



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO.19 OF 2019

MAGDALENE WANJIKU NDUNGU.....APPELLANT

VERSUS

JANE NJOKI NJUGUNA.....RESPONDENT

(Being an Appeal from the Judgment of the Honourable M.W Wanjala (SRM sitting at Thika Civil Suit No. 286 of 2006 made and delivered on the 22nd January 2019)

BETWEEN

JANE NJOKI NJUGUNA.....PLAINTIFF

VERSUS

MAGDALENE WANJIKU NDUNGU.....DEFENDANT

JUDGEMENT

The Appellant herein **Magdalene Wanjiku Ndungu** was the Defendant in **Thika CMCC No. 286 of 2006**. The Respondent **Jane Njoki Njuguna** was the Plaintiff.

By a Plaint dated **6th April 2006**, the Plaintiff (Respondent) sought for orders against the Defendant(Appellant) that;

- 1. That the ownership and title of Parcel Number Gatwanyanga/Ngoliba/Block 1/162 to the defendant be cancelled and the same be registered in the name of the 2nd Plaintiff.**
- 2. Costs of the suit.**
- 3. Any other or further relief the Court may deem just.**

In her statement of Claim, the Plaintiff (Respondent) averred that she was the original allottee of the suit property. That the Defendant /Appellant fraudulently and without the 1st plaintiff's knowledge caused the said title to be registered in her name. She particularized fraud as;- presenting herself to the Land Registrar as the owner of the title; having herself registered as the owner while she knew the land belonged to the 1st Plaintiff; causing the land to be registered in her name without the 1st Plaintiff's Knowledge. That the 2nd plaintiff bought the suit property from the 1st Plaintiff and she has exclusively developed the same .

The suit was contested and the Defendant (Appellant) filed a Statement of Defence dated **15th May 2006**, and denied all the allegations made in the Plaint and averred that she is a bonafide purchaser for value without Notice . That the original proprietor of the suit property was one **Gladys Woki Ndungu**, and what the 1st Plaintiff purports to have been selling to the 2nd Plaintiff was neither in existence nor did it measure one acre as per the survey records.

Further that prior to the transfer of the suit property to the Defendant, she got a letter of no objection to transfer from **Gatundu Nyakinyua Company Limited**, together with **Land Control Board's Consent** to transfer. It was averred that if the Plaintiff (Respondent) had developed the suit premise, she has trespassed. It was further contended that there have been proceedings between the 1st Plaintiff(Respondent) and the Defendant being **Thika Magistrates D.O Case No. 25 of 2005**, which the 1st Plaintiff is the Plaintiff and the Defendant is a Defendant in which Judgment was quashed by the High Court. Further that Thika Chief Magistrate D.O 11 in which one **John Njuguna**, alleged husband to the 2nd Plaintiff was the Plaintiff and the Defendant, a Defendant and the Court found in favour of the

Defendant (Respondent),

After Close of pleadings, the matter proceeded by way of viva voce evidence wherein the Plaintiff (Respondent) called two witnesses and the Defendant (Appellant) also called two witnesses

PLAINTIFF'S (RESPONDENT'S CASE)

PW1 Micheal Mburu Warui adopted his witness statement and testified that the late **Teresiah Wangari Njuguna**, was his sister. It was his testimony that **Teresiah** entered into a written agreement dated **18th July 1989**, for sale of **Gatuanyanga Ngoriba Block 1/162**, with the 2nd Plaintiff for **Kshs.22,000/=**. That **Teresiah** was a member of **Gatundu Nyakinyua Company Ltd**, and had the share certificate, ballot and list of members.

Further that though he was there when the said **Teresiah** sold the land, he was not present when the sale agreement was written. That they did not go to the relevant offices to effect the transfer and at that time, the membership for **Nyakinyua** was only women. That he was not given any letter showing that the list is from **Nyakinyua**.

PW2 Jane Njoki Njuguna adopted her witness statement as her evidence in Court. It was her testimony that on **18th July 1989**, she entered into a written agreement with **Teresiah** and she paid **Kshs.22,000/=** in cash. That she had seen the parcel of land before the purchase. Further that she confirmed that the land belonged to **Teresiah** as she had the requisite documents to wit a Share Certificate and a ballot **No. 162**. That she also confirmed that her name was in the register and she as member **No. 2190**. That she had planted trees around the parcel and the Defendant cut them down. She produced the Sale agreement as Exhibit 1, share Certificate as Exhibit 2, ballot as Exhibit 3 and the list of member as Exhibit 4. She urged the Court to cancel the Defendant's title.

She further testified that when she went to **Nyakinyua** to transfer the land, she was informed that a title had already been issued to another person. She denied demolishing the Defendant's house that she was constructing on the suit land.

DEFENCE (APPELLANT'S)CASE

DW1 Magdalene Wanjiku Ndungu adopted her witness statement. She further produced her documents as Exhibits 1 to 6 . That she bought the land from **Gladys Woki Ndungu** on **29th July 2000**, when it already had a title deed and commenced construction. That they went to the **Land Control Board** at Thika . Further that she did not follow up with the issue of **Nyakinyua** as by the time she bought the land, it already had a title. That she constructed a three room house and commenced constructing a 2nd house. Further that she learnt that people were demolishing her house in the Company of the Deputy OCS.

That **Gladys Woki Ndungu** showed her the ballot which was **No. 162** and she already had a title for the land. That she did not check whether **Gladys** was a member of **Nyakinyua**. That her documents were stolen when her house was demolished. That she reported the theft of her documents to **Kilimambogo Police Station**. That they followed due process in the transfer of the land.

DW2 Gladys Woki Ndungu adopted her witness statement and testified that she was a member of **Nyakinyua** and has had several properties and only **Plot 162**, had raised issues. That she was issued with a share Certificate and gave it to the person she sold the land to. That **Plot No.162**, was allocated to her by **Nyakinyua** and she paid something small and was issued with a title deed . That they went to the Land Control Board and they were issued with a consent which she gave to the Defendant. That she had other documents other than the title deed and she gave them to **Magdalene** who told her that her house was broken into and the documents were stolen. That she was issued with a title deed in **1995**, and she had it until the year **2000**.

After the *viva voce* evidence, the parties filed their written submissions and on **8th February 2019**, the Court delivered its Judgment in favour of the Plaintiff (Respondent) and held that;

“This Court will have failed in its duty if it fails to find that such title as the one being held by the Defendant was not appropriately acquired in the circumstances stated. In a Court where such situations involving land acquired through land buying companies are rampant, the court 's position should be very clear , that a party should be able to not only prove that he holds title to the and in issues, but that such title can be traced back in the books or records of the land buying Company that allocated the land. In the circumstances in this case, I am constrained to allow the prayers as sought in the Plaint that was filed in Court on 6th of April 2006.”

The Appellant was aggrieved by the above determination of the Court and Decree thereon and she has sought to challenge the said Judgment through the **Memorandum of Appeal** dated **22nd February 2019**, and sought for orders that ;

- a) The Judgment of the trial court in Civil Suit No. 286 of 2006 –Thika be set aside.**
- b) This Appeal be allowed.**

The Appeal is based on the grounds that;

- 1. That the Learned Trial Magistrate erred in both Law and in fact in making a finding that the Appellant had not proved his case.**

2. That the Learned Trial Magistrate erred in both Law and in fact by applying a higher standard of proof in reaching an erroneous decision.

3. That the Learned Magistrate erred in law and in fact by shifting the burden of proof to the Defendant and requiring that she should show where her already registered title was procured from in regards to Land parcel Gatunyaga/Ngoliba/Block 1/162.

4. That the Learned Magistrate erred in Law and in fact by concluding without evidence that the Plaintiff had proved fraud as was earlier alleged.

5. That the Learned Magistrate erred in law and fact by reaching a decision which was not supported by any documentary evidence.

6. That the Learned magistrate erred in Law and in fact in condemning the Appellant yet she as a bonafide purchaser for value.

7. That the Learned Magistrate erred in Law and in fact by not considering the letter written by the Board of Directors Gatundu Nyakinyua Company Limited.

The Appeal was canvassed by way of written submissions and the Appellant through the Law Firm of Karanja Kangiri & Co. Advocates filed the submissions on 30th November 2020 and urged the Court to allow the Appeal. It was submitted that the Appellant is the registered owner of the suit property having purchased the same for **Gladys Woki Ndungu**, who was the previous registered owner. It was further submitted that the title document held by the Appellant was not obtained through fraud and is clean and good title. Further that it was not incumbent upon the Appellant to prove the validity of her title deed but the burden was upon the Respondent to prove the invalidity of the same.

The Respondent through the Law Firm of **Karuga Wandai & Company Advocates** filed her written submissions dated 26th October 2020 and submitted that the 1st Plaintiff died during the pendency of the suit and was substituted with **Michael Waweru Mburu**. It was further submitted that while the Plaintiffs(Respondents) produced in evidence documentation evidencing how the land was acquired, the Appellant only produced a title deed as evidence of ownership. That the Appellant failed to prove how she acquired ownership from Nyakinyua by failing to show what other process was followed. It was thus submitted that the trial Court made a sound judgment.

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **SelleVs... Associated Motor Boat Co. [1968] EA 123** where the Court held that;

*“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must 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. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif vs. Ali Mohamed Sholan(1955)**, 22 E. A. C. A. 270).*

The Court has carefully considered the Memorandum of Appeal, the written submissions by the parties the evidence in the subordinate Court and the Court finds that the issue for determination is **whether the Appeal herein is merited.**

For the Court to determine whether the appeal is merited, it must determine whether the trial Court arrived at a wrong Conclusion. It is not in doubt that both the Appellant and the Respondent are laying claim to the suit property. The title being held by the Appellant was challenged by the Respondent. While the Appellant claims to have bought the suit property from **DW2 Gladys Woki Ndungu**, the Respondent claims to have bought the suit property from **Teresiah Wangari (Deceased)**.

In the case of **Hubert L. Martin & 2 Others ...Vs... Margaret J. Kamar & 5 Others [2016] eKLR**, the Court held that;

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

It is not in doubt that the suit property initially belonged to **Nyakinyua Company limited**. The Appellant has contended that she bought the suit property from **Gladys Woki** who was a member of **Nyakinyua**. However, the Appellant has not produced in evidence any document to show that the said **Gladys Woki Ndungu** was a member of **Nyakinyua Company Limited** or that she even possessed the ballot No. **162** subject of the suit property.

Though the Appellant had alleged that she had lost all the documentation in the alleged demolition by the Respondent, the Court has seen the list produced in evidence by the Appellant for the lost items in the said demolition. While there is no evidence that this issue was ever reported to the Police, the Court also notes that among the documents that the Appellants listed as lost, neither a share certificate nor a ballot paper belonging to **Gladys Woki** were listed as lost. Further **Nyakinyua Company** is still in existence and there is nothing that prevented the Appellant from seeking any documentation confirming the root of the title to be produced in Court. The Court therefore finds and holds that the Appellant failed to prove the root of her title by failing to prove the root of **Gladys Woki's** title.

On the other hand, the Respondent testified that she bought the suit property from **Teresiah Wangari**. To buttress her case, she produced a Sale Agreement dated **18th July 1989**, she further produced a share certificate dated **29th September 1986** from **Nyakinyua Company** that proved that the said **Teresiah Wangari** was a shareholder at the Company, ballot for **plot 162** and a list of members that evidenced that the said **Teresiah Wangari** held **Certificate No, 2447** and was therefore a member of the Company. With the above evidence, the Court is satisfied that indeed the Respondent was able to prove the root of her title.

Having failed to prove the root of **Gladys Woki's** title, it therefore followed that the said **Gladys** could not have passed a good title to the Appellant. This Court is thus satisfied that the Learned trial Magistrate correctly held that the title held by the Appellant was not appropriately acquired. Having found that the same was not appropriately acquired, the only cause of action therefore would be to cancel the said title.

In the case of *Alice Chemutai Too...Vs...Nickson Kipkurui Korir & 2 Others [2015] eKLR* the Court held that:

*“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012* where I stated as follows:- “...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”*

Having now carefully re-evaluated and re-assessed the available evidence before the trial court and the **Memorandum of Appeal** together with the **written submissions**, the Court finds and holds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the said determination.

The upshot of the foregoing is that the Appellant's Appeal is found **not merited** and consequently the said Appeal is dismissed entirely and the Judgment and Decree of the trial court is upheld with costs to the Respondent herein.

It is so ordered.

Dated, signed and Delivered at Thika this 8th day of April 2021.

L. GACHERU

JUDGE

8/4/2021

Court Assistant - Phyllis

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Kanja holding brief for Mr. Karanja Kangiri for the Appellant

No appearance for the Respondent

L. GACHERU

JUDGE

8/4/2021