



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CIVIL APPEAL NO. 146 OF 2014

BETWEEN

LAWRENCE P. MUKIRI MUNGAI,

ATTORNEY OF FRANCIS MUROKI MWAURA APPELLANT

AND

ATTORNEY GENERAL FIRST RESPONDENT

JAMES NDIRANGU SECOND RESPONDENT

JOSEPH NDIRITU MUGI THIRD RESPONDENT

ANNAH WANGARI NDIRITU FOURTH RESPONDENT

LYDIA MUTHONI NDIRITU FIFTH RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi, (Gitumbi, J.) dated 10th May, 2013

in

HCCA NO. 169 OF 2008)

JUDGMENT OF THE COURT

INTRODUCTION

1. The substantive issue for determination in this appeal is whether an innocent purchaser for value can acquire a good title over a parcel of land from a person who had fraudulently acquired title over the land and thereby defeat the claim by the original owner of the property in issue. The learned trial judge held that the 3rd, 4th and 5th respondents' title over a parcel of land known as **L.R. Ruiru/Ruiru 7/13** (*the suit property*) was valid, notwithstanding the fact that the 2nd respondent who sold and transferred title to the suit property to them had acquired suit property fraudulently.

PLEADINGS BEFORE ENVIRONMENT & LAND COURT

2. In his amended plaint dated 18th August, 2008, the appellant, as the lawful attorney of Professor Francis Muroki Mwaura, (*Mwaura*) sought a declaration that Mwaura is the registered owner of the suit property; cancellation of the title document issued to the 3rd, 4th and 5th respondents; reinstatement of Mwaura as the rightful legal owner; eviction of the 3rd, 4th and 5th respondents from the suit property; mesue profits and costs of the suit.

3. The appellant averred that on or about May, 2007 the 3rd, 4th and 5th respondents conspired with Thika District Land Registry Officers and fraudulently transferred the suit property and altered public records held at Thika Land Registry to convey the suit property to the 2nd respondent and subsequently to the 3rd, 4th and 5th respondents.

4. The appellant set out particulars of fraud against all the aforesaid persons. The Attorney-General (*the 1st respondent*), was sued for and on behalf of the Land Registrar, Thika, and the Land Control Board, Ruiru.

5. The 2nd respondent neither entered appearance nor filed a statement of defence, having been served with the plaint and summons to enter appearance by way of advertisement of the said documents in the **“Daily Nation”** newspaper.

6. The 1st respondent filed a statement of defence and basically denied all the claims contained in the amended plaint.

7. The 3rd, 4th and 5th respondents filed a joint statement of defence and averred that they acquired the suit property legally from the 2nd respondent, the then registered owner, having followed all due process. They denied all the particulars of fraud attributed to them. They added that they were innocent purchasers for value and that the appellant had no cause of action against them.

SUMMARY OF EVIDENCE TENDERED BEFORE THE TRIAL COURT

8. The appellant testified as the holder of a lawful power of Attorney donated to him by Mwaura, who purchased the suit property from Varsity Villa Limited in 1992 and was issued with a Title Deed over the same. The appellant and Mwaura were both employees of Kenyatta University. Kenyatta University Staff had bought a big parcel of land at Ruiru and sub-divided it into several one acre plots. The appellant and Mwaura bought a plot each, **Nos. Ruiru/Ruiru 7/11 and 7/13** respectively.

9. After sometime, Mwaura emigrated to the United States of America and he appointed the appellant to look after his affairs in Kenya. Upon his retirement from employment of Kenyatta University, the appellant became an advocate in the name and style of Lawrence Mungai & Company Advocates.

10. Sometimes in 2008 the appellant was approached by a client who wanted to purchase plot No. L.R. Ruiru/Ruiru 7/12 (Plot No. 12). In the course of conducting a search on plot No. 12, he realized that both his plot No.11 and the appellant's No. 13 (*the suit property*) had been transferred to some other people. The search showed that the suit property had been registered in the name of the 2nd respondent. But when the appellant enquired from Mwaura whether he had sold the suit property to anyone, Mwaura said that he had not. Indeed the Title Deed in respect of the suit property was still held by the appellant.

11. The 3rd respondent testified that sometimes in 2005 he saw the suit property advertised for sale in the **“Daily Nation”** newspaper and when he telephoned the advertiser, the 2nd respondent, they met and he was given a copy of the Title Deed. The 3rd respondent went to the Land Registry, Thika, and applied for an official search, which confirmed that the 2nd respondent was the registered owner of the suit land.

12. Subsequently, the 3rd respondent and his two daughters, the 4th and 5th respondents, purchased the suit property from the 2nd respondent at a price of Kshs.850,000/=. Consent to purchase the same was

granted by the Thika Land Control Board on 6th September, 2005.

13. Thereafter the 3rd respondent lodged the documents for registration and the suit property was registered in their names and they were issued with a Title Deed.

THE TRIAL COURT'S FINDINGS

14. In her judgment, having set out the facts of the case, the learned judge stated; *inter alia*:

“It emerges quite clearly from the facts above that the plaintiff did not transfer the suit property to the 2nd defendant and that the fact that the 2nd defendant managed to obtain title to the suit property was certainly fraudulent. That is not in dispute. The question that thereafter arises is whether the title obtained by the 3rd, 4th and 5th defendants jointly in the suit property from the 2nd defendant is in itself tainted by fraud?”

15. Having considered the provisions of **sections 26 (1) and section 80** of the **Land Registration Act**, as well as the parties submissions, the learned judge concluded as follows:

“To my mind, I have not been convinced that the 3rd, 4th and 5th defendants were aware about the fraudulent dealings of the 2nd defendant. I believe their testimony with regard to the process they underwent to become the joint registered proprietors of the suit property. That being the case, as the law states as cited above, their title to the suit property is absolute and indefeasible. Section 80 (2) of the Land Registration Act specifically applies to this particular case and protects their title to the suit property as they were innocent purchasers for value without notice.”

16. With that, the learned judge dismissed the appellant's suit but ordered each party to bear its own costs.

APPEAL TO THIS COURT

17. Being aggrieved by that decision, the appellant preferred an appeal to this Court. In his memorandum of appeal, the appellant stated, *inter alia*, that the learned judge erred in: holding that the 3rd, 4th and 5th respondents' title was valid; ignoring the clear provisions of **section 26 (1) (b)** of the **Land Registration Act**; in ignoring the fact that the appellant is still holding a valid title to the suit property; in ignoring the appellant's uncontroverted evidence that the 3rd, 4th and 5th respondents did not have all the requisite documents to enable them acquire a valid certificate of title; in ignoring the provisions of **section 3** of the **Law of Contract Act** which requires that a contract for disposition of land must be in writing; and in holding that the 3rd, 4th and 5th respondents were innocent purchasers for value.

18. In his brief submissions, **Mr. Kabuthi**, learned counsel for the appellant, argued that since there was no dispute that the 2nd respondent had not acquired a lawful title over the suit property, there was no way he could have passed a good title to the 3rd, 4th and 5th respondents. He cited the provisions of **sections 26 (1)** of the **Land Registration Act** which states that:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through

a corrupt scheme.”

19. Mr. Kabuthi added that there was overwhelming evidence that the 3rd, 4th and 5th respondents acquired the Title Deed to the suit property unprocedurally because they did not have any written agreement with the 2nd respondent, which in itself was a violation of **section 3** of the **Law of Contract Act**. They had therefore lost the protection of being innocent purchasers for value.

20. **Miss Wambui**, learned counsel for the 1st respondent, submitted that the Land Registrar, Thika, would effect any order made by this Court. She added that no irregularity or fraud had been proved against the 1st respondent.

21. On his part, **Mr. Karanja**, learned counsel for the 3rd, 4th and 5th respondents, submitted that his clients were *bona fide* purchasers for value and cited the case of **KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173** where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a *bona fide* purchaser 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, ... (he) must prove that:

- (a) he holds a certificate of title;**
- (b) he purchased the property in good faith;**
- (c) he had no knowledge of the fraud;**
- (d) he purchased for valuable consideration;**
- (e) the vendors had apparent valid title;**
- (f) he purchased without notice of any fraud;**
- (g) he was not party to any fraud.”**

22. Mr. Karanja however conceded that there was no written sale agreement between the 2nd respondent and his clients, only an oral agreement was made. He however submitted that the particulars of fraud that had been alleged as against the 3rd, 4th and 5th respondents had not been proved. Counsel urged the court to dismiss the appeal.

ANALYSIS AND DETERMINATION

23. We shall start by considering the provisions of **section 26 (1)** of the **Land Registration Act** which we have already quoted. The appellant contended that the 3rd, 4th and 5th respondents' Title Deed to the suit property is challengeable because there was evidence that the same was acquired illegally, unprocedurally and/or through a corrupt scheme.

24. The 3rd respondent, who was the only defence witness, admitted that he did not enter into a written sale agreement with the 2nd respondent, who he did not know until they met sometime after the 3rd respondent read the advertisement in the local newspaper regarding sale of the suit property.

25. The 3rd respondent said that he interacted with the 2nd respondent about 4 times, but he never bothered to get the 2nd respondent's identity card; that his advocate witnessed the oral sale agreement; and that he did not make any effort to contact the 2nd respondent after commencement of the suit.

26. The 3rd respondent did not produce any receipt to prove that he paid any stamp duty for the transfer, he said he just gave some money to the Land Registrar, Thika. The 3rd respondent did not even have a copy of the transfer that was allegedly signed by the 2nd respondent in respect of the suit property.

27. In our view, the conduct of the 3rd respondent was not of a diligent *bona fide* purchaser as described in **KATENDE V HARIDAR & COMPANY LIMITED (supra)**. The 3rd appellant is not an illiterate person. He was a Director of a Tea Factory who definitely knew or ought to have known how to go about a land transaction; particularly the need for a written sale agreement. The 3rd respondent had an advocate by the name Samuel Waiganjo, who allegedly “*witnessed the oral (sale) agreement*” as well as payment of Kshs.650,000/= being the balance of the purchase price. The said advocate was not called as a witness by the 3rd respondent.

28. We agree with the appellant’s counsel that the learned judge did not give any regard to the provisions of **section 26 (1) (b)** of the **Land Registration Act**, that is, whether the Title Deed to the suit property had been acquired procedurally or whether there had been any corrupt scheme in its acquisition. Similarly, the learned judge did not apply the provisions of **section 80** of the **Land Registration Act** which she cited to support her inability to order cancellation of the Title Deed that was held by the 3rd, 4th and 5th respondents. That section provides as follows:

“80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

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

29. The conduct of the 3rd respondent in deliberately failing to enter into a written sale agreement with the 2nd respondent; failing to pay stamp duty for the transfer (if any); and failing to keep a copy of the transfer, if at all, raises more questions than answers and portrays him quite negligent in his business transactions. In our view, he cannot be described as a *bona fide* purchaser for value. The trial court should therefore have ordered rectification of the register.

30. As at the date of the trial, the appellant was still holding a valid Title Deed to the suit property, which title was issued to him in 1992. The 2nd respondent was allegedly issued with a Title Deed for the same property in 1996. A property cannot have two valid title deeds. Even assuming that the second title had been issued by mistake, the first in time prevails; see **GITWANY INVESTMENT LIMITED V TAJMAL LIMITED & 3 OTHERS [2006] eKLR**.

31. The trial court, having established that the 2nd respondent held a valid title, and having heard how the 3rd, 4th and 5th respondents obtained their title, had no basis in law to hold that the latter were innocent purchasers for value without notice.

32. Consequently, we allow this appeal, set aside the decree made on 10th May, 2013 and substitute therefor an order entering judgment for the appellant as prayed in the Amended Plaint dated 18th August, 2008. The 2nd, 3rd, 4th and 5th respondents shall jointly and severally bear the costs of the appeal as well as the costs in the trial court.

DATED and Delivered at Nairobi this 10th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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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.