



**Mohamed v Duba & another (Civil Appeal 83 of 2019)
[2022] KECA 442 (KLR) (18 March 2022) (Judgment)**

Neutral citation: [2022] KECA 442 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 83 OF 2019
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MARCH 18, 2022**

BETWEEN

KHADIJA MOHAMED APPELLANT

AND

AMINA ABDI DUBA 1ST RESPONDENT

MOHAMED ABDUL RAHMAN 2ND RESPONDENT

*(An Appeal from the Judgment of the Environment and Land Court at Malindi
(Olola J.) dated 29th May 2019 in Environment and Land Court Case No. 1 of 2013)*

JUDGMENT

1. The Appellant herein, Khadija Mohamed, is dissatisfied with a judgment by the Environment and Land Court (ELC) at Malindi, which dismissed the suit she had filed therein, and ordered her to execute a cross transfer for the Respondents to take the vacant plots among the ten plots that were the subject matter of the suit, within thirty days of the judgment. In default, the Deputy Registrar of the ELC was to forthwith execute the same.
2. The said Appellant, in an Amended Plaint dated 28th November 2013 filed in the ELC, had sought declarations that the titles issued to the Respondents in respect of the parcels of land known as 1734/528 and 1734/459 Maisha Mapya Scheme (hereinafter the “suit properties”) were null and void, and that she was the owner of the suit property and has a right to continue owning the suit property; that the Respondents be restrained by a permanent injunction from encroaching or remaining on the said land; the Respondents be compelled by an order of mandatory injunction to pull down a fence they had erected on the land, and that the Respondents be compelled by an order of mandatory injunction to issue to the Appellant all the deed plans of the said land. The Appellant’s claim was that she purchased and obtained a deed plan and title with respect to the suit properties by an agreement of sale dated 14th May 1995, and paid the purchase price of Kshs 25,000/=. She therefore claimed that she



was owner of the suit properties arising from their registration in her name, and prolonged residence thereon, and that the Respondents had illegally obtained title to the suit properties. Further, that the Respondents had encroached thereon, pulled down her fence and started to construct a perimeter wall on the property.

3. The Respondents on their part filed a Defence and Counterclaim in the ELC on 29th May 2012, and denied that the Appellant was the owner of the suit properties, which they claimed to have purchased from the wife of one Erwin Berner, one Hamida Charagh Berner. The Respondents sought declarations that they were the only legally registered owners of the suit property, and any other interest that affected their rights was null and void and should be expunged from the register. They also averred that in the event of a mix up in the deed plans and occupation of the suit properties, they were willing to execute a cross transfer.
4. After hearing the parties and considering the pleadings filed, the trial Judge found that it was not denied that the Appellant's mother and the Appellant had made payment for various plots of land in Maisha Mapya Scheme, but that in the year 2004, one Hussein Abubakar Erwin Berner caused the registration of five of the ten plots originally in the Appellant's name to be cancelled, after he laid a claim on them which was upheld by the area administration, on the basis of an agreement entered into between the Appellant and his father, Erwin Berner, to share the ten plots on a 50/50 basis. The Respondents having bought the suit properties from Hussein's wife, were innocent purchasers for value without notice of any encumbrances and were entitled to protection of the property that they had lawfully acquired. The ELC also found that the Respondents were ready to accommodate the Appellant and take alternative plots that have been left vacant.
5. The Appellant being dissatisfied with the said judgment, proffered this appeal. The Appellant challenges the findings of the ELC in seven grounds of appeal in a Memorandum of Appeal dated 27th June 2019, which are along two strands, namely that the trial Judge failed to properly evaluate evidence on record as regards the Appellant's claim to the suit property, and applied wrong principles of law in evaluating the agreements, title and claim by the Respondents.
6. As this is a first appeal from the decision of the trial Court, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & others* (1968) EA 123 where it was stated that;

“..... this court is not bound necessarily to accept the findings of fact by the court below. 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 demeanour of a witness is inconsistent with the evidence in the case generally”
7. We heard the appeal on 28th October 2021, and Mr. Ole Kina, learned counsel for the Appellant, urged one ground of appeal, namely that the Appellant, having established that she had titles registered earlier than those of the Respondents, had proven her case on a balance of probabilities, and that it was upon the Respondents to place themselves within the exceptions set out in in the case of *Joseph N. K. Ngok vs Moiyo Ole Keiwua* [1997] eKLR demonstrating fraud or misrepresentation to which the Appellant was party.



In addition, that the Respondents were not bona fide purchasers for value as defined in the Court of Appeal case of *Weston Gitonga & 10 others vs Peter Rugu Gikanga & another* [2017] eKLR, as the sale agreements relied upon by the Respondents were based on impugned letters of administration issued to Hussein Abubakar's widow and mother, who thereby did not have good titles to the properties. The Appellant's counsel also faulted the trial Judge for directing the Appellant to execute a cross transfer without making any efforts to identify the subject vacant plots, whether they were in the Appellant's name, and whether the Appellant was in a position to transfer them.

8. Mr. Mouko, learned counsel for the Respondents, on his part insisted that his clients were innocent purchasers for value of the suit properties and are not trespassers, and pointed out that the suit properties had double titles arising from the Appellant's deliberate failure to surrender the deed plans and titles erroneously issued to her. Further, that failure to authenticate the certificate of confirmation of grant issued to Hussein Abubakar's widow and mother was not material, as the suit properties were already registered in Hussein Abubakar's name at the time of his death, and his beneficiaries were therefore entitled to the property.
9. The dispute and main issue in this appeal is who, as between the Appellant and Respondents, is entitled to the suit properties. It is not dispute that the suit properties were initially bought by the Appellant's mother, Zam Zam Binti Ali, who is since deceased, and this was testified to by the PW1, PW2 and PW4, PW5, PW6, PW7 who were relatives and neighbours of Zam Zam and the Appellant. The Appellant, who testified as PW3, also confirmed that she inherited the plots from her mother and produced receipts to show that her mother paid for a number of plots which were part of a scheme administered by Maisha Mapya Self Help Group, of which they were members. The Appellant as a result executed indentures with Maisha Mapya Self Help Group for the suit properties on 3rd March 2003, on the strength of the said payment.
10. The Appellant in her evidence admits to there having been a dispute with Hussein Abubakar over some of the plots in 2004, but denied ever entering into an agreement with Hussein or Erwin Burner, who she described as a family friend who used to come to their house. According to the Appellant, Hussein, who she stated was Erwin Burner's son, was stopped by the DO from constructing on the disputed land because he had no documents, and that he did not have any indentures from Maisha Mapya. However, she also in a turn of events testified that the area chief summoned her and told her to give Hussein five of the plots, and that Maisha Mapya heard and gave the plots to Hussein in her absence.
11. The 1st Respondent on her part testified as DW1 and produced evidence of indentures dated 28th February 2005 between Hussein Abubakar Erwin Berner and Maisha Mapya Self Help Group, and the indentures she executed with the widow and legal representative of Hussein Abubakar Erwin Berner on 19th May 2011, in relation to the suit properties. The Respondents also called the chairman of the Maisha Mapya Self Help Group to testify as DW2, and a committee member as DW3. The two witnesses provided details of the dispute between Hussein Abubakar and the Appellant, arising from an agreement that the Appellant had entered into with Erwin Berner to give Hussein Abubakar five of the plots registered in her name. DW1 claimed that Erwin Berner was Zamzam's husband, and Hussein Abubakar was Erwin Berner's son by a different mother. DW2 and DW3 explained that this dispute led to the current situation of the duplicate indentures and deed plans in the Appellant's name, after the dispute was resolved in favour of Hussein Abubakar Erwin Berner, and he was issued with documents in relation to the suit properties by Maisha Mapya Self Help Group.
12. DW4, an advocate of the High Court of Kenya, on his part testified to having drawn the agreement between the Appellant and Erwin Berner, and upon payment of money he received from Erwin



Berner and paid to Maisha Mapya Self Help Group for the release of five of the plots registered in the Appellant's name which was to be transferred to the said Erwin Berner. DW4 also testified that the agreement was drawn and executed on the Appellant's instructions, that he witnessed the Appellant's signature on 14th May 1996, and he produced a copy of the agreement in evidence.

13. It is notable that none of the parties in this appeal produced any registered title in respect to the suit properties in their names, and the principles they relied on in *Joseph N. K. Ngok vs Moiyo Ole Keiwua (supra)* are therefore not applicable. A determination of the respective parties' entitlement to the suit properties can only be made on the basis of an analysis of the various indentures produced by the parties and their evidence as regards the circumstances of their procurement, and their legal effect. Our analysis has been guided by the principles that apply to evidence of title in respect of unregistered land as provided in the text by Kevin Gray and Susan Francis Gray on *Elements of Land Law, 5th Edition* at page 185 as follows:

“Evidence of title to an unregistered estate in land usually exists only in the form of a chain of documentary records (or title deeds) which detail successive transactions with that land over the course of time. These historic documents of title (or 'deeds bundles') are privately controlled, being retained normally within the custody of the proprietor of the estate to which they relate. These deeds provide the “essential indicia of title” since the information contained in them, when coupled with the fact of undisturbed possession, generally identifies the person who currently has the best 'title' to any relevant estate in the land. Title to an estate can also be claimed, however, by one who holds no supporting documentary evidence but relies instead on the sheer fact of his own possession.”

14. It is our view in this respect that the Respondents' evidence as regards the circumstances leading to the existence of duplicate indentures in respect to the suit properties was not only consistent, but was also corroborated, as opposed to the Appellant's, and controverted the Appellant's evidence. The Appellant did not therefore prove her entitlement to the suit properties to the required standard, and the Respondents were able to establish the legal basis for their proprietorship and entitlement to possession for the suit properties arising from purchase. While, bearing in mind the legal nature of an indenture, which is essentially a formal written instrument or contract made by two or more parties, our evaluation of the evidence adduced in the ELC leads us to the following conclusions.
15. First, the legal effect of the said indentures was that Maisha Mapya Self Help Group, as beneficial owners of the suit properties, conveyed their interests in the properties firstly to the Appellant, and later to Hussein Abubakar Erwin Berner, arising from an agreement by the Appellant and Erwin Berner to relinquish her interest in five of her plots in his favour. Second, on the Respondents' interests, the Court of Appeal in the case of *Weston Gitonga & 10 others vs Peter Rugu Gikanga & another (supra)* held as follows as regards a bona fide purchaser:

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“23. *Black's law Dictionary 8th Edition* defines “bona fide purchaser” as:

“One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”



24. In the Ugandan case of *Katende v. Haridar & Company Limited* [2008] 2 E.A.173 it was held:-

“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.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

16. Therefore, the principle of a bona fide purchaser is only applicable where there is a registered title to land, unlike in the present appeal. In this respect we have already found that the estate of Hussein Abubakar Erwin Berner was the beneficial owner of the suit properties as at the time of his death on 3rd May 2005, having executed indentures with Maisha Mapya Self Help Group on 28th February 2005 for the conveyance of the said properties, and at the time of sale agreement between the Deceased’s beneficiaries and the Respondents on 31st December 2007 and 17th August 2011. In addition, evidence was produced that Hussein Abubakar’s widow had been appointed administrator of his estate on 26th October 2006, and confirmed on 12th July 2007, before the said sale agreements were entered, and at the time she executed the indentures with respect to the suit properties. Lastly, letters of administration and certificate of confirmation of grants are legally impugned in succession proceedings by the process of revocation set out in the Law of Succession Court, and the Appellant did not produce any evidence of such proceedings or of any such revocation, neither did she call the author of the letter relied on to impugn the letters of administration and certificate of confirmation of grant, so that the said author could lay the basis for the contents therein, and be examined on the same. Our conclusion therefore, is that from the evidence adduced, the Respondents have demonstrated that the Appellant’s entitlement to the suit properties was divested, and they have proprietary rights in the suit properties.

17. We therefore find that the ELC did not err in dismissing the Appellant’s suit, and in finding that the Respondents were bona fide purchasers of the suit property and entitled to protection of their interests in the said property.

However, we note that no evidence was led as to the Appellant’s plots that are currently vacant and their value if any, that could form the basis of the orders granted by the ELC for execution of a cross transfer between the Appellant and Respondent. In addition, having been legally recognised as the legal proprietors of the suit properties, the Respondents are at liberty to take appropriate legal measures they deem fit to perfect, secure and protect their interests.

18. We accordingly affirm the orders of the ELC dismissing the Appellant’s suit, and declare the Respondents the legal proprietors of, and entitled to possession of the parcels of land known as



1734/528 and 1734/459 Maisha Mapya. The orders of the ELC that the Appellant executes a cross transfer for the Respondents to take the vacant plots among the ten plots that were the subject matter of the suit within thirty days of the judgment, and that in default, the Deputy Registrar of the ELC to execute the same, are hereby set aside. The Appellant shall bear the Respondents' costs of the suit and counterclaim in the ELC and of this appeal.

19. Orders accordingly

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MARCH 2022.

S. GATEMBU KAIRU (FCIArb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

