



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 136 OF 2014

ANTONY TED ANDREW HOAREAU.....PLAINTIFF

VERSUS

MARY MUTHONI WANJOHI.....DEFENDANT

JUDGMENT

(Plaintiff seeking to cancel defendant's title and to be registered as proprietor; plaintiff having purchased suit land from previous proprietor; plaintiff handing over the transfer documents to an agent to effect transfer; agent forging a sale agreement purporting to have purchased the land from the original owner and proceeding to sell the land to the defendant; defendant arguing that she is an innocent purchaser for value; defendant not making any inquiry from the original owner on the sale to the agent; defendant cannot be afforded the defence of an innocent purchaser for value; defendant's title cancelled; court unable to order title to be registered in the name of the plaintiff as no consent of the Land Control Board obtained; title to revert back to original owner)

1. This suit was commenced by way of a plaint which was filed on 19 May 2014 and amended on 17 June 2016. The original plaint, had two defendants, Mary Muthoni Wanjohi as 1st defendant and James Kariuki Kiongo (Kariuki or Kiongo) as 2nd defendant. It however emerged that at the time the suit was filed, the 2nd defendant had already died. The plaintiff then amended the plaint to remove his name from the proceedings, and there is therefore only one defendant, Mary Muthoni Wanjohi.

2. It is the plaintiff's case that he purchased the land parcel Naivasha/Mwichiringiri Block 5/595 (hereinafter referred to as "the suit land") from the then registered owner, one Stephen Mwangi Wangethi (Mwangi or Wangethi), sometimes in the year 2009 at a consideration of KShs. 350,000/= which he paid in full. The vendor then handed over to him the requisite transfer documents being his PIN certificate, passport size photographs, copy of his national identity card, executed transfer forms and the original title deed, to enable the plaintiff transfer the property to himself. The plaintiff then entrusted these documents to his agent, the said Mr. Kiongo (now deceased) to proceed with registration of the same. It is claimed that what Mr. Kiongo did, was to transfer the land into the name of Mary Muthoni Wanjohi, the now sole defendant, and not to the plaintiff. The position of the plaintiff is that this transfer to the name of the defendant was done fraudulently by the defendant and the following particulars of fraud are pleaded :-

- (a) *Causing the registration of the suit land in her favour.*
- (b) *Causing the registration of the suit land in her favour when reasonably knowledgeable that she did not have any right over the property to the detriment of the plaintiff.*
- (c) *Causing registration of the suit land in her favour without following due process of law.*
- (d) *Failing and neglecting to perform due diligence before registering the plaintiff's property in her favour.*
- (e) *Causing registration of the suit land in her favour even after establishing that it was registered in favour of Stephen Mwangi Wangethi.*
- (f) *Tendering forged documents to the lands office purporting to confer title over the suit land in her favour without any colour of right.*
- (g) *Failing, neglecting to enquire and/or contact either the plaintiff or the previous owner of the suit land before fraudulently proceeding with registration in her favour.*
- (h) *Proceeding with registration of the title into her favour without consent from the Land Control Board or paying any*

consideration or following the other prerequisite mandatory procedures.

(i) Processing the registration in her favour when reasonably aware that she never had any colour of right.

(j) Failing and neglecting to perform the pre-requisite due diligence before her unlawful act.

3. It is common ground that Mr. Kiongo was in the case Naivasha Magistrate's Court Criminal Case No. 3098 of 2009, charged with forgery, uttering a false document, obtaining money by false pretenses, and making a document without authority, all in relation to the transaction that led to the registration of the suit property to the name of the defendant. Mr. Kiongo was found guilty of all these counts and sentenced to some years in jail. He died in prison.

4. It is thus the case of the plaintiff that the registration of the suit property into the name of the defendant is illegal, fraudulent, null and void and ought to be reversed through the cancellation of her title. The plaintiff has further sought a declaration that he is the rightful and legal owner of the suit land, vacant possession and in default an eviction order against the defendant, a permanent injunction to restrain the defendant from the suit land, or in the alternative payment of money equivalent to the current market value of the land. The plaintiff has also claimed a sum of Kshs. 23, 200/= which was used to advertise the suit for purposes of serving summons to Mr. Kiongo (when he was 2nd defendant), as it is his position that the defendant knew of his whereabouts but never disclosed the same thus making the plaintiff incur this expenditure.

5. The defendant's position on this dispute as noted in her defence, is that there was no sale agreement between the plaintiff and the said Stephen Mwangi Wangethi nor was Mr. Kiongo an agent of the plaintiff. She has averred that the truth of the matter is that Mr. Wangethi sold the suit land to Mr. Kiongo, who in turn sold it to her (the defendant). She has averred that it was Mr. Wangethi who tried to sell the property to two persons and that the remedy of the plaintiff is to recover whatever he paid to Mr. Wangethi. She has contended that she is an innocent purchaser and she has denied colluding with Mr. Kiongo to obtain title. According to her, her transaction was above board and open, and the entire legal process was followed. She has asserted that her title is clean.

6. The plaintiff testified and called Mr. Wangethi as his witness. In his evidence, the plaintiff testified inter alia that he purchased the suit land from Mr. Wangethi on 7 April 2009 at a consideration of Kshs. 300,000/= which he said he paid in full. He produced the sale agreement as an exhibit. He stated that Mr. Wangethi then gave him a copy of his ID Card, photographs, PIN and the title deed to enable him transfer the title to himself. He testified that he gave these documents to Mr. Kiongo and the sum of Kshs. 15,000/= to enable him register the transfer. Mr. Kiongo did not effect the transfer and stopped picking the plaintiff's calls. Eventually, the plaintiff reported the matter to the police and Mr. Kiongo was arrested and charged with forgery and convicted. It was then discovered that Mr. Kiongo has transferred the land from Mr. Wangethi to the defendant.

7. Cross-examined, he testified that it was Mr. Kiongo who introduced him to Mr. Wangethi. He stated that Mr. Wangethi signed his part of the transfer form, but he, the plaintiff did not sign on his part. He confirmed that the sale agreement provided that the sale was subject to the consent of the Land Control Board but they have not yet lodged any application for consent and consent has not yet been issued. He agreed that he is yet to be registered as proprietor and stated that what he now wants is for title to be registered into his name. He affirmed that the sale agreement that he had with Mr. Wangethi, entitled him to take possession, but he admitted to not having taken possession nor fencing the land. He also had no evidence that he paid stamp duty or transfer fees for the land. He stated that it was Mr. Kiongo who defrauded him and had no answer when asked whether the defendant has committed any fraud. He stated that Mr. Kiongo was nobody's agent, as he was just a land broker, who connected him to the seller. He said that he was paid by both himself and Mr. Wangethi. According to him, Mr. Kiongo died without leaving a family, and he has not followed up on whether anyone has taken out letters of administration for his estate. He sued Mr. Kiongo in this matter as he was not aware that he had already died.

8. Mr. Stephen Wangethi Mwangi, in his evidence, stated that he did sell the suit land to the plaintiff at Kshs. 350,000/= which money was paid in full. The sale agreement was prepared and executed at an Advocates' office. He then signed the transfer form and gave the buyer his ID, PIN and passport photographs so as to enable him transfer the land to himself. He affirmed that he did not sell the plot to Mr. Kiongo. In the year 2009 he was informed that Mr. Kiongo has transferred the land to himself and later to the defendant. It is then that Mr. Kiongo was arrested and charged.

9. Cross-examined, he denied that Mr. Kiongo was his agent and also the agent of the plaintiff. He identified Mr. Kiongo as a broker who looked for a buyer for his plot. He had assigned his cousin (Patrick Kaniu) to get a person who can sell the land and his cousin contacted Mr. Kiongo. He met Mr. Kiongo for the first time in the Advocates' office. Questioned about whether consent of the Land Control Board was obtained, he stated that it was the duty of the buyer to follow up on it but no application for consent was executed. He denied having sold the suit land to the defendant and did not know how the title was transferred to her. He stated that he intended to sell the land to the plaintiff and not the defendant and did not authorize the transfer of the land to the defendant. He agreed that the fault was with Mr. Kiongo who transferred the land to the defendant and that the defendant was not at fault. He admitted that he has filed no suit regarding the transfer of the title his explanation being that he had already sold the land.

10. With the above evidence, the plaintiff closed his case.

11. In her defence, the defendant testified inter alia that the suit land was sold to her by Mr. Kiongo on 4 June 2009. She had an interest in buying land within the area of the suit land and a friend introduced her to Mr. Kiongo. She did a search which showed that the land belongs to Mr. Wangethi Mwangi (PW-2) and the land was sold to her at Kshs. 340,000/=. She first paid a deposit of Kshs. 200,000/=. Mr. Kiongo gave her the original title deed and the other requisite transfer documents belonging to Mr. Wangethi Mwangi, and a document from the Land Control Board. She gave these documents to Mr. Kiongo and a surveyor to transfer them to her name, which was done, after which she paid the balance. She produced as her exhibit the sale agreement between herself and Mr. Kiongo. She also produced a copy of the title deed, now in her name. She denied colluding with Mr. Kiongo to defraud the plaintiff. She testified that there was nothing on the ground which would have showed that the plaintiff had purchased the land. She was confident in purchasing the land as Mr. Kiongo had a sale agreement from Mr. Wangethi Mwangi and all the documents needed to transfer title from him. It is when she went to fence the plot that she was called

by the police (CID).

12. Cross-examined, she stated that she was introduced to Mr. Kiongo in March 2009 and he presented that the land belongs to him. She was questioned as to why she has not produced the sale agreement between Mr. Wangethi Mwangi and Mr. Kiongo and she stated that the same was collected by the CID. She did not know Mr. Wangethi Mwangi before, and everything was handed over to her by Mr. Kiongo. She stated that she would not have purchased the land if she had known that this land has not been sold to Mr. Kiongo and she purchased it with the knowledge that it belonged to Mr. Kiongo. She was not aware of any fraud.

13. With the above evidence, the defendant closed her case.

14. In his written submissions, Mr. Orege, learned counsel for the plaintiff, submitted inter alia that failure of the plaintiff and Mr. Wangethi Mwangi to obtain consent of the Land Control Board, does not render their transaction void, and he referred me to the case of **Willy Kimutai Kitilit vs Michael Kibet (2018) eKLR**. He thought that the defendant was party to the fraud or did not conduct proper due diligence as she never met the owner of the land before purchasing it from Mr. Kiongo. He submitted that the property was hurriedly transferred to the defendant even before the whole purchase price had been paid and that there was no consent of the Land Control Board. He also raised issue that the defendant was aware that Mr. Kiongo has been charged and convicted and never took steps to sue him, but instead visited him in prison, and obtained warrants confirming his death. He submitted that the title of the defendant ought to be cancelled and referred me to Section 26 of the Land Registration Act, 2012 and she be permanently restrained from the property.

15. On the other hand, Mr. Karanja Mbugua, learned counsel for the defendant, inter alia submitted that this court cannot enforce the sale agreement between the plaintiff and Mr. Wangethi Mwangi, as no consent of the Land Control Board has been obtained and he pointed me to a chain of authorities (at least eight in number) including the Court of Appeal decision in the case of **David Sironga ole Tukai vs Francis arap Muge & 2 Others (2014) eKLR**. He further submitted that the defendant is an innocent purchaser for value and she obtained good title. He relied on the Ugandan case of **Katende vs Haridas & Company Limited (2008) 2 EA 173**, and the case of **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another (2000) eKLR** on proof of fraud, and finally the case of **John Kamunya & Another vs John Nginyi Muchiri & 3 Others, Nakuru Civil Appeal NO. 123 of 2007**.

16. I have considered all the above in arriving at my decision and I take the following view of the matter.

17. Firstly, I do not think that it can be disputed that the plaintiff had a sale agreement with the original owner of the suit property, Mr. Wangethi Mwangi. That agreement was produced in evidence and both seller and purchaser did affirm that the sale agreement is authentic. I also find that upon execution of the sale agreement, the seller did hand over to the plaintiff, the executed transfer instruments, PIN, ID and the original title deed so that the plaintiff may transfer the property to himself. I have no doubt in my mind that these documents were then given to Mr. Kiongo so that Mr. Kiongo can transfer the property to the name of the plaintiff. Now, Mr. Kiongo did not transfer the land to the plaintiff but what he did, and I have gathered this from the proceedings in the criminal case, is that he forged a sale agreement purporting that PW-2 has sold the land to him. He was indeed found guilty of forging this purported sale agreement. Armed with this sale agreement, he pretended that the land has now been sold to him and he looked around for buyers. Since he had the transfer documents, he could transfer the land to whomever he could convince to buy the property, which is exactly what he did. The defendant was looking around for a property and the suit land was presented for sale. The defendant looked at what Mr. Kiongo had and was persuaded from the sale agreement that he had purchased the land from the original owner PW-2, and could thus sell the land to her. She proceeded to transact with Mr. Kiongo and the property was transferred to her.

18. I have no doubt in my mind that Mr. Kiongo had no land to sell. He never purchased one, and he had no title in his name. The only task that he was given was to transfer the title from PW-2 to the plaintiff. He never did this, but instead, he forged a sale agreement purporting to have bought the land from PW-2, and rather than transfer the land to the plaintiff, he transferred it to the defendant. This was a fraudulent act on the part of Mr. Kiongo.

19. The transactions herein and the registration of the land to the defendant took place under the regime of the Registered Land Act (now repealed) and Section 143 applies. It provides as follows :-

143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

20. Ordinarily, therefore a title acquired by fraud or mistake is subject to cancellation. However, Section 143(2) does provide a defence to a proprietor, the so called, bona fide purchaser who had no notice of the fraud. That is exactly the defence that the defendant has availed herself in this case and Mr. Karanja has cited the Ugandan Court of Appeal case, of **Katende vs Haridas & Co**. It was held inter alia in the case, that for a purchaser to successfully rely on the bona fide doctrine he must prove the following :-

(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.

21. The above decision is of course not binding and is only of persuasive value. If I am to take cue from it, the defendant would still fail the test of being an innocent purchaser for value, for the vendor in this instance, did not have a valid title. He held a title that was in the name of PW-2 but pretended that PW-2 had sold to him the land. I think the defendant had a duty in conducting her due diligence, to contact the person shown to be the registered owner of the land, for it is this person who was going to transfer the land to her. She never did so. Borrowing from the dictum of Okello JA, in the Ugandan case of *Sir John Bagire vs Ausi Matovu*, Court of Appeal at Uganda, Civil Appeal NO. 7 of 1996 cited in the *Katende vs Haridas* Case), "...lands are not vegetables that are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only of the land but also of the seller before purchase." In the same *Katende vs Haridas* case, the following dictum in the case of *Mpagazihe & Another vs Nchumisi (1992-93) HCB 148*, was cited, "a purchaser who without investigating whether his predecessor had any title or Power of Attorney to sell the land could not be held as bona fide purchaser."

22. I do not see, how the defendant, assuming that the bona fide purchaser defence can be available to her, can be said to be innocent. She could only be said to be innocent if she showed that she did all the necessary due diligence and background check on the property and also of the seller, given that the seller never had title in his own name. She never did this, and I do not see how she can claim to be an innocent purchaser for value. It will be seen that Section 143(2) does not protect a proprietor who "caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."

23. In the instance of this case, I do not hesitate to find that the defendant substantially contributed to the fraud, by her neglect or default, in failing to investigate whether Mr. Kiongo actually held a valid sale agreement with the original land owner, as he had purported to hold himself out as having. A simple inquiry would have revealed that Mr. Kiongo was a fraudster. Moreover, I have no evidence that she appeared before the Land Control Board since it does appear that the suit property was in a controlled area. Having no title to the suit property, the defendant must vacate the same and is also permanently enjoined from using the same. I sympathise with her, but the fact of the matter remains that she was conned by Mr. Kiongo; Mr. Kiongo had nothing to sell, and could not transfer title to her.

24. I am not in doubt that the title of the defendant is therefore liable to be cancelled and I proceed to cancel the same. In his case, the plaintiff has sought to have title to the suit property. Mr. Karanja in his submissions argued that this court cannot order the transfer of the title to the plaintiff for want of consent of the Land Control Board. The issue of whether or not consent of the Land Control Board is mandatory now appears to be unsettled, as there seems to be conflicting Court of Appeal decisions. Mr. Orege referred me to the case of *Kimutai Kitilit* whereas Mr. Karanja referred me to the case of *David Sironga*. In the former the Court of Appeal upheld a transaction where consent of the Land Control Board was not obtained, whereas in the former, the Court of Appeal held a different opinion. On my part, I will follow what is provided in statute, for the law has not yet been repealed, and the law is that consent of the Land Control Board is required as provided for in the Land Control Act Cap 302.

25. The plaintiff's agreement appears to have been subject to consent of the Land Control Board which means that without consent the agreement cannot be enforced. I concur. I cannot order transfer of the land to the plaintiff and it follows that the title will have to revert back to PW-2 and not to the plaintiff. Transfer of the land from PW-2 to the plaintiff can only be passed if consent of the Land Control Board is obtained and I have not been shown any such consent. Upon cancellation of the title of the defendant, the land to revert back to the name of PW-2, Mr. Wangethi Mwangi.

26. I think I have dealt with all issues save for costs. Costs ordinarily follow the event, but in the instance of this case, and being greatly sympathetic to the defendant, I will make no order as to costs.

27. I now make the following final orders :-

(a) That the title of the defendant to the land parcel Naivasha/Mwichiringiriri Block 5/595 be and is hereby cancelled and the said title to revert back to the name of Stephen Mwangi Wabethi.

(b) That the defendant do vacate the land parcel Naivasha/Mwichiringiriri Block 5/595 within 14 days of today and is also permanently restrained from entering, being upon, utilizing, occupying or selling, charging, or in any other way dealing with the title to the said land.

(c) That there shall be no orders as to costs.

28. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 20th day of November 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Mr. Bizimana holding brief for Mr. Orege for the plaintiff.

Mr. Karanja Mbugua for the defendant.

Court Assistants: Nelima Janepher.

Carlton Toroitich

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU