IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: KIAGE, MUCHELULE & KORIR,

JJ.A.) CIVIL APPEAL NO. 655 OF 2019

BETWEEN

IGAINYA LTD ..... 1ST APPELLANT ISABELLA NYAGUTHII WANJOHI ..... 2ND APPELLANT ISAAC GATHUNGU WANJOHI .... 3RD APPELLANT

AND

GODFREY KARURI GITHAE ..... 1ST RESPONDENT DIANA GATHONI KINYUA ..... 2ND RESPONDENT VICTOR WACHIRA MURIUKI ..... 3RD RESPONDENT JAMES GUANDARU KIBERA ..... 4TH RESPONDENT ESSENTIAL HIRE PURCHASE LTD ..... 5TH RESPONDENT NAIROBI CITY COUNCIL ..... 6TH RESPONDENT

(An appeal against the judgment and decree of the Environment and Land Court of Kenya at Nairobi (K. Bor, J.) dated 4th April 2019

in

E&LC Case No. 1607 of 2001)

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JUDGMENT OF THE COURT

1. The history of this appeal is traceable to the 2nd Further Amended Plaint dated 29th March 2018, wherein the appellants, then plaintiffs, sought mandatory injunction directed to the respondents to yield vacant possession over L.R. No. 1/421 situated along Ngong Road, Nairobi (***"suit property"***) and hand

over the same by physically pointing out the beacons and removing the tenants thereon. The appellants also sought to declare the allocation of

part of the suit property to the 5th respondent null and void. In the said plaint, the appellants further sought mesne profits at a rate to be determined by the court from 1st September 2000 until the handing over of the suit property to the appellants as well as general damages or loss of revenue or rent. As an alternative, the appellants sought a refund of the purchase price of Kshs. 10,000,000 plus interest from the date of payment or purchase of the suit property.

2. Through a defence dated 26th July 2018, the 1st respondent denied the claim, arguing that it was defeated by paragraph 14 of the Law Society Conditions of Sale (1989 Edition) to which the alleged sale was subject, and that it was barred by the doctrine of laches. The 1st respondent also argued that upon executing the sale agreement, the suit property was handed over to the appellants. The 6th respondent in a defence dated 8th November 2002 denied allocating the suit property to the 1st to 4th respondents. The 6th respondent maintained that the purported sale was void since it was not signed by the Town Clerk or any of its employees and that there was no resolution authorising the allocation and subsequent transfer of the suit property to the 1st, 2nd, 3rd and 4th respondents. According to the 6th respondent, it had always been in possession of the suit property and the tenants therein are part of its staff establishment.

3. In dismissing the claim, K. Bor, J. in a judgment delivered on 4th April 2019, held as follows:

"23. The 6th Defendant stated in its evidence that its officers still occupy the four maisonettes on the Suit Property, which confirms that the 6th Defendant has been using and still requires to use the suit land for the purposes for which it was acquired and that it ought not to have been sold pursuant to Section 144 (6). This fact was also confirmed by the Plaintiffs whose advocate wrote to the 6th Defendant's tenants indicating an increment in rent to Kshs. 40,000/= per month. The tenants did not hand over possession of the Suit Property prompting the Plaintiffs to file this suit in which they seek mesne profits from 2000 to date. No explanation was given by the Plaintiffs for the delay in having this suit which was filed almost twenty years ago heard and determined expeditiously.

24. The Plaintiffs have failed to prove their claim on a balance of probabilities, it is dismissed. Each party will bear its own costs."

4. The appellants are now before us challenging the learned Judge's findings on 16 grounds. We have condensed the grounds of appeal as follows: that the learned Judge erred in dismissing the claim; in misapprehending the evidence on record; in finding that the Minister did not approve the sale, yet the consent under **section 144(5**) of the **Local Government Act** was not necessary; in relying on the evidence that was introduced at the submissions stage by the 6th respondent who did not call any witness; by being biased against the appellants and acting beyond her jurisdiction; and by taking into account extraneous factors which were not relevant to the dispute.

5. In prosecuting their case, the appellants called three witnesses. First on the stand was the 3rd respondent, **Isaac Gathungu Wanjohi (PW1**). He stated that, some time in 2000, they received offers from the 1st to 4th respondents to purchase the suit property, after which he instructed their advocate to conduct due diligence and investigate the title to the suit property. Once satisfied with the outcome of the investigations and validity of the title of the suit property, they entered into a sale agreement with the 1st to 4th respondents dated 11th August 2000. PW1 produced a copy of the sale agreement, which they entered into with the 1st to 4th respondents. He also produced a copy of the conveyance, which transferred the property from the City Council of Nairobi to the vendors, a copy of a receipt dated 4th July 2000 issued by the Lands Office in respect of the conveyance over the property, and a conveyance dated 18th August 2000 in favour of the appellants. PW1 further stated that he instructed their lawyers to release the purchase price to the 1st to 4th respondents, and caused the advocates to write to the tenants in the four maisonettes in the suit property informing them that they would be required to pay rent of Kshs. 40,000 per month to the appellants. He also stated that upon paying the purchase price, they were issued with the completion documents and that the issue of vacant possession did not form part of the sale agreement. According to PW1, it was after the sale agreement that the tenants in the 4 mansionettes erected on the property informed them that they were paying rent to the 6th respondent.

6. **Mary Ngima Mwangi**, an advocate of the High Court of Kenya, testified as PW2. She stated that she represented the appellants in the purchase of the suit property. The vendors deposited the conveyance documents with her, and she conducted due diligence and drafted the sale agreement based on the provided documents. PW2 indicated that the appellants deposited Kshs. 10 million with her, awaiting the registration of the conveyance. She prepared the transfer documents, caused them to be registered in the Lands Office, and released the funds to the vendors once the transaction was completed. Following this, she wrote to the tenants residing in the four maisonettes on the suit property, informing them that the new monthly rent would be Kshs. 40,000. However, the 1st to 4th respondents did not hand over vacant possession to the purchasers and instead offered to buy back the suit property for Kshs. 11 million. She presented the conveyance documents she prepared as evidence. She confirmed that the sale agreement did not explicitly address the issue of vacant possession, but it was subject to the Law Society Conditions of Sale, which include the provision for giving vacant possession. PW2 also stated that the Mayor, whom she personally knew, executed the conveyance on behalf of the 6th defendant.

7. **Joseph Kahuthia Kibui** (PW3) produced the valuation report he prepared, which indicated that as at 15th March 2018, the expected rent for the four maisionettes and the extra space stood at Kshs. 1,020,000 per annum. PW3 estimated the rent payable as

at the year 2000 to be Kshs. 54,000 per month for each masionette.

8. The 1st respondent, **Godfrey Karuri Githae** (DW1), testified that he was trading as Winky Enterprises alongside the 2nd, 3rd and 4th respondents. That they were allocated the suit property to which they paid the required lease consideration to the 6th respondent. DW1 conceded selling the property to the appellants for Kshs. 10 million and stated that the appellants were aware of the tenants on the suit property at the time it was sold to them, and that the failure to collect rent from the tenants was attributable to their own fault. He maintained that they transferred good title to the appellants and that the 1st to 4th respondents were allocated the suit property in 1987. However, the 1st respondent's evidence took a different trajectory when he testified that he did not know how they got to be allocated the suit property and that the 3rd and 4th respondents, who were key in the transaction, had since died. He also stated that he was not sure whether the purchase price of Kshs. 10,000,000 was paid, as he was only given a token of Kshs. 350,000 by the 3rd respondent, who was the main actor in the transaction.

9. The 5th and 6th respondents did not call any witness.

10. When the appeal came up for hearing, learned counsel, Mr. Kingara and Mr. Mireu appeared for the appellants. There was no appearance by the respondents despite service. The respondents did not file their submissions. For the appellants, learned

counsel

Mr. Kingara relied on the written submissions on record and briefly highlighted the same.

11. In support of the appeal, learned counsel Mr. Kingara argued that the learned Judge erred in concluding that the appellants did not prove their claim on a balance of probabilities. He submitted that the appellants presented uncontroverted evidence, supported by the 1st respondent, and urged that the burden of proof placed upon them by **section 107** of the **Evidence Act** was thus discharged. He argued that the appellants adduced evidence in support of their case, while the 6th respondent provided no contradictory evidence, asserting that the appellants' evidence should have been accepted as proving their case. He cited **Edward Mariga vs. Nathaniel David Schulter & Another [1997] KECA 336 (KLR)** to support the contention that, absent defence evidence, the appellants' case should be believed.

12. Next, counsel argued that the learned Judge improperly treated the 6th respondent's pleadings and submissions as evidence without any substantiation. Counsel highlighted that the 6th respondent called no witnesses nor provided evidence, yet the Judge relied on its pleadings and submissions as evidence. Learned counsel cited **CMC Aviation Ltd. vs. Cruisair Ltd. [1978] KLR 103** in support of the proposition that pleadings do not constitute evidence until proven. Citing **North End Trading Company Limited vs. City Council of Nairobi [2019] eKLR**, counsel emphasised that a party must provide evidence to support

their case. Counsel also argued that submissions are not evidence and relied on **Erastus Wade Opande vs. Kenya Revenue Authority & Another - Kisumu HCCA No. 46 of 2007**, to buttress that position. He referred to **Avenue Car Hire & Another vs. Slipa Wanjiru Muthegu Civil Appeal No. 302 of 1997** to reiterate that judgments cannot be based solely on written submissions. Counsel further asserted that reliance on unsubstantiated submissions violated the appellants' right to a fair hearing under **Article 50** of the Constitution and indicated bias, thereby contravening the **Bangalore Principles of Judicial Conduct, 2002**. Relying on **King Woolen Mills Limited & Another vs. Standard Chartered Financial Services [1995] eKLR**, counsel urged that confidence in the justice system is undermined when bias is perceived.

13. Counsel challenged the Judge's decision, arguing that the appellants were bona fide purchasers who conducted due diligence which confirmed the 1st to 4th respondents held a valid title. He referenced **Katende vs. Haridar & Company Limited [2008] 2 E.A.173** to illustrate the qualifications for a bona fide purchaser, asserting that the appellants met the conditions and deserved protection. Additionally, he argued that the learned Judge should have granted judgment in default, as the 6th respondent did not defend the claim, and the 1st respondent supported the appellants' case. As a result, counsel asked us to allow the appeal, set aside the judgment, and grant the reliefs sought in the plaint.

14. This being a first appeal, our duty is as was expressed in **Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** that:

> **"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re- evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."**

15. We have considered the record as well as submissions and the authorities cited by counsel. The issues arising for resolution are: whether the appellants proved their claim, and whether they are entitled to the reliefs sought.

16. Before we substantially address the two issues identified above, we are concerned with the appellant's assertion that the 6th respondent did not call any witness and therefore the case against it should be deemed as undefended. There is no doubt that where the respondent files a defence but fails to call any witness, the appellant's evidence stands uncontroverted and the trial court is entitled to act on it. However, it must be recalled that the fact that the 6th respondent did not adduce any evidence did not relieve the appellants of the burden to prove their case to the required standard. The burden was always on the appellants to prove their case on a balance of probabilities, even if the case was undefended. Where evidence is uncontroverted, the court must still evaluate it and satisfy itself that it proves the claim. Additionally, an

undefended suit must be distinguished from a suit where a defence is filed, but evidence is not adduced.

17. We have appreciated the authorities cited to us by learned counsel Mr. Kingara on this issue. In our view, the correct position is as was expressed by the Court in **Charterhouse Bank Limited (Under Statutory Management) vs. Frank N. Kamau [2016] KECA 153 (KLR)** as follows:

> **"The suggestion, however, implicit in some of the decisions quoted above, that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct. It is also obvious to us that in some of those decisions the question whether the plaintiff has, in the absence of evidence from the defendant, proved his case on a balance of probabilities, was conflated and confused with the distinct issue of the effect of the defendant's failure to testify when he had filed a defence and a counterclaim. While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities…**
>
> **We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the**

defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the

evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the defendant has not testified."

18. The above holding captures the correct approach on how a court seized of a defended matter, but evidence is not led for the defence is supposed to decide the suit before it. It is the same approach that, in our view, the learned Judge adopted in arriving at the impugned judgment. We therefore do not find credence in counsel's suggestion that the learned Judge ought to have entered a default judgment in favour of the appellants. Since there was a defence on record, the appellants still bore the burden of proving their case on a balance of probability.

19. The main issue, then, is whether the appellants proved their claim to the suit property. **Section 107** of the **Evidence Act** provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. It follows that the appellants had the burden of proving their claim of ownership of the suit property. Interestingly, in this case, whereas the appellant asserts ownership of the suit property, the 6th respondent claimed possession thereof. That calls for the application of the provisions of **section 116** of the **Evidence**

Act, which states that when the

question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

20. The appellants fault the learned Judge for questioning the root of their ownership of the suit property. According to the counsel, since the 1st respondent attested that they sold the suit property to the appellants, the appellants' case was proved, and the property ought to have been handed to them. However, in our view, the ownership of the suit property was contested. The original owner of the property claimed possession, a claim confirmed by the appellants, who sought an order evicting the tenants, who, at the time, were paying rent to the 6th respondent.

21. Counsel for the appellant has also urged us to find that the appellants were bona fide purchasers for value. The Supreme Court in **Dina Management Limited vs. County Government of Mombasa & 5 Others [2023] KESC 30 (KLR)** held that establishing a good root of the title is the first step in establishing whether a party is a bona fide purchaser for value. In that regard, the Court stated as follows:

> **"94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment...**
>
> **110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to**

issuance of the title did not comply with the law, then such a title cannot be held as indefeasible...

> **111. Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired."**

22. This Court in **Mbarak vs. Freedom Limited [2024] KECA 160 (KLR)** observed that:

23. In line with the foregoing principles of law, we cannot fault the learned Judge for proceeding to inquire into the root of the title. The 6th respondent had expressly, in its statement of defence dated 16th September 2002, denied allocating the suit property to the 1st to 4th respondents. It follows that before the appellants' claim of ownership of the suit property could succeed, they were under an obligation to show that the ownership which they

claimed was based on an unquestionable title whose root could be clearly

traced. Just like the trial court, we cannot overlook the challenge raised by the original owner of the property, the 6th respondent.

24. In this case, the appellants asserted that they bought the suit property from the 1st, 2nd, 3rd and 4th respondents. PW2 oversaw the transaction and stated that she conducted the background check and confirmed that the vendors had a valid title. DW1 (1st respondent herein), on his part, did not give any evidence as to how they acquired the property from the 6th respondent. Instead, he stated that the 3rd and 4th respondents were the key actors in the transaction. DW1 actually testified that it was the 3rd respondent who conducted the negotiations.

25. The defunct 6th respondent was a creature of the **repealed Local Government Act**. It was the original owner of the suit property and the entity that is alleged to have leased the property to the 1st, 2nd, 3rd and 4th respondents. Under **section 144 (5)** and **(6)** of the **repealed Local Government Act**, the consent of the Minister for Local Government was necessary in granting a person a license to occupy any land. Neither the appellants nor the 1st, 2nd, 3rd and 4th respondents tendered any evidence to establish that this consent was sought and granted. To add to that, no evidence was put forth by the vendors to affirm that their interest in the suit property, which they sought to transfer to the appellants, was acquired upon payment of any consideration. Without this kind of evidence, can we then find that the title allegedly owned by the vendors from

whom the appellants got their interest was valid? The answer is in the negative.

26. We, just like the learned Judge, have to arrive at one inevitable finding: the title to which the appellants lay claim cannot withstand scrutiny as regards its roots. It cannot be said to have been a good title. In our view, the doctrine of *bona fide purchaser* cannot cure an illegality at inception, particularly in cases involving public land. Indefeasibility of title is not absolute, and Article 40 of the Constitution does not extend protection to unlawfully acquired property. A purchaser who relies solely on the register, without interrogating the legality of the process leading to registration, does so at his/her own peril.

27. This Court in **Funzi Island Development Limited & 2 Others vs. County Council of Kwale & 2 Others [2014] KECA 882 (KLR)** held that:

> **"In the case of allocated land, even if the section is applicable, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title."**

28. When the matter went to the Supreme Court as **Pati Limited vs. Funzi Island Development Limited & 4 Others [2021] KESC 29 (KLR)**, the Supreme Court, in upholding the decision of this Court, concluded that:

> **“The entire process and notice for setting apart, fell far short of the requirements of the Constitution and the law. In view of these shortcomings and our conclusion regarding the legal status of the suit land, we find no reason to upset the judgment of the Court of Appeal.”**

29. Consequently, we find no reason to disturb the finding by the learned Judge of the Environment and Land Court. As a result, this appeal is dismissed.

30. On the issue of costs, we note that the respondents did not participate in the appeal. The appeal having been dismissed, we make no order as to costs.

Dated and delivered at Nairobi this 13th day of February 2026.

P. O. KIAGE

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.