Ndigirigi v Nzioki & 4 others (Civil Appeal 85 of 2020)
[2024] KECA 538 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KECA 538 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 85 OF 2020

SG KAIRU, F TUIYOTT & JW LESSIT, JJA

MAY 9, 2024

BETWEEN

TABITHA WOTHAYA NDIGIRIGI ..... APPELLANT

AND

MOHAMMED MUTUKU MUTISYA NZIOKI ..... 1ST RESPONDENT

JOSEPH MACHUKA OKARU ..... 2ND RESPONDENT

MAIMA NAYKINYWA MOHAMMED ..... 3RD RESPONDENT

JOYCE TERESA AKINYI ..... 4TH RESPONDENT

RICHARD KARIRUN NGUNJIRI ..... 5TH RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court at Nairobi (Bor, J.) delivered on 11th October 2018 in ELC Civil Case No. 301 of 2010 Consolidated with ELC Civil Case No. 369 of 2011)

JUDGMENT

1. This appeal challenges a judgment delivered on 11th October 2018 by which the Environment and Land Court (ELC) (K. Bor, J.) upheld the 5th respondent's title to the property known as LR No. 209/12734 on the basis that the 5th respondent is an innocent purchaser for value without notice of defect in the title. The court held that in lieu of the relief sought by the appellant for cancellation of the transfers of the suit property, her remedy lay against her partners the 1st and 2nd respondents who were ordered to pay her Kshs 1.5 million and general damages of Kshs 500,000.00.

2. The facts are that the appellant, Tabitha Wothaya Ndigirigi, the 1st respondent, Mohammed Mutuku Mutisya Nzioki, and the 2nd respondent, Joseph Machuka Okaru, entered into a Partnership Deed in the year 2005 under which they agreed to carry on the business of clearing and forwarding under the

business name of "Toika international Company", a name apparently coined from initials of their three names.

3. The Partnership Deed provided that each partner's stake in the business was 33.33%. The business name was duly registered with the Registrar of Business Names and a Certificate of Registration dated 9th June 2005 issued. The 2nd respondent was to be the Chairman. The appellant was the Secretary. The 1st respondent the treasurer.

4. By a letter dated 9th December 2005, the Department of Lands offered Toika international Company a grant of a lease over the property known as LR No. 209/12734 measuring approximately 0.1999 hectares for 99 years from 1st December 2005. Subsequently, a Grant in respect of that property was issued and registered in favour of the appellant, and the 1st and 2nd respondents trading as Toika international Company.

5. Sometime between December 2005 and January 2006, the appellant unfortunately fell sick. She was admitted at the Mbagathi District Hospital from 9th January 2006 and remained hospitalized until her discharge on 31st January 2006. On being discharged, she moved to her rural home in Nyeri to recuperate. From there, she would commute to and from Nairobi for follow up treatment and checkups. All the while, she believed the suit property "was safe" in the hands of the chairman, the 2nd respondent.

6. The appellant eventually returned to Nairobi in early July 2007 having substantially recovered from her ailment. On visiting the property, she was surprised to find construction in progress. On enquiring from the building contractor who was the developer, she learnt that the property had been sold and her partners, the 1st and 2nd respondents had received the purchase price for the property. She reported the matter to the Chief and to the police.

7. The appellant's business partner, Joseph Machuka Okaru, the 2nd respondent, was subsequently charged before the Chief Magistrate's Court at Kibera with two counts of the offence of making a document without authority contrary to Section 357(a) of the *Penal Code* and two counts of the offence of forgery contrary to Section 349 of the *Penal Code*. The particulars of the offences were that on 2nd February 2006, jointly with others, with intent to defraud without lawful authority or excuse made/forged a sale agreement in respect of the property purporting it to be a genuine agreement signed by the appellant; that on 20th November 2006 with the intent to defraud and without authority he made/forged a transfer form in respect of the property purporting it to be a genuine transfer form signed by the appellant. He was tried before the Chief Magistrate's Court at Kibera and convicted on all four counts in a judgment delivered on 5th October 2017.

8. Meanwhile the appellant had filed suit on 10th April 2008 before the Magistrate's Court at Milimani, Nairobi against the 1st to 4th respondents seeking revocation of the sale and transfer. She subsequently withdrew that suit and on 21st June 2010 filed suit, being ELC No. 301 of 2010, before the High Court against her business partners, the 1st and 2nd respondents as well as against the persons to whom they had purportedly sold the property, the 3rd and 4th respondents. In the suit, the appellant pleaded that on 20th November 2006, her partners the 1st and 2nd respondents purported to sell the property to the 3rd and 4th respondents without her consent for which they received Kshs 1,800,000.00; that the sale was fraudulent and illegal as her signature on the purported sale agreement and transfer was forged. The appellant sought orders for the revocation of the sale and transfer of the property; cancellation of all entries transferring the property without her consent; permanent injunction to restrain the 3rd and 4th respondents from interfering with the property and general damages.

9. On 17th September 2010 the applicant filed an application seeking orders to restrain the 1st to 4th respondents from trespassing, selling, or dealing with the property pending the hearing of the suit.

10. In their statement of defence, the 1st and 2nd respondents, in addition to a general denial, asserted that the sale of the property was legal; that the consent of all the proprietors of the property was sought and obtained; and that the appellant executed the sale agreement and the transfer.

11. On their part the 3rd and 4th respondents pleaded that the sale agreement dated 2nd February 2006 was duly executed by the appellant and the 1st and 2nd respondents as the proprietors of Toika International Company and as allotees as lessees of the property; that they agreed to purchase the property for Kshs 3.2 million which was paid to the 1st and 2nd respondents on behalf of Toika International Company with the full knowledge of the appellant.

12. Richard Kabiru Ngujiri, the 5th respondent, had in a separate action, HCCC 369 of 2011, sued the appellant for trespass on the basis that he purchased the property from the 3rd and 4th respondents for "about Kshs 22,000,000.00" under a sale agreement dated 18th March 2011 and a subsequent transfer dated 10th June 2011 without any knowledge of any claims by the appellant.

13. The two suits, ELC No. 301 of 2010 and HCCC 369 of 2011, were later consolidated and Mr. Ngunjiri named as the 5th respondent.

14. In her testimony before the trial court, the appellant reiterated her averments in the plaint; that upon allocation of the property, she left everything to her partners, the 1st and 2nd respondents; that she was not privy to the sale and transfer of the business of Toika International Company or of the property; that she was hospitalized and did not sign the sale agreement or the transfer and neither did she know the advocate who purportedly witnessed the agreement and the transfer; that her partners, the 1st and 2nd respondents to whom she referred as her co-directors, had all the documents with which they processed the transfer. She did not call any witnesses.

15. The 1st to 4th respondents did not testify in the trial. One can only speculate why they skipped the trial. However, Aggrey Priston Ochieng Ogutu, advocate, a common factor in all the impugned transactions relating to the property, testified as DW1. He stated that he drew and attested the agreement and transfer from the appellant, the 1st and 2nd respondents on the one part as vendors to the 3rd and 4th respondents on the other part as purchasers. That he also drew the sale agreement from the 3rd and 4th respondents to the 5th respondent while the transfer in favour of the 5th respondent was drawn by the 5th respondent's advocate. He stated that although he did not indicate the appellant's identity card number on the agreement, the appellant appeared in his office for execution.

16. Mr. Ogutu stated that he did not witness payment of the purchase price which was done directly between the parties. That the transfer from the appellant, the 1st and 2nd respondents to the 3rd and 4th respondents took the form of transfer of business name of Toika International Company and the parties had to appear before the Assistant Registrar of Business Names for the transfer of business to be effected and this happened after the appellant and the 1st and 2nd respondents had executed the sale agreement.

17. Mr. Ogutu had also testified as a defence witness in the criminal trial against the 2nd respondent before the Chief Magistrates Court at Kibera. His testimony there, which was more elaborate, was that in 2006, he was invited to a meeting in Westlands, Nairobi by his client, the 3rd respondent who informed him that she had identified a property for purchase in South C Nairobi; that at the meeting, the 3rd respondent was in the company of the 4th respondent; that he was introduced to the vendors at that

meeting, namely, the1st and 2nd respondents who indicated that the property was in the name of Toika International Company; that he asked them for their identity cards including that of the appellant (who was instructively not present at the meeting), but they did not have the appellant's identity card; that he then drew the sale agreement leaving provision for appellant's Identity Card blank as he did not have it; that later, the appellant and the 1st and 2nd respondent went to his office where the appellant was given the sale agreement, inserted her identity card number and signed alongside the 1st and 2nd respondents; that he then witnessed and attested the signatures; that after the sale agreement was done, "there was no need of transfer of land as the purchaser was buying the company Toika together with the land"; that accompanied by the appellant, the 1st and 2nd respondents, they went to Sheria House and after identifying themselves, they signed a form for the transfer of business; that after the purchase price was paid, he was instructed to go ahead with the transfer which was executed by the appellant, the 1st and 2nd respondents in his office on 20th November 2006; that he later learnt that the 2nd respondent had been arrested on allegations of forging documents. He maintained in his evidence before the Magistrate in the criminal trial that the sale agreement dated 2nd February 2006 and the transfer dated 20th November 2006 which he drew were signed by the appellant in his presence.

18. The 5th respondent, DW2, stated in his testimony before the ELC that when he purchased the property from the 3rd and 4th respondents on 13th March 2011, he did not know there was a dispute and that he is an innocent purchaser and would not have risked Kshs 22.5 million in buying the property had he known of the dispute; that he was also not aware that there was a court case over the property which he bought in vacant possession but there "was a perimeter fence and a few structures"; that he found a building which had been demolished which he gathered was demolished by City Council for not conforming to building requirements; that he moved to court on 22nd July 2011 because the appellant "had come with a gang of 50 people and demolished my structures and perimeter fence."

19. The 5th respondent called Arthur Atsiaya Agatsiva, DW3, who stated that he moved into the property in 2010 before the 5th respondent bought it and had not heard of any dispute over the property before that; that he used to work on the property as a caretaker; that structures that had been erected by the 3rd and 4th respondents were demolished by the City Council; that he saw the appellant for the first time on 16th July 2011 "when she came with people to the land". With that the defence case was closed.

20. In its impugned judgment delivered on 11th October 2018, the ELC (K. Bor, J.) referring to Section 23 of the Registration of Titles Act held that based on the "position of the law which was in force at the time the suit property was transferred to the 5th" respondent, "the court is inclined to uphold the title held by the 5th [respondent] as an innocent purchaser for value without notice." The Judge stated that the appellant owned 1/3 of the property while the 1st and 2nd respondents each owned 1/3 share in the property and that "no finding of fraud was made against the 1st defendant" and that the evidence of the advocate who did the conveyance transaction over the suit property was not challenged by the [appellant]"; that the 1st respondent did not give evidence and that had he done so, he might have shed more light on what really transpired when the suit property was transferred. In the end, the trial court expressed that the appellant's recourse lay in pursuing the 1st and 2nd respondents who the Judge ordered, suo motto, should pay the appellant Kshs 1.5 million as well as general damages of Kshs 500,000.00.

21. The appellant, who appeared before us in person during the hearing of the appeal on 8th November 2023, has challenged that judgment on grounds that the Judge erred in failing to appreciate that forgery was proved vide the Criminal Case No. 2777 of 2010; in holding that her remedy is in damages against her partners, the 1st and 2nd respondents, in lieu of adjudicating on the issues before her; for failing to appreciate that the title could be nullified on grounds of fraud, forgery or misrepresentation; and for

failing to have regard to the evidence. She relied entirely on her written submissions dated 31st March 2021 which we have duly considered.

22. There was no appearance for the 1st to 4th respondents during the hearing of the appeal. Learned counsel for the 5th respondent Mr. Kabugu orally highlighted his written submissions dated 3rd November 2023 which we have also considered.

23. Based on the memorandum and record of appeal and the submissions, there are essentially two issues for consideration. The first is whether fraud, the substratum of the appellant's case, was proved to the required standard. The second is whether the 5th respondent is an innocent purchaser for value without notice.

24. On the first issue, it is established principle that fraud must be specifically pleaded and proved. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2002] eKLR, the Court stated:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

See also *Central Bank of Kenya limited v Trust Bank Limited & 4 others* [1996] eKLR.

25. There is no doubt that in her plaint, the appellant, albeit acting in person, complied with the requirement on pleading fraud. She set out in detail under paragraph 9 of the plaint the particulars of fraud, among which were that the agreement for sale and transfer were forged; that alteration of the records of Toika International Company with the Registrar of Business Names including declarations of documents were forged.

26. Before the trial court, the appellant relied on the proceedings and judgment in Criminal Case No. 2777 of 2010 to which we have already referred in which the 2nd respondent was convicted for forgery of the sale agreement and the transfer. Although the learned Judge noted in her judgment that the appellant relied on those proceedings and the conviction, she appears to have disregarded the same on the somewhat confounding basis that "no finding of fraud was made against the 1st defendant" as though to suggest the presumed innocence of the 1st respondent nullified the conviction for forgery and making of the said documents with intent to defraud on the part of the 2nd respondent.

27. Section 47A of the *Evidence Act* provides that:

> " A final judgement of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgement or after the date of the decision of any appeal there in, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

28. The fact that one of the partners in the business, namely the 1st respondent, was not charged or convicted cannot in our view validate the sale agreement and the transfer found, by a competent court in a criminal proceedings, to have been forged. The complaint by the appellant that the learned Judge erred in failing to appreciate that forgery was proved on the face of the conviction in Criminal Case No. 2777 of 2010 has merit.

29. Moreover, the complaint that the learned Judge failed to consider, in a holistic manner, all the circumstances of the case is also merited. There is, for instance, the observation by the learned Judge that the evidence of the advocate (DW1) who did the conveyance transaction over the property was not challenged. DW1 stated that when he was first summoned by his client the 3rd respondent to a meeting with the vendors in Westlands and instructed to prepare the sale agreement, only the 1st and 2nd respondents were present. The appellant was conspicuously absent which gives credence to the appellant's assertion that she was not privy to the transaction. The appellant maintained in her evidence that she was not known to DW1 and had never been to his office as he claimed. The observation by the Judge that DW1's evidence was not challenged is therefore not accurate. Indeed, when DW1's testimony before the trial court is compared to his testimony during the trial in the Criminal Proceedings, concerns on credibility arise. On our part, we are satisfied that fraud, which the learned Judge failed to adequately address in her judgment, was proved to the required standard.

30. We turn to the question whether the Judge erred in holding that the 5th respondent is an innocent purchaser for value without notice. Learned counsel Mr. Kabugu submitted that the trial Judge was right in holding that the 5th respondent is a bona fide purchaser for value without notice of any defects to the property. Counsel cited the decision in *Katende v Haridar & Company Limited* (20080 2 EA 173, where the Court of Appeal of Uganda held that for a purchaser to successfully rely on the bona fide doctrine, he must prove that he holds a valid certificate of title; he purchased the property in good faith; he had no knowledge of the fraud; he purchased the property for valuable consideration; the vendors had apparent valid title; he purchased without any notice of any fraud and was not party to the fraud.

31. In the present case, the 5th respondent pleaded in his statement of defence dated 4th November 2013 that as a subsequent purchaser for value and out of abundance of caution, he conducted a historical search and investigation into the history of the property and saw the sale agreement and transfer duly executed by the appellant accompanied by her identity card, PIN certificate and photographs bearing her likeness and that he also quizzed the advocate who witnessed the execution of the documents who confirmed that the appellant had indeed signed the documents in his presence.

32. In his testimony before the trial court, he stated that he undertook due diligence before purchasing the property and asked his advocates to do a search. He did not however elaborate how exactly that was done. He stated that when he bought the property from the 3rd and 4th respondents on 12th March 2011, he had no knowledge of the claims by the appellant and that prior to the appellant trespassing on the property he had "never heard of her." He stated in his further witness stated that:

> "During my investigations I contacted the 3rd and 4th defendants' lawyer, whom I knew because he had conducted the transaction of sale of the property to me, and required him to tell me whether he knew of the initial transaction between the earlier owners of the property to the 3rd and 4th defendant.
>
> He informed me that he was also involved in the earlier transaction and that he knew for a fact that the plaintiff was a willing participant in the original sale because he was present when she signed the sale agreement and the transfer to the 3rd and 4th defendants together with the 1st and 2nd defendant.
>
> He told me that the only thing he could not be sure about was how the proceeds of sale was shared among them but he was sure that the sale documents were signed by the plaintiff in his presence."

33. Apart from the fact that DW1 was the common factor in all three transactions, from the sale from the 1st and 2nd respondents to the 3rd and 4th respondents and onto the 5th respondent, what emerges from that statement is that the investigations the 5th respondent says he undertook, he did so, after the fact. He omitted to say how he came to learn that the property was for sale and how he met with the 3rd and 4th respondents. Indeed, the agreement for sale between the 3rd and 4th respondents and the 5th respondent is not part of the record before us. He however stated that the appellant was not in occupation of the property when he bought it in vacant possession and that "there was a perimeter fence and a few structures" and that he found a building which had been demolished and was told that the City Council demolished the structures that did not conform to building requirements. With that state of affairs, one would have expected the 5th respondent to explain what enquiries he made prior to contracting to purchase the property.

34. In *Torino Enterprises Limited v Attorney General* (Petition No. 5(E006 of 2022) [2023] KESC 79(KLR) the Supreme Court of Kenya pronounced that:

> "An innocent purchaser for value would also denote one was aware of what they are purchasing by inspecting the suit premises. This takes us to the question of whether the appellant had visited the suit premises and if so, what was its impression of the military installations on the suit premises? The fact that the suit land was occupied must have sounded a warning of "buyer be aware" to the appellant. We therefore find that it was not an innocent purchaser for value entitled to orders for restoration or compensation."

35. As already indicated, the record of appeal before us does not contain the sale agreements or the transfers from the 3rd and 4th respondents and onto the 5th respondents. What it contains is the Grant in respect of the property issued to the appellant and the 1st and 2nd respondents trading as Toika International Company registered on 6th June 2006. It has an entry of the transfer in favour of the 3rd and 4th respondents on 29th December 2006. Although the agreement for sale and the transfer in favour of the 5th respondent is not on record, he stated that he bought the property from the 3rd and 4th respondents on 12th March 2011. By that time, the appellant had already registered a caveat against the title which bears the Department of Lands stamp of 26th May 2010 claiming beneficial interest.

36. In the foregoing circumstances we are not persuaded that the holding by the learned Judge that the 5th respondent is a bona fide purchaser for value is well founded. Moreover, considering the judgment of the Chief Magistrates Court convicting the 2nd respondent for fraud and making the sale agreement and transfer with intent to defraud, there was no valid title capable of transfer to the 3rd and 4th respondents and onto the 5th respondent.

37. Counsel submitted further that the sale agreement and transfer from the appellant and the 1st and 2nd respondents was on the face of it duly signed by all three of them; that the complaint by the appellant that her signature was forged is a matter, as the learned judge held, between her and her partners the 1st and 2nd respondent and the 5th respondent should not be concerned, and need not have inquired into the internal affairs of the business.

38. We do not, with respect, agree with counsel for the 5th respondent, that the rule in Turquand's case would aid the 5th respondent. That rule, as stated in the case of *Royal British Bank v Turquand* (1856) 6 E. & B 327 Exch.Ch has it that a third party dealing with a company is not bound to ensure that all internal regulations of the company have in fact been complied with as regards the exercise and delegation of authority. In that case, the board of directors had borrowed money from the bank on a bond bearing the company's seal, and even though no resolution had been passed by the company in

general meeting, the company was nevertheless bound. We do not think that the principle is applicable in the circumstances of this case where a competent court found the appellant's purported signature on the sale agreement and transfer to have been forged. In addition, the 5th respondent was under a duty to inquire as to the validity of the sale and transfer to the 3rd and 4th respondents because at the time the 5th respondent bought the property from the two there was a caveat against the title by the appellant claiming a beneficial interest.

39. In conclusion therefore, the appeal succeeds. Yet we have had to mull over the final orders to make for two reasons. One, a copy of the title shows that CFC Stanbic took a charge over the property on 23rd December 2014 yet the Bank was never a party to the proceedings. The provisions of Order 21 Rule 6 that require the production of a certified copy of a title where there is a prayer for a judgment that would result in the alteration to the title is not idle. Had the trial Court paid heed to contents of the copy of the title produced then it would have required the Bank to be joined to the proceedings. It is therefore not without some unease that the order we shall finally make will, on the face of it, defeat the interest of the Bank. Yet we are somewhat comforted that it is the inevitable and just outcome if not only because the charge was taken during the pendency of the suit. Secondly, because of the orders sought, the property will revert to the partnership. We have found one of the partners to be liable for fraud and it might seem an oxymoron that the result of our decision will appear to benefit him. But we have no doubt that whoever is aggrieved by that result is not without remedy!

40. The judgment of the ELC delivered on 11th October 2018 is hereby set aside in its entirety. We substitute therefor judgment in favour of the appellant against the respondents as prayed in the appellant's plaint dated 17th June 2010 to the extent that we order that:

    i. The sale and transfer of the property known as LR. No. 209/12734 from Tabitha Wothaya Ndigirigi, Mohamed Mutuku Mutisya Nzioki and Joseph Machuka Okaru trading as Toika International Company to Naima Nyakioya Mohamed and Joyce Teresa Akinyi Ochieng and all subsequent transfers of the property are hereby cancelled with the result that the ownership of the property shall revert to, and be registered in the names of Tabitha Wothaya Ndigirigi, Mohamed Mutuku Mutisya Nzioki and Joseph Machuka Okaru trading as Toika International Company.

    ii. The appellant shall have the costs of the appeal and of the costs of the proceedings before the ELC.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR