IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 130 OF 2018

BETWEEN

ROBERT KIBAGENDI OTACHI.....APPELLANT

AND

MARIA ROSITA CARDOZO *(Suing through her appointed agent*

MASAI MARA SOPA LODGE LIMITED.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Being an appeal from the Judgment of the Environment & Land Court at Nairobi (L. Gacheru, J.) delivered on 31st August 2017

in

E&LCCC No. 75 of 2008)

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JUDGMENT OF THE COURT

1. In a judgment delivered on 31st August 2017 in ELC No. 75 of 2008, the Environment and Land Court (**L. Gacheru, J.**) declared the transfer of the property known as Title Number Nairobi/Block90/235 to the appellant as null and void; ordered the appellant to deliver the Certificate of Lease in respect thereof to the 2nd respondent for cancellation; and ordered that the title to the property should revert to the original and rightful owner, Maria Rosita Cardozo, on whose behalf the suit was instituted. The court also awarded the costs of the suit to the 1st respondent. Aggrieved, the appellant lodged the present appeal.

2. The facts are that until 8th April 1997, the property known as Title Number Nairobi/Block90/235 (the property) was registered in the names of Victor Anthony Cardozo and Maria Rosita Cardozo. They held a Certificate of Lease over the property given by the Land Registrar, Nairobi District Registry on 29th April 1986 under which they were registered as proprietors, as joint tenants, of the leasehold interest in the property for a term of 99 years from 1st January 1978. Victor Anthony Cardozo died in 2004. Maria Rosita Cardozo who survived him was described as an elderly lady resident in Canada.

3. Evidence was led that sometime in 2007, Maria Rosita Cardozo went to the suit property and was harassed. On conducting an official search at the Lands Registry, it was discovered that the property had been transferred and registered in the name of the appellant and a Certificate of Lease issued to him on 8th April 1997.

4. By a Power of Attorney dated 23rd April 2007 Maria Rosita Cardozo appointed Masai Mara Sopa Lodge Limited to be her attorney and generally in relation to her interest in the property. On 4th March 2008, Maria Rosita Cardozo through Masai Mara Sopa Lodge Limited filed suit by way of plaint against the appellant and against the 2nd respondent seeking a declaration that the transfer of the property to the appellant is null and void; order directing the appellant to deliver the Certificate of Lease in his favour to the 2nd respondent for cancellation; an order directing the 2nd respondent to cancel that Certificate of Lease; and an order that the title to the property revert to her. She also prayed for costs of the suit and interest thereon. The suit was based on the grounds that the appellant had fraudulently transferred the

property to himself without any legal right to do so and without the authority or consent of the owner. During the pendency of the suit Masai Mara Sopa Lodge Limited executed a Caution on behalf of Maria Rosita Cardozo on 4th April 2008 and the same was registered against the title to the property on 21st April 2008.

5. In his statement of defence, the appellant denied the claims and averred that he is a purchaser for value without notice of any defects in the title to the property. He maintained that he is the duly registered owner of the property and that he had paid the land rent and rates of the property since the same was transferred to him.

6. In its defence, the 2nd respondent denied the claim and asserted that it is a stranger to the allegations made by the 1st respondent. It averred that based on the records at Nairobi Land Registry, a lease was registered in favour of the appellant on 29th April 1986. It also claimed that it had not been given notice under Section 13A of the Government Proceedings Act and that the claim was statute barred under Section 3 of the Public Authorities Limitations Act.

7. For the 1st respondent, evidence was led by a director of Masai Mara Sopa Lodge Limited who stated that he is a friend of Maria Rosita Cardozo. He produced the original Certificate of Lease in favour of Victor Anthony Cardozo and Maria Rosita Cardozo and stated that he was personally familiar with the property; that it is located in Loresho Nairobi and is fenced with barbed wire and is vacant; that a search conducted after a visit to the property by Maria Rosita Cardozo revealed that it had been transferred to the appellant, in whose favour another Certificate of Lease had been issued. He stated that Maria Rosita Cardozo had not transferred property to the appellant. He also produced a copy of the certificate of death relating to Victor Anthony Cardozo.

8. On his part, the appellant stated that he purchased the property from Esono Anguesomo and Teresita Esono Suguitan under an agreement for sale dated 5 February 1997 for the price of Kshs.2,300,000.00; that after paying the purchase price, the property was transferred to him and he was issued with a Certificate of Lease dated 8 April 1987 which he produced before the trial court. He stated further that he had paid all rates and land rent on the property; and had charged the property to a bank as security for a loan of Kshs.800,000.00.

9. After the trial conducted partially before **Okwengu, J** (as she then was); **Koome, J** (as she then was); and ultimately before **Gacheru, J**, the impugned judgment was delivered on 31st August 2017 in which the court determined that the 1st respondent is the rightful proprietor or owner of the property and that the Certificate of Lease issued to the appellant *"is null and void"*.

10. The appellant has challenged that judgment on nine grounds set out in his memorandum of appeal. Appearing for the appellant during the hearing of the appeal, Mr. Mainye Manyara learned counsel relied on his written submissions which he highlighted. He submitted the 1st respondent's suit was incompetent because there was no resolution passed by Masai Mara Sopa Lodge Limited accepting the appointment as the attorney for Maria Rosita Cardozo or authorizing the institution of the suit; that the Judge arrived at a wrong decision for failing to hold that the vendors from whom the appellant acquired the property should have been joined in the suit by the 1st respondent; that the Judge erred in ordering the cancellation of the title in favour of the appellant without first ordering cancellation of the entry in favour of the vendors who purportedly transferred the property to him; that the Judge erred in holding that the appellant's title was acquired illegally having found that the 1st respondent did not establish fraud on his part.

11. Counsel submitted that the Judge fell into error in applying Section 26(1) of the Land Registration Act which came into force on 2nd May 2012; that the property was registered under the now repealed Registered Land Act Cap 300 and the provisions of that Act are applicable by reason of Section 107 of the Land Registration Act; that an order for rectification of the register could only be made in the circumstances set out in Section 143 of the Registered Land Act; that had the Judge applied the correct legal provisions she would have dismissed the 1st respondent's suit.

12. Counsel concluded by urging that the order by the Judge condemning the appellant to pay costs of the suit was a wrong exercise of discretion considering that the court found that the appellant was not at fault. In that regard reference was made to the case of ***Capital Fish Kenya Limited vs. Kenya Power & Lighting Company Limited [2010] eKLR***.

13. Opposing the appeal learned counsel for the 1st respondent James Tugee also relied on his written submissions which he orally highlighted. He submitted that no company resolution was required as it is not Masai Mara Sopa Lodge Limited that was instituting the suit but Maria Rosita Cardozo through the company as her attorney.

14. It was submitted that there was uncontroverted evidence that Maria Rosita Cardozo and her late husband acquired the property in 1986 and they never transferred it and neither was the title ever revoked; that there was evidence before the High Court by the lawyer who purportedly drew the sale agreement in favour appellant disowning it; that it was incumbent upon the appellant to join the persons who purportedly sold the property to him in the suit; that the appellant did not produce a transfer of the property in his favour and it is a mystery how he acquired title; that the appellant's remedy is against those who purportedly sold the property to him.

15. With regard to the application of Section 26(1) of the Land Registration Act, counsel submitted that the same was rightly invoked by the court in light of Section 106(1) of the same Act which provides that the repealed statutes ceased to apply on the coming into force of that Act on 2nd May 2012.

16. On costs, it was submitted that the High Court properly exercised its discretion in awarding costs of the suit to the successful party and there is no basis for this court to interfere with that decision.

17. We have considered the appeal and submissions by learned counsel. The main question in this appeal is whether the learned trial Judge erred in upholding the 1st respondent's title to the property and in ordering the cancellation of the appellant's title to the same. In that regard,

we are alive to the fact that this is a first appeal. We are therefore entitled to draw our own conclusions based on our review and analysis of the evidence presented before the trial court. As Sir Kenneth O'Connor stated in case of ***PETERS vs. SUNDAY POST, [1958] E.A. 424*** at 429:

> ***"An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."***

18. The principle was further articulated by Sir Clement De Lestang, V.P in the often cited case of ***Selle vs. Associate Motor Boat Co. Ltd., [1968] E.A. 123*** at 126 where he stated:

> ***"I accept counsel for the respondents' proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial 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 witnesses and should make due allowance in this 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 demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."***

19. Those principles remain relevant and continue to be applied by this Court. We have therefore, in keeping with our mandate, reviewed the evidence adduced in the lower court in order to determine whether the conclusion reached upon that evidence should stand.

20. Based on the evidence, there is no doubt that until the appellant came to the scene in April 1997, the property was registered in the names of Victor Anthony Cardozo and Maria Rosita Cardozo whose Certificate of Lease was issued about 11 years earlier on 29th April 1986. The appellant's evidence was that he purchased the property from Esono Anguesomo and Teresita Esono Suguitan under an agreement for sale dated 5th February 1997. That agreement for sale was purportedly drawn by a firm of advocates known as Nyangoro and Company Advocates. Part of the material presented before the trial court were letters written by one Faraday Nyangoro, the presumed proprietor of the firm Nyangoro and Company Advocates disassociating himself from the agreement for sale and asserting that he did not know the purported vendors Esono Anguesomo and Teresita Esono Suguitan and neither did he append his signature to the agreement as the same purported. He stated further that by the time the agreement for sale was said to have been entered into in February 1997, he had not even been admitted to the bar.

21. It is also noteworthy that the Certificate of Lease dated 8th April 1997 in favour of the appellant clearly indicates under the property section, that the Lessee from the Government of Kenya (the Lessor) is Victor Anthony Cardozo and Maria Rosita Cardozo. Yet, the appellant claims to have purchased the property from persons by the names Esono Anguesomo and Teresita Esono Suguitan without demonstrating any movement of title from Victor Anthony Cardozo and Maria Rosita Cardozo to the said persons. Neither did the appellant produce a transfer on the basis of which he acquired title to the property.

22. Based on the foregoing, we are entirely in agreement with the trial Judge when she stated in her judgment that:

> ***"It is evident that the Plaintiff was the first registered owner of the suit property. Her interest could not be defeated except as provided by the law. The 1st Defendant has alleged that he purchased the suit property from*** *Mr. & Mrs. Esono*.
>
> ***He did not call them as witnesses. There was no evidence from the Ministry of Lands to confirm whether the Plaintiff had relinquished her interest by the time the 1st Defendant allegedly purchase the suit property. The 1st Defendant did not produce the transfer form which showed that indeed the suit property was transferred to him by*** *Mr. & Mrs. Esono*.
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> ***There was no evidence of payment of the stamp duty. Further his Certificate of title shows that the Lessee were*** *Victor Antony Cardozo* ***and*** *Maria Rosita Cardozo*. ***The Green Card which shows the history of entries over the title were not produced by any of the parties herein. The Court therefore finds that there was no evidence that the Plaintiff's title had been defeated by operation of the law as at*** *8th April 1997*, ***when the 1st Defendant acquired his***
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> ***Certificate of title. The Plaintiff's Certificate of title had not been cancelled or revoked. It was the first in time. Therefore, the Court finds that the*** *Plaintiff's title* ***is the*** *valid Certificate herein*. ***The 1st Defendant's title was not acquired procedurally, or regularly but illegally or irregularly, since the Plaintiff's title had not been cancelled. The 1st Defendant's title therefore can be challenged and impugned."***

23. It is indeed surprising, based on the material placed before the trial court, that the Judge stopped short of calling the transaction giving rise to the appellant's title as fraudulent. Being of that persuasion, it is unnecessary to address the other complaints. The appeal is devoid of merit and is dismissed with costs to the 1st respondent only.

Orders accordingly.

Dated and delivered at Nairobi this 7th day of June, 2019.

W. OUKO, (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR