**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: OUKO (P), MUSINGA & GATEMBU, JJ.A.)**

**CIVIL APPEAL NO. 68 OF 2018**

**BETWEEN**

**JAMES TEKO LOPOYETUM..............................................................APPELLANT**

**AND**

**ROSE KASUKU WATIA...............................................................1ST RESPONDENT**

**DICKSON KYALO WATIA.........................................................2ND RESPONDENT**

**EDWARD WATIA NZILU............................................................3RD RESPONDENT**

**THE NATIONAL LANDS COMMISSION.................................4TH RESPONDENT**

**THE ATTORNEY GENERAL (*on behalf of the Government of Kenya & Ministry of***

***Lands and Settlement*)....................................................................5TH RESPONDENT**

***(Being an appeal from the judgment of the Environment & Land Court at Machakos (Angote, J.) dated 13th April 2018***

***in***

***Malindi ELC Case No. 38 of 2015***

***Formerly***

***Nairobi ELC Case No. 1567 of 2014)***

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**JUDGMENT OF THE COURT**

1. This appeal arises from a judgment delivered on 13th April 2018 by which the Environment and Land Court (ELC) (***Angote, J.***) restrained the National Land Commission, the 4th respondent herein, from making any compensation payments to James Teko Lopoyetum, the appellant; declared that the transfer of the property known as Title Number Lamu/Hindi/Magogoni/682 in Lamu County (the property) in favour of the appellant was unlawful, null and void; ordered the cancellation of the title deed issued to the appellant and at the same time directed the Chief Land Registrar to issue a title deed to Edward Watia Nzilu, the 3rd respondent; and ordered the National Land Commission (NLC) and the Attorney General not to pay any compensation to the 3rd respondent.

2. Rose Kasuku Watia and Dixon Kyalo Watia, the 1st and 2nd respondents, are the wife and son respectively of Edward Watia Nzilu, the 3rd respondent. The latter was until 29th July 2009 the registered proprietor of the property measuring

approximately 6.8 hectares which according to 1st and 2nd respondents is family property on which the matrimonial home is situated and on which they have lived for many years, although, according to the 1st respondent, the 3rd respondent deserted the home. Part of that land was apparently, earmarked for acquisition by NLC, the 4th respondent for a public road in connection with the LAPSSET project. In that regard, sometimes in 2014, the 1st and 2nd respondents went to the Lamu County Government to enquire about compensation for the *"shamba"* on which *"the road passed"* and were directed to the Land Registrar to obtain an official search over the property. On conducting the search, they discovered, to their shock and distress, that the property had been transferred to the appellant on 29th July 2009 and a title deed issued to him.

3. With that knowledge, on 18th December 2014, the 1st and 2nd respondents instituted suit before the ELC joining the 3rd respondent, the appellant, NLC, and the 5th respondent, Attorney General as defendants. In the plaint, they averred that the transfer of the property in favour of the appellant was fraudulent, null and void. They sought the reliefs, which as we have stated were granted by the trial court.

4. The 3rd respondent in his statement of defence readily conceded that the 1st and 2nd respondents are his wife and son respectively and that they and other family members reside on the property. He disowned the transfer of the property in favour of the appellant and averred that it was obtained "*through falsehood, trickery and fraud through the offices of the local chief where he had been summoned and where he was unlawfully tricked to sign a document under the influence of alcohol*"; he wondered how the appellant would have had the property, "*which he never knew existed*" transferred to him; and averred that the entire process was unlawfully and fraudulently carried out and that if he had signed any transfer documents it was through trickery, deception and/or under influence of alcohol.

5. On his part, the appellant in urging the court to dismiss the suit pleaded that he purchased the property from the 3rd respondent; that the process of transfer was properly carried out and was not in any way fraudulent, illegal or unlawful; that the parties to the sale agreement applied for land control board consent on 24th June 2009 and the same was granted on 25th June 2009; that the transfer was done on 30th June 2009; and a title deed issued to him on 29th July 2009.

6. In their testimony before the trial court, the 1st and 2nd respondent stated that they lived, and had lived on the property for many years; that they had no idea how the property got transferred to the appellant; that they were not at any stage involved in the transaction with the appellant and neither were they involved in the land control board process; that they only discovered that the property had been transferred in the process of pursuing compensation for the portion of the property compulsory acquired for purposes of a road. The 1st respondent stressed that she lives on the property with all her children and that bodies of two of her children who died were interred there, the last of whom was buried in May 2014 without anyone attempting to stop the burial. The 2nd respondent also stated that he lives on the property with his siblings and has lived there since 1993 and throughout that period no one has ever made claim to the property.

7. The 3rd respondent adopted his statement of defence and maintained that he has never sold the property to anyone; that he had no idea about the purported sale and never entered into any agreement with any one or received any money for the purported sale; that he has never attended a Land Control Board meeting in connection with the purported sale; and that the property belongs to his whole family including grandchildren who live on the property.

8. The appellant called the local chief (DW2) as his witness. He testified that the 3rd respondent requested him to get a buyer for his property; that he introduced him to the appellant and paid him Kshs.100,000.00 in cash towards the purchase price; that a week later the 3rd respondent received a banker's cheque for Kshs.1,000,000.00. DW2 confirmed that the 3rd respondent has a family, wife and children, but that he did not involve the family when he connected the appellant to the 3rd respondent, and neither was he involved in the process of obtaining the land control board consent.

9. The appellant testified as DW3. He stated that he met the 3rd respondent in Lamu in 2009 and "*we agreed*"; that he paid him Kshs.100,000.00 in cash as a deposit towards the purchase price and later Kshs.1,000,000.00 by a banker's cheque. He stated that they attended the land control board on a date he would not remember at which the 3rd respondent was present with one of his sons; that at the time the land was vacant, and the 3rd respondent only moved to the land after the LAPSSET issue came.

10. After considering the evidence and the submissions made before him, the learned Judge found that there was no evidence to show that the 3rd respondent signed the transfer document of 30th June 2009 or that he received the purchase price; that there was no evidence to show that he attended the meeting of the Land Control Board before the consent of that board was issued. The Judge therefore concluded that the transfer of the property to the appellant was fraudulent and on that basis granted the reliefs aforementioned.

11. The appellant has in this appeal challenged the judgment of the ELC, principally on grounds that the 1st and 2nd respondent, not being privy to the agreement for sale between the 3rd respondent and the appellant, did not have locus standi to institute the claim; and secondly,

that fraud was not established to warrant the orders that the trial court issued.

12. During the hearing of the appeal, Mr. Muiyuri, learned counsel appeared for the appellant; Mr. V.M. Muya, learned counsel appeared for the 1st and 2nd respondents; and Mr. Edward Watia, the 3rd respondent appeared in person. There was no appearance for the 4th and 5th respondents. Learned counsel relied on their respective written submissions which they highlighted. The 3rd respondent made oral representations before us.

13. Mr. Muiyuri began by submitting that the 1st and 2nd respondents who instituted the suit in the lower court had no dealings with the appellant on the basis of which they could institute a suit. Referring to them as strangers, counsel submitted that the 1st and 2nd respondents had no basis, or locus standi, to institute the suit for relief based on the agreement between the appellant and the 3rd respondent. The learned Judge therefore erred, it was submitted, in entertaining the suit at their behest.

14. It was pointed out that the judgment deviated and contradicted an earlier interlocutory ruling without justifiable basis. In the earlier interlocutory ruling, the trial court, while rejecting an application by 1st and 2nd respondents for interim relief had ruled that the 1st and 2nd respondents had no capacity to claim the property and had not established a *prima facie* case to warrant grant of temporary injunction to restrain the appellant from dealing with the property. In that ruling the court noted that spousal consent was not required in respect of the transaction between the 3rd respondent and the appellant. It was urged that there was no privity of contract between the 1st and 2nd respondents and the appellant and that it was only the 3rd respondent who could maintain the claim against the appellant. The case of ***William Muthee Muthami vs. Bank of Baroda (2014) eKLR*** was cited**.**

15. On the question of fraud, counsel submitted that the Judge fell into error in concluding that the transfer of the property in favour of the appellant was fraudulent. He referred to the case of ***John Kamunya & Another vs. John Nginyi Muchiri & 3 Others [2015] eKLR*** for the proposition that evidence must be tendered to support allegations of fraud in order for the court to make a determination; the case of ***Arthi Highway Developers Ltd vs. West End Butchery Limited and 6 others [2015] eKLR*** for the proposition that fraud cannot be left to be inferred from the facts pleaded and that fraudulent conduct must be distinctly alleged and distinctly proved; and the case of ***Peter Gicharu Njiri vs. Richard Wanyonyi Sitati [2019] eKLR*** for the proposition that the burden placed on a plaintiff to prove fraud is higher than the balance of probabilities. It was submitted that the 1st and 2nd respondents did not tender evidence to the required standard to establish fraud.

16. Furthermore, counsel urged, in the absence of evidence of a handwriting expert, the trial court erred in finding that the 3rd respondent did not sign the application for Land Control Board consent as well as the transfer documents. In that regard, reference was made to Sections 48 and 80 of the Evidence Act and the case of ***Peter Gicharu Njiru vs. Richard Wanyonyi Sitati (2019) eKLR*.**

17. Opposing the appeal, ***Mr. Muya*** submitted that the contention by the appellant that the 1st and 2nd respondents did not have *locus standi* to institute the suit is misconceived; that the subject matter of the suit is family land which is in their possession and on which their homestead is situated. Accordingly, it was urged, the 1st and 2nd respondents indisputably have an interest in the property giving them footing to file suit upon discovering that the property had been transferred without their consent.

18. Fraud, counsel submitted, was established to the required standard.

It was submitted that the 3rd respondent confirmed in his testimony that the property was family land and that the same was transferred fraudulently; that in light of the contention by the 3rd respondent that he did not enter into any agreement with the appellant; that he was not paid for the alleged purchase; that he did not sign the application for land control board consent or the transfer of the property in favour of the appellant, it was incumbent upon the appellant to prove otherwise but no evidence was tendered by the appellant in that regard. Relying on a decision of the Environment and Land Court in the case of ***Alice Chemutai Too vs. Nickson Kipkurui Korir & 2 others [2015] eKLR***, it was submitted that a title to property is liable for cancellation where, as here, fraud is established.

19. It was submitted further that the appellant was not an innocent purchaser for value and could not claim protection under Section 143(2) of the repealed Registered Land Act as he was never in possession of the property; that there was no legal contract of sale of land that fulfilled the requirements of the law capable of protection by dint of Section 3(3) of the Law of Contract Act as there was no evidence of a contract in writing between the appellant and the 3rd respondent. In that regard the decision of the Court in Machakos ***District Co-operative Union Limited vs Philip Nzuki Kiilu, C.A. No. 112 of 1997*** was cited.

20. Counsel further submitted that under Section 17 of the Land Control Board Act, the consent of the family members of the 3rd respondent was required but was not sought and obtained and they did not appear before a Board for that purpose.

21. Counsel concluded by stating that the judgment of the court has, in any event, been executed and the transfer in favour of the appellant cancelled and the property transferred back to the 3rd respondent.

22. On his part, the 3rd respondent, who as already noted appeared before us in person, stated that he has the title deed in respect of the property and that he has already given it to his seven children.

23. We have considered the appeal and the submissions. In keeping with our mandate under Rule 29 of the Court of Appeal Rules as amplified in ***Selle & Another vs. Associated Motorboat (K) Ltd & Others [1965] EA 123***, we have reviewed and re-evaluated the evidence with a view to drawing our own conclusions as we bear mind that we have not seen nor heard the witnesses. Two issues arise in this appeal. The first is whether the 1st and 2nd respondents had standing to institute the suit against the appellant. The second is whether they established their case to the required standard and whether the conclusions reached by the trial judge that the transfer in favour of the appellant was fraudulently obtained and liable to nullification are well founded.

24. We start with the issue of *locus standi*, an expression meaning *"the right to bring an action or to be heard in a given forum" as* defined in **Black's Law Dictionary,** 9th Edition. In the case of ***Alfred Njau & 5 others vs. City Council of Nairobi [1983] eKLR*** this Court expressed that:

> ***"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding."***

25. What then was the nature of the claim by the 1st and 2nd respondent, and did they have sufficient interest to institute the suit? The basis of their claim emerges from paragraph 9 of their plaint, where they pleaded:

> ***"The plaintiffs aver that, together with the other family members of the 1st defendant live and have settled in the suit premises and have been in possession and occupation of the suit premises and have been in possession and occupation of the suit premises as their matrimonial home for many years."***

26. Further, the evidence shows that the 1st and 2nd respondents are the wife and son respectively of the 3rd respondent who was the registered proprietor of the property at the material time and their home is situated on the property. They were and remain in possession of the property and it was on that basis that they instituted suit. We are satisfied that the 1st and 2nd respondents demonstrated sufficient footing on the basis of which they instituted suit seeking reliefs to which we have referred to protect their interest. The suit was not based, as the appellant has misapprehended, on the purported agreement for sale between him and the 3rd respondent to which the 1st and 2nd respondents were evidently not privy.

27. The appellant also took the position, wrongly in our view, that the judgment contradicted the trial court's earlier ruling when dismissing the 1st and 2nd respondent's application for interim relief where the court had ruled that the 1st and 2nd respondents had not established a *prima facie* case to warrant the grant of interlocutory injunction. In that ruling, and subsequently in the judgment, the trial court alluded to the question whether spousal consent was required before the 3rd respondent could transfer the property and reached the conclusion that the law at the material time did not require such consent. It must however be borne in mind that at the interlocutory stage, the Judge could not express concluded views on contested matters of fact as he did not at that stage have the benefit of hearing witnesses and considering the totality of the evidence. The views expressed in the interlocutory ruling, were as it were tentative, and not binding on the eventual outcome of the case upon conducting a full hearing.

28. We conclude therefore that there is no merit in the appellant's complaint that the 1st and 2nd respondents lacked *locus standi* to institute the suit.

29. On fraud, that it must be specifically pleaded and proved is trite. The authorities cited by counsel for the appellant in that regard suffice. See ***John Kamunya & Another vs. John Nginyi Muchiri & 3 Others*** (above) and also ***Arthi Highway Developers Ltd vs. West End Butchery Limited and 6 others*** (above). It is also correct, as submitted, that fraud must be proved to a higher standard than balance of probabilities. See ***Peter Gicharu Njiri vs. Richard Wanyonyi Sitati*** (above).

30. The basis upon which the trial court held that the property was fraudulently transferred to the appellant is three-fold. First, that there was no evidence that the alleged transaction between the appellant and the 3rd respondent met the requirements Section

3(3) of the Law of Contract Act and that the appellant failed to establish that the 3rd respondent signed the transfer in favour of the appellant. Secondly, that on the face of the claim by the 3rd respondent that no purchase price was paid, it was incumbent upon the appellant to show that he had paid but tendered no evidence in that regard. The Judge justifiably wondered why in the face of that claim by the 3rd respondent the appellant could not produce a copy of the banker's cheque or his bank statement to demonstrate the payment. Thirdly, that no evidence was tendered to show that the 3rd respondent attended the meeting of the land control board before the consent was issued. At paragraph 49 of the judgment the Judge stated:

> ***"The analysis of the documents before me shows that there is no evidence to show that the first defendant signed the transfer document of 30th June 2009 or that he received the purchase price. There is also no evidence to show that he attended the meeting of the Land Control Board before that consent of the board was issued a day after signing the application. Indeed, the minutes of the Board were not produced."***

31. In their suit, the 1st and 2nd respondents pleaded that they only discovered, fortuitously in August 2014 when pursuing compensation for a section of the property acquired for a road, that the title to the property they called home had been transferred to the appellant. They averred that they had never been summoned before any Land Control Board for consent in relation to property they described as *"family land"* where *"the family live and have settled"*. Under particulars of fraud, they pleaded, among other things, that the alleged transaction was concealed from them, that consent of the Land Control Board was surreptitiously sought, and the property transferred without authority.

32. In his defence, the appellant averred as already noted that he was lawfully registered as the owner of the property; that the parties to the sale agreement applied and obtained land control board consent after which the property was transferred to him and a title deed issued to him on 29th July 2009. It is somewhat baffling that despite being registered as owner as early as that, the appellant appears to have taken no steps at all to take possession of the property.

33. As the learned Judge noted in his judgment, the applicable law in respect to the property is the law that was applicable at the time the title deed was registered in favour of the appellant namely the repealed Registered Land Act. Section 143 of that Act provided:

> ***"143. (1) Subject to sub-section (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.***
>
> ***(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration unless such proprietor had knowledge of the omission, fraud or mistake or substantially contributed to it by his act, neglect or default."***

34. The transfer in favour of the appellant on 30th June 2009 was not a first registration as the property was previously registered in the name of the 3rd respondent. The evidence showed that the appellant was never in possession of the property. Despite the appellant being registered as owner of the property as early as June 2009, it was the uncontroverted testimony of the 1st respondent that it was not until 2014 when discovery was made that the property had changed ownership and during the intervening period, the appellant had never gone to claim possession of the property. As ***Madan, J.A.*** stated in ***Chauhan vs. Omagwa [1980] eKLR***, under Section 143(2) "*possession of the land as stated in subsection (2) …is a pre-requisite to immunity against rectification of the register*." In that case, the Judge stated:

> ***"The provisions of section 143(2) did not prevent the learned judge from making an order for rectification of the register for even if the appellant did not acquiesce in the fraud by the first defendant or even if he was a bona fide purchaser of the land for value without any knowledge of the previous transaction between the first defendant and the respondent, the appellant was not in possession of the land as stated in subsection (2) which is a pre-requisite to immunity against rectification of the register."*** *[Emphasis]*

35. The conclusion reached in that case, as captured in the judgment of ***Madan, J.A.*** that the trial Judge was ***"authorized by section 143 to order rectification even if the plaint did not disclose a cause of action against the appellant provided the appellant was not in possession of the land which he was not as I have pointed out"*** applies equally to the circumstances in the present case. Likewise in this case, the Judge having found as a fact that transfer to the appellant was fraudulent, he was entitled to order, as he did, rectification of the register notwithstanding that the appellant may not have been privy to the fraud.

36. For those reasons, we see no reason for interfering with the judgment of the trial court. We are not satisfied that the appeal is merited. Accordingly, it is hereby dismissed. Each party will bear their own costs of the appeal.

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

**W. OUKO, (P)**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

**......................................**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, (FCIArb)**

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**JUDGE OF APPEAL**

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

*Signed*

***DEPUTY REGISTRAR***