IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: TUIYOTT, JOEL NGUGI & ODUNGA, JJ.A.)

CIVIL APPEAL NO. 435 OF

2019 BETWEEN

LYDIA WANJIRU MURIITHI.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

*(Being an appeal arising from the Decree and Judgment of the Environment & Land Court at Nairobi (**Bor, J.**) dated 8th February 2018*

in

ELC Case No. 24 of 2015)

****

JUDGMENT OF THE COURT

[1] It turns out that land surveyed and delineated as **Nairobi/Block 82/5892** (**the suit land**) falls on a sewer line and should never have been alienated for private use.

[2] At the Environment and Land Court, in Environment and Land Court Case No. 24 of 2025, the case of Lydia Wanjiru Muriithi (**the appellant or Wanjiru**) was that she bought the suit land at a consideration of Kshs. 250,000.00 from one John. G. Thogo (Thogo). Thogo had been allocated this parcel of land by the Commissioner of Lands through a letter reference No. 361/11 dated 28th April 1994. The parcel of land measures 0.14 hectares.

[3] Trouble for Wanjiru began when she sought to change user of the land so as to develop a commercial cum residential unit on the suit land. This was not granted as the Nairobi City Council, the predecessor to the County Government of Nairobi, advised that the suit land cuts across the trunk sewer line that serves Donholm Estate.

[4] It was the case for Wanjiru that the property was, therefore, worthless. She lamented that the Commissioner of Lands was negligent in allocating the suit land to Thogo thereby exposing her as an innocent buyer to the risk of buying a worthless piece of land. According to her, the negligence comprised in the Commissioner of Lands allocating that land to Thogo when he knew or ought to have known that it was on a sewer line and not available for private development. Further, consenting to and/or authorizing the transfer of the said parcel of land from Thogo to her when the Commissioner knew or ought to have known that the parcel of land was on a sewer line and therefore not available for private development.

[5] The claim by Wanjiru was for special damages of Kshs. 250,000 being the purchase price, Kshs. 28,500 being the cost of fencing the parcel of land and Kshs. 49,000 as stand premium. She also sought compensation in the sum equal to the open market value

of the suit property at the time of filing suit, and general damages. Interest on all those monetary claims was also sought.

[6] The Attorney General, the respondent herein, was sued on behalf of the Commissioner of Lands. In a six-paragraph statement of defence, the Honourable Attorney General averred that: it was not privy to the transaction between Wanjiru and Thogo, denied that the Commissioner of Lands was negligent in allocating the land parcel to Thogo; and was a stranger to the special damages sought by Wanjiru.

[7] The hearing of the case before Hon. Justice Bor, who also delivered the impugned judgment, was short. The testimony of Anne Wangeci Ndegwa, a sister and holder of power of attorney for Wanjiru, regurgitated the case set out in the plaint. James Githaiga Thirikwda (PW2), a valuer with Camp Valuers, testified that he valued the suit land and, in a report dated 12th June 2024, returned a value of Kshs. 75,000,000/-.

[8] The Attorney General who was absent at the hearing did not offer any evidence on that day or on a later date.

[9] In the impugned judgment, the trial court (**Bor, J.**) held that so as to be entitled to indemnity under **section 144(3)** of the **Registered Land Act**, a claimant must show that the seller or the person whom she/he acquired title, caused or substantially contributed to the damage by his/her fraud or negligence. In

this

event, Wanjiru did not carry out thorough investigation or even make enquiries from the neighboring residents as to whether the suit property was reserved for public utility and had she done so, she would have discovered that there was a sewer line running through the suit property that serves Donholm residents. Regarding the right to indemnity under **section 81** of **The Land Registration Act**, the trial court held that Wanjiru still held the certificate of lease over the suit land and the registrar had not rectified it.

[10] The appellant is dissatisfied and seeks to impeach the judgment on grounds set out in the memorandum of appeal dated 5th September 2017. In her submissions, the appellant rallied those grounds around four questions;

1. ***Whether there was fraud in the acquisition of the suit land by the appellant?***

2. ***Whether the learned judge ought to have dealt with the issue of fraud yet it was not specifically pleaded or brought up in evidence?***

3. ***Whether the respondent is liable for allocating to the appellant a plot that was unavailable for use then reacquiring it and using it for public means?***

4. ***Is the appellant entitled to compensation?***

[11] At the plenary hearing of the appeal, learned counsel **Mr. Kuria**

represented the appellant while learned state counsel **Ms.**

Ndundu appeared on behalf of the respondent. Mr. Kuria chose to rely on the written submissions filed on behalf of his client without making any highlights. Regarding the first issue, it was submitted that the evidence presented at trial clearly detailed a procedural acquisition of the property. She explained that she met John G. Thogo, the original allottee, in September 1995 and purchased the land for Kshs. 250,000, for which she received a formal receipt. Further, that the land was subsequently surveyed, delineated as NAIROBI/BLOCK 82/5892, and she was issued with a Certificate of Lease. The appellant argued that at no point during the sale or registration did she have notice of a sewer line running under the property, nor did official maps from the Director of Survey indicate such an encumbrance. Relying on **section 26(1)** of the **Land Registration Act**, the appellant submitted that her title was absolute and indefeasible unless fraud was proved, and since no evidence of fraud was produced by the defence, her ownership of the suit land should not have been challenged.

[12] The appellant submitted that the trial judge erred by dealing with the issue of fraud as it was not specifically pleaded or brought up in evidence. The appellant argued that the respondent's defence only contained mere denials and did not mention fraud, which violates the established principle that

fraud must be specifically

pleaded and strictly proved. To support this, she cited several authorities: **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] KECA 223 (KLR)**, emphasizing that particulars of fraud must be stated on the face of pleadings; **Kinyanjui Kamau v George Kamau [2015] eKLR** and **Ndolo v Ndolo [2008] 1 KLR (G & F) 742**, for the well renowned principle that the standard of proof for fraud is higher than in ordinary civil cases: **Independent Electoral and Boundaries Commission & another v Mule & 3 others (Civil Appeal 219 of 2013) [2014] KECA 890 (KLR)** and **Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Election Petition 1 of 2017) [2017] KESC 31 (KLR)**, asserting that parties are bound by their pleadings and the court cannot frame issues outside of them; and **Moi v Muriithi & another (Civil Appeal 240 of 2011) [2014] KECA 642 (KLR)**, where the court held that legal submissions do not constitute evidence. The appellant contended that by relying on submissions rather than evidence, the trial judge gravely misdirected herself.

[13] On the third issue, the appellant submitted that the respondent was liable for allocating a plot that was unavailable for development and then reacquiring it for public use. The appellant argued that the respondent, as the custodian of land records, acted negligently or maliciously by issuing a lease for a residential

structure while withholding information that a sewer line ran deep beneath the land. The appellant further submitted that the respondent's subsequent actions, erecting a police post and a chief's camp on the property without any right or authority of the appellant, constituted an arbitrary deprivation of her property rights under **Article 40** of **The Constitution of Kenya**. She maintained that the respondent failed to follow the procedures of the **Land Acquisition Act** and acted in bad faith by hiding crucial information.

[14] The appellant submitted that she was entitled to full compensation because she was unprocedurally denied her property rights through a de facto compulsory acquisition. The appellant argued that the construction of public offices on her land without compensation was illegal. She cited **Nelson Kazungu Chai & 9 others v Pwani University College [2017] KECA 135 (KLR)**, to support the argument that property rights can only be acquired as prescribed by law. Furthermore, she pointed to **section 75(1)** of the retired Constitution of Kenya, which mandated prompt payment of full compensation for compulsory acquisition. Consequently, the appellant submitted that she should be compensated at the current market value of Kshs. 75,000,000.00, as assessed by Camp Valuers in the report dated 5th August 2014.

[15] Finally, the appellant submitted that she was entitled to the costs of the litigation. She referenced **Justice (Rtd) Kuloba's Judicial hints on Civil Procedure** to explain that costs should follow the event, meaning the successful party should generally be awarded costs. Citing **section 27(1)** of the **Civil Procedure Act** the appellant argued that the court should exercise its power to award her costs both at the trial and here.

[16] Ms. Ndundu orally argued that the appellant did not seek for the court to determine the issue of whether her title was valid so as to be entitled to compensation and in addition, a point which was raised during trial, the process through which the appellant obtained the certificate of lease may not have been proper as there were no documentation produced in support of that allocation or the certificate of lease. Further that the appellant did not produce a letter of allotment and only produced an informal transfer and it was thus impossible for the trial court to determine the conditions that had been given by the Commissioner of Lands and if indeed an allocation was made to Thogo or whether he complied with those conditions. Counsel contends thus that the appellant was not entitled to any form of compensation from the respondent on the basis of the lease as the burden of proof had not been met.

[17] Another issue raised was that while the appellant submitted at

trial that she was not aware of the restriction that had been placed

by the Chief Land Registrar on their title, the certificate of lease she produced indicated at the back page that the restriction was there even when she obtained the certificate of lease. In addition, had she done due diligence, it would have been discovered that the plot was situated between two blocks of properties, on a road and thus on a public utility plot.

[18] As a first appellate Court, we are called upon to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that, unlike the trial court, we did not see or hear the witnesses testify. This position was stated in the case of **Selle & Another v. Associated Motor Boat Company Ltd. & Others [1968] EA 123** as follows: -

> ***"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled.***
>
> ***Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the***

evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955) 22 EACA 210).”

[19] As we have understood the judgment, central to the trial judge's finding that the appellant would not be entitled to compensation, is that had she carried out due diligence, it would have been apparent to her that the suit land was public property sitting on a sewer line. The manner in which the appellant made her claim and which invariably reflected the factual matrix invited the trial court to consider whether the appellant can be said to be blameless for the predicament she found herself. The appellant bought the suit land from Thogo when it was still an allocated land. Indeed, the transfer of the property from Thogo to her required the consent of the Commissioner of Lands which he gave on 5th September 1995.

[20] It was, therefore, apparent or would have been apparent to Wanjiru that what she was buying was land that had just been alienated from the Government. It turned out, and this is conceded by the appellant, that the suit land sat on a public sewer line serving Donholm Estate. To be able to pass the test of an innocent victim of the negligent or unlawful exercise of duty by the Commissioner of Lands, the appellant would have been required to make all reasonable inquiries and to carry out due diligence to satisfy herself that the land she was just about to buy was available for allocation in the first place. This duty was

heightened, we think and hold, by the fact that what she was purchasing was recently alienated land. The onus to demonstrate that she had done everything required by the law to satisfy herself that the root of the title to the suit land was beyond reproach was inextricably tied to the success of the case she had pleaded. The Attorney General need not have pleaded nor proved fraud.

[21] This is where the appellant's case faltered and had to fail. The appellant did not lead evidence to demonstrate that she made enquiries from the Commissioner of Lands to confirm that the land was actually available for allocation for private use or development. She did not prove that she visited the property prior to buying the property. She did not lead any evidence to prove that even on such a site visit, the physical status or location of the land would not betray that it was public land sitting on a sewer line. In a word, the appellant failed to establish that she was blameless and therefore a victim of the fate that befell her. As a corollary, that she was entitled to compensation as she could not develop the suit property.

[22] The finding by the trial court, which we endorse, follows the spirit of the decision of the Supreme Court in **Dina Management Ltd v County Government of Mombasa & 5 others (Petition 8**

(Judgment) which came about five years later. There, the apex court said:

> ***"108. As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of*** *Funzi Development Ltd & Others v County Council of Kwale, Mombasa Civil Appeal No.252 of 2005 [2014] eKLR* ***the Court of Appeal, which decision this Court affirmed, stated that:***
>
> > *"...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 gives its seal of approval to an illegal or irregularly obtained title." ....*
>
> ***…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. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.***
>
> ***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. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of the Constitution. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.***

> ***112. We therefore agree with the appellate court that the appellant's title is not protected under article 40 of the Constitution and the land automatically vests to the 1st respondent pursuant to article 62(2) of the Constitution. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence."***

[23] In the end, the appeal lacks merit and is hereby dismissed with costs.

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

F. TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.