



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, ASIKE-MAKHANDIA & KANTAL, J.J.A)

CIVIL APPEAL NO. 411 OF 2018

BETWEEN

MOSES PARANTAI & PERIS WANJIKU MUKURU SUING as the legal representatives

of the estate of SOSPETER MUKURU MBEERE (DECEASED).....APPELLANTS

AND

STEPHEN NJOROGE MACHARIARESPONDENT

(An appeal from the Judgment of the Environment & Land Court at Kajiado

(Christine Ochieng, J.) dated 26th September, 2018

in

ELC Case No. 702 of 2017)

JUDGMENT OF THE COURT

By a Complaint dated 16th July, 2015 the appellants through Messrs. Migos Ogamba & Co. Advocates sued the respondent and three others seeking: a declaration that they are entitled to exclusive and unimpeded right of possession and occupation of all that piece or parcel of land known as **Kajiado/Olchoro-Onyore/3665** (hereinafter, “*the suit land*”) situate in Kajiado and that the alleged occupation and possession of the suit land by the respondent was illegal, unlawful, null and void; an order of permanent injunction restraining the respondent either by himself, his employees, servants and/or agents from continuing to occupy, trespassing on, purporting to sell, subdividing, erecting structures and/or in any other manner interfering with the appellants’ quiet enjoyment and possession of the suit land; an order of eviction against the respondent; an order directing the Officer Commanding Station (OCS) Kiserian Police Station to provide security and ensure compliance with the orders herein; an order compelling the respondent to surrender the suit land title to the District Land Registrar, Kajiado North District for cancellation and correction of entries in the register to reflect that the appellants are the sole owners of the property and to have title registered as such; an order to issue compelling the District Land Registrar, Kajiado North District to cancel the title issued to the respondent and register it in the names of the appellants; general damages for loss of user, income, mesne profits, costs of the suit and interest thereon.

The basis of the claim was that the respondent fraudulently, illegally and in breach of statutory duty, dispossessed the appellants of the suit land and had it eventually registered in his name. The respondent was in the circumstances a trespasser.

The respondent filed a defence in which he denied the allegations levelled against him in the complaint, and averred that the suit land was registered in the name of **Sospeter Mukuru Muchana** (“*the deceased*”) who happens to be a father in law to the 1st appellant and a father to the 2nd appellant until 19th August, 2010, when the same was transferred in favour of his wife, one **Janet Wairimu Muritu** hereinafter, “*Janet*”.

The transfer of the suit land to Janet was effected on 19th August 2010. He denied the particulars of fraud, illegality as well as breach of statutory duty and maintained that he took possession of the suit land lawfully after it was sold and transferred to him by one, Joseph Otieno Onyango who had in turn purchased the same from Janet. He therefore denied trespassing on the suit land and the particulars thereof as well

as loss and damage claimed by the appellants.

Janet, Joseph Otieno Onyango and the District Land Registrar, Kajiado North District though served with the summons in the suit, did not bother to enter appearance nor file a defence. As a result, interlocutory judgment was entered against them.

The appellants in prosecuting their case testified. The 1st appellant stated that he was the son in-law to the deceased, the initial proprietor of the suit land. That the deceased died on 7th June, 2011. He claimed that Janet was fraudulently registered as proprietor of the suit land and got title on 8th October, 2010 and that **Joseph Onyango Otieno** hereinafter, "*Joseph*" was registered as owner of the said land on 13th June, 2011. He testified further that on 10th October, 2014 the respondent was registered as the proprietor of the suit land from the said Joseph. He nonetheless confirmed that the suit land was registered in the name of Janet when the deceased was still alive and he had not raised any complaint before the deceased died. He also clarified that there were no criminal proceedings initiated against Janet regarding the transfer and registration of the suit land to herself.

The 2nd appellant testified that she was the daughter as well as the administratrix of the estate of the deceased. It was her testimony that the deceased owned the suit land and wanted the court to revert its ownership to the name of the deceased. She confirmed that Janet was registered as the owner of the suit land on 19th August, 2010, when the deceased was still alive. It was her testimony that Janet handed over some title deeds to her mother of some properties owned by the deceased.

In defence, the respondent testified that he purchased the suit land from Joseph for a consideration of Kshs. 7,000,000/- . That at the time of purchase, the suit land belonged to Joseph. He was given completion documents which he took to Ngong Lands Office for registration and was issued with title deed in his name. That at the time, he was not aware of any dispute over the suit land hence he took possession and started cultivating the suit land. He denied obtaining the title deed fraudulently and insisted that he undertook due diligence before purchasing the suit land. He contended that he has never been charged in court with regard to his acquisition of the suit land. He highlighted the various entries in the Green Card and stated that entry No. 6 dated 19th August, 2010 showed that the suit land was registered in Janet's name while entry No. 8 dated the 13th June, 2011 indicated that the suit land was registered in Joseph's name. It was his evidence that Janet and Joseph did not dispute that he had fully paid for the suit land.

Janet testified as DW2 and confirmed that the suit land was initially owned by the deceased but he transferred it to her in his lifetime. She asserted that the deceased was her husband and they stayed together in Nairobi West. That after his demise, she gave three title deeds of the properties he owned to his first wife but did not give her the title deed for the suit land because it had already been transferred and registered in her name. She stated that she sold the suit land to Joseph because the first wife's children were harassing her over the same. She further confirmed that it was Joseph who sold the suit land to the respondent. She confirmed that she sold and transferred the suit land to Joseph.

Christine Ochieng, J. upon evaluating the pleadings and evidence tendered before court determined that since the suit land was transferred to Janet during the deceased's lifetime and there were no criminal proceedings against her relating to her acquisition of the suit land, there was no demonstration of fraud against her. That since Janet already had a title to the suit land, she was protected by Sections 25 and 28 of the Land Registration Act hence the Certificate of Title which Janet held over the suit land was conclusive proof of ownership as she had not been prosecuted of having acquired the same illegally, unprocedurally or through a corrupt scheme. The Judge further noted that after transfer of the suit land to Janet, the deceased remained alive for about 10 months but never complained that Janet had fraudulently acquired the suit land from him. That being the case, Janet had a good title and had capacity to sell and transfer the suit land to Joseph. That the Green Card which is a Land Register by virtue of section 7 of the Land Registration Act contained all the records of all the transactions that had taken place in respect of the suit land hence the records in the Green Card superseded what was contained in the Certificate of Official Searches. That insofar as the appellants had pleaded and particularized the acts of fraud they had failed to lay the basis in their evidence. In essence, the court held that there was no proof of fraud as against Janet, Joseph and the respondent with regard to their dealings with the suit land.

As to whether the respondent was a bona fide purchaser for value, the Judge noted that the respondent produced a Sale Agreement dated 7th November, 2014 and a Transfer dated 10th November, 2014 which he had executed with Joseph and was subsequently registered as the owner of the suit land. The court further noted that the respondent was issued with a title deed in 2014 and that at the time of purchase of the suit land, the respondent undertook due diligence and the records at the Land Registry confirmed that Joseph was the proprietor of the suit land. The court was thus satisfied that the respondent was a *bona fide* purchaser for value.

Consequently, the trial court held that the appellants had not proved their case against the respondent on a balance of probability and were not entitled to the orders sought. The suit was as a result dismissed with costs to the respondent.

Dissatisfied with the judgment, the appellants lodged the present appeal in which they raised nine (9) grounds to wit, that the learned Judge erred in law and in fact by holding that: the acquisition of the suit land by Janet from the deceased was legal; the transfer from Janet to Joseph was also legal on the basis of the Green Card yet there was a glaring mistake which showed that the entries were backdated;

overlooking the fact that part of the purchase price was sent to Janet yet she had allegedly sold and transferred the suit land to Joseph; failing to appreciate that there were no transfer records from the deceased to Janet and from Janet to Joseph; holding that the respondent was an innocent purchaser for value without notice yet there was glaring evidence of fraud; failing to acknowledge that by 2012 the search certificate still had the name of the deceased as the proprietor of the suit land hence any subsequent changes were fraudulent and indeed amounted to intermeddling with the estate of the deceased as a grant of letters of administration of the estate of the deceased had not been obtained; failing to acknowledge that there was interlocutory judgment entered against Janet and Joseph; and lastly, that the learned Judge erred in law and in fact in failing to appreciate the appellants' pleadings, submissions and authorities.

At the plenary hearing of the appeal, **Mr. Senteu** and **Mr. Gatumata**, learned counsel appeared for the appellant and the respondent respectively. Both counsel relied on their respective written submissions and opted not to orally highlight the same.

Mr. Senteu in his submissions took the view that on a balance of probability, the appellants had established and proved their case as all the witnesses acknowledged that the suit land was initially owned by the deceased. That since the appellants had the original title bearing the name of the deceased given to them by a Mr. Njoroge, Janet and Joseph had no title or interest in the suit land that they could transfer to the respondent. He maintained that there could not be a second title unless it was obtained fraudulently. Counsel further emphasized that the appellants had established and proved ownership of the suit land by producing the original title which indicated that there was no transfer of the suit land from the deceased to Janet. Counsel faulted the learned Judge's finding that the appellants did not produce enough evidence yet the respondent did not tender in evidence of the Land Control Board consent, identification card and transfer documents, which in turn demonstrated that the transactions were fraudulent and the respondent acquired title illegally and unprocedurally. Counsel also took issue with the learned Judge for not considering the interlocutory judgment entered against Janet and Joseph while rendering her decision. He contended that the Green Card entries were made after the demise of the deceased hence a glaring discrepancy in the captured entries.

While relying on the case of **Willy Kimutai Kitilit v Michael Kibet [2018] eKLR** counsel submitted that Janet did not produce the Land Control Board consent or prove that an application for the said consent was made and obtained. He further stressed that there was no evidence of transfer of the suit land in Janet's or Joseph's favour and that the transfer to the respondent was thus fraudulent. Counsel further submitted that it is trite in law that no two titles can exist at the same time in respect of the same parcel of land.

He submitted that the respondent could not be deemed to be the absolute and indefeasible owner of the suit land as the title he holds was challenged on grounds of being acquired illegally, unprocedurally or through a corrupt scheme under Section 26(1) of Registration of Land Act. That Janet could not claim to have sold the suit land as she could not sell what she did not own. Further, counsel relied on the case of **Monica Karuru & Others, Succession Cause No. 108 of 2014, Morris Mwiti Mburugu v Denis Kimathi Mburugu [2016] eKLR** and Section 45 of the Law of Succession Act in submitting that the changes made after the death of the deceased were fraudulent and amounted to intermeddling with the estate of the deceased. Lastly, counsel took the position that since there was judgment against Janet and she opted not to defend the same, all the allegations made against her were true.

Opposing the appeal, Mr. Gatumuta pointed out that Janet was called as the respondent's witness to explain how title to the suit land was transferred from the deceased to her. She could not have been expected to demand all the documents used in the transaction as the land belonged to the deceased at the time and he could deal with it as he pleased. That the copy of the Green Card clearly showed that the transfer was lawfully effected. That she handed all the other titles to the 1st wife of the deceased and retained the title to the suit land as it did not form part of the estate of the deceased having been transferred and registered in her name. That she sold the suit land to Joseph due to the hostility from the appellants. It was counsel's further submission that at the time the respondent purchased the suit land, it was in the name of Joseph as shown in the official search and Green Card. That the respondent further tendered in evidence the sale agreement, copy of transfer and letter of consent thereby confirming that due process was followed before the title deed was issued to the respondent. That there was no restriction or caution registered on the suit land at the time the respondent purchased it.

Counsel further pointed out that the appellants did not allege any fraudulent acts against the respondent in the entire transaction hence the respondent was a bona fide purchaser for value without notice of any irregularity or at all. Counsel questioned the title produced in court by the appellants as Mr. Njoroge who allegedly had handed it to them was not called as a witness to tell the source of the said title. That the entries in the Green Card and issuance of subsequent titles to Janet, Joseph and the respondent would not have been processed without the original title initially held by the deceased being surrendered.

Counsel further submitted that the respondent as an innocent purchaser had no responsibility of correcting information on the Green Card. Furthermore, counsel pointed out that transfer documents once lodged at the land's office cease being the property of the vendor or purchaser. That the interlocutory judgment did not in any way affect the respondent's title. That the allegations of fraud were merely stated in the plaint but not proved and that no evidence was adduced to prove that the respondent participated in any fraud or was aware of any purported fraud when he purchased the suit land. To his mind, the learned Judge gave a considered and well-reasoned judgment in view of the evidence adduced.

This being a first appeal, it is the duty of the first appellate court to re-evaluate the evidence led before the trial court both on points of law and facts and come up with its own findings and conclusions. In the case of **Kamau v Mungai [2006] 1 KLR 15**, the court restated the principle as follows:

“Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that.”

We have carefully considered the record of appeal, the grounds thereof, the impugned judgment, the rival submissions and the law. We discern main issues for determination to be; whether the transfer of the suit land from the deceased to Janet, sale and transfer from Janet to Joseph and thereafter to the respondent was marred with fraud; and whether the respondent was a *bona fide* purchaser for value without notice.

The Black's Law dictionary defines fraud as follows:

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

From the above definition and the circumstances of the present case, we are faced with questions as to whether the mistakes in the Green Card and existence of two titles to the suit land is evidence of fraud.

The appellants pleaded that Janet and the District Land Registrar, Kajiado North had fraudulently colluded to transfer the suit land to Janet

and also altered the Green Card to indicate that the suit land had been transferred from the deceased. They further contended that they had conducted an official search in 2012 with regard to the suit land and the same showed that the deceased was still the registered owner of the suit land. However, according to the Green Card and the official search conducted on 24th June, 2013, as at January 2012 Joseph was the registered proprietor of the suit land. The trial court noted the contradictory information on the search certificate and chose to rely on the Green Card which is a Land Register in itself and by virtue of Section 7 of the Land Registration Act. It is a principle of the law that the party who alleges must prove. The appellants alleged that the transfer of the suit land from the deceased all the way to respondent was fraudulent. Did the appellant prove to the required standard the allegations of fraud against Janet, Joseph and the respondent? In the case of **Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979] eKLR**, this Court took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR**, Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these 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 facts.” Emphasis ours.

Given the seriousness of the allegations, the onus was on the appellants to provide evidence to the Court of the alleged fraud which evidence must meet the standard of proof as was underscored by this Court in **Central Bank of Kenya**

Limited v Trust Bank Limited & 4 Others [1996] eKLR as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the Court rendered itself as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”

In the instant case, the appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of Janet all the way to the respondent. That the trio were parties to the fraud or had knowledge of it. We note just like the trial court that no criminal charges or proceedings were laid against Janet, Joseph and the respondent over the transfer and registration of the suit land. The learned Judge further held that there was no demonstration of fraud and that in fact the suit land had actually been transferred to Janet during the lifetime of the deceased who had not raised any complaint before he died. This position was also confirmed by the appellants in their testimonies that Janet was the registered owner of the suit land as at 8th October, 2010; that Joseph was then registered as the proprietor on 13th June, 2011 and the respondent was registered as owner of the suit land on 10th November, 2014. Indeed, the 2nd appellant confirmed that the other titles to the properties owned by the deceased were handed over to her mother by Janet. We are persuaded just like the trial court that if the appellants were aggrieved and felt defrauded, they had recourse under the law to report the matter to the police for their further investigations and appropriate action. Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities. No evidence was tendered to this end by the appellants. They did not call any witness from the land office to verify their allegations. The officials at the land's registry are the custodians of land records and would have been in a better position to explain the concerns raised by the appellants. The respondent on the other hand produced the Green Card, which was the land register for the suit land and the entries made therein were in favour of the deceased, Janet, Joseph and himself.

The appellants further contested the existence of two title deeds over the same suit land. They produced what they claimed to be the original title in the name of the deceased in evidence and maintained that it was conclusive proof of ownership of the suit land by the deceased. The respondent's counsel aptly submitted that no entry can be made in the Green Card without surrender of the original title. Therefore, it was upon the appellants to prove that what they had was the original title deed and not a duplicate copy while keeping in mind that the deceased handed over title deed of the suit land to Janet while he was still alive.

The appellants did not even call a **Mr. Njoroge** who allegedly handed to the appellants the alleged title deed and how he had come by it. We note that Janet was in possession of the other title deeds which she handed over to the 1st wife of the deceased upon his demise save for the title to the suit land which was in her name. To this end we are satisfied just like the trial court that fraud was not proved against Janet, Joseph and the respondent to the required standard.

As to whether the respondent was a *bona fide* purchaser for value without notice, the **Black's Law Dictionary 9th 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.”

In **Katende v Haridar & Company Limited [2008] 2 E.A.173** the Court of Appeal in Uganda held that:

“For the purposes of this appeal, 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;**
- g. he was not party to any fraud.”**

In the instant appeal, the respondent currently holds the certificate of title to the suit land and is in actual possession having acquired the same on 10th November, 2014 upon transfer and registration. It is therefore *prima facie* evidence that he is the absolute and indefeasible owner as provided for under Section 26 of the Land Registration Act. His title is also shielded from being defeated by Section 25 unless proved otherwise. The respondent further led evidence to the effect that he purchased the suit land in good faith, having executed the sale agreement and paid the purchase price as was stipulated in the sale agreement without any notice of fraud. The appellants did not tender any evidence to show that indeed the respondent had any notice of an illegality or fraud. Having done his due diligence by conducting a search and obtaining a Green Card which clearly indicated that Joseph was the registered owner of the suit land, it would have been near impossible for a normal thinking person to suspect fraud let alone have knowledge of it.

The respondent also proved that he paid Kshs. 7 Million as the purchase price for the suit land. The respondent thus had no knowledge of any fraud and was not a party to any fraud having followed due process as was required of him under the law and obtained a valid title deed to the suit land. We are therefore satisfied that the respondent who holds a title deed to the suit land exercised due diligence in acquiring the suit land and is a bona fide purchaser or innocent purchaser for value and without notice

In the end, we find no reason to interfere with the judgment of the trial court.

The appeal lacks merit and is accordingly dismissed with costs to the respondent.

Dated and delivered at Nairobi this 6th day of November, 2020.

M. K. KOOME

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR