



**Ramji Meghji Gudka Limited v Getembe Thrift Company Limited & 2 others
(Civil Appeal 45 of 2019) [2025] KECA 22 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KECA 22 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 45 OF 2019
PO KIAGE, M NGUGI & F TUIYOTT, JJA
JANUARY 17, 2025**

BETWEEN

RAMJI MEGHJI GUDKA LIMITED APPELLANT

AND

GETEMBE THRIFT COMPANY LIMITED 1ST RESPONDENT

ALFRED MORFAT OMUNDI MICHIRA 2ND RESPONDENT

THOMAS ORESI OMWOYO 3RD RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Kisii (D. K. Musinga, J.) dated 23rd September 2011 and delivered on 30th September 2011 by Makhandia, J in Kisii HCCC No. 40 of 2001)

JUDGMENT

1. This appeal concerns the ownership of land known or described as Kisii Municipality Block 11/72 (the suit land).
2. The evidence before the trial court was that M/s Ramji Meghji Gudka Limited (Gudka or the appellant) was the registered owner of the suit land. It was the case of Gudka that prior to the sale and transfer of the land to it, Getembe Thrift Company Limited (Thrift or the 2nd respondent) had entered into a sale agreement with Alfred Morfat Omundi Michira (Michira or the 1st respondent) which did not materialize. However, Michira took possession of the suit land and remained there even after his agreement with Thrift had failed. This triggered the commencement of Kisii High Court Civil Case No. 40 of 2001. Ramji Meghji Gudka Limited vs Alfred Morfat Omundi Michira in which Gudka sought the following orders:
 - a. Vacant possession/Eviction.



- b. Mesne profit and/or general damages for loss of use of the premises herein.
 - c. Costs of the suit.
 - d. Interest on (b) & (c) hereinabove at court rates.
 - e. Any other or further orders as the court may deem fit and expedient be granted.
3. In turn, Michira refuted the claim, alleging that he had purchased the property and was in possession of it. He stated that the property was the subject matter of Kisii High Court Civil Case No. 426 of 1998 between him as the plaintiff and the Land Registrar Kisii and Thrift as the defendants in which he sought specific performance of the contract.
 4. Michira launched a counterclaim against Gudka with Thrift as the 2nd defendant. In it, he averred that by a sale agreement dated 27th August 1998, Thrift sold to him the suit land at an agreed purchase price of Kshs. 3,200,000.00, upon which he made a down payment of Kshs. 595,500.00 with the balance to be paid “during” transfer. On 28th October, 1998, he received information that Thrift intended to transfer the same property to Gudka. Upon inquiry, it emerged that one of the directors of Thrift was fraudulently attempting to sell the suit property to Gudka causing the other director to write to the Land Registrar to enter a restriction to the title of the property on 2nd November 1998 and the transfer sought to be made to Gudka was rejected.
 5. Michira narrates that later, on 3rd March 2000, Gudka fraudulently caused itself to be registered as the owner of the suit land after resubmitting the transfer, and set out the particulars of fraud;

“Particulars Of Fraud

 - a. By resubmitting the transfer of lease form which was greatly in dispute when it was presented for registration and the same had been rejected.
 - b. Substantially contributing to the disappearance of the relevant documents from the parcel file.
 - c. Causing himself to be registered when he knew that there was a restriction on the said suit title and the same had not been removed.
 - d. Causing new documents to be prepared with wrong and erroneous entries.
 - e. Causing himself to be registered when he knew that the title had a dispute within the 2nd defendant itself and also with the defendant herein.”
 6. In the counterclaim against Gudka and claim against Thrift, Michira sought the following intervention from Court;
 - a. For an order of rectification of the register by directing that the registration of the plaintiff of the suit land plot No. Kisii Municipality/block II/92 be cancelled.
 - b. An order be issued directing the 2nd defendant to specifically perform part of his contract and transfer the suit property unto the defendant.
 - c. Alternatively if the 2nd defendant does not comply with the said order of transfer the Deputy Registrar of the court do sign all manner of documents and all such things to effect the transfer unto the defendant.
 - d. Costs
 - e. Any other and further relief which may appear just.



7. Enter Thomas Oresi Omwoyo (Omwoyo or the 3rd respondent) into the fray. Thrift supported the defence and counterclaim by Michira but contended that in the month of October 1998, its secretary/treasurer learnt that Omwoyo, who is a director and chairman of the company, was fraudulently attempting to sell the suit property to Gudka forcing the secretary/treasurer to cause entry of the restriction alluded to earlier.
8. Thrift asserted that Omwoyo and the Land Registrar acted fraudulently and connived to deprive Michira of his property. The particulars of fraud and connivance were set out as;

“particulars Of Fraud And Connivance

- i. The plaintiff fraudulently connived with the 3rd defendant in:-
 - a. While knowing that the suit land had been sold to the 1st defendant, he purported to orally purchase the same.
 - b. Falsely pretending that the plaintiff had paid a purchase price of Kshs. 600,000/= when the same had never been paid to the 2nd defendant.
 - c. The 3rd defendant acted fraudulently by purporting to sell the suit land at an under value of Kshs. 600,000/= when the 1st defendant had entered into a contract in writing with the 2nd defendant at a consideration of Kshs. 3,200,000/=.
 - d. Pretending that the 2nd defendant has received Kshs. 600,000/= knowing the fact to be false.
 - e. While knowing that there was a restriction entered in the register and still in force the plaintiff proceeded to cause himself to be registered.
- ii. The plaintiff fraudulently connived with the Land Registrar Kisii District in:-
 - a. Causing the disappearance of the relevant document from the parcel file at the land’s office.
 - b. Causing other documents to be prepared with wrong and erroneous entries.
 - c. Conspiring with the Land Registrar to register a transfer form which had been rejected way back on 2nd December, 1998.
 - d. Registering the transfer and issuance of the lease certificate in favour of the plaintiff without the plaintiff’s consent.
 - e. Causing the plaintiff to be registered while knowing that a restriction was still in force.”
9. Against this backdrop of pleadings, the High Court received the evidence of the respective parties. A somewhat bizarre aspect of Thrift’s case is that, while it filed one statement of defence, it was represented by two different firms of advocates pulling in different directions. One firm represented a faction of directors who supported the sale to Gudka and the other appeared for the directors who supported Michira’s transaction. That division persisted to this appeal.



10. Ramji Megji Gudka is a director of Ramji Megji Gudka Limited while the other directors are his brothers. He knows Omwoyo to be the major shareholder of Thrift. It was his testimony that on 29th October 1998, Omwoyo and one Siro Mogaka approached him to buy the suit land and brought him consent of the Municipal Council. Although no sale agreement was drawn, he signed the transfer form alongside his brothers as transferee while Omwoyo and Siro signed as transferor. On the following day, he presented the transfer to the Lands Office but it was rejected on 2nd December 1998. He was later to learn that the rejection was because of the existence of Case No. 426 of 1998. Later, by virtue of a ruling dated 17th February 1999, the transfer was allowed. In March 2000, he presented the transfer form together with the ruling and the transfer was registered in favour of Gudka on 30th March 2000. He told the court that Michira collects the rental income of about Kshs. 60,000 per month from the property.
11. Regarding the consideration for the purchase, his testimony was that it was Kshs. 600,000.00 but which had not been paid because it was only to be paid after he obtained vacant possession. In cross-examination, he was put to task regarding the apparent discrepancy on the dates when Thrift was registered as lessor of the suit land, one being 22nd September 1998 and the other 28th October 1998.
12. Mr. Joseph Momanyi Aunga (PW2) practices law under the name and style of Momanyi Aunga & Co. Advocates. On 28th October 1998, his colleague Paul who was an advocate in the firm of Reuben Masese & Co. Advocates, came to his chambers with a transfer form in respect of the suit land with a request that he attests the signatures on them. Paul asked PW2 to trust him and on his word, he attested the signatures. It was his testimony that;

“ what I did was not procedural but I believed my colleague.”

The transfer document did not have the seal of the company.
13. Michira testified as DW1. He reiterated what was pleaded by him. On payment of the purchase price, his evidence was that he initially paid a deposit of Kshs. 510,000.00, Kshs. 1,014,500.00 by way of cheque on 22nd August, 1998 and cash of Kshs. 75,500.00. The balance of Kshs. 1,600,000.00 was to be paid upon execution of a transfer by Thrift in his favour. Later, in November 1998, Omwoyo brought back the cheque of Kshs. 1,014,500.00 requesting for an additional personal sum of Kshs. 300,000.00 because he had identified another buyer who was willing to give him that amount as a token. He filed Civil Suit No. 426 of 1998 when he realized that Thrift were intent on cancelling the agreement.
14. John Mogaka (DW2) is a director of Thrift. His testimony was that the company sold the suit property to Gudka and although he did not sign it or have a copy of the sale agreement, he had seen it. It was his further evidence that Gudka paid the purchase price of Kshs. 600,000.00. He was not aware that C.I.D. investigations prompted by a complaint of Michira’s revealed that there were 2 green cards to the property.
15. The trial court (Musinga J, as he then was) identified three issues for determination-
 - i. The validity of the sale agreement between Thrift and Muchiri.
 - ii. The validity of the sale of the suit property by Thrift to Gudka.
 - iii. Whether Gudka was an innocent purchaser for value?
16. To the first issue, the learned Judge held that aside from the fact that the sale agreement was not properly sealed, there was no defect in the said transaction; Michira did not breach the agreement; and it was



- not open for Thrift or any of its directors to unilaterally decide that the sale agreement was not binding upon it.
17. To the second and third issues, the learned Judge held that there was no written agreement for sale as required by section 3(3) of the *Law of Contract Act*; that it was doubtful that two directors signed the transfer and in any event it was not attested to as required under law; it was not clear how the restriction registered against the title was removed; the registration of the transfer whilst a restriction was still subsisting was illegal; Gudka did not give a satisfactory reason as to why no written sale agreement was executed; there was no explanation why the consideration of Kshs. 600,000.00 or any part of it was not paid before the purported transfer was registered; and the two latter findings point to Gudka as not being an innocent purchaser for value.
 18. Although the appeal raises 18 grounds, they can be clustered under four issues. Whether the learned Judge erred in law and fact in;
 - a. Upholding the transaction between Thrift and Michira even after holding that the sale agreement was not properly executed by Thrift.
 - b. Invoking the provisions of section 3(3) of the *Law of Contract Act* to find that the contract between Thrift and Gudka invalid when Gudka was not enforcing an agreement against Thrift.
 - c. Finding that the transfer to and registration of the title in favour of Gudka was carried out in the face of an existing restriction.
 - d. Faulting the attestation of the transfer.
 19. Miss Ochwal, learned counsel representing Gudka, submitted that having found that the sale agreement purportedly entered between Thrift and Michira was faulty because only one director of Thrift executed it and, second, the company seal was not affixed on it, the learned Judge could not save the contract on account of the doctrine of equity because the doctrine could not be relied upon to bypass clear and explicit provisions of the law. As equity follows the law, it was argued there was no basis to warrant an order for specific performance.
 20. Learned counsel asserted that as Gudka was already registered as the owner of the suit property and did not seek to enforce a contract against Thrift, the provisions of Section 3(3) of the Law of Contract could not be invoked against it. It was submitted that the trial Judge paid undue premium on those provisions when they were irrelevant and inapplicable.
 21. Regarding the attestation of the transfer document that gave rise to its title, Gudka contended that it was well settled that a document that is on the face of it attested is sufficient and lawful. Pointing to the provisions of section 97 of the *Evidence Act*, counsel argued that there was no need for the court to rely on viva voce evidence to explain the document. Gudka cited the decision of this Court in Speaker of the County Assembly - Kisii County & 2 Others vs Jama Omariba Nyaoga [2015] eKLR. The trial judge was criticized for apparently over relying on the evidence of PW2.
 22. The appellant argued that Michira did not have locus standi to plead fraud and that pleading particulars of fraud without proof is not sufficient. The learned trial Judge was faulted for believing the contents of a Green Card showing evidence of a restriction when there was another Green Card with no restriction. It was further argued that Michira did not produce a revenue receipt leading to the registration of the restriction. Gudka suggested that it was imperative for Michira to call the Chief Land Registrar, as he had indicated he would, to confirm the legitimacy of the alleged restriction.
 23. A substantial portion of the arguments made in the submissions dated 9th December 2020 by Anyona Mbunde & Co. Advocates for the Thrift are similar to those of the appellant and it would be needless



to set them out. Counsel, however, adds the following; the application for injunction filed by and on behalf of Michira in HCCC 426 of 1998 to avert the alienation of the suit property in favour of a third party was lifted on 17th February 1999, following which Gudka re-lodged the transfer for registration and it was duly accepted and registered by the land registry. It is argued that the appellant's title was anchored on a legitimate transfer instrument.

24. Counsel further argues that Michira only paid a sum of Kshs. 510,000.00 and even then, to Siro Mogaka and not Thrift. It is contended to be common ground that the cheque of Kshs. 1,014,500 drawn by Michira in favour of Thrift was never presented for payment and so there was no basis for the learned Judge to hold that Michira owed Thrift a sum of Kshs. 1,014,500.00 only on the basis of the impugned sale agreement.
25. An argument is also made that, as Michira alleged fraud on the part of both the Land Registrar and Thrift, it was imperative that Michira joined the Attorney General to his counterclaim. That in any event, Michira did not supply any evidence to support the particulars of fraud pleaded.
26. What does the other faction of Thrift have to say? It is represented by the firm of G.J.M. Masese Esq. who filed submissions dated 24th August 2020 in opposition to the appeal. As they are a mirror of the submissions made on behalf of Michira, I will not reproduce them.
27. Omwoyo, who was assailed by Michira for assisting Thrift to obtain an illegal title, too, opposes the appeal. This is surprising and at odds with the position he took at trial where, in his pleadings, he averred that the suit property was lawfully sold and transferred to Gudka (paragraph 6 of his defence dated 26th June 2001).
28. He contends that the allegation of purchase by Gudka is conspicuously deficient because it was not supported by a sale agreement and therefore runs against the provisions of Section 3(3) of the *Law of Contract Act*. He relied on the decision of Eboso J in *Leo Investment Limited vs Estuarine Estate Limited* [2017] eKLR. It is further contended that the documents presented to the land Registrar as transfer documents were fraudulently acquired by the appellant and that the restriction was unlawfully removed. Omwoyo supports the finding of the trial judge that the transfer was not properly executed and there was no proof of payment of the alleged consideration of Kshs. 600,000.00
29. The duty of an appellate court of first instance is to re-evaluate the evidence and to draw its own conclusions having regard to the fact that, unlike the trial court, it did not see or hear the witnesses testify, and due allowance must be given for this handicap. This position was stated in the case of *Selle & Another v. Associated Motor Boat Company Ltd. & Others* [1968] EA 123 where Sir Clement De Lestang Vice-President at Page 126 stated 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).”

30. It is logical to start by examining the bona fides of the transaction relied on by Gudka in support of its claim. First, it is common ground that there was no sale agreement between it and Thrift and this could prove problematic because of the clear provisions of section 3(3) of the *Law of Contract Act*,

“Section 3(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. We are urged by Ms. Ochwal, learned counsel appearing for Gudka, that this omission notwithstanding, the provisions should not be invoked against her client because it was not seeking to enforce the contract against Thrift as it already held a title to the suit property after a legitimate transfer. But it may not be that simple because to begin with, the legitimacy of transfer was at the very heart of the dispute. In the defence it filed, Thrift questioned the legitimacy of the transaction and alleged fraud against Gudka, Omwoyo and the land Registrar and in the end, sought a declaration that the proposed sale of the suit property to Gudka was null and void. So too in respect to the registration of Gudka as the owner, and cancellation of that registration and rectification of the register. It has to be said that the formal position of Thrift was in the pleadings it filed, which were never amended or expunged, and it matters not that a faction of directors of the company seek to resile from this position. Parties, as law commands, are bound by their pleadings.

32. Looking at it from the perspective that the former registered owner of the land was questioning the entire transaction, it had to be examined to see whether it passed legal muster, which included conformity with the provisions of the *Law of Contract Act*. The learned trial Judge’s holding that the transaction violated the mandatory provisions of section 3(3) of The *Law of Contract Act* and was thus unsustainable cannot be faulted.

33. The evidence of Gudka was:

“I presented the transfer to the Land office in (sic) the same date. I (sic) was rejected in 2nd December 1998. No reason was given for the said rejection. I was later told that there was a high court case in 426/98 and that is why it was rejected.”

34. He denied being aware of the existence of the restriction and that his transfer was registered after the order of injunction in Kisii HCCC 426 of 1998 was lifted. At the hearing, two certified extracts of the title (Green Cards) to the suit property with different entries were produced. That by Gudka did not show an entry of a restriction while the one produced by Michira showed a restriction entered as entry No. 3. Gudka urges the Court to find that existence of the restriction was not proved because no revenue receipt as evidence for its payment was produced, nor was the Chief Land Registrar called to confirm its existence.



35. To be observed is that, at trial, both sides accepted the production of the competing green cards without calling the makers. So as to which green card reflected the true state of affairs of the register at the time Gudka first presented its impugned transfer, one must look to other evidence. I take the view that if, indeed, the reason why Gudka's transfer was at first rejected was because of an existing order in HCCC No. 426 of 1998, then it would be expected that the green card produced by Gudka would have an entry of the court order and another order, later, lifting it.
36. A further problem with the green card produced by Gudka is the entry number which shows that Thrift was first entered as proprietor of the suit property on 28th October 1998. This is a variance with the entry in the copy of the certificate of lease to the property produced by John Mogaka (DW2), a director of Thrift, which in the entry No. 1 on the proprietorship section, shows that Thrift was entered as the proprietor on 22nd September 1998. To the credit of the green card produced by Michira, entry no. 1 is that Thrift was entered as proprietor on 22nd September 1999, which tallies with that on the certificate of lease. The authenticity of this latter green card and the entries in it could be proved without calling the Chief Land Registrar or producing revenue receipts as suggested by Gudka.
37. Just like the trial court, I believe that the green card produced by Michira, which showed a subsisting restriction at the time the transfer of Gudka was supposedly effected, was a faithful reflection of the register. To effect a transfer in spite of the existing restriction would be to commit an illegality. The following holding by the learned trial Judge is therefore for endorsing;
- “The registration of the transfer whilst a restriction was still pending was illegal. It appears that the original land records in respect of the suit property that were first opened on 22nd September, 1998 were unlawfully removed and new ones opened on 28th October, 1998. That is clear from existence of two different Green Cards.”
38. Clearly, someone breached the law so as to pave the way for the registration of the transfer in favour of Gudka. This transfer in favour of Gudka is just as dubious when one considers that the company obtained the transfer without paying a single cent of the supposed consideration of Kshs.600,000.00. In this regard the explanation given by PW1 is not convincing, he said:
- “I was to pay them once I get possession”.
- The entire transaction has the hallmarks of fraud when, in addition, Thrift was supposedly selling a property which it had sold just 60 days earlier at Kshs. 3,200,000.00 at Kshs. 600,000.00, less than a fifth of the price.
39. The evidence is that even prior to the supposed registration of the transfer, Gudka became aware of Michira's claim to the property, a man known to the directors of Gudka and who was in possession of the suit property. Gudka never bothered to make inquiries from Michira about his claim. This surely is not the behaviour of an innocent purchaser. It, in fact, seems to me that as Gudka was aware of Michira's stake in the property even at the time of execution of the transfer explains why it did not wish to pay the purchase price until it obtained possession. There is a plethora of evidence that Gudka was not an innocent purchaser and was simply throwing a dice at a property already purchased by another. The trial court was correct in bringing an end to that game of chance and is not to be faulted.
40. Having reached that conclusion, then it is moot for me to consider whether or not the impugned transfer was properly executed by the parties because even if lawfully executed, it cannot prop up an illegal and fraudulent transaction.



41. It is now easy to deal with the first issue which is whether the trial court erred in fact and law in upholding the transaction between Thrift and Michira after holding that the sale agreement which founded it was improperly executed by Thrift. The sale agreement was only signed by one director and no seal was affixed to it. That execution did not accord with Article 14 of the Articles of Association of Thrift which reads;

“Seal Of The Company

The Seal of the Company shall not be affixed to any instrument except by authority of the resolution of the Board of Directors having majority votes or a Committee of the Directors or of the Directors previously given and shall be affixed in the presence of three Directors or one Director and Secretary of the Company or Chairman of the Board of Directors who shall sign every such instrument to which the Seal is affixed. No instrument unless it is Sealed and signed as herein authorized shall be binding on the Company.”

42. For that reason, some of the directors of Thrift argued that, by explicit design of Article 14, the instrument did not bind the company. That stance, however, overlooks the simple truth that Thrift formally and clearly spoke through its pleadings in which it endorsed and supported the transaction to Michira. And as I have found that the transaction of Gudka was illegal, the argument that Gudka sets up against the sale agreement between Thrift and Michira becomes academic and nothing can turn on it. That ends the matter.

43. One last issue calls for observation. One set of directors of Thrift argue that the learned trial Judge erred by holding that the amount owed to Thrift by Michira is only Kshs. 1,014,500.00 when he had only paid a sum of Kshs. 510,000.00. However forceful and deserving the argument may be, there is no platform upon which this Court can consider it as no appeal was filed on this or on any other question by Thrift.

44. In the end, I propose that the appeal be dismissed with costs to the 1st and 2nd respondents.

Judgment Of Kiage, JA

1. I have had the benefit and pleasure of reading in draft the judgment of my learned brother Tuiyott, JA, with which I am in ready and full agreement.
2. It seems to me quite clear that, confronted with two competing narratives in a sometimes bizarre kaleidoscope of human duplicity propped up by blatant lies and outright fraud, Musinga, J. (as he then was) did a fine job of separating fact from fiction. The challenge to his judgment was bound to fail and the appeal is for dismissal with costs, as proposed by Tuiyott, JA. With Mumbi Ngugi, JA being of the same mind, it is so ordered.

Judgment Of Mumbi Ngugi, JA

1. I have had the benefit of reading in draft the judgment of my brother, F. Tuiyott, JA., which I entirely agree with and have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JANUARY 2025.

F. TUIYOTT

JUDGE OF APPEAL

P. O. KIAGE



JUDGE OF APPEAL

MUMBI NGUGI

JUDGE OF APPEAL

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

Signed

Deputy Registrar

