



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO 86 OF 1999

HANNAH WANGUI ITHEBU)

NDAMBUKI MUSEMBI) APPELLANTS

VERSUS

JOEL NGUGI MAGU)

KAKUZI LIMITED) RESPONDENTS

THE LAND REGISTRAR MURANG'A)

(An Appeal from the Judgment of Hon. W. C. Wamae, RM
in Thika SPMCC No. 649 of 1995 delivered on 21st May, 1998).

JUDGMENT

By a Plaintiff dated 24th May, 1995, and filed in the lower court 13th June, 1995, the 1st Respondent (Plaintiff in the lower court) claimed ownership of land parcel number Kakuzi/Kirimiri/Block 9/289 (hereinafter "the suit land") which he alleged had been fraudulently acquired by the Appellants. The lower court agreed with him and found that all the Respondents, including the Land Registrar, Muranga, had conspired to fraudulently transfer the suit land to the Appellants. This is how the lower court delivered itself, in part:

"A certified copy of a register of title relating to the plot in dispute shows that the title deed was issued to the 2nd and 3rd defendants on 2nd February, 1990 a month prior to balloting. These anomaly in the dates shows that 2nd and 3rd and 4th defendants conspired to fraudulently deprive the plaintiff of plot number 289 which he'd paid for balloted for and entered into an agreement with 1st defendant unlike 2nd and 3rd defendants. It is also clear that the title deed was back dated by 4th defendant in favour of the 2nd and 3rd defendants to pre-empt (sic) any claim on the plot by the plaintiff or by any other person."

Aggrieved by that decision, the Appellants have appealed to this Court on the following six grounds of appeal:

1. That the learned trial Magistrate failed to find the 1st Respondent had not proved his case on the balance of probabilities in view of the fact that certified copy of the register which was availed to the court by the 2nd and 3rd appellants as required under Order Rule 5A of the Civil Procedure Rules showed that the Commissioner of land was on first registration the owner of the suit land and the 1st respondent did not tender any other certified copy of the Register which contradicted the certified copy

of the register which was tendered to the court as aforesaid.

2. The learned trial Magistrate erred in law in not finding that particulars of fraud which formed basis of the 1st respondent case did not disclose any fraud against the Commissioner of land and even if the commissioner of lands acted fraudulently by causing himself to be so registered, the registration being the first registration such fraud in law could not form the basis of rectification of the Register under Section 143 of the Registered Land Act Cap 300.

3. The learned trial Magistrate erred in law in not finding that the Respondent's failure to shake the Commissioner of lands 1st registration who had passed the Title to the 2nd and 3rd Appellants was fatal to the Respondents' case because no fraud was proved or was capable of being proved between the Commissioner of Lands and the 2nd and 3rd appellants because the Commissioner of Lands was not a party in the suit and no such fraud was pleaded.

4. The learned trial Resident Magistrate erred in law in not finding that the order for cancellation of the 1st and 2nd Appellant's registration could not be made without proof of fraud between the appellants and the Commissioner of lands.

5. The learned trial Magistrate erred in law in not giving effect to Section 27 and 28 of the Registered Land Act Cap 300.

6. The learned trial Resident Magistrate erred in law in awarding general damages.

Essentially, the issue before this Court turns on a legal point: whether the title deed issued to the Appellants in respect of the suit land conferred upon the Appellants an indefeasible and unimpeachable title, which could not be challenged on any ground including fraud.

It is evident here that the Appellants produced before the lower court the title deed issued to them by the Land Registrar under the Registered Land Act, Cap 300. They also produced before the lower court a certified copy of the register of title (D 2 Exhibit 6 – See page 29 of the Record of Appeal) to show that they were the first registered owners having acquired the suit land from the Government of Kenya on 2nd February, 1990.

What then is the effect of the issue of the Certificate of Lease? Section 27 of the aforesaid Act creates in favour of the proprietor of the land absolute and indefeasible ownership of the leasehold interest in the land. Section 28 of the Act grants to such proprietor indefeasible rights subject only to overriding interests referred to in Section 30 of the Act (See *Livingstone Nkurruna vs Patrick Seki (Nairobi Civil Appeal No. 31 of 1996)*). In the case of *Nairobi Permanent Markets Society & Others vs Salima Enterprises & Others – (Nairobi Civil Appeal No. 185 of 1997)* the Court of Appeal held that under Section 23 of the Registration of Titles Act (which is in parimateria to the Registered Land Act) a Certificate of Title issued by the Registrar to any purchaser of land is to be taken by all courts as conclusive evidence that the person named therein as the proprietor of land is the absolute and indefeasible owner thereof and his title is not subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.

However, the Appellant's registration as owners of the suit land was a first registration, and under Section 143 (1) of the Registered Land Act, Cap 300 Laws of Kenya, such registration could not be defeated even by proof of fraud. So, even if the lower court was correct in finding that the defendants "conspired to fraudulently deprive the plaintiff (of the suit land)", as it did, this could not defeat the registration of the Appellants, as the first registered owners of the suit land. Unfortunately, that is the law, and much though I might dislike or disapprove of it (and I must say that indeed I disapprove of it), I am bound by it. In its wisdom, the Parliament made that law, and I am duty bound to apply it.

Accordingly, this appeal is allowed with costs. The Judgment and the decree of the lower court is set aside and the 1st Respondent's case in the lower court is dismissed with costs.

Dated and delivered at Nairobi this 18th day of May, 2005.

ALNASHIR
JUDGE

VISRAM