IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 89 OF 2016

BETWEEN

JACOB WEKESA BOKOKO BALONGO.....APPELLANT

AND

KINCHO OLOKIO ADEYA.....1ST RESPONDENT

BERNARD ENYONYI ADEYA .....2ND RESPONDENT

(**An appeal from the Judgment of the High Court of Kenya at Busia(S. M. Kibunja, J.) dated 6th October, 2014 in HCCA NO. 63 OF 2010)**

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JUDGMENT OF THE COURT

This is a second appeal arising from the judgment and decree of the High Court of Kenya at Busia, (S. M. Kibunja, J.) delivered on 6th October, 2014 dismissing the appellant's 1st appeal with costs. The 1st appeal was against the judgment and decree of the Senior Principal Magistrate's Court at Busia (Keago, SRM) in Busia SRMCC No. 40 of 2010.

The appellant, Jacob Wekesa Bokoko Balongo filed a suit against the respondents in the Senior Principal Magistrate's Court aforesaid claiming ownership of land parcel Bukhayo/Kisoko/2281 "the suit land" on account of having purchased it from one, Patrick Kwoba Adeya "Patrick", a brother to Kincho Olokio Adeya and Bernard Enyonyi Adeya "the respondents". Having purchased the suit land, the appellant proceeded and had the same transferred and registered in his name. Following this, Patrick moved out of the suit land to settle elsewhere but left the respondents in situ. Despite demand by the appellant for the respondents to move out of the suit land, they had failed to do so, hence the suit and prayers for their eviction and general damages for trespass.

The respondents in their defence denied the appellant's claim. They averred that they never sold the suit premises to the appellant as there was no sale agreement. That the suit premises belonged to two brothers, the 1st respondent and Patrick, having been gifted to them by their late father, Adeya Omaita and were in occupation thereof. They further averred that documents of title in possession of the appellant were fraudulently obtained.

In seeking general damages for trespass and the eviction of the respondents from the suit land, it was the appellant's testimony at the plenary hearing that he bought the suit land in 1980 from Patrick. He obtained the Land Control Board consent in January 1981 but the same was found to be defective by the District Land Registrar, though the suit land had already been marked for subdivision. He caused the consent to be amended and paid the requisite fees hence Bukhayo/Kisoko/358 was subdivided into three parcels being numbers 2279, 2280 and 2281, the last being the suit land. However, the respondents declined to vacate the suit land. The gravamen of this case was that at the time of subdivision and purchase, Bukhayo/Kisoko/358 was registered in the joint names of the respondents and Patrick. Patrick's share was 4 acres. He bought Patrick's share but had only managed to take possession of ½ acre of the same.

In defence, the respondents testified and denied any involvement in a sale transaction relating to the suit land or any other parcel of land with the appellant. The appellant was thus a stranger to them. They did not even know how he became the registered owner of the suit land. They testified that parcels Bukhayo/Kisoko/2279, 2280 and the suit land were a subdivision of Bukhayo/Kisok/358 which belonged to their late father, Adeya Omaita before he died in 1977. The Respondents were allocated the suit land and 2279, respectively. Bukhayo/Kisoko/2280 had been sold to one James Alusara by the time their father died. The 2nd respondent resided on the suit land although he had been allocated Bukhayo/Kisoko/2279. The suit land had been given to Patrick and the 1st respondent with marked boundaries to separate the two. Patrick on the other hand denied selling the suit land to the appellant. He stated that the Kshs. 1, 900/- he received from the appellant was for his use while he looked for employment. It was never meant to be the purchase price of the suit land.

The learned Magistrate, E.H. Keago, SRM, in his considered judgment found in favour of the respondents and dismissed the appellant's suit with costs. The dismissal was on the basis that the appellant's suit was time barred pursuant to the provisions of section 7 of the Limitation of Actions act since his claim to recover land was brought after 18 years instead of within 12 years. Secondly, that there was no agreement of sale tendered in evidence to show that indeed Patrick sold the suit land to the appellant. In the absence of a valid sale agreement the appellant's claim to the suit land was fraudulent and the title in his custody was not properly obtained, the learned Magistrate held. Finally, the learned Magistrate found that the appellant's title, not being a first registration, was liable to impeachment as it was not protected by sections 27 and 280 of the Registered Land Act.

The appellant was aggrieved by the judgment and decree aforesaid. Consequently he lodged an appeal in the High Court at Busia on the grounds that the learned Magistrate erred in law and fact by: - dealing with the doctrine of adverse possession when it was not pleaded; not upholding the sanctity of the appellant's title; misapplying the law on Limitation of Actions; finding that the appellant's title was obtained irregularly and fraudulently; entering judgment against the weight of evidence; and, refusing the appellant's application requesting the court to summon the District Land Registrar to come to testify.

Having listened to the parties in the appeal, Kibunja, J. dismissed the same, reasoning that though the appellant claimed to have bought the whole share of Patrick in the suit land in 1980, there was no written sale agreement produced before the trial court, hence it was not possible to confirm the terms of the agreement including the acreage of the portion sold, the purchase price, the vendor, purchaser and their witnesses if any which was in turn a violation of section 3(3) of the Law of Contract Act. The learned Judge further held that Patrick denied having sold the suit land to the appellant, and the copy of the mutation forms for Bukyayo/Kisoko/358 showing that parcels Bukhayo/Kisoko/2279 to 2281 were created following the subdivision in 1990 were not genuine as they did not exist before the date of the subdivision of parcel 358. That the copies of the register and official search for the suit land showed that the register was opened on 23rd October, 1991 and was not in existence in 1980 when the appellant is alleged to have bought it from Patrick. That the suit land did not exist when the letter of consent to transfer dated 20th January, 1981 was issued and therefore it was not surprising that the said letter bore cancellations and cannot therefore be anything else but a forgery. That if indeed there was a land sale agreement between appellant and Patrick in 1980, then the letter of consent would have been obtained within six (6) months from the relevant Land Control Board in accordance with section 8(1) of the Land Control Act which was not the case here.

The learned Judge went on to hold that even though the proceedings did not involve Patrick as a party, the fact that the respondents called him as a defence witness spoke volumes regarding the authenticity of the appellant's claim. The evidence suggested that the monies he received from the appellant in 1991 and not 1980, was either a loan or, as Patrick stated, was meant to assist him as he looked for employment. The money could not therefore have been the purchase price of the suit land. That the appellant's claim, if any, should have been against Patrick with whom he allegedly entered into a land sale agreement as the said vendor would possibly have shown him the portion he sold in 1980 and assist him to get vacant possession. Finally, he held that the 1st Respondent had been in occupation of the suit land even before the purported sale agreement in 1980 hence a period exceeding 12 years from the date the appellant was registered as the proprietor thereof to the date when he filed suit. That though the respondents in their filed statements of defence had averred that the 1st Respondent had been in occupation of the land for over 12 years, it was therefore an issue for interrogation and the learned trial Magistrate could not be faulted for commenting on it. However, since the respondents had not lodged a counterclaim based on adverse possession the court did not make a finding on the issue and rightly so in the opinion of the Judge. The learned Judge went on to hold that a title issued on first registration had been held to be so sacrosanct that it could not be easily vitiated, however in this case, the appellant's title to suit land was not a first registration, and was also procured fraudulently, unprocedurally and irregularly, hence not protected.

The learned Judge therefore found no merit in the appeal and dismissed it with costs to the respondent.

Dissatisfied with the judgment and decree of the High Court, the appellant lodged the present appeal on grounds inter alia; that the learned Judge erred in law in:- concluding that the appellant had obtained the title to the suit land fraudulently; failing to properly exercise his discretion with regard to ensuring that relevant evidence was placed before court to enable it to determine the matter fairly, disregarding the relevant evidence with regard to issues that were before court and failed to correctly re-evaluate and assess the evidence before him; failing to accede to his request to have the land registrar Busia County testify; not ordering the eviction of the 1st respondent from the suit land; failing to uphold the sanctity of the appellant's exhibits; and failing to appreciate the material contradictions in the testimony of the respondents which made their evidence doubtful.

During the hearing of the appeal, parties appeared in person and relied entirely on their written submissions that they had filed. They opted not to highlight.

The appellant submitted that the learned Judge concluded that the appellant's title was a forgery without evidence. He failed to appreciate that the respondents' father before his death had divided his land among his three sons, the respondents and Patrick. He had gone further and demarcated the three portions on the ground. That Patrick thereafter sold his share to him although the entire parcel of land was owned jointly by the three brothers as per the records at the lands office. It is for this reason that he had requested the court to summon the District Land Registrar to produce the records with regard to those parcels of land which the court declined for no apparent reason. He further submitted that he had been in occupation of a portion of the suit land from 1980 and that it was in the interest of justice that this Court appreciates that fact. Lastly, he submitted that it would be unfair if the appeal was dismissed as he would suffer irreparable loss.

The respondents opposed the appeal. They relied on Section 3 (3) of the Law of Contract Act in impugning the transaction since no document in form of an agreement of sale of an interest in land was tendered in evidence. They submitted that the fact that the appellant failed to call Patrick as a witness to confirm whether or not he sold him the suit land raised eyebrows. They argued that the title to the suit land was fraudulently obtained given that Bukhayo/Kisoko/358, the parent title was jointly registered in their names and for such title to be subdivided, consent of the respondents and Patrick was required. Since they did not give the consent, the subdivision was illegal and fraudulent. They contended further that the appellant did not purchase the suit land as Patrick denied any such transaction with him. They also faulted the appellant for failing to observe due diligence and pointed out that had he done so he would have discovered that the respondents were in actual occupation and possession of the suit land. That the documents produced by the appellant in support of his claim had glaring disparities. They therefore urged us to dismiss the appeal with costs.

This is a second appeal. Our jurisdiction as has been delineated in a long line of cases decided by the Court, (including Maina v Mugiria (1983) KLR 78 and Stanley N. Muriithi & Another v Bernard Munene Ithiga (2016) eKLR), is to confine ourselves to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the English case of Martin v Glywed Distributors Ltd (t/a MBS Fastenings) (1983) ICR 511 it was held inter alia that:

> "where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

We have anxiously and painstakingly considered the record of appeal, the grounds thereof, the judgments of the two courts below, the rival submissions and the law. The issues of law that we have distilled for determination are: whether there was a sale agreement, and if so, whether it was in accordance with section 3(3) of the Law of Contract Act; fraud and indefeasibility of title and; lastly, evaluation of evidence.

On the sale agreement section 3(3) of the Law of Contract Act provides that:-

> "No suit shall be brought upon a contract for the disposition of an interest in land unless— the contract upon which the suit is founded—is in writing; is signed by all the parties thereto; and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

It would appear that both parties acknowledged that there was no sale agreement or even if there was, it was never reduced into writing nor tendered in evidence. Under the applicable section 3(3) of the Law of Contract Act, no suit can be maintained for disposition of an interest in land unless the contract is in writing and executed by both parties. Oral agreements for the sale of real estate and or land are generally not worth anything and are unenforceable by dint of the applicable section 3(3) of the Law of Contract Act. Other than claiming that he bought the suit land from Patrick, the appellant had no other evidence in particular, documentary, to back up his claim. It would appear that the appellant's contention is that once he obtained the title, the historical context by which he came by the title could not be revisited or questioned. We think that this is a wrong approach. The historical background to the acquisition of the title is as good as the title itself. How else, for example, can a person seeking to impugn or impeach the title on the grounds of fraud, misrepresentation or it having been obtained unprocedurally or through corrupt means do so without placing the title in its historical context? We are satisfied that the Judge properly evaluated the evidence on record and considered the historical background and circumstances under which the appellant acquired title to the suit land as he was entitled to. It was during this historical journey that the two courts below were able to impugn the title and they were right in doing so. In the absence of a sale agreement in terms of section 3(3) of the Law of Contract Act, it is not possible to tell or confirm that the appellant's title to the suit land was properly, procedurally or regularly obtained or that it was not obtained fraudulently or through corrupt means.

On the evaluation of evidence by the High Court, we hasten to state that though it is the mandate of the 1st appellate court to re-evaluate, reconsider and review the evidence tendered before the trial court so as to reach its independent conclusion, (See Selle vs Associated Motor Boat Co. [1968] EA 123), there is no set standard or formula of doing so. Each Judge or indeed judicial officer has his own style of doing so. However, it is expected that the first appellate court will in the exercise of that mandate, identify the factual and legal issues involved in the dispute, analyze the evidence tendered in their support and opposition to ascertain what has been proved or not. In the circumstances of this case we are satisfied that the first appellate court distilled the legal and factual issues for its determination. Based on the identified issues, the trial court issue by issue appraised the evidence on record led in their support and identified the relevant law applicable in determination of each issue, contested or not. Accordingly, upon our own appraisal of the judgment of the first appellate court, we are satisfied that the court properly re-evaluated the evidence on record as required. This ground of appeal therefore has no merit.

On the ground of indefeasibility of title, it was urged that the trial judge erred in failing to find that the appellant's title to the suit land was indefeasible. In the persuasive case of Fahiye & 2 others – v- Omar & 4 others [201] 2KLR, 224, it was held that indefeasibility of title is not absolute particularly where the whole transaction was void. In Milankumar Shah and 2 Others vs. City Council of Nairobi & Attorney General (Nairobi HCC Suit No. 1024 of 2005 (05), it was correctly pointed out that:

> "The concept of absolute and indefeasible ownership of land cannot be clothed with legal and constitutional protection if the interest was acquired through fraud, misrepresentation, illegality, unprocedural ways or corrupt schemes. This concept cannot be used to sanitize the commissioner if it allocates or issues title in such manner. In the case of Champaklal Ramji Shah & 3 Anors –v- AG & Anor, HCCC No. 145 of 1997, it was held that the court has a duty to examine the process of acquisition of such title and if it determines that there is an illegality, should nullify the titles as required.

In the instant appeal, the appellant's title to the suit land is traced to its fraudulent, and unprocedural acquisition as there was no instrument in writing evidencing a sale agreement between the respondents, Patrick and the appellant. The suit land did not exist at the time the appellant claims to have bought the same. Further, the suit land did not exist when the letter of consent was purportedly issued to the appellant in respect thereof. To this end, the sale transaction between the appellant and Patrick, if any and the instrument of transfer arising therefrom was null and void, and the concept of indefeasibility of title does not apply to a void transaction. Further it was not even a first registration.

Ultimately, the appeal is bereft of merit and is accordingly dismissed with costs to the respondents.

Dated and delivered at Kisumu this 31st day of January, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.