



**IN THE COURT OF APPEAL**

**AT MALINDI**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)**

**CIVIL APPEAL NO. 90 OF 2018**

**BETWEEN**

**MINUDI OKEMBA LORE.....APPELLANT**

**AND**

**LUCY WANGUI GACHARA .....RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Environment & Land Court at Malindi (Olola, J.) delivered on 25<sup>th</sup> May 2018*

*in*

*ELC No. 189 of 2014)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

1. In a judgment delivered on 25<sup>th</sup> May 2018, the Environment and Land Court (*Olola, J.*) dismissed the appellant's suit against the respondent in which he had sought an order of possession of a property he purchased at a public auction, namely Plot No. 825(original No. 814/12) Watamu CR. No. 27990. By the same judgment, the court nullified "*the purported sale*" on the basis of which the appellant acquired the property. Aggrieved by that judgment, the appellant lodged this appeal.
2. Based on the pleadings and the evidence tendered before the Environment and Land Court (ELC), the pertinent facts are, to a large extent, not in contention. By an instrument of legal charge dated 7<sup>th</sup> September 2011, Susan Nyambura Wangai (the chargor), the then registered owner of the property known as Plot No. 825(original No. 814/12) Watamu CR. No. 27990 (the suit property), charged the same to Equity Bank Limited (the Bank) to secure the principal sum of Kshs.1,000,000.00 and interest.
3. Following default by the chargor in the repayment of the loan, the Bank advertised the property for sale. At a public auction held on 26<sup>th</sup> April 2013, the appellant was declared the highest bidder and the property was knocked down to him for a price of Kshs.10,220,000.00.
4. Upon payment of the purchase price, the Bank transferred the property to the appellant by an instrument of Transfer by Chargee dated 18<sup>th</sup> July 2013. That Transfer was registered on 29<sup>th</sup> October 2013 whereupon he became the registered proprietor of the property.
5. Following the registration of the property in his name, the appellant was according to his pleading, shocked to discover the respondent was in occupation of the property; that despite notices to vacate served on her, the respondent refused to hand over possession of the property; that the appellant was therefore constrained to file a suit before the ELC in which he sought judgment for: an order of immediate possession and ejection of the respondent from the property; a declaration that the respondent is a trespasser on the property; and a permanent restraining order preventing the respondent from trespassing, occupying or continuing to live on the property.
6. In her defence and counterclaim, the respondent averred that although the appellant is registered as the owner of the property, the sale of the property to him was not legal or lawful. She averred that the legal charge by the chargor on the basis of which the sale and transfer by chargee was founded was fraudulent because: the property was matrimonial property owned jointly by the respondent and her estranged husband, Josef Joachim Strobel; that Strobel purported to transfer the property to a stranger, Firdaus Ali, without the respondent's consent, who in turn transferred the property to the chargor; that the chargor fraudulently released the title documents relating to the property to the Bank while a different property, Gede/Kirepwe/ "B" 168 was the property intended to be offered as security; and that the title documents relating to the property were fraudulently used without the authority and consent of Strobel, the registered owner.

7. The respondent pleaded further that the Bank was either negligent or connived with the chargor. Under particulars of fraud and or negligence by the Bank, the respondent averred that the Bank advanced a loan to the chargor on the security of the property without visiting the property to ascertain its actual status; that the Bank failed to exercise due diligence by securing the loan on wrong information and by selling the property to the appellant even *“after learning of the fraud”* perpetrated by the chargor.

8. As against the appellant, the respondent pleaded that the appellant was negligent in buying the property because he did not compare the property that was used to secure the loan with what was offered for sale; that he failed to visit the property to acquaint himself with it; that he did not inquire whether there was any dispute with regard to the property before bidding for it.

9. On those grounds, the respondent counterclaimed against the appellant for a declaration that the purchase of the property by the appellant be declared a nullity.

10. After conducting a trial, in which the appellant and the respondent were the only witnesses, the learned Judge delivered the impugned judgment on 25<sup>th</sup> May 2018 dismissing the appellant’s claim and upholding the respondent’s counterclaim for nullification of the sale in favour of the appellant.

11. In his judgment, the Judge thought it was significant that Strobel had transferred the property to Firdaus Mohammed Ali on 5<sup>th</sup> February 2010 who he married in 2001 and expressed that, *“no explanation was however offered as to why the land which was bought in 1999 was being transferred to her in 2010”* and that despite the respondent’s protests that there was no such person as Firdaus Mohammed Ali who was married to Strobel, *“no explanation was offered by the [appellant] as to her whereabouts.”*

12. The Judge also frowned at the fact that the suit property land had been transferred to the chargor for love and affection and thereafter used to secure a loan of Kshs.1,000,000.00 which the chargor *“by design or otherwise failed to remit thus leading to the auctioning of the suit property some one and a half years later.”*

13. The Judge then concluded that, *“if indeed Susan charged the property to Equity Bank Ltd, her actions were clearly actuated by malice and were, indeed fraudulent”*. In the Judge’s view, the chargor knew that the respondent *“had been living in the suit premises and had been reinstated therein following the institution of a suit she was aware of.”*

14. The Judge was confounded that although Strobel bought the property in 1999 for Kshs.1,500,000.00, eleven years later, the chargor used it to secure a loan of Kshs.1,000,000.00 on 7<sup>th</sup> September 2011. Neither could the Judge fathom how that loan had *“ballooned to a sum of Kshs.10,220,000/= for which it was auctioned on 26<sup>th</sup> April 2013”*. That, according to the Judge, was a matter that required some explanation by both *“Susan and the Bank.”* The Judge also expressed that, the appellant having chosen not to join the Bank as a party in the suit for vacant possession *“is again one of those mysteries.”*

15. With that the Judge concluded:

***“For now I am not persuaded that the defendant was a stranger and/or a trespasser in the suit property as alleged by the plaintiff. Courts of law exists to do justice to the parties. In the matter before me, it would be extremely unjust to order the eviction of the defendant from the suit property in which she has lived since 1996, more so when she has filed and has pending a case which seeks a number of declarations over her entitlement to the same.”***

16. The appellant has challenged that judgment on 12 grounds set out in the memorandum of appeal which raise the questions whether the Bank properly sold the property to the appellant; whether the property was matrimonial property of the respondent and Strobel; whether the legal charge over the property and the subsequent sale of the same by the Bank as chargee in exercise of its statutory power of sale was actuated by malice and was fraudulent; whether the respondent has a right to challenge the sale and transfer of the property to the appellant; and whether the sale and transfer of the property to the appellant could be vitiated in the absence of proof of fraud on the part of the appellant.

17. Urging the appeal before us, **Mr. M. Kilonzo**, learned counsel for the appellant, submitted that no evidence whatsoever was presented to the court to support the claim by the respondent that the transfers of the property from Strobel to Firdaus Mohammed Ali and subsequently to the chargor were either malicious or fraudulent; that it is not contested that the appellant is the registered owner of the property, having purchased the same from the Bank which sold it in exercise of its statutory power of sale under Section 90 of the Land Act.

18. It was submitted that the process of sale by the Bank accorded with the provisions of Sections 97 and 98 of the Land Act in that a valuation of the property was undertaken following which the property was advertised for sale in the newspaper; that having carried out due diligence, the appellant purchased the property in a lawful manner and is an innocent purchaser for value whose interest is protected under Article 40 of the Constitution and under Section 98(4) of the Land Act.

19. In any event, counsel urged, under Section 99(2) of the Land Act, the appellant was not under an obligation to inquire whether the exercise of the power of sale by the Bank was necessary, proper or regular; and that there is no basis for the claim by the respondent that he was negligent in not establishing the physical status of the property. In that regard counsel cited the decision of the Court in **Captain Patrick Kanyagia & another vs. Damaris Wangechi & 2 others [1995] eKLR** for the proposition that there is no duty cast on an intending purchaser at an auction to inquire into the right of the Bank as chargee to sell.

20. As to the claim by the respondent that the property is matrimonial property owned by her and her estranged husband, Josef Joachim Strobel, it was submitted that no evidence was presented by the respondent to show that it was jointly purchased or indeed that the respondent made any contribution to its purchase; that there was indeed no evidence of marriage, whether customary or otherwise, or cohabitation between the respondent and the said Josef Joachim Strobel beyond the photograph of a *“mock wedding”* that the respondent

produced; that the court therefore erred in arriving at a decision that there was a presumption of marriage between the respondent and Josef Joachim Strobel; that it is also noteworthy that in registering a caveat against the property, which she subsequently withdrew, the respondent had not asserted her claim as a wife but claimed “*a licensee interest*”.

21. Counsel concluded by submitting that as no marriage was established as between the respondent and Josef Joachim Strobel, the respondent did not have capacity, under Section 103 of the Land Act, to apply for relief against the exercise by the chargee of any of the remedies provided under Section 90(3) of the Land Act. Moreover, counsel argued, under Section 99(4) of the Land Act the remedy provided to any person prejudiced by an unauthorized or improper or irregular exercise of the power of sale is damages.

22. Opposing the appeal, **Mr. J. Mouoko** learned counsel for the respondent, submitted that the respondent was married to Josef Joachim Strobel, the previous registered owner of the property, with whom she cohabited between 1997 and 2007 when they separated; that the property was amongst those that were acquired by the couple during coverture but registered in the name of the husband, Josef Joachim Strobel; that the respondent and the said Josef Joachim Strobel contracted a Kikuyu customary marriage and held themselves out as husband and wife; that at the very least, there should be a presumption of marriage between the respondent and the said Josef Joachim Strobel; that when they separated, the respondent was left residing on the property while Josef Joachim Strobel relocated to a another property in Turtle Bay and the decision of the ELC was therefore correct.

23. Counsel urged that although a marriage certificate between the said Josef Joachim Strobel and Firdaus Mohammed Ali was tendered in evidence, its origin was not disclosed and the appellant must have had a connection with the chargor and the entire transaction was tainted with fraud; that the successive transfers of the property from Josef Joachim Strobel to Firdaus Mohammed Ali and then to the chargor who then charged it to the Bank which valued a different property and gave a loan using the property as security smacks of fraud; that the appellant is not an innocent purchaser as he claims as he did not go to view the property after it was advertised for sale; that the appellant’s remedy lies with the Bank.

24. We have considered the appeal and the submissions by counsel. The principal question arising from the numerous grounds of appeal is whether the Judge erred in nullifying the sale, and in effect the transfer of the property by the Bank as chargee to the appellant. In that regard, and this being a first appeal, we are entitled to draw our own conclusions based on an appraisal of the evidence. See **Paul Joseph Ngei vs. Official Receiver [1990] eKLR.**

25. There was evidence before the trial court that the property was registered in the name of Strobel until 22<sup>nd</sup> January 2010 when he transferred the same to Firdaus Mohammed Ali who, approximately ten months later, transferred it to the chargor on 13<sup>th</sup> October 2010. Almost a year later, the chargor charged the property to the Bank to secure a loan facility.

26. Following default by the chargor in the repayment of the loan, the Bank, in exercise of its statutory power of sale, advertised the property for sale and the same was knocked down to the appellant who was the highest bidder at a public auction held on 26<sup>th</sup> April 2013 at a price of Kshs.10,220,000.00. Thereafter the Bank executed a Transfer by chargee in favour of the appellant which was registered on 29<sup>th</sup> October 2013.

27. There can be no doubt therefore, and the respondent admitted as much in her statement of defence, that the appellant became the registered proprietor of the property on 29<sup>th</sup> October 2013 as pleaded in the plaint.

28. The basis upon which the respondent sought to impeach the appellant’s title to the property was fraud. On the one hand, the respondent averred that the property is matrimonial property transferred by her “*husband*” Strobel to Firdaus Mohammed Ali without her consent and subsequently transferred to the chargor and charged to the Bank.

29. On the other hand, the respondent averred that the Bank was “*either complacent, negligent or did connive*” with the chargor in accepting the property as security. Under particulars fraud and/or negligence by the Bank, the respondent pleaded that the Bank did not inspect the property to ascertain its actual status; failing to exercise due diligence and securing the loan on wrong information; and selling the property to the appellant “*after learning of the fraud perpetrated by*” the chargor.

30. The respondent had the burden to prove those allegations of fraud. It was incumbent upon the respondent to prove fraud. In **Nancy Kahoya Amadiva vs. Expert Credit Ltd & another [2015] eKLR** where, as in this case, allegations of fraud were made, the Court expressed:

***“As they are serious allegations, the onus is on the party alleging fraud to provide evidence to the court that rises to the standard of proof which 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. In that appeal, 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.”***

31. Allegations of fraud must therefore be strictly proved at a standard higher than a mere balance of probabilities. [See also **RG Patel vs. Lalji Makanji [1957] EA 314** and **Vinesh Emporium Gudka vs. Keshavji Jivraj Dodhia [1982] eKLR.**] Did the respondent discharge that burden?

32. In relation to the claim by respondent that the property was matrimonial property, beyond her own statements that she was customarily married under Kikuyu customary law to Strobel and the production of a photograph of what she herself termed as evidence of a “*mock wedding*” in Germany, there was no evidence of the alleged marriage between the respondent and the said Strobel. On the contrary, a marriage certificate was produced by the appellant evidencing a marriage between the said Strobel and Firdaus Mohammed Ali to whom the

property was initially transferred. Moreover, even if the respondent had established that she was married to the said Strobel, we doubt that that in itself would establish, to the required standard, that the transfer of the property by Strobel to Firdaus Mohammed Ali was fraudulent.

33. In reaching the decision that the series of transfers of the property from Strobel to Firdaus Mohammed Ali and then onto the Chargor who charged it to the bank were irregular, the learned Judge appears to have proceeded on the basis that he was resolving a dispute between the respondent and her estranged “*husband*”. In that regard, the Judge expressed:

***“...it is apparent to me that the defendant had been residing in the suit property for some time with the full knowledge of Strobel who was previously the registered owner of the suit property. It is apparent that following their differences, the defendant and the said Strobel at one time or other fought over the ownership and occupation of the suit property.”***

34. The Judge then alluded to a suit instituted by the respondent against the said Strobel, being Malindi CMCC No. 217 of 2011 and to Malindi High Court Civil Suit No. 8 of 2012(OS) instituted by the respondent against the Chargor and the Bank before concluding that as long as those suits were pending, it would be unjust to allow the appellant’s suit. That in our respectful view was a misdirection by the Judge. The matter the Judge was called upon to determine was whether the respondent had established, to the required standard, that the appellant’s title was impeachable by reason of fraud. The Judge was not dealing with an interim application for preservation of the suit property pending resolution of the suits to which he referred. In our view, the allegations of fraud made by the respondent remained mere allegations that were not proved.

35. As regards the allegations of fraud against the Bank, it is noteworthy that it is the respondent that made the claims. It was therefore incumbent upon the respondent as the party making the claims against the Bank to join the Bank in the suit. The only relief the appellant sought in his suit, as the registered proprietor of the property, was for the ejection of the respondent from the property. The adverse observation by the Judge that the appellant “*chose not to enjoin the Bank in seeking orders of vacant possession*” is therefore not clear.

36. In conclusion, based on our evaluation and appraisal of the evidence presented before the trial court, the respondent did not discharge her burden of proof to establish that the acquisition of the property by the appellant was fraudulent so as to justify the nullification of the same.

37. There is another reason that this appeal should succeed. The sale of the property by the Bank to the appellant was in exercise of the Bank’s statutory power of sale. It was not incumbent upon the appellant to go seeking out all persons who at one time or other had previously been registered owners of the property before making a bid at the auction. As held by the Court in *Captain Patrick Kanyagia & another vs. Damaris Wangechi & 2 others* (above) an intending purchaser at an auction is not under an obligation to inquire into the rights of the chargee to sell.

38. Furthermore, under Section 99(4) of the Land Act, the remedy for any person prejudiced by an unauthorized, improper and irregular exercise of the power of sale lies in an award in damages. See *Krobought Grant vs. Kenya Commercial Finance Co Ltd & 2 others, Civil Appeal No. 227 of 1995*.

39. Having established that he is lawfully registered as the proprietor of the property, the appellant is entitled, as submitted by counsel, to protection under Article 40 of the *Constitution*. As the Supreme Court stated in *Rutongot Farm Ltd. vs. Kenya Forest Service & 3 others [2018] eKLR*, :

***“Once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property.”***

40. In conclusion therefore, the learned Judge erred in nullifying the sale and transfer of the property to the appellant in the absence of any cogent evidence of fraud capable of vitiating the sale and transfer of the property.

41. We accordingly allow the appeal, set aside the judgment of the ELC given on 25<sup>th</sup> May 2018 and substitute therefor judgment in favour of the appellant as prayed in the plaint dated 10<sup>th</sup> October 2014 and filed in the ELC on 14<sup>th</sup> October 2014.

42. The appellant shall have the costs of the proceedings before the ELC and the costs of this appeal.

Orders accordingly.

**Dated and delivered at Malindi this 4<sup>th</sup> day of October, 2019.**

**D.K. MUSINGA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**A.K. MURGOR**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**