



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**HCC NO. 74 OF 2009**

**JOHN MUTHEE KAMAU.....PLAINTIFF**

**VERSUS**

**ALBERT GEKONDE.....DEFENDANT**

**JUDGMENT**

1. By plaint dated 27<sup>th</sup> January 2009, and filed on 2<sup>nd</sup> March, 2009, the Plaintiff John Muthee Kamau (suing as representative of administrator of the estate of the late Susan Mbaire Muthee) sued the Defendant Albert Gekonde, claiming that the Defendant had fraudulently bought a parcel of land from a person who had died some 13 years before the sale, and consequently sought the following orders –

- (i) that the title deed issued in favour of the Defendant in respect of the parcel of land registered as BAHATI/ENGORUSHA BLOCK 252 be cancelled.
- ii. that an eviction order be issued against the Defendant to remove him, his agents, his servant, his structures and buildings from the said parcel of land so that vacant possession may be granted.
- iii. A permanent order of injunction restraining the Defendant by himself, his agents, and servants from selling, transferring, charging alienating or disposing or in any way interfering with, entering, remaining or laying any claims on **BAHATI/ENGORUSHA BLOCK 1/252** (the suit land).
- iv. The costs of the case be borne by the Defendant.

**The Defence**

2. In a Defence dated and filed on 11<sup>th</sup> May, 2009 the Defendant denied all the allegations and particulars of fraud as set out in the plaint, and called for strict proof thereof. The Defendant claimed that he was an innocent purchaser for far value without notice.

**The Evidence.**

3. The Plaintiff's evidence was that the property was owned by his late wife, Susan Mbaire Muthee and who had passed away on 11<sup>th</sup> April, 1996 at Nakuru War Memorial Hospital at the age of 40 years due to renal failure. Though no will was produced to prove so, it was the Plaintiff's testimony that it was his late wife's intention that the suit property would be given to their daughter, who he said was then 16 years of age; but whose name or identity was not disclosed to the court.

4. It was also the Plaintiff's evidence that he lived in Nakuru at **NAKA ESTATE** some distance from the suit land and never visited it since the demise of his wife, and sent his daughter to check on the suit property some 13 years later and found the land had been developed, and subsequently established that the Defendant had not only bought the land transferred to him, but also held title thereto and was the developer thereof. He therefore accused the Defendant of fraud, and asked the court to grant the orders sought in the plaint.

### **The Defendant's Evidence**

5. Apart from his own evidence, the Defendant called two other witnesses. Their evidence was consistent. The defendant who worked in a parastatal, the National Hospital Insurance Fund (N.H.I.F.) had sought for land to invest in Nakuru Town and had asked his brother – in – law, DW2, to identify a suitable piece of land for the Defendant to buy. As it is common in most urban and semi-urban areas of Kenya parcels of land for sale are found by way of advertisements on road sides with wooden boards pointing to some bush or house for sale and invariably including the contact telephone number of the seller or agent.

6. That was the evidence of the Defendant which was corroborated by DW2 a military officer, who had come all the way from Northern Kenya to testify that he identified the land through the sign board and gave the particulars to the Defendant who carried out a search, found the particulars of ownership consistent with those of the seller Susan Mbaire Muthee. DW3, a resident of the plot neighbouring the suit land also testified that the seller was the person who used to cultivate the crops and vegetables in the plot and appeared uncertain of the plaintiff and the plaintiff's claims.

### **The Submissions**

7. Though the Defendant's filed written submissions, the plaintiff's Counsel did not file any.

### **Analysis**

8. I have considered the respective pleadings, (the plaint and defence) the evidence by the plaintiff and that of the Defendant and his witnesses. Though the suit land had two identical title deeds issued on 5<sup>th</sup> January, 1997 (Pexh.1 and the copy of title among the Defendant's list of documents) the Defendant relied upon the certificate of official search which showed one Susan Mbaire Muthee as the registered owner of the suit land. Counsel for the Defendant observed, quite correctly in my view, that the photograph attached to the Sale Agreement and that of the funeral of the said Susan Mbaire Muthee had remarkable resemblance, and it is reasonable to conclude that the said photograph was taken while the deceased wife was still well and living. This led to an observation by Counsel for the Defendant of suspicion of the Plaintiff's behaviour in the entire suit. It is also no less curious that the plaintiff did not find it fit to call a witness, his daughter the alleged beneficiary of the suit land! Why would she remain in the shadows?

9. Notwithstanding these gaps, and assuming for argument's sake that the seller of the late Susan Mbaire Muthee suit land was an imposter and a fraudster, the question or issue to be answered is whether the Defendant was part of the fraud, and should therefore suffer the consequences of his fraud by granting the plaintiff the orders sought in the plaint.

10. The Defendant claims that he was not aware of the fraud. If there was any such fraud, he was an innocent buyer for value, without notice of any such fraud. Who is an innocent purchaser for value and without notice?

11. Blackies Dictionary defines an innocent purchaser as-

**“one who buys something for value without notice of another's claims to the property and authority actual or constructive notice of any defects or infirmities , claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without**

**notice or prior notice of adverse claims. Generally, a bona fide purchaser for value is not affected by the transferor's fraud against a third party and has superior right to the transferred property as against the transferor's creditor to the extent of consideration that the purchaser had paid."**

12. From the above definition it is clear that the Defendant Albert Gekonde qualifies as an innocent purchaser, for value and without notice. He asked DW2 to look for a parcel of land for him within Nakuru Municipality. DW2 found the land. DW2 put the Defendant in touch with the apparent seller of the land, the seller came up with the original title upon which a search was carried out and confirmed the ownership of the land by the seller. The Defendant paid the purchase price, and the transfer was duly effected.

13. DW3, a neighbour confirmed that the seller was the lady who frequented the parcel of land, and subsequently sold the suit land to the defendant.

14. For the plaintiff to prove fraud, he needed to show that the Defendant and the purported seller either knew each other, the Defendant knew that the suit land belonged to the plaintiff's wife; and proceeded to purchase the suit land. In other words the Defendant took part in the fraudulent transaction. It is also curious on the part of the Plaintiff that he failed to call as a witness the daughter the preferred beneficiary of the suit land. It is also noted that in his evidence the Plaintiff produced a photograph of his deceased wife which resembled that of his deceased wife. It is also strange that for close to ten years, the Plaintiff never visited the suit land and only found out the land had been developed by the Defendant, a person he did not know, when allegedly informed by the daughter – who as observed earlier was never called in evidence to testify as to her knowledge of the suit land.

15. In the circumstances, I must find on the balance of probability that the Plaintiff failed to prove any fraud on the part of the Defendant, and if there was any fraud, the Defendant is an innocent purchaser for value, without notice of any over fraud.

16. For these reasons the Plaintiff's suit dated 27<sup>th</sup> February, 2009, and filed on 2<sup>nd</sup> March, 2009 is hereby dismissed with costs to the Defendant.

17. There shall be orders accordingly.

**Dated and Signed in Mombasa this 24<sup>th</sup> day of February, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

Delivered by Hon. Justice Odero at Nakuru this 4<sup>th</sup> day of March, 2016.

**M. A. ODERO**

**JUDGE**