IN THE COURT OF APPEAL

AT ELDORET
(CORAM: WARSAME, ACHODE & MATIVO, JJ.A) CIVIL APPEAL NO. 41 OF 2020

BETWEEN

KOGO FLATS LIMITED.....APPELLANT

AND

SAMMY CHERUNYA ..... 1ST RESPONDENT

JOHN ROTICH .....2ND RESPONDENT *(Being an appeal from the judgment of the Environment and Land Court at Eldoret (Odeny J) delivered on 28th May 2019*

in

ELC No. 41 of 2014)

****

REASONS FOR JUDGMENT

1. This appeal was dismissed when it came before us for plenary hearing on 11th June 2025. The Court considered the record of appeal and the submissions of the appellant and dismissed the appeal on the spot reserving the reasons therefore, for a later date. Costs were awarded to the respondent. These are the reasons for the dismissal.

2. To bring the appeal into perspective it is prudent that we set out its background.

3. In this dispute, Kogo Flats Limited, the appellant, a registered company is claiming ownership based on a recent purchase and registration. Their acquisition was traced to a third party called Philip Koech. Sammy Cherunya and John Rotich, the

respondents are asserting ancestral and original ownership of

the mother title. Their claim was traced directly to the original leasehold title **L.R. No. 8148**, still in their possession.

4. The suit originated from a plaint dated 12th February 2014, and amended on 9th June 2015, filed by the appellant in Eldoret Environment and Land Court (ELC), against the respondents. The appellant sought orders for: vacant possession of the suit property from the respondents; mesne profits from the date of illegal occupation to the date of vacant possession; rent for the period of illegal occupation; general damages for trespass and nuisance; and costs of the suit and interest.

5. The appellant averred that it was the registered proprietor of the land known as **Eldoret Municipality/Block 15/1857**. That on or about 3rd November 2013, it discovered that the respondents had unlawfully entered and taken possession of the said property without authority. The appellant's efforts to secure eviction prompted the institution of this suit.

6. The respondents, through an amended defence and counterclaim dated 9th October 2017, denied the appellant's claim, and prayed that the suit be dismissed with costs. They sought cancellation of Title No. **Eldoret Municipality/Block 15/1857** and rectification of the land register to reflect the name of the original proprietor, contending that the appellant's title was fraudulent and irregularly obtained.

7. The appellant's lone witness, **Sammy Boit Arap Kogo (PW1),** a director of the appellant company, adopted his witness statement and testified that Kogo Flats Ltd was duly incorporated on 9th May 1995 under Company No. C.64802. The company acquired parcel No. **Eldoret Municipality/Block 15/1857**, measuring approximately 1.0 hectare, from one Philip Koech, through a sale agreement dated 8th May 2013, for Kshs. 2,000,000.

8. According to PW1, a transfer of lease was duly executed on 1st July, 2013 and registered on 16th July, 2013, upon which the Land Registrar issued a certificate of lease in the appellant's name. He produced documentary evidence including the sale agreement, certificate of lease, transfer instrument, survey map, Registry Index Map (RIM), rates clearance certificate, and an official search.

9. Upon inspection, PW1 found the land initially vacant, but later discovered that the respondents had erected illegal structures thereon without his consent. On cross-examination, he conceded that the land was purchased from Philip Koech and not from the respondents or their predecessors. He claimed to have conducted due diligence and denied knowledge of any government compulsory acquisition. He was unaware of the existence of the original head title (L.R. No. 8148) registered in the name of Kiptalam Arap Cherunya and he denied any knowledge of the late Kiptalam Cherunya, or related court proceedings.

10. Four witnesses testified for the respondent. **Sammy Cherunya, DW1** stated that the land in question formed part of the estate of his late father, William Kiptalam Cherunya, who died on 14th April 2013. The deceased was the original owner of **L.R. No. 8148**, measuring 617 acres, and its original title deed had not been surrendered. The family obtained letters of administration on 30th August 2017.

11. DW1 explained that the Government compulsorily acquired 400 acres of the 617-acre parcel, leaving 217 acres located along the Ndalat–Salient Road. He produced a subdivision map, a letter of conversion by the Land Registrar, and correspondence from the Commissioner of Lands dated 17th May 2007, confirming the acquisition and subdivision. However, when the government failed to compensate them, the family filed **Nairobi Judicial Review Case No. 191 of 2008**, wherein the court nullified the acquisition and restored the family's ownership of the entire 617 acres. The matter was subsequently transferred by Mumbi Ngugi J (as she then was), to the Environment and Land Court (ELC) for hearing and was still pending determination at the time of hearing this dispute.

12. DW1 averred that he had consistently paid land rent and that seven individuals, including the appellant, had encroached upon their remaining 217 acres. Asserting that he was in continued possession of the original head title, he urged the court to cancel the appellant's title for being fraudulent.

13. On cross-examination, DW1 admitted that the appellant's title was issued in 2013, after the setting aside of the compulsory acquisition in the judgment in **Nairobi Judicial Review** *(supra)*, and that the appellant was not a party to that suit. He confirmed that the portion occupied by the appellant lay within the 217 acres which was not compulsorily acquired by the government.

14. **John Rotich DW2**, testified that he had lived on the land since 1962 and confirmed that the land belonged to the late Cherunya. He alleged that the appellant destroyed their crops and fenced part of the land, prompting him to make a report at Yamumbi Police Station.

15. Samuel Kipyegon Koech DW3, a Land Surveyor from Uasin Gishu County, testified that he surveyed **L.R. No. 8148** in 2005 when it was subdivided into two parcels being; **Eldoret Municipality Block 15/2366** measuring 400 acres for the Government and **Block 15/2365** measuring 217 acres for Cherunya's family. He asserted that the appellant's parcel **Block 15/1857** wrongly fell within **Block 15/2365**, constituting an overlap and therefore, should be cancelled.

16. **Wilson Kibichiy DW4**, a senior officer from the Directorate of Surveys, corroborated the evidence of DW3. He stated that during the amendments to the RIM, it was discovered that certain titles including **Block 15/1857** had been irregularly created within the Cherunya family land. Consequently, the

Director of Surveys wrote to the Commissioner of Lands recommending that the title be expunged from the record.

17. Upon considering the matter before her, Odeny J found in favour of the respondent and dismissed the appellant's suit with costs to the respondents, in a judgment delivered on 28th May 2019. She issued an order for the cancellation of parcel No. **Eldoret Municipality /Block 15/1857**, ordered the Land Registrar to rectify the Register and restore the name of the original proprietor, being the estate of William Kiptalam Cherunya, to parcel **No. Eldoret Municipality Block 15/9**. She awarded the costs of the counterclaim to the respondents.

18. Aggrieved by the judgment the appellant filed this appeal. In his memorandum of appeal dated 21st February 2020, he raised 18 grounds summed up as follows:

    i. *The appellant's proprietorship of the land parcel known as **Eldoret Municipal/ Block 15/ 1857** having been acquired for valuable consideration and in good faith could not be challenged by dint of **section 26 of the Land Registration Act, 2012**.*

    ii. *The appellant was an innocent purchaser for value.*

    iii. *The Judge misconstrued the concept of the Torrens system of land registration.*

    iv. *The respondents had not established allegations of fraud against the appellant as required.*

    v. *The doctrine of lis-pendens did not affect the title*

of the appellant.

vi. *The Judge erred in delving into the issue of lack of proper authority by a Limited Liability company to institute legal proceedings despite the same having not been raised at trial by any parties.*

vii. *The respondents' counterclaim was allowed in circumstances which the respondents had no locus to institute or sustain the suit.*

19. Mr. Muo Wambua and Mr. Munyua learned counsel were present for the appellant during the plenary hearing. They relied on their submissions dated 9th June 2025, filed through the firm of Wambua Kigamwa & Company Advocates and added that the learned Judge erred in holding that there was fraud in the acquisition of the land, when the respondent did not lead any such evidence.

20. Mr. Mitey, learned counsel for the respondent did not file any submissions or attend the hearing, although he was duly served with the hearing notice.

21. The appellant submitted that it is the proprietor of parcel **No. Eldoret Municipality/Block 15/1857** having acquired it for valuable consideration in good faith. Therefore, by dint of **section 26** of the **Land Registration Act** it cannot be challenged. Further, that its rights are provided for in **section 25(1)** of the **Land Registration Act**. It asserted that in the absence of proof by the respondents, that it was a party to fraud in acquiring the title, the appellant was an innocent purchaser for value.

22. The appellant argued that the learned Judge misconstrued the concept of the Torrens System of land registration by requiring the appellant to investigate the history of acquisition of the land beyond what was captured on the register. It contended that the respondents did not prove fraud or misrepresentation on the part of the appellant. The nature of the fraud was not expressly pleaded and the respondents did not prove that the certificate of lease was obtained illegally, unprocedurally, or through a corrupt scheme. Further, that the respondents did not call the Land Registrar to shade light on the failure to follow due process if there was any.

23. The appellant submitted that the decision of DW3 to write to the Commissioner of Lands, to expunge the titles which included that of the appellant among other persons, as contained in the letter dated 30th May 2007, militated against the requirements of natural justice and was an abuse of authority, as the Director of Surveys had no such power then and even today.

24. The appellant asserted that the respondents did not expressly plead the doctrine of *lis-pendens* in the defence, and the pending proceedings did not involve the appellant or Phillip Koech in any way. It relied on the decision in **Nairobi HCCC. NO. 430 of 2002- Ruaha Concrete Co. Limited vs Parliament Bank Limited** which provided the ingredients of the doctrine of *lis-pendens* as: the presence of an active

prosecution of a suit relating to the disputed property; the

existence of a contentious suit between the parties; and, a right to immovable property being specifically in question.

25. The appellant posited that it had proved that the respondents were trespassers and the learned Judge fell in to error by failing to find as much. Lastly, that by addressing the issue of lack of proper authority by a Limited Liability Company to institute the suit, an issue which was not raised by any of the parties, the learned Judge made a fundamental error of law and fact as she deviated from the hackneyed principle that "*parties are bound by their pleadings*".

26. This being a first appeal, we exercised our jurisdiction to re-appraise the evidence and draw inferences of fact. In doing so, we considered whether the law was properly and correctly applied to those facts, for that is the import of **Rule 31(1)(a)** of the **Court of Appeal Rules, 2022**. As expected of an appellate court, we gave leeway to the fact that it is the trial court that saw and heard the witnesses testify and was therefore in a better position to assess their demeanour.

27. The mandate of the first appellate court, was pronounced by this Court in the case of **Kamau v Mungai [2006] 1 KLR 15** as follows:

> ***"Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that."***

28. In dismissing the appeal we gave due consideration to the record of appeal and submissions of the appellant. We considered: whether the suit was competent in law without a board resolution; whether the appellant's title was lawfully and procedurally acquired; and, whether the respondent's counterclaim for rectification was proved.

29. On whether the suit was competent in law without a board resolution, the appellant asserted that lack of authority by the company to file this suit was neither pleaded, nor raised by the parties to the suit. Thus, the trial Judge should not have made a finding on it.

30. This Court in **G.K. Macharia & another v Lucy N. Mungai [1995] KECA 165 (KLR)** quoted with authority the pronouncement of **Duffus P**, in **Odd Jobs vs Mubia [1970] EA 476** as follows:

> ***"It is therefore the duty of the court to frame such issues as may be necessary for determining the matters in controversy between the parties. Apart from these provisions, the Court has wide powers of amendment and should exercise these powers in order to be able to arrive at a correct decision in the case and to finally determine the controversy between the parties. In this respect, a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates and on which a decision is***

necessary in order to determine the dispute between the parties."

31. Similarly, in **Mithamo & another v Mithamo [2024] KECA 1864 (KLR)** this Court in determining whether the superior court was right in deliberating on the issue of trust that was not pleaded, held that:

"35. It is trite that where a party seeks to anchor a claim on trust, the issue should be pleaded and particulars of trust given. Where this is not done, the opposite party has the right to move the court under the Civil Procedure Rules to have the pleadings struck off. Should the application for striking out of pleadings not be made, and it is followed by the issue of trust being addressed in evidence at the hearing and in submissions, it is assumed that the party has opted to forgo his right to challenge the pleadings, and acquiesced to the issue being determined by the court.

36. Given the fact that the issue of trust was raised by both the parties and that during the hearing witnesses adduced evidence that touched on the issue of trust and that in the written submissions the issue was extensively addressed by both parties, it is clear that the issue was left for the determination of the court.

37. Though unpleaded, the issue of trust therefore had to be determined, and must therefore be construed as having been left to the ELC for

determination, and the ELC did not therefore err in determining this unpleaded issue."

32. We note that as much as the issue of lack of a board resolution by the company was not pleaded, it was central to determining the competence of this suit.

33. The trial Judge found that there was no case before her, because there was no board resolution to file the suit. She pronounced herself thus:

> *"The issue of lack of a board resolution to file a suit does not qualify as a procedural technicality which flies on the face of the provisions of section 1A and 1B of the Civil Procedure Act and the provisions of Article 159 (2)*
> *(d) of the Constitution that justice shall be administered without undue regard to procedural technicalities.*
>
> *In the case of Joshua Werunga v Joyce Namuyak (2013) eKLR it was held that the provisions of Article 159(2)(d) should not be used by litigants as a panacea to all irregularities and procedural technicalities. The provisions are supposed to be applied with caution taking into account that there has to be predictability and order in administration of justice. Evidence having been concluded in this case without rectifying the anomaly, I find that we do not have a case before the court. Even though this was not raised as an issue, it is important to put the record straight."*

34. It is trite law that a company is a legal entity separate from its shareholders and directors. In **Moir v. Wallersteiner [1975]**

1 ALL ER 849 at **pg 857**, Lord Denning MR stated that:

"It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in <u>Foss V. Harbottle</u> [1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue."

35. We are also cognizant of this Court's decision in **<u>Wanyiri Kihoro v Konahauthi Ltd</u> [2017] KECA 747 (KLR)** where it was held that:

"The second issue seems to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; Bugerere *Coffee Growers Ltd v Sebaduka & Anor (1970) 1 EA 147****. The court in that case held: -***

'When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally

liable to the defendants for the costs of the action.

However, the principle enunciated in the Bugerere case has since been overruled by the Uganda Supreme court in the case of *Tatu Naiga & Emporium vs. Virjee Brothers Ltd Civil Appeal No 8 of 2000* ***where the Court endorsed the decision of the Court of Appeal that the decision in the Bugerere case was no longer good law as it had been overturned in the case of*** *United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998****. The latter case restated the law as follows: -***

"…. it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company."

The decision has since been applied in Kenyan courts, for example, in Fubeco China Fushun v Naiposha Company Limited & 11 others [2014] eKLR."

From the foregoing cases, it is evident that the trial Judge erred in holding that this suit was irregularly before the court, for lacking the backing of a board resolution.

36. On the second issue, the appellant's argument is that it is a

bonafide purchaser, having bought the suit land from one

Philip Koech for a consideration of Kshs. 2 million. To prove this, it produced a sale agreement dated 8th May 2013, an official search dated 28th March 2014, a transfer dated 1st July 2013, approved Survey Map and Registry Index Map, (RIM). On their part the respondents' witnesses produced evidence in the trial court to prove that the suit land forms part of **L.R 8148** which belonged to the late William Kiptalam Cherunya, the 1st respondent's father.

37. In finding that the appellant did not acquire the title procedurally, the trial court had this to say:

> *"The plaintiff admitted that he did not know the original owner of the parcel of land (the late Kiptalam Cherunya) and further that he was not aware that the government had compulsorily acquired 400 acres of the suit land.*
>
> *It should be noted that the plaintiff admitted that he did not know the history of suit land especially that the same belonged to the late Cherunya who is the father of the defendants. It is important to note that the plaintiff was not aware that the government had compulsorily acquired 400 acres of the suit land and that subdivisions had been done to that effect. This is very crucial information that should have been within the knowledge of the plaintiff having confirmed that he had carried out a search and due diligence in respect of the property.*
>
> *The documents that the plaintiff produced were after its registration as an owner, there is scanty information from the documents of acquisition by one*

Phillip Koech who purportedly sold the land to the plaintiff. The court was only shown a sale agreement, a transfer of lease, map and official search. This information did not reveal how the vendor acquired the land as there was no title document registered in his name.

The defendants had the original title deed for the whole 617 acres which had not been surrendered for cancellation, of which the plaintiff was not able to challenge. Why would the defendant still have the head title which was supposed to be surrendered to enable issuance of other titles."

38. The appellant's argument that it is a *bonafide* purchaser must meet the requirement laid down in **Mbugua & 3 others (Sued as the Administrators and Personal Representatives of the Estate of Joseph Kiarie Mbugua - Deceased and in Their Capacities) v Njuguna & 2 others [2024] KECA 1931 (KLR)** as follows:

> ***"The appellants claimed that the suit property was purchased by Mbugua from John Ngugi Kimani at a consideration, and he was thus, an innocent purchaser for value without notice. For this defence to hold, this Court in several decisions, inter alia, Elizabeth Wambui Githinji &***
> ***29 Others vs. Kenya Urban Roads Authority & 4 Others [2019] eKLR and Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs. Attorney General & 4 Others [2017] eKLR, has developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is an innocent purchaser for***

value and

without notice: "…….. for a purchaser to successfully rely on the bona fide doctrine, (he) must prove that: a) he holds a certificate of title;
b) he purchased the property in good faith; c) he had no knowledge of the fraud; d) he purchased for valuable consideration; e) the vendors had apparent valid title; f) he purchased without notice of any fraud; g) he was not party to any fraud." A bona fide purchaser of a legal estate without notice has an absolute, unqualified, and answerable defence against a claim of any prior equitable owner." (Emphasis added).

39. The appellant is also required to have performed due diligence before purchasing the suit land. In the case of **Samuel Kamere v Lands Registrar, Kajiado [2015] KECA 644 (KLR)** the Court of Appeal relied with approval on the decision in **Munyu Maina vs Hiram Gathiha Maina, Civil Appeal No. 239 of 2009** where it was held that:

"We state that 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. It is this instrument of title that is in challenge and 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, formal and free from any encumbrances including any and all interests which would not be noted in the register." (emphasis ours)

40. We have scanned through the evidential documents availed by the appellant. As held in **Munyu Maina** *(supra),* the appellant

ought to have conducted due diligence before purchasing the suit land. This was not done; we say so because the appellant did not provide evidence of the title of Phillip Koech (the vendor) before it was passed to it. There was no history of the property before the respondent acquired it, and they did not call the vendor to testify to his ownership. This also shows that the appellant cannot use the defence of *bonafide* purchaser for consideration, as provided in **Mbugua & 3 others,** *(supra)*. Accordingly, we agree with the trial court's finding that the appellant did not acquire the title procedurally.

41. On the other hand, the respondents gave the chronological account of the suit land. They provided documentary evidence of proof that the suit land is part of parcel **No. LR 8148** which is in the name of the late William Kiptalam Cherunya (deceased). The 1st respondent produced the Title deed to parcel **No. L.R 8148** in the name of the deceased. Therefore, we find that the respondents proved their counterclaim to the standard required.

Upon hearing the appeal on 11th June 2025, we found that it was lacking in merit for the reasons stated above, and we dismissed it on the spot. We gave no orders as to costs since the respondent did not file any submissions or attend the hearing.

It is so ordered.

Dated and delivered at Nakuru this 21st day of November

2025

M. WARSAME

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. JUDGE OF APPEAL

L. ACHODE

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. JUDGE OF APPEAL

J. MATIVO

.....

. JUDGE OF APPEAL

I certify that this is a true copy of the original ***Signed***
DEPUTY REGISTRAR