



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, KIAGE & MURGOR, J.J.A)

CIVIL APPEAL NO. 283 OF 2016

BETWEEN

LANGATA DEVELOPMENT COMPANY LTD..... APPELLANT

AND

MARY WAIRIMU DAMES ..... RESPONDENT

*(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Gacheru, J.) dated 12th February, 2016*

in

*ELC No. 1413 of 2007 Formerly HCCC No. 1077 of 2004)*

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JUDGMENT OF THE COURT

This appeal and the dispute that led to it is yet another example of the perfidious nature of human beings and their interactions which go to show that honesty and honour are at times in short supply. It all started as a simple enough transaction: the appellant **Langata Development Company Limited**, a land buying company wanted to buy land for onward sale to its members and the respondent **Mary Wairimu Dames** had just what it needed. She owned a huge chunk of prime land east of Thika Town known as LR No. 7240/2 christened Mary Dale Farm measuring 1062 acres.

The appellant's directors identified the land and visited the respondent's house where it was agreed that the appellant would buy some 672 acres being a portion of the whole at the price of Kshs. 23,500 per acre translating to Kshs. 15,792,000. These terms were duly captured in an Agreement for Sale dated 6th February 1989 executed between the two parties. The agreement contained, *inter alia*, special conditions that;

***“2. The vendor shall cause the sub-division of the portion being sold by her to be surveyed at her own cost and obtain the Deed Plan of such portion and hand it over to her advocate.***

***3. The vendor will obtain all the necessary consents to transfer including the Land Control Board consent to sub-divide and transfer.”***

In furtherance of that subdivision condition the respondent, who was represented by the law firm of Mahida & Khosla Advocates in the transaction, instructed a firm of surveyors, Ms. Harunani & Associates to effect the same. And it is at this stage that confusion was injected into the process whether by accident, ineptitude or mischief, which has led to the protagonists herein being caught up in litigation for some fourteen years. Notwithstanding, that the sale agreement as well as the preceding letters described the acreage of the property subject of the transaction as 672 acres, and notwithstanding further, that the consent of the Land Control Board given on 9th January 1990 for the sale specified the area as 672 acres, the Transfer under the **Registration of Titles Act** prepared and eventually executed by the respondent on 7th August 1992 indicated that the respondent was thereby transferring to the appellant ***“all her right title and interest in and to ALL THAT piece of land situate as aforesaid containing by measurement Three Hundred and Six decimal figure (306.5) Hectares or thereabouts ...”*** The said transfer was duly registered and a certificate of title issued to the appellant on 25th August 1992 for Land Reference No. 7240/23 measuring the said 306.5 hectares.

That transfer to and registration of the appellant as owner of 306.5 hectares is the crux of dispute herein because its acre equivalent is 757.3 and thus exceeded the agreed, paid for and consented to acreage of 672 acres by the not insignificant size of 85.3 acres. The respondent's

case was that she was blissfully unaware of that discrepancy until years later when in 2004 she received a Rates demand from the Municipal Council of Thika which showed the acreage of her remaining land, which she still occupied, to be different from what it ought to have been.

The respondent thereupon instructed the firm of J.K. Ngaruiya & Co. Advocates who wrote to the appellant setting out her grievance that her 85.3 acres had been fraudulently and surreptitiously transferred to the appellant. She demanded that the same be immediately transferred back to her failing which she would file suit. That she did when the demand was not honoured. Her plaint filed on 16th February and later amended on 16<sup>th</sup> February 2011 contended that the 85.3 acres were transferred and registered into the appellant's name fraudulently, illegally and unlawfully and was therefore null and void *ab initio* the particulars whereof stating the land measurements in hectares whilst the sale agreement indicated the measurements in acres; taking advantage of the respondent's education background; causing transfer without the requisite consent of the Land Control Board and without payment of any consideration. The respondent therefore sought judgment for;

***“(a) A declaration that the transfer and registration of 85.3 acres forming a portion of L.R. 7240/23 to the 1st defendant was null and void.***

***(b) An order of re-transfer of 85.3 acres out of land parcel L.R. 7240/23 to the plaintiff.***

***(c) Costs of interest.***

***(d) An order for eviction of the 1st defendant itself/its agents/servants/tenants/employees/members/directors or any other person or entity claiming proprietary rights or any interests whatsoever through it on land parcel L.R. 7240/23.***

***(e) An order for a permanent injunction restraining the 1st defendant itself, its agents/servants/tenants/employees/members/directors/or any other person or entity whatsoever claiming proprietary rights or any other interests whatsoever through the 1st defendant from subdividing/occupying/developing/constructing/selling/alienating/wasting or otherwise dealing with the suit premises namely L.R.7240/23 until this suit is fully heard and determined.***

***(f) An order for the deputy registrar to execute all relevant documents on behalf of the 1st defendant in favour of the plaintiff for transfer on a portion of land measuring approximately 85.3 acres out of L.R. 7240/23 if the 1st defendant fails to do so voluntarily.***

***(g) In the alternative and without prejudice to the above compensation for the 85.3 acres at the prevailing/current market value at the time of the determination of this suit.”***

The appellant's defence first raised a plea of limitation which was subsequently disposed of. It then stated that the suit against it could not lie because by a letter dated 24th February 1994 the respondent discharged it from all further claims directly or indirectly connected with the sale of the suit land. It pleaded that the remedies the respondent sought could not be granted as the suit property had been sub-divided and sold to individual third parties. After denying the allegations and particulars of fraud, the appellant averred tongue in cheek at paragraph 4 as follows;

***“(c) Even if, which is denied the [appellant] committed the alleged fraud, the [respondent] should with reasonable diligence, have discovered the fraud as soon as the transfer was registered in August 1992 because the facts relied on to support the alleged fraud were clearly within her knowledge by then.***

...

***(e) The [appellant] avers that it paid the full purchase price for the land that was sold to it pursuant to the sale agreement.***

***(f) The [appellant] expressly denies that the [respondent] transferred to it any land that it had not paid for and puts the [respondent] to strict proof.”***

Of interest is that the appellant's defence conspicuously omitted any mention of size or acreage of the land in dispute notwithstanding that the suit was precisely about that.

The suit in the High Court eventually proceeded to trial before Gacheru, J. who took the testimony of the respondent; Charles Gathogo (PW2), a land surveyor; and the respondent's son **John Andrew Dames** (PW3). Testifying on behalf of the appellant was its director **Eliud Anthony Kariuki** (DW1) and three other witnesses **Livingstone Kamande Gitau** (DW2) a surveyor; **Kenneth Ng'an'ga Kamau** (DW3), a photographer; and **Jane Wanjiru Waciuri** (DW4), a plot buyer.

We have in keeping with our duty as a first appellate court carefully perused and considered the testimony of those witnesses and scrutinized the documents that were produced with a view to drawing our own inferences of fact and arriving at our own independent conclusions thereon since a first appeal proceeds by way of re-hearing but without the advantage of hearing and observing witness testimony. We would therefore be slow to interfere with the impressions formed and the conclusions arrived at based on the credibility of witnesses we did not see, doing so only if the trial court's finding is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles or perversely in reaching that finding. See **MWANASOKONI vs. KENYA BUS SERVICES LTD [1985] KLR 931.**

In her judgment rendered on 12th February 2016, the learned Judge, though not persuaded that the appellant had been fraudulent,

nevertheless found that there was a mistake or misrepresentation as to acreage and that the appellant was still registered and in possession of some 85.3 acres for which it never paid, that the respondent had not intended to sell; and that the appellant could not keep that land. The court, however, declined to declare the appellant's title null and void and ordered instead, granting the alternative prayer; that it compensates the respondent for the 85.3 acres at the prevailing market rates. The respondent also got the costs.

That determination aggrieved the appellant who challenges it on the grounds that the learned Judge ordered compensation for the respondent, and at market rates at that, yet there was no fraud proved; for blaming the appellant for errors by the respondent's surveyor; and for punishing innocent purchasers for value. The respondent on the other hand filed a cross appeal by which she complained about the learned Judge's failure to hold the appellant's acquisition of 85.3 acres null and void for lack of consideration and Land Control Board consent.

Counsel for the parties filed written submissions which were highlighted before us. For the appellant learned counsel **Mr. A.B. Shah** who led **Mr. Njagi** submitted that the 85.3 acres were no longer available as the same had been sub-divided and it would be inequitable for the respondent to be allowed to enforce rights in the circumstances of the case created by her own surveyor. He cited in aid the decision of Goff J. in **SOCIETE ITALOBELGE POUR LE COMMERCE ET L'INDUSTRIE S.A. vs. PLAM AND VEGETABLE OILS (MALAYSIA) SDN BHD [1982] 1 ALL ER 19**. Counsel then submitted that the claim made and granted for compensation at market rates was a claim for special damages which should have been pleaded and proved but was not, for which proposition he relied on **SIREE vs. CAKE TURKANA EL MOLU LODGES LTD [2000] 2EA 521**, a decision of this Court.

Turning to the cross-appeal, Mr. Shah charged that the learned Judge having absolved the appellant of any fraud, for which there was not *an iota* of evidence, the title it acquired was indefeasible under **section 23** of the Registration of Titles Act (Repealed) and so the claim for re-transfer to the respondent cannot lie and the cross-appeal should be dismissed. He asked us to instead allow the appeal and certify costs for two counsel.

For the respondent, learned counsel **Ms. Gichuhi** indicated that on cross appeal the respondent seeks the prayers in the amended plaint and specifically a declaration that the transfer of 85.3 acres forming part of I.R. 57530 LR 7240/23 was null and void and for an order of its retransfer to the respondent. As there was no dispute that the appellant got more than it bought and paid for, and therefore it cannot keep it. She pointed out that the extra portion of 85.3 acres was clearly distinguishable and separate from the 672 acres that the appellant bought and to which it was connected in the sub-division survey plan by way of an inexplicable brace. She insisted that on the evidence, there was fraud perpetrated by the appellant's advocates who prepared the transfer document, and the respondent's advocates who failed to discover and bring to her attention the discrepancy in acreage. As there was no agreement and no Land Control Board consent for 767 acres, any transfer thereof was fraudulent, null and void, and the learned Judge should have so found.

Counsel urged that it would be unconscionable for the appellant to be allowed to keep the 83.3 acre portion it did not pay for and which is still intact and available for retransfer. She disputed the appellant's contention that it had been sub-divided and transferred to third parties as there were no transfers, certificates, ballot papers or any other documents produced to show that such transfer to members had occurred. Indeed, the respondent resides on the remaining portion of Mary Dale Farm and was aware that the 85.3 acres had not been transferred and had not been occupied by any third parties.

Mr. Shah's brief reply was that the learned Judge properly found that there was sub-division and sale of the suit property and that the respondent was literate enough and had legal representation so that she had no excuse. Her claims lay against her advocates and surveyor, not the appellant.

Having considered those submissions and the authorities cited in light of the judgment and the entire record, it seems to us quite plain that the appellant, who negotiated, contracted and paid for 672 acres from the respondents, nevertheless by strange, inexplicable but definitely very audacious, if not greedy and rapacious, scheme, of which the respondent's advocate and surveyor must have been a part, managed to have transferred to itself an extra 85.3 acres without paying a cent for it. The decision we have to make is simply whether as a court of justice we should allow the respondent to keep that which it obtained under those circumstances, as it urges, or order that portion of land be re-transferred back to the respondent to reverse a null and void conveyance, as she maintains.

The learned Judge in her judgment made a clear finding, that "*Indeed a mistake or representation of the acreage did occur herein.*" She absolved the appellant of the allegations of fraud levelled against it on the basis that the evidence before her did not reach the requisite standard of higher than the ordinary civil one of a balance of probability but lower than the criminal standard of beyond reasonable doubt as enunciated in many cases including **RATILAL GORDSHANBHAI PEATEL vs. LAJI MAWEJI [1957] 314**

which she quoted. The learned Judge properly applied her mind to the law on the subject and we see no reason to depart from that finding, she having had the advantage of receiving *viva voce* evidence.

Whereas the standard of proof with regard to fraud is that much higher, it is noteworthy that under **section 23(1)** of the Registration of Titles Act, (now repealed by Land Registration Act, No. 3 of 2012), a certificate of title is conclusive evidence of ownership and cannot be impeached or defeated save for not just fraud, but also misrepresentation to which the proprietor is proved to be a party as held in numerous decision including **MBOTHU & 8 OTHERS vs. WAIRIMU & 11 OTHERS [1986] KLR 171**. In absolving the appellant of the misrepresentation as well, the learned

Judge reasoned thus;

***"In the instant case, there is no evidence that the defendant herein was involved in fraud as alleged by the plaintiff or any misrepresentation which it knew of or was part of it. It is evident that there was mistake on the recording of the size of land sold to the defendant. However, that mistake or misrepresentation cannot be attached or attributed to the defendant as the conveyance work was done by the parties advocates and the survey work was done by Mr. Harunani, surveyor, who was contracted by the plaintiff herein."***

With respect to the learned Judge, we are unable to accept that the appellant, which was the obvious and direct beneficiary of the convenient misstatement and misrepresentation as to acreage, was blameless. It was submitted before us on behalf of the respondent, and without contest, that the transfer was prepared by the appellant's advocate and then sent to the respondent for execution. That would mean in this case that the appellant's advocates, acting on instructions of and on behalf of the appellant, misstated the size of the land being transferred as 306.5 hectares, which had featured nowhere before. At any rate, there having been evidence that the appellant's directors first visited the land and an agreement was reached as to how much land was being sold, and the respondent's surveyor having sub-divided the land as instructed into four portions one of which was 672 acres as per the sale agreement, its purporting to claim the larger area is unconscionable and untenable. Holding out that the larger portion is what it bought or was entitled to amounts to a direct misrepresentation in the form of false or misleading conduct leading the respondent to believe and act on the basis that the land being transferred was of the same acreage that had been contracted and paid for.

But whether there was misrepresentation or not, the transfer of the contentious 85.3 acres must be declared null and void for a number of other reasons. First, there was no agreement in writing evidencing the sale of that size of land. It is trite that under the Law of Contract Act a disposition of an interest in land not evidenced in writing is ineffectual. Second, it is common ground that the appellant did not offer any consideration for the 85.3 acres. A contract to be enforceable must be backed by consideration and so both at common law and at equity, there could be no basis upon which the appellant could keep land it never paid for. To allow it to do so would be to unjustly enrich the appellant. Finally, the only effective Land Control Board consent applied for and granted related to the contractual area of 672 acres. There was no application made and no consent given for the transfer of 85.3 acres to the appellant. By virtue of **section 6** of the Land Control Act, such a transaction, in this case the transfer and registration of the appellant as the proprietor of the 85.3 acres, is null and void for all purposes. See **WASIKE vs. SWALA [1985] KLR 425**. There was in this case a compelling basis in law for declaring the transfer null and void and we fault the learned Judge for not doing so.

As to the remedy, the learned Judge appears to have accepted that the subject land had been sub-divided yet the appellant, who resided in the vicinity, was quite categorical that the contentious 85.3 acre had not been occupied. The learned Judge expressed herself thus;

***“It is also evident that the defendant has sub-divided the land and it was alleged that it has sold most of this land to different purchasers or third parties. Though the certificate of title is still in the name of the defendant, there was evidence of subdivisions of the land into several small portions. The land is therefore not as it was when the defendant purchased it from the plaintiff.***

***However, it is evident that the defendant is in possession of excess of 85.3 acres, which it never paid for and which the plaintiff had not intended to sell to the defendant. The defendant cannot keep that land without compensating the plaintiff for the same,”***

(Our emphasis)

We think, with respect once more, that in so far as the certificate of title was still in the appellant's name, it was amenable to an order of re-transfer. There was no proper basis laid for the conclusion that there was sub-division of the 85.3 acres, the subject of the dispute, or that there was occupation of the same. But even if there was, the land was clearly the respondent's and the appellant had no basis for getting third parties onto it. If at all it did so, that was in violation of the injunction given in the suit and also contrary to the *lis pendens* principle or doctrine that is meant to maintain the *status quo* thereby preserving property that is the subject matter of a suit until its determination. Any change of status of suit land, be it by transfer or taking of possession while the litigation is pending can only be seen as an attempt to defeat the litigation and is, as was held by this Court in **OGADA vs. MOLLIN [2009]KLR 620**, a nullity that is of no legal effect and must be reversed. Given the position we have taken, it must follow that we do not find the views expressed by the English Commercial Court in the **SOCIETO ITALO-BELGE** case (supra) to be at all persuasive for application in this case as there was nothing to suggest that the respondent had waived her rights. Nor can there be an estoppel against statutory requirements.

We have said enough to show that we see no merit in this appeal and it is accordingly dismissed.

The cross appeal succeeds and we therefore set aside the judgment and the decree in so far as it ordered compensation. We substitute therefor an order that the transfer and registration of the extra 85.3 acres forming a portion of land parcel I.R. 57550 LR 7540/23 to the respondent is null and void and that the said 85.3 acres shall be re-transferred to the respondent forthwith.

The respondent shall have the costs of the appeal and of the cross appeal.

**Dated and delivered at Nairobi this 28th day of September, 2018.**

**W. OUKO**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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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**