



**Ndambiri v Ngari & another (Civil Appeal 129 of 2017)
[2025] KECA 573 (KLR) (14 March 2025) (Judgment)**

Neutral citation: [2025] KECA 573 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 129 OF 2017
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
MARCH 14, 2025**

BETWEEN

EPHANTUS NJOGU NDAMBIRI APPELLANT

AND

JUSTUS NGARI 1ST RESPONDENT

PATRICK MUGO DANSON 2ND RESPONDENT

*(Being an appeal against the judgment of the Environment and Land Court
at Kerugoya (B. Olao, J.) dated 19th May 2017 in ELC Case No. 755 of 2013)*

JUDGMENT

Background

1. Ephantus Njogu Ndambiri (the appellant) is aggrieved by the judgment of the Environment and Land Court (ELC) at Kerugoya (B. Olao, J.) dated 19th May 2017 in ELC Case No. 755 of 2013. By that judgment, the ELC dismissed the appellant's claim against Justus Ngari and Patrick Mugo Danson (the 1st and 2nd respondents respectively) with costs and allowed the respondents' counterclaim with costs. The ELC held that Land Reference No. Baragwe/Guama/1891 (the suit property) belongs to the respondents and that the registration of the appellant as the registered owner of the suit property be cancelled and substituted with the names of the respondents.
2. Dissatisfied by the decision of the ELC, the appellant appealed to this Court seeking inter alia that the judgment of the ELC be set aside and substituted with an order for dismissal of the respondents' counterclaim; and entry of judgment for the appellant as prayed in the Plaintiff.
3. The brief background of the appeal is that through an amended plaintiff the appellant moved the High Court against the respondents seeking that the respondents', their servants and agents be evicted from



the suit property and all the inhibitions, restrictions and cautions lodged thereon be lifted forthwith and that the Officer Commanding Kianyaga Police Station provide security.

4. The basis of the appellant's claim was that he was the registered proprietor of the suit property having acquired it for valuable consideration from one Josphat Muriithi Gachiri (Gachiri) who had obtained it through a court order made on 8th September 2004 in Nyeri HCCC No. 86 of 2004 which suit was between the said Gachiri and one James Bundi Munene (Munene) who was the original registered owner of the suit property. The appellant contended that when he went to the suit property to begin work, he found the respondents illegally working on it and refused to vacate, hence the suit.
5. In disputing the appellant's claim, the respondents in their defence stated that the issue of ownership of the suit property had been fully canvassed and concluded in Kerugoya Principal Magistrate's Court Land Dispute Case No. 74 of 2001 (L.D No. 74 of 2001) and also in Nyeri HCCC No. 86 of 2004 and the suit was therefore res judicata. Further, that the respondents owned the said land in the ratio of 0.15Ha and 0.20Ha respectively. Alongside the defence, was a counter-claim raised against the appellant, Munene and Gachiri seeking dismissal of the appellant's suit and orders that the title to the suit property belongs to them and that the registration of the appellant as owner of the land be cancelled and substituted with their names in the ratio of 0.15Ha for the 1st respondent and 0.25 for the 2nd respondent.
6. In the said counterclaim, the respondents maintained that Munene was the registered proprietor of the suit property which measured about 0.4 Ha and that through an agreement dated 10th February 1998, Munene sold the suit property to the respondents which led to subdivision of the land into 2 portions: Baragwe/Guama/2100 for the 1st respondent and Baragwe Guama/2101 and 2102 for the 2nd respondent. According to the respondents, the purchaser (Munene) refused to execute the transfer forms leading to filing a reference at the Gichugu Land Disputes Tribunal. The tribunal's decision was in their favour and a decree was issued to that effect at Kerugoya Principal Magistrate Land Dispute Case No. 74 of 2001 (LD No. 74 of 2001). The respondents argued that consequently thereof, Munene had no title to the suit land to transfer to the Gachiri and later to the appellant.
7. The appellant's response to the counterclaim was that the LD. No. 74 of 2001 has no bearing to the suit and the decree in Nyeri HCCC No. 86 of 2006 was between Gachiri and Munene hence the plea of res-judicata did not arise. Further, that the issues determined in L.D Case No. 74 of 2001 involved different parties and the decree was null and void ab initio for want of jurisdiction. The appellant also disputed the joinder of the said Gachiri and Munene in the suit through the counter claim without leave of the court.
8. After considering the pleadings and the evidence before it, the ELC, found that the joinder of Munene and Gachiri in the suit through the counterclaim contravened the provisions of Order 9 Rule 9 of the Civil Procedure Rules as summons were not served upon them as required by law, and thus the ex-parte judgment entered against them was set aside. That finding left the issues for determination as stated in the suit and the counter-claim between the appellant and the respondents only. As regard this dispute, the ELC held in part that:

“It is plain to this Court therefore, that for as long as the orders issued by the Principal Magistrate's Court Kerugoya in the case No. 74 of 2001 remained un- discharged, it was not open to James Bundi Munene and Josphat Muriithi Gachiri to record the consent order that they did in Nyeri HCCC No. 86 of 2004 transferring the suit land to Josphat Muriithi Gachiri. That order was clearly obtained through concealment of material facts relating to the suit land and which were within the knowledge of James Bundi Munene. It was also made in contravention of an earlier order, albeit issued by a subordinate Court,



and which had not been discharged... Therefore, the transfer of the suit land to Josphat Muriithi Gachiri and thereafter to Ephantus Njogu Ndambiri the plaintiff in the main suit vide the agreement dated 24th November 2004 was unlawful. No valid title to the suit land was acquired by the said Ephantus Njogu Ndambiri, the plaintiff in the main suit, that can be protected by the provisions of Section 26(1) of the Land Registration Act ...”

“Clearly therefore the agreement entered between James Bundi Munene and the two defendants in the main suit cannot be defeated by the provisions of the Law of Contract Act as to attestation for the reason that in 1998, a disposition in land only required the signature of the person to be charged or by some person authorized to sign it. ... Finally, even if the agreement were invalid, which they were not, it is not contested that the two defendants in the main suit are in occupation of the suit land and that is why the plaintiff in the main suit wants to evict them. It would be unjust for the plaintiff to evict the two defendants in the main suit given those circumstances. The plaintiff’s claim for the orders evicting the two defendants from the suit land must therefore fail.”

9. The appellant challenges the decision of the ELC on 10 grounds alleging that the ELC erred in law and fact by:
 - i. Invalidating the transfer of land parcel Baragwe/Guama/1891 by Josphat Muriithi Gachiri to the appellant even though the appellant was not a party in Kerugoya Principal Magistrate's Court LDT No. 74 of 2001 or Nyeri High Court Civil case number 86 of 2004;
 - ii. Invalidating the Appellant’s title to land parcel Baragwe/Guama/1891 in spite of his having found that there was a valid agreement of sale which had been blessed with the requisite consent of the land control board;
 - iii. Making adverse findings against James Munene and Josphat Muriithi Gachiri the first and second Defendants in the counter claim even after having found that they were not parties to the suit;
 - iv. Failing to find that the orders emanating from Kerugoya Principal Magistrate Court in LDT case number 74 of 2001 were void ab initio in that they were issued ex parte by a court without jurisdiction against James Bundi Munene who had not been served with any court process or order emanating from the said case;
 - v. Finding that there was concealment of material facts relating to the suit land and which were within the knowledge of James Bundi Munene when he had not been served with the court process or orders in Kerugoya Principal Magistrate LDT case number 74 of 2001;
 - vi. Finding that as long as the orders issued by the Principal Magistrate's Court in Kerugoya in case number 74 of 2001 remained un-discharged, it was not open to James Bundi Munene and Josphat Muriithi Gachiri to record the consent order that they did in Nyeri High Court Civil Case No. 86 of 2004 transferring the suit land to Josphat Muriithi Gachiri when the said Josphat Muriithi Gachiri was not a party in Kerugoya P.M LDT No. 74 of 2001 and James Bundi Munene had not been served with court process, pleadings or orders made therein;
 - vii. Ordering the transfer of the suit land to the respondents on the strength of an agreement for sale which was void for want of consent from the land control board;
 - viii. Ordering the transfer of the whole of the suit land to the respondents which was in excess of the purported Judgement in Kerugoya Principal Magistrate's Court LDT NO. 74 of 2001;



- ix. Dismissing the Appellant's case without appreciating that the appellant was a Purchaser for value without notice;
- x. Allowing the counterclaim by the respondents against the weight of the evidence adduced in court.

Submissions by Counsel

- 10. At the hearing of the appeal counsel had both filed written submissions. Learned counsel Mr. Njagi for the respondent was present but there was no appearance by counsel for the appellant, despite service.
- 11. In his written submissions, counsel for the appellant condensed the grounds into 4 and submitted that the appellant was an innocent purchaser for value of the suit property and the invalidation of his title by the ELC was erroneous. Counsel submitted that the appellant produced all the necessary documents including the agreement for purchase of the suit property, acknowledgments in respect of the purchase price, application and consent of the land control board, and duly executed transfer forms in support of his claim.
- 12. Counsel further submitted that both parties relied upon the certified copy of the register in respect of the suit property. Further, that there was no evidence that the appellant was a party to the L.D Case no. 74 of 2001 or the Nyeri HCCC No. 86 of 2004, which prominently featured in the impugned judgment. Counsel further submitted that the register had no encumbrance when the appellant was purchasing the suit property and his transfer could therefore not be tainted by any dealings made between the previous owners of the suit property who were not parties to the suit. Counsel submitted further that the ELC having found that Munene and Gachiri were not parties to the suit, it was misdirection by the ELC to make an adverse finding against them. Further, it was a misdirection to attribute it to the appellant and use this as a basis to invalidate the appellant's title to the suit property.
- 13. Counsel submitted that the ELC erred in failing to find that the order emanating from the L.D Case No. 74 of 2001 were void ab initio in that a court without jurisdiction issued them ex parte. That the tribunal had no jurisdiction to deal with the title to land in view of section 3(1) of the Land Disputes Tribunal Act (repealed). Counsel relied on this Court's decision in the case of Jotham Amunavi vs the Chairman of Sabatia Division Land Disputes Tribunal in support of the proposition that elders have no jurisdiction to arbitrate on issue of title to land.
- 14. Counsel further submitted that there was no evidence that Munene was ever served to attend to the matter before the tribunal as shown in the minutes of the tribunal's proceedings. Counsel further submitted that the ELC had no jurisdiction to set aside the orders made in Nyeri HCCC No. 86 of 2004 as the said court had no jurisdiction to sit on appeal over orders issued by a court of concurrent jurisdiction. Counsel also relied on the decision of Ali Bin Khamis vs SALIM Bin Khamis (1956) EACA 195 to counter the adverse finding of the ELC, which he is said to have made against Munene who had no knowledge of the orders of the L.D Case No. 24 of 2001. In this regard, counsel cited the case of Ali Bin Khamis v Salim Bin Khamis (supra) which was cited in the decision of Koinange Investment & Development Ltd v Nairobi City Council & Others [2009] eKLR which stated that:

“Where an order is improperly made without serving a person known to be affected by it and have statutory right to be served before it can be made, the order is a nullity ...”



15. Counsel further submitted that the ELC erred in ordering the transfer of the suit property to the respondents on the strength of the agreement of sale, which was void for want of consent of the land control board. Further, that the respondents' purchase agreements were in respect of parcel No. Baragwei/Guama/302 and not the suit property. Counsel submitted that being agricultural land, the consent ought to have been issued within 6 months from the date of the transaction hence the agreements were void for want of the consent. Further, that the ELC also erred in ordering the transfer of the whole suit to the respondents contrary to the decision of the L.D Case No. 74 of 2001 that ordered for transfer of 0.15Ha to the 1st respondent and 0.20Ha to the 2nd respondent and 0.05Ha to the original owner, Munene.
16. Counsel for the respondent opposed the appeal and submitted that the ELC did not err in upholding the orders in L.D. Case No. 74 of 2001 in that the said orders had become a decree of the court by operation of the law. Counsel submitted that the appellant knew about the case in Nyeri HCCC No. 86 of 2004. That the ELC did not err in holding that the decree in Kerugoya L.D case No. 74 of 2001 having been executed against the suit property there was no room for other decree such as the Nyeri HCCC No. 86 of 2004. Counsel further submitted that the suit property was subdivided and ceased to exist in its original number.
17. Further, that the impugned judgment ordered registration of the 1st and 2nd respondents as proprietors in the ratio of 0.15Ha and 0.25Ha respectively and not the whole land as claimed by the appellant. The respondents also contend that the appellant was not an innocent purchaser for value noting that he had pleaded in his original plaint to have acquired the suit property through gift and only introduced the issue of purchase through amendment. Counsel further submitted that the copy of the green card at entry No. 9 where the appellant was registered as the proprietor does not show that consideration was passed. Counsel urged the Court to dismiss the appeal for lack of merit.

Determination

18. We have considered the record, the submissions by counsel, the authorities cited and the law. This Court is called upon to exercise its duty as a first appellate court by reassessing the evidence produced during trial, evaluate it and arrive at its own independent findings taking into account that the Court neither heard nor saw the witnesses as they testified. See Rule 31 (1) of the Court of Appeal Rules 2022 and this Court's decision in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. See also *Selle & Another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123.
19. Further as was held by the Court of Appeal for East Africa in *Peters vs Sunday Post Limited* [1958] EA page 424:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.”
20. We discern from the record that the main issue for determination is whether the cancellation of the appellant's title to the suit property and substituting it with the respondents' names was justified and if not, whether the respondents should be evicted from the suit property. It is not in doubt that original owner of the suit property was James Munene. The suit property measures approximately 0.40Ha of which the Munene sold 0.15Ha and 0.20Ha to the respondents respectively sometime in 1998



and 1999 and he received the full purchase price as agreed from the sale agreements produced. It was apparent from the evidence that the respondents took possession of their respective portions of land.

21. Regarding payment of the purchase price, counsel submitted that the respondents took possession of the suit property. However, the purchaser (Munene) reneged on the respondents' agreements and refused to transfer the suit property to the respondents. The appellant acquired the title to the land through purchase sometime in the year 2004 as per the sale agreement produced. He acquired it from Gachiri who had bought it from Munene.
22. In short, having failed to transfer the suit property to the respondents after receiving the purchase price, Munene chose to resell the suit property to Gachiri who then sold it to the appellant. After acquiring the suit property, the appellant went to the ground to take occupation and was faced with resistance by the respondents hence the suit before the ELC seeking orders to evict the respondents. On the other hand the respondents raised a counter-claim seeking cancellation of the appellant's title and substitution with their names.
23. On the first issue, the appellant contends that his title ought not be cancelled in favour of the respondents for reason that he is an innocent purchaser for value without notice. A 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.”

24. The Supreme Court, in the case of *Dina Management Limited vs County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), stated that in determining whether a party is a bona fide purchaser for value, the court must first establish the root of the title right from the first allotment. While upholding the dicta of this Court in the case of *Samuel Kamere vs Lands Registrar, Kajiado*, Civil Appeal No. 28 of 2005 [2015] eKLR the Supreme Court pronounced itself in the following terms:

“...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property”

25. By parity of reasoning, we find that the appellant had a duty to conduct due diligence in order to establish the root of the title in order to fit within the definition of a bona fide purchaser. This Court in the case of *Said v Shume & 2 Others* (Civil Appeal E050 of 2023) [2024] KECA 866 (KLR) (26 July 2024) (Judgment) stated as follows:

“The court reaffirmed the law regarding the importance of due diligence in land transactions holding that, “...Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase.” And as in the Supreme Court decision in *Dina Management Limited vs County Government of Mombasa* (supra), the Court went on to hold that, once the root of the title has been challenged, a party cannot derive benefit from the doctrine of bona fide purchaser.’



26. From the copy of green card, entry 3 and 4 were entries lodged in the year 2000 by the respondents registering cautions claiming purchasers' interest and the said entries were then removed on 14th September 2004 through a court order issued in HCC Case No. 86 of 2004 dated 8th September 2004. On 17th November 2004 Gachiri was registered as the owner pursuant to the court order HCCC No. 86 of 2004 and on 30th December 2004 the appellant was registered as the proprietor. As submitted by counsel for the respondent, no consideration is noted to have passed in registering the appellant as proprietor. Further, a scrutiny of the court order that allowed Gachiri to be registered as owner of the suit property reveals that the Nyeri HCC No. 86 of 2004 was filed by Gachiri suing Munene via plaint dated 7th September 2004 alleging that Munene had refused to transfer the suit property to him despite having paid him the entire purchase price of Kshs.400,000/- for the sale of the land. Gachiri sought for orders that the suit property be transferred to him and all the cautions, restriction and inhibitions against the land be removed. It was instructive that the appellant in the suit did not enjoin the respondents, as the persons who lodged the caution, as defendant in the suit. In a statement of defence dated 8th September 2004, Munene admitted all the claims as follows:

“

“4. The defendant also admits all the contents in para 4 of the plaint that on or about February 2000 he agreed to sell to the Plaintiff and the Plaintiff agreed to buy from him the whole of the suit land at the agreed price of Kshs.400,000 and acknowledged receipt of the whole purchase price

5. The defendant admits the contents of all para Nos. 6,7, 8 and 9 of the plaint. REASONS WHEREFORE the defendant prays for judgment to be entered in favour of the plaintiff as prayed in the plaint and costs be in the course.”

27. The defence having been filed just a day after the plaint was filed and on the same date of filing (8th September 2004), a consent was drawn in the following terms:

“We undersigned parties do hereby consent as follows: -

1. That the defendant do transfer one acre or 0.040 Ha of the suit land to the plaintiff
2. That the inhibitions, restriction and cautions lodged against the suit land be lifted forthwith ...
3. That costs be in the course Dated 8th Sept 2004”

28. Thereafter, the Deputy Registrar endorsed the consent on 9th September 2004. It is clear that this was a fraudulent suit filed by the appellant in collusion with Munene and Gachiri with the apparent aim of defeating the respondents' claim over the suit parcel of land without their knowledge. Due diligence required by law as stated above would have revealed defects in the title of the suit property that the said consent order was obtained as a cover up to the transaction between Gachiri and Munene. The contents of defence would raise eyebrows to any reasonable person's reasons for Munene had to have the backing of a court order for the transfer to be effected. Further, the consent order provides for removal of cautions that were registered by 3rd parties (respondents) who were not party to the suit without giving them the right to be heard.



29. Further, the persons who registered the cautions were in occupation of the suit property thus a visit to the suit property before the purchase would have revealed the respondents’ interest in the suit property. All these were indicators, which the appellant ignored.

30. We are persuaded by the holding in the case of Jones v. Smith [1841] 1 Hare 43, the Chancery Court that:

“a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...”

31. In view of the foregoing, we find that the appellant was not a bona fide purchaser for value. Due diligence would have given him notice that the purchaser’s (Gachiri’s) title to the suit property had serious defects.

32. As regards the registration of the title, we have noted that the appellant was registered as owner of the suit property in 2004. The respondents were in occupation thereof since 1998 with permission of the original registered owner, first through a lease and later through a sale. The respondents took possession of the land in trust that the registered owner would do his part of the bargain and transfer the suit property to them but later he reneged on the sale without any legal justification. The registration of the suit property in the name of the appellant was subject to the equitable rights of the respondents having taken possession and occupied the land long before him. The registered owner, (Munene) by allowing the respondents to take possession of the suit property created a constructive trust in favour of the respondents and the same could not be defeated by the appellant’s registration of the suit property.

33. We reiterate the sentiments of this Court stated in the case of Said v Shume (supra) that:

“We have said enough to show that, the appellant having failed to undertake sufficient due diligence into the title to the suit property, turned a blind eye to all the extant irregularities and, as a consequence, was not by any standard a bona fide purchaser for value of the suit property without notice.”

34. By parity of reasoning, we find that the appeal has no merit and it is therefore dismissed with costs to the respondents.

35. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 14TH DAY OF MARCH, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

