



REPUBLIC OF KENYA



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**Karanja v Kamau & another (Civil Appeal 91 of 2017)
[2024] KECA 1701 (KLR) (28 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1701 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 91 OF 2017
W KARANJA, J MOHAMMED & LK KIMARU, JJA
NOVEMBER 28, 2024**

BETWEEN

TITUS KINYUA KARANJA APPELLANT

AND

ROSE NJOKI KAMAU 1ST RESPONDENT

ARCHIBALD WAMBURA KAHORA 2ND RESPONDENT

*(Being an Appeal from the Judgment of the Environmental & Land Court
at Kerugoya (B.N. Olao, J.) dated 5th May 2017 in E.L.C. No. 69 of 2012)*

JUDGMENT

1. This is an appeal arising from the judgment and decree of B.N. Olao J. delivered on 5th May, 2017 at the Environment and Land Court (ELC) in Kerugoya. A short background will help place this appeal in perspective.
2. Rose Njoki Kamau (the 1st respondent) and Wambura Kahora (the 2nd respondent) were husband and wife as at the time the suit before the ELC was filed by the 1st respondent against the 2nd respondent and Titus Kinyua Karanja (the appellant). The 1st respondent claimed, inter alia, that the 2nd respondent fraudulently caused the transfer of Land Parcel No. Loc.2/Kangari/2970 (the suit land) to the appellant without obtaining her consent as his wife and that the appellant did not obtain the requisite Land Control Board consent to transfer the suit land hence that the transfer was fraudulent. She averred that she had a beneficial interest in the suit land and that the 2nd respondent held the land in trust for her and her father.
3. The 1st respondent prayed for judgement against the appellant and the 2nd respondent jointly and severally for;



- a. An order for permanent injunction restraining the 1st and 2nd defendants their servants, agents and/or any persons claiming through them from continuing with or commencing construction, depositing buildings materials, cutting down any trees, picking tea leaves or committing any acts of waste of doing any acts directly or indirectly on Land Parcel Number Loc.2/Kangari/2970.
 - b. An order for declaration that Land Parcel Number Loc.2/Kangari/2970 is matrimonial property.
 - c. An order that the sale and registration of Land Parcel Number Loc.2/Kangari/2970 be cancelled and that title for the suit land be registered jointly between the 1st Defendant and the Plaintiff.”
4. The appellant and 2nd respondent filed separate memoranda of appearance and statements of defence. The 2nd respondent averred that he entered into a sale agreement over the suit property on 10th April 1998 with one Paul Maina Duncan for valuable consideration and was the registered owner of the suit land. He stated that the 1st respondent was a witness in the transaction and that he was not holding the same in trust as alleged. He denied all the particulars of fraud.
 5. The appellant on his part averred that he purchased the suit property from the 2nd respondent and that at the time he purchased the suit property it had no encumbrance or rival claim by the 1st respondent and that the 2nd respondent had informed him that he had sought the consent of one Elizabeth Njambi, his wife who had no objection to the transaction. He denied all the particulars of fraud.
 6. During the hearing the 1st respondent testified that it was not true that the 2nd respondent purchased the suit property alone as she contributed towards the purchase of the suit land which was bought at consideration of Kshs.540,000. She stated that she together with the 2nd respondent contributed Kshs.220,000 of the purchase price while her father one Samuel Kamau Mwangi contributed Kshs.320,000 towards the purchase of the suit property from one Paul Maina.
 7. She testified that at the time the suit property was purchased she was married to the 2nd respondent. She stated that the land was sold without the consent of the Land Control Board and was transferred to the appellant on 29th August 2012. She stated that the suit land was registered in the name of the 2nd respondent but she was the one cultivating and selling tea from the tea bushes on the suit land.
 8. In cross-examination she testified that she was married to the 2nd respondent in 1998 under customary law and together they have two children but they did not live together as they separated due to this dispute.
 9. On his part, the 2nd respondent testified that the 1st respondent was his wife and they have two children. He stated that they lived together in Githurai Kimbo and that in 1998 they raised some money to buy the suit land. He testified that it was true that he and the 1st respondent combined their money and that the 1st respondent’s father also helped and contributed towards the purchase price of the suit land. He stated that the 1st respondent and his father-in-law allowed him to be registered as the owner of the suit land and allowed the 1st respondent to plant some tea bushes which she was managing with her father. He further stated that they did all this as man and wife.
 10. He testified that in 1998 he got into some financial difficulties and he sold the suit land to the appellant but that the appellant fraudulently went to the Land Control Board and transferred the land in his names without consulting him yet he had not finished paying the purchase price. He stated that he was not involved in the transfer and that when his wife called him, he told her that he was not aware of the



- transfer and when he went to ask the appellant, he told him to look for land elsewhere. He stated that he was ready to refund the appellant's money as he got the land fraudulently.
11. On cross-examination he stated that the appellant had not paid him the entire purchase price. He further stated that it was true that his defence and his testimony in court was different but that his testimony in court was what was true. He confirmed that the 1st respondent was his wife and it was true that he had another wife named Elizabeth Njambi from whom he got consent to sell the land. He further stated that he did not go to the Land Control Board and that he did not sign any transfer form in favour of the appellant. However, he stated that his signature was on the form.
 12. The appellant testified that the suit property known as Land Parcel No. Loc 2/Kangari/2970 was registered in his names. He stated that in February 2012, the 2nd respondent approached him saying that he had a loan to pay and was having difficulties repaying the same and that the bank was about to sell the suit land and that the 2nd respondent asked him if he could buy the same to enable him repay the loan.
 13. He stated that on 7th March 2012 he went to Muranga Land Office to conduct a search and he confirmed that the land was in the 2nd respondent's name upon which they agreed that he would buy the suit land at Kshs.1.1 million per acre and that the entire suit land was 2.3 acres. He testified that the 2nd respondent took him to the suit land and he paid him Kshs.1 million and that they agreed that when he finished paying the balance, the 2nd respondent would sign the transfer which was done by August 2012 and that he went into occupation of the suit land.
 14. He testified that he attended the Land Control Board at Kigumo and that he did not know the 2nd respondent's wife and only saw her in court. He stated that he had the Land Control Board consent, search and other documents that formed his list of documents.
 15. On cross-examination, he stated that he saw the tea bushes on the suit property but he did not make an enquiry whom they belonged to and that he only heard the 1st respondent's evidence in court that she was the one growing the tea on the land. He stated that he had an oral agreement for the sale of the land and that he paid some of the purchase price in cash and by way of money transfer. He referred to a money transfer of Kshs.40,000. He confirmed that he had no confirmation from the 2nd respondent that he had bought the suit land from him. He stated that he had the consent from Kigumo Land Control Board but that the document was not fully filled because the wife of the 2nd respondent was not present and so they used the marriage certificate and that he saw the 1st respondent only once. He stated that he bought the suit land at Kshs.2.3 million.
 16. Upon considering the evidence, the trial Judge, B.N. Olao, J. found that the transfer of the suit land to the 2nd defendant was fraudulent and that it was un-procedural as it contravened the [Law of Contract Act](#). In summary, the learned Judge made the following findings: On the issue of Land Control Board Consent, he found the transfer of the suit land to the 2nd defendant was made without the necessary consent from the Land Control Board, making the transfer invalid. The court found that the 2nd defendant could not be considered an innocent purchaser as he was aware of the fraudulent nature of the transfer; and that the plaintiff's allegations of fraud were proven to the required standard, supported by a letter from the Secretary to the Kigumo Land Control Board indicating that the consent obtained was a forgery.
 17. The learned Judge went on to find that [Law of Contract Act](#) mandates that any land purchase agreement must be in writing, signed by the parties, and witnessed. The 2nd defendant admitted that there was no written agreement; that since the transaction was not legally documented, no proprietary rights were



- transferred to the 2nd defendant. The court concluded that the transfer was fraudulent, as pleaded by the plaintiff.
18. From the evidence presented before the court, the learned Judge concluded that the suit land was matrimonial property since it was acquired during the marriage through joint efforts, even though it was registered in the 1st defendant's name and this implied that it was held in trust for both spouses.
 19. The court found the plaintiff's request to have the suit land registered in both her and the 1st defendant's names was supported by the 1st defendant and was not challenged. The court reiterated that under section 26(1) of the [Land Registration Act](#), a certificate of title is conclusive evidence of ownership, unless it can be challenged on grounds of fraud, misrepresentation, or if it was acquired illegally or unprocedurally. In this case, the court aimed to correct the registration of the suit land to reflect its status as matrimonial property by having it registered in the joint names of the plaintiff and the 1st defendant.
 20. Ultimately the learned Judge entered judgment for the plaintiff against the 2nd defendant in the following terms:
 - a. An order of permanent injunction restraining the 2nd defendant, his servants, agents and/or any person claiming through him from continuing with or commencing construction, depositing building materials, cutting down trees, picking tea leaves or committing any acts of waste or doing any acts directly or indirectly on land parcel No. Loc 2/Kangari/2970.
 - b. An order of declaration that the land parcel No. Loc 2/Kangari/2970 is matrimonial property.
 - c. An order that the sale and registration of land parcel No. Loc 2/Kangari/2970 be cancelled and that the title thereof be registered in the joint names of the plaintiff and 1st defendant.
 - d. The 2nd defendant shall meet the plaintiff's costs."
 21. Aggrieved by the above findings, the appellant proffered the instant appeal by filing the memorandum of appeal dated 5th July, 2017. The appeal is premised on grounds, inter alia, that the learned Judge allowed the 2nd respondent to abandon his defence without amending his defence and statement as recorded and filed in court; that the learned Judge erred in allowing the 2nd respondent to give testimony which was completely materially not in accordance with the statement of defence filed in court as the defence opposed the claim while the evidence supported the claim; that the learned Judge erred in not estopping the 2nd respondent in recanting his filed defence and statement of defence filed in court whereby he has in terms admitted fully selling and fully transferring the suit land to the appellant at Kshs.2,300,000; that the learned Judge erred in law and fact in arriving at a decision that there was fraud in the sale transaction and transfer against the weight of evidence produced; that the learned Judge erred in law in arriving at a decision that the suit land was matrimonial property, that the 1st respondent is not a wife of the 2nd respondent in view of the position that the 2nd respondent is statutorily married to Elizabeth Njambi Wamburu who had given spousal consent and that the said marriage is not dissolved; and that the learned Judge erred in law and fact in not appreciating that the appellant in part performance had taken possession of the land and had commenced construction of a residential building, had also paid part of consideration before embarking on the transfer process, absence of written formal sale agreement does not vitiate the sale.
 22. When the appeal came up for plenary hearing on 24th July, 2023 there was no appearance by either the parties or their respective counsel on record. Learned counsel had, nonetheless, filed comprehensive submissions which had been filed earlier. The court relied on the said submissions to determine this appeal.



23. In his submissions, the appellant expounded on the grounds of appeal. It was submitted that the learned Judge should have estopped the 2nd respondent from contradicting the contents of his defence or denouncing his statement of defence whereby he had admitted having sold the suit land to the appellant.
24. The appellant contended that the 1st respondent is not legally recognized as the 2nd respondent's wife because the 2nd respondent was already married to Elizabeth Njambi in a monogamous marriage since 1982, which has not been dissolved. According to the appellant, without a valid marriage between the 1st and 2nd respondents, there cannot be any property designated as matrimonial property between them.
25. Counsel stated that the appellant presented evidence showing that the 2nd respondent was in urgent need of money to redeem other land parcels and the appellant paid him cash for the suit land; he received the title deed, and was put in possession of the land, indicating part performance of the sale. Counsel contended that a written sale agreement was not necessary and the absence of one could not necessarily invalidate the sale transaction.
26. Counsel maintained that the appellant submitted numerous documents as evidence; the respondents did not challenge these documents during cross-examination and the learned Judge's decision went against the weight of this evidence.
27. The appellant urged the Court to allow the appeal.
28. In rebuttal the 1st respondent submitted that the spousal consent was not acquired as provided for under the *Land Act*, 2012; that the 2nd respondent was guilty of failure to obtain the said consent. It was submitted that, since the 2nd respondent did not obtain her consent then the purchase of the property by the appellant was fraudulent and further that the said fraud was shown to have occurred when the appellant failed to obtain the Land Control Board consent as was confirmed by a letter by the Secretary to the Land Control Board one L.W. Muiruri dated 12th November 2012.
29. On the suit land being matrimonial property, it was submitted that the same was acquired during the subsistence of the marriage between the 1st and 2nd respondent.
30. Finally, on whether there was a written formal sale agreement, it was submitted that section 3(3) of the Law of Contract is illustrative to the effect that a contract has to be written and signed by all the parties. Further, it was submitted that the appellant did not take possession of the suit land and that the agreement was void as it was oral and that no spousal consent was sought.
31. We are urged to dismiss the appeal with costs to the 1st respondent.
32. We have considered the record of appeal in its entirety along with the rival submissions filed by counsel for the parties and the law. This is a first appeal in respect of which we are enjoined by rule 31(1)(a) of the Court of Appeal Rules to re-consider, re-analyse and re-assess the evidence on record and reach our own conclusions. However, caution must be exercised that, in so doing, and since, unlike the trial court, we had no benefit of seeing or hearing the witnesses testify, we must give allowance for that handicap. This position was restated in *Selle -vs- Associated Motor Boat Co.* [1968] EA 123 where this Court held that:

“ 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 demeanor of a witness is inconsistent with the evidence in the case generally."

33. As held in *Alfarus Muli -vs- Lucy M. Lavuta & Another* [1997] eKLR, the Court, sitting as the first appellate court, must appreciate that it will interfere with the findings of the trial court:

"Only if it is shown that there was absolutely no evidence or that the evidence that was there could not possibly support such a finding...Even if a Judge does not give his reasons for his finding the appellate Court can find the same in the evidence."

34. From a careful perusal of the record of appeal, parties' submissions and the authorities, the issues arising for determination can be discerned to be:

- a. whether the learned Judge misdirected himself in holding that the Land Control Board consent was not obtained;
- b. whether the appellant obtained transfer of the suit property through fraud and procedural irregularities;
- c. whether spousal consent from the 1st respondent was necessary;
- d. whether there was a sale agreement between the appellant and the 2nd respondent, and
- e. whether the suit property was matrimonial property.

35. As to whether the Land Control Board's consent was obtained in respect of the transaction involving the appellant and the 2nd respondent and on whether the learned Judge misdirected himself by holding that the appellant obtained the suit property fraudulently, we note that the learned Judge was guided by the letter by the Secretary to the Land Control Board one L.W. Muiruri dated 12th November 2012 wherein it was stated:

"RE: Loc 2/Kangari/2970

Your letter dated 9th November 2012 concerning the above piece of land refers. This is to confirm that we have no recorded transaction in our Land Control Board register as from January 2012 to date regarding the above parcel of land.

L.W. Muiruri, Secretary,

L.C.B Kigumo District"

36. The authenticity of the above letter was not disputed. It is not in dispute that the suit property is agricultural land whose sale was subject to the provisions of the *Land Control Act*. In a long thread of decisions, it has been held consistently that failure to obtain Land Control Board consent makes the sale agreement void for all intents and purposes and no principle of equity can soften or change this mandatory statutory provision. See *Hirani Ngaithe Githire -vs- Wanjiku Munge* [1979] KLR 50 and *David Sironga Ole Tukai -vs- Francis Arap Muge & 2 Others* [2014] eKLR.

37. Section 6 of the *Land Control Act* provides that a transaction affecting agricultural land is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with the Act.



38. The law is clear as buttressed in the case of *Vijay Morjaria -vs- Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

39. In our view, the absence of the consent of the Land Control Board sealed the fate for that transaction. Even if the Court was to find that there was a proper sale agreement (which is not the case), absent the blessing of the Land Control Board, the sale was null and void.

40. The lack of the Land Control Board consent is intertwined with the issue of fraud. This was so because the 2nd respondent stated that he never attended the Land Board for consent. The appellant claimed to have obtained the consent. The respondents asserted that there was no consent to transfer and disputed the authenticity of the consent document that the appellant produced in court. On the other hand, the Land Control Board Secretary confirmed that they had not issued the said consent. In the circumstances, it behooved the appellant to prove that the consent in question was genuine. He did not do so and in view of the overwhelming, unrebutted evidence placed before the trial court, we have no doubt that the document was a forgery.

41. As regards the standard of proof, this Court in the case of *Kinyanjui Kamau -vs- George Kamau* [2015] eKLR expressed itself as follows: -

“It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

42. The conclusion by the learned Judge that fraud was proved was correct.

43. On the issue as to whether there was a sale agreement between the appellant and the 2nd respondent, the question is whether an oral agreement for sale of land is valid, if at all there was one. The fact that there was no written agreement is not in dispute. The only question is whether such an oral agreement, if ever there was one, coupled with the lack of the consent of the Land Control Board could support the sale and transfer of the suit land from the 2nd respondent to the appellant.

44. We find the discourse as to whether the oral agreement was valid and the law surrounding the issue unnecessary, because lack of the Land Control Board consent renders the entire transaction null and void and the non-compliance with the *Law of Contract Act* becomes peripheral.

45. We also wish to point out that the casualness with which the purported sale and transfer of the land was done creates serious suspicion as to whether the appellant was indeed a bona fide purchaser of the suit land. We are also perturbed that at one point, the appellant in his testimony told the trial court that the 2nd respondent’s wife accompanied them to the Land Control Board. On cross-examination, however, he stated that the 2nd respondent’s wife was not there “and they had to use a marriage certificate instead”. In any event, where spousal consent is required in support of a land transaction, the same is



given through an affidavit by the spouse. There is no evidence whatsoever that such a document was made available. The entire transaction was shrouded with illegalities and fraud and did not pass muster and could not legally transfer any proprietary rights.

46. The next issue is whether the 1st respondent's consent was a mandatory requirement prior to the sale and transfer of the suit land. There was ample evidence to show that the suit land was bought by both respondents and the 1st respondent's father. The 2nd respondent held the property in trust for the 1st respondent, who was his wife and for her father. The suit land was evidently matrimonial property, the purchase of which the 1st respondent had contributed to financially. The 2nd respondent could not, therefore, dispose of it without her consent. The 1st respondent had not given her consent and any dealings with the property was without her sanction, which was mandatory in the circumstances.
47. The learned Judge did not, therefore, err when he made the finding that the suit land was matrimonial property and making the order that it be registered in the names of both respondents jointly. We have said enough to demonstrate that this appeal is totally devoid of merit.
48. Before we pen off, we wish to state that we are not oblivious of the fact that the appellant paid some money to the 2nd respondent, and having lost the land, it would have been fair and conscionable for an order for the refund of the purchase price to him to be made in his favour, more so when the 2nd respondent averred that he was prepared to refund the purchase price to the appellant. Unfortunately, from the record before us there is paucity of evidence in support of how, when and how much was paid to the 1st respondent, and this would need calling of further evidence. The appellant is at liberty to file suit against the 2nd respondent to recover the same.
49. In the circumstances, in as much as we sympathize with the appellant, the only order that commends itself to us is to dismiss this appeal, which we hereby do, with costs to the 1st respondent.

DELIVERED AND DATED AT NYERI THIS 28TH DAY OF NOVEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

