



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & SICHALE JJ.A)

CIVIL APPEAL NO. 224 OF 2016

BETWEEN

ESTHER NDENGI NJIRU.....1ST APPELLANT

JANE MUGO WANJIRU NJIRU.....2ND APPELLANT

AND

LEONARD GATEI MBUGUA.....RESPONDENT

(An appeal from the Judgment of the Environment and Land Court (Mutungi, J) delivered on 30th September, 2014

IN

ELC No. 128 of 2011)

JUDGMENT OF THE COURT

The appellants, **Esther Ndengi Njiru** and **Jane Mugo Wanjiru Njiru** filed the appeal herein against the decision of the Environment and Land Court (**Mutungi, J.**) delivered on **30th September, 2014**.

Briefly, the background of this appeal revolves around the ownership of Title No. **Ruiru Kiu/Block 2/3104** (the suit property). The appellants claim that they are innocent purchasers for value without notice of the suit property having purchased it in 2008 for a sum of Kshs 400,000.00 from one, **James Kinuthia Waiharo (Waiharo)**. **Waiharo** had allegedly purchased the property from **Githunguri Constituency Ranching Co. Ltd (the Company)** and he had been issued with a certificate of title on **6th January, 2004**. A certificate of title was subsequently issued to the appellants on **23rd October, 2008**. However, on **5th February, 2011**, the appellants visited the suit property and to their dismay found that their beacons had been removed by the respondent, (**Leonard Gatei Mbugua (Mbugua)**) and a notice placed on the land stating “*not for sale*”.

Consequently, the appellants filed suit at the High Court. In an amended plaint dated **23rd March, 2011**, the appellants sought orders *inter alia*, a declaration that their title is absolute and indefeasible and a declaration that **Mbugua** was a trespasser. They also sought permanent injunction restraining **Mbugua** from interfering with the suit property.

On his part, **Mbugua** filed a defence to the amended plaint as well as a counter-claim dated **23rd June, 2011**. In the counter-claim, the Company, **James Kinuthia Waiharo** and the two appellants were named as the 1st, 2nd, 3rd and 4th defendants respectively. **Mbugua** averred that he purchased the suit property on **13th September, 1996** for Kshs. 80,000 from the children of the late **Simon Githinji Macharia** (the deceased) namely, **Peter Githinji** and **Nancy Githinji** who sold their father’s shares in the Company to him. He maintained that the appellants did not have a valid title to the suit property since **Waiharo** had no title to pass to them. In his defence and counterclaim filed on **28th June, 2011**, **Mbugua** sought orders *inter alia*, a declaration that he is the rightful owner of the suit property, a cancellation of the title deed issued to the appellants and an order that a new title be issued in his name.

Upon consideration of the evidence before him, the learned Judge (**Mutungi, J.**) found in favour of **Mbugua** and entered judgment as prayed in the counterclaim.

The Court held as follows:

“Having come to the finding that the plaintiffs did not obtain a valid and/or a good title from the 2nd defendant it follows that the title issued to the plaintiffs is for cancellation and I accordingly order and direct that the title issued to the plaintiffs on 23rd October 2008 be cancelled forthwith and the plaintiffs names be deleted from the register of land Title Number Ruiru Kiu/Block 2/3104. Having considered and reviewed all the evidence and material placed before the court I find and hold that the plaintiffs have not proved their case against the Defendant on a balance of probabilities and I order that the same be and is hereby dismissed”

Aggrieved with the court’s findings, the appellants filed the appeal now before us. In a Memorandum of Appeal filed on 31st July, 2017, the appellant listed 13 grounds of appeal faulting the trial court for failure:

- (i) to apply section 143 of the Registered Land Act and failure to hold that title in the name of **Waiharo** could not be cancelled being a first registration,
- (ii) in finding that the respondent had proved his counter-claim to the required standard,
- (iii) in failing to find that the appellants were innocent purchasers for value without notice,
- (iv) in finding that the appellants were required to do more than obtain a search while conducting due diligence before buying the property.

On 26th November, 2019, the appeal came up for plenary hearing before us.

Learned counsel **Mr. Musyoka**, appeared for the appellants whilst learned counsel **Mr. Kinyanjui** appeared for the respondent. Both parties highlighted their submissions filed on 7th July, 2017 and 31st July, 2017 respectively.

Mr. Musyoka faulted the Learned Judge for finding that the Registered Land Act (RLA) (repealed) ceased to apply by dint of **Section 106(1)** of the Land Registration Act (LRA) which states that **“on the effective date, the repealed acts shall cease to apply to a parcel of land to which this act applies”**. He contended that the suit property was registered under the repealed RLA and a title issued to **James Kinuthia Waiharo** on 6th February, 2004, hence, the applicable law was the RLA; that the Land Registration Act (LRA) which commenced in 2012, did not apply to the suit property. Citing **Section 106(3) (a)** of the RLA, **Section 162 (1)** of the Land Act and **Section 23(3)** of the Interpretation and General Provisions Act, he emphasized that the rights and liabilities acquired in relation to a parcel in a repealed law should continue to be governed by the law applicable prior to the commencement of the new law. It was counsel’s position that the Learned Judge also erred in law by cancelling the appellants’ title despite having found that the appellants were *bonafide* and innocent purchasers. Relying on the decisions of **David Peterson Kiengo & 2 Others vs. Kariuki Thuo [2012]**, the English case of **Gibbs vs. Messer (1981) AC 247 PC** and the Canadian case of **Regal Constellation Hotel Ltd Re 2004 CanLII 2006 Ontario C.A.**, counsel submitted that the appellants had done their due diligence in conducting a search on the suit property and that it was unnecessary for a party seeking to acquire interests in land to go beyond the register to establish ownership and satisfy themselves of its validity in view of the mirror principle, the register therein reflecting the correct status of one’s title.

Lastly, it was submitted that the respondent had failed to prove the allegation of fraud (on the part of the appellant) to the required standard and more importantly, that **Waiharo’s** title was indefeasible in view of section 143 (1) of the RLA, it being a first registration. We were urged to allow the appeal.

In opposing the appeal, **Mr. Kinyanjui** was emphatic that once an illegality is found to have taken place, the same cannot be protected. Counsel submitted that the allegation of fraud had been proved by the Chairman of the Githunguri Constituency Ranching Company Ltd who testified that the documents presented by the appellants that led to the registration of the title deed in **Waiharo’s** name were not authentic and that the said **Waiharo** did not appear in the register of the Company and that the register demonstrated that the share certificate of the original owner- (the deceased) was transferred to the respondent. Counsel was of the view that the trial court was correct in applying **Section 26(1) (b)** of the LRA as well as **Article 40(6)** of the Constitution to the suit property as this was the applicable law, and not the RLA. Counsel also pointed out that **Waiharo** who was the 2nd defendant in the respondent’s counter-claim filed an appearance but did not file defence nor appear to defend his case and that the appellants had not provided any sale agreement or evidence to show that they had bought the suit property for value. Relying on the case of **Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs. Attorney General & 4 others [2017] eKLR** counsel posited that in deliberately failing to enter into a sale agreement, the appellants could not be described as *bona fide* purchasers for value.

In a brief rebuttal, **Mr. Musyoka** contended that the sale agreement was not necessary and the fact remained that the appellants were innocent purchasers for value.

We have considered the record, the rival written and oral submissions, the authorities cited and the law.

The appeal before us is a first appeal. Our mandate as a 1st appellate court is well articulated in the case of **Selle & Another versus Associated Motor Board Company Ltd and others [1968] 1 EA 123**, wherein the Court of Appeal for Eastern Africa set out the principles to be considered when determining an appeal from the High Court as follows:-

“An appeal from the High Court is by way of retrial and the Court of Appeal is not bound to follow the trial Judge’s findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inhabited with the evidence generally.”

We have subjected the entire evidence adduced before the trial court to an exhaustive review. The respondent purchased the suit property that comprised of the deceased’s shares in the Company. D.W.4, **John Maina Mburu**, the Chairman and Director of the Company testified that plot No. 1465 belonged to **Simon Githinji Macharia** (the deceased) and that on **28th May, 1997**, the deceased’s shares were transferred to the respondent. He stated:

“in the register we have no person by the name James Kinuthia Waiharo who is the 2nd defendant in the counter-claim”.

D.W.2, **Peter Kiguta Githinji**, and D.W.3 **Nancy Wanjiru Githinji**, a son and daughter of the deceased respectively confirmed the sale and transfer of their father’s share to the respondent. It is noteworthy that **Waiharo** did not controvert the allegations made against him in the respondent’s defence and counter-claim. In the counter-claim, **Waiharo** was blamed for:

“(i) forging documents purporting to be true receipt and share certificate for the said parcel of land,

(ii) making false entry into the register of the Githunguri Constituency Ranching Company Ltd purporting to be true share holder of the company,

(iii) preparing forged documents and presenting the same to the Registrar of Land at Thika purporting to be a genuine share holder thus obtaining title deed No. L.R. Ruiru Kiu/Block 2/3104.

(iv) Using the said title deed fraudulently acquired to transfer the said parcel of land to the 3rd and 4th defendants knowing very well that he had no title to pass as he had no good title”.

It is noteworthy to point out that although **Waiharo** was brought on board by the respondent in his defence to the amended plaint and counter-claim, and although he entered appearance, he did not file any defence in respect of the counter-claim. The effect of non-filing of a defence to the counter-claim is that all the allegations of fraud against **Waiharo** were admitted. Additionally, the appellants who had no sale agreement between themselves and **Waiharo** did not call **Waiharo** as their witness to substantiate the sale and legality of title (if at all) that he transferred to the appellants. It is on the basis of the evidence adduced and the non-denial of the respondent’s claims against **Waiharo** that the judge found that **Waiharo** ***“....did not hold a valid title to the suit property which he could sell and transfer”***.

The learned judge further stated:

“The 2nd defendant must have known what he was doing. He was simply a conman otherwise he would have appeared to defend and/or clear his name. While it is clear the title held by the plaintiffs cannot be impugned under section 26(1) (a) of the Act as they were not party to any fraud or misrepresentation, the title is nonetheless impeachable under section 26(1)(b) as the title transferred to them by the 2nd defendant was obtained illegally and unprocedurally”.

The appellants sought refuge under section 143(1) of the Registered land Act (the repealed Act) which provided as follows:

“143 (1) subject to subsection (2) 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”.

We agree with the finding of the learned judge. Indeed it is in tandem with a five-Judge-Bench decision of this Court, ***Embakasi Properties Limited & Anor. vs. Commissioner of Land & Anor. [2019] eKLR*** in which this Court expressed itself as follows:

“Although it has been held time without end that the certificate of title is: “... conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the Land Registration Act, 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”

However, in our considered view, the learned judge was correct when he applied section 106(1) of the Land Registration Act No. 3 of 2012 which provides:

“On the effective date, the repealed Acts shall cease to apply to a parcel of land to which this Act applies”.

In our view, the RLA had ceased to apply and the applicable statute was the LRA. Further, the Judge placed reliance on section 80 (1) of the

LRA which provides:

“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”.

It is clear from the above provisions that no registration is exempt from rectification and titles obtained fraudulently are prone to cancellation.

As to whether the “new” Land Laws were applicable, the judge stated:

“From the date of commencement of the Land Registration Act, 2012, the registers maintained under the repealed Acts were deemed to be the land register for the corresponding registration unit established under the Land Registration Act pursuant to section 104 of the Act. The titles held under the repealed Acts were equally under section 105 of the Land Registration Act deemed to be titles issued under the said Act. It is thus clear that the applicable law would be the law as presently contained in the new Land Acts”.

We agree.

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs.

Dated and Delivered at Nairobi this 24th Day of April, 2020

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR