



Kibuchi v Kanja; Kumuru & 7 others (Interested Parties) (Environment and Land Appeal 45 of 2018) [2022] KEELC 3266 (KLR) (5 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3266 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 45 OF 2018**

BM EBOSO, J

JULY 5, 2022

BETWEEN

JOHN IREGI KIBUCHI APPELLANT

AND

STEPHEN WATHIARI KANJA RESPONDENT

AND

PETER WATHOKO KUMURU INTERESTED PARTY

REGISTERED OFFICIALS DRYLAND SELF HELP GROUP INTERESTED PARTY

GITHUNGURI CONSTITUENCY RANCHING COMPANY LTD INTERESTED PARTY

BERNARD KIGO KAGAI INTERESTED PARTY

DAVID KARIUKI MUTURI INTERESTED PARTY

ADLINE KERUBO BIKERI INTERESTED PARTY

LAND REGISTRAR (THIKA REGISTRY) INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

((Being an Appeal arising from the Judgement and Decree of Hon. C.A OTIENO-OMONDI (PM) delivered in Thika Chief Magistrate Court on 13/12/2018 in Civil Case No 613 of 2011))

JUDGMENT

1. This appeal arose from the judgment rendered by Hon C.A Otieno Omondi, [Principal Magistrate] on December 13, 2018 in Thika Chief Magistrate Court Civil Case Number 613 of 2011. The



- dispute in the said suit revolved around the question of legality of title number Ruiru East Block 1 [Githunguri]/1566, relating to a parcel of land located in Ruiru, measuring 0.50 of a hectare [the suit property]. I will first outline a brief background leading to the appeal, before I dispose the issues falling for determination.
2. Through a plaint dated September 19, 2011 [and subsequently amended], Stephen Wathiari Kanja [the respondent] sued the following parties: (i) Peter Wathoko Kumuru; (ii) John Iregi Kibuchi [the appellant]; (iii) the Registered Officials of Dryland Selfhelp Group; (iv) Githunguri Constituency Ranching Company Ltd; (v) Benard Kigo Kagai; (vi) David Kariuki Muturi; (vii) Adline Kerubo Bikeri; (viii) the Land Registrar and (ix) the Attorney General. His case was that he purchased the suit property from the “family of Beth Wangari Tirathi and Herina Mwihaki Watheta”. To facilitate registration of the land and issuance of a title in his name, Githunguri Constituency Ranching Company Ltd [the 3rd interested party] issued him with a clearance certificate advising the Land Registrar to open a parcel register and issue him with a title deed. Upon presenting his papers to the Land Registry, he discovered that Peter Wathoko Kumuru [the 1st interested party], together with the then officials of Githunguri Constituency Ranching Co Ltd [the 3rd interested party], had fraudulently caused the land to be registered in the name of the 1st Interested Party who subsequently sold and transferred the land to the appellant. The appellant had in turn subdivided the land and sold it to the Registered Officials of Dryland Selfhelp Group [the 2nd interested party]. When he visited the land in May 2011, construction was ongoing on the land and the construction works were at an advanced stage.
 3. During trial, he led evidence by John Maina Mburu who was the Chairman of Githunguri Constituency Ranching Company Ltd at the time he acquired shares in the company relating to the suit property. It was his case that the appellant and the interested parties had “jointly and severally fraudulently procured title documents” relating to the suit property. He set out various particulars of fraud. He sought, among other reliefs, an order declaring that the suit property belonged to him, and nullifying the subdivisions. He also sought an order compelling the appellant and the interested parties to transfer the suit property to him.
 4. Peter Wathoko Kumuru [the 1st interested party] who was the 1st defendant in the said suit filed a defence dated February 19, 2013. He denied the allegations made by the respondent and averred that he was, until June 23, 2005, the proprietor of the suit property. During trial, he testified that he was a member of Githunguri Constituency Ranching Company Limited and he got the land from the said company. It was his evidence that the company cleared him and he was subsequently registered as proprietor of the land and issued with a title deed in the year 2003. He led evidence by John Ruiru Waweru who testified that he was a director of Githunguri Constituency Ranching Company from the year 2003 and that Peter Wathoko Kamuru was a member of the company.
 5. The appellant was the 2nd defendant in the said suit. He filed a statement of defence dated April 20, 2013 in which he contested the respondent’s claim of ownership of the suit property. He averred that he was a *bona fide* purchaser for value of the suit property without notice of any fraud or irregularity in the title. During trial, he testified that he bought the suit property from Dryland Selfhelp Group and subdivided it into twelve (12) plots. He added that he had sold all the plots to third parties except three (3) plots which were still in his name. He added that prior to purchasing the land, he carried out due diligence.
 6. Upon conclusion of trial, the trial court found that Peter Wathoko Kamuru had acquired title to the suit property through fraud and that the subsequent transfers relating to the suit property were null and void. She granted the respondent the reliefs sought in the plaint. She dismissed the 1st interested party’s counterclaim.



Appeal

7. Aggrieved by the judgment of the trial court, the appellant brought this appeal, advancing the following verbatim grounds of appeal:
- 1) The honorable magistrate erred in law in entertaining the suit when she did not have the pecuniary jurisdiction to hear and determine the suit.
 - 2) The honorable magistrate erred in law and fact by delving into irrelevant issues of membership of the 4th defendant when such was not an issue for determination.
 - 3) The honorable magistrate erred in law and fact by failing to appreciate that judgement having been entered against the 4th defendant, it was factual that any fraud was actuated at the 4th defendant and not the 1st defendant [sic].
 - 4) The honorable magistrate erred in law and fact by cancelling the 2nd, 5th and 6th defendants title even though making a finding that they were not party to any fraud, corruption and/or misrepresentation.
 - 5) The honorable magistrate erred in law and fact by delving into irrelevant issues of membership of the 4th defendant when such was not an issue for determination in the suit.
 - 6) The honorable magistrate erred in law and fact by failing to appreciate that the suit land, Title Number Ruiru East Block 1/1566 had never been registered in the name of the plaintiff and the 4th defendant.
 - 7) The honorable magistrate erred in law and fact by failing to find that there was no evidence that the suit property belonged to the plaintiff and/or the 4th defendant.
 - 8) The honorable magistrate erred in law and fact by failing to find that every entry or note in or on any register, cadastral map or filed plan shall be received in all proceedings as conclusive evidence of the matter or transaction that it records.
 - 9) The honorable magistrate erred in law and fact by failing to find that to the 2nd defendant the 3rd defendants were the registered owner of Ruiru East Block 1/1566 when the 2nd defendant bought the land. [sic]
 - 10) The honorable magistrate erred in law and fact in declaring the suit premises Ruiru East Block 1/1566 belongs to the plaintiff when there was no evidence to support that position. [sic]
 - 11) The honorable magistrate erred in law and fact in nullifying the 2nd defendant's title to the suit premises Ruiru East Block 1/1566 and the subdivisions thereto despite finding that the 2nd defendant was not party to any fraud, misrepresentation and or corruption.
 - 12) The honorable magistrate erred in law and fact in ordering the 2nd defendant to give vacant possession to the plaintiff whereas the plaintiff had not proved any beneficial and/or legal proprietary right to the suit premises.
 - 13) The honorable magistrate erred in law in failing to address herself to the fact that the 2nd defendant was an innocent purchaser for value of Ruiru East Block 1/1566 without notice of the plaintiff claim to the said premises.
 - 14) The honorable magistrate erred in law in failing to award costs to the 2nd defendant.



- 15) The honorable magistrate erred in law and fact by failing to address herself to the appellant's pleadings, submissions and evidence.
- 16) The honorable magistrate erred in law and fact by delivering a judgement that was against the weight of the evidence, submissions and the law relating to land.

Submissions

8. The appeal was canvassed through written submissions filed through the firm of Njonjo, Okello & Associates. Although the appellant had advanced the above sixteen (16) grounds of appeal, counsel for the appellant condensed them into three issues and invited the court to dispose the appeal through a determination on the three issues, namely: (i) Whether the appellant was an innocent purchaser for value without notice; (ii) Whether the appellant's title should be cancelled; and (iii) Whether the appeal is merited.
9. Counsel submitted that the appellant was a bonafide purchaser for value without notice in a transaction that led to his registration as proprietor of the suit property, adding that subsequent to that, he had subdivided and sold the land to third parties. Relying on the Court of Appeal decisions in (i) *Tarabana Company Limited v Harcharam Singh Selimi*; and (ii) *Elizabeth Wambui Gitthinji & 29 others v Kenya Urban Road Authority & 4 others* [2019] eKLR, among other decisions, counsel argued that the appellant acquired the suit property from the Trustees of Dryland Selfhelp Group in good faith and without notice or knowledge of any fraud.
10. On whether the appellant's title should be impeached, counsel for the appellant submitted that no case of fraud was established against the appellant. Relying on the Court of Appeal decisions in: (i) *Gladys Wanjiru Ngacha v Theresa Chepsaat & 4 others* [2013] eKLR; and (ii) *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare [deceased] & 5 others* [2013] eKLR, counsel submitted that, in the absence of fraud on part of a registered proprietor, the title of the registered proprietor is indefeasible. Counsel urged the court to uphold the appellant's title. Counsel urged the court to allow the appeal.
11. The respondent filed written submissions dated February 8, 2022, filed through the firm of Wangui Kuria & Co Advocates. Although the said written submissions were expressed as being in response to the notice of motion dated December 24, 2018, counsel for the respondent identified the three issues which the appellant had identified in the appellant's written submissions and submitted on the three issues.
12. On whether the appellant was an innocent purchaser for value without notice, counsel for the respondent cited Article 40 of the *Constitution* and submitted that it is not upon a legally registered proprietor to know whether one is an innocent purchaser for value without notice of fraud or not. Counsel added that any attempt to defeat the rights of a registered proprietor of land would be a violation of Article 40 of the *Constitution*. Citing section 25(1) of the *Land Registration Act*, counsel added that the respondent's rights as "the first registered proprietor cannot be defeated". Counsel argued that the respondent "cannot be deprived the title on account of a third party's malfeasance or any other action."
13. Counsel added that during trial, the appellant never tendered evidence of purchase of the suit property from Dryland Selfhelp Group, hence the contention that the appellant was an innocent purchaser for value was unsupported. Citing the Court of Appeal decision in *Arthi Highway Developers Ltd v West End Butcheries Limited & 6 others* [2015] eKLR, counsel for the respondent submitted that a title acquired through fraud could not be passed to someone else as a good title.



14. Counsel argued that if the 1st interested party did not acquire a good title over the suit property, the appellant could not purport to have received a good title over the suit property. Counsel urged the court to reject the appeal.

Analysis and Determination

15. I have considered the entire record of the trial court; the grounds of appeal set out in the memorandum of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. As noted earlier, although the appellant listed sixteen (16) grounds of appeal, he subsequently condensed the sixteen (16) grounds of appeal into the following three thematic issues: (i) Whether the appellant was an innocent purchaser for value without notice; (ii) Whether the appellant's title should be cancelled; and (iii) Whether the appeal is merited. Taking cue from the appellant, the respondent similarly submitted on the above three thematic issues. The other parties to this appeal did not submit on the appeal. I will, in the circumstances, dispose this appeal by analyzing and disposing the above three issues that were identified and submitted on.
16. The principles upon which a first appellate court exercises jurisdiction is well settled. The duty of a first appellate court is to re-appraise the evidence and make its own inferences. [See *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR]
17. The first issue in this appeal is whether the appellant was an innocent purchaser for value without notice. I have looked at the appellant's pleadings. The appellant [John Iregi Kibuchi] and the Registered Officials of Dryland Selfhelp Group filed a joint statement of defence dated April 20, 2013 through the firm of Mwangi Wahome & Co Advocates. At paragraphs 7 and 9 of the statement of defence, they averred that they were innocent purchasers for value without notice of any fraud. During trial, the appellant testified as DW2. He produced a total of thirteen (13) documents. None of the thirteen exhibits relates to purchase of the suit property by the appellant from the 2nd interested party. None of them relates to payment of any consideration to the 2nd respondent by the appellant. Put differently, although the appellant's case was that he and those who purportedly conveyed to him the suit property were innocent purchasers for value without any notice of fraud, neither him nor the purported vendors placed before the trial court documentary evidence to support their joint defence to the effect that they were innocent purchasers for value without notice of any fraud.
18. DW4 - James Mwaura Kimani who testified on behalf of Dryland Selfhelp Group did not produce any document. Similarly, Peter Wathoro Kimuru who had conveyed the title to the trustees of Dryland Selfhelp Group did not tender any documentary evidence relating to purchase and consideration. What therefore emerges from the evidence that was before the trial court is that whereas the appellant jointly with officials of Dryland Selfhelp Group pleaded that they were innocent purchasers for value, no documentary evidence was tendered to support the alleged purchase and value/ consideration.
19. Kenya's Court of Appeal and our third tier superior courts have in a number of decisions cited the holding by Uganda's Court of Appeal in *Katende v Haridar & Company Limited* [2008] 2 EA 173 in relation to what a party claiming to be a bonafide innocent purchaser for value must demonstrate. The Court of Appeal of Uganda held 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 that:

- i) he holds a certificate of title;



- ii) he purchased the property in good faith;
- iii) he had no knowledge of the fraud;
- iv) he purchased for valuable consideration;
- v) the vendors had apparent valid title;
- vi) he purchased without notice of any fraud;
- vii) he was not party to any fraud.

20. In the appeal under consideration, the appellant presented a joint written defence in which they contended that they were innocent purchasers for value. They, however, failed to present to the trial court documentary evidence to demonstrate the two critical ingredients of an innocent purchase for value, namely; evidence of purchase, and evidence of value/consideration. It is not lost to this court that section 3(3) of the *Law of Contract Act* was in force at the time the appellant procured registration of the suit property in his name. It is therefore expected that if there was a purchase, there would have been some form of agreement.
21. The totality of the foregoing is that the appellant did not establish the key ingredients of an innocent purchaser for value without notice and cannot therefore be said to have been one.
22. As to whether the appellant's title should be cancelled, I have re-appraised the evidence that was presented during trial. The suit property is a subdivision within a scheme owned by Githunguri Constituency Ranching Company Limited. The Chairman of Githunguri Constituency Ranching Company Limited testified as PW2. His evidence was that he was the custodian of all records relating to the company. He explained the due process of becoming an owner of a subdivision land in the scheme. He stated that the suit property was a subdivision within the company's scheme and previously belonged to Beth Wangari and Mwihaki Waitheta. The suit property subsequently changed hands through sale of shares. He confirmed that the respondent purchased the suit property and the company's records were updated accordingly. The company thereafter gave the respondent a clearance to facilitate opening of the parcel register and issuance of a title in the name of the respondent. He confirmed to the trial court that the respondent was the legitimate owner of the suit property. He testified that Peter Wathoko Kumuru was not a member of the company and did not own the suit property.
23. The totality of the evidence which was presented to the trial court is that Peter Wathoko Kumuru procured a title relating to the suit property fraudulently. He did not own land in the scheme. He had no valid title to pass to any other person. Given the above evidence which was tendered before the trial court, it is my finding that the fraudulent title which Peter Wathoko Kumuru purported to pass to the appellant was a nullity. So were the subsequent titles that were generated out of the fraudulent title. I cannot, in the circumstances, fault the trial court on its finding to the effect that the fraudulent titles should be nullified. That is my finding on the second issue.
24. For the above reasons, this court does not find merit in this appeal. The appeal is accordingly dismissed. The appellant shall bear costs of the parties who participated in the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 5TH DAY OF JULY 2022

B M EBOSO
JUDGE



In the Presence of:-

Mr Oyunge holding brief for Mr Njonjo for the Appellant

Court Assistant: Ms Lucy Muthoni

