IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, NAMBUYE & MUSINGA, JJ.A.)

CIVIL APPEAL NO. 145 OF 2016

BETWEEN

JOSEPH MURIITHI NJERU.....APPELLANT

VERSUS

MARY WANJIRU NJUGUNA.....1ST RESPONDENT

SARAH KEMUMA OSIEMO.....2ND RESPONDENT

(*An appeal from the Judgment of the High Court of Kenya*

at Nairobi (Ougo, J.) dated 28th November, 2013

in

H.C.C.C. No. 999 of 2001)

****

JUDGMENT OF THE COURT

Introduction

1. At the centre of this dispute is a property in Umoja I Estate, Nairobi, registered as **L.R. NBI/UMOJA/BLOCK 109/268/346 ("the suit property"),** on which stands a residential house known as **House No. D84**.

The appellant's contention is that he lawfully purchased the suit property from **Njuguna Njoroge**, the 1st respondent's husband, sometimes in 1992. However, the 1st respondent asserted that the said sale was fraudulent and successfully challenged it in court, then together with her husband sold the suit property to the 2nd respondent. The trial court found in favour of the respondents, thus giving rise to this appeal.

The respondents' case before the High Court

2. The 1st respondent stated in her plaint that sometimes in 1977, together with her husband, they entered into a tenant purchase scheme with the City Council of Nairobi in respect of the suit property, which was registered in her husband's name; that in 1992 she discovered that her husband had sold the suit property to the appellant and the City Council of Nairobi (**"the City Council"**) had approved the sale and transfer of the suit property; that thereafter she filed a suit, **HCCC No. 4539 of 1994,** seeking cancellation of the transfer and a decree in her favour was issued on 18th December, 1995.

3. Acting upon the said decree, the 1st respondent had a lease certificate issued to her, but the L.R. Number was shown as **Nairobi/Umoja Block 109/346**; that she sold the said property to the 2nd respondent; that in August 1997 the 1st

respondent received a letter from the Land Registrar, Nairobi, recalling the said lease certificate, saying that it had been wrongly prepared and registered; that upon carrying out a search at the lands registry she realized that the suit property had been given a new registration number, L.R. No. NRB/UMOJA/BLOCK 109/268/346 and a certificate of lease issued to the appellant on 11th February, 1998.

4. The 1st respondent averred that the appellant and the Registrar of Lands, who was the 1st defendant in the High Court matter, acted fraudulently in causing her certificate of lease to be recalled and re-issued to the appellant.

5. The 2nd respondent averred that she was an innocent purchaser for value of the suit property and she had a right to obtain a certificate of lease in respect of the suit property.

6. The respondents sought the following orders:

> ***"(a) A declaration that the Registration of the 2nd Defendant herein as Leasee (sic) to the property known as LR NBI/UMOJA/BLOCK 109/268/346 was illegal for fraud and was void abinition.***
>
> ***(b) An order directing the 2nd defendant herein; the Land Registrar to cancel the registration of the 2nd defendant as Leasee (sic) to the property in (A) above and in its place have registered the 1st plaintiff or the 2nd plaintiff herein as the convenience may necessitate.***
>
> ***(c) A permanent injunction restraining the 2nd defendant whether himself or through his agents and servants from interfering with the 2nd plaintiff's peaceful occupation of the property LR NBI/UMOJA/BLOCK 109/268/346.***
>
> ***(d) The costs of this suit be borne by the defendants jointly and severally.***
>
> ***(e) Any other relief this court deems appropriate to grant."***

The appellant's Statement of Defence

7. The appellant denied that the suit property was ever registered in the name of the 1st respondent's husband; that it belonged to the City Council of Nairobi, which leased it to the 1st respondent's husband; who sold it to him and by an assignment dated 15th February, 1993 assigned it to the appellant and the sale and assignment was approved by the City Council.

8. The appellant stated that in **HCCC No. 5913 of 1993** the 1st respondent sued her husband and himself (the appellant) and the 2nd respondent was joined as a third party to the proceedings on account of her occupation of the suit property. Subsequently, the appellant obtained an eviction order in **Rent Tribunal Case No. 182 of 1994** against the 2nd respondent, who was then evicted but she unlawfully and forcefully broke into the suit property and took possession.

9. The appellant denied that he was sued by the 1st respondent in **HCCC No. 4539 of 1994** and further denied that any decree was issued against him in the said suit. He averred that **"the purported decree is a nullity and void *ab initio*"** as he was neither served with any court process relating to the matter and nor did he participate in any way in the said suit.

The appellant added that **"the purported decree is a forgery as the same has been disowned by the court which purportedly prepared it and the same is a reflection of the 1st plaintiff and her husband's wishful thinking and is tainted by irregularity, misrepresentation and fraud".**

10. The appellant set out the particulars of irregularity, misrepresentation and fraud as hereunder:

> ***"(a) The 1st defendant in HCCC No. 4539 of 1994 purported to consent to conveyance and registration of the suit premises after title had passed to the 2nd defendant and therefore he lacked capacity to enter into such consent.***
>
> ***(b) The plaintiff and 1st defendant in HCCC No. 4539 of 1994 being, by all appearances, happily married colluded to sue each other & transfer the suit property to the plaintiff & her first son Njoroge Njuguna without consent of the leassee (sic) who, like the son, were not parties the (sic) suit.***
>
> ***(c) The 1st defendant in HCCC No. 4539 of 1994 purported to enter a consent with the 2nd defendant who had not appeared for the refund of purchase price of the suit property.***
>
> ***(d) The purported decree was not signed by any of the sitting deputy registrar's.***

(e) The court file cannot be traced since the date of the alleged decree."

11. As regards the lease in respect of **L.R. NO. NAIROBI/UMOJA BLOCK/109/1/346**, the appellant stated that no such property ever existed; and that it was a creation of the 1st respondent and her husband, from whom it was allegedly transferred.

12. The appellant denied having ever colluded with the Land Registrar to have the suit property registered in his name. He contended that the 2nd respondent's occupation of the suit property was unlawful. By way of a counterclaim, the appellant sought a declaration that he is the rightful and lawful lessee of the suit property; an order of eviction against the 2nd respondent; special damages of Kshs.2,644,000/= being the accrued rent up to December 2012; general damages and mesne profits upto the date of delivery of vacant possession plus costs.

13. The respondents filed a defence to the appellant's counterclaim. In particular, the 2nd respondent stated that she was in occupation of the said property as a lawful purchaser for value.

Summary of the respondents' evidence before the High Court

14. The 2nd respondent (PW1) testified that she bought the suit property from the 1st respondent on 25th March, 1997 at an agreed purchase price of Kshs.950,000/= and thereafter took possession; that at the time of the sale the 1st respondent had not obtained a certificate of lease; that she had no knowledge of HCCC No. 5913 of 1993 filed by the 1st respondent in which she had been joined as a third party. She conceded that she did not obtain consent from the lessor, the City Council, to purchase the suit property.

15. The 1st respondent's husband, **Njuguna Njoroge, (PW2)** testified that he entered into a tenant purchase agreement with the City Council sometimes in 1974 and moved into the residential house on the suit property with his family in 1975; in 1992 he entered into a sale agreement of the suit property with the appellant at an agreed purchase price of Kshs.530,000/=. PW2 said that according to the sale agreement, the purchaser was to give him a motor vehicle valued at Kshs.230,000/=, which he did; he was paid Kshs.140,000/= and the balance of Kshs.160,000/= was to be paid after the signing of all transfer documents. The purchaser was to take possession of the suit property upon the signing of the sale agreement but because the balance of Kshs.160,000/= had not been paid, they agreed that PW2 would continue living in the suit property as a tenant of the appellant until the transaction was finalized.

16. Regarding **HCCC No. 4539 of 1994** that was filed by his wife against him and the appellant, the 1st respondent's husband testified as follows:

> ***"The suit was decided in favour of my wife and she took possession after the court had given me back the property. The case was not heard. Yes I was served with summons and I instructed a lawyer. I do not know if the 2nd defendant was served. I never attended court at any time. I was told by lawyer that the case was over."***

17. PW2 further testified that in the aforesaid suit he was directed to refund the money that he had received from the appellant; that he refunded Kshs.200,000/= through an advocate known as Njeru, and returned the motor vehicle given to him by the appellant; thereafter together with his wife they sold the suit property to the 2nd respondent; and that he was paid Kshs.950,000/= less expenses for the transaction.

18. As regards the decree that was issued in HCCC No. 4539 of 1994, despite the fact that PW2 had told the Court in his examination in chief that he never attended court at any time, in cross examination he conceded that the substantive order sought was an order directing the appellant to effect transfer of the suit property to the 1st respondent; that the appellant did not attend Court; that he entered into a consent with his wife (the 1st respondent) to the effect that the title to the suit property be transferred and registered in favour of the 1st respondent and their first born son to hold in trust on their behalf and on behalf of their family; that the suit property was however transferred and registered in the name of the 1st respondent alone; and that he paid to his wife Kshs.30,000/= as costs of the suit.

19. The 1st respondent told the court that together with her husband they purchased the suit property in 1978 at Kshs.1,000,000/=; that they occupied the suit property until 1996; that her husband failed to pay rent to the appellant, who filed a suit for their eviction before the Rent Restriction Tribunal; that later on she successfully sued her husband and the appellant and had the suit property registered in her name.

Summary of the appellant's case

20. The appellant testified that he met the 1st respondent's husband, PW2, in 1992. The appellant used to import and sell vehicles. PW2 was interested in one of the vehicles the appellant was selling, registration No. KAB 255P. PW2 offered to sell to the appellant the suit property so that the consideration for the said motor vehicle could form part of the purchase price.

21. A sale agreement dated 4th December, 1992 in respect of the suit property was drawn by Njeru Karanja Advocate. It provided that the purchase price was Kshs.530,000/=, the vendor (PW2) acknowledged receipt of Kshs.230,000/= as deposit, paid by way of motor vehicle registration number KAB 255P; cash Kshs.40,000/=; Kshs.100,000/= by a Bankers cheque; and the balance of Kshs.160,000/= to be paid upon all the necessary consents being obtained, which he paid. It was further agreed that the appellant would take possession of the suit property upon signing the sale agreement. But because PW2 wanted to remain in occupation of the suit property for a short time, it was agreed that he would pay a monthly rent of Kshs.2,000/=, which he failed to pay.

22. The appellant instituted eviction proceedings against PW2 before the **Rent Restriction Tribunal; Case No. 182 of 1994**; the eviction order was granted and executed and the appellant started to repair the house. Shortly thereafter the husband to the 1st respondent approached the appellant and told him that he and his wife had purchased the suit property from the 1st respondent and had acquired a certificate of lease. By then the appellant's certificate was still being processed by the City Council's advocate, **Mr. Musyoka Annan**.

23. The appellant further testified that sometimes in 1993 the 1st respondent had filed a case against him and her husband, **HCCC No. 5913 of 1993**, challenging the sale of the suit property. The appellant entered appearance and filed his statement of defence. The 1st respondent withdrew the case sometimes in 1997. Shortly thereafter the 2nd respondent and her husband forcefully entered the suit property.

24. On 28th July 1997, the appellant went to the office of Musyoka Annan Advocate in pursuit of his certificate of lease. The appellant was shown a decree that had been delivered there by the 2nd respondent; it was issued in favour of the 1st respondent in HCCC 4539 of 1994, which the appellant said he was not aware of as he had never been served with any court process in relation to that case; that the appellant went to the High Court and met the Registrar, who called for the High Court file but it could not be traced and upto the date of the hearing of this appeal it had not been traced.

25. Regarding the alleged refund of the purchase price by PW2, the appellant said that he never instructed any advocate to receive any money on his behalf from the 1st respondent; that he enquired from Mr. Njeru Karanja advocate about the receipt of the alleged Kshs.200,000/= and the advocate denied having received any money from PW2. The said advocate could not testify during the hearing as it was indicated that he had since passed away. The 1st respondent had produced a copy of a letter dated 7th May, 1996 allegedly from Njeru Karanja Advocates showing that PW2 had deposited with the said firm Kshs.200,000/= to be paid to the appellant.

26. **Peter Njeru Mugo**, advocate, who was a Chief Magistrate in Nairobi and was the Deputy Registrar who was said to have been the one who signed the impugned decree in HCCC 4539 of 1994, testified and said that the signature appended thereto was not his. He said: **"It is definitely not my signature ….. Someone must have tried to make it look like my signature".**

27. Mr. Musyoka Annan, advocate, testified that he was instructed by the City Council to prepare and register instruments of title in form of leases for various properties within Umoja Estate in Nairobi; that in February 1997 the 1st respondent and her husband went to his chambers and requested him to prepare the necessary instruments of title to the property then known as house No. D84, Umoja Phase 1; that he requested them to produce an agreement or letter of allocation from the City Council and other necessary documents; which they did.

28. Mr. Musyoka informed them that the head title for block D had not been issued by the Commissioner of Lands; it was agreed that the necessary lease documents would be prepared and signed while awaiting issuance of the head title for Block D; that inadvertently the documents relating to D84 were sent by his office to the City Hall together with other documents for Block C, whose head lease had come out as Nairobi/Block 109/1 and the property known as D.84 was wrongly given a number as Nairobi/Block 109/1/346; and that the same was forwarded with other documents to the City Council and executed by the Mayor and the Town Clerk.

29. The witness further stated that in June 1997 the appellant also went to his chambers seeking registration of the same property, D84; that in July he called up for the appellant's file, only to realize that another file on the same property had been opened and so he decided to verify who the real owner of the property was; that he called the appellant and informed him about the interest in the same property by the 1st respondent and her husband; that upon the applicant insisting that he had lawfully purchased the suit property from the 1st respondent's husband, Mr. Musyoka checked from the Conveyance Department of the City Council and confirmed that indeed the 1st respondent's husband had sold the suit property to the appellant in 1992 and the transaction had been duly approved by the City Council and recorded in the Council's minutes of 2nd March 1993, which were duly produced in Court.

30. On 29th July 1997, Mr. Musyoka was instructed by the City Council to cease any further action on the suit property as there was litigation over the same between the appellant and PW2; that in August 1997 he learnt that the suit property had been registered in the 1st respondent's name; later he sought advice from Mr. Kiriago, Land Registrar, who asked him to put in writing how the registration had been effected; that all the parties were summoned and appeared before the said Land Registrar, who, upon hearing the matter cancelled the lease that had erroneously been issued to the 1st respondent and issued a new one in favour of the appellant. This part of evidence of Mr.

Musyoka was corroborated by **Mr. Peter Kihiro**, Land Registrar.

31. **Mr. Anthony Njoroge Gicheha**, a valuer by profession, testified that he was instructed by the appellant to prepare projected rent estimates for the suit property. He did so and the total amount for the period between 1996 and December 2012 was **Kshs.2,644,000/=.** He tendered his report to the court.

The trial court's findings

32. In her considered judgment, the learned judge, in allowing the respondents' case and dismissing the appellant's counterclaim held, *inter alia:*

> ***(i) That the process of cancellation of the certificate of lease that had been issued in favour of the 1st respondent was not proper; that Mr. Musyoka should have had the 1st respondent's title rectified and not cancelled and a new one in favour of the appellant issued;***
>
> ***(ii) That the appellant had failed to establish that he fulfilled the terms of the agreement he had with the 1st respondent's husband as there was no evidence of transfer of the motor vehicle in issue; and that the sum of Kshs.200,000/= had been refunded to him through Mr. Njeru Karanja advocate, who had passed on before the matter was heard.***
>
> ***(iii) That the 2nd respondent was a bona fide purchaser for value without notice.***
>
> ***(iv) The 1st respondent was entitled to the declarations as sought in the plaint.***
>
> ***(v) That the evidence regarding the authenticity of the signature of the Deputy Registrar, Mr. Mugo, was not sufficient because expert evidence was not adduced as to the same.***

Appeal to this Court

33. Being dissatisfied with the trial court's decision, the appellant preferred an appeal to this Court. The appellant's memorandum of appeal consists of 17 grounds of appeal, some of which are admittedly repetitive and unnecessarily argumentative. The substantive grounds of appeal may otherwise be summarized as follows:

> ***(i) That the learned judge erred in law and fact in holding that the appellant had not proved that he had fully paid the purchase price for the suit property to the 1st respondent's husband,***
>
> ***(ii) That the learned judge erred in law and fact in finding that the transfer of the suit property from the 1st respondent's husband to the 1st respondent was lawful by virtue of the consent judgment and the subsequent decree issued in favour of the 1st respondent in HCCC No. 4539 of 1994.***
>
> ***(iii) That the learned judge erred in law and fact in holding that the 2nd respondent was a bona fide purchaser for value of the suit property.***
>
> ***(iv) That the learned judge erred in law in holding that the Land Registrar acted unlawfully in cancelling the certificate of lease for the suit property that had been issued to the 1st respondent and in issuing one to the appellant.***
>
> ***(v) That the learned judge erred in law in directing the Land Registrar to cancel the registration of the appellant's certificate of lease of the suit property and register the 1st respondent as the leasee thereof.***
>
> ***(vi) That the learned judge erred in law in dismissing the appellant's counterclaim.***

The appellant urged this Court to allow the appeal with costs; set aside the trial court's judgment and allow his counterclaim with costs. **Mr. Nyaga,** learned counsel for the appellant, and **Mr. Namada,** learned counsel for the respondents, filed submissions and orally highlighted them, albeit briefly.

34. It is well settled that an appeal from the High Court to this Court is by way of a re-trial and the Court of Appeal will not normally interfere with a finding of fact by the trial court, unless it is based on no evidence, or it is premised on a misapprehension of the evidence, or it is shown that the trial court acted on wrong principles in reaching the decision. See **RATILAL GOVA SUMARIA & ANOTHER v ALLIED INDUSTRIES LIMITED [2007] eKLR**.

35. Likewise, in **PETERS v SUNDAY POST LIMITED [1958] E.A. 424,** it was held that whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion; or if it is shown that the trial judge has failed to appreciate the weight or bearing of

circumstances admitted or proved, or has plainly gone wrong, the appellate Court will not hesitate to decide.

36. It is with these well settled principles in mind that we shall proceed to evaluate the evidence tendered before the trial court and determine this appeal. We shall begin with the first transaction in respect of the suit property between the appellant and PW2, the 1st respondent's husband.

The learned judge was faulted for holding that the appellant failed to establish that he fulfilled the terms of the sale agreement between him and PW2. The learned judge held that:

> ***"…there was no evidence of transfer of the motor vehicle as consideration of the agreement and it is Mr. Njuguna's evidence that the money was refunded to Mr. Njeru as exhibited in the letter dated 7th May 1996 in which the late Mr. Njeru Karanja advocate acknowledged receipt of Kshs.200,000/= of their client being a refund of the house No. 84D Umoja Estate. Therefore the registration of the title of the 2nd defendant as lessee to the property known as LR Nairobi/Umoja/Block 109/268/346 was irregularly done."***

37. The appellant's counsel submitted that the appellant had paid to PW2 the full purchase price. But according to the respondent's counsel, the trial court's finding was consistent with the evidence on record. To determine this issue, it is imperative that we consider the terms of the sale agreement against the evidence that was tendered by the two sides. The sale agreement dated 4th December, 1992 shows that the purchase price for the suit property was agreed at Kshs.530,000/=. The other salient terms of the agreement were as follows:

> ***"3. The Vendor hereby acknowledges receipt of Kshs.230,000/- being part payment/deposit of the purchase price paid by way of motor vehicle registration number KAB 255P Toyota Corolla being transferred to the Vendor, cash of Kshs.40,000/- and Kshs.100,000/- by Bankers cheque No. 033819.***
>
> ***4. Both parties agree that the balance of the purchase price of Kshs.160,000/- shall be paid upon all necessary consents being obtained an on or before 4th December, 1992.***
>
> ***5. Both parties agree that the Vendor takes possession and ownership of motor vehicle KAB 255P representing part payment of Kshs.230,000/-.***
>
> ***6. Both parties agree that the purchaser will take possession of the subject House upon signing of this agreement and payment of the said deposit.***
>
> ***7. The Vendor undertakes to avail the document of lease free from any encumbrance.***
>
> ***8. Time will be of essence in this agreement.***
>
> ***9. The Vendor will pay all out goings taxes rents and any other incidental costs upto the date of signing this agreement."***

38. Shortly after execution of the sale agreement, on 15th December, 1992 the appellant leased the suit property to PW2. It was agreed that PW2 would pay a monthly rent of Kshs.2,000/= with effect from 1st July 1993. PW2 failed to pay any rent and the appellant filed Rent Restriction Case No. 182 of 1994 and was granted eviction order against PW2. There is nothing on record to show that PW2 had ever alleged that he had not been paid the full purchase price for the suit property. That is not all.

39.On 15th January, 1993 PW2 executed a Deed of Assignment in respect of the suit property to the appellant. The Deed of Assignment bears the common seal of the City Council, the signature of the Mayor and the Town Clerk. The document was registered at the central lands registry, Nairobi, on 22nd November, 1993. Subsequently, the transfer of title to the suit property was effected under minute 2 of the City Council's ordinary meeting held on 2nd March, 1993. How could PW2 consent to all these transactions if at all the terms of the sale agreement had not been met by the appellant? PW2 never made any demand to the appellant for any unpaid balance of the purchase price, if at all, and neither did he complain that the motor vehicle in question had not been transferred to him.

40. The oral evidence by PW2 in July 2008 to the effect that he had not been paid the full purchase price for the suit property, almost five years after execution of the sale agreement and transfer of the suit property to the appellant, was a futile attempt to contradict the explicit terms of the sale agreement.

Where the intention of parties has been reduced into writing, under the parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, to contradict, vary or add to the terms of the agreement. See this Court's decision in **FIDELITY COMMERCIAL BANK LIMITED v KENYA GRANGE VEHICLE INDUSTRIES LIMITED [2017] eKLR**.

41. In view of the foregoing, we find and hold that the learned judge erred in law and fact in holding that the terms of the sale agreement between the appellant and the 1st respondent's husband, (PW2), had not been complied with. To the contrary, there was overwhelming evidence that the appellant lawfully purchased the suit property from PW2.

42. We now turn to consider the legality of the transfer of the suit property from PW2 to the 1st respondent pursuant to the decree issued in HCCC No. 4539 of 1994 and the subsequent transfer of the suit property to the 2nd respondent. In that suit, the 1st respondent prayed, *inter alia*, for a declaration that the sale and transfer of the suit property to the appellant was null and void and for an order directing the appellant to effect transfer of the suit property to the 1st respondent to be held by her in trust for the members of her family.

43. First of all, there were several troubling issues that were raised regarding the propriety of that suit and the ensuing decree. First, the suit was filed on 30th December, 1994, almost a year after the Rent Restriction Tribunal ordered PW2 to vacate the suit property and grant possession thereof to the appellant; secondly, although the appellant had stated in his statement of defence that he had no knowledge of the suit, and had testified that he was not served with any summons to enter appearance, the 1st respondent did not make any attempt to prove that the appellant had been served with court process; thirdly; even assuming that the appellant had been served with summons to enter appearance and had not done so, no formal proof was done; fourthly, the 1st respondent and her husband purported to enter into a consent to transfer the suit property to the 1st respondent and their first born son when the property was already registered in the appellant's name, without any order directing cancellation of the appellant's title; fifthly, the court file (if at all there was one) has never been sighted; sixth, Peter Njeru Mugo, former Chief Magistrate/Deputy Registrar, who was alleged to have signed the decree, categorically stated that the signature appended thereto was not his; and lastly, the decree was not entirely in conformity with the prayers sought.

44. The only issues that the learned judge addressed herself to regarding the said suit and the decree were that the court file could not be traced and that expert evidence ought to have been adduced to prove that Mr. Mugo's signature had been forged. The learned judge did not pronounce herself on the all important question, that is, whether the 1st respondent as the plaintiff and a defendant, (her husband) could lawfully enter into a consent whose effect was to divest a co-defendant of his proprietary rights to the suit property permit and purport to the transfer of the property to the 1st respondent.

45. In our view, the procedure that was crafted by the 1st respondent and her husband was outrightly fraudulent and cannot be sanctioned by law. The terms of the said decree could not be a proper basis for transferring the suit property from the appellant to the 1st respondent. The contrived decree was therefore null and void and every subsequent transaction that was premised on the purported decree was a nullity and of no legal consequence. It is unjust and inequitable to dispossess an innocent proprietor of his property through fraudulent acts of conspirators in a suit. It is settled law that a person who holds a bad title cannot pass a good title to a purchaser. See **ARTHI HIGHWAY DEVELOPERS LIMITED v WEST END BUTCHERY LIMITED & 6 OTHERS [2015] eKLR.**

46. Further, in various decisions of this Court, we have cited the dicta by **Lindley LJ in SCOTT v BROWN, DOERING, McNAB & CO, (3), [1892] 2 QB 724** that:

> ***"No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing the obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality."***

See also **MISTRY AMAR SINGH v SERWANO WOFUNIRA [1963] E.A. 48.**

In her suit, the 1st respondent was seeking to enforce an illegal and fraudulent transaction between herself and her husband. The trial court's attention was drawn to that illegality but it did nothing.

47. Was the 2nd respondent a bona fide purchaser for value without notice and did she acquire a good title? We have partially disposed of this issue. **BLACK'S LAW DICTIONARY** 9th 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."***

48. In **KATENDE v HARIDAR & COMPANY LTD [2008] 2 E A 173**, the Court of Appeal in Uganda held that:

> ***"For the purposes of this appeal, it suffices to describe a bona fide purchase as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.***
>
> ***For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, must prove that:***
>
> ***(1) he holds a certificate of title;***
>
> ***(2) he purchased the property in good faith;***
>
> ***(3) he had no knowledge of the fraud;***
>
> ***(4) he purchased for valuable consideration;***
>
> ***(5) the vendors had apparent valid title;***
>
> ***(6) he purchased without notice of any fraud; and***
>
> ***(7) he was not party to the fraud."***

See also **LAWRENCE P. MUKIRI MUNGAI & ANOTHER v ATTORNEY GENERAL & 4 OTHERS [2017] eKLR**.

49. In this matter, the 2nd respondent does not hold a certificate of title (lease). Secondly, the vendor's title was not valid as it had been fraudulently obtained. Thirdly, as at March 1997 when she purported to purchase the suit property from the 1st respondent, the City Council as the head lessor did not give any consent to the transaction. The leasehold property could not be sold without written consent of the City Council. A purchaser who does not hold a title to a property and who did not exercise due diligence in acquiring a registered property cannot be described as a bona fide purchaser or innocent purchaser.

50. We now turn to consider whether the Land Registrar acted unlawfully in cancelling the certificate of lease that had been issued to the 1st respondent and in issuing one to the appellant. Mr. Musyoka Annan, an advocate of no mean repute, testified in great details as to the circumstances under which the certificate of lease was inadvertently issued to the 1st respondent. Mr. Kiriago, District Land Registrar, Nairobi, summoned the 1st respondent, the appellant and Mr. Musyoka to his office on 26th November, 1997. The 1st respondent was represented by an advocate, Mr. Maosa.

51. After considering all the representations made, the Land Registrar ruled, *inter alia:*

> ***"My summons to Mrs. Njuguna were clear in that she was required to attend and show cause why the title issued to her should not be cancelled. She has however sent her counsel to represent her without proper instructions. The Title for Block "D" i.e. Block/109/1/346 cannot be legal as it has no basis. The R.I.M. has not been amended which in law renders any title for Block "D" null and void."***

The Land Registrar also caused the necessary notification to be published in Kenya Gazette Notice No. 4698.

52. The learned judge found as a matter of fact that under **section 142** of the repealed **Registered Land Act** the Land Registrar had power to rectify the register or any instrument presented in cases of error or omission.

However, the learned judge's view was that the error in the title that was held by the 1st respondent could simply have been rectified so that it is issued under the appropriate block. That could have been the right thing to do, if only the 1st respondent had lawfully acquired the first certificate of lease.

53. But as we have already demonstrated, that was not the case. We must, however, point out that under **section 143(1)** of the **repealed Registered Land Act,** the Court may order rectification of the register by directing cancellation or amendment of a title where it is satisfied that the registration was obtained by fraud or mistake. Having reviewed the totality of the evidence on record, we agree that the learned judge erred in law for faulting the Land Registrar for taking the action that he did, which in our view was the correct action for him to take in the circumstances of this appeal.

54. In view of the foregoing, we find that learned judge erred in law in directing the Land Registrar to cancel the registration of the appellant's certificate of lease of the suit property and register the 1st respondent as the

lessee thereof.

55. Turning to the appellant's counterclaim, the learned judge held:

> ***"With my findings on the plaintiff's claim the counterclaim filed by the 2nd defendant cannot stand as I have declared that the title for the property that he has was irregularly issued".***

56. With great respect to the learned judge, we do not agree. Contrary to the learned judge's finding, we have demonstrated that the appellant adduced overwhelming evidence as to how he purchased the suit property from the 1st respondent's husband; and how the certificate of lease was registered in his favour, as opposed to the fraudulent manner in which the 1st respondent and her husband conspired to cheat the appellant and thereafter sell the suit property to the 2nd respondent.

57. The appellant also established that he was lawfully entitled to vacant possession of the suit property, having lawfully evicted the people who had been put in possession thereof by the 1st respondent and her husband. The 2nd respondent and her husband forcefully took possession of the suit property. We have found that they had no right to the suit property. The 2nd respondent's remedy lies in seeking a refund of whatever amount she may have paid to the 1st respondent and her husband. We hereby order the 2nd respondent and/or any other person in occupation of the suit property to vacate forthwith and grant the appellant vacant possession of his property.

58. The appellant's evidence regarding the claim for special damages in the sum of Kshs.2,644,000/= was not controverted by the respondents. **Mr. Anthony Njoroge Gicheha**, a valuer by profession, testified that the appellant would have collected rent amounting to the aforesaid sum for the period running from December 1996 to December 2012. He said that the monthly rent was between Kshs.15,000/= and 18,000/=. We find that the appellant is entitled to special damages of Kshs.2.644,000/= being the lost rent upto December, 2012 and we so order.

59. The appellant also prayed for mesne profits upto the date of delivery of vacant possession. He argued that the respondents had been in unlawful occupation of his property. In **SWORDHEALTH PROPERTIES v TABET & OTHERS [1979] 1 ALL ER 240**, it was held that where a person remains as a trespasser on residential property the owner is entitled to damages for the trespass without bringing evidence that he could or would have let the property to someone else if the trespasser had not been there; and that the measure of damages will be the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages. In this matter, we find and hold that the appellant is entitled to mesne profits at the rate of Kshs.18,000/= per month from 1st January, 2013 until the date vacant possession of the suit property is given to him. This order for payment of special damages and mesne profits is made against the respondents jointly and severally.

60. In conclusion, we allow this appeal, set aside the judgment entered by the trial court in its entirety and substitute therefor judgment in favour of the appellant in terms of his counterclaim as stated hereabove. The appellant is also awarded costs of this appeal as well as costs of the High Court proceedings.

Dated and delivered at Nairobi this 12th day of October, 2018.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

R.N. NAMBUYE

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR