



**Mutua v Ng'ang'a & another (Civil Appeal 115 of 2018)
[2023] KECA 1118 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1118 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 115 OF 2018
HM OKWENGU, JM MATIVO & WK KORIR, JJA
SEPTEMBER 22, 2023**

BETWEEN

SOPHIA MUTIO MUTUA APPELLANT

AND

PETER MUHIA NG'ANG'A 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

(Being an appeal from the Judgment of the Environment and Land Court at Nairobi (Gacheru, J) delivered on 6th October 2017 in ELC No. 104 of 2008)

JUDGMENT

1. This appeal arises from the judgment of the Environment and Land Court (ELC) (Gacheru, J), in which the learned Judge dismissed a suit that had been filed by the appellant Sophia Mutio Mutua, against Peter Muhia Ng'ang'a and The Attorney General (1st and 2nd respondents respectively).
2. The appellant had filed the suit claiming that she was the lawful owner of land known as Nairobi/Block 82/5874 (suit property), having purchased the same from one Fredrick Mutua Mutoko in 1997. Later, she discovered after carrying out a search, that the 1st respondent without colour of right, had been fraudulently registered as the owner of the suit property in 1999. The appellant contended that the registration of the 1st respondent as the owner of the suit property was procured through fraud perpetrated by the 1st respondent in conjunction with, and the assistance of officers of the 2nd respondent.
3. The 1st respondent denied the appellant's claim maintaining that he owns the suit property, having purchased it in 1999 from one Fredrick Mutua Mutoko who was acting for the appellant.
4. In her judgment, the learned Judge of ELC found that the appellant had not proved the allegations of fraud as she did not adduce any evidence to prove that the 1st respondent fraudulently forged her



signature on the purported documents of transfer, nor was there any evidence that the documents of transfer were procured through fraud. The learned Judge found that the 1st respondent who was the registered proprietor of the suit property, was the absolute and indefeasible owner of the suit property because under section 26(1)(a) of the *Land Registration Act* (LRA) his certificate of lease is indefeasible. Consequently, the learned Judge ordered that a caveat that had been placed on the title to the suit property by the appellant be removed with immediate effect.

5. In her memorandum of appeal, the appellant has raised 17 grounds. The grounds include: the learned Judge misdirecting herself that the appellant did not produce a copy of the sale agreement to prove her ownership, ignoring that the appellant had produced a copy of her certificate of lease which is conclusive and indefeasible evidence of her ownership of the suit property; and by relying on the certificate of official search as exclusive evidence of proof of the 1st respondent's ownership of the suit property.
6. In addition, the grounds included the learned Judge having misdirected herself: by failing to focus on the primary ground in the appellant's pleading which was her absolute and indefeasible title to the suit property whose transfer to the 1st respondent she alleged to be fraudulent; by disregarding the doctrine of priorities which involves the equitable maxim that he who is earlier in time is stronger in law; by believing and accepting the 1st respondent's unsupported and unsubstantiated allegations regarding nominee of the appellant and transfer to the 1st respondent of the suit property; and by failing to appreciate the evidence of Paurvi Ramesh Rawal and her position as advocate and officer of the court with an obligation to assist the court.
7. The appellant has filed written submissions in which she challenged the judgment of the ELC, maintaining that the fact that she did not produce a copy of the sale agreement, should not be considered fatal or prejudicial to her case, because the manner in which she had procured ownership of the suit property was not in dispute, and she had produced a copy of certificate of lease which is conclusive proof of ownership. She maintained that this evidence was sufficient to counteract the unsubstantiated allegations of the 1st respondent of having acquired ownership of the suit property through a nominee.
8. The appellant submitted that the 1st respondent's documents comprising of a transfer and a certificate of official search were fraudulent; that his allegation that he owned the suit property was a mere sham and not substantiated; and that the 1st respondent contradicted himself regarding how he paid the purchase price for the suit property, initially saying that he made payment to the appellant and later changing that he gave the money to Fredrick Mutua Mutoko on behalf of the appellant.
9. The appellant stated that the learned Judge misdirected herself by ignoring the evidential value of the evidence of her witness Mrs. Paurvi Ramesh Rawal, an advocate of the High Court. She argued that the learned judge failed to recognize the implication of the allegation by the 1st respondent regarding ownership of the suit property, and the fact that under section 26(1)(b) of the LRA, the certificate of title produced by the 1st respondent could be challenged on grounds of fraud or misrepresentation to which the title holder is proved to be a party, or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
10. The 1st respondent also filed written submissions in which he urged that the judgment of the ELC be upheld because he had proved that he was the registered owner of the suit property. He denied procuring his title through fraud and contended that although the appellant based her claim on fraud, she did not prove fraud to the required standard nor did she produce any evidence in support of her allegations that the signatures on the transfer documents were forged as no handwriting expert was brought in to contest the said signatures.



11. The 1st respondent dismissed the evidence of Mrs. Paurvi Ramesh Rawal as a mere denial that did not prove that the stamp and signature on the sale agreement were not from the advocate's office. She argued that the appellant filed her suit 10 years after the suit property was registered in his (1st respondent's) name because she had no interest to protect in the suit property; and that although the appellant claimed that she bought the land from Fredrick Mutua Mutoko, she was not able to produce the sale agreement. The 1st respondent, therefore, urged the Court to uphold the judgment of the ELC and dismiss the appeal.
12. The 2nd respondent also filed written submissions in which it was denied that there was connivance or fraud on the part of officers in the registration of the suit property as alleged by the appellant, and maintained that the officers acted in good faith and that the documents presented for purposes of registration were genuine documents. The 2nd respondent supported the judgment of the ELC for reasons that: the suit property was registered in the name of the 1st respondent on 2nd November 1999 and he was therefore deemed to be the absolute and indefeasible owner of the suit property under section 26(1)(a) of the LRA; the appellant was unable to prove her allegations of fraud to the standard required; the documents were duly signed by the Commissioner of Lands; there was no evidence that the transfer was obtained by fraud; and the appellant failed to prove her case.
13. This being a first appeal our duty as a first appellate Court is to reconsider and analyze the evidence and the law with a view to coming to our own conclusion. In doing so we have to give due allowance to the fact that we have not had the advantage that the trial court had of seeing and assessing the demeanour of the witnesses. (See *Peters v. Sunday Post Ltd* [1958] EA 424; [*Gitobu Imanyara & 2 others vs Attorney General* \[2016\] eKLR.](#))
14. It is not disputed that a certificate of official search was produced which showed that the 1st respondent was registered as the leasehold proprietor of the suit property since 1999, and that the appellant in whose name the suit property was previously registered denied having transferred the suit property to the 1st respondent either directly or through a nominee. The main issue for consideration is whether or not on the evidence that was adduced before the ELC the 1st respondent's title was procured through fraud.
15. Section 26(1)(b) of the LRA provides as follows:

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions, and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:

 - a. On the ground of fraud or misrepresentation to which the person is proved to be a party: or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
16. The appellant pleaded in her plaint that the 1st respondent forged the appellant's signature on the transfer document and also forged the signature and official stamp of Paurvi Ramesh Rawal the advocate indicated on the transfer document to have attested the transaction. In *Ratilal Gordhanbhai*



Patel vs Lalji Makanji [1957] EA 314 at 317 the former Court of Appeal for East Africa, stated as follows:

“Allegations 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”

17. In *Urmila w/o Mahendra Shah vs Barclays Bank International & Another* [1979] KLR 16 Madan and Law, JA held that a standard of proof approaching proof beyond reasonable doubt is required to establish fraud. Therefore, in order to succeed in her claim, the appellant who was asserting that the 1st respondent had fraudulently acquired the transfer and registration of the suit property to himself, had to discharge the burden of proof by proving her allegations of fraud on a standard that is higher than that of a mere balance of probabilities.
18. With the above authorities in mind, we have considered whether the appellant discharged the burden of proof in establishing her claims of fraud. In her evidence, the appellant relied on her own evidence and that of the advocate, Paurvi Ramesh Rawal. She reiterated what she had stated in her pleadings that she was the owner of the suit property and produced a copy of a certificate of lease in support thereof. She denied the 1st respondent’s evidence that she had either directly or indirectly transferred her interest in the suit property to the 1st respondent. She relied on the evidence of the advocate who denied having attested the signatures on the transfer documents. Apart from this oral evidence, the appellant did not call any other evidence to support her contention that neither the advocate nor herself signed the transfer.
19. The easiest way that the appellant could have established that the transfer document was a forgery was to demonstrate that the signatures on the transfer document were not attested by the advocate, by calling a document examiner to give an expert opinion on the signatures. Without the evidence of the document examiner, it was the word of the advocate against that of 1st respondent regarding the attestation of the signatures on the document, and this was not sufficient to prove the alleged fraud to the required standard.
20. We note that in his statement of defence, the 1st respondent claimed at paragraph 3 that the appellant had never had any proprietary interest in the suit property except for being used as a mere nominee by Fredrick Mutua Mutoko who was the rightful owner of the suit property. The 1st respondent also claimed that the appellant as the rightful nominee of Fredrick Mutua Mutoko executed both the agreement for sale and the relevant transfer document, pursuant to which the 1st respondent acquired his title to the suit property.
21. The appellant produced a copy of a certificate of lease showing that the property was registered in her name on 23rd October 1997. She also produced a certificate of official search showing that a certificate of lease was issued to the 1st respondent on 2nd November 1999, and that the appellant had filed a caution on 13th March 2007 claiming an allottees interest. The 1st respondent did not produce a certificate of lease but relied on the transfer document allegedly executed by the appellant and himself. This means that the 1st respondent’s claim to ownership was anchored entirely on the propriety of the transfer document.
22. The 1st respondent was not able to produce any certificate of lease but he claimed that he had given it to his surveyor and that the same could not be traced after his surveyor died. Be that as it may, although the 1st respondent may not have adduced evidence to establish that the appellant was a nominee of Fredrick Mutua Mutoko, the certificate of search from lands office that the appellant produced, showed that the



property was registered in the 1st respondent's name as a leaseholder. Surprisingly, the appellant's name appears as a cautioner, claiming an allottee's interest on the search certificate. As it was the appellant who asserted that the transfer document that gave rise to the 1st respondent's registration was a forgery, the burden of proof was upon her to establish the same.

23. We find that on the evidence that was before the ELC, the learned judge came to the correct conclusion in finding that the 1st respondent was the registered owner of the suit property, and that the appellant failed to establish her claim that the transfer document was forged, or that the 1st respondent was fraudulently registered as the owner of the suit property. For the above reasons, we find no merit in this appeal. Accordingly, the appeal is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

