



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 30 OF 2015

BETWEEN

FLEMISH INVESTMENTS LIMITED.....APPELLANT

AND

TOWN COUNCIL OF MARIAKANI.....RESPONDENT

*(Appeal from the judgment and decree of the Environment  
and Land Court of Kenya at Mombasa, (Mukunya, J.) dated*

*30<sup>th</sup> October 2014*

*in*

*ELCC No. 459 of 2010)*

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**JUDGMENT OF THE COURT**

The main issue in this appeal is whether the *Environment and Land Court* at Mombasa (*Mukunya, J.*) erred in holding that *Plot No. 34*, a two-acre parcel of land on which has stood a public cattle dip since 1978, is not part of the property known as *LR No. 24366 (the suit property)*, registered in the name of *Flemish Investments Ltd (the appellant)* since 2006. The appellant claims that *Plot No 34* and the cattle dip are within its property whilst *the respondent*, the *Town Council of Mariakiani* maintains that the plot and the dip have always been public utilities and that *Victor Ndambuki (Ndambuki)*, from whom the appellant purchased the suit property had in 1999, fraudulently, and to the knowledge of the appellant, included the plot and the dip as part of the suit property. It is necessary to point out that after failing to enter appearance and file defence, judgment was duly entered against Ndambuki on 31<sup>st</sup> August 2012 and he did not take part in the proceedings in the trial court or this court.

In the trial court, the appellant and the respondent called 2 witnesses each, whose evidence established the following facts. Previously the suit property was Trust Land and part of a larger parcel measuring approximately 40 acres, owned by 4 brothers. In 1993, two of the brothers, *Samuel Sikukuu Katetei* and *Elijah Kimanathi Katetei* sold to Ndambuki 8 acres while another brother, *Michael Mundathi*, sold to him 2 additional and separate acres. The 2 acres sold by Mundathi were described as being “*at the back*”,

which we understand to mean behind the 8 acres and away from the Mombasa-Nairobi Road. By the time of those transactions, the respondent had already set apart Plot No 34, comprising 2 acres of the larger parcel, for public utility and had in 1978 constructed a cattle dip thereon for use by members of the public. Plot No 34 was “*in front*” of the 8 acres and abutted the Mombasa-Nairobi Road. When Ndambuki purchased the suit property, he applied for setting apart of the land for industrial purposes, which was duly approved by the respondent’s predecessor. Ultimately when he was registered the owner of the suit property in 1999, it totaled in area 10.1 acres. In addition, he had caused to be included in the suit property Plot No 34, which, as we have already stated, had already been set apart for public use and on which stood the cattle dip, instead of the 2 acres at the back as was intended. Ndambuki subsequently sold and transferred the suit property to the respondent on 18<sup>th</sup> September 2006. When the appellant attempted to construct a perimeter fence round the suit property, the respondent stopped the exercise on the grounds that the suit property wrongfully and illegally included Plot No. 34, which had already been set apart for public purposes.

On 16<sup>th</sup> December 2010, the appellant filed ***Civil Suit No. 459 of 2010*** against the respondent seeking a declaration that the respondent had no legal basis to stop it constructing a perimeter wall around the suit property; a permanent injunction restraining the respondent from obstructing or interfering with the construction of the wall; and special damages of ***Kshs 180,000*** per month from 1<sup>st</sup> June 2010 until the respondent ceased interfering with the suit property. The appellant pleaded that it was the lawfully registered owner of the suit property with absolute and indefeasible title and that as a result of the respondent’s interference with the suit property, it had incurred the pleaded special damages by having to hire alternative land for parking of its motor vehicles.

The respondent delivered a defence and a counterclaim against both the appellant and Ndambuki. The essence of the defence was that the registration of the suit property, first in the name of Ndambuki, and later in the name of the appellant was fraudulent because Ndambuki did not buy Plot No 34; that the same was already set apart for public utility and was not available for sale to him or the appellant; and that the appellant knew or ought to have known that Plot No. 34 was not part of private land by reason of the public cattle dip erected thereon. Particulars of fraud were duly pleaded against both the appellant and Ndambuki and the respondent prayed for: a declaration that Plot No 34 was not part of the suit property; a mandatory injunction for the rectification of the relevant deed plan to excise or exclude Plot No 34 from the suit property, and a permanent injunction to restrain the appellant and Ndambuki from interfering with Plot No. 34.

Mukunya J. was persuaded that Plot No. 34 was not part of the suit property as it had already been set apart for public purposes. He was also not satisfied that the appellant was an innocent purchaser because of the presence of a public cattle dip right into the suit property. Accordingly he dismissed the appellant’s suit with costs, allowed the respondent’s counterclaim and issued an order for excision of Plot No 34 from the suit property and its registration in the name of Kilifi County Government to be held in trust for the public. The appellant was aggrieved and lodged this appeal.

By consent of the parties, this appeal was heard through written submissions. Although the parties requested an opportunity for limited oral highlighting of the submissions, on the scheduled date only counsel for the respondent turned up and opted to forgo highlight the submissions. Accordingly we directed that this appeal would be determined on the basis of the submissions filed by each party.

In support of the appeal, the appellant submitted that it was the registered proprietor of the suit property under the ***Registration of Titles Act, Cap 281*** (repealed) and that by virtue of ***section 23(1)*** of that Act a certificate of title was conclusive evidence of proprietorship and could not be challenged except on grounds of fraud or misrepresentation to which the proprietor was a party. It relied on among others, the judgments of this Court in ***Bruce Joseph Bockle v. Coquero Ltd, CA No. 41 of 2013*** and ***Dr. Joseph N. K. Arap Ng’ok v. Justice Moijo ole Keiwua & 5 Others, CA No. 60 of 1997*** to demonstrate the interpretation and application of the provision.

The appellant further urged that even if fraud was proved, by dint of ***section 24*** of the repealed Act, the remedy available to the respondent was a claim for damages and not nullification of title. In this case, the

appellant exonerated itself from fraud and contended that if any fraud was proved, it was only against Ndambuki. It therefore faulted the learned judge for finding that it was party to the fraud whereas the evidence on record indicated that it was a *bona fide* purchaser for value. In that regard the learned judge was also faulted, on the authority of *Nyangate Guto alias Watson Mogere Mogoko v Maxwell Okemwa Mogoro & Another*, CA No 165 of 2011, for failing to find that the fraud alleged against the appellant was not proved to the required standard, which is above a balance of probabilities.

The respondent opposed the appeal submitting that it had not sought, and the trial court had not ordered, nullification of the appellant's title. All that was in contention, it was contended, was whether Plot No 34 was legally part of the suit property, and that the trial court had correctly found that it was not. The appellant further submitted that even when property was registered under the repealed Act, fraud or misrepresentation relating to the registration and to which the registered proprietor was a party was enough to vitiate the title.

In this case, the respondent submitted, fraud was proved to the required standard against both Ndambuki and the appellant. It was contended that Ndambuki had surreptitiously included Plot No 34, which he had not bought, and which had already been set apart for a public cattle dip, in the suit property. When the respondent purchased the suit property the cattle dip was standing and still is standing on the suit property, giving him sufficient warning and notice that it was public land which could not form part of private property. The respondent disputed that the appellant was a *bona fide* purchaser and contended that all along the appellant was aware of the fraud perpetrated by Ndambuki and went along with the fraud, purporting to be oblivious of the conspicuous public cattle dip on the land.

Lastly the respondent submitted that the evidence on record, which showed the appellant seeking permission from the respondent to relocate the cattle dip at its own expense, was the clearest indication that all along the appellant knew that Plot No 34 was public property and not genuinely a part of the suit property. The judgments of the High Court in *Multiple Hauliers East Africa Ltd v. The Attorney General & 10 Others*, Petition No. 88 of 2010 and *Kenya Guards & Allied Workers Union v. Securicor Guards Services & 38 Others*, HC Misc. App. No. 1159 of 2003 were cited in support of the submission that where public interest and private interest clash, the former must prevail.

Having set out the background to the appeal and the positions taken by both the appellant and the respondent, we now turn to consider the merit of the appeal. This is a first appeal from the Environment and Land Court pursuant to **section 16** of the *Environment and Land Court Act, 2011*. Such an appeal proceeds by way of retrial and we are obliged to re-evaluate and reappraise the evidence adduced before the trial court and come to our own conclusion. We are nevertheless required to bear in mind that we do not have the advantage that the trial judge had of seeing and hearing the witnesses as they testified. On issues turning on the credibility of witnesses, we must therefore defer to the conclusions of the learned judge, unless we are satisfied that on the basis of the evidence on record, no reasonable tribunal would have arrived at the conclusion that the trial court did. (See *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123).

There are several facts that are not in dispute in this appeal. Before the sale of the suit property to Ndambuki, the same was Trust Land within the meaning of **Chapter IX of the former Constitution** and the *Trust Land Act, cap 288*. By virtue of **section 115 (1)** of the former Constitution, all Trust Land was vested in the county council within whose area of jurisdiction the land was situated and each county council held the Trust Land for the benefit of the persons ordinarily resident on the land. **Section 115(2)** obliged the county council to give effect to rights and interests vested by African customary law in any tribe, group, family or individual over the land. In this case, the rights to the parcel of land of which the suit property was part were vested in the Katetei family, which sold its rights and interests to Ndambuki.

It is also important to advert to the provisions of **section 117** of the former Constitution, which provided as follows, in the pertinent parts:

**“117 (1) Subject to this section, an Act of Parliament may empower a county council to set apart any area of Trust land vested in that county for use and occupation-**

a. *by any public body or authority for public purposes; or*

b. ...

c. ...

*and the Act of Parliament may prescribe the manner in which and the conditions subject to which such setting apart shall be effected.*

**(2) Where a county council has set apart any area of land in pursuance of this section, any rights, interests or other benefits in respect of that land that were previously vested in any tribe, group, family or individual under African customary law shall be extinguished.** (Emphasis added).

The Act of Parliament contemplated by section 117(1) was the Trust Land Act, **section 13** of which provides for setting apart of land vested in a county council for public purposes, and sets out the procedure to be used in setting land apart. It is not in dispute that in 1978 the respondent's predecessor set apart Plot No 34 for purposes of a public cattle dip and indeed constructed a dip thereon, which exists today, its condition notwithstanding. The evidence adduced by Samuel Sikukuu Katetei was clear that the Katetei family sold 8 acres to Ndambuki and that he purchased an additional 2 acres at the back of the 8 acres. The witness confirmed that Plot No 34, which was in front of the 8 acres had already been set apart for public purposes and indeed was not the 2 acres that were sold to Ndambuki.

The evidence is clear too that it was Ndambuki, who illegally and fraudulently included Plot No. 34 in the suit property. When he was served with summons, he did not enter appearance or file defence and default judgment was entered against him. From the evidence on record, like the learned judge, we are satisfied that fraud and misrepresentation against Ndambuki was proved in the process leading up to the registration of the suit property in his name.

What of the appellant, was fraud proved against it? The trial judge was certainly not impressed by the fact that the appellant was fully aware that there was a public cattle dip enclosed in the suit property. Coupled with its efforts to relocate the cattle dip at its own expense, the learned judge concluded that the appellant was not a *bona fide* purchase of Plot No 34. We agree with the trial judge that on the basis of the evidence on record, the appellant's *bona fides* was practically non-existent. A *bona fide* purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, persons, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellant honestly believed that Plot No. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells.

However that in itself does not suffice to make the appellant party to Ndambuki's fraud or misrepresentation. As this Court stated in ***Gudka v. Dodhia [1982] KLR 376***, allegations of fraud must be strictly proved more than on a mere balance of probabilities. (See also ***R. G. Patel v. Lalji Makanji [1957] EA 314***). But that is not to say we are persuaded, in the circumstances of this appeal, that the inclusion of Plot No 34 in the suit property and subsequent registration of the same in the names of Ndambuki and later of the respondent, were lawful and protected by the Registration of Titles Act. Far from it. There is a more fundamental and compelling reason why we must uphold the conclusion reached by the trial judge.

By dint of section 117(2) of the former Constitution, once Plot No. 34 was set apart for public purposes, all the rights that the Katetei family or any other person had over that plot were immediately extinguished by operation of the Constitution. The effect thereafter was that neither the Katetei family nor any other person, could sell and transfer any rights over Plot No 34 to Ndambuki.

Similarly, Ndambuki had no rights over Plot No. 34 to sell and transfer to the appellant. Although section

23 of the Registration of Titles Act declared that the certificate of title was conclusive evidence of proprietorship, that by itself could not have conferred on Ndambuki and the appellant title to Plot No 34, simply because the Constitution, a higher legal norm than the Registration of Titles Act, had extinguished title to plot No. 34 before it could be transferred to Ndambuki or the appellant. As the evidence on record, in the form of postal search dated 28<sup>th</sup> April 2010 shows, Plot No. 34 is still registered in the name of County Council of Kilifi and reserved as a community cattle dip. The purported transfer and incorporation of Plot No 34 into the suit property was simply *void ab initio*.

We come to the conclusion therefore that this appeal has no merit and is dismissed in its entirety, with costs to the respondent. It is so ordered.

**Dated and delivered at Mombasa this 25<sup>th</sup> day of November, 2016**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**