



**Njenga & 3 others v Ndua & another (Civil Appeal 187 of 2017)
[2021] KECA 253 (KLR) (3 December 2021) (Judgment)**

Neutral citation: [2021] KECA 253 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 187 OF 2017
AK MURGOR, J MOHAMMED & KI LAIBUTA, JJA
DECEMBER 3, 2021**

BETWEEN

**CECELIA NJOKI NJENGA 1ST APPELLANT
ELIZABETH NJERI NYOIKE 2ND APPELLANT
IDA WAIRIMU OTIENO 3RD APPELLANT
JOHN KIARIE KINUTHIA 4TH APPELLANT**

AND

**JAMES MBURU NDUWA 1ST RESPONDENT
CATHERINE WANJIRU KINUTHIA 2ND RESPONDENT**

(Appeal against the Judgment of the High Court of Kenya at Nakuru (J.N. Mulwa, J.) dated 23rd October 2017 and delivered on 24th October, 2017 in High Court Civil Case No 335 of 2018)

JUDGMENT

Background

1. This appeal arises from the judgment of Hon. Justice J. N. Mulwa dated 23rd October 2017 and delivered by the Hon. Justice R. Lagat Korir on 24th October 2017 in Nakuru HCC No. 335 of 2009 in which the Appellants, Cecelia Njoki Njenga, Elizabeth Njeri Nyoike, Ida Wairimu Otieno and John Kiarie Kinuthia, had sued the Respondents, James Mburu Ndua and Catherine Wanjiru Kinuthia seeking –
 - (a) a declaration that the registration of the 1st Respondent as the owner of Land Reference No. Nakuru Municipality 2/276 was fraudulent, illegal, null and void and that the title be cancelled and the rectification of the Register to read the owners as the administrators of the estate of Augustine Kinuthia;



- (b) a permanent injunction restraining the Respondents by themselves, their servants, employees or anyone claiming under them from entering, encroaching on, obstructing, trespassing on, or transferring, charging, selling, alienating or in any other way whatsoever from interfering with Land Reference No. Nakuru Municipality 2/276;
 - (c) costs of the suit and interest at court rates; and
 - (d) any other relief that the court may deem fit and just to grant.
2. The Respondents filed their statements of defence. The 1st Respondent denied that the Appellants were entitled to the relief sought and contended that the suit was incompetent. He asked the High Court to strike it out. On the other hand, the 2nd Respondent supported the Appellants' claim and alleged that "... the transfer and registration of the 1st Respondent as the owner of the [suit property] was fraudulent, illegal, null and void and that the title should be cancelled and the rectification of the Register be done to read the owners as the administrators of the estate of Augustine Kinuthia". She prayed that judgment be entered against the 1st Respondent as prayed in the plaint.

The Parties

3. The Appellants are the surviving children of the 2nd Respondent, who is the widow and co-administrator of the estate of Augustine Kinuthia (deceased) having been appointed together with her son, Paul Julius Murathi (deceased), as a joint administrators of the said estate, which they held in trust for themselves and the Appellants under and by virtue of a Grant of Representation as confirmed by the Certificate of Confirmation of Grant issued on 6th June 2005 in High Court of Kenya at Nairobi Succession Cause No. 554 of 2001.
4. The 1st Respondent, a third party, purchased LR No. Nakuru Municipality 2/276 from the 2nd Respondent and her deceased son in 2008 for a sum of KShs. 5,200,000 as appears from a sale agreement dated 31st March 2008 and which was duly executed by the 1st Respondent, the 2nd Respondent and her deceased son aforesaid.

Dispute and Findings of the High Court

5. A dispute arose between the Appellants and the Respondents over and concerning the validity of the sale of the suit property to the 1st Respondent without the Appellants' consent, or a valid consent of the High Court. In his defence, the 1st Respondent contended that he was a bona fide purchaser for value without notice of fraud alleged by the Appellants to have been committed by the 2nd Respondent's deceased son in obtaining a forged consent of the High Court in the Nairobi succession cause aforesaid.
6. It is then that the Appellants filed suit in Nakuru HCC No. 335 of 2009 from which this appeal arises. Upon hearing the parties, the learned Judge found that the declaration sought by the Appellants was not available to them and directed inter alia that –
- (a) the 2nd Respondent do pay to the Appellants the balance of the purchase price in the sum of KShs. 2,400,000 with interest at 6% per annum with effect from 2nd December 2009 until payment in full;
 - (b) the 2nd Respondent, being liable for breach of trust to the Appellants, an order of compensation do issue against her to pay sufficient compensation to the trust estate, including to the Appellants as beneficiaries in the sum of KShs. 2,800,000 together with interest at the rate of 6% per annum with effect from January 2010 until payment in full; and
 - (c) the suit being between members of the same family, there be no orders as to costs.



7. Aggrieved by the decision of the learned Judge, the Appellants instituted this appeal from the whole of her judgment on 19 grounds, which we need not reproduce in full here. However, we take the liberty to summarise and reframe them. In our considered view, the salient grounds are that –
- (a) the learned judge erred in law and in fact in finding that the 1st Respondent was not party to the fraud complained of;
 - (b) the learned Judge erred in law in holding that the issue between the parties was purely a matter of breach of trust;
 - (c) the learned Judge misdirected herself in holding that the statute law applicable to their case was the Registered *Land Act*, Cap. 300 (now repealed) instead of the *Land Registration Act*, 2012;
 - (d) the learned Judge erred in law and in fact in finding that the 1st Respondent was a bona fide purchaser for value without notice, and that the suit property was not available for recovery by the Appellants;
 - (e) the learned Judge erred in law in failing to find that the transfer to the 1st Respondent of the suit property, and the sale agreement on which it was founded, were invalid on account of the forged consent order; and
 - (f) the learned Judge erred in fact in failing to award the Appellants the relief sought, notwithstanding the weight of evidence.
8. On the basis of the foregoing, the Appellants have asked us to –
- (a) allow the appeal and set aside the judgment of the superior court;
 - (b) substitute the judgment of the superior court for an order allowing the prayers in the plaint; and
 - (c) grant them costs of this appeal.

Appeal and Submissions of Counsel

9. Having examined the record of appeal and the grounds on which it is founded, we are of the considered view that the appeal stands or falls on the following issues of law and fact, and on which learned counsel comprehensively submitted. Those grounds may be summarized as follows:
- (a) whether the 2nd Respondent and her son, Paul Julius Murathi (deceased) acted in breach of trust in selling and transferring to the 1st Respondent LR No. Nakuru Municipality 2/276;
 - (b) whether the sale and transfer of the suit property was fraudulent and, if the answer to this question is in the affirmative, who were party to that fraud;
 - (c) whether, in relation to the suit property, the 1st Respondent was a bona fide purchaser for value;
 - (d) whether the suit property was available for recovery and return to the Appellants;
 - (e) whether the Appellants were entitled to the remedies sought in the High Court; and
 - (f) what orders should this Court make in determination of the appeal.
10. We have considered the findings of the High Court, the submissions of counsel and the numerous statutory provisions cited before us. This being a first appeal, it is also our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by



this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co.* [1968] EA p.123 where the Court held:

“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 demeanor of a witness is inconsistent with the evidence in the case generally.”

Breach of Trust

11. An issue arose as to whether the 2nd Respondent and her son, Paul Julius Murathi (deceased) acted in breach of trust in selling and transferring to the 1st Respondent the suit property. We agree with the trial Judge’s finding that they did. According to the evidence, the 2nd respondent and her deceased son sold the suit property without the Appellants’ consent, and on the basis of an invalid consent upon which the Letters of Administration had been granted and confirmed. In her letter dated 25th January 2010 addressed to M/s. Kairu Mbuthia and Kiingati, Advocates, and which appears on page 53 of the record of appeal, the Principal Deputy Registrar of the Family Division of the High Court of Kenya at Nairobi confirmed that the purported consent to transfer the suit property did not emanate from that court.
12. In her witness statement dated 20th June 2011 (and which appears on page 24 of the record of appeal), the 2nd Respondent explained that, in light of her inability to read and write, she might have signed an agreement to sell the suit property to the 1st Respondent. According to her, if she did sign, she was not informed that she did not have the capacity to sell the suit property. She explains that she was misled by her deceased son to sign the agreement together with other documents, which were brought to her by “some unknown people”.
13. We find paragraph 7 of her witness statement of interest. It reads:

“I did not know that I could not sell the property without the consent of my children. Had I known this, I would not have signed the agreement. My children have never given consent for the sale of the land or any other property. I am not aware of any court order that was granted by the court to sell the land.”
14. In paragraphs 8 and 9 of her statement, the 2nd Respondent says that “the sale was initiated by my late son, Paul Julius Murathi.” She expressed the view that “... the claim by the Appellants [was] genuine and should be allowed as against the 1st Respondent, who colluded with my late son and used me to perpetuate the fraud.”
15. When cross-examined, the 1st Appellant took the same position taken by the 2nd Respondent. According to her, the 2nd Respondent was not party to the procurement of the consent order pursuant to which the sale was transacted. However, she confirms that “the 1st [Respondent] was not implicated” in the fraud. In her testimony, she explained that she was “... complaining against the administrators who abused their powers as trustees.”



16. On his part, the 1st Respondent stated in his examination-in-chief that he did not collude with the trustees as he did not know them before the transaction. According to him, he was shown a consent for the transfer of the suit property, but was not aware that it was a forged document. However, he was aware that the sellers were to obtain the consent to transfer.
16. It is on account of the foregoing corresponding testimonies that we find that the learned Judge was correct in her finding that the 2nd Respondent and her deceased son acted in breach of trust, whether or not the 2nd Respondent acted fraudulently in obtaining the forged consent order. What remains for our determination is the relief available to the Appellants, a matter to which we will shortly return guided by, among others Section 39(2) of the Registered [Land Act](#), Cap.300 (now repealed).

Validity of Sale and Transfer of the Suit Property

18. It was in issue before the High Court whether the sale and transfer of the suit property was fraudulent and, if the answer to this question is in the affirmative, who were party to that fraud. It is common ground that the sale and transfer of the suit property was facilitated by forgery of a document purported to be a consent order of the court, and of which the 1st Respondent was neither aware of nor was party to. The sale and transfer in issue were transacted by two trustees who had powers to execute the documents and bind third parties.
19. In our considered view, the validity of the sale and transfer of the suit property turns on the question as to whether the 1st Respondent was a bona fide purchaser for value without notice of the forgery complained of. We find that he was. He was neither aware of or party to the forgery nor of the resulting breach of trust by the 2nd Respondent and her deceased son. Unfortunate as it might have been for the Appellants, that sale and transfer is, on that account, indefeasible under and by virtue of Section 39(2) of the Registered [Land Act](#), Cap. 300 (now repealed).
20. *Black's law Dictionary 8th Edition* defines a “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.”
21. Citing the decision in the Ugandan case of *Katende v Haridar & Company Limited [2008] 2 EA p.173*, this Court in *Weston Gitonga and 10 others v Peter Rugu Gikanga and another [2007] eKLR* held that “... 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; and
 - (g) he was not party to any fraud.”



22. In its judgment, the Court went on to observe that “a bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.” Section 39 (2) of the repealed Cap. 300, which applied at the time when the suit property was dealt with, provided that “where the proprietor of land, a lease or a charge is a trustee, he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by the trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that the disposition amounted to a breach of trust.

Can the 1st Respondent’s Title to the suit property be cancelled and the Title Register rectified into the names of the Administrators of the Estate of Augustine Kinuthia (Deceased) as the Registered Proprietors thereof?

23. We do not think so. It is too late in the day. The right to trace and recover what was then trust property has been long exhausted and overtaken by events. It is noteworthy that the suit property had been subdivided and portions thereof sold as far back as January 2009 or soon thereafter. In her testimony, the 1st Appellant stated at the trial that they discovered the sale and transfer of the suit property in January 2009. According to her, “the land had been subdivided and advertised for sale in Nakuru.” The 1st Appellant’s testimony was confirmed by the 1st Respondent who told the learned Judge that the property was transferred to him after which he subdivided it and sold three out of eight portions. He explained that the subdivision titles have not been processed because of the suit that was then pending in the High Court. Accordingly, we agree with the High Court that the suit property is beyond recovery by the Appellants. It can no longer be returned to them. Neither can the title register be rectified as sought.

24. In *Foskett v McKeown* [2001] 1 AC p.102 at pp.127-130, it was held that where a person has such a proprietary interest, he may enforce it by (a) following the asset unless and until the asset passes into the hands of a bona fide purchaser for value without notice; and also (b) tracing the value of his proprietary interest into identifiable substitutes for the original asset, unless the substitute has been provided by a bona fide purchaser for value without notice. This position has long been anchored in statute law applicable to the dealings in issue and in the appeal before us.

25. On the authority of Section 143(2) of Cap. 300 (now repealed), “... 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 in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.” As we have already observed, the 1st Respondent was neither party to, nor aware of, the breach of trust or fraud perpetrated either jointly by the 2nd Respondent or by her deceased son.

26. In his submissions, counsel for the 1st Respondent told us that the responsibility for the forged consent order rests squarely on the shoulders of the 2nd Respondent and her deceased son. We agree. The two were, in our considered view, in breach of trust. It is doubtful, though, whether the 2nd Respondent knowingly and willfully engaged in the misdealing that resulted in the breach of trust. Whatever the case, her state of mind has no effect on the outcome of their conduct. Neither would innocence on her part reverse the fact that the 1st Respondent was a bona fide purchaser for value and without notice of the fraud apparently orchestrated by the 2nd Respondent’s deceased son. Either way, we find that the two acted in breach of trust for which the 2nd Respondent and the estate of her deceased son may be called upon to account. The two did what, as trustees, they were not authorized to do, and by so doing, failed to secure the whole of the deceased’s estate for the benefit of the beneficiaries.



What then are the remedies available to the Appellants?

- 27. We are not persuaded that the remedies sought by the Appellants in the High Court can be made available to them. We cannot turn the wheels of time to dispossess the 1st Respondent of that which he obtained in good faith, for value, and without notice of the fraud or forgery complained of, and for which the 2nd Respondent and her deceased son, or the deceased alone, were responsible. In our considered judgment, on no account would the law contemplate placing the burden resulting from the breach of trust on his shoulders without proof of fault on his part.
- 28. Counsel for the 1st Respondent invited us to consider the decision in *Target Holdings Ltd v Redferns [1996] AC p.421*, at p.434 where it was stated that “a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss ... If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed.” We hasten to hold that this would have been the proper course of action for relief and find no reason to disturb the judgment and decree of the High Court.
- 29. In conclusion, we uphold the judgment of the High Court dated 23rd and delivered on 24th October 2017, and dismiss the Appellants’ appeal in its entirety with costs to the 1st Respondent.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER, 2021

A. K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

