



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE, MURGOR JJ, A)

CIVIL APPEAL NO. 28 OF 2005

BETWEEN

SAMUEL KAMERE.....APPELLANT

AND

LANDS REGISTRAR, KAJIADO.....RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Nairobi  
(Khamoni, J) dated 25<sup>th</sup> February, 2000 in H.C.C.C. NO. 2143 OF  
1993)*

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JUDGMENT OF THE  
COURT

In this appeal, *the appellant, Samuel Kamere* seeks to be indemnified by *the respondent, the Lands Registrar Kajiado* for the cancellation of his name from the Land Register which reinstated the name of *Archibold Karanja Kagai, the plaintiff* as the registered proprietor of a parcel of land known as land reference number Ngong/Ngong/3088 (*the suit property*) situate in Kajiado District, registered under the Registered Land Act, Chapter 300, (*the Act*) (*now repealed*). The plaintiff was not included as a party to the appeal.

Briefly, the facts are that the plaintiff filed a suit in the High Court wherein he claimed that at all material times he was the registered owner of the suit property. He contended that on or about 5<sup>th</sup> April 1991 the respondent wrongfully and unlawfully registered the appellant as the owner of the suit property, and issued him with a certificate of title. The plaintiff had demanded that the respondent rectify the register to reinstate him as the registered owner, but the respondent had failed and or refused to do so. As a consequence, the plaintiff filed suit against the appellant and the respondent for the rectification of the register.

In an amended defence, the appellant, on his part contended that he was the lawful registered proprietor of

the suit property, and that he had purchased it from the plaintiff. He further contended that the respondent registered the suit property in his name. During the proceedings, and pursuant to the orders of the trial court, the appellant filed a further statement of issues wherein he sought the court's determination on the issue of whether the appellant would be entitled to be indemnified by the respondent, in the event the plaintiff was successful.

The respondent on its part stated that the registration of the suit property, and the issuance of the land certificate in the appellant's name was lawful, as they were done in reliance on the documents that were presented at the time of registration. The respondent also denied that it was liable to indemnify the appellant.

Upon hearing both parties, the learned trial judge found that the suit property had been unlawfully transferred to the respondent, and ordered the rectification of the register to reinstate the plaintiff as the rightful owner. The learned judge further found that the respondent was not entitled to be indemnified by the respondent for general damages for loss of the suit property and all the expenses including the payment of stamp duty and registration fees.

Being aggrieved by the judgment of Khamoni, J delivered on 25<sup>th</sup> February 2000, the appellant filed this appeal which is before us.

When **Mr. Gacanja** learned counsel for the appellant appeared before us he sought to collapse the grounds of appeal into three main issues namely,

- i. *Whether or not the appellant was the bonafide purchaser of the suit property for value;*
- ii. *Whether there was a duty or liability on the part of the respondent in causing the transfer of the suit property to the appellant;*
- iii. *Whether the respondent is liable to compensate the appellant for the fraud occasioned under the provisions of the Registered Land Act.*

It was counsel's submission that, the respondent had accepted and registered the title of the suit property in the appellant's name upon the presentation of the transfer documents, which included an alleged original title document, the signed transfer, Land Control Board consent, the payment of stamp duty and registration fees. It was submitted that, since the respondent did not find any shortcomings in the documents, the plaintiff's name was cancelled, and the appellant entered as proprietor on the land register, whereupon he was issued with a certificate of title. It was counsel's submission that, in registering the suit property in the appellant's name the respondent had a duty to the public to verify the registration documents, and that without adherence to this duty, there could be no public trust in the land registration system. Counsel continued that the facts disclosed during the trial, showed that the title that accompanied the transfer documentation was a fake and did not belong to the plaintiff. Counsel further submitted that the learned judge erred in determining that there was wrong doing on the part of the appellant in acquiring the suit property by finding that the appellant had contributed to the fraudulent registration of the suit property in his name, yet no such proof was tendered.

On the issue of indemnity due to the appellant, counsel submitted that by virtue of section **144 (1) (a)** of the Act, any person suffering damage on account of rectification of the land register was entitled to be indemnified. As a result of the judgment the register was rectified to reinstate the plaintiff as the registered proprietor of the suit property, and the appellant was entitled to be indemnified for the loss arising therefrom. Further, that the limitation under **section 144 (2)** of the Act did not apply, as the trial court found that there had been no fraud on the appellant's part which contributed towards the rectification. Counsel urged the Court to allow the appeal.

**Mr. WaigiKamau**, learned Principal State Counsel for the respondent opposed the appeal and relying on Mr. Maroro's submissions in the trial court contended that, no indemnity was due to the respondent as he was the author of his own misfortune. No valid contract of sale was produced, and the appellant only

produced copies of the Land Control Board consent. He did not present any authentic documents before the court, or proof that consideration was paid for the suit property. Counsel went on to submit that the appellant did not call the persons who had sold the suit property to him to testify. That the onus was upon the appellant to undertake the necessary due diligence in respect of the suit property prior to purchase which he failed to do. That **section 144 (2)** of the Act provides that no indemnity will be payable where the person suffers loss on account of his own carelessness, and that in any event indemnity is only payable to the extent of the rectification of the register. When the registrar noted an objection, a restriction was properly entered on the register.

In reply, Mr. Gachanja, submitted that the appellant paid the purchase price albeit after registration, but that this did not vitiate the transaction. He was an unaware of and had no part in the fraud of which he was a victim. That upon discovery of the fraud, the appellant reported the matter to the police, and the fraudsters were arrested, but later released.

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 demeanour of a witness is inconsistent with the evidence in the case generally.”***

This was cited with approval by this Court’s in ***Jivanji v. Sanyo Electrical Company Ltd [2003] KLR 425 at p. 431.***

The first issue is whether the appellant was a bona fide purchaser for the value of the suit property. The appellant has argued that, irrespective of how or from whom he purchased the suit property, he acquired an indefeasible title that defeated the plaintiff’s title to the suit property once the transfer was registered in his name by the respondent.

In this regard the learned judge stated thus:-

***“The registration of the Plaintiff as the proprietor of the suit parcel of land, having acquired it for valuable consideration, was until 5<sup>th</sup> April 1991 protected by the provisions of sections 27 and 28 of the Registered Land act. His rights could only be defeated through the provisions of the Registered Land Act. Otherwise his title in the land was indefeasible.”***

And went on to state,

***“No person has legal capacity or authority to transfer to another person a registered proprietors interest in a parcel of land registered under the Registered Land Act without the participation or knowledge and consent of the registered proprietor. The transfer of the suit parcel of land to the first Defendant on 5<sup>th</sup> April 1991 was done by a transferor who was not the registered proprietor of that parcel of land. It was done without the knowledge and consent, or participation of the Plaintiff. The transferor had no legal title in the Plaintiff’s said parcel of land. The transferor had no proprietary rights in that parcel of land to pass to the first Defendant. Notwithstanding the fact that the transaction was or may have been blessed with consent of the relevant Land Control Board, was or may have***

***been registered, that transaction was null and void ab-initio in so far as it purported to transfer the suit parcel of land to the first Defendant as there could be no valid transfer where the transferor has no title to transfer. Documents may have been prepared, consent of the land control board obtained, signatures appended and attested and the transfer registered. But all those could not give the purported transferor the title to transfer to the first Defendant. That transfer was unlawful.”***

It is stipulated at **section 27** of the Act that the registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appertaining thereto.

At **section 28** of the Act it is further provided,

***“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—***

***(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and***

***(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.***

***(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”***

From the evidence, it is not disputed that prior to the registration of the appellant, the plaintiff was the registered proprietor of the suit property. During the hearing, the plaintiff produced an original certificate of title in respect of the suit property, which was confirmed to be authentic by the respondent, and which was in his possession subsequent to the transfer of the suit property to the appellant. It is also undisputed that, the plaintiff did not sell the suit property to the appellant who in turn admitted that, the persons who sold him the suit property were charged in the District Magistrates Court, Kajiado.

Since the plaintiff did not transfer his property to the appellant, having regard to **sections 27** and **28** of the Act, he retained an absolute and indefeasible title. Yet, having said that, it is the appellant’s argument that, irrespective of how he procured the suit property, he (the appellant) was a bona fide purchaser for value, and as such, acquired a valid and indefeasible title under the provisions of the Act, following the unequivocal registration of the transfer in his name by the respondent.

It is evident that there are two competing claims over the suit property, and we have said that the plaintiff’s proprietary interest is already established. Since the appellant’s title is under challenge, in order to be considered a bonafide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.

We will begin by addressing the question of whether the appellant was able to prove that he acquired a valid and legal title upon transfer.

In the case of ***MunyuMaina vs Hiram GathihaMaina, Civil Appeal number 239 of 2009***, this Court stated,

***“We state that when a registered proprietor’s root of title is under challenge, it is not***

**sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.” (emphasis ours)**

It was the appellant’s case that, he purchased the suit property from a Mr. and Mrs. Karanja Kagai who had been introduced to him by a land agent.

He further testified that after he had seen the property, the purchase price was negotiated, after whereupon, Land Control Board consent was obtained, from the District Office, Ngong. Thereafter, together with Mr. and Mrs. Kagai, he proceeded to Kajiado Land Registry to have the transfer documents registered. The documents were accepted and registered by the respondent on 5<sup>th</sup> April 1991. It was on this basis that he maintained that he was a bonafide purchaser.

Despite the elaborate testimony on the process, none of the requisite documents were produced before the trial court. Regarding these documents the appellant stated thus,

***“We went to the Land Control Board for consent. I did not make copies of those documents. I took a copy of the letter of consent. We had no written agreement between us. We agreed on the price. We applied for consent of the Land Control Board. I took a copy of that application. No copy of the title deed. No copy of his identity card.”***

On the signed transfer the appellant had this to say,

***“I signed the transfer as well as Mr. Kagai. I do not remember whether that transfer form was signed by anybody else. I have been dealing with land and know the procedure. (Witness shown a format of the transfer form). I do not remember whether what we signed resembled this one you are showing me.”***

Having failed to produce any documents to prove the legality of his title, the appellant complained that he had applied for the Land Registrar Kajiado to produce the parcel file, the parcel correspondence file and the Land Register appertaining to the suit property, but which had not been made available to the court.

On his part, **Mr. Peter Muigai Kihii**, the Land Registrar, Kajiado Land Registry who testified on behalf of the respondent told the court that the Land Registrar at the time the transfer was registered was a **Mr. Mugambi Njeru**, who had since left. He nevertheless testified that the Land Register he produced showed that the suit property was registered in the appellant’s name. He also stated,

***“For every entry in the land register, there are supporting documents kept in the Land Registry by the Land Registrar. I have the Original of the land register. I have a certified copy of the same and hereby produce as an exhibit (D2 Exhi 1). I have tried to look for the application for consent, Letter of Consent, the Transfer and the Original Title Deed. But I could not trace any of them in the Land Registry. The Land register is the only document remaining.”***

In totality, despite the reference to the various registration documents, it is remarkable that the only documents that were available for scrutiny by the trial court were the plaintiff’s original title dating back to 5<sup>th</sup> April 1991, the appellant’s title issued upon registration of the transfer, and the Land Register.

Other than these documents, there is nothing to show why the appellant’s name was entered on the Land Register, or on what basis the registration was effected.

Without any documents to support the registration of the appellant as the proprietor of the suit property, the appellant failed to discharge the evidentiary burden of proof as required, and the only conclusion that we can reach on a balance of probabilities is that, since the appellant has not proved or shown the root of

his purported title, he could not acquire title to the suit property, which in any event, was incapable of passing to him upon the registration of the purported transfer.

In considering whether the appellant carried out a proper due diligence to establish the lawful owner of the suit property, the appellant maintained that he conducted a search at the Land registry, Kajiado to ascertain the ownership and title of the suit property, subject to which, he prepared the requisite documents, which were lodged for registration.

From our reevaluation of the evidence, it is instructive that no sale agreement was produced and the sellers did not testify. The appellant stated that the seller were introduced to him by an estate agent. It is intriguing that the estate agent subsequently disappeared, and also did not testify on his knowledge of the sellers' identities. The sellers were persons unknown to the appellant, yet from the evidence, he failed to take any steps to verify their identities, only indicating that he was shown an identity card, yet no copy was produced in court.

As concerns the ownership of the land, the appellant testified that he was shown the land and immediately entered into negotiations with the sellers. It is significant that, despite being conversant with land acquisition processes, he neglected to carry out any physical or local enquiries or investigations to ascertain the actual land owner from neighboring residents, the local administration or the area chief, save to indicate that, he conducted a search of the title. The documents relied on by the respondent to register the transfer were also not available to the trial court for verification of the signatories, or the identities of the persons authenticating the transferor's and transferee's signatures.

In short, the land acquisition process, as undertaken by the appellant, was unsatisfactory and grossly inadequate, to the extent that he was misled into purchasing the suit property from imposters. The impugned transfer arose as a direct consequence of the laxity in the conduct of proper investigations to ascertain the rightful owner of the suit property. Like the trial court, we are satisfied that, had the appellant carried out thorough investigations into the ownership, as he was obligated to, he would have established that the plaintiff was the rightful owner. We take the view that, the appellant's misadventure was of his own making, and he cannot now turn around and claim that he acquired proprietary rights from imposters who were incapable of passing on such rights in the first instance.

On the question of whether the valuable consideration was paid, there is nothing in the evidence to show that the appellant paid valuable consideration, or indeed, any consideration at all, for the suit property. It was the appellant's testimony that he drew cash from his bank account, and paid the alleged seller of the suit property. But, he did not produce a bank statement evidencing the cash withdrawal, or provide any relevant proof of payment. Furthermore, no sale agreement was produce showing that a purchase had taken place. There was no seller in evidence who testified. He did not produce any acknowledgments confirming receipt of the purchase price. Without such evidence, we are not satisfied that appellant actually pay any consideration, and if at all, to whom?

Accordingly, having failed to conduct a proper due diligence on the ownership of the suit property, or prove how he acquired his title we find that the appellant has not demonstrated that he was a bonafide purchaser, and further having failed to prove that he paid any consideration for the suit property, we find that he was not a bona fide purchaser for value. As a result, we consider that, the learned judge rightly ordered the rectification of the register to restore the plaintiff as the registered proprietor.

The appellant's other complaint is that the respondent was negligent in failing to produce the parcel and parcel correspondence file to prove that the appellant acquired a legitimate title. It is our view, that it was as much the responsibility of the appellant to produce such documentation as was necessary to establish the root of his title, as it was the respondent's to produce the registration documents that were used to register the appellant's alleged ownership. Needless to say, as the respondent's alleged negligence was not an issue for the determination of the lower court, as it was neither pleaded nor proved, see ***Nairobi City Council v Thabiti Enterprises Ltd (1995 – 98) 1 EA 231*** we consider that this is not an issue that can now be determined by this Court.

We finally turn to the issue of the indemnity. The appellant's complaint is that since fraud was not pleaded or proved by the plaintiff, and the trial court concluded that there was no fraud established on the part of the appellant, then the appellant was entitled to be indemnified or compensated for the loss of the suit property on account of the respondent's omissions and mistakes, pursuant to **section 144 (1) (a)** of the Act. The appellant further complained that the learned judge was wrong in failing to assess the indemnity or damages due to the appellant.

In its findings, the trial court concluded that the suit property was unlawfully registered in the appellant's name, and ordered the rectification of the Land Register pursuant to **section 143** of the Act, so as to reinstate the plaintiff as the registered proprietor. As the learned Judge rightly observed, the plaintiff did not allege fraud on the part of the appellant or the respondent, and neither was fraud established. The question that therefore arises is whether the High Court was right in finding that the appellant caused or contributed to the loss or damage, and as a consequence was not entitled to be indemnified.

This issue was extensively addressed by the learned judge, who stated thus,

***“But looking at section 144 (1) (a) more closely, I do not think it covers the first Defendant. It seems to me the provision is intended to cover a person in the position of the Plaintiff here and not in the position of the first Defendant. He should be a person lawfully or properly registered. I have said that the first Defendant was not properly registered because the transfer of the suit land to him was null and void ab-initio as the purported transfer or had no title to transfer to the first Defendant. I have also said that the first Defendant contributed to the mistakes or omissions made by the second Defendant. I have said that the transfer contravened section 28 of the Registered Land Act. I do not see how a transferee in those circumstances can be entitled to indemnity.”***

In making this claim the appellant has relied on **section 144 (1) (a)** of the Act which provided, that any person suffering damage by reason of any rectification of the register under the Act shall be entitled to be indemnified by the Government.

At **section 144 (2)** of the Act there is a proviso to **section 144 (1)** which stipulates,

***“(2) No indemnity shall be payable under this Act to any person who himself caused or substantially contributed to the damage by his fraud or negligence, or who derives title (otherwise than under a registered disposition made bonafide for valuable consideration) from a person who so caused or substantially contributed to the damage.”***

Having regard to the circumstances of the case, it goes without saying that any payment of indemnity would be entirely dependent on whether or not the appellant's actions were construed to be within the confines of the proviso to **section 144 (2)** of the Act. In other words, to be entitled to such indemnity it must be shown that, either, the person did not himself cause or substantially contribute to the damage by his fraud or negligence, or that he did not acquire his title from a person who caused or substantially contributed to the damage, provided further that, the registration was based on valuable consideration.

When the facts of the instant case are considered in the light of the two provisos set out at **section 144 (2)** of the Act, it is our view that, since the appellant's registration arose on account of a transfer arising from an alleged fraudulent purchase, the second proviso is applicable to the circumstances of this case.

Having said that, the second proviso raises two questions that we must address to ascertain whether or not the appellant succeeds in his claim for indemnity. These are, firstly, from whom did the appellant acquire his title, and secondly, did he pay valuable consideration in respect of the acquisition.

In addressing the first question, the appellant conceded that he did not acquire his title from the plaintiff. And as we have said, he acquired his title from imposters, on account of his failure to undertake a proper due diligence of the legal ownership of the suit property. As such, in answer to this question, we find that

the appellant acquired his title from strangers to the suit property, and that his actions, and omissions contributed in all respects to any loss he may have suffered.

On the second question, as we have already stated, the appellant did not demonstrate that he paid any consideration for the suit property, as there is no evidence to support this contention.

Accordingly, since the appellant's title was not properly or legitimately acquired, and there is no proof that any consideration was paid for the suit property, we find that his claim to be indemnified cannot succeed having failed to meet the stipulations of the proviso in **section 144 (2)**. It follows also that any assessment of the alleged loss is unfounded, and as a consequence, this ground fails.

For the above stated reasons, we find no reason to interfere with the decision of the court below, and dismiss the appeal with costs to the respondent herein.

***DATED and DELIVERED at NAIROBI this 12<sup>th</sup> day of June, 2015.***

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**P.O.KIAGE**

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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 REGISTRA.**