



**Ngore & another v M'alabwa (Environment and Land Appeal
E101 of 2021) [2023] KEELC 18471 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18471 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E101 OF 2021**

CK YANO, J

JULY 5, 2023

BETWEEN

CHARLES MUTETHIA NGORE APPELLANT

AND

JOHN MICHUBU M'NGUTHARI INTERESTED PARTY

AND

JOSEPH NTONGAI M'ALABWA RESPONDENT

JUDGMENT

Introduction

1. By a plaint dated 21st day of November 2016, and amended on September 9, 2020, the respondent sued one John Michubu N'Nguthari as defendant, and the appellant herein as an interested party for an order compelling the said John Michubu M'Nguthari to transfer 0.40 hectares of land parcel number, 5036/Kangeta/Kangeta Adjudication Section to the respondent and an order cancelling the name of the appellant as the owner of the said land and registering the same in the name of the respondent. The respondent's case was that the appellant acquired the suit land from the said John Michubu M'Nguthari fraudulently when there was a subsisting court order restraining the latter from selling or transferring the said land to any other person. The respondent pleaded that he had purchased the said land from John Michubu M'nguthari on September 8, 1999 for a sum of Kshs 40,000/= and was promptly put in possession and had been utilizing the land since then.
2. The respondent further pleaded that he learnt that immediately the title was issued to John Michubu M'Nguthari, the latter, instead of signing transfer forms in favor of the respondent transferred it to the appellant. The respondent gave particulars of fraud attributed to the said John Michubu M'Nguthari and the appellant.



3. The respondent pleaded that the appellant who is his neighbor bought the land whilst there was a court order to defeat the respondent's title.
4. John Michubu M'Nguthari filed a defence dated February 11, 2017 in which he denied executing any agreement on September 8, 1999 as he was admitted in hospital following a road accident on September 6, 1999 and discharged on September 13, 1999. He further pleaded that the cause of action was time barred.
5. The appellant also filed a defence dated October 8, 2020 denying the allegations in the amended plaint. He admitted being the registered proprietor of LR No Kangeta/Kangeta/5036, adding that at the time he purchased the land, the same was vacant and did not know that the respondent (who he denied being his neighbor) had also bought it. That there was no inhibition registered against the said land and he was not served with any court order.
6. After hearing the parties, the trial court on August 26, 2021 found in favour of the respondent and ordered that the appellant's title be cancelled and the same to be registered in the name of the respondent. The appellant was aggrieved by the said judgment and filed the present appeal citing the following grounds-;
 1. That the learned trial magistrate erred in law and fact in ordering the cancellation of the appellant's title to LR Number Kangeta/kangeta/5036 when no fraud, misrepresentation, want of procedure, illegality or corrupt scheme had been established against him.
 2. That the learned trial magistrate erred in law and fact in finding that the appellant was not a purchaser for value without notice.
 3. That the learned trial magistrate erred in law and fact in finding that the appellant was aware of the court order barring the sale of the disputed land when there was no evidence to support the finding.
 4. That the learned trial magistrate misdirected himself in relying on extraneous matters in arriving at his decision.
 5. That the trial magistrate erred in law in shifting the burden of proving the respondent's case to the appellant
 6. That the learned trial magistrate erred in law in finding that the respondent's claim was not time barred.
 7. That the learned trial magistrate erred in law in finding that the issue of limitation could not be raised in the final submissions.
 8. That the learned magistrate erred in law in finding that the cause of action arose when the register was opened.
7. The appellant proposed to ask the court for orders that this appeal be allowed, the judgment of the lower court cancelling the appellant's title to LR Number Kangeta/Kangeta/5036 be set aside and the respondent's claim in the lower court be dismissed and the appellant be awarded costs of this appeal and those of the lower court.
8. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated March 6, 2023 through the firm of M/s Nkunja & Company Advocates while the respondent filed his dated March 7, 2023 through the firm of M/S Nyamokeri Ombachi & co. advocates.



Appellant's Submissions

9. Counsel for the appellant combined grounds 1, 2, 3, 4 and 5 and submitted that it is trite law that the duty of a first appellate court is to reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. That the court would only interfere with the conclusions of the trial court if they were unsupported by the evidence on record. The appellant's counsel relied on the case of *James Obande Vs Kennedy Ouma Nyatogo* [2015] eKLR
10. The appellant cited the provisions of Section 26 (1) of the *Land Registration Act* on the grounds upon which a title can be challenged and referred to the case of *Elijah Makeri Nyangwira Vs Stephen Mungai Njuguna & another* [2013] eKLR and submitted that it is clear from the record and the trial court's own judgment that it was not disputed that the appellant is the registered owner of the suit land. That the respondent challenged the appellant's title under Section 26(1) (a) of the *Land Registration Act*.
11. The appellant submitted that it is trite law that allegations of fraud must be pleaded and strictly proved and cannot be inferred from the facts and relied on the case of *Kinyanjui Kamau Vs George Kamau Njoroge* [2015] eKLR and *Kuria Kiarie & 2 Others vs Sammy Magera* [2018] eKLR and submitted that the trial court did not address the issue of whether the respondent who had the burden of proof had proved the particulars of fraud against the appellant. That he based his finding of fraud on the fact that the appellant did not produce a receipt to show how he paid the consideration and did not call witnesses who were present when he negotiated the transaction, and also found that the fact that there was no encumbrances on the title deed when the appellant bought the land was of no consequence as the same could not have been registered because the register was only opened in the year 2014. That is despite the fact that the orders by Justice P.M Njoroge were issued on December 20, 2016, two years after the title had been issued in the year 2014.
12. It is the appellant's submission that the issue of non- payment of consideration by the appellant was not pleaded and neither was any evidence led to prove that he did not pay, and that it only arose during cross examination of the appellant at the tail end of the trial. The appellant relied on the case of *Kinyanjui Kamau Vs George Kamau Njoroge* [2015] eKLR and submitted that parties are bound by their pleadings and cannot be allowed to litigate beyond the scope of the pleadings. It is further submitted that it was not open for the court to use the fact that the appellant had not produced a receipt to show that he paid for the balance of the consideration and that he did not call witnesses to show that he indeed paid as proof of fraud because this was not pleaded. Further, as was held in *Jennifer Nyambura Kamau Vs Humphrey Mbaka Nandi* [2013] eKLR, the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. It is the appellant's submission that the onus was on the respondent to prove fraud and faulted the trial court for shifting the burden of proof to the respondent.
13. The appellant pointed out that no evidence was produced by the respondent to show that the appellant was aware of the orders issued on December 20, 2016 because he was not a party to the suit and there was also no evidence adduced to show that the appellant knew that the respondent had also bought the land. The appellant's counsel submitted that neither fraud nor misrepresentation was proved against the appellant and therefore the order cancelling the title deed should not be allowed to stand. It was further submitted that the trial court was wrong in finding that the appellant was not a purchaser for value without notice and reference was made to the land sale agreement dated August 11, 2017 and the official search which did not reflect any order of inhibition against the land. That, indeed the trial court in its judgment confirms that no inhibition has even been registered against the land.



14. Regarding grounds 6, 7 and 8 of the appeal, the appellant's counsel submitted that the respondent's claim from the initial plaint was based on the law of contract and as per Section 4(1) (a) of the Limitation of Contract Act is six years. That the sale agreement relied upon by the respondent having been entered on September 8, 1999, his suit should have been filed by September 7, 2005 but instead was filed on September 22, 2016, well over ten years after the cause of action had become time barred. That the trial court in its judgment found that the issue of limitation could not be raised in final submissions and dismissed it despite the fact that the same had been pleaded in the defence dated February 11, 2017. It is the appellant's submission that the position taken by the trial court is contrary to the decision of the court of appeal in *Anadet Kalia Musau Vs Attorney General & 2 others* [2020] eKLR where it was held that the issue of limitation being one of jurisdiction can be raised any time and could actually be raised by the court on its own motion.
15. In view of the foregoing the appellant urged this court to find that the appeal is merited and allow it with costs of both this appeal and the lower court.

Respondent's Submissions

16. In their submissions, counsel for the respondent gave a synopsis and or facts of the case and submitted that the substantive issue in the appeal is whether the appellant was an innocent purchaser and whether he had knowledge of the existence of an order inhibiting dealings in the land. That from the lower court proceedings, it is clear from the evidence of both the respondent and the appellant that the distance between the appellant's home and the respondent's home is about five kilometres. That due diligence by the appellant for example making inquiries from the neighbors would have revealed that the suit land was owned by the respondent given that he was in occupation. The respondent further submitted that the speed at which the transfer was conducted between the interested party and the appellant was intended to defeat the ends of justice by subverting an existing court order.
17. It is the respondent's submission that the title to the land was passed by the interested party to the respondent in 1999 when they entered into a land sale agreement and in 2017, the interested party could not sell the same land to the appellant as in law, one cannot sell what he does not possess or own. That for the 17 years to date, possession of the land was with the respondent.
18. The respondent cited the definition of property in the *Black's Law Dictionary* and submitted that the interested party lacked any interest in the suit land. That the interest in the suit land passed on September 8, 1999 to the respondent when the interested party sold the land and that this makes any subsequent dealings with the land by the interested party null and void. That possession of a title deed does not negate the agreement entered on 8th September, 1999. That the reason the title deed was issued to him has been explained by the respondent to the effect that the area was under adjudication, as the person who gathered the land, it was only natural that the title deed be issued to him.
19. The respondent further submitted that the suit land is Agricultural land and consent of the Land Control Board is a requirement. That neither the interested party nor the appellant provided evidence to show that they obtained consent of the Land Control Board in accordance with the provisions of the *Land Control Act* Cap 302 Laws of Kenya.
20. It is also the respondent's submission that it is a legal requirement that in cases involving registration of land, stamp duty should be paid after the property is subjected to valuation. That there is no evidence by either the interested party or the appellant that there was payment of stamp duty. The respondent's counsel cited Rule 4 (1) of the *Stamp Duty (Valuation of Immovable Property) Regulations, 2020* and submitted that the whole process was rushed in order to defeat the ends of justice, and in this case the existence of a court order.



21. The respondent further submitted that the appellant failed to produce evidence of payment of the balance of the purchase price of Kshs 350,000/= nor call witnesses to support his claim. Counsel for the respondent relied on the case of *Lawrence P. Mukiri Mungai Vs. The Hon. Attorney General* Civil Appeal No 146 of 2014 and submitted that there was overwhelming evidence to show that the appellant and the interested party were in a scheme to defraud the respondent of his property. They also relied on the case of Kitale High Court ELC No 35 of 2016 (*Peter Kagunza Adaji vs Shikuku Martin Maiyo & Margaret Chesang Maiyo*) which covered the issue of spousal consent and cited Section 12 of the *Matrimonial Property Act* which was enacted in 2013 and was operationalized on January 16, 2014 and pointed out that the agreement herein was executed in 2017. That the husband held the property as trustee of the wife. It is the respondent's submission that he has proved his case and that the appeal should be struck out with costs.

Analysis And Determination

22. I have perused and considered the record, of appeal the grounds of appeal, the submissions made and the authorities relied on by the advocates for the parties to buttress their rival positions. This being a first appeal, it is trite law that this court has the duty and obligation to reconsider the evidence, evaluate it and draw its own conclusions, bearing in mind that this court has neither seen nor heard the witnesses and therefore will make due allowance in this respect. There are only two issues I find call for my consideration – whether the appellant was a bona fide purchaser for value, whether fraud had been proved against the appellant and the interested party.
23. The respondent testified as P.w 1 and adopted his statement dated November 21, 2016 and filed on November 22, 2016. His evidence was that he purchased the suit land from the interested party in the year 1999 at a consideration of kshs 40,000/= which he paid in full and was promptly put in possession of the land. He produced the agreement dated 8th September, 1999 as P exhibit 1. From the evidence on record, the land was still under adjudication at the time and the respondent testified that the interested party failed to transfer the land when the title came out and instead sold it to the appellant who is a neighbor without regard to an order of court that had been issued. It was therefore the respondent's contention that there was collusion and fraud on the part of the interested party and the appellant.
24. In his testimony, the interested party admitted executing the agreement between him and the respondent and the proceeds were used to settle his hospital bill. He also admitted selling the same land to the appellant despite an order issued by the court restraining him from selling. Indeed the interested party was found to be in contempt of court and was jailed.
25. In his testimony, the appellant admitted buying the land from the interested party. He stated that he bought the land when there was no encumbrance and argued that he was a purchaser for value without notice. He stated that he carried out due diligence before buying the land. He denied knowledge of any order forbidding sale of the land.
26. The trial court found that the respondent had purchased the land from the interested party, took possession and developed it. That the interested party sold the same land to the appellant despite an order restraining the sale.
27. The question therefore is what evidence is available on record to support the conclusion by the learned magistrate that there was fraudulent steps undertaken by the interested party and the appellant in the manner the appellant acquired the suit property? In this case, it is clear from the record that the parties are all neighbours. It is also not in dispute that the interested party had sold the suit land to the respondent in the year 1999 and put him in possession. At the time the appellant purported to purchase the land from the interested party, the respondent was already in possession and occupation



and had even carried out some developments on the land. Whereas the appellant alleged that he carried out due diligence before purchasing the suit land, it is not clear why he did not inquire from the respondent who was in possession and occupation why he was on the land. There is no cogent evidence that the respondent ever made inquiries either from the respondent or other neighbours as to the reason why the respondent was on land which he was being sold. In my view, it was not enough for the appellant to satisfy himself that there was no encumbrance registered against the land. Had the appellant made inquiries from the respondent who was the one in occupation and use of the land or even other neighbours no doubt he would have discovered that the land was already sold and was not available for sale. Moreover, there was a court order in place prohibiting the sale or any dealings in the land. Therefore, in my considered view, the appellant was not an innocent purchaser and must have colluded with the interested party to defeat the ends of justice by subverting an existing court order. In my view, and as rightly found by the trial court, the interested party had no valid title to pass to the appellant since he had sold the same land to the respondent in the year 1999.

28. In addition there is no evidence that was tendered by the appellant and the interested party that the balance of the purchase price was paid or that they obtained consent of the Land Control Board and paid stamp duty as required by law. Section 26 of the *Land Registration Act* provides as follows-;

26(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by the courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances easements restrictions and conditions contained or endorsed in the certificate, 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.

29. Whereas the law is protective of title, the title can be challenged where the same is obtained by fraud or misrepresentation to which the person must be proved to be a party and where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. In this case it is clear to me the title of the appellant was obtained by fraud or misrepresentation. Indeed, the title was acquired in defiance of a court order which was then in place and for which the interested party was found to be in contempt of and convicted. I am also of the view that the appellant was a party to the fraud or misrepresentation that conveyed the title to him and his title was rightly impeached. In my view, the appellant was not an innocent purchaser for value. This is so, considering the omissions referred to earlier. The evidence in this case puts no doubt that the title to the appellant was obtained illegally and against a court order that was then in force. The title could not therefore have been obtained legally or procedurally. I am satisfied that the findings and holding of the learned trial magistrate were well founded, and I find no reason to interfere with the same.

30. Consequently, I find no merit in this appeal and the same is dismissed with costs to the respondent.

31. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF JULY, 2023.

In the presence of

Court Assistant – V. Kiragu



Kaberia for appellant

Nyamokeri for respondent

C.K YANO

JUDGE

