



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & M'INOTI, JJ.A.)

CIVIL APPEAL NO. 139 OF 2013

BETWEEN

MOSES LUTOMIA WASHIALI.....APPELLANT

AND

ZEPHANIAH NGAIRA ANGWEYE.....1ST RESPONDENT

KENYA COMMERCIAL BANK LIMITED.....2ND RESPONDENT

(Appeal from the judgment and decree of the High Court  
of Kenya at Nairobi (Ogola, J.) dated 6th February 2013

in

HCCC No. 767 of 2010)

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**JUDGMENT OF THE COURT**

We are yet again confronted by an appeal where the integrity of our land registration system is seriously called into question. As we recently stated in Denis Noel Mukhulo Ochwada & Another v. Elizabeth Murungari Njoroge & Another, CA. No. 293 of 2013:

*“At the centre of Torrens land registration system, on which ours is based, is the basic assumption that meticulous professionals of conscience, absolute honesty and integrity, will superintend over it.”*

(See also Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others [2017] eKLR).

Once again, dishonesty, abuse of trust, complicity, and lack of professionalism and integrity are readily apparent in the dealings with land leading to this appeal. This is how the appeal has landed before this Court.

On or about 22nd September 1995, *the 1<sup>st</sup> respondent, Zephaniah Ngaira Angweye*, purchased the parcel of land known as *LR No. Isukha/Shirere/3643* situate in Kakamega town and measuring in area 0.2 Hectares, (*the suit property*) from the then registered proprietor, *Manasseh Bwosi*, for a consideration of

**Kshs 15,000.00.** On the same date the 1st respondent was duly registered as proprietor under the **Registered Land Act, Cap 300** (repealed). Subsequently the 1st respondent took possession and built a permanent house on the suit property. Because he was then working and residing in the Republic of South Africa, he installed one **Laban Ngaira Mulinya (Malinya)**, a relative of his, into the suit property as its caretaker. It would appear that sooner than later, Malinya, who died in 2008, contrived to transfer the suit property into his own name and to sell it off to a third party. Towards that end he managed, on 23rd September 2002, to transfer the suit property to himself as purchaser from the 1st respondent for a sum of **Kshs 40,000.000.** This transfer was somehow irregularly effected without production or surrender of the original documents of title to the suit property, which were still in the 1st respondent's possession and custody.

Sometime in 2006, Malinya agreed to sell the suit property to one **Chrispinus Ingoi Simwa (Simwa)** for **Kshs. 500,000.00**, which he duly received. That transaction however fell through, apparently because of Malinya's inability to produce the original documents of title for the suit property. Accordingly on 15th July 2006, Simwa placed a caution on the suit property claiming a purchaser's interest, and only removed the same after **the appellant, Moses Lutomia Washiali**, refunded to him Kshs. 500,000.00.

Thereafter the way was clear for Malinya to enter into a transaction to sell the suit property to the appellant. On or about 2nd December 2006 the two entered into an agreement by which the appellant agreed to purchase the suit property for **Kshs 2,200,000.00.** Although **M/s Shitsama & Company Advocates** purportedly drew the agreement for sale, it is common ground that a **Mr. Macdonald Thachi**, a clerk in that law firm, attested it. Subsequently the suit property was registered in the name of the appellant on 26th February 2006 and he immediately charged the same in favour of **the 2nd respondent, Kenya Commercial Bank Limited** to secure a facility of **Kshs 2,100,000.000.**

It is also common ground that before the appellant proceeded with the transaction he was twice informed expressly that there were questions around Malinya's alleged title to the suit property. The first time was on 21st December 2006 when Simwa's advocates, **M/s Khasoa Company Advocates**, wrote to the appellant informing him that Malinya was unable to complete the transaction with Simwa and that the caution they had placed on the title would only be removed if the appellant refunded the Kshs 500,000.00 already paid by Simwa to Malinya. The second time, the appellant was informed by **Velma Khevali Mutali**, the 1st respondent's wife, that the transaction was fraudulent and that Malinya did not have any lawful interest in the suit property that he could sell and transfer to him. On the basis of that information, the appellant advised the 2nd respondent to withhold payment to Malinya, but after three days, he allowed the transaction to proceed and payment to be made to Malinya.

After the transaction between Malinya and the appellant, Velma filed in the High Court at Kakamega, **Civil Suit No. 39 of 2007**, against the appellant, Malinya and 3 others. She withdrew that suit on 20th July 2010 and on 15th November 2010 the appellant filed in the High Court at Nairobi, against the appellant and the 2nd respondent, the suit that gave rise to this appeal. He pleaded that he was the lawfully registered proprietor of the suit property and that the sale between Malinya and the appellant was fraudulent, null and void. He accordingly prayed for, among others, a declaration to that effect, and an order for cancellation of the appellant's title.

In his defence filed on 16th December 2010, the appellant maintained that the transaction was lawful and above board. He denied the fraud pleaded by the 1st respondent and averred that he had acquired an indefeasible title to the suit property. The 2nd respondent, who we are advised was duly paid the money advanced to the appellant on the security of the suit property, took no active part in the proceedings in the High Court and none at all before this Court.

**Ogola, J.** heard a total of five witnesses called by the parties and by a judgment dated 6th February 2013, entered judgment for the 1st respondent as prayed, after finding that the appellant had failed to conduct due diligence before purchasing the suit property from Malinya. It is that judgment that the appellant impugns in this appeal. His learned counsel, **Mr. Wabuyabo**, challenged the judgment of the High Court on four broad grounds, contending that the learned judge erred by failing to hold that the appellant was an innocent purchaser for value without notice of fraud; by holding that the appellant had not conducted due

diligence prior to purchasing the suit property; by selectively relying on maxims of equity; and by relying on immaterial procedural defects in the transaction.

On whether the appellant was a *bona fide* purchaser for value without notice, it was submitted that prior to purchasing the suit property the appellant conducted a search at the Lands Registry, Kakamega, which showed that Malinya was indeed the registered owner of the suit property. Relying on ***National Bank of Kenya Ltd v. Lawrence Otweyo Gumbo [2006] eKLR***, the appellant contended the certificate of title in the name of Malinya was *prima facie* evidence of the matters shown therein, namely that he was the registered owner of the suit property. He further contended that it was not his business to find out how Malinya ended up as the registered owner of the suit property and submitted that the learned judge had erred by shifting the burden of proof to him when he stated that he should have called the land registrar at the material time to testify on the circumstances under which Malinya was registered as proprietor of the suit property. The appellant also urged us to find that Malinya was the agent of the 1st respondent and that there was collusion between the two in the sale of the suit property because the 1st respondent did not make Malinya a party in the suit. As regards the information given to him before conclusion of the transaction by Velma, to the effect that Malinya did not have a genuine title to the suit property, the appellant's curt response was that calls from strangers could not determine the validity of Malinya's title. It was his further contention that since no fraud had been proved on his part and that the learned judge held as much, there was no basis for cancellation of his title.

On due diligence, the appellant submitted that he had visited the suit property and found that Malinya and his family were in occupation and thereafter he had conducted a search at the land's registry which showed that Malinya was the owner of the suit property. In the circumstances, it was submitted that he had done his best to confirm Malinya's ownership of the suit property and that the fault was with the 1st respondent for retaining Malinya in the suit property whilst he knew he was not an honest person.

Next the appellant submitted that the learned judge erred by holding that the 1st respondent's registration was first in time and that *in equity the first in time should prevail*. In his view the learned judge ignored other pertinent maxims of equity, namely that *equity follows the law* and *equity suffers no wrong without a remedy*. If the learned judge had duly considered the above maxims, it was urged, he could not have found in favour of the 1st respondent.

Lastly the appellant faulted the learned judge for impeaching the transaction on the basis of minor procedural defects such as that no stamp duty was paid on the agreement for sale; that an advocate's clerk attested the agreement for sale; and that Malinya had purchased the suit property for only Kshs. 40,000.00. It was submitted that none of those defects affected the validity of the contract between the appellant and Malinya; that consideration need not be adequate but only sufficient; that stamp duty was duly paid on the transfer; and that there was no legal requirement that an advocate should attest the agreement for sale.

**Dr. Khaminwa**, learned counsel for the respondent opposed the appeal and urged us not to interfere with the conclusion by the learned judge. He submitted that **section 34 (1)(a)** of the **Advocates Act** as explained by the Supreme Court in ***National Bank of Kenya v Anaj Warehouse Ltd [2015] eKLR*** renders a document or instrument of conveyance null and void for all purposes if prepared, executed or attested by unqualified persons, distinct from an advocate who did not hold a practising certificate. In this appeal, it was submitted, the clerk who attested the agreement for sale was an unqualified person and the same was therefore null and void.

Next the 1st respondent submitted that he was registered as proprietor of the suit property years before Malinya's purported registration and that he still had in his possession the original documents of title. In his view, under **sections 27** and **28** of the repealed Registered Land Act, he was the true proprietor of the suit property. He urged us to find, like the court below, that Malinya did not have any title to the suit property that he could validly sell and transfer to the appellant.

Lastly the 1st respondent submitted that there was no due diligence conducted by the appellant because he was expressly notified that Malinya's purported title to the suit property was fraudulent, but he ignored

the notice.

We have anxiously considered the record of appeal, the judgment of the trial court, the submissions by learned counsel and the authorities that they cited. In our estimation this appeal turns on whether, as regards the suit property, the appellant was a *bona fide* purchaser for value without notice and whether his registration as proprietor thereof conferred upon him indefeasible title in the circumstances of this appeal.

It is not in dispute that as at the time the appellant purported to purchase the suit property from Malinya, the latter was reflected in the register as the proprietor. The appellant contends that upon registration as proprietor of the suit property on 26th February 2007 under the repealed Act he obtained an indefeasible title, which cannot be impeach by the 1st respondent. Section 28 of the repealed Act provided as follows:

***“28. The rights of a proprietor, whether acquired on first registration or whether acquired 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...”***  
***(Emphasis added).***

The protection of the registered proprietor’s title guaranteed by the above provision was subject to **section 143** of the same Act, which empowered the registrar to rectify the register in certain circumstances. It is necessary to reproduce that provision, which was in the following terms.

***“143. (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.***

***(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”***

In ***Chemey Investments Ltd v Attorney General & 2 Others, CA No. 349 of 2012***, this Court explained that sanctity of title to land registered under the repealed Act was guaranteed under the above provisions and could not be defeated except on the specific grounds set out therein. Where, however, title to property was obtained fraudulently or illegally in violation of the provisions of the Act, (except a first registration) the same was not sacrosanct, did not enjoy any protection, and the court had power to order rectification of the register. (See also ***Denis Noel Mukhulo Ochwada & Another v. Elizabeth Murungari Njoroge & Another*** (supra).

It is common ground that the appellant’s registration was not a first registration within the meaning of the repealed Act. It follows therefore that the mere fact that the appellant appears in the register as the proprietor of the suit property, will not avail him if it is proved that his registration was obtained by fraud or mistake and that he caused the fraud or mistake or had knowledge of the same, or substantially contributed to it by his act, neglect or default.

The evidence on record shows that after he managed to get the suit property registered in his name, Malinya attempted to sell it to Simwa but was thwarted by the fact that he did not have the original documents of title, which were still, even at the time of trial, in the 1st respondent’s possession. The evidence of the 1st respondent, which the learned judge accepted, was that he never sold and transferred the suit property to Malinya and never authorised him to sell it to any other person. It was his further evidence that all along he was in possession of the original documents of title, which he produced in court as exhibits. The Land Registrar, Kakamega, ***Machora Mogare (DW2)*** testified that in the event of sale of a property, the original title is surrendered and a new one issued to the purchaser. Where the documents of title are lost, a gazette notice has to be published and a new title issued. In this case there was no such

gazette notice. DW2 also confirmed that exhibit No.2 that was produced by the 1st respondent was the original document of title issued in his name. In his view, if indeed the 1st respondent had sold the suit property to Malinya, he was obliged to have surrendered the original title that was in his name.

The fact that the 1st respondent had in his custody the original documents of title to the suit property even after he had allegedly sold the suit property to Malinya convinces us that the transfer of the suit property to Malinya was fraudulent. This view is further supported by the fact that the sale of the suit property by Malinya to Simwa aborted due to lack of the original documents of title, which, as we have stated, were still in the custody of the 1st respondent.

The appellant contends that he was a *bona fide* purchaser for value without notice, who conducted due diligence before purchasing the suit property from Malinya. Our impression of the evidence on record does not support that view. That Malinya was the 1st respondent's caretaker on the suit property was confirmed both by the 1st respondent and **Naftali Mulinya Mushosho**, the local Assistant Chief (PW3). But more telling, the letter dated 21st December 2006 addressed to the appellant by Simwa's advocates made him aware that Malinya was unable to sell and transfer the suit property to Simwa due to questions concerning his title thereto. When Simwa testified, he told the court that the transaction between him and Malinya fell through because the latter was unable to produce the original documents of title. The appellant was therefore duly notified that Malinya's purported registration as proprietor of the suit property was shrouded in dispute and uncertainty, but he chose to ignore the information.

As if that was not enough, Velma, the 1st respondent's wife also called the appellant and warned him that Malinya's purported registration, as proprietor of the suit property, was fraudulent. In his evidence in chief, the appellant testified as follows:

***“After a week I received a call from Velma who told me that the property I bought was hers. She informed me she was the owner of the property. I was able to withhold the payment of the money for about 3 days after which our branch in Kakamega released the money to Laban (Malinya).”***

On cross-examination by the 1st respondent's counsel, the appellant stated:

***“When I was told by Velma that the transaction was fraudulent I took steps to stop payment to Laban. At that time (there) was 1.5 million in the account. I could not stop the transaction because I had no reason to go to the police at all. When I was told that a previous intending seller (sic) had backed out, I did not have reason to establish from Khasoa & Company Advocates any detail as to why the sale flopped except what I was told earlier that he had under quoted. Later on I was informed that Mr Zephania Ngaira-the plaintiff herein, was holding another title deed.”***

In these circumstances, the appellant still maintains he is a *bona fide* purchaser for value without notice. ***Black's Law Dictionary, 8th 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.”***

(See also ***Athi Highway Developers Ltd v. West End Butchery Ltd & 6 Others [2015] eKLR*** and ***Katende v. Hardidar & Company Ltd [2008] 2 EA 173***).

We are not persuaded, from the evidence on record, that the appellant was a *bona fide* purchaser for value without notice. He had actual notice of the challenges to Malinya's title but still proceeded with the purported sale. To use the words of this Court in ***Athi Highway Developers Ltd v. West End Butchery Ltd & 6 Others*** (supra), it is a foolhardy rather than a diligent person who purchases land with the alacrity of a potato dealer at Wakulima market.

Our conclusion that the appellant was not a *bona fide* purchaser for value without notice, coupled with his failure to conduct due diligence even after express notification of fundamental question pertaining to Malinya' purported title to the suit property, is adequate to dispose of this appeal in its entirety. Accordingly we do not deem it necessary to delve into the other issues raised by the appellant, because a finding in his favour in those issues cannot salvage his purported title to the suit property, which is irredeemably vitiated by the finding on *bona fides*.

Accordingly we do not find any merit in this appeal and the same is dismissed with costs to the 1st respondent. It is so ordered.

**Dated and delivered at Nairobi this 7th day of May, 2018**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**