Elizabeth Sarange Abange v Milka Musimbi Mavia & 8 others (Civil Appeal 74 of 2018) [2022] KECA 904 (KLR) (8 July 2022) (Judgment)

Neutral citation: [2022] KECA 904 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 74 OF 2018

F TUIYOTT, PO KIAGE & M NGUGI, JJA

JULY 8, 2022

BETWEEN

ELIZABETH SARANGE ABANGE ..... APPELLANT

AND

MILKA MUSIMBI MAVIA ..... 1ST RESPONDENT

ALFRED MAGOTSI ..... 2ND RESPONDENT

LIVINGSTONE ARUNGA MAVIA ..... 3RD RESPONDENT

BONFACE WITIRA MAVIA ..... 4TH RESPONDENT

MMBONE MAGOTSI ..... 5TH RESPONDENT

ESTHER MAGOTSI ..... 6TH RESPONDENT

CHRISTINE ARUNGA ..... 7TH RESPONDENT

ANNAH MWELEMA ..... 8TH RESPONDENT

EVERRLINE MAKUNGO ..... 9TH RESPONDENT

(Being an appeal from the judgment and decree of the Environment & Land Court at Eldoret (Ombwayo, J) dated 18th April, 2018 in ENVIRONMENT & LAND COURT CASE NO. 228 OF 2012 (formerly ELD HCC NO. 7 OF 2006)

JUDGMENT

JUDGEMENT OF TUIYOTT, JA

1. This dispute is between Elizabeth Sarange B. Abenga (the appellant) and members of the family of John Mavia Wetira (the deceased).

2. In a suit filed at Eldoret High Court being Civil Suit No. 7 of 2006 and later designated ELC No. 228 of 2012, the appellant brought an action against the nine respondents seeking, in the main, that they be evicted from land parcel number Uasin Gishu/Kimumu/1567, which is registered in the name of the appellant. The deceased was the husband of the 1st respondent and father of the 2nd to 9th respondents.

3. In resisting the claim by the appellant, the respondents stated that they were in actual occupation of the land and that the interest of the appellant is subject to their right to possession and occupation under section 30 (g) of the now repealed *Registered Land Act.* As an alternative plea, they averred that the title of the appellants was obtained by fraud, citing an alleged failure to obtain consent of the relevant Land Control Board; failure to enquire about their interest before obtaining title; purchasing land from the initial proprietor in "contumentons" (sic) disregard for their right of occupation; colluding with the Land Registry staff at the Uasin Gishu District Lands Registry to remove restrictions placed on the suit land; and forgery and obtaining a fake land control board consent. In a counterclaim dated 12th September, 2006, they sought a declaration that the registration of the appellant was a nullity and cancellation of the registration of the appellant as proprietor.

4. At trial, the appellant told court how she conducted an official search of the register of the suit land in 2005 before buying the property from the deceased. After the search, she entered into a written agreement dated 13th September 2005 with the deceased who had been introduced to her by one Robert O'gitange Otieno (PW2). The purchase price was Kshs. 450,000.00. She paid Kshs. 270,000.00 on the date of the agreement and the balance of Kshs. 180,000.00 on 16th September, 2005.

5. It was her evidence that a transfer was done on the last day of payment and that consent of the Land Control Board had been processed by the deceased and granted to him. She was however unable to access the parcel of land as it was occupied by the respondents. It emerged that there was a restriction placed on the title but which was removed on 8th December 2003, a day before the title was issued in her favour.

6. The 1st respondent told the trial court that she is the widow of the deceased and was jointly with her late husband allocated the suit land in 1966 and paid all the dues required by the Settlement Fund Trustees. It was her contention that the land belonged to her and her husband although it was solely registered in his name. Her testimony was that there had been an earlier attempt by the deceased to sell the land but the transaction was stopped upon her filing a claim before the now defunct Land Disputes Tribunal in Award No. 28 of 2005. She and her children were not invited to the Land Control Board.

7. Her child, Livingstone Arunga Mavia, testified as DW2. His testimony was that in the suit land are six graves including that of his grandmother. The deceased, however, was buried in a different land at Kamagut and which is about 2 acres and which land was apparently bought by the deceased using the proceeds of sale of the suit land.

8. After considering the evidence and submissions of counsel, the trial court held that as the land was transferred to the appellant when Land Disputes Tribunal Award No. 28 of 2005 was pending then the transaction was caught up by the doctrine of lis pendens. In the end the trial Judge concluded: -

> "I have looked at the Award of the Tribunal and do find that it was resolved on 14.10.2005 in favor of the defendants and therefore, the District Land Registrar was bound to register the decision of the Land Disputes Tribunal as it awarded the land to the defendants but instead the Land registrar went ahead to register the land in the names of the plaintiff. The Land Registrar should have looked at the decision of the Land Disputes Tribunal before registering the transfer, but appears to have registered the land in the names of the

plaintiff to pre-empt the adoption of the award. I do find that the lifting of the restriction and registration of the property in the names of the plaintiff was illegal as the Tribunal had ordered that the property be registered in the names of the defendants. The plaintiff therefore obtained the title illegally and contrary to the award of the Tribunal which was adopted on 15th December 2005 and when the dispute was pending before the court therefore in breach of the doctrine of lis-pendens."

9. In the submissions filed before us, the appellant collapsed her grounds of appeal to five. She urges that the learned judge erred in law and fact in: -

   a. Holding that her registration as a proprietor of Uasin Gishu/Kimumu/1567 is a nullity on the grounds that no Land Control Board consent was obtained and on the doctrine of trusteeship.

   b. Failing to appreciate and apply the doctrine of sanctity of title and to find that the appellant was a bona fide purchaser for value without notice.

   c. By extending the application of the doctrine of lis pendens.

   d. By failing to consider the case as presented by the appellant and instead relied on the decision of the Land Dispute Tribunal to dismiss the appellant's case.

   e. By awarding costs of the suit to the respondent.

10. It was submitted for the appellant that sections 23, 24 and 26 of the *Land Registration Act* (which are similar to sections 27 and 28 of the repealed *Registered Land Act* Cap. 300) provides that title issued by the Land Registrar is prima facie evidence of title and a person registered as proprietor is deemed as the absolute owner with all rights and privileges appurtenant thereto. Under section 25, such title shall only be subject to restrictions and encumbrances that are registered against the title. The appellant argued that she conducted a search on the property on 9th September, 2005 and ascertained that there existed no inhibitions, cautions, restrictions or encumbrances against the title held by the deceased.

11. As regards the consent of the Land Control Board, the appellant contends that it is common conveyancing practice that the vendor obtains the consent and the deceased applied for and obtained the consent dated 5th August, 2005. She further argues that the respondents did not prove fraud or a corrupt scheme on her part to justify nullification of registration in her name.

12. Further, we were urged to find that the mere fact that the respondents are relatives to the deceased did not entitle them to a claim over the suit property. The respondents, we are told, did not produce any evidence to support their claim for existence of a trust or to create a nexus or link of the alleged trust to the deceased. The Court was referred to various decisions in support of the argument by the appellant that the onus is on a party relying on the existence of trust to prove it through evidence and the same can never be implied by court unless there was an intent to create it in the first place, reference being made to the holdings in *Juletabi African Adventure Limited & Another vs Christopher Michael Lockley* [2012] eKLR, *Alice Wairimu Macharia vs Kirigo Philip Macharia* [2019] eKLR.

13. On the issue of the restriction, the appellant submits that the certificate of official search was obtained before the restriction ordered by the Land Disputes Tribunal was registered on 21st September, 2005. The restriction was removed on 7th December, 2008 and the appellant registered as sole proprietor on 9th December, 2005, after the restriction was removed. She states that she had no knowledge of the restriction or its removal. Further, that as she was not a party to the dispute before the Land Disputes Tribunal she was an innocent purchaser for value with no notice of any prior dealings on the property.

14. This Court was asked to find that by dint of the provisions of section 3 (1) of the now repealed *Land Disputes Tribunals Act,* 1990, the Land Disputes Tribunal lacked jurisdiction to determine issues touching on the sale, purchase or registration of land and the rights of a purchaser. The decision in *Elekia Mabosio Marenga* [2018] eKLR and *Wamwea vs Catholic Diocese of Muranga Registered Trustees* [2013] eKLR were cited. Flowing from these submissions was the contention that the learned Judge erred in holding that registration of the property in the name of the appellant was illegal as the Tribunal had ordered that the property be registered in the name of the respondents.

15. It is further argued that the decision of the Tribunal was only specific to the dispute between the deceased and the respondents and did not determine the legality or otherwise of the appellant's title to the property. On whether the doctrine of lis pendens rendered the title acquired by the appellant illegal, the appellant sought to rely on the decision of the Supreme Court of India in *Hardev Singh vs Gurmail Singh* [2007] 2 SCC 404 where the court held;

> " The learned Trial Judge and the First Appellate Court had decreed the suit of Udham Kaur only on the basis that she acquired the suit property during the pendency of the earlier litigation. Section 52 of the Act merely prohibits a transfer. It does not state that the same would result in an illegality. Only the purchaser during the pendency of a suit would be bound by the result of the litigation. The transaction, therefore, was not rendered void and/or of no effect."

16. Counsel for the appellant further asserts that the doctrine only applies where a matter is filed before a court of competent jurisdiction (*Dev Raj Dogra & Others vs Gyan Chand Jain & Others* 1981 SCR (3) 174).

17. On costs, the appellant takes the position that the trial court failed to take into consideration the factors that triggered the litigation and the fact that the respondents caused the litigation when they refused to vacate the property of the appellant and to allow her to enjoy quiet possession of the same.

18. In answer to the appellant's submissions, the respondents, through counsel, filed submissions dated 27th July, 2020. The respondents beseech us to find that the appellant had admitted the respondents' overriding interest under section 30 (g) of the repealed Registered Land Act, Cap 300 having confirmed that she visited the suit land and saw the respondents on it. Further, she confirmed that the Land Control Board consent was undated, and the nature of transaction and consideration were not indicated. It was also submitted that her conduct in acquiring the land showed that she was aware of the respondents' interest.

19. The respondents rely on the definition of "bona fide purchaser" found in Black's Law Dictionary 8th Edition to argue that the Judge's findings of invalidity of her title and rectification pursuant to section 143 of the Repealed Registered Land Act cannot be faulted.

20. On the maxim of lis pendens, the respondents' view is that the appellant did not need to be party to the litigation to be bound by it. The respondents refer us to the decision of Madan JA in *Mawji vs United States International University & Another* [1976] KLR 185.

21. The respondents contend that the appellant could not feign ignorance of the existence of the pending dispute and that she had to remove the restriction to have the land transferred to her. The learned trial Judge is applauded for reaching a conclusion that the removal of the restriction was for the purpose of registering the 1st and 3rd respondents as proprietors in tandem with the decree of the court and not to transfer the land to the appellant.

22. On the question of lack of jurisdiction by the Tribunal, the respondents argue that no party appealed against its decision. The Judge could not therefore be faulted for applying it because he was not inquiring into the jurisdiction of the Tribunal.

23. On the question of trust, the respondents submit that evidence at trial showed that the deceased held the suit land in trust for the family members and this was affirmed by the Land Disputes Tribunal. The respondents rely on section 28 of the repealed *Registered Land Act* that a proprietor of land is not relieved from any duty or obligation to which he was subject as a trustee.

24. Finally regarding costs, the respondents' simple answer is that a successful party is entitled to costs as costs follow the event.

25. The applicability of the doctrine of lis pendens in Kenya is undoubted. In *Mawji* (supra) Madan JA (as he then was) said this about that doctrine and its objective; -

> "We are unburdened by trammellings obtainable or operable in India upon the conditions of which country the Transfer of Property Act is, I say it respectfully, in many respects archaically based. I think the situation in Kenya is, or it ought to be, this the Court has power to prevent a breach of the provisions of section 52 in proceedings before it in which any right to immoveable property is directly and specifically in question by imposing a prohibitory order against the title of the property to prevent all dealings in it pending the final determination of the proceedings, except under the authority of the court and upon such terms as it may impose. This is to ensure that which Turner L J had in mind does not happen. He said in Bellamy v Sabine (1857) 1 De G & J 566, 584, a case quoted by Mr Salter to further his argument:
>
> It is ... a doctrine common to the Courts both of law and equity, and rests, as I apprehend, upon this foundation – that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations pendente lite were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to be defeated by the same course of proceeding.
>
> This passage is enthusiastically quoted by both Mulla and Gour in their treatises on the Indian Transfer of Property Act: Mulla (5th Edn) page 245; and Gour (7th Edn) volume 1, page 579. With respect, Turner LJ's words are prudent. Gour also says (at page 579) that story explains the same rule from another stand point:
>
> Every man is presumed to be attentive to what passes in the Courts of justice of the State or Sovereignty where he resides. Therefore, purchase made of property actually in litigation, pendente lite, for a valuable consideration, and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had such notice, and he will accordingly be bound by the judgment or decree in the suit.
>
> Only a foolhardy purchaser, or a fraudulent purchaser, would purchase a property which is actually the subject-matter of litigation. Why should the defendants worry about a prohibitory order being imposed? They say or would wish to say, that they are both honest persons. In any event it is only an interim order and, recalling the words of Roskill L J in Losinska v Civil and Public Services Association [1976] I CR 743, no guarantee that the plaintiff would succeed in the suit."

26. I agree with the submissions by counsel for the appellant that the effect of the doctrine is not to void or annul a transaction that has taken place during the pendency of a suit, but to bind the purchaser to the outcome of the litigation. That being the case, if the result of the litigation is to upset the interest of the vendor in the property, then the transfer to the purchaser will be of no effect and the purchaser will have failed to acquire any interests or rights over the property. In effect, the outcome of the litigation renders the transfer a nullity.

27. A second issue raised by the appellant is that the doctrine of lis pendens would be inapplicable to this dispute as the Land Dispute Tribunal whose decision was adopted in Eldoret Chief Magistrate Tribunal Case No. 25 of 2005 - Milka Musimbi Mavia & Another vs John Mavia Wetira did not have jurisdiction to hear or determine the dispute between the deceased on the one hand and the 1st and 2nd respondents on the other over ownership of the suit property. The proposition that the doctrine of lis pendens only applies where the pending litigation is before a court of competent jurisdiction is not without merit (*Dev Raj Dogra & Others* (supra)). The logic is that proceedings before a court without jurisdiction, and therefore its outcome, is a nullity and cannot therefore defeat a transaction that has happened. However, a party whose interests in a property sought to be impugned by virtue of the doctrine of lis pendens and whose defence is that the litigation was before a court without jurisdiction, must seek a specific declaration to that effect so as to avoid the effects of the doctrine. In this instance, once it was clear to the appellant that a defence of the respondents was that the transfer of the property to her was subject to the outcome of the Land Dispute Tribunal Award No. 28 of 2005, it was upon her to plead that the Tribunal lacked jurisdiction so as to avoid the rigours of the doctrine. That would serve as a formal invitation to the trial court to interrogate the issue of the competency of the proceedings before the Tribunal and the court that adopted the Tribunal's decisions and make a specific pronouncement in that respect.

28. In paragraphs 11 and 12 of her reply to amended defence and counterclaim, the appellant avers:

> " 11. THE Plaintiff further wishes to aver that she is not and has never been a party to the suits and proceedings set out in paragraph 10 of the Defendants amended defence and counterclaim. The Plaintiff particularly denies having any knowledge of the alleged ELD CMCC LTD CASE NO. 28 OF 2005 or ELDORET HCC *MISC APPL. NO. 2 OF 2006*. The Defendants are therefore invited to strict proof of the allegation.
>
> 12. THE Plaintiff further denies that the Land Disputes Tribunal has jurisdiction to adjudicate on the present dispute which touches on registered land."

29. Other than finding that the transaction between the deceased and the appellant was in breach of the doctrine of lis pendens, the trial court did not address the issue of the competence or otherwise of the Tribunal. On this, the trial court fell into error.

30. It falls on us to determine the issue. It is common ground that the dispute between the two respondents and the deceased was one regarding ownership of the suit land. The Land Disputes Tribunal was established by section 4 of the *Land Disputes Act*, 1990 (now repealed) and section 3 (1) provided for its jurisdiction:

> " 3.
>
> (1) Subject to this Act, all cases of a civil nature involving a dispute as to—

(a) the division of, or the determination of boundaries to land, including land held in common;

(b) a claim to occupy or work land; or

(c) trespass to land, shall be heard and determined by a Tribunal established under section 4"

31. Clearly, the Tribunal did not have jurisdiction to determine a dispute over title to land and was therefore incompetent to hear and determine a dispute over the ownership of the suit land. Contrary to what the respondents argue, this position does not change notwithstanding that no appeal was preferred against the decision. The Tribunal being bereft of jurisdiction, then the purchase of the suit land by the appellant could not be an affront to the doctrine of lis pendens. On this I reach a different outcome from the trial court.

32. I turn to the next issue. The evidence is that at the time of purchasing the suit land, the appellant was aware that the respondents occupied the suit land. The appellant, however, states that she did not bother to inquire as to the nature of occupation and whether it was pegged on any rights. Yet a term of the sale agreement betrays the appellant's assertion that she was unaware of the respondents' interest over the land. Clause 9 reads;

> " The seller has already talked to his family members and they do not have any objection to the transaction."

33. At least two issues arise. It may be asked why the deceased would have to seek a 'no objection' from members of the family if they did not have an interest over the land. This serves to buttress the assertion by the respondents that the suit land was family land held by the deceased on their behalf. The occupation of the suit land was further testimony of this. A second issue that arises is that clause 9 placed an implicit onus upon the appellant to inquire from the respondents whether they objected to the sale. Having failed to do so, she cannot be said to be a bona fide purchaser without notice and must suffer any consequences that follow that failure.

34. In their defence, the respondents invoked section 30 (g) of the Repealed *Registered Land Act* Cap 300 which provides:

> " 30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -
>
> (a) .....;
>
> (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;
>
> (h) .....:
>
> Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit."

35. By failing to make the inquiry expected of her, the purchaser took the title subject to the respondents' right of possession and actual occupation.

36. The appellant's title, it would seem, still has further difficulties. The transaction entered into between the appellant and the deceased was a controlled transaction subject to consent by the Land Control Board. Indeed, the need for consent was expressly contemplated by the terms of the sale agreement. Clause 6 provides: -

> " The seller will obtain consent to transfer from the Land Control Board on or before 30th November 2005."

37. From the language in this covenant, the consent had not been obtained as at the date of the agreement on 13th September 2005. It turns out, however, that the consent which was used to effect the transfer to the appellant was granted in a meeting held on 2nd August 2005. This would be more than a month before the date of the agreement.

38. As to how the consent was sought and granted, the appellant testified as follows:

> " I applied for consent of the Land Control Board. I produce the application as 1. Exhibit 4. The consent was granted."

39. When pressed, in cross-examination, to explain why the stamp of the board was not on the consent, she stated:

> " There is no stamp of the Land Control Board but I have an explanation. The consent was acquired by the vendor."

40. One quickly notices the shift in position. At one time the appellant says that she applied for the consent, on another that it was acquired or obtained by the deceased. This shift is troubling in the face of the respondents' assertion that the consent was a forgery. And even if it was the vendor who obtained the consent, the appellant ought to have noticed that it pre-dated the date of the agreement when the agreement itself contemplated that it had not been obtained on that date. In reaching this conclusion i will not get drawn into discussing whether or not the consent lacked validity because it was obtained before the date of the agreement. That is beyond the scope of this decision. Simply, it is to demonstrate that the allegation by the respondents that the consent was a work of fraud is not a trifle. It is in fact well founded.

41. Further evidence is that the date when the application for the consent was made and the nature of the transaction and purchase price were not disclosed on the consent. Given these circumstances, the trial court cannot be faulted for concluding:

> " I do find that the application for consent of the Land Control Board was not dated and therefore, the same is suspect and it is not possible to tell when it was made. But probably when the dispute was pending in the tribunal. The nature of transaction, the consent was sought was not disclosed. The purchase price was not disclosed in the application form and therefore, the application form was devoid of the required information. I do find that the plaintiff and the vendor did not make full disclosure to the Land Control board on the status of the land and therefore, the consent obtained was based on non-disclosure of material facts to the Land Control Board. It is worth noting that the consent was obtained on 5.8.2005 before the agreement was made on 13th September 2005 and on the 21.9.2005, there was a restriction by the Land Disputes Tribunal and the restriction was removed on 8.12.2005 claiming that the Land Disputes Tribunal was resolved."

42. In addition, a restriction which had been on the register of the suit land was removed on 8th December 2005 just one day before the transfer was effected on 9th December 2005.

43. In the end, I find that the transaction was fraught with stark irregularities that could not go unnoticed by the appellant or which ought to have been easily noticed the appellant. The conclusion to draw is that reached by the trial court; the appellant was not a bona fide purchaser without notice of the irregularities. She had to suffer the consequences of participating in an irregular transaction. The trial court was entitled to frown upon the transaction and to make the orders it made.

44. I find no merit in the appeal and would propose that it be dismissed with costs.

JUDGMENT OF KIAGE, JA

I have read in draft the judgment of my learned brother Tuiyott, JA. with which I am in full agreement and there would be no utility in my adding anything thereto.

As Mumbi Ngugi, JA also agrees, the appeal shall be disposed of as proposed by Tuiyott, JA.

JUDGMENT OF MUMBI NGUGI, JA

I have read in draft the judgment of my learned brother Tuiyott, JA. with which I am in full agreement and have nothing useful to add.

Dated and delivered at Kisumu this 8th day of July, 2022.

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

M. NGUGI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed.

DEPUTY REGISTRAR