



IN THE COURT OF APPEAL

AT MOMBASA

[CORAM: KARANJA, GATEMBU & SICHALE, JJA]

CIVIL APPEAL NO. 48 OF 2018

BETWEEN

PETER KIM BAKER.....1ST APPELLANT

NISHA BALKRISHNA PATEL.....2ND APPELLANT

ASHOK BALKRISHNA PATEL.....3RD APPELLANT

AND

SIDI KATANA BONGO.....1ST RESPONDENT

BAHARI KATANA BONGO.....2ND RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court of Kenya at Malindi (Angote, J) delivered on 12th May, 2017

IN

E&LC No. 82 of 2013

JUDGMENT OF THE COURT

The appellants herein laid claim on two parcels of land namely, **Kilifi/Mtondia/1113** and **Kilifi/Mtondia/1114**, (the suit lands) by institution of a suit against **Sidi Katana Bongo (Sidi)** and **Bahari Katana Bongo (Bahari)** (the then 1st and 2nd defendants and now the 1st and 2nd respondents). In particular, all the 3 appellants laid claim on title Number **Kilifi/Mtondia/1113** whilst the 1st and 3rd appellants laid claim on title number **Kilifi/Mtondia/1114**.

The appellants averred that they are the registered owners of the suit lands, the 1st and 3rd appellants having purchased **Kilifi/Mtondia/1114** from **Kenga Katana Bongo** and **Gaone Katana Bongo** and all the 3 appellants having purchased **Kilifi/Mtondia/1113** from **Katana Bongo Masha** (the deceased).

In a statement of defence and counter-claim, the respondents denied that there was a sale and further averred that **Kenga Katana Bongo** and **Gaone Katana Bongo** (who are sons of the deceased) had no authority to transfer **Kilifi/Mtondia/1114**.

The trial before **Angote, J** commenced on **12th November, 2015** and **Peter Kim Baker**, the 1st appellant relied on his witness statement filed on **24th July, 2015** in which he stated that on **1st September, 2009**, he, together with the 2nd and 3rd appellants entered into a sale/purchase agreement with the deceased in which they bought plot No. **Kilifi/Mtondia/1113** for a sum of **Kshs 7,857,780/=** and obtained title on **21st January, 2010**. Further, that on **15th September, 2010**, he, together with the 3rd appellant entered into a sale/purchase agreement with **Gaone Katana Bongo** and **Kenga Katana Bongo** for sale/purchase of **Kilifi/Mtondia/1114** for a sum of **Kshs 6,000,000/=**. They obtained title on **5th May, 2011**.

Then there was P.W.2 **Joseph Katana Nzaro**, an estate agent. His evidence was that on or about the year 2009, the deceased asked him to sell plot No. **Kilifi/Mtondia/1113**. He testified that he later obtained instructions from **Kenga Katana Bongo and Gaone Katana Bongo** for sale of **Kilifi/Mtondia/1114**. In brief, he is the one who identified the purchasers of the two suit lands, the appellants herein. He is also on record as having stated that towards the end of the year 2009, he attended the deceased's burial.

In the respondents' defence, **Bahari** testified as D.W.1. It was his evidence that his father (the deceased) had land measuring 13 acres, out of which one acre was sold to one **Saidi Hamisi Mohamed (Kilifi/Mtondia/1112)**; that the remaining 12 acres was subdivided into two parcels of 6 acres each for each of his two wives, one being the 1st respondent (**Sidi**) and the other being the mother of **Gaone Katana Bongo and Kenga Katana Bongo**. According to him, the deceased died on **22nd June, 2009**, long before the alleged sale/purchase of **Kilifi/Mtondia/1113**.

Samwel Henry Katana Mlewa, a volunteer in a Human Rights organization testified as D.W.2. He came into the matter in a bid to assist the respondents. He told the trial court that the deceased had two wives, **Jumwa Katana Bongo and Sidi**.

On her part, **Sidi** who testified as D.W.3 told the trial court that she was the 3rd wife of the deceased and that she together with her children live on parcel No. **Kilifi/Mtondia/1114**. According to **Bahari** and **Sidi**, the two respondents, **Kenga Katana Bongo and Gaone Katana Bongo** are children of the deceased's 1st wife.

In a judgment dated **12th May, 2017**, **Angote, J** made the following findings:

“Considering that the plaintiffs knew or ought to have known before purchasing plot number 1114 that the defendants were living on the suit land and that the land initially belonged to Mzee Masha, they should have made further inquiries before entering into an agreement with the two vendors. The plaintiffs cannot therefore be said to be innocent purchasers for value without notice.

The totality of the evidence that was presented before the court shows that plot number 1114 was fraudulently transferred in favour of Kenga Katana bongo and Gaone Katana, who are the step sons of the 1st defendant. The two sons of Mzee Masha then transferred the said

land to the plaintiffs, who knew or ought to have known, that the said land had been acquired by the two sons fraudulently.

“For those reasons, I find that the two plots that is Kilifi/Mtondia/1113 and Kilifi/Mtondia/1114 were fraudulently transferred to the plaintiffs.

In the circumstances, I dismiss the plaintiff's suit and allow the defendants' counter-claim as follows:

(a) A permanent injunction be and is hereby issued restraining the plaintiffs, their servants, employees, agents or anybody acting through them from interfering with the defendants' occupation of parcels of land known as Kilifi/Mtondia/1113 and Kilifi/Mtondia/1114.

(b) An order be and is hereby issued to the Kilifi Land Registrar to cancel the Title Deeds that were issued to the plaintiffs in respect of parcels of land known as Kilifi/Mtondia/1113 and Kilifi/Mtondia/1114 and replace them with the names of Katana Bongo Masha (deceased).

(c) An order be and is hereby issued to the Kilifi Land Registrar to rectify the register by cancelling the entries transferring the suit properties to the plaintiffs.

(d) The plaintiffs to pay the costs of the suit and the counter-claim.”

Aggrieved with the decision of the learned Judge, the appellants moved to this Court and in a Memorandum of Appeal filed in this Court's Registry on **9th April, 2018** listed seven (7) grounds faulting the Judge for:

(i) failing to appreciate that the appellants were innocent purchasers for value who had no knowledge whatsoever of any alleged fraud;

(ii) failing to determine the issue of the purchase price paid by the appellants to the registered owners of the two properties and which proceeds of sale the respondents had partly benefitted from;

(iii) failing to appreciate that the vendors in both Plots were the registered owners at the time and were represented by counsel who executed and attested the sale agreement and transfer thereof as well as the disbursements of the proceeds of sale and no complaint has been made against the said counsel;

(iv) making drastic orders in relation to Plot No. **Kilifi/Mtondia/1114** when the vendors thereof had not been enjoined in a Counter-

Claim and had not been heard as to the manner in which they acquired the property prior to the disposal thereof to the appellants;

(v) entertaining the Counter-Claim as relates to the title to Plot No. **Kilifi/Mtondia/1113** when the respondents had no *locus standi* as they were not the Legal Representative to the Estate of the late Katana Bongo Masha;

(vi) failing to consider the evidence on record and further for failing to appreciate that the burden of proof lay squarely on the respondents in proving their Counter-Claim.

In their written submissions filed on **28th June, 2018**, it was contended that a written statement filed by the 1st appellant showed that the appellants purchased the Plot No. **Kilifi/Mtondia/1113** from the registered owners, that is **Katana Bongo Masha** through a Sale Agreement dated **1st September, 2009** for a consideration of Kshs 7,857,780.00; that as regards Plot No. **Kilifi/1114**, this was purchased from **Kenga Katana Bongo** and **Gaone Katana Bongo** (the deceased's two sons) for a consideration of Kshs 6,000,000.00 and that the vendors rightfully owned the parcel of land as a share allotted to them by their late father; that upon registration of the transfer in the names of the two, a title deed was issued; that there was sufficient evidence to show that the documents used for the purchase and transfer of titles to the appellants were lawfully acquired; and that there were no registered impediments hindering the vendors' right to the transaction of the suit properties. They relied on this Court's decision of **Sophie Wanjiku John vrs. Jane Mwhaki Kimani [2013] eKLR** where it was held:

“To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also to lay a basis by way of evidence, upon which the Court would make a finding”.

It was contended that in this case, the appellants were in possession of Plot No. **Kilifi/Mtondia/1113** and were at all material times not in any way privy to any fraudulent acts in relation to the purchase of the suit properties. The appellants reiterated that having lawfully acquired the suit properties and having taken possession of the same, they had undertaken substantial developments thereon of which they are bound to suffer drastic loss in the event that the titles are cancelled and rectified. It was further contended that the respondents were in temporary occupation of **Plot No. Kilifi/Mtondia/1114** and the respondents had executed a deed to vacate the said plot upon receiving payments from the vendors of the suit property. The appellants faulted the trial court for failure to uphold that the appellants had lawfully acquired title to the suit properties.

On the issue of *locus standi*, the appellants submitted that since the respondents had not applied for or acquired letters of administration in respect of the estate of the deceased, they had no *locus standi* to challenge the transactions relating to Plot No. **Kilifi/Mtondia/1113** or sustain a Counter-Claim.

They cited Section 82(a) of the Law of Succession Act which provides:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers:

“

(a) To enforce, by suit or otherwise all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

The appellants submitted that for one to have authority and *locus standi* to represent and /or bring a suit on behalf of the estate of a deceased, they must have obtained letters of administration. They referred the Court to the Court of Appeal decision in **Rajesh Pranjivan Chudasam vs. Sailesh Pranjivan Chudasama [2014] eKLR** where it was held:

“It therefore matters not that the respondent had a cause of action. Indeed the issue was not whether he had a cause of action or not but that he lacked the requisite locus standi to seek relief from the Court with first obtaining letters of administration.”

The appellants therefore submitted that the respondents were not properly in Court as they lacked the *locus standi* to sustain a suit in respect to the estate of the late **Mzee Katana Masha Bongo** and urged the Court to allow the appeal with costs and to dismiss the respondents' Counter-Claim with costs to the appellants.

The appeal came before us for plenary hearing on **27th May, 2019**, **Mr. Nyongesa Wafula**, learned counsel for the appellants highlighted the appellants' submissions filed on **28th June, 2018**. He also relied on the list of authorities filed on **4th July, 2018**. Counsel reiterated that the two suit lands were purchased in a span of one year; that **Kilifi/Mtondia/1113** was purchased from the deceased vide an agreement dated **1st September, 2009**; that the deceased attended the Land Control Board, who gave its consent on **3rd September, 2009**; that P.W.2 confirmed that he attended the deceased's burial towards the end of 2009 and hence the death certificate dated **4th April, 2011** indicating the date of death as **23rd June, 2009** was suspect; that the appellants upon purchase took possession of the suit lands and established a quarry

business which they operated for two (2) years prior to the court action.

As for plot No. **Kilifi/Mtondia/1114**, Counsel contended that this was purchased from **Kenga Katana Bongo** and **Gaone Katana Bongo** who had title issued in their names and hence the duo had every right to enter into the sale/purchase agreement of **15th September, 2010** with the 1st and 3rd appellant. Further, that the 2nd respondent agreed to move out of parcel No. **Kilifi/Mtondia/1114** upon the payment of **Kshs 900,000/=**. The appellants asserted that they were bona fide purchasers for value. It was also the appellants' position that the two respondents had no *locus standi* as they had no authority to act on behalf of the deceased before obtaining letters of administration.

In opposing the appeal, **Mr. Muchiri**, learned counsel for the respondents relied on the respondents' submission filed on **7th September, 2018**. It was counsel's submissions that the sale/purchase of the suit lands and the subsequent transfers were tainted with illegality; that the death certificate No. **028001** issued on **4th April, 2011** attested to the date of death of the deceased as **23rd June, 2009**; that subsequently, the death of the deceased was registered on **30th June, 2009** and certificate issued on **4th April, 2011**); and, finally that the two brothers (**Kenga Katana Bongo and Gaone Katana Bongo**) had no capacity to sell land that belonged to their late father without having obtained letters of administration in respect of the estate of their late father.

We have carefully considered the record, the rival submissions of the parties, the authorities cited and the law.

As this is a first appeal, we are enjoined by law to re-evaluate the evidence relied on by the trial court and arrive at our own independent conclusion. In so doing however, we should never lose sight that unlike the trial court, we did not have the benefit of seeing or hearing the witnesses. In *Selle vs. Association of Motor Boat Co. of Kenya & others [1968] EA 123* it was stated:

“I) an appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of a 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 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 the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs- Ali Mohamed Sholan (1955)22 EACA 270”.

Therefore, we would be hesitant to reverse the decision of the trial Judge on findings of facts. We will only do so if, first, it appears that the Judge failed to take into account particular circumstances or probabilities material for the evaluation of the evidence, or secondly, that the Judge's impression based on the demeanour of a material witness was inconsistent with the evidence in the case generally; or thirdly, the finding is based on no evidence, or the Judge is shown demonstrably to have acted on wrong principle(s).

For a start, it is common ground that the suit lands were properties of the deceased. It is also not in contention that **Sidi** and **Bahari** were wife and son of the deceased respectively. **Kenga Katana Bongo** and **Gaone Katana Bongo** were also deceased's sons being sons of the deceased's first wife. It is also not denied that **Sidi** and her children lived on one of the suit lands, namely, **Kilifi/Mtondia/1114**. From the record, title number **Kilifi/Mtondia/1113** was issued to the deceased (whose **ID Number** was [.....]) on **13th March, 2009**.

On **21st January, 2010**, this title was transferred to the three appellants vide a transfer dated **19th December, 2009** on the basis of an agreement allegedly dated **1st September, 2009**. The application to the Land Control Board was allegedly signed /thumb printed on **6th August, 2009** by the deceased and the Land Control Board consent obtained on **3rd September, 2009**. On the transfer document, there is a thumb print allegedly made by the deceased and witnessed by **K. N. Waweru Advocate**. It is noteworthy that this Advocate was not called as a witness to rebut the evidence that as at **19th December, 2009** when he issued the certificate attesting to the deceased's thumb print, the deceased was no longer alive.

Title number **Kilifi/Mtondia/1114**, was similarly issued to the deceased on **13th March, 2009**. It is alleged that vide an instrument bearing a thumb print, the deceased transferred this parcel to **Kenga Katana Bongo** and **Gaone Katana Bongo** in consideration of **Kshs 300,000.00** This transfer is alleged to have been registered on **15th June, 2009**. It is on this basis that **Kenga Katana Bongo** and **Gaone Katana Bongo** became the registered owners of **Kilifi/Mtondia/1114**. The learned judge summed up the position as follows:

“The totality of the evidence that was presented before the court shows that plot number 1114 was fraudulently transferred in favour of Kenga Katana Bongo and Gaone Katana, who are the step sons of the 1st Defendant. The two sons of Mzee Masha

then transferred the said land to the plaintiffs, who knew or ought to have known, that the said land had been acquired by the two sons fraudulently. For those reasons, I find that the two plots that is Kilifi/Mtondia/1113 and Kilifi/Mtondia/1114 were fraudulently transferred to the plaintiffs”.

Clearly, the two parcels of land belonged to the deceased who had at least two (or 3 wives) – as **Sidi** said she was a 3rd wife. Although it was alleged that the deceased transferred plot No. **Kilifi/Mtondia/1113**, this was long after he had died.

The death certificate showed that the deceased died on **23rd June 2009** and the registration of his death was made on **30th June, 2009** and a certificate of death issued on **4th April, 2011**. Having died on **23rd June 2009**, the deceased could not possibly have been present on **1st September, 2009** to execute the sale agreement, he was also not there to thumb-print the application to the Land Control Board dated **6th August, 2009** neither did he attend the Land Control Board meeting on **3rd September, 2009** nor execute the transfer witnessed by **Waweru Advocate** on **19th December, 2009**. He could not have done these from the grave. It is for these reasons that we find that the purported sale of **Kilifi/Mtondia/1113** by the deceased was fraudulent.

As for plot No. **Kilifi/Mtondia/1114**, it was alleged that the 1st and 3rd appellants purchased it vide an agreement dated **15th September, 2010** from **Kenga Katana Bongo** and **Gaone Katana Bongo**. It is common ground that the two are the deceased’s children from his 1st wife. As stated above, this parcel is alleged to have been transferred to the two brothers on **15th June, 2009** for a paltry sum of Kshs 300,000.00 as indicated on the purported letter of consent dated **19th March, 2010**. However, the undated application to the Land Control Board indicates the estimated value as Kshs 3,000,000.00 and that the land was given to the two by way of a gift. If this be the case, the land control Board consent should not have indicated that Kshs 300,000.00 was the “*consideration*” between the deceased and **Kenga Katana Bongo** and his brother **Gaone Katana Bongo**. It is this same parcel of land that the 1st and 3rd appellants allegedly purchased from the duo vide an agreement of **15th September, 2010** for a sum of Kshs 6,000,000.00 Several issues arise. **Sidi** and her children live on this parcel of land. **Kenga Katana Bongo** and **Gaone Katana Bongo** are from the deceased’s 1st wife and there is evidence that the 1st wife’s house lived on **Kilifi/Mtondia/1113** and not **Kilifi/Mtondia/1114**.

Indeed, an attempt was made to pay **Sidi** money so as to move out of **Kilifi/Mtondia/1114**. There is an agreement dated **12th July, 2011** allegedly by **Kenga Katana Bongo** and **Gaone Katana Bongo** on the one part and **Katana Sidi Bongo**, who it referred therein as “*tenant*”. She was to be paid Kshs 500,000.00 so as to move out of the “... *property within 21 days*”. This agreement is “*signed by the owners*” (**Kenga Katana Bongo** and **Gaone Katana Bongo**) and it is thumb-printed by the “*tenants*”. There is also an agreement dated **25th July, 2011** made before the Assistant Chief, Kilifi between **Kenga Katana Bongo** and **Gaone Katana Bongo** who were to pay Kshs 900,000.00 to **Sidi**. The agreement is referenced “*MAPATANO BAINA YA KENGA KATANA BONGO NA MAMAKE MDOGO, SIDI CHANZERA*”. Admittedly, **Sidi** was the deceased’s wife and she resided on parcel No. **Kilifi/Mtondia/1114**. It was therefore wrong for her to be referred by her two step-sons as a “*tenant*”. It is our considered view that the two agreements are proof that **Sidi** & her children lived on parcel known as **Kilifi/Mtondia/1114**. Contrary to what **Kenga Katana Bongo** and **Gaone Katana Bongo** depicted her in the agreement of **12th July, 2011**, **Sidi** was not a “*tenant*” on parcel of land known as **Kilifi/Mtondia/1114**.

Any attempt by **Kenga Katana Bongo** and **Gaone Katana Bongo** to sell land where their step mother (**Sidi**) and her household reside smacks of fraud. In any event, there was no evidence of payment of Kshs 300,000.00 to the deceased by his two sons, **Kenga Katana Bongo** and **Gaone Katana Bongo** and as stated above, the application to the Land Control Board indicated that this was a gift to the two by the deceased. It could not be a gift as this was the land where **Sidi** and the children lived as opposed to parcel No. **Kilifi/Mtondia/1113** where the deceased’s first wife and her children occupied. Again, as shown above, the two parcels of land belonged to the deceased. The position in law is that no person is permitted to deal with property of a deceased person without obtaining grant of letters of administration. Section 45 (1) of the Law of Succession provides:

“45(1) No intermeddling with property of deceased person except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person”.

In this matter **Kenga Katana Bongo** and **Gaone Katana Bongo** sold property belonging to the deceased. They did not have letters of administration and hence had no authority to sell. Any sale and/or transfer was therefore void *ab initio*.

As for the contention that **Sidi** and **Bahari** had no letters of administration and hence could not act on behalf of the deceased, our response is simple. It is the appellants who filed suit against the two on the basis that they occupied **Kilifi/Mtondia/1114**. The appellants cannot now turn round and say that the two have no *locus standi* having been sued by virtue of being in occupation of **Kilifi/Mtondia/1114**, they did not need to have letters of administration to defend their right of occupation.

It is for the foregoing reasons that we find no merit in this appeal. It is hereby dismissed with costs to the respondents.

Dated and delivered at Malindi on this 28th day of November, 2019.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR