



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO (P), MUSINGA & ODEK, J.J.A.)**

**CIVIL APPEAL NO. 342 OF 2012**

**BETWEEN**

**DANIEL MOGOI ONCHIEKU..... APPELLANT**

**AND**

**JUSTUS NTIATO KETON.....1<sup>ST</sup> RESPONDENT**

**PATRICK WANYONYI SICHANGI.....2<sup>ND</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Nambuye, J.) dated 28<sup>th</sup> August, 2012*

**in**

**H.C.C.C. No. 32 of 2006)**

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**JUDGMENT OF THE COURT**

1. **Daniel Mogoi Onchieku**, the appellant, brought this appeal against the judgment and decree of **Nambuye, J.** (as she then was), delivered on 28<sup>th</sup> August 2015 dismissing the appellant's suit against **Justus Ntiato Ole Keton**, the 1<sup>st</sup> respondent, **Patrick Wanyonyi Sichangi**, the 2<sup>nd</sup> respondent, and the **Hon. Attorney General**, sued on behalf of the Land Registrar, Kajiado, the 3<sup>rd</sup> respondent.
2. The appellant, through his plaint dated 12<sup>th</sup> January, 2006, had sought injunctive reliefs against the respondents *inter alia*; that the 1<sup>st</sup> respondent be compelled to specifically perform his part of the agreement dated 21<sup>st</sup> December, 2000 and 24<sup>th</sup> May, 2004 and relinquish 0.40 hectares out of **LR No. Kajiado/Kisaju/1618**, (hereinafter the **Suit property**) to the appellant; that the Registrar of Lands, Kajiado, be compelled to revoke the title deed issued in favour of the 2<sup>nd</sup> respondent and issue the said title to the appellant; an order restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from encroaching, interfering or in any way dealing with the suit property. He also prayed for general damages and costs of the suit.
3. The appellant pleaded that the 1<sup>st</sup> respondent was the owner of the suit property measuring 1.70 hectares or thereabout, which had been held in trust by the 1<sup>st</sup> respondent's late father, one **Keton Ole Koponi Parsena (deceased)**. His claim was that by a sale agreement dated 21<sup>st</sup> December, 2000, the deceased and the 1<sup>st</sup> respondent agreed to sell to him a portion of the suit property measuring 0.40 hectares.
4. He averred that he fully paid the purchase price agreed at **Kshs 160,000/=** which monies the 1<sup>st</sup> respondent acknowledged receipt of on behalf of the deceased.
5. Unknown to the appellant, it turned out that subsequently the 1<sup>st</sup> respondent unlawfully sold to the 2<sup>nd</sup> respondent the whole of the suit property in total disregard of the appellant's interest in the suit property. According to the appellant, the respondent did not have capacity to sell the property to the 2<sup>nd</sup> respondent.
6. In the trial court, the 1<sup>st</sup> respondent did not file any statement of defence. The 2<sup>nd</sup> respondent however defended himself by asserting that

as at the date of the said agreement between the 1<sup>st</sup> respondent and the appellant, the 1<sup>st</sup> respondent was not the registered owner of the suit property, hence he could not have purported to have sold the suit property as alleged.

7. In his testimony, the 2<sup>nd</sup> respondent stated that on 3<sup>rd</sup> November, 2004 he entered into a sale agreement with the 1<sup>st</sup> respondent for the purchase of the suit property at a consideration of **Ksh 680,000/=**. At that time the 1<sup>st</sup> respondent was the legal owner of the suit property. The 1<sup>st</sup> respondent had been gifted the suit property by his deceased father and had the same registered in his name on 3<sup>rd</sup> September, 2002.

8. Thereafter the 2<sup>nd</sup> respondent obtained the area Land Board Consent; transfer documents; paid stamp duty and all other requisite fees and had the suit land transferred to him and a title deed issued in his favour. Suffice it to say that he was an innocent purchaser for valuable consideration.

9. The 3<sup>rd</sup> respondent on its part stated that not only was the appellant's suit time barred but it also failed to disclose a cause of action against the Registrar of Lands, Kajiado, since he was not privy to any sale agreement between the appellant and the 1<sup>st</sup> respondent.

10. At the end of the trial, the learned judge found that the appellant's entitlement to the suit property had not crystallized in his favour as at the time of filing the suit since title to the suit land had passed on to the 2<sup>nd</sup> respondent. The trial court dismissed the suit in its entirety. The trial judge further held that the 1<sup>st</sup> respondent could not be made accountable for the actions of his deceased father without having either a power of attorney or letters of administration in respect of the deceased's estate.

11. Aggrieved by the judgment of the High Court, the appellant preferred this appeal against the entire judgment, raising eighteen grounds. All the parties, except the 1<sup>st</sup> respondent, filed their written submissions. At the hearing of this appeal, the appellant was represented by learned counsel

**Mr. Oonge M.N.** instructed by M. N. Oonge, & Company Advocates. **Mr. Kulecho K.** from the firm of Kulecho & Company Advocates appeared for the 2<sup>nd</sup> respondent while **Mr. Eredi** appeared on behalf of the Attorney General, the 3<sup>rd</sup> respondent. The respective counsel opted to rely on their written submissions.

12. From his submissions as filed, the appellant's 18 grounds were reduced to six. **Rule 86(1)** of the Rules of this Court requires that grounds of appeal should be concise, without argument or narrative. In light of this, we have narrowed down the appellant's grounds to the following core issues which, in our view, are sufficient to dispose of this appeal:

· ***Whether there existed a sale agreement for the suit property between the appellant and the 1<sup>st</sup> respondent, and if so, whether it was valid.*** · ***Whether the 2<sup>nd</sup> respondent was an innocent purchaser for value without notice and obtained a good title.***

· ***Whether the appellant is entitled to the prayers sought in the plaint.***

13. We have considered the record of appeal, respective submissions by learned counsel as well as the authorities cited. Our mandate on a first appeal is set out in **rule 29(1)** of this Court's Rules, which is to re-appraise the evidence and to draw inferences of fact. We remain guided by the principles enunciated in **Selle v Associated Motor Boat Company Ltd [1968] EA 123**; and we will not interfere with the trial court's judgment, unless we are satisfied that the judge misdirected herself in some matter and as a result arrived at a wrong decision, or if it is manifest from the case as a whole that the judge was clearly wrong in the exercise of her discretion and occasioned injustice by such wrong exercise.

14. Turning to the first issue of whether there existed an enforceable sale agreement between the appellant and the 1<sup>st</sup> respondent, the appellant contends that the 1<sup>st</sup> respondent had beneficial interest of 0.40 hectares in the suit property and that upon the demise of the 1<sup>st</sup> respondent's father, the 1<sup>st</sup> respondent assumed the role of a personal representative and assign; that the 1<sup>st</sup> respondent was aware of the sale agreement dated 21<sup>st</sup> December, 2000 between the deceased and the appellant and even acknowledged receipt of the purchase price, yet he still went ahead and sold the entire parcel of land to the 2<sup>nd</sup> respondent.

15. It is not in dispute that indeed there was a sale agreement dated 21<sup>st</sup> December 2000 between the appellant and the 1<sup>st</sup> respondent's deceased father, whereby the appellant was the purchaser and the 1<sup>st</sup> respondent's father the vendor. It is also not in dispute that the appellant paid a sum of **Kshs. 100,000/=** as deposit towards the purchase of the suit property. The parties are also in agreement that the balance of **Kshs 60,000** was to be paid **upon successful completion of sub-division and transfer** as per the agreement.

16. A perusal of the sale agreement clearly indicates that the agreement was between **Keton Ole Koponi Parsena**, the 1<sup>st</sup> respondent's father who was the registered owner of all that piece of land known as KJD/KISAJU/1618 measuring 1.70 Ha and **Daniel Mogoi Onchieku**, who was to purchase a portion thereof measuring 0.40 Ha. Indeed from the evidence on record, there are two acknowledgements of payments, one dated 21<sup>st</sup> December, 2000 where the 1<sup>st</sup> respondent acknowledged receipt of Kshs 100,000 on behalf of the deceased, being part payment of the purchase price and the second one dated 24<sup>th</sup> May, 2004 where the 1<sup>st</sup> respondent acknowledged receipt of the balance of Kshs 60,000 from the appellant.

17. It is trite law that a contract is only binding if both parties have capacity to enter into it. The 1<sup>st</sup> respondent was not a party to that agreement. The suit property was then registered in the 1<sup>st</sup> respondent's late father. There was no valid sale agreement of the suit land between the appellant and the 1<sup>st</sup> respondent. The acknowledgement of receipt of Kshs.60,000 by the 1<sup>st</sup> respondent on 24<sup>th</sup> May, 2004 was pursuant to the sale agreement dated 21<sup>st</sup> December, 2000 which was between the deceased and the appellant.

18. Further, the appellant and the deceased did not obtain the area Land Control Board consent and the purported sale agreement was therefore null and void.

19. The issue of Land Board Consent has been dealt with in several cases by this Court. For instance in **Elizabeth Cheboo Vs Mary Cheboo Gimnyigei, Civil Appeal No.40 of 1978**, the Court held that:

***“Failure to get Land Control Board consent renders the agreement void and no specific reference can be granted.”***

See also **Mbuthia Charagu Vs Kiarie Kaguru, Civil Appeal No.87 of 1986**, where the Court held that:

***“Unless there is a consent of Land Control Board all the transactions relating to the transfer are null and void.”***

20. On the second issue, as to whether the 2<sup>nd</sup> respondent was a *bonafide* purchaser for value without notice, the 2<sup>nd</sup> respondent testified that before he entered into the sale agreement, he did a search at the lands office and established that the 1<sup>st</sup> respondent was the registered owner. Thereafter they entered into the sale agreement; obtained land board consent; filed the transfer documents; paid stamp duty and all other fees and eventually the suit property was registered in his name on 3<sup>rd</sup> December, 2004. He paid Kshs.680,000 as the purchase price for the suit property. As at the time of signing the agreement with the 1<sup>st</sup> respondent’s deceased father, the 2<sup>nd</sup> defendant was not privy to the fact that the appellant had initially paid any money to the 1<sup>st</sup> respondent or the deceased towards purchase of part of the suit property.

21. In the circumstances, we are satisfied that the 2<sup>nd</sup> respondent was a bona fide purchaser for value without notice of any wrongdoing. To our mind, the 2<sup>nd</sup> respondent diligently followed the lawful procedure in obtaining ownership of the suit property, whose rights were protected by **Sections 27(a) and 28 of the repealed Registered Land Act** and therefore holds an absolute and indefeasible title.

22. **Section 27(a) of the repealed Registered Land Act** provided that

***“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”***

Further, **Section 28** of the same **Act** stated as follows:

***“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”***

23. The last issue for our determination is whether the appellant is entitled to the reliefs sought. Having found that there was no privity of contrast between the appellant and the 1<sup>st</sup> respondent; and that the 2<sup>nd</sup> respondent was a bona fide purchaser for value of the suit property, we must conclude, as we hereby do, that the appellant was not entitled to the prayers he had sought in the plaint. In our view, the appellant’s claim can only be as against the estate of the deceased for refund of the amount paid towards acquisition of the 0.4 hectares of the suit land.

24. In conclusion, we find no merit in this appeal and dismiss it in its entirety. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents are awarded costs of the appeal.

**Dated and delivered at Nairobi this 22<sup>nd</sup> day of February, 2019.**

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**