IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A) CIVIL APPEAL NO. 94 OF 2020

BETWEEN

ELISHA OYUGI ..... 1ST APPELLANT BISHOP JOSEPH SAMOEI ..... 2ND APPELLANT

FREDRICK MUMIA (Suing as the registered trustee of FULL GOSPEL CHURCHES OF KENYA) ..... 3RD APPELLANT AND

THE BOARD OF GOVERNORS, KHWISERO GIRLS SECONDARY SCHOOL..... 1ST RESPONDENT ASTALI NAMBWENYA ..... 2ND RESPONDENT SADIQUE ENTERPRISES...3RD RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Kakamega (N. Matheka, J.) dated 5th November, 2019

in

ELC Case No. 41 of 2018

****

JUDGMENT OF THE COURT

1. In a further amended plaint dated 5th October, 2017, the appellants lodged a suit against the respondents before the Environment and Land Court at Kakamega. The appellants averred that they were the registered owners of land parcel

number **Kisa/Wambulishe/1141**, measuring approximately

5.5 Ha (*the suit property*) from 2nd February, 1982, until 12th

February, 2008, when the suit property was registered in favour of Khwisero Girls Secondary School, "the 1st respondent", without their knowledge and consent. The appellants asserted that they founded the 1st respondent and constructed some of the school infrastructures on part of the suit property, while the remainder of the suit property was utilized for church activities. They contended that they transferred key administrative roles of the day to day running of the school to the Government of Kenya, while the appellants retained the role of the main sponsor of the school, and a licensor in respect of part of the suit property occupied by the school.

2. The appellants stated that at no point did they transfer the entire stake in the school or any part of the suit property to the government. That sometime in 2008, the respondents encroached on part of the suit property utilized by the appellants for church activities claiming that the appellant had given them the said land. That on 8th December, 2008, the 1st respondent fraudulently acquired title to the whole suit property, with the help of the 2nd and 3rd respondents, thereby dispossessing the appellants of lawful ownership of the suit property. The appellants averred that the

respondents are now interfering with the appellants' peaceful possession of the suit

property, and had even gone ahead and destroyed the appellants' property within the suit property.

3. The appellants prayed for: a declaratory order that all judicial and quasi-judicial proceedings and orders that resulted in the sale and registration of the suit property in the name of the 1st respondent be declared null and void; an order cancelling the registration of the suit property in the name of the 1st respondent, and a further order reverting the same back to the appellants; injunctive orders restraining the respondents from interfering in any way with the appellants' business on the suit property, and or encroaching onto the appellants' property; *mesne* profits; and costs of the suit.
4. The respondents filed a further amended defence dated 21st March, 2018 denying all the averments made by the appellants in their amended plaint, and the particulars of fraud thereof.
5. The case was heard by way of *viva voce* evidence. PW1, Fredrick Mumia Wangara, a Reverend and trustee of the Full Gospel Churches of Kenya, told the court that the suit property was acquired by the church in 1982. It was his evidence that the 1st respondent was built by the church on

the suit property in the year 2000. The church oversaw construction of the school and the initial recruitment of the teachers. He stated that at no point

did the church transfer the suit property to a third party, nor was it notified of any public auction relating to the suit property. That sometimes in April 2008, the church learnt that the title to the suit property had secretly been transferred to the 1st respondent. PW1 testified that he visited the Lands offices at Kakamega and was able to obtain the transfer documents relating to the suit property. He stated that the transfer forms were signed by a Senior Executive Officer from the Chief Magistrate's Court at Kakamega, on behalf of the transferor. He stated that the property being transferred was listed as "***Khwisero/Wambulishe/1141"*** as opposed to ***Kisa/Wambulishe/1141,*** which is the suit property. He testified that the church has never been served with any court documents indicating the existence of any court proceedings relating to the suit property, which resulted in the sale of the suit property to the 1st respondent.

6. PW2, **Charles Omukholo Njisi**, a church elder, testified that the church purchased the suit property in 1982. He was a member of the church when it constructed the 1st respondent on the suit property. He testified that about the year 2005, a church elder, **Mr. Okutoyi**, was arrested for trespassing on the suit property allegedly because it

belonged to the 1st

respondent. PW2 stated that he informed PW1 who produced title documents indicating that the suit property was owned by the church. Later in 2007, the then Deputy principal of the 1st respondent showed him a public notice which showed that the suit property was being auctioned. PW2 informed PW1 and they decided to visit the Land offices and Court registry to find out what was happening. It was his evidence that at the Lands office, they found out that the suit property was still registered in the church's name. They were however not able to obtain court records which purported to have authorized the sale by public auction of the suit property.

7. DW1, **Rose Wandera Malema,** stated that she was the 1st respondent's school Principal and secretary to the Board of Governors. It was her evidence that the 1st respondent was no longer sponsored by the appellants as the sponsorship ended when the 1st respondent acquired the suit property through a public auction. She stated that the 1st respondent was now a registered county school, sponsored by the government.
8. DW2, **Justus Akatsa Shibutsi**, testified that he was the PTA Chairman at the 1st respondent from the year 2007 until

2009. He stated that they were not aware of any conflict between the church (purchasers) and the vendors of the suit property. He

stated that sometime in February 2007, the school's Deputy principal brought to their attention a public notice by the 3rd respondent which announced sale by public auction of the suit property. It was his evidence that the school put in motion steps to stop the auction of the suit property by making a down payment of Kshs.50,000 to the 3rd respondent, as the auctioneer's fees. That on 28th February, 2007, the 3rd respondent informed them that they were required to clear a decretal sum of Kshs.544,231.20 within 45 days, if they desired to stop the intended sale by public auction of the suit property. The 1st respondent paid the said sum through their advocates Bakhoya & Co. Advocates. It was his evidence that the appellants failed to honour their obligations as the purchaser of the suit property. He stated that after settling the decretal sum they embarked on the process of transferring the suit property to the 1st respondent.

9. At the end of the trial, the learned Judge found in favour of the respondents. The learned Judge determined that the 1st respondent acquired the suit property legally through a public auction that was sanctioned by a court order. She found that the appellants failed to prove the allegations of fraud against the respondents as particularized in their

amended plaint.

10. Dissatisfied with this decision, the appellants have lodged the instant appeal before us. They challenge the impugned decision on grounds that the learned judge erred: in dismissing their suit; in misapprehending the evidence on record and arriving at conclusions that were perverse; in holding that the appellant was party to the quasi-judicial proceedings before the Tribunal and the subsequent adoption of the Tribunal's award by Kakamega Chief Magistrate's Court, when there was no evidence on record to prove that they were enjoined as parties in the said proceedings; in determining that the suit property was sold to the 1st respondent in a public auction when evidence on record suggests that the intended sale by public auction was called off; in failing to adjudicate on key issues such as whether the Tribunal had the requisite jurisdiction to determine the claim before it, whether the award by the Tribunal and subsequent court order were validly enforced against the appellants who were not party to these proceedings, and whether the 1st respondent legally procured registration of the suit property; in failing to find that the 1st respondent acquired title to the suit property through a corrupt scheme; and lastly, in rendering a Judgment that failed to comply with the provisions of **Order**

21 Rule 4 of the **Civil Procedure Rules.**

11. The appeal was heard by way of written submissions. **Mr. Balusi** was on record for the appellants. It was his submission that according to the green card produced before the trial court, the suit property was originally jointly owned by **Atsali Nambenya** and **Mukwana,** until 12th August, 1970, when they transferred the same to five joint owners, namely, **Dishon Khalondo, John Rundieni, Daniel Onyango, Naftali Andenga** and **Francis Atemo.** He submitted that twelve (12) years later, the five proprietors transferred the suit property to the appellants, on 2nd October, 1982. He asserted that in the year 2000, the appellants founded the 1st respondent. Counsel urged that the appellants were never enjoined as parties to proceedings before the Tribunal, as well as in Kakamega CMCC Miscellaneous Application No. 171 of 2001, which culminated in an order of the court directing sale of the suit property in a public auction. He urged that the respondents in the miscellaneous suit were namely **Alela Abneri Jairo,** and **Samuel O. Omolo,** who were never established as trustees or agents of the appellant in any capacity.

12. Counsel for the appellants further submitted that the 1st respondent never purchased the suit property through a

public auction, as the evidence on record, and clear admissions by the

defence witnesses, indicated that the 1st respondent took steps to forestall the intended auction, and that the said auction never took place. He argued that what happened was that the 1st respondent settled the decretal sum with a view of redeeming the suit property. It was his submission that at that time, the 1st respondent was an amorphous entity wholly owned by the appellants, and it follows that any steps taken by the 1st respondent's officials to stop the intended sale of the suit property were done while acting as an agent of necessity of the appellants.

13. The appellant's counsel asserted that the only relief available to the 1st respondent was reimbursement of expenses of the sums allegedly paid to settle the decree, only if the said sums were not acquired from profits derived from the 1st respondent, which was essentially owned by the appellant. He held the view that this was a case of unscrupulous 1st respondent's officials who manipulated the judicial process through deceit and misinterpretation, and fraudulently acquired ownership of the suit property. He argued that they did so with the help of the 2nd respondent who instituted a fictitious suit. Counsel urged that any claim for purchase price owed was never justiciable before a Land

Dispute Tribunal for want of jurisdiction,

rendering any award and subsequent court order null and void. In the premises, counsel for the appellants urged us to allow the appeal and set aside the decision of the trial court.

14. The appeal was opposed. Counsel for the 1st respondent, **Mr.**

Kiveu, submitted that the 2nd respondent sued the appellants in Khwisero Lands Disputes Tribunal, whose award was adopted as the order of the court in Kakamega Misc. Application No. 171 of 2001. Counsel submitted that the said dispute was lodged by the 2nd respondent against the appellants and two others. He pointed out that the appellants were ordered to pay the 2nd respondent Kshs.300,000/= and that when they failed to settle the said decretal sum, the 2nd respondent took steps to execute the said decree against the appellants by way of public auction of the suit property. It was his submission that since the suit property hosted the 1st respondent, the 1st respondent stepped in and redeemed the suit property by settling the decretal sum. He argued that on redeeming the suit property, vesting orders were issued and the suit property was transferred to the 1st respondent. He submitted that the appellants filed another application *vide* Kakamega High Court Misc. Application No. 35 of 2002, seeking to quash the

award by the Tribunal. The application was however dismissed.

15. Counsel for the 1st respondent further submitted that the appellant failed to attach or specifically plead the judicial and quasi-judicial proceedings that he wished the court to declare null and void. He reiterated that the appellants bore the burden of proving that the alleged proceedings were unlawful, which they failed to do. He stated that the appellants had the option of lodging an appeal against the decision of the magistrate's court and the Tribunal but failed to do so. It was his argument that the allegations of fraud as particularized by the appellants were not sufficiently proved; that no evidence was led by the appellants to prove loss of user to warrant an award of mesne profits. Counsel urged us to dismiss the appeal with costs for want of merit.

16. This being a first appeal, the role of the first appellate court was well settled in the case of ***Gitobu Imanyara & 2 Others v. Attorney General [2016] eKLR***, where this court observed thus:

> ***"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 allowances in this respect."

17. Having evaluated the record of appeal, as well as submissions by the appellant, the principal issue that falls for determination by this Court is whether the trial court was justified in dismissing the appellant's suit.

18. **Section 26** of the **Land Registration Act 2012** provides as follows:

> ***(1) "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:***
>
> > ***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***
> >
> > ***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***
>
> ***(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."***

19. The above section of the **Land Registration Act** is

more or less a reproduction of **sections 27** and **28** of the

repealed **Registered Land Act** that the suit property was registered under.

20. The gist of the appellants' appeal is that the 1st respondent acquired title to the suit property through a corrupt scheme. The appellants argued that they were never parties to the proceedings before Khwisero Land Disputes Tribunal or in Kakamega CMCC Miscellaneous Application No. 171 of 2001, which resulted in an order for the sale of the suit property by public auction, and that the named respondents in that suit were neither trustees nor agents of the appellant. They contended that no public auction ever occurred; instead, the 1st respondent merely settled the decretal sum due to forestall the intended sale while acting as an agent of necessity on behalf of the appellant, since the 1st respondent was wholly owned by the appellants at the time. The appellants further asserted that the purported acquisition of the suit property was procured through fraud, deceit, and a fictitious claim improperly entertained by a Land Disputes Tribunal acting without jurisdiction, thereby rendering the award and subsequent court orders null and void.
21. After a re-evaluation of the record, we are in agreement with the finding of the learned Judge that the 1st respondent

legally

acquired the suit property through a court-sanctioned public auction of the suit property. The evidence on record shows that a decretal sum was outstanding against the appellants; that the appellants failed to settle the said sum; that steps toward execution had been commenced by the 2nd respondent by way of a public auction of the suit property, which was at the time owned by the appellants; and that the 1st respondent thereafter settled the decretal amount.

22. Whether the suit property was sold at a public auction or redeemed prior to the auction, the uncontroverted position is that execution had lawfully issued pursuant to a lawful court decree. The 1st respondent, faced with the imminent sale of the land upon which the 1st respondent stood, settled the decretal sum and thereafter a vesting order was issued culminating in registration of the suit property in favour of the 1st respondent. The 1st respondent was not party to the civil proceedings that led to the issuance of the decree against the appellants. The evidence before the trial Court showed that the appellants made no effort to settle the decretal sum or appeal against the decision to forestall the sale of the suit property by public auction. The 1st respondent, the immediate affected party took steps to protect the land on which the 1st respondent stood

otherwise the same would have been sold to third parties by public auction to the detriment of the 1st respondent. The appellants did not tender evidence to demonstrate that the vesting order issued was irregularly obtained or that the executing court lacked jurisdiction to issue them. In the absence of such proof, the presumption of regularity and legality attaches to the judicial proceedings.

23. The appellants pleaded fraud as particularized in their amended plaint. It is settled law that allegations of fraud must not only be specifically pleaded but must also be strictly proved to a standard higher than a mere balance of probabilities, though not beyond reasonable doubt. (See decision of this Court in ***M'Miti v Ndwiga (Civil Appeal 161 of 2019) [2025] KECA 2137 (KLR)***). The evidence tendered by PW1 and PW2 consisted largely of assertions that the transfer was 'secret'. No evidence was adduced to demonstrate falsification of records or collusion between the respondents. On the other hand, the defence placed before the court evidence of a decree, execution process and subsequent registration of the 1st respondent. The appellants did not rebut this cogent evidence with proof of impropriety. The

learned Judge therefore correctly concluded that the threshold for proof of fraud had not been met.

24. It was the appellant's submission that the 1st respondent, in settling the decretal sum acted as an agent of necessity. Agency of necessity arises when an agent, without prior authority, acts on behalf of a principal in an emergency to protect the principal's interests, where it was impossible to communicate with the principal, and the act was reasonably necessary to prevent a loss (See English decision in ***Great Northern Railway Co v Swaffield (1874) LR 9 Ex 132***). The burden of

proving such agency lies squarely on the party asserting it. In the present case, the appellants have not demonstrated the existence of any emergency that rendered the church impossible for it to act on its own behalf to rescue the property from sale by public auction. The appellants were fully aware of the award made by the Tribunal that was subsequently adopted as an order of the Court. The appellants chose not to appeal or challenge the said award. The appellants further chose not to settle the decretal amount. Execution proceedings were lawfully initiated pursuant to a lawfully obtained decree issued by the Court. The impending auction of the suit property was not an unforeseen emergency but the natural and lawful consequence of a valid decree. We were not persuaded by

the argument put forward by the appellants to the effect that the 1st respondent

were allegedly agents of necessity on behalf of the appellant who should not have had the suit property transferred to them. The 1st respondent found itself in an impossible situation which required its urgent intervention or else the fate of the hundreds of learners in the 1st respondent would have been jeopardized.

25. We are satisfied that there is no evidence on record of any express or implied authority granted to the 1st respondent school to act on behalf of the appellant in settling the decretal sum or in protecting the suit property from sale by public auction. The 1st respondent satisfied the decree and obtained registration of the suit property in its own name. Such registration confers *prima facie* indefeasible title under **section**

26 of the **Land Registration Act**, unless acquired through fraud, misrepresentation, or illegality, none of which was proved against the 1st respondent. The appellants' assertion that it "owned" the 1st respondent does not, without more, establish an agency relationship. Agency must be proved; it cannot be presumed.

26. The appellant's claim that they were not party to the proceedings that led to the sale of the suit property is

unfounded. We note that the appellants lodged an application vide *Misc. Civil Application No. 35 of 2002* before the High Court

of Kenya at Kakamega, which was dated 5th March, 2002. The application was against the **Honourable Attorney General**, **Khwisero Land Disputes Tribunal**, and **Atsali Nambwenya** (the decree holder in Kakamega CMCC Misc. Application No.

171 of 2001) as an interested party. In the application, the appellant sought an order of certiorari to quash the decision of Khwisero Division Land Disputes Tribunal in its award dated 7th August, 2001 in respect of the suit property, which award was adopted as an order of the court in Kakamega Chief Magistrate's Court Misc. Civil Application No. 171 of 2001. This showed that the appellants were aware of the proceedings against them. The appellants did not demonstrate that they successfully challenged those proceedings in the appropriate forum. Instead, they lodged a separate application which was dismissed, as the learned Judge held the same view, that the appellants ought to have exhausted the proper and available appellate channels. Having failed to challenge the original judgment, the appellants cannot, through this appeal, indirectly reopen issues conclusively determined by a Court of competent jurisdiction.

27. We have said enough to show that the appellants' failed to establish their case before the Environment and Land Court on

a balance of probabilities. The 1st respondent legally acquired title to the suit property. In the circumstances, we are satisfied that the learned Judge addressed herself correctly on the law, based on the evidence tendered before the trial court. The appeal before us has no merit. It is hereby dismissed with costs to the 1st respondent.

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

ASIKE-MAKHANDIA

.....
... JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL

L. KIMARU

.....
.... JUDGE OF APPEAL

I certify that this is a true copy of original.

Signed

DEPUTY REGISTRAR