



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE NO. 117 OF 2015

MARTHA WANGUI THURURA

KOJAK NDEGWA THURURA (Both suing as the Leg. Rep. of

CHRISTINE WANGECHI THURURA)PLAINTIFFS

VERSUS

HENRY GITAHU THURURA.....1ST DEFENDANT

STABEX INTERNATIONAL LIMITED.....2ND DEFENDANT

COUNTY LAND REGISTRAR BUSIA.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

J U D G E M E N T

1. The Plaintiff brought this suit by filing a plaint for an order of court cancelling the successive transfer of land parcel no. NORTH TESO/KAMURIAI/1002 from the deceased proprietor to the 1st Defendant and from the 1st Defendant to the 2nd defendant and restoration of the said parcel into the name of the deceased CHRISTINE WANGECHI THURURA, costs of the suit and any other or further relief.

2. The plaintiff pleaded that the defendants fraudulently and unlawfully removed the name of the deceased from the register of land parcel No. NORTH TESO/KAMURIAI/1002 and as such disinherited the plaintiffs' from their share. They listed the particulars of the defendants' misconduct as follows:

- (a) *Removing the name of the deceased without evidence that a succession cause had been filed and letters of administration granted in respect of the estate of the deceased.*
- (b) *Entering the names of the 1st and 2nd defendants on the register of suit land without following due process of the law.*
- (c) *Registering and discharging irregular loan instruments.*
- (d) *Failing to satisfy themselves of existence of proper transfer documents before effecting dispositions on the subject land.*

3. The 1st defendant denied the plaintiffs' claim and put them to strict proof. The 2nd defendant denied the allegations in the plaint and claimed that it was an innocent purchaser for value without notice of defect in title. They pleaded that they were not privy to nor were they involved in the alleged fraud. They did their due diligence before purchasing the suit land. The 3rd and 4th defendant denied the allegations in the plaint and put the plaintiff to strict proof.

Plaintiffs Case

4. The matter proceeded for hearing with PW1, Martha Wangui Thurura stating as follows; the 2nd plaintiff and the 1st defendant are her brothers and the deceased was her mother. She adopted her witness statement as her evidence and the documents in the list dated was produced as **Pex 1-11**. During cross-examination by Mr. Ipapu for the 1st Defendant, she stated that their grandmother told them that the 1st defendant had asked for the title which she had custody of and she gave it to him. They were told that the 1st defendant secured a loan using the suit title. They did not benefit from the loan as they were not aware he had borrowed money. That their mother died in 1991. She knew the 1st defendant had transferred the title in 2015. The green card showed that a charge was registered on the title in 2005. She denied she

was complacent in the title being registered in the 1st defendant's name. She claimed that the 2nd defendant were to pay rent but they did not pay for any single day.

5. Mr. Kiprono for the 2nd defendant cross examined PW1 and she confirmed that the 1st defendant is her brother and she last spoke to him in 2015 before filing this suit. During their last conversation she suspected that the fraud/transfer had happened. She reported the fraud to Malaba Police Station and was issued with an OB Number but did not mention going to the police station in her statement. In **Pex 9**, which is the demand letter, she stated that the 3rd defendant assisted the 1st defendant to transfer the land to himself. That she did not report the surveyor to the police but instead filed this suit. She had an issue with the L.C.B Consent letter as it was done after the death of her mother. **Pex 7**, the transfer form was obtained from lands office and they never met the advocate who signed the transfer to the 1st defendant in 2005. They were not aware that the title was in the names of the 1st defendant when he took the loan. That as per the green card he took a loan 5 times. They had an agreement for sale of oil with the 2nd defendant but did not produce the said agreement in court. Further that the business license was in their grandmother's name and she was the one running it and no one made enquiries from her before the sale was effected. The 2nd defendant used to pay rent but there was no signed tenancy agreement. She denied the allegation that the 1st defendant sold the property because the bank wanted to sell it.

6. In further cross-examination by the 3rd and 4th defendant's counsel **PW1** stated that both consent and transfer were signed and she discovered the transfer to the 1st defendant in 2015 after the 2nd plaintiff came to Busia and obtained the copies of documents from the lands office. They reported the 1st defendant to Malaba Police station but he was not arrested. She could not explain why the surveyor was not sued. That the land registrar was doing his role of registering documents.

7. The 2nd plaintiff, Kojak Ndegwa Gichigi, **PW2**, adopted the 1st plaintiff's statement as his evidence and urged the court to return the title to the name of their late mother. During cross examination by Mr. Imapu, he stated that between 2005-2015 he knew that the title was still registered in their mother's name. He did not do a search prior to that because he had no reason to suspect any change. He was not aware the 1st defendant had obtained the title from their grandmother and had taken out a loan which they did not benefit from. Mr. Kiprono cross examined **PW2** where in he stated that he could not tell whether the 1st defendant and the grandmother had undertaken the transfer jointly. In 2014 he was not in Malaba when the 2nd defendant obtained the suit premises. They did not claim for rent in their plaint and he was never given any rent from the suit premises. During cross examination by Mr. Were for 3rd & 4th defendants, the witnesses stated that it was the 1st plaintiff who made a complaint to the police but the district surveyor was not arrested. It was the DCI who advised them to file a suit in court.

Defendants Case

8. When the matter came for defence hearing the 1st defendant, Henry Gitahi Thurura, **DW1** adopted his witness statement as his evidence and adopted the 2nd defendant's list of document as his exhibits. He said that LR. No. N. TESO/LABORE/1002 was registered in his mother's name and the grandmother had the title between 1991-2005. That before the death of his mother, she had told him the plot would be his when he turned 18. The petrol business came up around 2011. DW1 stated that in 2000, he approached the grandmother and told her he wanted to develop the property since she had told him earlier that she had financial constraints. They decided to take a bank loan using the title as a security in 2005. The siblings were aware of this arrangement and they did not object. Later on, he sold the land as the bank had issued a notice to auction the property and that was the only way to salvage their interests.

9. During cross examination by Mr. Kiprono, **DW1** stated that he sold his property N. Teso/Kamurei to the 2nd defendant in 2014. He entered into a sale agreement with the 2nd defendant and he signed it and was paid in full. The suit parcel was registered in his name in 2005. The loans were taken on advice of his grandmother as they were doing business together. He appeared before the Land Control Board with his grandmother to get consent to transfer the land to himself. He claimed that his siblings had no share in this property as they had their own properties given to them by their mother. That he was the one who developed the suit property.

10. He was cross examined further by Mr. Tarus and stated that when he went to the Land Control Board with his grandmother the whole family was aware. He developed the suit land between 2000-2002 when the plaintiffs were of age and they did not object. He denied colluding with the Land Registrar. During cross examination by Mr. Wanyama, **DW1** stated that Christine Thurura was the registered owner of the suit property. Their deceased mother had a meeting before her passing and gave him the title to the land. That their mother did not appear before the Land Control Board as she was deceased. He did not plead in his defence that his grandmother assisted him to obtain the title. The transfer form bears his mother's signature even though she was deceased at that time.

11. The 2nd defendant had one of their directors Abraham Kipkoech Korir testify on behalf of the company. **DW2** adopted his witness statement and his list of documents as their exhibits. He stated that before buying the property they carried a search which confirmed the land in the 1st defendant's name. it also showed the property was charged to Co-operative Bank. The purchase price was paid in full and the property was then discharged. They acquired the transfer in 2nd defendant's name on 30/12/2014. They denied any collusion with the 1st defendant to remove the name of Christine Thurura from the title as they only came in the picture 9 years after the 1st defendant had transferred the property to his name. During cross examination by the plaintiff's counsel, he stated that their company started dealing in fuel in 2009. That they were not supplying fuel to the plaintiff's family on another land and they do not have a marketing officer as they do their operations from the office. DW2 admitted that the plaintiff's family had purchased products from them at least twice before. It is the 1st defendant was the one who came to buy from them. They started local business in 2014 as previously they were exporting to Uganda. During the sale agreement, the 1st defendant's wife gave spousal consent.

Submissions

12. The plaintiffs filed their submissions on 6th November, 2020. The plaintiffs opened their submissions by giving a summary of the

evidence presented. The plaintiffs relied on the holding in the case of *Jane Gachoki Gathecha Vs Priscilla Nyawira & Another (2008) eKLR* that, “**A thief acquires no right or interest which is transferrable in stolen property. The transaction would be void ab initio and the property traceable**”

13. The plaintiffs also relied in the holding of Munyao J in the case of *Alice Chemutai Too Vs Nickson Kipkurui Korir & Ano (2015) eKLR* thus; “**Having considered all arguments I frankly do not see how the title of the 1st respondent, the star fraudster, can be upheld, and having nothing to charge. I do not see how the charge in favour of the bank can be upheld. It was argued that a decision to cancel the charge would be injurious to the economy. But it is no less, and in fact, it may probably be more injurious, if I am to deny the applicant and the heirs of the estate of the deceased their rightful inheritance, which comprises of the suit property. The charge has to be cancelled and I am afraid that in this instance, the bank will have to pursue the 1st respondent personally to recover its money. I sincerely hope that they will be successful in this mission. As for the applicant, she has succeeded in this case and the title has to revert back to the name of the deceased. On costs, I do not see why the same should not follow the event. The applicants shall have costs jointly and/or severally against the respondents.**”

14. Lastly, the plaintiffs submitted that the 2nd defendant’s plea of innocent purchaser for value is not merited because the title had never passed to the 1st defendant. That the 2nd defendant had dealt with the plaintiffs’ family previously in the oil retail business and they concealed their acquisition of the title until the secret was discovered. They urged the court to find in their favour and enter judgement as prayed in the plaint.

15. The 1st defendant filed his brief written submission on 8/12/2020 which summarised the evidence he presented. The 2nd defendant filed hers on 8th December 2020. Besides reference made to the documents produced in evidence and the summary of the witnesses’ evidence; the 2nd defendant submitted that they relied on the documents provided by the lands office. She relied on the Court of Appeal decision of *Elizabeth Wambui Githinji & 29 others Vs Kenya Urban Roads Authority & 4 others (2019) eKLR* which held that;

“It would be contrary to the intent of law and wholly unnecessary for a party seeking to acquire interest in land to go beyond the register to establish ownership and the history of the past transactions involving that land. It must be reiterated further that the only reason why the law requires the keeping of land records is to afford a notice to the whole world of the status of the property.”

16. The 2nd defendant submits that none of the particulars of misconduct pleaded in paragraphs 8(a) – (d) of the plaint have been shown to have been committed by her. That the plaintiffs failed to prove that there was fraud committed in the transfer of the suit property to the 2nd defendant. She supported her case by relying on the decision of *Shimoni Resort Vs Registrar of Titles & 5 others (2016) eKLR* that property in the hands of a bona fide purchaser would be protected even if it is shown that in the past before the bona fide purchaser, the same had been fraudulently transacted.

17. The 2nd defendant continued that the plaintiffs had not demonstrated that they were aware of the fraud as provided in section 26 of the Land Registration Act for her title to be cancelled. She supported this submission with the decision in *Elizabeth Wambui Githinji supra* that “**Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of the title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved.**”

18. The 3rd & 4th defendants filed their submissions on 2nd December 2020. They stated that the plaintiffs have failed to prove there was collusion between the office of the 3rd defendant and the 1st defendant in the transfer and registration of the suit property as alleged in the plaint. That the 1st defendant presented validly executed documents which appeared genuine to the Registrar so the 3rd & 4th defendants should not be held liable for any fraud. They urged the court to dismiss the suit as against the 3rd & 4th defendants with costs.

Determination

19. Having considered the pleadings filed, evidence adduced and submissions rendered, this court frames the following questions for determination;

- (i) *Whether or not the plaintiffs have proved the allegations of fraud levelled against the defendants.*
- (ii) *Whether or not the defence of innocent purchaser for value is availed to the 2nd defendant.*
- (iii) *Who bears the costs of this suit?*

20. The particulars of fraud levelled against the defendants are enumerated at paragraph 8 of the plaint. The 1st defendant in his defence stated that parcel No. N. Teso/Labore/1002 was registered in his mother’s name. That the title for the suit parcel was in the custody of his grandmother between 1991 – 2005 while the petrol business came up in the year 2011. According to the 1st defendant, the land was bequeathed to him by the mother before her death and it is the reason his siblings raised no objection when he used the title to acquire bank loans from 2005. The witness confirmed that the transfer form dated 14/6/2005 bears her mother’s signature although she was already dead by then.

21. The 1st defendant was registered as owner of the suit property on 29th May 2010 (as shown in copies of green card produced in evidence). The plaintiffs aver that his registration was done without obtaining letters of administration of the estate Veronica Wagaki Thurura – deceased. The 1st defendant did not allude to obtaining any such grant. Although he stated that the suit land was bequeathed to him, the law of Succession Act still required of him to take out letters of administration to implement the wishes if any of his deceased mother. Further, the 1st defendant did not give any background on how the transfer form was signed post humously. The inference drawn from the lack of explanation is that the transfer instrument used to pass ownership to the 1st defendant was defective making him guilty of the fraud pleaded in paragraph 8(a) of the plaint.

22. The 3rd & 4th defendants are however excused from bearing any blame because there was no evidence presented that showed the Land Registrar was aware Veronica Thurura was already dead. None of the beneficiaries of her estate had placed a restriction on the suit title to put the registrar on notice. It is therefore my considered opinion and I so hold that the plaintiffs have only proved the fraud alleged as against the 1st defendant.

23. The second question is whether the 2nd defendant's title cannot be cancelled on account of being an innocent purchaser for value. Blacks Law dictionary 10th Edition defines bona fide purchaser for value as **“someone 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. Generally, a bona fide purchaser for value is not affected by the transferor's fraud against a third party and has a superior right to the transferred property as against the transferor's creditor to the extent of the consideration that the purchaser has paid.”**

24. In several Court of Appeal decisions *inter alia Elizabeth Wambui Githinji & 29 others Vs Kenya Urban Roads Authority supra* and *Lawrence P. Mukiri Mungai, Attorney Francis M. Mwaura Vs A. G. & 4 others* the court rendered itself thus;

“Bona fide purchaser, the courts have maintained, is assured of protection, notwithstanding that previous dealings might be shown to have been mired in fraud. See Dr. Joseph Arap Ngok V Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997.

The Ugandan case of Katende v. Haridar & Company Limited (2008) 2 E.A.173, has been cited extensively with approval in many local decisions. It developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice:-

“..... it suffices to describe a bona fide purchaser as 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 that:

- a. he holds a certificate of title;**
- b. he purchased the property in good faith;**
- c. he had no knowledge of the fraud;**
- d. he purchased for valuable consideration;**
- e. the vendors had apparent valid title;**
- f. he purchased without notice of any fraud;**
- g. he was not party to any fraud.**

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

25. The 2nd defendant stated that she relied on the records obtained from the lands office which showed the suit title was registered in the name of the 1st defendant. DW2 denied that they were introduced to the 1st defendant as investors as they were only looking for land to buy. The witness denied supplying fuel to the plaintiffs' family on another land. He admitted that the plaintiffs' family purchase fuel from them once or twice. According to the plaintiffs' the 2nd defendant had previously had business dealings with the family so they cannot plead innocent purchaser for value without knowledge.

26. The burden of proof was two fold in this case. The first part required the plaintiffs to demonstrate that the nature of dealings that happened previous to the sale of the suit land made the 2nd defendant to have a background on capacity of the 1st defendant to deal. This would help in ascertaining the conclusion stated in section 26(1) of the Land Registration Act No. 3 of 2012. In paragraph 13 of the 1st plaintiff's witness statement she said *“That my grandson (1st defendant) used to connect me with the 2nd defendant who used to bring the fuel for retail.”* The witness did not however avail any evidence of supply of or purchasing fuel from the 2nd defendant. The 1st plaintiff did also not avail details of the investment contract they entered into with the 2nd defendant where she was to get a commission for every litre of

fuel sold. Infact, she produced no evidence of carrying on the business of a petrol station on the suit property. The 1st defendant had earlier stated that he was the one running the petrol business. This is corroborated by DW2 who said it is the 1st defendant who had purchased items from them. There was no evidence of dealings of the plaintiffs with 2nd defendant.

27. PW1 said in paragraph 18 of her statement that at the time the 2nd defendant began running the filling station, the title had not been transferred to her. She however does not say in whose name the title was. The plaintiffs left several blanks in her case as against the 2nd defendant i.e. when their filling station started having cash flow problems;

- In which year the 2nd defendant was introduced to them.
- The details of the contract and the effective date and how much rent was payable from the premises.
- Who they were dealing with from the 2nd defendant's company.

These information was important to ascertain knowledge of the 2nd defendant of the suit property before buying it.

28. From the evidence led, I am persuaded to find that the 2nd defendant had no dealings with the plaintiffs' family prior to the purchase of the property that would have enabled them know the 1st defendant had acquired his title through fraudulent means. The 1st plaintiff did not even disclose the year/period when the 2nd defendant was introduced to her as an investor. Given that the title documents were left in her possession after the demise of Veronica, she could not have allowed the 2nd defendant to carry on the running of the petrol station without ascertaining the documentation.

29. The second limb of the burden of proof was 2nd defendant in doing so, the 2nd defendant presented a sale agreement executed on 7th may 2014. Before the sale, they had written to the 1st defendant on 22/4/2014 expressing an interest to buy the suit land which offer was accepted on 28/4/2014. The 2nd defendant went ahead to produce a copy of title issued to the 1st defendant on 30/6/2005 as owner of the land. Page 2 of the title deed shows several entries of transactions undertaken by the 1st defendant before he sold the land to the 2nd defendant. Amongst the transactions were; charges to K-rep bank on 16/9/2005 and further charge from the same bank registered on 11/5/2007.

30. The 2nd defendant added that they did carry out a search on the title on 2nd May 2014 before buying which search showed that the property was charged to Cooperative Bank at the time. They went on to share copies of correspondence shared with the bank concerning the loan e.g. the letter dated 25th June 2014 confirming payment of the outstanding loan amount of Kshs.2,632,533.25 to the bank. The 2nd defendant produced evidence of paying stamp duty in the sum of Kshs.42,250 on 30/12/2014 and executed transfer form dated 24/12/2014. Thus defendant has shown that he met the criteria set for a purchaser to qualify for innocent purchaser for value without notice as stated in the cases cited herein above.

31. However, inspite of the 2nd defendant meeting the criteria for innocent purchaser for value, the 1st defendant's title was null and void *abinitio* as it contravened the provisions of section 45 of the Law of Succession Act Cap 160. If this court were to validate the 2nd defendant's title, it would amount to abetting a criminal act under section 45(2) Cap 160. The 2nd defendant's claim will thus lie against the 1st defendant but not against the estate of Christine Wangechi Thurura – deceased. Innocent purchaser for value is an equitable remedy that cannot override the provisions of the Law.

32. Consequently, I make a finding that the plaintiffs have made a good case. I enter judgment as follows;

(a) An order of Court cancelling the successive transfer of land parcel No. North Teso/Kamuriai/1002 from the deceased proprietor to the 1st defendant and from the 1st defendant to the 2nd defendant and restoration of the said parcel into the name of the deceased CHRISTINE WANGECHI THURURA.

(b) The costs of the suit awarded to the plaintiffs' payable by the 1st defendant.

Dated, signed & delivered at BUSIA this 18th day of March, 2021.

A. OMOLLO

JUDGE