



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**SUCCESSION CAUSE NO. 352 OF 2006**

**IN THE MATTER OF THE ESTATE OF: ALICE MWOSE NZIOKA (DECEASED)**

**MARGARET NGINA FRANCIS MUTUA.....PETITIONER**

**VERSUS**

**MARTIN NZIOKA MUTUA)**

**RUTH NDINDA MUTUA)**

**CYRUS MUTETI MUTUA).....OBJECTORS/RESPONDENTS**

**AND**

**MAMUCO SACCO LTD.....APPLICANT**

**RULING**

1. By an application dated 30<sup>th</sup> October, 2017, the applicant herein, **Mamuco Sacco Ltd**, seeks that this Court lifts the Restriction order made on 30<sup>th</sup> October, 2015 and order the removal of the caution dated 23<sup>rd</sup> June, 2011 restraining the land Registrar Machakos from dealing with the property Mavoko Town Block 3/2268 (hereinafter referred to as “the suit land”) pending the hearing and determination of the consolidated suits Machakos HCC No. 72 of 2006 and HCC No. 352 of 2006 and order the transfer of the said land to the Applicant herein.

2. According to the applicant, sometimes in the year 2010 while looking for land to purchase for its members, the applicant managed to get land from one **Josephine Mukonyo Muitia** (hereinafter referred to as “the vendor) who was selling her land and was the registered owner of the suit land measuring approximately 21.32 Ha. According to the applicant it conducted a search and found that the suit land was always registered in the name of the said vendor. Subsequently, the applicant entered into a sale agreement with the vendor and paid a substantial sum of money of the purchase price of Kshs 22,000,000.00 upon which the applicant was allowed by the vendor to commence surveying and sub-dividing the land. The applicant accordingly engaged **Topcon Ravivane Services** for the said work which the said surveyors did and were fully paid their survey fees.

3. It was averred that in pursuance of the foregoing the vendor sought for the consent for transfer which was granted and the applicant paid the stamp duty in order to commence the transfer. It was further deposed that the vendor executed the transfer forms which were duly signed and booked for transfer. However the Land Registrar declined to transfer the land stating that the land had a caution placed on it by the Petitioner herein thus preventing the applicant from getting the transfer registered which had already been executed in favour of the applicant by the vendor. It was the applicant’s case that the Petitioner herein is not the registered owner of the said parcel.

4. The applicant lamented that it was not a party to Machakos High Court Succession Causes Nos. 72 and 352 of 2006 and has never been joined to the said proceedings yet the title deed to the suit land still bears the name of the vendor.

5. It was therefore the applicant’s case that it is in the interest of justice that the said caution and restriction be lifted to allow the Land Registrar effect the transfer to the applicant.

6. In opposition to the application the Respondents/Objectors filed the following grounds of opposition:

**1) That the said Application is incompetent, bad in law and a nullity as the jurisdiction of the court has not been properly invoked.**

**2) That further the said Application is invalid and in contravention of mandatory provisions of Succession Act (Cap 160) Laws of Kenya.**

3) That the Application as drawn and the prayers thereto as framed fails to consider the provisions of Section 27 and Section 28 of the Laws of Succession Act (CAP 160) Laws of Kenya.

4) That the Applicant is ousted from making the said Application by the provisions of Section 29 of the Laws of Succession (CAP 160) Laws of Kenya.

5) That the Application dated 30-10-2017 should be dismissed with costs.

7. The application was similarly opposed by the Petitioner herein who in a replying affidavit deposed that she was the 2<sup>nd</sup> wife of **Geoffrey Mutua** (Deceased) who was the only child of **Alice Mwose Nzioka** (Deceased). According to her, **Josephine Mukonyo**, the vendor herein is the 1<sup>st</sup> wife of the said **Geoffrey Mutua Titus**. It was deposed that the petitioner's mother in law, the said **Alice Mwose Nzioka**, was a bona fide member No. 66 of the Defendant whose dividends produced various parcels of lands which were allotted to the said Alice. Upon the death of Alice on 23<sup>rd</sup> October, 2003, and without a succession cause being filed in respect of her estate, the vendor together with her son, **Martin Nzioka Mutua**, the 1<sup>st</sup> Objector, in conspiracy to defraud the petitioner, wrote to Lukenya Ranching and Farming Co-operative Society (the Society) a letter dated 29<sup>th</sup> August, 2004 instructing the said Society's officials to transfer the property to the Vendor claiming that she was the sole beneficiary to the Estate. Without carrying out investigations into the said claims or letters of administration, the said Society abided by the said instructions and the plot, previously allotted to **Alice Mwose Nzioka**, the suit property herein, was illegally transferred to the vendor and a title deed irregularly issued to the vendor.

8. Notwithstanding the foregoing vide a letter dated 24<sup>th</sup> March, 2006, the Society invited the vendor for a management Committee to discuss the title dispute. Noting the said transaction, the Petitioner applied for Grant of Letters of Administration *Ad Litem* pursuant to which she filed these proceedings seeking the cancellation of the title issued to the vendor and an injunction restraining the Defendants from interfering with the said plots. It was deposed that after the commencement of the said proceedings, the Land Registrar noted on the register the existence of the same and the same became public information.

9. The Petitioner therefore disputed the appellation by the applicant herein that it had due diligence before purchasing the suit property. The petitioner disclosed that prior to the sale transaction with the vendor, she had been informed by some members of the applicant that the applicant was interested in buying the property and she immediately visited the applicant's officials where the existence of the legal proceedings was disclosed. Despite disclosing the information relating to the said dispute, it was deposed that the applicant contended that the petitioner was not a wife of the deceased but was merely a girlfriend and vowed to proceed with the purchase of the suit property.

10. The petitioner further disclosed that on the suit property was and still is her house which has been there since 1992 long before her husband died. Despite all the foregoing, it was averred that the applicant still proceeded with the sale transaction.

11. The Petitioner further disclosed that based on her complaint to the issuance of the consent, the same was cancelled hence is non-existent. Further upon investigations, the vendor was detained in police custody. Further the Land Registrar summoned the applicant's officials and upon inquiring as to how the applicant acquired a signed search and letter of consent which did not disclose the existence of the court cases as noted in the register, advised the Petitioner to lodge the caution on the property which the Petitioner did on 23<sup>rd</sup> June, 2011. Subsequent to the placing of the said caution, it was deposed that the applicant tried to reach out to the petitioner with an offer of Kshs 7,000,000.00 to withdraw the objections on the register in order to allow the transfer to proceed but the petitioner declined to do so. Thereafter the petitioner as served with a Notice of Intention to remove the caution by the applicant at which point the Petitioner applied for an injunction restraining the lifting of the caution thereby giving rise to the Restriction dated 30<sup>th</sup> October, 2015.

12. The Petitioner insisted that this was a transaction grounded on fraud by both her co-wife, the vendor and the applicant. She therefore urged the Court to first hear the parties and to conclusively determine their interests since both the caution and the restriction order were put into place in order to prevent a further injustice from being occasioned to the petitioner in order to enable her to initiate action to establish her interest.

13. It was further averred that despite the said caution and restriction order, the applicant has been subdividing and selling the plots to innocent buyers comprised of its membership.

14. The petitioner's case was that this applicant is premature and she is bound to suffer great prejudice if allowed.

#### **Determination**

15. I have considered the issues raised in this matter.

16. Sections 76(1) of the **Land Registration Act**, 2012 which provides that:

*For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.*

*(2) A restriction may be expressed to endure—*

*(a) for a particular period;*

*(b) until the occurrence of a particular event; or*

*(c) until the making a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.*

*(3)The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.*

17. The issue for determination by this Court is whether the restriction the subject of this application ought to be lifted. In **Ahmed Ibrahim Suleiman and another v Noor Khamisi Surur [2013] eKLR** it was held that:

**“I would like to observe that the registration of a caution alone cannot create a registrable interest where there was none. The essence of registering a caution or a caveat is to act as a stop gap measure to enable the cautioner or caveatee to initiate action to establish his or her interest.”**

18. Apart from that in **David Macharia Kinyuru vs. District Land Registrar, Naivasha & another [2017] eKLR**, it was held that:

**“It will be noted from the above, that the purpose of a restriction is aimed essentially at stemming fraud or improper dealings over land. The Land Registrar may also place a restriction where there is other sufficient cause. Restrictions are to endure for a particular time, or until the occurrence of an event, or the making of a further order. It is not the purpose of this section of the law to have restrictions remain indefinitely. The reasoning is that a restriction should only hold a property in abeyance, as the underlying issue leading to the restriction is being resolved, since a restriction by itself does not solve a dispute.”**

19. Therefore the mere fact that the Petitioner herein was not the registered proprietor of the suit land does not bar the Petitioner from having the caution or the restriction registered on the suit title. The Petitioner has contended that the essence of instituting the proceedings was in fact to establish her interest in the suit land. It was therefore held in **Mary Anyango Okech vs. Nyakundi Maeche Nyaigoti [2015] eKLR** that:

**“The Caution was registered under Section 71(1) of the Land Registration Act, 2012. That section provides expressly as to who can lodge a Caution against a title to land. A Caution can be lodged by a person, who claims a right to obtain an interest in land, lease or charge which is capable of creation by an instrument registerable under the said Act or a person who is entitled to a license over the land or a person who has presented a bankruptcy petition against a proprietor of land, lease or charge. For the respondent to be able to maintain the Caution registered against the title of the suit property, the respondent has to show that he has an interest in the nature set out above.”**

20. In this case the petitioner has raised allegations of fraud against the applicant herein and the vendor. Issues of fraud, it is trite cannot be conclusively resolved by way of cold-print affidavits.

21. However as was held in In **Yosia Ofumbi vs. Nagongera Farmers & Another Kampala HCCS No. 449 of 1992** fraud was defined as the knowledge of other people’s rights, and the deliberate acquisition of a registered title in face of such knowledge actual or constructive, which would render voidable the certificate of title, so obtained, and voluntary ignorance is for this purpose the same as knowledge.

22. In **Katende vs. Haridas and Company Limited Civil Appeal No. 84 of 2003** it was held that:

**“For a party to plead fraud in registration of land a party must first prove that fraud was attributable to the transferee. It must be attributable either directly or by necessary implication, that is, the transferee must be guilty of some fraudulent act or must have known of such act by somebody else and taken advantage of such act...This was not a case of a mere irregularities but a case of a person who had no title to pass to a purchaser. The appellant claims a title tainted with fraud from the beginning up to the time of sale of the suit property. The irregularities in the substitute certificate rendered it null and void. Similarly, any document based on it was of no effect for the same reasons. Firstly, the instrument purportedly transferring the title was written in respect of another piece of land. There was no way title could have been passed. The issue was not of irregularities in the registry only but the predecessor had no title to pass which eventually was transferred to the appellant. There is no doubt that the appellant benefited from and took advantage of the fraudulent transactions...Fraud is a very serious allegation. It means actual fraud, which means dishonesty of some sort but not constructive fraud. Fraud must be pleaded specifically and proved. The standard of proof required is higher than the usual balance of probabilities in civil matters. However, the standard of proof is not so high to require proof beyond reasonable doubt...Fraud can be participatory which means the party participates in fraudulent dealings. However, fraud can be imputed on a person, that is when he or she was aware of the fraud and condoned it, or benefited from it or used it to deprive another person of his rights. In short all those who actually participate in the fraudulent transaction and who had knowledge of it are privy and have notice of fraud...However, the doctrine of bona fide purchaser for value without notice is a complete defence to allegations of fraud. Although our law does not define it, the doctrine was incorporated in section 176(c) of the Registration of Titles Act to protect innocent buyers. The courts are generally guided by Common Law principles and hitherto the many decided cases on this doctrine. For the purposes of this appeal, 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: 1) he holds a certificate of title; (2) he purchased the property in good faith; (3) he had no knowledge of the fraud; (4) he purchased for valuable consideration; (5) the vendors had apparent valid title; (6) he purchased without notice of any fraud; and (7) he was not a party to the fraud...A bona fide purchaser of a legal estate for valuable consideration without notice has absolute, unqualified and answerable defence against the claims of any prior equitable owner. The burden to establish or prove the plea lies on a person who sets it up. It is**

a single plea and is not sufficiently made out by proving purchase for value and leaving it to the opposite party to prove notice if he can. There is a requirement that in case where there are series of subsequent transfers for the title of the incumbent registered proprietor to be impeached, all previous frauds must be brought to the knowledge of the person concerned. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make does not itself prove fraud on his part. However, if it is shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him...Whether the appellant had notice or not, decisions taken by his agents, namely, lawyers or auctioneers on his instructions must be binding on him. On the record before the court it is hard to believe that any agent handling the transaction on the suit property would fail to note the glaring irregularities before advising their client to buy the suit property. In the present case, the appellant told the court that almost everything was done for him and that his lawyers carried out a search in the Land Registry and found the suit property free of encumbrances. In the court's view the search was not done with diligence as a proper search would have brought out all the fraudulent dealings on the suit title. As the appellant's advocates, they should have discovered that the relevant documents were not signed by the Registrar which rendered them null and void. Lands are not vegetables that are bought from unknown sellers but are valuable properties and buyers are expected to make thorough investigations not only of the land but also of the seller before purchase. A purchaser who, without investigating whether his predecessor had any title or power of Attorney to sell the land could not be held as a bona fide purchaser...Clearly, in the present case circumstances warranted investigating the predecessor's title which on the evidence from the registry was defective. No letters of administration were produced. Further there was also evidence that before the purchase of the suit property, there were the alleged illegal occupants occupying the suit property and yet they were civil servants under a Government Scheme. Clearly, their presence on the premises was suspect and therefore a warning of a possible dispute. For the aforesaid omissions the appellants cannot be said to be bona fide purchasers for value without notice...A large part of the appellant's testimony consist of hearsay evidence as none of his agents or officials in the Registry...was called to give evidence. The logical conclusion is that none of the agents carried out the necessary investigations. Secondly, if investigations were properly done then the failure by the appellant to call his agents to give evidence was suspect. Clearly, it is only their evidence that would have assisted the appellant to establish the plea of *bona fide* purchaser for value. As the evidence stands, it is not certain as to whether there was a valid sale agreement signed. The failure to call the aforesaid agents drew an inference that their evidence, if called would have been or would have tended to be adverse to the appellant's case...The aforesaid notwithstanding if the search had been properly carried out still the onus of proving the plea of *bona fide* purchaser was squarely at the door of the appellant. It was incumbent on the appellant to call witnesses to rebut the allegations. This, however, must not be seen as shifting the burden of proof. The appellant had to defend himself by rebutting the allegations of fraud and to establish his plea of *bona fide* purchaser. The appellant's defence of ignorance, non-participation and illiteracy did not in any way challenge the cogent evidence of the respondent's witnesses. He did not only largely rely on hearsay evidence but the respondent's evidence was not challenged at all apart from the aforesaid testimony of the appellant...Whereas under section 59 of the Registration of Titles Act a certificate of title is conclusive evidence of ownership of the property, there are exceptions such as fraud. Assuming that the appellant had obtained a valid certificate to the suit property it would have been liable to impeachment for fraud...The appellant's case is not one of only irregularities in the early stages but is a case tainted with fraud and forgeries throughout...There were also other serious omissions and irregularities which reflected fraudulent transactions. A good example is the different figures shown as consideration or purchase price in different documents. Further, at first the appellant denied having signed the sale agreement but later admitted having done so. Again on instructions of UCB he paid the money to different persons but could not explain further, which was strange. The only inference to be drawn from it, is that the purchase price if paid at all was shared by those who participated in the fraudulent transactions...Clearly, in the instant case there was also evidence to show that the perpetrators got assistance from some officials from the Land Registry...to interfere with the records with the intention of depriving the respondent of its title to the suit property. The plea of *bona fide* purchaser for value could not be available to him because of the imputed fraud of his agents...On the evidence and the conduct of the appellant he could not have been a bona fide purchaser for value. Whether an imperfect title would pass a good title would depend on the imperfection, whether fatal or found to go to the root of the transaction or minor. There is, therefore, a duty on the buyer personally or through his agents to inquire into the title of his predecessor."

23. Considering the averments and counter-averments by the parties herein I cannot say that the issues raised herein are frivolous. To my mind there are serious issues that require in-depth investigations. Should the caution and the restriction be lifted in the meantime? In Mary Anyango Okech vs. Nyakundi Maeche Nyaiigoti (supra) it was held that:

"As things stand now though, I am satisfied that the Caution complained of by the applicant was properly lodged. I am of the view that no prejudice would be suffered by the applicant if the same remains in place pending the hearing and determination of Kisii High Court Civil Suit No.356 of 2014 (O.S) that the respondent has lodged against the applicant to establish his interest in the disputed portion of the suit property. If the respondent fails in those proceedings, the Caution herein would be without any basis and the applicant would be at liberty to move the court for the removal of the same."

24. To my mind that same reasoning applies to the instant case. If the applicant feels that the petitioner is guilty of feet-dragging in prosecuting her cases, the solution does not lie in lifting the caution and the restrictive order but in seeking to have the said matters dismissed.

25. In the premises just like in Esther Nasambu Makokha vs. Abigael M'mbone Lumbasi [2014] eKLR, I find that this application is unmerited. The same is hereby dismissed.

26. As regards costs, although this Court directed the parties to furnish it with soft copies of the pleadings and submissions in word format, none of the parties complied. Section 1A(3) of the *Civil Procedure Act* provides as hereunder:

*A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.*

27. One of the overriding objectives of the **Civil Procedure Act** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. Accordingly, there will be no order as to the costs of this application.

28. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 12<sup>th</sup> day of October, 2018.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr King'oo Wanjau for Mr Murithi for the Petitioner**

**Mr Babu for the 4<sup>th</sup> Respondent**

**CA Geoffrey**