IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, KIAGE & KANTAI, JJ.A)

CIVIL APPEAL NO. 317 OF 2012

CHRISTOPHER MWANGI KIOI…….....APPELLANT

AND

THE CHIEF LAND REGISTRAR ……..…...1ST RESPONDENT

PETER MAEHLMANN……..... 2ND RESPONDENT

ELIZABETH MAEHLMANN …….....3RD RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Sitati, J) dated the 17th day of February, 2011

in

HC Civil Case No. 493 of 2001)

****

JUDGMENT OF THE COURT

In the plaint filed at the High Court of Kenya at Nairobi the appellant, **Christopher Mwangi Kioi** sued the respondents – The Chief Land Registrar ("1st respondent"), **Peter Maehlmann** *("2nd respondent")* and **Elizabeth Maehlmann** *("3rd respondent")* where it was claimed *inter alia* that the appellant was the registered proprietor of a parcel of land known as LR No. Nairobi/Block 112/29 situate at Runda Mimosa Estate, Nairobi ("*the suit land*") having acquired it on 25th September, 1998 when he was issued with a Certificate of Lease by the 1st respondent. The appellant further claimed that he paid the purchase price for the said land to the advocates of the 2nd and 3rd respondents M/S P.G. Mburu Advocates and that a transfer was duly registered in his favour whereafter he took possession of the suit land. Such possession was nonetheless interrupted by the 2nd and 3rd respondents who appeared on the suit land and laid claim to it stating that they had not sold the suit land to the appellant either as alleged or at all. It was further claimed that a complaint was lodged with the 1st respondent on why there were two titles to the suit land and because the 1st respondent was unable to resolve the issue it necessitated the suit where the appellant prayed for an order directing the 1st respondent to rectify the register by removing the name of the proprietor improperly entered in the register and an order be issued cancelling Certificate of Lease improperly issued in respect of the suit land.

In a statement of defence the 1st respondent denied any wrong-doing, claiming that the Registrar had no obligation to adjudicate on matters of contracts between parties but was mandated to issue titles to those

who acquired land as required in law.

The 2nd and 3rd respondents (they are a husband and wife) filed a statement of defence where the appellants claim was denied. In a counter-claim these respondents claimed that they were the registered proprietors of the suit land since 24th August, 1990; that the appellant had entered upon the suit land in September, 1999 and trespassed on it; that the appellant had engaged in various acts of fraud in having himself registered as proprietor thereof, particulars of the alleged fraud were duly set out. The 2nd and 3rd respondents therefore prayed for a declaration that they were the lawful owners of the suit land; that an injunction be issued restraining the appellant from holding himself out as owner of the suit land or developing the same and there was a prayer for damages for loss of user and trespass.

Evidence was taken by various judges and the trial was concluded by R. Sitati, J., who in a judgment delivered on 17th February, 2011 did not find merit in the appellant's case and dismissed the suit. It is those findings that have provoked this appeal premised on the Memorandum of Appeal drawn for the appellant by his Advocate where the appellant complains, in essence, that: the learned judge did not properly evaluate the evidence; the trial judge erred in finding that the appellant was charged with a criminal offence while there was no evidence to support such finding; the learned judge erred in finding that there was a valid agreement for sale between the appellant and the 2nd and 3rd respondents; the learned judge erred in finding fault in the fact that advocates who acted in the transaction were not called as witnesses; the learned judge erred in finding that sections 27 and 28 of the Registered Land Act protected the 2nd and 3rd respondents, not the appellant; the learned judge erred in finding that signatures on documents were different when there was no explicit evidence to that effect; the learned judge erred in holding the appellant a trespasser to the suit land and in awarding damages for trespass and issuing injunction against the appellant and finally the learned judge is faulted for not ordering cancellation of the 2nd and 3rd respondents' title and thus find for the appellant. For all these, it is prayed that we make an order cancelling the improperly registered proprietor or in the alternative find that there was a mistrial and we should remit the case back to the High Court for retrial before a different judge.

This is a first appeal and it is our duty as first appellate court to re-evaluate and reconsider the evidence and come to our own conclusions on the case but must give allowance for the fact that we did not see or hear the witnesses, an advantage only a trial judge has. See, for an enunciation of the principles governing the duty of a first appellate court, the oft-cited case of **Selle and Another V. Associated Motor Boat Co. Ltd & Others [1968] EA 123** where it was stated:

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

Bundles of agreed documents were produced before the trial court and the oral evidence that followed was quite brief. The appellant, an auditor in the firm of Njuguna, Kioi & Associates testified how, in 1997/8, being desirous of acquiring land, he approached land agents who identified the suit land. The appellant then engaged his lawyers, P. G. Mburu & Company, advocates to whom he deposited the entire purchase price of Kshs.2,400,000/= after which a title was issued in his favour, subsequently, he fenced the suit land, planted some trees on it and engaged a caretaker to take care of the suit land but was surprised to be informed that other people were laying claim to the suit land. On reporting the matter at Gigiri Police Station, the appellant was told that the people claiming the suit land had already made a report claiming the suit land. He produced various documents in evidence including a Certificate of Lease dated 24th August, 1990 in favour of the 2nd and 3rd respondents; a Certificate of Official Search issued on 22nd April, 1998 showing the proprietors of the land as the 2nd and 3rd respondents; a Certificate of Official Search issued on 22nd April, 1998 showing the proprietors of the suit land as the 2nd and 3rd respondents (though name mispelt); an undated agreement for sale between the appellant and the 2nd and

3rd respondents and a Certificate of Lease in his favour issued on 25th September, 1998. The matter was then adjourned on several occasions and although opportunity was accorded to the respondents to cross-examine the appellant they did not avail themselves of those opportunities and the appellants case was thus closed. Evidence of the 3rd respondent who had testified earlier ("*de bene esse*" being resident in Germany, not Kenya) on her own behalf and on behalf of her husband the 2nd respondent, was that they purchased the suit land from Mimosa Plantation on 24th August, 1990 and had not sold it to anybody at all. She denied ever appointing the law firm of Njathi Mwangi advocates to act for them and denied ever having dealt with the appellant or entering into a transaction with him. She prayed for the orders set out in the counter-claim and produced into evidence various agreed documents. The 1st respondent did not call any evidence.

In submissions before us when the appeal came up for hearing Mr. Gitonga Murugara, learned counsel for the appellant faulted the learned trial judge who learned counsel submitted had not evaluated the evidence. According to learned counsel, the fact that there were two titles to the suit land led to an inference that a fraud had been committed and learned counsel thought it was the duty of the 2nd and 3rd respondents to explain. Learned counsel also faulted the learned judge for awarding damages for trespass and asked us to issue an order cancelling the 2nd and 3rd respondent's title.

Miss Wambui, learned counsel for the 1st respondent, in opposing the appeal submitted that the appellant had failed in his duty to prove any fraud on the part of the 1st respondent. According to learned counsel, misspelling of a name in a Certificate of Official Search could not constitute fraud when all other particulars were correct. In any event, continued counsel, the 2nd and 3rd respondents' title was issued earlier in time and took precedence over the appellant's title which was issued later in time.

It was then time for Mrs. Judith Guserwa, learned counsel for the 2nd and 3rd respondents. Learned counsel in agreeing with Miss Wambui submitted that there was no evidence that the purchase price had been paid; the appellant had admitted in evidence that he had never met the 2nd and 3rd respondents and, according to learned counsel, the learned trial judge was entitled to comment on criminal proceedings involving the appellant because that had been made an issue in the "*Agreed Issues*" filed by the parties.

Mr. Murugara had the last say as far as submissions went. He wondered why the 2nd and 3rd respondents had not explained an error in names in a Certificate of Official Search issued in 1997.

We have carefully considered the record of appeal, the submissions made on behalf of the respective parties and the law and having done so we have taken the following view of the appeal.

The case before the trial court revealed an unfortunate situation where apparently innocent parties in matters concerning land become victims of fraud committed by fraudsters who pocket large sums of money and then disappear, not to be seen again. Those frauds occur without being noticed or detected by the Chief Land Registrar, the custodian of documents relating to land, who, when presented with what appear to be properly executed documents including transfer, proceeds to register them unknowing that frauds have taken place.

The evidence produced before the trial court showed that the 2nd and 3rd respondents purchased the suit land from Mimosa Plantations Limited and a Certificate of Lease was issued to them on 24th August, 1990. The 2nd and 3rd respondents then engaged the services of a caretaker to tend the suit land as they were not resident in Kenya. These respondents denied either engaging an advocate to sell their land or entering into any agreement for sale of their land with the appellant or any other person.

The appellant's testimony was to the effect that he engaged land agents to identify available land for purchase; that the suit land was located and that he deposited money with an advocate after which a title to the suit land was issued to him in 1998.

The learned trial judge evaluated the evidence and faulted the agreement for sale produced by the appellant which was undated and also faulted the appellant for failing to call the advocates who dealt with the suit land on behalf of the appellant as witnesses. After also faulting the 2nd and 3rd respondents for

not calling the caretaker who took care of the suit land on their behalf the learned judge found that the appellant had failed to prove his case on a balance of probabilities and then dismissed the case.

On our own re-evaluation and reconsideration of the evidence we cannot find any fault or error in the finding of the learned judge that the case by the appellant had not been proved to the required standard or at all. Here was a case where the appellant, who readily admitted never having met the 2nd or 3rd respondents at all before the alleged sale agreement and before the suit, was filed, alleging that he had dealt with advocates who purported to have instructions to transact on the suit land yet, when the issue was taken where the said respondents denied entering into any sale, no other evidence is called to support the claim. The appellant did not avail or call the advocates he allegedly dealt with in the alleged transaction to testify in the matter, but sat back believing that he could seek shelter in provisions of the **Registered Land Act** without factual evidence being placed before the trial court. That comfort was, to say the least, and with due respect, misguided. The 2nd and 3rd respondents had acquired title to the suit land earlier in time and they had no obligation at all to assist the appellant to find out how an obvious fraud had been committed against him. The 2nd and 3rd respondents were, indeed, entitled to the protection of law and the learned trial judge was right so to find.

Once apparently properly executed documents including transfer were presented to the 1st respondent he had to register them as there was no legal requirement for the 1st respondent to carry out any further due diligence beyond an examination of documents presented and payment of appropriate fees. We can see no fault that can be attributed to the 1st respondent by the appellant and the same is dismissed.

One complaint by the appellant regarding award of damages to the 2nd and 3rd respondents appears to have merit.

The learned judge awarded the 2nd and 3rd respondents general damages Kshs.200,000/= against the appellant for loss of user and trespass.

A perusal of the evidence by the 3rd respondent does not say in any way indicate why those respondents were entitled to an award of damages at all. This issue only appears in the counter-claim where general damages were sought for ***"--- loss of user and trespass ---".*** The 3rd respondent was not led in evidence at all on alleged loss of user and although trespass is actionable *per se* it was necessary for evidence to be led by the 2nd and 3rd respondents to show that the appellant had entered upon the suit land and occupied it without leave of the owner. Absent such evidence, the learned judge fell into error by awarding the said damages. In the event we are entitled to and we hereby set aside the said award of damages. Save that setting aside of the award of damages for loss of user and trespass this appeal has no merit and we accordingly dismiss it with costs to the respondents which we award at ¾ of costs to be certified by the Registrar as we have interfered with the judgment of the trial court in respect of the award of general damages which we have set aside.

DELIVERED and DATED at NAIROBI this 24th day of March, 2017.

M. K. KOOME

……...

JUDGE OF APPEAL

P. O. KIAGE

…….……..

JUDGE OF APPEAL

S. ole KANTAI

……...

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR