



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, M'INOTI & MURGOR, JJA)

CIVIL APPEAL NO. 266 OF 2007

BETWEEN

SUKHDEV SINGH LALY.....APPELLANT

AND

PHILIP OJWANG KAMAU.....1ST RESPONDENT

THE ATTORNEY GENERAL ON

BEHALF OF THE PRINCIPAL

REGISTRAR OF TITLES.....2ND RESPONDENT

SURESH JETHWA & JYOTSANA

SURESH JETHWA.....3RD RESPONDENT

CHARLES ODUOL AKUKA.....4TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

at Nairobi (Lenaola, J.) delivered 11th October 2007)

in Nairobi HC Case No. 1462 of 2002)

JUDGMENT OF THE COURT

In this appeal the appellant, ***Sukhdev Singh Laly***, (*Sukhdev*) seeks to set aside, vary or have vacated an award by the High Court of Kshs 4,250,000, costs of Kshs. 656,000, and an order of cancellation of a title over the property known as L.R. No. 9104/49 (*the suit property*) held by ***Philip Ojwang Kamau*** (*Ojwang*) the 1st respondent, and to have the costs of the suit against him set aside.

The facts of the case are that pursuant to a sale agreement made between them, Ojwang agreed to purchase the suit property from Sukhdev for a sum of Kshs 4,250,000. A transfer dated 22nd March 2002 was subsequently registered with the ***Registrar of Titles, the 2nd respondent*** (*the Registrar*). According to the abstract of the title, the original transferees ***Suresh Jethwa*** and ***Jyotsana Suresh Jethwa, the 3rd respondents*** (*the Jethwas*) were alleged to have transferred the suit property to one, ***Charles Oduol Akuka, the 4th respondent*** (*Akuka*), who transferred it to Sukhdev, who then transferred it to Ojwang.

In the plaint, Ojwang stated that following transfer of the suit property into his name, he moved in to undertake development, but by a letter of 30th July 2002, the Registrar informed him that his ownership of the suit property was disputed, that the Jethwas were claiming to be the true owners, and that the subsequent transfers entered on the register were fraudulent. The letter concluded by demanding that Ojwang hand over the title to the Registrar within a period of sixty (60) days from the date of the letter failing which his title would be cancelled. Ojwang contended that the entries in relation to his ownership of the suit property were legal and done in strict compliance with the procedures of

sale and the law; that if they were forgeries, it was carried out with the active participation of Government officials and therefore his title could not be impeached.

Ojwang sought;

- i) A declaration that he is the rightful owner of the suit property;*
- ii) A declaration that the Jethwa's purported transfer of the suit property was unlawful null and void;*
- iii) A permanent injunction to restrain the Registrar from cancelling his title;*
- iv) And in the alternative an order that Sukhdev refund him the sums paid to him pursuant to the agreement of sale made between them.*

Simultaneously with the filing of the suit, Ojwang filed a chamber summons seeking an order to restrain the Registrar of Titles from cancelling the title to the suit property or deleting his name from the register or transferring the ownership of the suit property to the Jethwas, which order was granted by the court on 11th September, 2002.

On his part, Sukhdev confirmed that he had purchased the suit property from one, Charles Oduol Akuka in August 2001 and on 7th February 2002 a transfer was registered in his favour. He also confirmed that he sold and successfully transferred the suit property to Ojwang for Kshs. 4,250,000. It was only when he received a letter dated 30th July 2002 from the Registrar that he learnt for the first time that the suit property may have been fraudulently transferred. He denied inducing or coercing Ojwang to purchase the suit property or pay the purchase price. He particularly denied the allegations that he fraudulently misrepresented to him that he was the absolute indefeasible title holder of the suit property.

The Jethwas case was that at no time had they sold or transferred the suit property or any part of it to any person or persons. They denied selling it to Akuka, and maintained that Ojwang had not acquired an indefeasible title from Sukhdev by virtue of the sale, transfer and registration of the suit property in Ojwang's name. They further denied that Ojwang was in possession of the suit property, or that he had moved onto it to undertake developments. They contended that it was their advocates, Shah & Shah Advocates' letter of 10th July 2002 to the Chief Land Registrar that prompted the Principal Land Registrar to write the letter of 30th July 2002 where Ojwang was informed that he held a fraudulent title and that they were the rightful title holders of the suit property. They prayed that Ojwang's claim be dismissed with costs.

The Jethwas also filed a counter claim where they alleged that on diverse dates between 2nd July 1993 and 22nd March 2002, Ojwang, Sukhdev, officers of the Ministry of Lands and Settlement and one Charles Oduol Akuka connived to fraudulently dispossess them of the suit property. They set out the particulars of misrepresentation and fraud as being the making, forging and uttering a false document of transfer dated the July 1993 transferring the suit property from the Jethwas to one Akuka (a third party); making, forging and uttering a false document of transfer dated 12th September, 2001 purporting to transfer the suit property from Charles Oduol Akuka to Sukhdev; making, forging and uttering a false document of transfer dated 12th September 2001 purporting to transfer the suit property from Sukhdev to Ojwang, and making forged certificates of title, and forging the Jethwas signatures. They maintained that their title remained the valid title.

The Jethwas prayed for;

- i) a permanent injunction against Ojwang, his servants and agents to restrain them from assigning, claiming, alienating or in any manner interfering with the suit property;*
- ii) a declaration that the Jethwa's are the legitimate owners of the suit property;*
- iii) a declaration that Ojwang's title is invalid; and*
- iv) the costs of the counterclaim together with interest.*

In his defence, the Registrar denied being a party to the fraudulent transactions, and confirmed that he had informed Ojwang and Sukhdev that the Jethwas were the rightful title holders.

In the judgment, the learned judge found that Akuka was not the lawful owner of the suit property as the Jethwas had not transferred it to him. As a consequence, he did not hold any valid title or interest in the suit property to pass onto Sukhdev or Ojwang. In so finding, the learned judge ordered Sukhdev to refund Ojwang the purchase price of Kshs. 4,250,000, and to pay Kshs. 656,000 in costs as set out in the further amended plaint. A permanent injunction was issued against Ojwang, his servants and agents from claiming or alienating the suit property; the Jethwas were declared the rightful owners of the suit property, and Ojwang's title declared to be invalid and cancelled forthwith. Ojwang was ordered to pay the costs of the suit and counterclaim to the Jethwas, while Sukhdev was ordered to pay the costs of the suit to Ojwang.

Sukhdev was aggrieved by the decision of the High Court, and filed this appeal on the grounds that the learned judge's interpretation of his sale agreement with Ojwang was erroneous given that the court had found as a fact that Ojwang had not unlawfully misrepresented to the Registrar that the transfer was unlawfully and fraudulently procured; that the learned judge unjustifiably interpreted the letter dated 30th July 2002, as a true representation of the lawful position despite the existence of the lawfully obtained, land searches and registered transfers of title; that the learned judge failed to appreciate that the transfer by the Jethwas, and the subsequent registration of the transfer by the Registrar

was lawful and above board; that the trial judge made a finding of illegality which was neither pleaded nor proved; that the learned judge misdirected himself when he found that the Jethwas were the rightful owners of the suit property on the basis of the letter of 30th July 2002, and further found that Charles Oduol Akuka had obtained the title through forgery, fraud, misrepresentation and by outright act of theft, whilst at the same time absolving the Registrar from responsibility.

In his view, by absolving the Registrar from blame, the learned judge failed to appreciate the repercussions on persons dealing with land; that furthermore, the Registrar's decision violated **section 5** as read together with **section 18** and **25** of the **Registration of Titles Act** and was a departure from ***Gitwany Investment Limited vs Tajmal Limited HCCC No. 1114 of 2002 (UR)***. It was contended that under **section 24** of the same Act, cancellation is unlawful, and the only remedy available to the Jethwas was in damages; that the learned judge failed to appreciate that Sukhdev was as much a victim as the Jethwas, having lost the entire purchase price as well as stamp duty, advocates fees, search fees, registration fees and incidental expenses which he had paid to Akuka.

Learned counsel for Sukhdev, **Ms. S. Nyang** submitted that the learned judge fell into error when he condemned Sukhdev to pay damages and the costs of the suit, despite finding that the case against him was unclear; that it was not shown that he was responsible for the fraudulent transaction, and there was no question that the land was transferred to him in good faith. Counsel argued that though the Registrar had registered the transfers, the court was wrong to exonerate him from the erroneous registration and the costs and on the basis of a letter recalling the title. It was contended that on this occasion the Registrar was responsible for the wrongdoing, and that the court ought not to have concluded that Sukhdev was liable to pay compensation which responsibility squarely rested with the Registrar.

Ms. Ndundu, learned counsel for the Registrar opposed the appeal and submitted that in the main suit, Sukhdev was the 3rd defendant, and that he had not filed any counterclaim; that no fraud was pleaded or proved; that the transfer had not emanated from the Jethwas. Counsel urged that Sukhdev had purchased the suit property from a third party, and not by way of a transfer signed by the original owner, and that a document examiner had attested to this. It was further submitted that the sale agreement was not signed by an advocate as required by the Law Society Conditions of sale, and that as a consequence, no valid title had come into existence, as the person who allegedly sold the suit property to Sukhdev had no legitimate title to pass on to him.

As to whether the Registrar should be condemned to pay costs, counsel stated that the Registrar could only pay damages if the perpetrator is deceased or could not be found or was insolvent; that in this case the perpetrator was available and could be traced. Counsel asserted that the Registrar's office had received the documents and sought to register them, but, the documents lodged were incapable of selling or transferring the suit property. Counsel concluded that no fraud or misrepresentation was proved against the Registrar.

Ms. Nyang submitted in reply that the title was transferred, but at the same time Sukhdev was found to have been free from fraud, and should not therefore have been held liable to refund the purchase price or to pay costs to Ojwang.

We have considered the grounds of appeal and the written and oral submissions by counsel for the parties. This a first appeal and we are duty bound to re-evaluate the evidence and arrive at our own independent conclusions. – See ***Selle & another vs Associated Motor Boat Co. & Others [1968] EA 123***.

Essentially, Sukhdev's main grievance is that he was a *bona fide* purchaser for value, and as a consequence had acquired a good title which he transferred to Ojwang; that the court ought not to have condemned him to refund the purchase price and pay costs to Ojwang for no valid reasons, whilst at the same time exonerating the Registrar from wrongdoing despite the participation of the Registry in the transactions; and that it should be the Registrar, who registered the transactions, who should be responsible for paying all the damages.

As we see it therefore, the issues for consideration are;

- i) *Whether or not Sukhdev was a bona fide purchaser of the suit property;*
- ii) *Whether the suit property was transferred to Charles Oduol Akuka, Sukhdev and Ojwang, and whether they acquired good title;*
- iii) *Whether the trial court rightly ordered that Sukhdev repay the purchase price to Ojwang and the costs.*

Beginning with whether Sukhdev was a *bona fide* purchaser for value, this is what the learned judge had to say;

“... the title held by the 2nd Defendants over the suit land was unlawfully taken away by Charles Oduol Akuka in acts bordering on criminal fraud...neither Charles Oduol Akuka, the 3rd Defendant nor the Plaintiff had any title worth the paper it is written on. Their title was obtained from the registered proprietors and those who have it cannot expect this court properly addressing its mind to the facts and the law, to uphold those acts of fraud whether committed with intent or inherited innocently by another party.”

In the case of ***Samuel Kamere vs Land Registrar Kajiado, Nairobi Civil Appeal No. 28 Of 2005***, this Court addressing a similar issue concerning competing titles stated thus;

“It is evident that there are two competing claims over the suit property, and we have said that the plaintiff's proprietary interest is already established. Since the appellant's title is under challenge, in order to be considered a bona fide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”

In view of the above, we must reevaluate the evidence to ascertain whether Sukhdev was a *bona fide* purchaser for value as alleged.

To do so, it will be necessary to trace the antecedents of the title. It is not in dispute that the suit property was initially registered in the name of the Jethwas. It was their case that they acquired it on 22nd July 1988. A sale agreement, a transfer between them and Whispers Estate Development Limited and title deed evidenced this transaction. The Jethwas testified that they had been paying land rates over the years and produced City Council receipts in support of the payments. They stated that they did not know or sell the suit property to one Charles Oduol Akuka, and did not receive the sum of Kshs. 950,000 as the purchase price for the suit property from him. They further stated that the signatures appearing on the transfer did not belong to them and that they were forgeries. In a nutshell, it was contended that the alleged sale of the suit property to him was a fraudulent sham.

Section 23 (1) of the Registration of Titles Act provides;

“The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as a proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrance, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

What is clear from the evidence is that, before the purported sale of the suit property to Akuka, the Jethwas were the registered proprietors of the suit property, and held an absolute and indefeasible title. Having denied selling the suit property to the said Akuka, it became incumbent upon Akuka, to demonstrate that he indeed purchased it from them and as a consequence, he became the *bona fide* purchaser for value of the suit property, having acquired a valid title.

Though he was joined as a third party to the suit, Akuka did not enter appearance, nor did he testify or produce any documents proving his ownership of the suit property, leading the learned judge to conclude that;

“...it cannot take a genius to simply conclude that Charles Oduol Akuka obtained title to the suit land fraudulently. The evidence against the authenticity of the title he acquired is overwhelming because whereas the transfer to him was executed by persons other than the 2nd Defendants, the document was prepared by a person who is not an advocate or a person authorized to attest to documents of transfer of title under Section 58 of the Registration of Titles Act, Cap 281.”

In light of the evidence on record which showed that Akuka had fraudulently transferred the suit property from the Jethwas to his name, the mere registration of the suit property in his name and the issuance to him of a certificate of title under *section 23(1)2* the Registration of Titles Act did not confer on him an indefeasible title to the suite property.

Sukhdev's case was that he purchased the suit property from Akuka. He claimed that he met Akuka when the latter came to his shop on Market Street and took him to see the suit property together with one Peter Njagi, the agent. Sukhdev then engaged an advocate to act for him in the sale and transfer of the suit property. He produced a copy of a search dated 8th August 2001, a sale agreement dated 9th August 2001 and a copy of Akuka's identity card. He added that he then paid Akuka a deposit of 10%, that is, Kshs. 200,000 as the sale price was Kshs. 2,000,000. He also produced a transfer dated 8th September 2001 that was affixed with stamp duty stamps of 4000 pounds and registered on the same day.

On cross examination, he stated that he paid the rates, but he did not have the receipts. He claimed that his title was genuine, and that neither the Jethwas' signatures nor the title document was forged. But when asked whether he was able to prove that he had paid Akuka for the suit property, he stated that the documents were burnt with his shop, and that he did not have any receipts evidencing payment to Akuka. Sukhdev also indicated that Akuka applied for and obtained the consent to transfer, but like the other documents, he did not produce it, or remember in whose name the consent to transfer was made.

Based on this evidence, the question that arises at this stage is whether Akuka transferred a valid title to Sukhdev. On this issue the learned judge had this to say;

“Once the title obtained by Charles Oduol Akuka is faulted and I have, then he had nothing to pass on to the 3rd Defendant who also had nothing to pass on to the Plaintiff. Parties must, painfully perhaps, accept the fact that the title held by the 2nd Defendants is still the only valid title regarding the suit property.”

In the case of *Munyū Maina vs Hiram Gathiha Maina, Civil Appeal Number 239 of 2009*, this Court stated;

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (emphasis ours)

The answer to whether Sukhdev acquired a good title from Akuka, or whether the transfers between Charles Oduol Akuka and Sukhdev, and from Sukhdev to Ojwang were invalid and illegal, is to be found in the evidence of *Rosina Ndila Mule*, the Senior Deputy Registrar of Titles who testified on behalf of the Registrar. She stated that;

“Exh. D 1 I am shown the transfer dated 2.7.1993 to Charles Oduol Akuka and an entry thereof. It was never registered in our

offices. Exh. f- there are no entries in regard to the transfer above. I detect irregularities in the issuance of the titles and Exh 1 is not an authentic title. The transfers in Exh.1 are invalid and illegal.”

The Registrar explained;

“I am referred to a letter dated 3.7. 2002 (sic)- Pexh 13. The complaint in that letter was that the title held by Philip Ojwang Kamau had no root and was a forgery. In paragraph 14 of that letter, he was required to hand over the title for cancellation within 60 days. This was necessary to forestall future transactions on it. It was also meant that it would be expunged from our records. It meant that this was in our records as it was sneaked in though Entry No. 2 to Charles Oduol Akuka and then after entries were made and then other entries were made after it. The genuine title was then removed and the fake title then substituted with it.”

According to the Registrar, the transfer to Akuka was declared to be a forgery because it was based on an irregular and unlawful transfer and an invalid title, since the genuine abstract of the Jethwas title was removed from the Registry and replaced by a forged one bearing the irregular transfer to Akuka. It is this title that was used to transfer the suit property to Sukhdev and Ojwang. The Registrar further explained;

“We have no records of Charles Oduol Akuka being the proprietor of the suit property and therefore he cannot pass any right to anyone”.

Since Ojwang’s title was unknown to the Registrar of Titles, because no valid documents existed to support the transfers or the endorsements to Akuka, his title was discredited, as were the ensuing transfers to Sukhdev or Ojwang. This lends credence to the assertion that since no root of their title was established, they were rendered invalid. Akuka’s title was empty and devoid of substance or foundation. It was defective, invalid and incapable of conveying any rights to a third party. And it mattered not that it mysteriously found its way into the registry. Without such rights attached to it, it was nothing but a worthless piece of paper. So that the Jethwas, not having executed a transfer in favour of Charles Oduol Akuka or any other persons, it could not be said that they passed on their proprietorship or the interests that had vested in them in the suit property to Sukhdev, or to Ojwang, who in turn, did not acquire any rights or interest in the suit property.

It was stated in the case of *Macfoy vs United Africa Co. Ltd (1961) 3 All ER, 1169* that;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

In this case, Ojwang’s certificate of title having been found to be invalid, illegal, null and void, we find that the learned judge, rightfully cancelled it, and properly declared the Jethwas to be the legal and valid titleholders of the suit property.

Having so found, Sukhdev’s further complaint was that the learned judge was wrong to order him to refund the purchase price of Kshs. 4,250,000 to Ojwang, together with costs incurred in transferring the suit property amounting to Kshs. 656,000, the argument being that responsibility to refund the sums rested with the Registrar for wrongly registering the transfers and misleading the parties.

In ordering Sukhdev to refund the sums paid to him, the learned judge stated;

“Regarding prayer (d) of the Plaint, clearly the 3rd Defendant obtained Kshs. 4.25 million from the Plaintiff in a transaction steeped in illegality and whether or not the 3rd Defendant did so with knowledge of the fraud cannot matter. At paragraph 5 (ix) of the Agreement for sale between the parties, the property was sold free from any encumbrances, clogs or fetters. We now know that all those things existed in respect of the suit property and being the party that unlawfully benefited from an unlawful transaction, the 3rd Defendant is responsible to the Plaintiff for the whole purchase price paid. To do otherwise would be telling the 3rd Defendant that he can have everything from an illegality and the Plaintiff should suffer loss of the money and the land...”

In addressing this issue, it is necessary to take cognizance of the sale agreement dated 6th March 2002 between Sukhdev and Ojwang on the purported sale of the suit property to Ojwang. Ojwang’s evidence is that upon signing the sale agreement, he paid Sukhdev the full purchase price of Kshs 4,250,000, following which the suit property was purportedly registered in his name.

Then came the letter of 30th July 2001 from the Registrar of Titles, which disputed his title and informed him that he had been defrauded by conmen, and that the Jethwas were the lawfully registered owners of the suit property.

Following that notification, Ojwang informed Sukhdev of the fake title, but the latter denied any knowledge of the fraudulent transfer prompting Ojwang’s suit against him seeking a refund the purchase price and the costs, or an order for the Registrar to refund the purchase price of the suit property together with costs, or in the alternative, an injunction to restrain him from disposing of the suit property.

Sukhdev on the other hand denied any wrongdoing in respect of the transaction, or any responsibility for the loss occasioned by Ojwang on account of the fraudulent transaction.

Under the Special Conditions of the Sale Agreement, at clause (ii), it was provided that;

“The Vendor’s Advocates shall deliver to the Advocates for the Purchaser the following documents;

- a) A duly signed transfer in respect of the property in favour of the Purchaser or his nominee(s);***
- b) A valid clearance certificate;***
- c) All necessary consents for the transfer;***
- d) A stamp duty valuation form duly completed;***
- e) The original documents of title including the title deed.***

(emphasis ours)

It was a clear term of their agreement that the vendor was to provide the original documents of title including the title deed. Therefore Sukhdev was required to deliver to Ojwang valid original title documents in return for the purchase price. As it transpired, not only were the documents forgeries, they later proved to have been incapable of passing any proprietary interest in the suit property to Ojwang, with the result that the transaction failed to culminate in a legitimate transfer of the suit property.

So that, contrary to the terms of the sale agreement, Sukhdev failed to fulfill his part of the contract, which failure resulted in the recession of the agreement, and an obligation to refund the purchase price. Consequently, for as long as he was unable to fulfill the terms of the agreement with Ojwang, like the learned judge, we find that Sukhdev was obliged to refund the money Ojwang had paid to him.

At this juncture we think it necessary to restate the learned judge’s observations in distinguishing the circumstances of this case from the case of ***Gitwany Investment Limited vs Tajmal Limited HCCC No. 1114 of 2002 (UR)*** relied on by Sukhdev. The judge explained;

“In that case the Commissioner of Lands in spite of prodding by the court refused to address the anomaly of two titles issued regarding the same property and put up a shallow defence and conducted its case in a most laissez-faire manner and in the end suffered the consequences of its apathy. This is not the case here because upon being alerted of the fraud, the Principal Registrar of Titles recalled the Plaintiff’s (Ojwang’s) title for cancellation and advised the Plaintiff on what to do. I see no reason to hold that the Principal Registrar of Titles acted waywardly... and I cannot like I did in the Gitwany case hold a diligent officer responsible for a transaction otherwise unlawful ab initio”.

The documents registering Akuka, Sukhdev and Ojwang as the alleged registered proprietors were subsequently found by the Registrar to be forgeries and the transfers fraudulent and unlawful, thereby giving rise to a defective title, which was unlike in the case of ***Gitwany***, where the court found the Commissioner of Lands culpable. The court declared Gitwany’s title that was first in time to be the valid legal title, and held the Commissioner of Lands liable for the losses that accrued to the unsuccessful party on account of mistakenly issuing the second title.

In this case, there is no evidence that the Registrar was to blame and by virtue of the sale agreement made between them, Sukhdev must look to Akuka, and not the Registrar for redress for any losses that he may have suffered in terms of their agreement, and we so find.

Finally, it is not lost on us that, having failed to claim the refund in a counterclaim in the trial court, Sukhdev’s claim against the Registrar is without basis. He is bound by his pleadings, and cannot seek to claim what he had not prayed for.

In conclusion we have no reason to interfere with the decision of the trial court and, the appeal is dismissed with costs to the 2nd respondent.

It is so ordered.

Dated and delivered at Nairobi this 26th day of October, 2018.

P.O. KIAGE

.....

JUDGE OF APPEAL

K. M’INOTI

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR