



REPUBLIC OF KENYA



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**Njonjo v Attorney General & 2 others (Civil Appeal 187 of 2019)
[2024] KECA 599 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 599 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 187 OF 2019
MA WARSAME, S OLE KANTAI & PM GACHOKA, JJA
MAY 24, 2024**

BETWEEN

JEDIDAH MBARE NJONJO APPELLANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

MARY WAMBUI KARIUKI 2ND RESPONDENT

MARY NGENDO TIBA 3RD RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court at Nairobi (Mary M. Gitumbi, J.) dated 4th July 2018 in ELC Case No. 173 of 2008)

JUDGMENT

1. The dispute before us sheds light on the importance of documentary evidence in tracing the history of a title. It is a sad state of affairs that holding a title in Kenya is not sufficient proof of ownership. If there is one infamy that the land registry system suffers, it is the existence of two or more titles in respect of one parcel of land. This forces the courts to behave like document examiners as the Judge is called upon to examine and analyze documentary evidence and conduct a historical analysis to determine which title is genuine. This is what befell the trial court; called upon to determine which of the two parties was the genuine and lawful registered proprietor of all that parcel of land namely L. R. No. Ruiru/Ruiru East Block 7/15 (the suit land) as both held a title to it. The trial court was tasked to determine the authenticity of the 3rd respondent's title on the basis that it was obtained fraudulently. It is that issue that forms the central question for determination in this appeal.
2. Summarizing the background as captured in the amended plaint dated 18th August 2008, the appellant contended that she was the registered owner of the parcel number Ruiru/Ruiru East Block 7/15 measuring 0.4042 hectares. That she bought the said parcel of land in 1980 and was issued with a title deed in 1991; that she still holds the original title to the parcel of land; that in 2007, she was alerted by



a neighbour, (as she does not reside on the plot), that there was some activity on the plot. Galvanized by that information, the appellant conducted a search in the land registry and discovered that the suit land had been transferred to the 3rd respondent who was unknown to her, that she had never sold the land and reported the matter to the criminal investigation department, Thika.

3. The 3rd respondent's evidence was that she is in the business of buying and subdividing land for onward sale to 3rd parties. That she bought the subject property in the year 2006. The property had been advertised for sale in a newspaper. In that regard, the 3rd respondent called the number displayed in the advert and talked to the broker who was selling the land. She stated that the broker took the owner of the land to her office in Campus Towers on University Way. She carried out a search that revealed that the land was registered in the name of Mary Wambui Kariuki, the 2nd respondent. She then signed a sale agreement where the consideration sum was agreed at Kshs. 1 million. She testified that she paid Kshs. 600,000.00 in cash and the balance of Kshs. 400,000.00 was remitted by way of a banker's cheque. She then obtained consent to transfer and the land was registered in her name on 18th January 2007. Thereafter, she then obtained consent to subdivide that parcel of land into 8 subplots though the mutation was never registered. It was her evidence that she relied on the official search she conducted at the Thika Land Registry to confirm the authenticity of the registered owner.
4. The 3rd respondent called Agnes Mugechi John as her witness.
That she was in a partnership with the 3rd respondent; that she was the one who conducted the search; that she met the 2nd respondent in person; and that she was present during execution of the agreement and the forms for Land Control Board consent.
5. On cross-examination, she conceded that the land was not registered in the partnership but only in the name of 3rd respondent. She further stated that when she learned that the ownership of the land was contested, she tried to call Ngure, the broker they had dealt with, but they could not trace him. The 3rd witness for the 3rd respondent is a registered valuer and his evidence is not relevant to the issues in dispute in this appeal as he only confirmed that the land is now worth Ksh. 22 Million.
6. Upon considering the evidence and the submissions by the parties, the trial court framed 5 issues for determination as follows:
 - a. Whether to declare that the plaintiff is the legal registered owner of the suit property;
 - b. Whether to order for the cancellation of the title document purportedly issued to the 3rd defendant and reinstate the plaintiff as the rightful legal owner;
 - c. Whether to order for the eviction of the 3rd defendant from the suit property;
 - d. Whether to order that the plaintiff be awarded mesne profits; and
 - e. Who is to bear the costs of this suit and interest.
7. On the first question whether the appellant is the registered owner of the suit property, the Judge held as follows:

“This brings us to the main issue for determination in this suit which is as between the claim to the suit property by the plaintiff and the 3rd defendant, which claim shall this court uphold in the circumstances of this case? Was the plaintiff's ownership of the suit property overridden by the defendant's title? This boils down to determination on whether the 3rd defendant is an innocent purchaser for value without notice.”



In the plaint, the plaintiff listed the particulars of fraud of the 3rd defendant as being permitting to be transferred to herself the suit property owned by the plaintiff without the plaintiff's knowledge or consent. However, when it came to the hearing, the plaintiff produced no evidence to support those particulars of fraud she levelled against the 3rd defendant. I am guided by section 107 of the Evidence Act Cap 80 which provides:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

I am further guided by the finding of the former Court of Appeal for Eastern Africa in *R. G Patel versus Lalji Makanji* (1957) EA 314 which stated as follows:

“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

8. On whether the 3rd respondent's title should be cancelled, the court held as follows:

“The plaintiff did not produce or tender any evidence to link the 3rd defendant to any fraud, omission or mistake in the way she acquired her title to the suit property. On her part, the 3rd defendant went to great lengths to prove that she was an innocent purchaser for value without notice and is accordingly entitled to protection of her title to the suit property as set out in the legal provision set out above. Her testimony was very convincing as she told the court that she and her partner PW2 are in the business of purchasing parcels of land, subdividing them and then reselling them. She explained to the court very clearly and with the evidence in support that she followed all the required steps to acquire the suit property. Her evidence stood unchallenged and this court has satisfied that she had no knowledge of the plaintiff's claim to the suit property at the time she purchased the same. Indeed, this court finds that the 3rd defendant had no “knowledge of the omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

The Court accordingly proceeds to uphold the 3rd defendant's title to the suit property and declares that the plaintiff's title to the suit property stands extinguished.”

9. The trial Judge also held that in view of her findings on ownership, the prayer for eviction of the 3rd respondent and mesne profits could not stand. As a result, the appellant's suit was dismissed with costs.

10. This edict is the subject of this appeal. The appellant filed her notice of appeal dated 6th July 2018 and a memorandum of appeal dated 8th May 2019 raising 10 grounds impugning the findings of the learned Judge. We have taken the liberty to summarize the grounds as follows: that the Judge failed to consider section 26 of the *Registered Land Act* and its applicability to illegally acquired titles; that the holding that the 3rd respondent was an innocent purchaser for value was erroneous; that where there are two titles to a parcel of land, the first in time prevails; and that the 3rd respondent did not demonstrate how she acquired her title.

11. The appellant thus proposed that the appeal be allowed by setting aside the orders of the learned Judge and be substituted with an order allowing the prayers in the plaint.

12. The 3rd respondent filed a notice of cross-appeal dated 21st May 2019. It challenges part of the judgment on the ground that: the court did not consider the notice of claim against the 1st respondent for



- compensation of Kshs. 20 Million being the value of the land; that the expert evidence on valuation of the land was not considered; and that the court should have considered the prayer for compensation in the event that the appellant succeeded in her claim.
13. The appeal was heard on 14th February 2024 through the GoTo Virtual link platform. Learned counsel Mr. Kiongera appeared for the appellant while Mr. Gikonyo appeared for the 3rd respondent. The other respondents did not appear despite proof of proper service. The appellant's counsel's spirited attempt to adjourn the hearing on the basis that he had just come on record was rejected. The court noted that the previous advocates on record M/s Lawrence Mungai & Co. had filed written submissions dated 13th December 2019. Astonishingly, the appellant's counsel did not attempt to highlight those submissions. After a lot of nodding by the Court, the counsel only stated that he relied on the documents that had been filed by the previous advocate. Nevertheless, in the interest of justice, we shall consider those submissions and the authorities cited.
 14. The 3rd respondent relied on her written submissions dated 30th January 2020 in opposing the appeal and also in support of the cross-appeal. The counsel orally highlighted the submissions.
 15. The thrust of the appellant's submissions was that the 3rd respondent's title was obtained fraudulently and thus impeachable under section 26 of the Registered Land Act. To demonstrate that the 3rd respondent title was obtained fraudulently, the appellant pointed out that:
 - i. The transfer document from the 2nd respondent to the 3rd respondent was not produced in evidence;
 - ii. The receipt for payment of stamp duty was not produced in evidence;
 - iii. There was no proof that a transfer was signed from the 2nd respondent to the 3rd respondent; and
 - iv. No receipt for payment of the requisite transfer fees was produced in evidence.
 16. She argued that this was a demonstration that the 3rd respondent's title was obtained fraudulently and that the learned Judge was at fault for failing to consider those facts.
 17. The other question posed by the appellant is whether the 3rd respondent was an innocent purchaser for value. To demonstrate that the 3rd respondent cannot be deemed to be an innocent purchaser for value, the appellant pointed out the following facts:
 - i. She submitted in her evidence that she was 'granted' a discount of Kshs. 1 million on the purchase price as the market price then was Kshs.2 million.
 - ii. the agreement for sale showed that the 3rd respondent had doubts about the title as the agreement had an indemnity clause to the effect that "should any other person come forward to claim ownership of the above land", the 2nd respondent was to be held responsible fully" and;
 - iii. On the failure to prove payment of stamp duty, she cited the cases of *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others* [2017] eKLR and *Samuel Kamere v Lands Registrar, Kajiado* [2015] eKLR, the appellant submitted that the 3rd respondent cannot be held to be a bona fide purchaser for value due to her conduct.
 18. The appellant further submitted that her title was the first in time and the interest in the suit land could only be surrendered voluntarily by a court order if there is proof that it was obtained fraudulently. The case of *Benja Properties Limited v Syedna Mohammed Burbannudin Sabed & 4 others* [2015] eKLR was cited. In summary, the appellant's position was that the 3rd respondent obtained her



- title fraudulently and therefore not an innocent purchaser for value. As a result, the cross- appeal is unmerited and should be dismissed.
19. The 3rd respondent on the other hand contended that the findings of the trial court were faultless, lawful and proper; that the Judge was right in holding that the 3rd respondent was an innocent purchaser; that the appellant did not produce any evidence to link the 3rd respondent to the fraud, omission or mistake in the way she obtained her title; and that the Judge was right in holding that the appellant's title was extinguished. The 3rd respondent maintained that it carried out proper due diligence before signing the agreement for sale.
 20. Citing several authorities, the 3rd respondent maintained that it obtained the title procedurally after conducting a search in the land registry and having done proper due diligence. Therefore, she cannot be accused of having obtained the title fraudulently. The 3rd respondent cited the following authorities in support: *Katende v Haridar & Company Ltd* [2008] 2 EA 173, *Lawrence Mukiri Mungai v Attorney General & 6 others* [2013] eKLR, *Fletcher v Peck*, 10 U.S. 87 (1810), and [*Eunice Grace Njambi Kamau & another v Attorney General & 5 others* \[2013\] eKLR](#).
 21. The 3rd respondent urged us to dismiss the appeal and that in the event the appeal succeeds, we should allow the cross-appeal against the 1st respondent as it relied on an official search issued by the land registry as part of the due diligence.
 22. We have considered the parties' final submissions, examined the record of appeal and analyzed the law. As a first appellate court, an appeal is by way of a 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 and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and thus should make due allowances in this respect. (See [*Gitobu Imanyara & 2 Others v Attorney General* \[2016\] eKLR](#)).
 23. The rightful and lawful proprietor of the suit land remains the crux of this appeal. All the grounds of appeal revolve around this issue. Therefore, it is our view that the main issue for determination is whether the learned Judge arrived at a just or correct decision as to who the rightful owner of the suit land is. This means that all the grounds of appeal will succeed or fail once we determine this issue.
 24. We are alive to the provision of section 26(1) of the [*Land Registration Act*](#), which provides that the certificate of title issued upon registration shall be taken as a prima facie evidence that the person named as the proprietor is the absolute and indefeasible owner. However, the rider clause is that the title can be challenged if it is demonstrated that it was obtained through fraud, misrepresentation, illegally, unprocedurally, or by way of a corrupt scheme.
 25. It is not contested that both the appellant and the 3rd respondent hold a registered title to the suit land. Each contend to be the lawful registered owner. The appellant's position in the trial court was that she was registered first in time and that she still holds the original title to the suit land. She maintained that she had never sold the land to any other person. On the other hand, the 3rd respondent holds a title which she claims was lawfully obtained having purchased the land from the 2nd respondent who was the duly registered owner at the time of the purchase.
 26. With this conflicting evidence, it was incumbent upon the trial court to distill the evidence that had been adduced by the parties by assessing the historical background of the title that each party had submitted in evidence to establish who was the rightful owner. Having carefully examined the record, we note that other than stating that the appellant did not adduce evidence to prove fraud and that the 3rd respondent was an innocent purchaser for value, the learned Judge did not even attempt to analyze the evidence of the historical background to the titles that were in dispute. The Judge's position was



- that the 3rd respondent's evidence remains unchallenged and that the court was satisfied that the 3rd respondent was an innocent purchaser for value.
27. The elephant in the room is; who is the rightful owner of the suit land? Can the 3rd respondent be deemed to be an innocent purchaser for value? Did the 2nd respondent hold a valid title that could be passed to the 3rd respondent? In our view, these are the issues that the trial Judge should have addressed her mind to.
28. We have carefully examined the record and the following facts remain uncontroverted:
- i. The appellant was registered as the proprietor of the suit land on 15th July 1991.
 - ii. The appellant still holds her original title to the suit property;
 - iii. The 2nd respondent obtained a title to the suit land on 3rd September 1993;
 - iv. Despite being served with summons, the 2nd respondent did not enter appearance or file a defence and consequently, an interlocutory judgment was entered against her;
 - v. The 3rd respondent bought the suit land in 2006 after she saw an advertisement in the daily newspaper. According to her evidence in cross-examination, she dealt with a broker who indicated that the sale price was Kshs. 2 Million but negotiable. Eventually, the sale price was agreed at Kshs. 1 Million.
 - vi. Though the sale price is stated to be Kshs.1 Million, she paid Kshs.600,000 in cash and she only produced evidence of payment of Kshs.400,000 by way of banker's cheque. The sale agreement is only signed by the 3rd respondent and the 2nd respondent and has no witness. It was signed on 6th December 2006 and there is a handwritten note dated 26th January 2007 that Kshs.600,000 was paid in cash and the balance of Kshs.400,000 by a banker's cheque No. 090056.
 - vii. There is a handwritten document dated 26th January 2007 titled "To whom it may concern." In the handwritten document, it is stated that the 2nd respondent had sold the suit land to the 3rd respondent for a sum of Kshs.1 Million and that the amount had been paid in full. The said handwritten document is witnessed by the 2nd respondent and some two other people: Agnes Mugechi John and Peter Mwaura Nguire. One glaring question arises; Since the 2nd respondent and the 3rd respondent had signed an agreement on 6th December 2006, what is the purpose of the handwritten document dated 26th January 2007 that is addressed "To whom it may concern"? That question was missed by the learned trial Judge. We think the answer to that question is so fundamental to the dispute between the parties herein.
 - viii. It is common ground that the 2nd respondent and the purported agent, one Peter Mwaura Nguire, never gave evidence in court.
29. It is also instructive to note that the evidence of the 3rd respondent has glaring gaps on how she acquired her title. In her admission, she never produced a copy of the transfer signed between herself and the 2nd respondent. She also failed to produce the receipt for payment of the stamp duty and the receipts for the transfer fees. Therefore, although she alleges that she is an innocent purchaser for value, it is evident that she did not even demonstrate how she acquired the title. Without a signed transfer form and receipts for stamp duty and transfer fees, one wonders how the 3rd respondent obtained her title. The title is not supported by any other document and it is hanging in the air, so to speak. We think, the circumstances herein, manifestly demonstrate the 2nd respondent may not be innocent. The facts, evidence and her admission show that the veil of innocence has been removed.



30. From the record, the evidence of the appellant is clear and cogent. She demonstrated how she acquired the title. There was no evidence that she transferred her title to the 2nd respondent in 1993 or at all. She still holds the original title deed to the land. That evidence is solid and has not been shaken by the parties herein.
31. We think we have said enough to show that the trial Judge failed to analyze the evidence that was adduced by the parties. The holding by the trial Judge that the 3rd respondent was an innocent purchaser for value flies in the face of the evidence on record. Equally, the holding that the appellant's title was extinguished is not based on any evidence.
32. Clearly, even if the 3rd respondent relied on a search obtained in the land registry at Thika, her conduct as demonstrated by the documents and evidence adduced in court shows that she cannot by any stretch of argument/imagination be deemed purchaser for value. This Court in *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others* [2017] eKLR adopted the decision of the Ugandan Court of Appeal in *Katende v Haridar & Company Limited* [2008] 2 E.A.173 that weighed in on the definition of an innocent purchaser and this court takes the same approach. The Court held thus:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.”

33. It is settled law now that waving a title in the face of the court is not enough to prove genuineness of that title. This was the holding of this court in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR where it was held that:

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

34. In this appeal, we have said enough to show that the 3rd respondent cannot be taken to be an innocent purchaser for value. The 2nd respondent who sold the land to the 3rd respondent can only be described as a fraudster and no wonder, she disappeared to thin air after the sale. The 3rd respondent also engaged in conduct that also casts her innocence into doubt. Accordingly, the findings by the trial court that the 3rd respondent was innocent purchaser for value was wrong and not supported by evidence. Equally,



the holding that the appellant's title was extinguished was wrong. It cannot be protected by Article 40 of the *Constitution* as it was obtained unlawfully.

35. In the circumstances, after careful consideration of the record, the documents, the submissions and the authorities cited, we are satisfied that the grounds of appeal have merit and we do not hesitate to set aside the judgment and decree of the trial court. Accordingly, we set aside the judgment and substitute it with an order that the appellant is the legal registered owner of all that parcel of land namely Ruiru/ Ruiru East Block 7/15. We further order that the title held by the 3rd respondent should be cancelled and that the entry be removed from the register.
36. On the cross-appeal as to whether the 3rd respondent is entitled to compensation by the 1st respondent, we have already demonstrated that she cannot be deemed to be an innocent purchaser for value. Accordingly, the cross-appeal is unmerited and we dismiss it.
37. On the question of costs, the general rule is that costs follow the event but the court has to consider the circumstances of each case. As stated in the judgment, the conduct of the appellant's counsel during the hearing, left a lot to be desired and he refused to even highlight the submissions. He only indicated he would rely on the documents filed after much prodding by the court. Accordingly, costs to the appellant.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MAY 2024.

M. WARSAME

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

