



**Njuguna v Josiah & 2 others (Appeal E016 of 2021)
[2022] KEELC 13538 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13538 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
APPEAL E016 OF 2021
BM EBOSO, J
OCTOBER 4, 2022**

BETWEEN

STEPHEN KIENJE NJUGUNA APPELLANT

AND

GEORGE ODHIAMBO JOSIAH 1ST RESPONDENT

LAND REGISTRAR - RUIRU 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

*(Being an Appeal arising from the Judgment and Decree of Hon J. A Agonda
(Principal Magistrate) delivered in Ruiru Principal Magistrate Court on
24/11/2021 in Ruiru SPMC Environment & Land Case No. 44 of 2020)*

JUDGMENT

Background

1. This appeal arose from the Judgment rendered on 22/11/2021 by Hon J A Agonda, Principal Magistrate, in Ruiru SPMC Environment and Land Case No. 44 of 2020. The appellant was the plaintiff in the said suit. I will outline a brief background to the said Judgment before I turn to the issues that fall for determination in the appeal.
2. Through a plaint dated 13/5/2020, the appellant contended that he was registered as proprietor of land parcel number Ruiru/Ruiru East Block 3/982 [the suit property] on 17/8/2015 after purchasing the suit property from one Zacheaus K M Onguko who was the registered proprietor of the suit property at the time of purchase. He contended that he purchased the suit property after conducting due diligence and after the Land Registrar [the 2nd respondent] had confirmed that Zacheaus K M Onguko was the registered proprietor of the suit property.



3. The appellant further contended that in February 2020, he was surprised when he received a letter from the 2nd respondent, alleging that the suit property was originally allocated to the 1st respondent, and recalling the title deed that had been issued to him. Consequently, he initiated the suit seeking, among other reliefs, a declaration that his title was valid and was lawfully issued. Further, he sought a permanent injunction restraining the respondents against interfering with the suit property.
4. During trial, the appellant testified as PW1. He did not call any witness. He produced various exhibits, among them, a title deed dated 17/8/2015, bearing him as the registered absolute proprietor of the suit property.
5. The 1st respondent filed a statement of defence and counterclaim dated 5/2/2021. His case was that he was the legitimate proprietor of the suit property, having purchased it in 1983 from Mwalimu Investment Co Ltd [which was later succeeded by Mwalimu Sukari Company Limited] at Kshs 4,060. He contended that upon learning that the appellant was laying a claim of ownership to the suit property, he visited the Thika Lands Registry and established that a fraudulent title relating to the suit property had been issued. He reported the matter to the Directorate of Criminal Investigations [the DCI]. Upon the DCI concluding investigations, one Michael Kinyua Kibuna [the person alleged to have procured the fraudulent registration of the title that was subsequently conveyed to the appellant] was arraigned in court and charged with the offence of obtaining of registration of land in false pretence contrary to Section 320 of the Penal Code. It was the case of the 1st respondent that following his purchase of the suit property, the Commissioner of Lands, at the behest of the land buying company from which he had purchased the land, executed and sent an instrument of transfer to the District Land Registrar, with instructions to the District Land Registrar to register the land in the name of the 1st respondent.
6. Through the counterclaim, the 1st respondent sought, among other reliefs, a declaration that he was the rightful owner of the suit property. He also sought a cancellation of the appellant's title.
7. At trial, the 1st respondent testified as DW1. He did not call any witness. He produced various exhibits, among them, a letter from the land buying company, requiring him to pay Kshs 4,060; receipts relating to payments made to the land buying company; letter from the Commissioner of Lands to the Land Registrar, forwarding a transfer vesting the land in the name of the 1st respondent; a transfer signed by the Commissioner of Lands; and the charge sheet relating to criminal proceedings initiated against Michael Kinyua Kibuna.
8. Upon conclusion of trial, the trial magistrate rendered the impugned Judgment in which she found that the 1st respondent was the legitimate proprietor of the suit property and that the title held by the appellant had been obtained fraudulently. She dismissed the primary suit brought by the appellant and allowed the respondent's counterclaim.

Appeal

9. Aggrieved by the Judgment of the trial court, the appellant lodged this appeal through a memorandum of appeal dated 30/11/2021. He advanced the following seven (7) verbatim grounds of appeal:
 1. That the learned magistrate erred in law and fact in disregarding the evidence produced.
 2. The learned magistrate erred in law and in fact in inferring without evidence (sic).
 3. The learned magistrate erred in law and in fact in dismissing the claim of a bonafide purchaser of title.



4. That the learned magistrate erred in law and in fact in concluding fraud whereas it was not pleaded or proved to the required standard as against the appellant herein.
 5. That the learned magistrate erred in law and fact in not allowing the makers of the documents to appear in court and produce their documents and dismissing the request.
 6. The learned magistrate erred in law and in fact in dismissing the appellant's prayers.
 7. That the learned magistrate erred in law in directing the Land Registrar to cancel the registration of the appellant's certificate of title of the suit property and register the 1st respondent as the owner thereof.
10. The appellant urged this court to set aside the Judgement of the trial court. Further, the appellant asked this court to award him costs of this appeal.

Submissions

11. The appeal was canvassed through written submissions dated 22/4/2022, filed through M/s Waweru Nyambura & Co Advocates. Counsel for the appellant identified seven (7) issues but submitted only on the following two issues: (i) Whether the learned magistrate erred in law and in fact in dismissing the claim of bonafide purchaser of title; and (ii) Whether the learned magistrate erred in law and in fact in concluding fraud whereas it was not pleaded or proved to the required standard as against the appellant herein.
12. On whether the trial court erred in dismissing the "claim of bonafide purchaser of title," counsel cited the decisions in: (i) *Katende v Havinder & Company Limited* [2008]2 EA 17B (ii) Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Muthare (Deceased) & 5 others; and (iii) *Samuel Kamere v Land Registrar – Kajjado*; Civil Appeal No 28 of 2005. Further, counsel cited the provisions of Section 24, 25 and 26 of the *Land Registration Act*. Counsel submitted that the trial court failed to take into consideration the fact that the appellant was a bonafide purchaser for value of the suit property. Counsel contended that prior to purchasing the suit property, the appellant conducted due diligence which revealed that the vendor, Zacheaus K M Onguko, was the registered proprietor of the suit property. Counsel added that the appellant purchased the suit property at Kshs 900,000. It was the position of counsel for the appellant that the appellant did all that was required of any buyer, adding that the appellant properly believed the official search certificate issued by the Land Registrar as a true mirror of all registrable interests in the land. Counsel contended that the appellant met all the qualifications of an innocent purchaser for value.
13. On whether the trial court erred in concluding fraud whereas it was not pleaded or proved to the required standard as against the appellant, counsel cited the decision in *Central Bank of Kenya Limited v Trust Bank Limited & 4 others* [1996] and the provisions in Section 109 of the *Evidence Act*. Counsel argued that the 1st respondent failed to discharge the onus of proof in relation to the allegations of fraud on part of the appellant. Counsel urged the court to allow the appeal.
14. The 1st respondent filed written submissions dated 24/5/2022 through M/s Okwach & Company Advocates. Counsel identified and submitted on seven (7) issues. I will only highlight the respondent's submissions on the issues that the appellant submitted on.
15. On whether the trial court erred in dismissing the "claim of bonafide purchaser of title," counsel for the 1st respondent cited among others, the Court of Appeal decision in *Suleiman Rabemtulla Omar & another v Musa Hersi Fabiye & 5 others* [2014] eKLR. Counsel contended that a claim of bonafide purchaser for value would not be allowed to stand if the seller had no title to pass to the purchaser.



Counsel faulted the appellant for not calling Zacheaus Onguko and Michael Kibunja as witnesses to demonstrate the root of the title held by the appellant.

16. Counsel added that the instrument of transfer which allegedly generated the title held by the appellant was neither stamped nor registered. It was the position of counsel for the 1st respondent that the vendor from whom the appellant allegedly acquired the impugned title had no valid title to pass to the appellant.
17. On whether the trial court erred in “concluding fraud”, counsel for the 1st respondent submitted that the appellant had failed to demonstrate the root of his title. Counsel added that the 1st respondent had, on his part, demonstrated he acquired the suit property in 1983 through purchase from the land buying company. Counsel added that the 1st respondent had demonstrated that the title held by the appellant was fraudulently obtained by Michael Kinyua Kibuna. Counsel contended that the transfer that generated the title held by the appellant was not stamped nor dated; and was not signed by the Land Registrar. Counsel submitted that the appellant had pleaded and proved fraud.
18. The Attorney General did not file submissions in this appeal.

Analysis and Determination

19. I have read the entire original record of the trial court and the record of appeal in this appeal. I have considered the grounds of appeal and the parties’ respective submissions. Similarly, I have considered the relevant legal frameworks and the prevailing jurisprudence on the issues that fall for determination in this appeal. The appellant listed seven grounds of appeal in his memorandum of appeal. In his subsequent written submissions, he itemized seven issues. However, he only submitted on the following two verbatim issues:
 - i. Whether the learned magistrate erred in law and in fact in dismissing the claim of bonafide purchaser of title; and
 - ii. Whether the learned magistrate erred in law and in fact in concluding fraud whereas it was not pleaded or proved to the required standard against the appellant.
20. The court does not therefore know what submissions the appellant had in mind when he itemized the seven (7) abandoned grounds of appeal and the seven (7) abandoned issues. Given the above circumstances, the court will only focus on the two issues on which the appellant submitted.
21. Before I turn to the two issues that fall for determination in this appeal, I wish to observe a typographical error which I noted at paragraph 2 of page 5 of the impugned Judgment. The error relates to the first identified issue in the impugned Judgment. The said paragraph reads as follows:

“The defendant claimed ownership of the suit property and that he has beneficial interest in the suit property. The issues for determination are as follows:

 - a. Whether Brilliant Ventures acquired a legal title to transfer to Shambaland.
 - b. Whether the plaintiff was the legitimate owner of the suit land.
 - c. Who should bear the costs of the suit.”
22. It is clear from the pleadings in the original record of the trial court and in the record of appeal that the dispute leading to this appeal did not involve Brilliant Ventures. Similarly the dispute did not involve any entity by the name Shambaland. Reference to the two entities was a typographical error. None of the parties to this appeal raised this issue in this appeal. The issue was not canvassed as a ground



of appeal. Further, this court is satisfied that the key issues in the dispute before the trial court were addressed by the trial court, notwithstanding the above typographical error. I will not say more on the typographical error.

23. The first issue submitted on by the appellant is whether the learned trial magistrate erred in law and in fact in dismissing the “claim of bonafide purchaser of title.” The evidence before the trial court reveals that the appellant acquired the impugned title from one Zachaeus K M Onguko. The said Zachaeus K M Onguko got his title from one Michael Kinyua Kibuna.
24. The 1st respondent led evidence demonstrating that the suit property was part of a larger parcel of land that belonged to Mama Ngina Kenyatta Mwalimu Investment Company Ltd acquired the land and subdivided it into smaller parcels which it allocated to various investors. He demonstrated that he paid Mwalimu Investment Co Ltd Kshs 4,060 as consideration of the suit property. He further led evidence to the effect that as part of the title processing procedure, the land buying company forwarded his name and documents to the Commissioner of Lands with a request that the Commissioner of Lands executes a transfer relating to the suit property to facilitate registration of the suit property in his name and issuance of a title in his name. The Commissioner of Lands duly executed the transfer and forwarded it to the District Land Registrar. The title was not prepared in the appellant’s name. What was instead generated at the District Land Registry was a fraudulent register and a fraudulent title in the name of Michael Kinyua Kibuna.
25. The 1st respondent further led evidence demonstrating that the Directorate of Criminal Investigations had carried out investigations relating to the land register and title bearing the name of Michael Kinyua Kibuna and had established that they were fraudulently generated. He led evidence to demonstrate that Michael Kinyua Kibuna was subsequently charged with the offence of obtaining registration of land in false pretence contrary to Section 320 of the Penal Code. On his part, the appellant did not lead evidence on how the impugned land register and the title that was ultimately registered in his name was generated. He elected not to call Michael Kinyua Kibuna as a witness to establish the root of the title he was waving. He similarly elected not to call Zachaeus K M Onguko as a witness.
26. Having elected not to lead evidence by the originator of the impugned title, the appellant contends that the trial court should have upheld the fraudulent generation of the impugned land register and the fraudulent title. He contends that the trial court should have dispossessed the 1st respondent of the land on account of the fraudulent title that was passed to him. I do not think that would be proper.
27. Not too long ago, the Court of Appeal stated the following in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR regarding the obligation of a registered proprietor of land whose title is challenged on the ground of fraud or other illegalities:

“....when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.... the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal....”
28. In the present appeal, Michael Kinyua Kibuna had no valid title to pass to Zachaeus K M Onguko. Similarly, Zachaeus K M Onguko had no valid title to pass to the appellant. What they held were products of fraud.



29. Confronted with a scenario not too different from the present scenario, the Court of Appeal stated the following in *Suleiman Rahemtulla Omar & another v Musa Hersi Fabiye & 5 others* [2014] eKLR:

“In any event, having found that the sale itself was fraudulent and that the seller had no title to pass to the vendors, then all the subsequent transactions including the registration of the indenture and the transfer of the property from the Government Lands Act (GLA) to the Registration of Titles Act (RTA) were all null and void. The issue of indefeasibility of the title does not therefore arise.”

30. For the above reasons, I entirely agree with the position taken by the trial court to protect the rights of the legitimate owner of the suit property. The remedy of the appellant lies in an action for damages against those who sold to him the fraudulent documents and against the Department of Land which made it possible for the fraudulent title to be issued to him.

31. The second issue submitted on by the appellant is whether the trial magistrate erred in “concluding fraud”. I have outlined in the preceding paragraph the evidence that was led by the 1st respondent vis-a-viz the evidence that was led by the appellant. Based on the above evidence, I have no doubt that the 1st respondent proved fraud in the generation of the impugned land register and the purported title that ultimately generated the documents held by the appellant.

32. The appellant contended that the 1st respondent did not plead and prove fraud, hence the trial magistrate should not have made the finding she made. That contention is not factual. The 1st respondent pleaded fraud at paragraphs 22, 23, 24, 25 and 26 of the defence and counterclaim. Further the 1st respondent led evidence properly proving fraud. I have outlined the evidence at length in the preceding paragraphs.

33. The result is that I do not find any error in the finding of the trial court on the question of fraud in relation to the root of the title that the appellant held.

Summary and Disposal Orders

34. In summary, the finding of the court on the two issues on which the appellant submitted are that:

- a. The trial court did not err in its finding on the appellant’s contention that he was an innocent purchaser of title for value.
- b. The trial court did not err in its finding on the issue of fraud.

35. The result is that this court does not find merit in this appeal. The appeal is accordingly rejected. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 4TH DAY OF OCTOBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Waweru Nyambura for the Appellant

Ms Luther for the 1st Respondent

Court Assistant: Sydney

