



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & GATEMBU, J.J.A.)

CIVIL APPEAL NO. 175 OF 2018

BETWEEN

PETER NJOROGE NG'ANG'A.....APPELLANT

AND

THE STATUTORY MANAGER FOR UNITED

ASSURANCE COMPANY LIMITED.....1ST RESPONDENT

UNITED INSURANCE COMPANY LIMITED2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court

at Kajiado (C. Ochieng, J.) dated 5th March 2018 in ELC Case No. 204 of 2017)

JUDGMENT OF THE COURT

1. This appeal arises from a judgment of the Environment and Land Court (ELC) at Kajiado (*Christine Ochieng, J.*) delivered on 5th March 2018 ordering the cancellation of the appellant's title deed over a property measuring approximately 20.23 hectares known as Title Number Kajiado/Kaputiei-North/4243 (the property) and upholding the 2nd respondent's title deed over the same. In the judgment, the ELC dismissed the appellant's suit for a permanent injunction to restrain the respondents from dealing with the property; allowed the respondents' counterclaim; declared the 2nd respondent as the legal owner of the property and ordered the cancellation of the appellant's title.

2. The main issue in the appeal is whether, in the circumstances of this case, the learned Judge erred in concluding that the appellant's title to the property was impeachable under Section 26(1) of the Land Registration Act on grounds of having been

“acquired illegally, unprocedurally or through a corrupt scheme” within the meaning of that provision.

3. Based on the pleadings and evidence tendered before the trial court, the pertinent facts are, to a large extent, not in dispute. The appellant, Peter Njoroge Nganga, entered into an agreement for sale dated 15th September 2011 with Martin Karumba Koiyet (PW1), as vendor, under which he purchased the property for a price of Kshs.21,500,000.00. The requisite land control board consent was granted on 8th February 2012. The Transfer in favour of the appellant, alongside instruments of Charge and Further Charge in favour of the Co-operative Bank of Kenya Limited (from whom the appellant borrowed part of the purchase price), were duly registered at the Land Registry at Kajiado on 14th March 2012. A Title Deed in favour of the appellant was also issued. The balance of the purchase price in the amount of Kshs.19,150,000.00 was paid to the vendor,

PW1, on 14th May 2012.

4. Just over a month thereafter, the appellant was shocked to see the property advertised for sale by the respondents in the newspaper on 25th June 2012. He immediately instructed his advocates to take up the matter. His advocates, Kamotho Maiyo & Mbatia, wrote a letter to the respondents on 29th June 2012 demanding the immediate withdrawal of the property from advertisement. The response to that demand came from Millimo, Muthomi & Co, the respondent's advocates, who revealed that the 2nd respondent, "*holds an original title issued...way back in 27th August 1999*" and that the property was handed over to the 1st respondent in 2005 upon its appointment as the statutory manager of the 2nd respondent. It was suggested in that response that the appellant "*should revisit its transactions with the alleged "seller" with a view to verifying its validity, legality or genuineness thereof*"

5. Shortly thereafter, the appellant instituted suit against the respondents by a plaint dated 9th July 2012 filed before the High Court at Machakos, asserting that he is the registered owner of the property; and that the respondents were threatening to unprocedurally and unlawfully sell the property having advertised it for sale on 25th June 2012. He sought judgment against the respondents for a permanent injunction to restrain them "*from interfering, wasting, disposing, alienating, entering onto or remaining or continuing in occupation*" of the property; aggravated damages and costs of the suit.

6. In their defence and counterclaim, in which they joined the Attorney General on behalf of the Land Registrar, Kajiado and the Chief Land Registrar, the respondents pleaded that the 2nd respondent is the registered owner of the property "*having acquired proprietorship of the same vide a title deed issued on 28th August 1999*"; that the appellant's purported ownership can only be a product of illegality, irregularity and fraud; that the respondents were within their rights to advertise the property for sale and the appellant had no basis for seeking a restraining order against them.

7. In the counterclaim, in which, as stated, the Land Registrar, Kajiado and the Chief Land Registrar through the Attorney General were joined, the respondents reiterated that the 2nd respondent was the registered owner of the property; that on 9th December 2009, the 1st respondent lodged a caution against the title to the property which was duly registered against the title on 27th January 2010; that the property was one of the assets of the 2nd respondent that was to be sold in order to settle liabilities of the 2nd respondent which had been placed under statutory management for insolvency; that it was in that connection that it advertised the property for sale only to be met with the appellant's claim of ownership over the same. The respondents maintained that the appellant's title could only have been procured by fraud illegality, irregularity and fraud.⁴

8. At the trial, Martin Karimba Koiyet, (PW1) the person who sold the property to the appellant, as well as the appellant himself (PW2), testified in support of the appellant's case. For the respondents, evidence was given by Christopher Onyango (DW1), who was the Operations Manager of the 1st respondent, and one Nyandoro (DW2), the Principal Land Registrar, Kajiado.

9. After considering the evidence and the submissions by counsel, the learned Judge delivered the impugned judgment in which she found that having sold the property to the 2nd respondent, PW1 surreptitiously applied for and obtained a re-issuance of the title deed in respect of the property; that the re-issuance of the title could only have been a result of collusion between PW1 and the land registrar; that there was dishonesty on the part of PW1, (who the Judge described as a fraudster) who being the vendor "*knew very well he had transferred*" the property to the 2nd respondent "*and proceeded again to sell the same*" to the appellant; that PW1 did not in the circumstances have a good title to pass to the appellant; that although there was no evidence that the appellant was privy to the collusion between PW1 and the land registrar, he did not acquire a good title as the same was illegally and unprocedurally obtained and subject to challenge under Section 26(1)(b) of the Land Registration Act; and that the 2nd respondent was the legitimate owner of the property having acquired it in 1999.

10. Consequently, the Judge ordered that: the appellant's suit be dismissed; declared the 2nd respondent as the owner of the property; declared the transfer of the property in favour of the appellant as invalid, null and void *ab initio*; directed the Land Registrar Kajiado to recall and cancel the title deed issued to the appellant; to

rectify the records so as to reflect the 2nd respondent as the registered proprietor of the property; restrained the appellant by a permanent injunction from trespassing, encroaching, remaining on or in any way interfering with the property; and awarded the costs of the suit to the respondents.

11. That judgment is challenged by the appellant on 12 grounds as set out in his memorandum of appeal but condensed by ***Edwin Omulama Onditi***, learned counsel for the appellant, into complaints that: the Judge erred in upholding the 2nd respondent's title to the property in that she failed to appreciate that no evidence of a contract in writing in accordance with the requirements of Section 3(3) of the Law of Contract Act was produced by the respondents; that the Judge failed to appreciate that in light of the testimony by PW1 that consent of the relevant land control board was not obtained in relation the transfer of the property in favour of the 2nd respondent and that the 2nd respondent's title is void under Section 9(2) of the Land Control Act.

12. In support, counsel cited the decision of this Court in ***Willy Kimutai Kitilit vs. Michael Kibet [2018] eKLR*** for the proposition that any act in furtherance of an avoided transaction is illegal; and the case of ***Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura vs. Attorney General & 4 others [2017] eKLR*** for the argument that the 2nd respondent cannot be considered to be a bona fide purchaser, having failed to produce the contract of sale or the land control board consent.

13. It was submitted that the appellant is a bona fide purchaser as defined by the Court of Appeal of Uganda in ***Katende vs. Haridas and Company Limited, EALR [2008] 2 EA 173*** in that he holds title to the property and purchased it for consideration in good faith and had no knowledge of any fraud and his title is protected under Section 80(2) of the Land Registration Act, 2012 which the Judge failed to apply; that had the Judge considered the authorities that were cited before her including the decision of this Court in ***Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others [2015] eKLR***, she would have found that the respondents did not establish the root of the 2nd respondent's title to the property and would therefore have upheld the appellant's title.

14. It was submitted that as both parties were relying on title documents issued by the Government, it was incumbent on both parties to demonstrate the root of their respective titles. In that regard, reliance was placed on a ruling of the High Court at Machakos in the case of ***Agnes Naipanoi Pasha vs. Stephen K. Wangombe and 2 others, H.C.C.C No. 123 of 2011***. It was urged that while the appellant was able to demonstrate the root of his title, the respondents tendered no evidence on how the 2nd respondent became registered as owner of the property and the Judge paid undue regard to the testimony of the Principal Land Registrar regarding the circumstances under which another title was re-issued to PW1 on the basis of which he (PW1) subsequently transferred the property to the appellant.

15. Counsel concluded by submitting that the conclusion reached by the Judge, upholding the 2nd respondent's title to the property, was not supported by the evidence tendered.

16. In her brief submissions in opposition to the appeal, ***Ms. Jacklyne Wanjiku Ithondeka***, learned counsel for the respondents submitted that the learned Judge correctly applied Section 26 of the Land Registration Act in light of the evidence that the title re-issued to PW1 on the basis upon which he transferred the property to the appellant was irregular; that under Section 26 (1)(b) of that Act, it is immaterial whether the appellant is an innocent purchaser for value without notice; that it was within the power of the court under that provision to order rectification of the register once it was established that the appellant's title was illegal even though the appellant may not have participated in the illegality.

17. It was further submitted that PW1 admitted having sold the property to the 2nd respondent in the late 1990's and that he never rescinded that sale but purported to apply for a re-issue of the title; that DW2 confirmed in his evidence that the 2nd respondent was duly registered as owner of the property and that the subsequent re-issue of the title to PW1 was irregular as he (PW1) well knew that he had surrendered the title to the 2nd appellant; that PW1 could not therefore purport to sell the same property to the appellant as he had no legal right to transfer the property to the appellant and that as no fraud or illegality was established against the 2nd respondent, the Judge was right to uphold its title. In that regard the case of ***Wreck Motor Enterprises vs. Commissioner of Lands & 3 others (1997) eKLR*** and the case of ***Faraj Maharus vs J. B. Martin Glass Industries & 3 others (2005) eKLR*** were cited in support.

18. Regarding the appellant's contention that his title is not impeachable by dint of Section 80(2) of the Land Registration Act, it was submitted that that provision must be considered in tandem with Section 26(1) of the same Act.

19. We have considered the appeal and submissions by counsel. We are cognizant of our duty on a first appeal such as this. As stated by the Court in the often cited case of ***Selle vs. Associated Motor Boat Company [1968] E.A. 123*** :

“An appeal to this Court from a trial by the High Court is by way of re-trial 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 witness and should make due allowance in that 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

20. Bearing that in mind, the principal question in this appeal as already stated is whether the Judge was right in concluding that the appellant’s title to the property was impeachable under Section 26(1) of the Land Registration Act on grounds of having been *“acquired illegally, unprocedurally or through a corrupt cheme”* within the meaning of that provision. In that regard, the learned Judge stated:

“I find that his [appellant’s] title is not protected by Section 26(1) of the Land Registration Act as PW1 did not have a good title to transfer to him. Further based on the records at the Lands Office, there is no evidence that the 1st Defendant’s title was cancelled so as to pave way for the Plaintiff’s title. It is against the foregoing that I find that the 1st Defendant is the legitimate holder of the title to the suit land.”

21. What then, we ask, was the relevant evidence before the trial court and whether the conclusion reached by the Judge was supported by the evidence?

22. PW1 (Martin Karimba Koiyet) stated that the 2nd respondent wanted to buy his land; that he surrendered his title deed for title number Kajiado/Kaputiei/772 to the 2nd respondent and a sale agreement was prepared but land control board consent was declined on account of the acreage he was selling to the 2nd respondent; that the transaction with the 2nd respondent was concluded; that the 2nd respondent paid him *“some money for 772”* which he *“did not refund to them”*; that the 2nd respondent did not return the title deed for title number Kajiado/Kaputiei/772 to him; that title number Kajiado/Kaputiei/772 was subdivided into 9 portions one of which is the property (Kajiado/Kaputiei North/4243) which he then sold and transferred to the appellant.

23. Under cross examination, the witness stated that title number Kajiado/Kaputiei/772 was 120.09 hectares; that the agreement with the 2nd respondent in which he was selling 70 acres was sometime in 1994; that they went to Purka Land Control Board in Kajiado; that he never refunded the 2nd respondent *“part of the purchase price they had paid me”* but could not remember the purchase price; and that he then met the appellant in 2011 who wanted to buy 50 acres of land.

24. Cross examined further, PW1 stated that the title deed for the property was re-issued on 28th March 2011 *“because United Insurance already had one title of 4243 and that is why I requested for re-issue.”*; that he went to the lands office to seek a re-issue of the title when he discovered that the 2nd respondent had another title. He stated that the 2nd respondent had registered a caution over the property because they did not conclude the transaction.

25. In his testimony, the appellant narrated that having agreed to purchase the property from PW1, he instructed his advocates to handle the transaction on his behalf; that a search was conducted and a sale agreement concluded under which the purchase price was agreed at Kshs.21,500,000.00; that he applied for a loan from the Cooperative Bank of Kenya Limited and the securities were prepared; that land control board consent was sought and obtained and that the transaction was concluded whereupon the full purchase price was paid to PW1. He stated that on conclusion of the transaction he became registered as owner of the property and was issued with a title deed.

26. Under cross examination, the appellant stated that the vendor, PW1, *“never told me he had previous dealings with a third party over the said land 4243”* and that he only became aware of such dealings when they were recording witness statements in 2016. In his words:

“The seller has never informed me of any dealings with a third-party on the suit land. He only informed me in 2016 when we were recording the witness statement. He says they never concluded the dealings. He told me he had misplaced the original title. It was after I had bought the land 4243. He did not tell me how the dealings were concluded. He has never explained how United Insurance Company Limited was in possession of a title and I also had a title through him.”

27. Christopher Onyango (DW1), an Operations Manager with the 1st respondent adopted, as his evidence in chief, a witness statement by one Mumut Ole Sialo who was at the material time a manager of the 1st respondent

designated to the 2nd respondent. It was his evidence that the 2nd respondent was placed under statutory management on 15th July 2006; that at the time of hand over to the statutory manager, the 2nd respondent handed over original documents relating to properties it owned which included the title deed in respect of the property; that the title deed has remained in the 1st respondent's possession since that time; that in December 2009, it lodged a caution over the property; that following a decision of the 1st respondent that was sanctioned by the Commissioner of Insurance, it was resolved to sell the 2nd respondent's immovable assets to enable it settle its liabilities; that on advertising the property for sale in the newspaper, it then received the protest by the appellant demanding the withdrawal of the property from the advertisement. It was his evidence that in those circumstances the appellant's title could not stand.

28. Under cross examination, the witness stated that he was not in a position, based on the records of the 1st respondent, to state how the 2nd respondent purchased the property.

29. The last witness was the Principal Land Registrar, Kajiado, Mr. Nyandoro (DW2.) He stated in his evidence that records in respect of the property had been missing from the registry archives but he was able to retrieve the presentation registers of 27th August 1999; that although "*some land register*" was missing, there was clear indication that the transfer of the property from PW1 to the 2nd respondent was received at the registry and captured under day book number 543; that a second title deed in favour of PW1 was issued on 28th March 2011; that a re-issue of the title would have occurred in case of loss or destruction; that there are records capturing the transfer of the property by PW1 to the appellant; that it is not clear how PW1 "*managed to receive a second title which he later transferred to [the appellant] while the original [was] held by [the 2nd respondent].*" The witness went on to say that there are two titles to the property; the one issued to the 2nd respondent on 27th August 1999 and the second one issued to the appellant on 14th March 2012 after the re-issue to PW1.

30. Under cross examination, the witness maintained that it was up to PW1 to explain how he sold the property twice and the circumstances in which he was re-issued with a title.

31. Based on the evidence, we find, as the trial Judge did, that PW1 sold the property to the appellant in September 2011 knowing fully well that he had previously sold it to the 2nd respondent. He accepted, under cross examination, that he never refunded the purchase price to the 2nd respondent and that the title deed that he had surrendered to it was not returned to him.

32. When PW1 applied for re-issue of the title deed, he was no doubt aware that the 2nd respondent was holding a title in respect of the same property. In his words, "*it was re-issued because United Insurance already had one title of 4243 and that is why I requested for re-issue.*"

33. Section 33 of the Land Registration Act provides that a proprietor may apply for the issue of a replacement certificate of title where the same is lost or destroyed and evidence to that effect must be provided to the Registrar. That was clearly not the case here as the title deed was neither lost nor destroyed but was in the hands of the 2nd respondent to whom PW1 had sold the property. PW1 having been aware that the title was with the 2nd respondent, he was not supposed to apply for a re-issue. As the Judge found, the re-issue of the title to PW1 was highly irregular and unprocedural and could not confer an interest in the property capable of being transferred to the appellant.

34. Section 26(1)(b) of the Land Registration Act provides that a certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute proprietor and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which the person is proved to be a party; or

"1 (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

35. That provision is consistent with Article 40(6) of the Constitution of Kenya which provides that the right to acquire and own property enshrined thereunder does "***not extend to any property that has been found to have been unlawfully acquired.***"

36. The conclusion reached by the trial Judge is in our view consistent with the principle in ***Arthi Highway Developers Limited vs. West End Butchery Limited & 6 others [2015] eKLR***, where this Court held that an "*irredeemable fake*" title could not be a basis for conferring proprietary rights to subsequent purchasers of a property. In that case the Court expressed:

“It is our finding that as between West End and Arthi, no valid title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no title to pass to subsequent purchases...”

37. The appellant, with whom we empathize, was evidently a victim of PW1’s dishonesty, to put it mildly. It is to PW1 that he should have sought recourse. The question here is not whether the doctrine of a purchaser without notice under Section 80 of the Land Registration Act applies. We agree with the view expressed by *Munyao, J.* in *Alice Chemutai Too vs. Nickso Kipkurui Korir & 2 others [2015] eKLR* that for Section 26(1)(b) of the Land Registration Act to be operative, it is not necessary that the title holder be a party to the vitiating factors and that the import of that provision is to remove protection of an innocent purchaser or innocent title holder. In that case, the Judge stated that:

“Where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part”

We respectfully agree.

38. In effect, Section 80(2) of the Land Registration Act on which the appellant relied and which provides that the register shall not be rectified to affect a title of a proprietor unless the 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 any act, negligence or default is not applicable to the circumstances of this case.

39. In conclusion therefore we uphold the finding by the trial Judge that the 2nd respondent is the legitimate legal owner of the property, having acquired it in 1999 and that the appeal is devoid of merit. It is hereby dismissed.

40. The costs of this appeal should have been borne by PW1 had he been a party to the proceedings but considering that he is not, we think each party should bear its own costs of the appeal.

Dated and delivered at Nairobi this 8th day of May, 2020.

M.K. KOOME

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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