficient evidence to back the claims on fraud and declaring the Respondent (Defendant) as a bona fide purchaser for value. It is this Judgment that the Appellant now seeks to set aside.
8. The Appellant strongly argues that the Respondent does not pass the test of a bona fide purchaser for value while the Respondent insists that he legally purchased the suit land from the Appellant's brother on the strength of a family agreement, witnessed by the Area Chief. The trial Magistrate in her Judgment opined that the Respondent was a bona fide purchaser for value as he had paid sufficient consideration and acted on the belief that the vendor had capacity to transact as the other family members had consented to the same.
9. This being a first Appeal, this court is expected to re-evaluate, re-analyze and re-consider the evidence presented in the lower court by the respective parties, before drawing its own conclusions. However, it has to bear in mind that the Appellate Court never saw nor heard the witnesses while testifying. See the decision of: [Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates \[2013\] eKLR.](#)
10. At this juncture, the main issue this court needs to determine is whether the Respondent is a bona fide purchaser for value without notice.
11. *Black's law Dictionary 10th Edition* defines a 'bona fide purchaser' as follows:

'One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.'
12. I will proceed to analyse the evidence presented in the lower court in respect to the Respondent's acquisition of the suit land. From the evidence in the Lower Court it emerged that the Respondent entered into a Sale Agreement with John Kikwa Mutua on December 11, 1999 to purchase the suit land. He claimed that the Appellant's mother had written a letter dated the November 27, 1997 stating that the family had agreed that John Kikwa Mutua proceeds to sell the said land. The Appellant in his testimony in the lower court stated that the father had died on June 5, 1992. Further, that the suit land emanated from Drumvale Farmers Cooperative Society Ltd and the said society indeed confirmed that the said land belonged to their late father Raymond Mutua. He insisted that it was only his late father who could have transferred the land to the Respondent. The Respondent in his testimony confirmed that he bought the suit land from Felista Mbesa Mutua and John Kikwa in 1990, then sold it to Lawen



Mwange. It was his testimony that he never saw the family of John Kikwa signing the consent and neither did he meet the deceased's family. Further, that he knew Raymond Mutua Kikwa was the owner of the suit land but he never obtained Letters of Administration and neither did he go to the Land Control Board as brokers signed the Transfer. I have had a chance to peruse the extract of the Green Card for the suit land and note that the said land was registered in the name of the deceased on January 6, 2000. Further, the same was transferred to the Respondent on February 10, 2000. I note the High Court at Machakos issued Limited Grant of Letters of Administration Ad Litem in respect to the estate of Raymond Mutua Kikwa on August 9, 2012. From the Death Certificate, I note the deceased died on June 5, 1992. Which brings me to the question as to whether the Respondent acquired a good title from John Kikwa to be deemed as a *bona fide* purchaser for value without notice.

13. On challenging validity of title, 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.'

14. 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 is irregular. Further in the Uganda Court of Appeal Case of [Katende V Haridar & Company Ltd \(2008\) 2 EA 173](#), the Court defined what amounts to a bona fide purchaser for value thus:

'A bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a Certificate of Title
- b. He purchased the Property in good faith;
- c. He has no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.'

15. While in the case of [Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura Vs Attorney General & 4 others \(2017\) eKLR](#), the Court of Appeal held that a party cannot claim a *bona fide* purchaser for value where the vendor did not have a valid title.



16. Yet in the case of *Munyu Maina Vs Hiram Gathiba Maina, Civil Appeal No 239 of 2009*, the Court of Appeal held that:-

'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.'

Based on the facts which I have analysed above, I find that since the suit land was sold after the demise of Raymond Mutua Kikwa who was its owner, before the representatives had obtained Letters of Administration Intestate and distributed the estate, the vendor John Kikwa and his mother Felista Mbesa Mutua did not have the capacity to sell it as they were not the legal representatives as defined by the *Law of Succession Act*. Further, that their actions are deemed to be intermeddling with a deceased estate contrary to the provisions of Section 45 of the *Law of Succession Act*. It is my considered view that Section 26(2) of the *Land Registration Act* does not offer the Respondent protection over his title. Insofar as I sympathize with his plight, I find that the vendor did not pass a good title to him. In the circumstances and relying on the facts as presented as well as associating myself with the various judicial decisions cited above, I find that the Respondent cannot be deemed as *bona fide* purchaser for value without notice.

On the issue of cancellation/rectification of title, I wish to make reference to Section 143 of the Registered Land Act (*repealed*) that was the law in place at the time of registration of the Respondent's title to the suit land, which stipulated thus:

- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.'

17. These provisions are replicated in Section 80 of the *Land Registration Act* which provides that:

- (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.'

18. Since I have held that the Respondent is not a *bona fide* purchaser for value without notice as he acquired the suit land from a person who was not the representative of the deceased owner's estate, while the Appellant had sought for cancellation of the said title in the lower court, I find that the title was not obtained legally and will proceed to order for its rectification and reversal to the deceased's estate.



19. In the circumstance, I find that the trial Magistrate erred in law when she dismissed the Appellant's suit against the weight of the evidence provided. Further, that she erred in law and in fact when she found that the Respondent was a *bona fide* purchaser for value while the Respondent had actually admitted in his testimony that he purchased the land knowing that the owner was deceased and his transfer documents were executed by brokers.
20. In the foregoing I find the Appeal merited and will proceed to make the following final orders:
- a. The Judgment delivered on December 16, 2015 in Machakos CMCC No 80 of 2015 be and is hereby quashed and set aside.
 - b. That Judgment be and is hereby entered in favour of the Appellant as prayed in the Plaint dated February 10, 2013, in Machakos CMCC No 80 of 2015.
 - c. The Costs of the Appeal is awarded to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9TH DAY OF NOVEMBER, 2022

CHRISTINE OCHIENG

JUDGE

