IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KARANJA & SICHALE, JJ.A)

CIVIL APPEAL NO. 199 OF 2018

BETWEEN

RAPHAEL KIMANI MWANGI.....APPELLANT

AND

CHAIRMAN, TREASURER AND SECRETARY KWARE MUKURU

KWA NJENGA JUA KALIASSOCIATION.....1ST RESPONDENT

PASTOR JOHN KIOKO KILUNGU.....2ND RESPONDENT

NELLIUS MUTHONI KARIUKI.....3RD RESPONDENT

(An appeal from the judgment of the Environment and Land Court at Nairobi (M. Gitumbi, J) at dated 21st April, 2017

in

ELC Appeal No.366 of 2015)

****

JUDGMENT OF THE COURT

This dispute started in the Chief Magistrates Court at Nairobi and relates to a parcel of land known as plot No. 51 Kware-Mukuru Kwa Njenga Association (the suit property).

The appellant insisted that by an agreement dated 18th September, 2002 he purchased the suit property from one Ayub Githendu (PW1). He thereafter took possession following a transfer by the association, represented by its officials, which then issued to him a share certificate; that he subsequently misplaced the share certificate; and that on 2nd June, 2009 he visited the property only to find construction work underway by the 3rd respondent who claimed to have purchased it from the 2nd respondent. Alarmed by the development the appellant asked the trial court to declare that the purported acquisition of title to the suit property by the 2nd respondent and subsequently to the 3rd respondent, were unlawful; and that the permanent construction work by the 3rd respondent was unlawful encroachment and trespass to private property. He also prayed that the respondents be restrained by an order of permanent injunction from encroaching, trespassing and undertaking construction works on the suit property.

The 1st respondent's position of the matter was that the suit property was sold to the 3rd respondent by the 2nd respondent, a member of the association at a consideration of Kshs. 930,000 with the initial deposit of Kshs. 100,000; that on 4th July, 2008 they signed an agreement and the balance of Kshs. 830,000 finally was paid. The 3rd respondent was then issued with a certificate of ownership and took possession. She started to build on the suit property only to be halted by a court order on 18th June, 2009 after the appellant challenged her title in court.

After hearing the parties, the trial court rejected the appellant's claim having found that it did not establish a *prima facie* case. The appellant was naturally aggrieved by this decision and proffered an appeal to the High Court.

The High Court in upholding the trial court added that the appellant had failed to produce any document to demonstrate his interest in the suit property; failed to prove that the transfer of the suit property from the 2nd respondent to the 3rd respondent was fraudulent; and failed to prove that the 3rd respondent was a trespasser.

Once again aggrieved by this decision the appellant has now lodged this second appeal on six grounds as enumerated in his memorandum of appeal which we can summarize as follows, that the learned Judge erred in law by: upholding that the transfer of the suit property was lawful; failing to make a finding that the appellant's evidence met the evidentiary standard of proof that the transfer of the suit property was fraudulent; making a finding that the 3rd respondent's possession of the suit was lawful; upholding the finding that the 3rd respondent was not a trespasser; disregarding the appellant's evidence that the entries in the register as regards ownership of the suit property were fraudulent and; upholding the trial court's decision against the weight of the evidence.

Mr. Kalume learned counsel, on behalf of the appellant restricted his submissions to the questions whether the transfer of the suit property to the 2nd and 3rd respondents was lawful and argued that the suit property was initially owned by Diana Njeri (PW4), who transferred it to Ayub Githendu (PW1) who, in turn sold and transferred it to the appellant in 2002. To prove this fact, counsel relied on the share certificate of PW1 and a hand written agreement between the appellant and PW1. He maintained that PW1 had a good title as he was the lawful owner. He asked the Court to find that this was a case of double allocation, if it is true that the 1st respondent sold the property to the 2nd respondent who, in turn sold and transferred it to the 3rd respondent. According to him the signatures on the share certificate was that of PW1; and that only evidence of a document examiner could rebut that; that the appellant also relied on the share certificate as proof that indeed the suit property was transferred to him; and that the burden was on DW2 to prove that he did not sign the share certificate. It was submitted that both the appellant and the 3rd respondent purchased the property but at different times and by allocating it to two people, the association was malicious; that since the appellant bought the suit property in 2002 before the transfer to the 3rd respondent in 2008 his registration was first in time entitling him to priority in equity. The appellant relied on the case of **Zakayo Michubu Kibuange V. Lydia Kaguna Japehth & 2 Others** (2014) eKLR to support some of his arguments.

Mr. Nyakundi learned counsel representing the respondents opposed the appeal and argued that the appellant had failed to prove his interest in the suit property; that in his testimony he was categorical that he bought the suit property from PW1, who, on his part stated that he bought it from PW4; that PW4 in her testimony told the trial court that she had acquired two plots, No. 50 and No. 51 as original owner. Yet the register in the custody of the Association showed that PW4 only owned plot No. 50 and at no time did she own plot No. 51 (the suit property); that there was no signed sale agreement between PW4 and PW1 regarding the purported sale of the suit property; that PW4 never involved the 1st respondent in her transaction with PW1 rather, she gave a blank certificate to PW1 who wrote the details for himself; that PW4 never produced any share certificates; and that without the share certificate in favour of PW1, in the first place, the appellant did not acquire any interest in the suit property; and that even assuming for the sake of argument that PW4 was the original owner, the sale of the suit property to PW1 was in contravention of **section 3(3)** of the Law of Contract Act.

Regarding the signature on the share certificate it was submitted that DW2 having disowned the signature the appellant lost the opportunity to have the said signature examined by an expert as the burden to prove it was upon him.

It was submitted finally that the appellant failed to prove on a balance of probabilities by producing documentary proof that he bought the suit property from the 1st respondent; that, on the other hand, the 2nd respondent demonstrated that he fully paid for the suit property and was issued with a share certificate; and that thereafter he held the property for 8 years without interruption; that thereafter he sold it to the 3rd respondent, in accordance with the recognized procedure; that the 3rd respondent presented in court an original certificate as a testament that the 2nd respondent to whom it had been issued was the first original owner. For these arguments the respondents cited **Saranji V. AG** (1970) EA 347 and the case of **Doris Morgan V. Stubenitsky,** Civil Appeal No. 30 of 1977, on the importance of any written agreement for disposition of property to satisfy the requirements of **section 3(3)** of the Law of Contract Act.

This is a second appeal as such the duty of this Court in such matters is well established as was explained in the case of **Kenya Breweries Ltd V. Godfrey Odoyo,** Civil Appeal No. 127 of 2007 as follows:

> **"In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two 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 case of Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:-**
>
> **"We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 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 as holdings of law or mixed 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 start by reiterating that the main issue in this appeal is whether the suit property was lawfully transferred to the 3rd respondent. The answer is in the history of the original title. That history is, in our opinion correctly enumerated in the passage highlighted below. We want to stress at this stage that it is common factor that the association which was started in 2000 owned several plots that were sub-divided and portioned for the members. Its members would acquire shares in terms of plots once they made payments. The suit property was one of the plots owned by the association. There are two competing claims to the ownership of the suit property. According to the appellant, the association initially owned the suit property before it transferred it to Diana Njeri (PW4); that PW4 transferred it to Ayub Githendu (PW1) who sold it to the appellant and the property was transferred to the latter in 2002. The second version, according to the respondents is that the association sold the property to the 2nd respondent who sold it to the 3rd respondent.

In upholding. the learned trial Magistrate the Environment and Land Court expressed the view that:

> **"The appellant has not been able to prove to this court that the Register of members produced in court by the 1st Defendant was in any way doctored. He was also not able to convince this court that there was a case of double allocation of the suit property by the 1st defendant. On those accounts therefore, I find that the appellant has not proved those grounds of appeal.**
>
> … **I have established that the appellant informed the trial Court that he misplaced his share certificate for the suit plot in the process of moving houses. He did not produce to the Trial Court any share certificate in his name. What he produced as PExhibit No. 1 was an original**

share certificate in the name of PW1 in respect of plot No. 50 which is not the subject matter of the suit. He further produced PExh No.2 which was a photocopy of an Ownership Certificate in the name of PW1 in respect of the suit plot. He did not produce any Ownership Certificate in his name, issued by the 1st defendant, to prove that he was indeed the owner of the suit plot.

…

In this particular suit, the appellant failed to prove that the transfer of the suit plot by the 2nd defendant to the 3rd defendant was fraudulent in any way. This particular transfer was confirmed to have been effected with the authority of the 1st defendant as stated earlier. The paper trail in support of that transfer was produced before the trial court. The 3rd defendant cannot be said to be a trespasser on the suit plot as she was able to prove that she indeed is the current owner of the same."

From the foregoing it is evident that both courts below made concurrent findings of fact that the appellant failed to present any proof that he was the rightful owner of the suit property.

This Court on numerous occasions has emphasized the futility and vanity of basing claims to land on dubiously acquired titles, because, as they say in Latin, *ex nihilo nihil fit* (out of nothing comes nothing). For example, in the case of **Munyu Maina V. Hiram Gathiha Maina,** Civil Appeal No. 239 of 2009, the Court said;

"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 Supplied)

The appellant traced his title to Diana Njeri (PW4) who he claimed to be the original owner. That title did not itself originate from the association and was found to be questionable, not only by the trial court but by the learned Judge too. There were no transactions between Diana (PW4) and PW1, the person from whom the appellant "purchased" the suit property. On the other hand, and apart from the informal agreement between the appellant and PW1, no share certificate or certificate of title was produced to show that the appellant acquired good title to the suit property. In addition, the association had no records of any kind of transactions involving the appellant in the acquisition of the suit property. The association being the custodian of all records of its properties and its members gave a clear history of the suit property in which the appellant and those who purported to transfer shares to him did not feature.

The inverse was that the 3rd respondent produced all documentary evidence traceable to the association and therefore established a *prima facie* evidence that she had acquired a proper title to the suit property. That title could only be challenged on account of fraud, with the onus being on the appellant to lead evidence to prove.

It is now well settled that where fraud is pleaded, it must be distinctly proved and the onus of proof is heavier than in ordinary civil cases. In **Vijay Morjaria V. Nansing Darbar & Another** (2000) eKLR, this Court stated that:

"It is well established that fraud must be specifically pleaded and that particulars of the fraud must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved and it is not allowable to leave fraud to be inferred from the acts".

With respect we agreed with the concurrent factual finding of both courts that the transfer of the suit property from the 2nd respondent to the 3rd respondent was proper and confirmed to have been effected with the authority and approval of the association. The paper trail in support of that transfer was not challenged.

Again with respect, we agree with both courts that this was not a case of double allocation by the association but one where only one lawful owner was known, the 3rd respondent.

There is no justification to disturb these findings. They were based on evidence from which a reasonable tribunal properly directing itself would have arrived at those very findings. There is therefore no justification for this Court to interfere with these findings.

The allegations of fraud and forgery of the register of members were ambiguous in addition to the failure of the appellant to specifically plead and prove those allegations.

The upshot of our analysis and consideration of this appeal is that it is bereft of any merit. We, accordingly dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 21st day of February, 2020.

W. OUKO, (P)

……..

JUDGE OF APPEAL

W. KARANJA

……

JUDGE OF APPEAL

F. SICHALE

……

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR