



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, OKWENGU & SICHALE, J.J.A)**

**CIVIL APPEAL 177 OF 2019**

**BETWEEN**

**MWANGI JAMES NJEHIA.....1ST APPELLANT**

**JANETTA WANJIKU MWANGI.....2ND APPELLANT**

**AND**

**SIMON KAMANU.....RESPONDENT**

(Being an Appeal arising for the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (S. Okongo, J.) dated and delivered on 1st November 2018 *in E.L.C Case No. 1818 of 2002*)

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**JUDGMENT OF THE COURT**

1. This is a first appeal against the judgment and decree of the Environment and Land Court (ELC), (S. Okongo, J.) where the learned Judge found that the appellants' title over land Parcel known as L.R. No. 8226/14 measuring approximately 2.167 Hectares (the suit property) was invalid, since the vendor who sold and transferred title to the suit property to them had acquired the same fraudulently. The Court, having so found, entered judgment to the effect that the respondent herein was the registered sole proprietor of the suit property and ordered that his name be restored in the register at the requisite land registry; that the certificate of title issued to the appellants herein be cancelled and that a permanent injunction do issue against the appellants to ensure the respondent's quiet possession of the suit property.
2. The substantive issue for determination before this Court is whether an innocent purchaser for value without notice can acquire a good title over a parcel of land from a person who had fraudulently acquired title over the land and thereby defeat the claim by the original legitimate owner of the property in issue.
3. A brief background of this matter is necessary to place this appeal in perspective. **Simon Kamanu** (the respondent herein) is the sole proprietor of the suit property and the vendor, Mary Murugi John (deceased) was his sister and at the material time, the custodian of the certificate of title holding the same on his behalf. The appellants herein are spouses who allegedly bought the suit property from the deceased.
4. Vide his plaint dated 16th December, 2002 the respondent, sought *inter alia* a declaration that he is the registered owner of the suit property; cancellation of the title document issued to the respondents (now appellants); his reinstatement as the rightful legal owner; and eviction of the respondents from the suit property to ensure his quiet possession of the suit property.
5. The respondent averred that vide a transfer instrument dated 23rd June, 1994 allegedly executed by him, he allegedly transferred his rights and interests in the suit property in favour of the deceased; that the said transfer was found to be a forgery hence null and void by the Resident Magistrate Court at Nairobi in Criminal Case No.1274 of 2000. Further, that the deceased had no good title to pass to a 3rd party, therefore, the sale agreement dated 15th December, 1994 quoting a consideration of Kshs. 4,000,000, and the subsequent transfer instrument dated 20th December, 1994 quoting a consideration of Kshs. 1,500,000, executed by her in favour of the appellants were invalid, null and void.
6. The respondent set out particulars of fraud against the appellants being that the purchase price as quoted in the sale agreement and that quoted in the transfer instrument differed indicating absence of forthrightness or genuineness in the sale transaction and that the appellants ought to have done proper due diligence before purchasing the suit property.

7. The appellants, (then defendants) vide a statement of defence dated 21st February, 2003 denied all the claims contained in the plaint deposing that they did their due diligence through their advocate ensuring that the suit property had no encumbrances, as of 29th June, 1994, before purchasing the same from the deceased at a consideration of Kshs. 4,000,000; and that they were innocent purchasers for value without notice and so they held a valid title. On counterclaim, they claimed exemplary damages in respect of trespass and malicious damage to property specifically the unlawful removal of the landmark beacons on the suit property by the respondent.
8. During trial before the ELC, the respondent reiterated the averments in his pleadings save that he was the sole proprietor of the suit property as was evident from of a certificate of lease dated 19th April, 1977 issued to him. Further, that at the time the purported sale between him and the deceased took place in 1994, he was still in U.S.A hence it was not possible that he could have effected the purported sale and subsequent transfer. He stated that when he learnt of the alleged transfer of the suit property to the deceased, he asked his brother to visit the lands office and find out what was happening. In addition, that at the time of instituting the criminal suit against the appellants, the deceased had already passed on in 1998.
9. He averred that although the 1st appellant was acquitted in the criminal case, the court found that the purported sale of the suit property by the deceased to the defendants was fraudulent and it is on this basis that the respondent approached the ELC for the recovery of the suit property.
10. Echoing the averments in their pleadings, the 1st appellant testifying on his own behalf and on behalf of the 2nd appellant further averred that he only came to know of the respondent upon the institution of the criminal proceedings.
11. Having considered the parties' pleadings and evidence before him and the rival submissions by Counsel, the learned Judge made findings that : the respondent was the first registered owner of the suit property; that the deceased's title was a result of forgery and fraud hence null and void, therefore, that she did not have good title over the suit property that she could pass to the defendants.
12. Ultimately, the learned Judge allowed the respondent's claim granting reliefs as sought and dismissed the appellants' counterclaim.
13. Being aggrieved by that decision, the appellants preferred this appeal on grounds, *inter alia*, that the learned Judge erred: by finding that the appellants' instrument of transfer was a forgery without any supporting evidence; by ordering the Land Registrar to cancel the appellants' title and restore the respondent as the sole proprietor of the suit property yet the registrar was not a party to the suit; and failing to find that the appellants were *bonafide* purchasers.
14. In his brief submissions, learned counsel for the appellants, urged that the respondent failed to adduce irrebuttable evidence to prove that he was the rightful owner of the suit property. Further, that instead it was evident that he was holding the same in trust for the deceased since despite the fact that the property was in his name, the consideration for the same was paid by the deceased. Counsel maintained that a resulting trust was created by the deceased's actions of holding the title hence showing no intention of transferring her rights and interests over the suit property to the respondent.
15. Counsel further submitted that the respondent failed to pursue his claim in 1994 when the suit property was transferred to the appellants and only exercised his rights and interests over the suit property six years later in 2000. He contended that the learned Judge erred by failing to appreciate that unlike the respondent, a plaintiff with a good cause of action ought to pursue it with reasonable diligence; he urged that equity does not aid the indolent.
16. Citing **section 44(1)** as read together with **section 45** of the Evidence Act, he submitted that the decisions reached in criminal proceedings may not necessarily be conclusive proof of facts and ought not be binding to another court. He maintained that the learned Judge erred in failing to reach his own independent findings of fact and he did not therefore carry out his duty as enjoined by law to do.
17. Placing reliance on among others the case of **Central Kenya Limited v. Trust Bank Limited & 4 Others Nairobi** Civil Appeal No. 215 of 2016 counsel submitted that despite specifically pleading particulars of fraud, he failed to prove them on a balance of probabilities.
18. Citing the case of **Joseph Muriithi Njeru v. Mary Wanjiru Njuguna & Another** (2018) eKLR counsel further contended further that the learned Judge improperly applied the law resulting in an erroneous finding that the appellants were not *bonafide* purchasers. He maintained that the appellants purchased the suit property in good faith after doing their due diligence through a competent advocate before purchasing the same. Consequently, that they had no knowledge of the deceased's fraudulent acquisition of the same.
19. He contended that failure by the respondent to join the deceased's estate in the suit was fatal to his claim as it was prejudicial to the appellants who were being condemned for acquiring the suit property from a fraudulent vendor i.e., the deceased. (See: **JMK v. MWM & Another** (2015) eKLR).
20. Opposing the appeal, counsel for the respondent submitted that the appellants failed to produce any evidence to invalidate the respondent's title over the suit property. He maintained that the appellants' arguments on grounds of fraud as against the respondent and the issue of a resulting trust between the respondent and the deceased were neither pleaded nor proved before the trial court, hence they were not issues before the trial Court and in turn this court ought not delve into the same. He maintained, citing **section 23(1)** of the Land Titles Act, that nevertheless, the appellants had failed to prove any fraud on the part of the respondent. Further, that the existence of any form of trust if at all between the respondent and the deceased was also not proved.
21. Citing **Central Kenya Limited v. Trust Bank Limited & 4 Others** (*Supra*) counsel submitted that the respondent tendered sufficient evidence before the trial court to prove fraud against the appellants in effecting the purported transfer of the suit property from the deceased.
22. Counsel maintained that having found that the purported transfer by the deceased was fraudulent, then she did not have a valid title to

transfer to the appellants. (See: **Arthi Highway Developers Ltd v. West End Butchery Ltd & 6 Others (2015) eKLR**).

23. He argued that in addition, the appellants failed to produce any evidence to prove that indeed they carried out due diligence before purchasing the suit property hence they were not *bona fide* purchasers.

24. He contended that since it was evident that the respondent had proved his case it was prudent for the trial court to exercise its powers as envisaged under **section 80** of the Land Registration Act, 2012, which clothes a court with the powers to issue orders for rectification of the register through cancellation or amendment where it is found that such registration was obtained, made or omitted through mistake or fraud. Further, that since the respondent had proved ownership and possession of the suit property, he was deserving of orders for a permanent injunction against the appellants to attain quiet possession of the same.

25. Having considered the record in its entirety, the evidence on record and rival submissions by counsel, it is evident that the principal issue arising is whether the appellants can claim to be innocent purchasers for value without notice, but more importantly, whether a person who obtains title through fraud can pass legitimate title to another person, whether that person was privy to the fraud or not.

26. As a first appellate Court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and draw its own conclusions, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses firsthand. (See: **Selle & Another v. Associated Motor Boat Co. Ltd. & Others (1968) EA 123**).

27. A close perusal of the record reveals a certificate of title registered in the respondent's name indicating that the respondent was the first registered owner of the suit property according to the first entry. Therefore, it was upon the appellants to prove that indeed they had acquired interest over the suit property in a manner that was lawful and valid enough to deprive the respondent of his rights and interests over the suit property. There was abundance of evidence before the ELC to demonstrate that as at the time the suit property was transferred from the respondent to the deceased, the respondent still had the original Title Deed with him in America.

28. It was also established beyond peradventure that as at the time the transfer was done, the respondent was still in America and he could not therefore have signed the transfer as alleged.

29. Consequentially, it is prudent to say that the respondent's claim before the ELC pointed towards the fraudulent acquisition of the suit property by the appellants herein following an illegal and fraudulent transfer to them by the deceased who had fraudulently acquired the same in the first place. Could the deceased in the circumstances pass good title to any buyer, whether innocent or otherwise?

30. **Section 26(1)** of the Land Registration Act states that:

**“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.**” (Emphasis supplied)

31. Further, in the case of **Munyu Maina v. Hiram Gathiha Maina, Civil Appeal No. 239 of 2009** this Court stated thus:-

**“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”** (Emphasis ours)

32. It was the appellants' argument that they acquired the suit property from the deceased for consideration vide a valid transfer instrument after carrying out due diligence.

33. A careful perusal of the proceedings before the ELC reveals that during cross-examination, the 1st appellant testified that he had purchased the suit property from the deceased for a consideration of Kshs. 4,000,000 through the deceased's advocates, Kambi Muhia Advocates who were acting for both parties in the conveyance. However, he could not remember whether he paid the same via a bank transfer or a cheque. He further stated that he had no evidence of the said payment either through a bank slip showing that he had a banker's cheque or a bank statement showing that his bank account had been debited with the said amount.

34. The 1st appellant went on to state that a search was done by the same advocates, however he did not have a copy of the requisite official search document. Again, when interrogated about the stamp duty he paid with respect to the alleged transfer, he stated that he neither remembered the amount paid nor could he produce the receipt issued to him upon payment.

35. As appears from the 1st appellant's testimony and as correctly observed by the trial Judge, the first appellant is a veterinary doctor. Therefore, it is peculiar that he would take a transaction worth Kshs. 4,000,000, so casually to the extent of not finding it necessary to keep records pertaining to the same. Further, despite deposing that some of the documents pertaining to the conveyance were in the custody of M/s Kambi Muhia Advocates who were acting for both deceased and the 1st and 2nd appellants, he did not bother to call an advocate from the

firm to testify in that regard or produce the said documents in evidence.

36. From the mere conduct of the appellants herein, it could be construed that the circumstances under which they acquired the suit property were fraudulent and fraught with illegalities and that they were well aware of those circumstances.

37. In **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014** this Court cited with approval the case of **Katende v. Haridar & Company Ltd (2008) 2 EA 173**, where the Court of Appeal in Uganda held that:-

**“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 as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, must prove that:**

- 1. he holds a certificate of title;**
- 2. he purchased the property in good faith;**
- 3. he had no knowledge of the fraud;**
- 4. he purchased for valuable consideration;**
- 5. the vendors had apparent valid title;**
- 6. he purchased without notice of any fraud; and**
- 7. he was not party to the fraud.”**

We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word “apparent” be done away with altogether.

38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased” properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.

39. The elephant in the room is whether genuine, legitimate owners of property should be dispossessed of their hard earned property, because a party has

“purchased” the property on the basis of an “*apparent title*” at the land registry which had been transplanted in place of the genuine title, only for the genuine one to reemerge after the transaction? In our view, no legitimate owner of property should be divested of their property unlawfully, under the guise that the “purchaser” was duped to buy land which he/she could have believed to be genuinely owned by the person holding himself out as the vendor.

40. We have no hesitation in concluding that the appellants do not fall in the category of innocent purchasers. Their appeal is destined to fail for two reasons. First, because as we have demonstrated in this judgment, the deceased had no good Title to pass to anybody; second because the appellants were not innocent purchasers for value without notice and they cannot call in aid the provisions of **Section 26 (1)** of the Land Registration Act.

41. With respect to the reliefs which were available to the respondent, **Section**

**80** of the Land Registration Act provides as follows:

**“80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**

**(2). The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”**

42. We cannot fault the learned Judge for granting the reliefs he did even in the absence of the Land Registrar being made a party to the suit. In any event, there was no evidence placed before the Court to even remotely suggest that the Land Registrar was complicit in the fraudulent

transfer of the respondent's property to the appellants.

43. We believe we have said enough to demonstrate that this appeal is totally devoid of merit. We dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021**

**W. KARANJA**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR**