REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT CHUKA

CHUKA ELC CASE NO 108 OF 2017

FORMRLY MERU ELC CASE NO. 12 OF 2009

JOHNSON NKONGE O. M'RUCHA.....1ST PLAINTIFF

ABDUL RASHID MBAE MAGAMBO.....2ND PLAINTIFF

VERSUS

JOHN PHARES NJERU M'ITHAARA.....1ST DEFENDANT

JUSTUS MURUJA MASA.....2ND DEFENDANT

JUDGMENT

BACKGROUND

1. This suit revolves around land parcel number MWIMBI/S.MUGUMANGO/1419.

There were 2 suits namely Meru CMCC 8 of 2010 in which the parties were Abdul Rashid Mbae Magambo versus John Phares Njeru and Justus Muruja Musa. The second suit was Meru HCC 12 of 2009 in which the parties were Johnson Nkonge M'Rucha versus John Phares Njeru. The 2 files were consolidated into Meru HCC 12 of 2009 and transferred to Chuka as ELC 108 of 2017. In the present case Abdul Rashid and Johnson Mkonge are the plaintiffs while John Phares Njeru and Justus Muruja Musa are the defendants.

2. MERU HCC 12 OF 2009

Johnson Nkonge had sued John Phares Njeru in Meru HCC 12 of 2009 for:

a) An order directing the defendant to pay the plaintiff damages for breach of contract.

b) costs of the suit

c) Interest thereon

d) Any other and better relief the Court may see fit to grant.

3. The facts are that John Phares failed to pay balance on purchase price for sale of the suit property executed on 7/8/2003. He indicated that in good faith, he had already transferred the same to John after receiving the deposit. But Johnson Nkonge got the same back via an LDT case no. 23 of 2007.

MERU CMCC 8/2010 FORMERLY CHUKA PMCC 77 OF 2009

4. Abdul Rashaid sued John Phares Njeru in Chuka PMCC 77 of 2009 which was transferred to Meru and Rashid amended to include Justus Muruja Musa as the 2nd defendant and the matter took on a new case number of Meru CMCC 8 of 2010. His claim was for:

1. A declaration that the Registration of the defendant as the proprietor of LR MWIMBI/S.MUGUMANGO/1419 on 24/4/2009 on the strength of the orders issued on 18/2/2009 and which orders the plaintiff was not party to was irregular and fraudulent and the

District Land Registrar Meru South be directed to rectify the register and reinstate the Plaintiff as the registered owner of LR No. MWIMBI/S.MUGUMANGO/1419.

2. An order of permanent injunction against the defendants restraining them, their agents, kin and/or anyone working under their instruction from whatsoever interfering in any manner with the peaceful utilization and occupation of LR MWIMBI/S.MUGUMANGO/1419.

3. An order of declaration that the registration of LR MWIMBI/S.MUGUMANGO/1419 in the names of the 1st defendant through Chuka LDT No 23 of 2007 proceedings and further transfer of the suit land to the 2nd defendants was fraudulent and a cancellation order to issue against the 2nd defendant's title on LR MWIMBI/S.MUGUMANGO/1419 to revert to the plaintiff's name.

4. Alternatively, an order of compensation do issue of all the current and subsequent developments by the Plaintiff on LR MWIMBI/S.MUGUMANGO/1419 since purchase supported by Agricultural and extension officer's report and/or as enumerated in paragraph 6A above.

5. Costs of the suit

6. Interest thereon at the usual court rate.

7. Any other better relief appropriate in the circumstances.

5. The facts relied upon are that he was the registered owner of the suit property having purchased it from Johnson Nkonge but the defendants caused it to be registered in the name of the 2nd defendant. During the pendency of tribunal proceedings, he was still the registered owner. At all times since purchase, he has had possession of the land which he has extensively developed. He sought a permanent injunction against the defendants, a declaration that the transfer of the suit land to the 1st defendant through the LDT 23/2007 was void ab initio, a rectification of register to reinstate him as owner or alternatively an order for compensation for all his developments.

6. In defence, John Phares and Justus Muruja Musa had stated that the suit land was subject of court proceedings and they were not privy to the plaintiff's claim or that of Johnson Mkonge. They said the plaintiff should not have purchased the land knowing it was subject to court proceedings and should seek refund from Johnson Nkonge.

WITNESS EVIDENCE FOR THE PLAINTIFFS

7. **PW1** was Johnson Nkonge O M'Rucha. He stated that:

1.John Phares Njeru is his cousin.

2.He adopted his statement of 21/8/2014.

3.The land in issue is in Mwimbi South Mugumango and Abdul Rashid who purchased the land, is on the land and has cultivated crops and trees thereon.

4.PW1 had an agreement in 2002 with John Phares but John Phares failed to pay the sum of KShs. 690,000/= and the agreement was not honoured. He paid KShs. 307,000/= only.

5.John Phares tricked PW1 into signing transfer for the land when the witness was sick.

6.He requested the documents filed on 30/9/2011 be used as evidence.

8. In cross-exam, PW1 stated that he was selling the land to John Phares and the land had a school on 2 acres and an additional 1 acre. When the contract was not fulfilled, the parties went before the Tribunal which ruled that either John Phares completes the payment or PW1 refunds the money received. This award was adopted by a Chuka court but none of them paid the other. PW1 states that Njeru corrupted a magistrate and the land was given to him as registered owner in 2003. PW1 went to court and the land was reverted to him on 18/11/2008. PW1 then sold to Abdul Magambo who was registered as owner on 29/12/2008. On 24/9/2009 Njeru got an order giving him back the land. Njeru then transferred the land to Justus Muruja Musa but has never paid PW1 the balance of the purchase price. He got a title on 6/9/2009. PW1 filed HCCA 27 of 2009 Meru which became Chuka CA 32 of 2017. This suit was dismissed for lack of prosecution on 6th April, 2017.

9. In re-exam, PW1 told the court that Njeru paid Kshs. 307,320/= while the agreement was for Kshs. 1,000,000/=. He told the court that the land is in the name of the 2nd defendant. PW1 also testified that he did not refund Njeru the money he was paid. PW1 told the court that he signed transfer forms when he was sick.

PW2, Rose Kawira, the plaintiff's (PW1) wife, testified that:

1. She knows John Phares Njeru as her husband's cousin and a purchaser of Mwimbi/Mugumango/1419.

2. She adopted her witness statement dated 4/9/2018.

10. In cross-exam, PW2 stated that her husband sued John Phares at the LDT and a decision was rendered in their favour but added that her husband never refunded John Njeru's money. She, however, told the court that her her husband paid Njeru some money after he was arrested and thereafter filed an Appeal. She did not know any other details concerning that matter.

11. In re-exam, PW2 stated that her husband was arrested only because of an issue of court costs.

12. PW3 was Abdul Rashid Mbae Magambo. He stated that:

1. He adopted his witness statement dated 15/8/2014.

2. He moved into the suit property immediately after he bought it wherein he fenced it and built a small house and a cow shed.

3. He has the title deed to the property.

13. In cross-exam, PW3 stated that he bought the land towards 2008 from Johnson Nkonge. They had an agreement but he did not have a copy. He left his copy at the police station when he went to report that the 1st defendant had broken into his house. The green card shows the title issued to PW3 on 29/12/2008 was cancelled and the name of John Phares Njeru was entered.

14. PW3 testified that he filed Chuka PMCC 77 of 2009 which is the present case after consolidation and transfer. He had no reason to sue Johnson Nkonge who sold the land to him as he still wanted the land to be transferred to him.

15. PW3 told the court that Nkonge misled him that he had paid all the money due to Njeru. He told the court that they all went to the police and the chief was involved and they were all told not to enter the land until conclusion of the court case.

16. In re-exam, PW3 stated that the order shown on the green card was what returned the land to Nkonge and had nothing to do with this case. PW3 reiterated that he had followed due procedure and was not made aware when the land was reinstated to the 1st defendant.

WITNESS EVIDENCE FOR THE DEFENDANTS

17. DW1, John Phares Njeru the 1st defendant testified as follows:

1. He adopts his two statements dated 3/7/2012 and 10/5/2016. He also relied on documents filed 3/7/2012.

2. He bought land from the 1st plaintiff which had a school and amenities. They disagreed because Nkonge destroyed classes and the pupils left. His interest was the school.

3. The tribunal order said the 1st plaintiff was to refund to the 1st defendant the amount of money paid to him with interest.

4. After the court gave DW1 the land, his wife got sick and he sold the land to Justus Muruja Musa for KShs. 310,000/= as it had no school.

18. In cross-exam, DW1 said he and PW1 entered into their agreement in 2002. In 2002 he paid Kshs. 50,000/= and in 2004 he paid Kshs. 257,320/=. He did not enter the suit land in 2002 but entered after the 2nd payment of 257,320/= around 2003 or 2004. According to his evidence, he did not pay any other monies as the school was demolished and he lost interest in the land. He told the court that he reported the matter to the police. Later on, the tribunal ordered the 1st defendant to restore the status quo and then DW1 would pay him. Nkonge never paid any money to him.

19. DW2, Justus Muruja Musa, stated that he wanted the court to adopt his witness statement dated 14.7.2017 along with attached documents as his evidence in this suit.

20. In cross-exam, DW2 stated that he purchased the suit land for KShs. 310,000/= from John Phares Njeru. He said that John Phares Njeru was his brother.

21. The 1st Plaintiff's submissions were filed on 30/10/2018. They submit that the sale between the 1st plaintiff and the 1st defendant is not disputed. They state that the 1st defendant did not pay the balance of the purchase price and thus breached the agreement. They rely on the case of Lulume vs Coffee Marketing Board (1970)EA 155. They also rely on the case of Total Kenya Ltd vs Joseph Ojiem, HCC 1243 of 1999. They submit that this Court can invoke Section 80 of the Land Act to cancel a title. They submit that the sale by 1st plaintiff to the 2nd plaintiff was valid and the 2nd Plaintiff was adversely affected by the court's order cancelling his title deed when he was not made a party to the case and his right to be heard was violated. They say that the Land Registration Act states that a title can only be cancelled if acquired through fraud or misrepresentation. They conclude that the court order of 18/2/2009 is what reinstated the 1st defendant's title and the same was improper. They attached the ELC Case 276A of 2017 Alton Homes vs Davis Chelogoi Nairobi HCCC 193 of 2010 [2018] eKLR and Nairobi High Court case 727 of 2012 Edney Adaka Ismail vs Equity Bank [2014] eKLR. The first case Alton Homes has to do with specific performance and illegal levy of distress and in that case, the parties were willing to complete the sale and were ordered to do so. It differs from our present case. The second case, Edney Adaka (op cit) was an application to reinstate another application. I fail to see the relevance of

this cited case to the 1st plaintiff's submissions. However, the court stated that mistakes of an Advocate happen but litigants must also show active follow up steps in their cases.

WRITTEN SUBMISSIONS BY THE DEFENDANTS

22. The defendants filed joint submissions on 12/10/2018. They state that there have been several cases filed by the plaintiff including the Mwiti LDT Case No.23/2007 and its subsequent adoption by the Chuka Magistrates court. An appeal at Embu Provincial Disputes Committee was dismissed. Chuka ELC Appeal 27 of 2009 remains unprosecuted. And there was also Meru HCC 12 of 2009. All these cases amount to gross abuse of court process. They submit that the plaintiffs have not proven their case. They state that the 2nd plaintiff was aware of the ruling of the SPM court which adopted the LDT decision and in which the plaintiffs did not appear but went on to file Chuka PMCC 77/09, which was transferred to Meru as CMCC 8 of 2010. They submit that the Chuka orders of 18/2/09 remain in force and the 2nd defendant rightly owns the property and should be allowed to take possession.

23. The defendants rely on the case of Margaret Wanjiku Kamau vs John Njoroge and Another (2005)eKLR regarding the need for a buyer to exercise great caution during a purchase. The said case was to do with an issue of allocation of public utility plots which arose post-purchase. It was stated that the approval of the Provincial Planner was wrongly obtained and the Commissioner of Lands was liable for creating a plot wrongly and not the Nakuru Municipal Council. They also rely on the case of Suleiman Rahamtulla (2014)eKLR to the effect that the Applicants were aware of the factors affecting the title and were not purchasers for value. This case involved public international policy as the Government of Somalia which was involved in a transaction had ceased to exist and the lawyers should have consulted the relevant Ministries on the apposite procedures.

ISSUES FOR DETERMINATION

24. Issue 1: Is the present suit an abuse of court process and res judicata?

The defendants bring to the Court's attention that the suits filed by the 1st plaintiff are Mwiti LDT 23/2007 and subsequent adoptions by the Chuka magistrates court, Embu Provincial Disputes Appeal(dismissed), Chuka Elc Appeal 27 of 2009 (dismissed for want of prosecution) and Meru HCC 12 of 2009.

25. The 2nd plaintiff is also stated as having been aware of the Chuka Court's proceedings following LDT 23 of 2007 but went on to file a case in Chuka PMCC 77/09 which later became Meru CMCC 8 of 2010. The court has noted that the 2nd plaintiff applied to be added as an interested party in the Chuka Magistrates Court but his application was dismissed.

26. The defendants have proffered Nyeri **ELC CASE 201 OF 2012** [2005] eKLR in which the Court stated that to prove a P.O. on res judicata, a party must show that:

a) The parties to the suit are the same

b) The title in dispute is the same

c) The matters in issue are identical

d) There is similarity or concurrence of jurisdiction

e) Finality of the previous decisions

27. In the above case, the P. O. was upheld because the parties had had a suit involving the same parties and the same issues concluded before the High Court which is a court of similar jurisdiction. They have also proffered Embu Civil Appeal 8 of 1998 [2005] eKLR. In that case, res judicata was upheld because the parties litigated before the LDT, then moved to the Magistrates Court and then onwards to the Appeals Committee.

28. The matter herein is very different in terms of facts. With regard to Meru HCC 12 of 2009, the same parties were the parties in the LDT case, at the Provincial Appeals Committee, at the lower court and at the High Court. The title was also the same. The suits were all concluded at the LDT, Appeals Committee and Magistrates Court. However, those bodies were not of similar jurisdiction. The 1st plaintiff did file a further Appeal case at Meru as HCCA 27 of 2009 which was transferred to Chuka as ELC Appeal 32/2017 which was dismissed for non-prosecution on 6th April, 2017. It appears that the 1st plaintiff sought to abandon that claim and pursue the present one. As a result, though the case existed in a court of similar jurisdiction, the ELC Appeal did not have a determined decision. Therefore the claims of res judicata fail on all fronts as against the 1st plaintiff.

29. Meanwhile the 2nd plaintiff is also accused of abusing the Court process as he was aware of LDT 23 of 2007 at the Magistrates Court but chose to file another suit, CMCC 8 of 2010, at Meru. However, it is clear that the 2nd Plaintiff Abdul Rashid was never a party to the proceedings before the LDT itself or before the matter at Chuka Magistrate Court. He did file an application to be enjoined in the case before the Magistrates Court as an interested party but his application was dismissed. Therefore he sought recourse by way of another suit and cannot be faulted for that. Therefore, although the title was the same and the Courts were of equal standing, the parties were different. The issue of res judicata fails against the 2nd plaintiff as well.

30. Issue 2: Does failure by Abdul Rashid (2nd plaintiff) to file a sale agreement invalidate his claim?

The defendant's submissions bring up the issue of lack of an agreement as required by the Law of Contract Act Cap 23, in Section 3(3) when a party makes a claim based on a sale of land.

The section states:

> (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> (a) the contract upon which the suit is founded—
>
> (i) is in writing;
>
> (ii) is signed by all the parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

31. Our courts have held that the above section is mandatory and have many times declared that such a contract cannot be enforced if the contract of sale is not availed.

However, I do find that the suit filed by the 2nd plaintiff was not founded on the contract between himself and Johnson Nkonge, the 1st plaintiff. Pursuant to that agreement, he already had a title deed in his favour cancelled by action of the 1st defendant and therefore that contract for sale was not in issue and thus he did not sue the other party in the contract. He sued to have his title deed, one already issued previously, protected against third parties. Therefore the agreement between the plaintiffs was not in issue for the Court to delve into the interpretation of the same.

32. Seeing as the land in issue was transferred between the 2 plaintiffs and the same is not disputed between them as vendor and purchaser respectfully, then in the interest of justice, the registration of the 2nd plaintiff should not be cancelled just because there is no contract of sale. The proprietor himself has not denied selling the land to him and has not challenged the 2nd plaintiff's title deed. Additionally, none of the parties have challenged the initial ownership of the 1st plaintiff who sold it to the 2nd plaintiff. Even if the defendants submit that it is "suspicious" they do not have privity of contract to demand the same as they would not even be able to claim anything from the same.

33. I find that the parties were not prejudiced by the failure to file the sale agreement as that contract was not the basis of the suit.

34. Issue 3: Who is the rightful owner of LR MWIMBI/S.MUGUMANGO/1419?

Having found that the suit is properly before the court for consideration on merit, I proceed to take a look at the Green Card for the suit property which shows several entries as below:

> i) On 4/2/1999, Johnson Nkonge was issued with a title deed.
>
> ii) On 6/1/2003, John Phares Njeru was documented as owner and a title deed was issued due to a consideration being paid of Kshs. 30,000/=.
>
> iii) On 18/11/2008, Johnson Nkonge was registered as owner once again subsequent to a court order in LDT 23 of 2007 issued on 5/11/2008. Johnson Nkonge was issued with the title deed on the following day, 19/11/2008.
>
> iv) On 29/12/2008 Abdul Rashid Mbae Magambo was registered as the owner and a title deed was issued on the same day.
>
> v) On 24/4/2009, John Phares Njeru was reinstated as the owner pursuant to a court order in PMCC Chuka related to LDT 23 of 2007. A title deed was issued to him five days later on 29/4/2009.
>
> vi) On 8/9/2009, Justus Muruja Musa was registered as the owner and a title was issued the following day i.e. 9/9/2009.
>
> vii) On 23/11/2009, an inhibition was registered that there would be no further dealings in the land. The said inhibition is indicated to have emanated from LDT 23 of 2007. Status quo was to be maintained.

35. I find it necessary to delve into jurisprudence apposite the following issues:

a) Specific performance vis a vis damages for breach of contract Gacheru J in **NAIROBI ELC 59 OF 2012 HENRY MWANGI GATAI & ANOTHER V MARGARET WANJIKU GODWIN & 2 OTHERS [2018] eKLR** opined that:

> ***"In Reliable Electrical Engineers Ltd…..Vs….Mantrac Kenya Limited (2006) eKLR,*** wherein Justice Maraga (as he then was) stated that:- ***"Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well principles"***

"The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are an adequate remedy, specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant."

b) Purchaser for value

(bi) In Henry Mwangi Gatai & Another (op cit) the court said:

"The Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR* pronounced itself on the doctrine of bonafide purchaser for value without notice, it commenced off by definition as outlined in *Black's law Dictionary 8th Edition as:*

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

The onus is on the person who wishes to rely on such defence to prove it, and the defence is against the claims of any prior equitable owner.

Having now considered the available evidence the Court is satisfied that the evidence tendered by the Interested Parties supports a credible finding that they were bonafide purchasers of the suit premises for value. The Court therefore finds that the Plaintiffs are not entitled to an order of specific performance and/or permanent injunction. However, the Plaintiffs are entitled to payment of damages in the tune of *Kshs.5,000,000/=* given that the sale agreement was terminated due to no fault of their own but the vendors fault."

(bii) In the case of **Amina Abdul Kadir Hawa v Rabinder Nath Anand & another [2012] eKLR** the court stated that specific performance was not an adequate remedy because 13 years had lapsed since the initiation of litigation, the suit property had changed hands and had been developed, the purchase price had been forfeited and there was no sentimental value attached to the property to prevent the plaintiff seeking another property. Refund of 10% deposit was also ordered. It stated:

"On general damages for breach, which this court has found payable as opposed to an order for specific performance, the principles guiding its award which the court has to bear in mind when making the assessment are:-

(i) These are discretionary, meaning the court has to ensure that it exercise its discretion judiciously and with a reason.

(ii) They are not meant to enrich a party but to compensate him/her for the injury suffered.

(iii (These should not be in ordinately too low or too high. Bearing these mind on the one hand, and on the other hand the fact that the bulk of the purchase price had not passed on to the defendant and therefore remained with the plaintiff and also considering that there is nothing sentimental about the defendants property to the plaintiff, and considering that there was an option to settle for another property considering that the transaction had lasted only a few months an award of Kshs.300,000.00 as general damages for breach of contract would be adequate compensation."

(biii) In the present case, I find that indeed the 1st defendant breached the agreement, which fact is not denied. Also, specific performance would still have been possible as the suit was filed within 6 years of the breach i.e. July 2003. However, the specific default clause at paragraph 6 is to the tune of Kshs 2,000,000/= which may cause undue hardship and is an unreasonable sum being double the purchase price. Additionally, the 2nd plaintiff has already occupied the property for 10 years and to exact specific performance would prejudice him. Though the defendant was at fault, considering the agreed sum was Kshs. 1,000,000/= and considering the improper act of the defendant registering the property in his name while he had not completed the sale, he should to pay damages. The sum of Kshs. 400,000/= is reasonable. The 1st defendant had already paid 307,000/= which is admitted by the 1st plaintiff. The contract did not state that any monies would be refundable in the event of breach, however, in the interest of equity, I am of the view that the damages be paid less the monies already received.

c) Proper title and cancellation of title deeds

In the case of **NAIROBI ELC 128 OF 2011 ESTHER NDEGI NJIRU & ANOTHER V LEORNARD GATEI [2014] eKLR** the court said:

"under section 27(a) of the repealed Registered Land Act Cap 300 Laws of Kenya they were upon registration of the property in their names vested with absolute ownership of the suit land with all rights and privileges belonging or appurtenant thereto. It is their further submission that they were innocent purchasers for value and having followed due legal process their title is indefeasible.

The equivalent to section 143(1) of the repealed Act (RLA) is section 80(1) of the Land Registration Act which provides:-

80.(1) subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake".

Under section 26(1) of the Land Registration Act the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements restrictions and conditions contained or endorsed in the certificate. Such title however may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

Section 26(1) provides:-

26.(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.

As regards the issue whether the registration of the plaintiffs as the owners of the suit property is absolute and indefeasible and not liable to be challenged. I would answer in the negative. Having held and found that the 2nd Defendant fraudulently processed and acquired the title to the suit property in his name my view is that he did not acquire a good title to the property and no interest in the property could pass to him. The 2nd Defendant therefore not having any good title or interest in the suit property could not pass a good title to the plaintiffs.

a. An order that the Title Deed over Title Number RUIRU/KIU BLOCK 2/3104issued on 23rd October 2008 in the names of JANE WANJIRU MUGO & ESTHER NDEGI NJIRU be cancelled forthwith by the Land Registrar at Thika.

b. That the Defendant/Plaintiff LEONARD GATEI MBUGUA be issued with a Title Deed in respect of Land Title Number RUIRU/KIU BLOCK 2/3104 forthwith."

(ci) Without a doubt, the registration of the 1st defendant fails as he engaged in a corrupt scheme in registering the property in his name when the sale had not been concluded. With regard to Justus Muruja Musa, he suffers at the hand of John Phares Njeru, his brother, the 1st defendant.

The Court of Appeal in **NAIROBI CIVIL APPEAL NO. 246 OF 2013 ARTHI HIGHWAY DEVELOPERS LIMITED V WEST END BUTCHERY LIMITED & 6 OTHERS [2015] eKLR opined as follows:**

1. "It is also stated therein that "the doctrine of purchaser without notice never enabled a purchaser to take free from legal rights, as distinct from equitable interests". So that, even if the issue of *bona fide* purchaser arose in this matter which, in our finding, it did not, we are not satisfied that the evidence tendered by Arthi supports a credible finding that it was a bona fide purchaser of the disputed land.

69. It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof."

(ciii) If no valid title passed from Johnson Nkonge to John Phares Njeru due to fraud, then no title passed from John Phares Njeru to Justus Muruja Musa.

d) Orders against a person not a party to a suit

(d) In the above court of Appeal case, the Court stated that:

"bona fide purchaser"is defined in Black's law Dictionary 8th Edition as:

"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

(di) In CIVIL APPEAL 15 OF 2015 J M K V M W M & ANOTHER [2015] eKLR

The Court dealt with a matter in which an individual was implicated in a sexual harassment claim. The court stated that

even if the judgment was against his employer, he had the right to be heard. The Court reviewed the judgment and ordered the case to start de novo. It stated:

"The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In *ONYANGO V. ATTORNEY GENERAL* *(1986-1989) EA 456, Nyarangi, JA* asserted at *page 459:*

"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."

At *page 460* the learned judge added:

"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."

And in *MBAKI & OTHERS V. MACHARIA & ANOTHER* *(2005) 2 EA 206*, at page 210, this Court stated as follows:

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

Having carefully considered this appeal, we are satisfied that the appellant ought to have been afforded an opportunity to be heard before he was condemned as a perpetrator of sexual harassment. We are equally satisfied that in the particular circumstances of this appeal, the industrial court ought to have reviewed and set aside its judgment dated 30th May 2014 to afford the appellant an opportunity to be heard."

ANALYSIS

36. I wish to now apply all the above principles while considering the issues before me.

My approach is to handle them transaction by transaction as recorded to determine if any was void. I will do this while also considering that the 1st Plaintiff (Johnson Nkonge) is suing for breach of contract and also while 2nd plaintiff (Abdul Rashid) is suing (as per amended Plaint in CMCC 8/2010) to void the LDT's decision, for permanent injunction, for cancellation of 2nd defendant's title deed and for compensation in the alternative.

a) The first two transactions indicate change of ownership from Johnson Nkonge to John Phares. Nkonge arose from an agreement dated 2/9/2002. John Phares Njeru does not deny this. They both agree that John Phares Njeru did not pay the full purchase price and Johnson Nkonge never refunded the monies paid to him. They differed and the contract was never completed. Johnson Nkonge indicates that he had signed the transfer documents in good faith while the payments were pending. It is clear that the contract between these two parties did not crystallize and the vendor was negligent in signing documents for transfer of the land. In any case, the sale agreement at paragraph 3 states that the purchaser was buying all that land inclusive of the developments thereon. The vendor, PW1, confirmed in his adopted witness statement of 21/8/2014 that on 7/8/2003, he entered into a further agreement with John Phares Njeru on the balance of the purchase price which was equally not honoured. Thereafter, PW1 did not deny that he demolished the educational centre that was on the land. But John Phares Njeru had not paid the balance of the contractual price within the agreed time. Therefore I am of the view that the purchaser John Phares Njeru indeed breached the sale agreement by failing to pay the balance of the purchase price as per the initial agreement and any further agreements. The conclusion, therefore, is that the registration of the property to John Phares Njeru (entry no 4) was done in an underhanded manner as he himself admits that the contract was never concluded. Therefore, the transfer documents were signed in anticipation of a future event, i.e. payment, which never happened and use of the said transfer by the purchaser to change ownership amounts to fraud as he knew and indeed confirms that he did not pay the rightful owner his dues. The transfer to John Phares Njeru on 6/1/2003 was therefore void ab initio. The owner should have been Johnson Nkonge who was rightly reinstated on 18/11/2008(entry no. 6).

The said rightful proprietor Johnson Nkonge has sued over breach of contract. It is not denied that the contract was not completed. I find that the suit for breach of contract succeeds. The contract was dated 2/9/2002 and was to be concluded by 30/6/2003. Therefore breach arose in June 2003 and the suit for breach was filed on 3/2/2009 within the statute on limitation for enforcement of contracts. I note that Johnson Nkonge amended his claim on 22/11/2010 to seek remedies for breach based on the further agreement of 7/8/2003. That further agreement was objected to during hearing and the objection was upheld. It was stated that the further agreement was not in the court record but indeed it was filed on 3/12/2009 as an exhibit to the application to the amended plaint in Meru HCC 12 of 2009 together with the initial agreement of 2/9/2002. Therefore both sale agreements were actually on record in HCC 12 of 2009. The amended plaint did invite the court to give any other relief as it deems fit and I feel it fit to grant breach on terms as per the initial undisputed contract of 2/9/2002.

b) After the reinstatement of Johnson Nkonge as the owner, he sold the land to Abdul Rashid Mbae Magambo who was issued with a title deed on 29/12/2008 (entry no.8). This sale was above board as Johnson Nkonge was still the rightfully registered owner of the land at the material time and had proper title capable of being passed on. No one thought to involve Abdul Rashid in the LDT related battles even though he had taken possession of the land, an assertion which has not been disputed. I therefore find that Abdul Rashid Mbae ought to have his prayers allowed in terms of prayers a, aa and aaa of the Amended Plaint filed in CMCC 8/2010.

c) Entry no. 10 on 24/4/2009 indicates that John Phares Njeru was reinstated as the owner pursuant to an LDT decision. I note that the sale agreement had a default clause for payment of KShs. 2,000,000/= by an offending party who breaches the contract. Rather

than enforce the said clause, the LDT murkied the waters and ordered that John Phares Njeru hold on to the land and pay the balance price failure to which he would return the land back to Johnson Nkonge. If the suit land was returned to Nkonge, he would pay back what he had received. No timelines were given for enforcement of these misplaced orders which were made on 29/9/2006. As a result, John Phares Njeru was registered as the owner (entry no 10). I find that the LDT erred and should have enforced the contract as drawn instead of issuing orders outside the same, 4 years into the contract. Therefore I find that the manner in which John Phares Njeru was registered as owner on 24/4/2009 by order of the LDT was irregular and ought to be quashed along with his sale of the land to Justus Musa on 24/8/2009.

d) The situation created by the LDT caused there to be a title deed issued to John Phares Njeru on 24/4/2009 and the said John Phares Njeru sold the land to Justus Muruja Musa(entry no 12)

Now, the sale between Johnson Nkonge and John Phares having failed, the land should have remained in the name of the vendor, Johnson Nkonge, who was the only person with proper proprietary rights to deal with the property. I find that Justus Muruja Musa was an innocent purchaser for value as the proprietor at the time was John Phares and therefore Justus Muruja cannot be faulted on his purchase. Nonetheless, the said vendor of the property, John Phares Njeru, was not properly in possession of the title in the first place and therefore could not pass good title. As a result I find that the Title deed held by Justus Muruja Musa should be hereby cancelled and John Phares Njeru be ordered to refund to him the purchase price.

37. Issue 4: Who should pay costs of this suit?

I am inclined to condemn, the 1st defendant to pay the costs to all the parties. He acted in bad faith by registering a transfer of land in his favour when he knew that he had not fulfilled his obligation to the vendor of the said property. It is his action that has led to the multifarious litigation between the parties right from the LDT to date and the constant alterations on proprietorship of the property.

38. In the circumstances, I issue judgment in the following terms:

a) The suit by the 1st plaintiff against the 1st defendant John Phares Njeru for damages for breach of contract succeeds and the court orders the 1st defendant John Phares Njeru to pay the plaintiff Johnson Nkonge O. M'Rucha the sum of Kshs.400,000/=as damages minus the sum of money he had paid to the 1st plaintiff MEANING that he will pay the plaintiff a sum of Kshs. Ninety three thousand (Kshs.93,000/=).

b) The suit by Abdul Rashid, initially filed as Meru CMCC 8 of 2010, succeeds in terms of prayers a, aa, and c and the Land Registrar, Chuka, is ordered to cancel the name of Justus Muruja Musa as proprietor of Land Parcel No. Mwimbi/S. Mugumango/1419 and instead register the name of Abdul Rashid Mbae Mugambo as proprietor of the land.

c) The 1st defendant, John Phares Njeru, is hereby ordered to refund the sum of Kshs.310, 000 paid to him by Justus Muruja Musa, the 2nd defendant, Justus Muruja Mus.

d) Costs are awarded to the plaintiff and to the 2nd defendant and are to be paid by the 1st defendant, John Phares Njeru.

39. Orders accordingly.

Delivered in open Court at Chuka this 18th day of December, 2018 in the presence of:

CA: Ndegwa

Kithaka h/b K'Opere for the Defendant

John Phares Njeru M'Ithaara – Defendant

Andrew Rashid Mbae Magambo – Interested Party

P. M. NJOROGE,

JUDGE.