



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GATEMBU, MURGOR & SICHALE JJ,A)

CIVIL APPEAL NO. 321 OF 2014

BETWEEN

ROSE AYUMA MUSAWA.....APPELLANT

AND

MATHIAS ONYANGO TABUCHE.....RESPONDENT

(Appeal from the judgment and decree and order of the Environment

& Land Court at Kitale, Obaga , J.) dated 30th April 2014

in

H.C.Env. & L C.C. NO. 14 of 2012)

JUDGMENT OF THE COURT

This is an appeal from the judgment of Obaga, J. *The appellant, Rose Ayuma Musawa (Rose)* seeks the reinstatement of her ownership **over Title No. Kiminini/Matunda/Block 7/797 (the Property)** being a portion of Masaba farm comprising 50x100 feet, which the Environment and Land Court cancelled for reasons that she had acquired it fraudulently.

The background of the appeal is that on or about 30th November 2001, the respondent, Mathias Onyango Tabuche, (*Onyango*) entered into a sale agreement for the purchase of half portion of the Property comprising 25x100 feet with one Francis Wamalwa Musimbi (*Wamalwa*). It was his complaint that it had later come to his knowledge that on the 27th July 2007, when Rose had registered the Property in her own name, she also included the portion claimed by Onyango. It was for this reason that Onyango filed a suit against her seeking the revocation and cancellation of the title obtained by Rose over the Property.

Rose's case was that she had purchased the Property from Wamalwa on 4th September 1999 for a sum of Kshs. 120,000/-; that she paid an initial sum of Kshs. 55,000/-, following which she obtained possession of the Property, where she has resided since. When she paid the balance of the purchase price on 21st June 2000, she was placed in the area list of farm members, and allocated a number. According to Rose, she was later issued with a clearance certificate which caused her to be issued with a title deed over the Property on 27th August 2012. Rose denied that Onyango had purchased a portion of the Property, and

further contended that he had since trespassed on the Property and erected a structure. It was for this reason that in her counterclaim she sought orders for eviction of Onyango from the Property.

Upon considering the pleadings and the evidence, the trial court found that Rose had acted fraudulently in acquisition of the title over the Property, and ordered its cancellation. The court further ordered that the Property be subdivided into two equal portions, and dismissed Rose's counterclaim.

Rose was not satisfied with the decision of the High Court and filed this appeal to this Court on grounds that the learned judge misdirected himself on the law applicable to the circumstances of this case and in finding that the title was fraudulently issued, since fraud was neither pleaded nor proved; that the court failed to appreciate that the agreement of 4th September 1999 was not at any time nullified; that the sale agreement between Wamalwa and Onyango was null and void for want of Land Control Board consent; that the learned judge fell into error when he found that the entire purchase price was not paid; that the learned judge misdirected himself on the law regarding the burden of proof, and further reached a decision which was against the weight of the evidence.

In his submissions, learned counsel for Rose, **Mr. Kiarie** submitted that the court ought not to have ordered a cancellation of Rose's title and dismissed her counterclaim on the basis of fraud. Counsel argued that, in the respondent's claim fraud was not pleaded, and neither was there any evidence showing that Rose had acted fraudulently. Having acquired a good title, under **section 25, 26 and 27** of the **Registered Lands Act (repealed)**, her rights to the title became indefeasible, and any cancellation of her title required to be undertaken in accordance with the law.

On the other hand, Onyango had failed to prove that he had acquired any title or ownership of any part of the Property. Counsel further submitted that in any event, the sale agreement between Wamalwa and Onyango was voided as Land Control Board consent had not at any time been obtained. Counsel cited **David Sirengo ole Tukai vs Francis Arap Muge [2014] eKLR** for the proposition that a valid purchase could not exist without Land Control Board consent having been obtained.

Counsel faulted the learned judge for finding against the weight of the evidence that Rose had failed to pay the entire purchase price, and for failing to appreciate that Wamalwa had unlawfully increased the purchase price of the Property without due regard for Rose's existing sale agreement; that it was only when she paid the additional amount of Kshs. 20,000/- that he agreed to transfer the Property.

Finally, as regards Rose's counterclaim, counsel submitted that, since Onyango was a trespasser on the Property, he urged this Court to order that he immediately vacate the portion occupied.

Onyango who appeared in person relied on his written submissions. It was his case that, Wamalwa's plot was Title No. 139, and Rose was issued with her own plot number. According to him Title No. Kiminini/Matunda/Block 7/797 did not exist. He further submitted that Rose was given two years within which to pay the balance of the purchase price which she failed to do, so that by an agreement dated 10th July 2003, Rose agreed to the sale of a portion of the Property to Onyango which was to be subdivided, so that Rose retain a half portion, and Onyango would purchase the other half. He argued that Rose had acted fraudulently by failing to produce this agreement in court. It was his argument that since he had paid for his half portion he was entitled to have half of the Property transferred to him.

With respect to the issue of Land Control Board consent, Onyango submitted that the issue had not been raised in the court below.

We have considered the pleadings, submissions of the parties, as well as the law, and in our view the following issues fall for our consideration.

- i. whether a valid sale agreement for the Property existed between Rose and Wamalwa, and if so, whether the agreement was at any time nullified;*
- ii. whether the learned judge rightly ordered the cancellation of the title and subdivision of the*

Property and on the basis of fraud; and

iii. Whether the failure to obtain Land Control Board consent rendered Onyango's sale agreement null and void.

This being a first appeal, we must consider the evidence adduced before the trial court, evaluate it and draw our own conclusions. We are alive to our duty on a first appeal as stated by Sir Clement de Lestang VP in **Selle v. Associated Motor Boat Company [1968] E.A. 123 at p. 126;**

"... 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 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 always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the 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."

These observations were cited with approval by this Court's in **Jivanji v. Sanyo Electrical Company Ltd [2003] KLR 425 at p. 431.**

We will begin with considering the last issue which was the validity of Onyango's agreement for reasons that Land Control Board consent had not been obtained.

In the grounds of appeal, Rose's argued that the Land Control Act was applicable and that failure to obtain Land Control Board consent rendered void the sale of land to Onyango; that the learned judge was in effect enforcing a void contract to which Rose was not a party.

In the case of **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR (Civil Appeal No. 219 of 2013)** it was stated that parties are indeed bound by their own pleadings. Rose in her defence and counter claim did not plead that land control board consent was not obtained. For Rose to seek a declaration that Onyango's sale agreement for a portion was null and void, she ought to have pleaded it so as to enable the court make a determination on the issue. Without having pleaded the issue at the time, we find that the issue cannot now be litigated at this stage.

We now return to address the question of whether a valid sale agreement existed between Rose and Wamalwa, and if so whether it was at anytime rescinded or determined by either party.

According to the evidence, Rose entered into a sale agreement with Wamalwa on 4th September 1999 to purchase the Property for a sum of Kshs 120,000/-. She was to complete the payment within two years. At the time of entering into the agreement she paid an initial amount of Kshs 55,000/-, and paid a further amount of Kshs. 5,000/- bringing the total amount paid to Kshs. 60,000/-. She testified that on 21st June 2000 she paid a further amount of Ksh. 60,000/-, and produced a document of acknowledgment of this payment. As a result, she was allocated the Property in the area list. The area list was later forwarded to the Land Control Board where consent was obtained.

In 2004, Rose contended that Wamalwa suddenly demanded a further sum of Kshs. 30,000/-, which at the time she was unable to pay. It was soon thereafter that Onyango commenced construction on a portion of the Property. He continued this construction despite her pleas for him to stop causing her to have to remove the fencing posts he had erected without her consent. For this, she was charged and convicted for interfering with a demarcated boundary. In 2006, Rose stated that she paid Wamalwa a further Kshs. 20,000/-, after which he accompanied her to the Registrar of Masaba farm where she was issued with a clearance certificate. It was later that she obtained the title to the Property.

Onyango's evidence was that he purchased a portion of the Property comprising 25x100 feet from Wamalwa for an agreed consideration of Kshs. 60,000/-. He produced a sale agreement dated 30th

November 2001. It was his case that having purchased a half portion of the Property, he embarked on subdividing it into two, and together with a surveyor, they proceeded to erect fencing posts on the Property following which he took over possession. Subsequently thereto, he sought orders to evict Rose from the portion of the Property that he occupied.

When cross examined, Onyango stated that the sale agreement entered into with Wamalwa did not specify or identify the plot that was the subject of the agreement. Onyango admitted that Rose was not a party to this agreement. There was also no mention in the sale agreement between Wamalwa and Onyango that the Property Rose had purchased would be subdivided with Onyango. Onyango also admitted that he did not at anytime seek Land Control Board consent to purchase a portion of the Property, and neither was his name included or identified with any plot on the area list of Masaba farm.

Catherine Nafula Wamalwa, (PW2), stated that at the time the agreement dated 4th September 1999 was entered into, Rose paid Kshs 30,000/-. She was also given a period of two years within which to pay the entire purchase price of Kshs. 120,000/-. She later made two payments of Kshs. 5,000/- and a further Kshs. 10,000/- bringing the amount paid to Kshs. 60,000/-. Catherine testified that after the lapse of the two year period, Rose failed to pay the balance of the purchase price. It was at this point that Wamalwa decided to sell a half portion of the Property to Onyango for an amount of Kshs 60,000/-, while Rose would retain the other half. A surveyor was employed to subdivide the Property, into two portions.

There is no doubt that on 4th September 1999 Rose entered into an agreement with Wamalwa to purchase the Property comprising 50x100 feet for an amount of Kshs. 120,000/-. Wamalwa's wife, Catherine corroborated the evidence that Rose initially paid Kshs. 60,000/-. What is questionable is whether the balance of Kshs. 60,000/- was actually paid. Rose produced an acknowledgment of receipt by Wamalwa of an amount of Kshs. 60,000/- on 21st June 2000, which was witnessed by several persons including Catherine. Of this evidence the learned judge had this to say,

“The Defendant produced an agreement dated 21/6/2000 (Defence exhibit 2). In this agreement it is alleged that she paid Kshs. 60,000/- being the remaining balance. This agreement is doubtful. It was introduced to her list of documents through a supplementary list of documents filed in court on 11/7/2013 pursuant to leave of the court. In 2004, the defendant was charged in court for interfering with the boundary between her and the plaintiff. In the proceedings of that case, it is clear that she pleaded with the court to allow her clear the balance owed to the deceased. If indeed she had cleared the purchase price by 21/6/2000, which is this balance that she again to clear? It is apparent that this agreement was solely made by the defendant for the purposes of this case.”

That may be so, but in the event the final balance was not paid, the question remains whether Rose's agreement remained valid.

The evidence does not show that Rose's sale agreement was rescinded or determined by Wamalwa at any time. We cannot find any notice of termination of the agreement. In addition, the agreement between Wamalwa and Onyango, did not refer to any consent by Rose to sell any portion of the Property to Onyango. The problem is further compounded by the fact that Onyango's sale agreement makes no reference to the Property, or the location of the portion purchased, and therefore it is not possible to reach a finding that the portion he purchased was a part of Rose's land.

This being the case, we find that Rose's agreement with Wamalwa remained valid, and failure to perform any part of the agreement was only enforceable by the respective parties thereto. In other words, as there was no privity of contract between Rose and Onyango in respect of the sale agreement between Rose and Wamalwa, it was not possible for Onyango to enforce that agreement on behalf of Wamalwa.

The doctrine of privity of contract proposes that a contract cannot confer rights or impose obligations on any person other than the parties to the contract, and therefore it is not capable of being enforced by a third party. In ***Dunlop Pneumatic Tyre Co. Ltd vs Selfridge & Co Ltd [1915] AC 847***, Lord Haldane LC stated thus;

“My Lords, in the Law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

The case of ***Agricultural Finance Corporation vs Lengetia*** 1982-1988 1 KAR 772 in addressing the issue stated thus;

As a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party even if the contract is made for his benefit and purports to give him the right to sue or make him liable upon it. The fact that a person who is a stranger to the consideration to the consideration of the contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.

What this means is that, this suit was filed by Onyango to enforce the terms of an agreement made between Wamalwa and Rose, so that Onyango could derive the benefits of an agreement made between Wamalwa and himself. Since Onyango was not a party to the agreement between Wamalwa and Rose, he could not enforce any of Wamalwa’s rights under that agreement. Conversely, since Rose was not a party to Onyango’s agreement with Wamalwa, Onyango could not seek to enforce any rights thereunder against her. If indeed a valid agreement existed between Wamalwa and Onyango then, any claim Onyango had under that agreement was against Wamalwa and not Rose. There being no privity of contract between Rose and Onyango, we find that the learned judge misdirected himself in seeking to enforce the terms of the agreement between Wamalwa and Rose to which Onyango was not a party.

We further find that, in seeking to enforce the agreement between Wamalwa and Onyango by cancelling the registration of Rose’s title and subdividing the Property, the learned judge fell into error, as again, no privity of contract existed between Rose and Onyango.

The next question we must address is whether the learned judge rightly ordered the cancellation of the Rose’s title for reasons that Rose acted fraudulently.

Section 143 of the ***Repealed Registered Land Act*** sets out the prerequisites for rectification of the register and stipulates thus;

“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such 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 his act, neglect or default.”

The provision makes it clear that, except in a case of first registration, the court may order the rectification of the Land register where fraud or mistake is established.

Order 2 rule 10 (1) of the ***Civil Procedure Rules*** stipulates;

Subject to subrule (2) every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including without prejudice to the generality of the foregoing—

b. Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and

b.

The case of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi, JA (as he then was) upheld these provisions when it was stated;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours)

Our review of the pleadings shows that Onyango did not plead nor particularise Rose’s fraudulent actions leading to the acquisition of her title. Neither was there any evidence placed before the court to show that fraud was proved. For a claim of fraud to succeed, Onyango was required to not only plead and particularise it, but show that Rose perpetuated a fraud so as to enable a court reach such a finding.

In the present case, there is no such evidence. Without a case of fraud having been made out, we find that the court below misdirected itself, by wrongly concluding that Rose had fraudulently acquired her title, which led to the wrongful order of cancellation of her title over the Property.

On account of the foregoing, we find that we must interfere with the decision of the Environment and Land Court dated 30th April 2014, and, in so doing, we make the following orders:

1. The appeal is allowed;
2. Rose’s title over Title No. Kiminini/Matunda/Block 7/797 is hereby reinstated;
3. The respondent is hereby ordered to vacate the portion of Title No. Kiminini/Matunda/Block 7/797 of which he is in occupation within the next 30 days from the date hereof;
4. Rose shall have the cost of this appeal as well as the costs in the Environment and Land Court.

It is so ordered.

Dated and delivered at Kisumu this 29th day of July, 2016.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR