



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, MWERA, & ODEK, JJ.A)**

**CIVIL APPEAL NO.7 OF 2012**

**BETWEEN**

**MAGDALENE JELAGAT CHEMIRMIR**

**JOEL KIPLIMO CHEMIRMIR**

**(In their capacity as Administrators of the Estate of**

**JONAH KIPLANGAT CHEMIRMIR).....APPELLANTS**

**AND**

**DORA NYAMBURA MAINA.....1<sup>ST</sup> RESPONDENT**

**ISAAC BOWEN SANG.....2<sup>ND</sup> RESPONDENT**

***(Appeal from the judgment and decree of the High Court of Kenya***

***at Nairobi (Muchelule, J.), dated 21<sup>st</sup> September, 2011***

***in***

***ELC. Case No.2950 of 1997)***

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

The appellants herein administer the estate of the late ***Jonah Kiplangat Chemirmir***, hereinafter the deceased, who was the co-defendant of the present 2<sup>nd</sup> respondent in the High Court. They were sued by the 1<sup>st</sup> respondent in respect of Plot No.427/4 Type B, Umoja Phase II Nairobi, the suit property.

The 1<sup>st</sup> respondent averred in her plaint that by an agreement dated 9<sup>th</sup> June, 1988 the 2<sup>nd</sup> respondent sold to her the suit property for Sh.30,500/=. She paid the whole purchase price; the 2<sup>nd</sup> respondent gave her the original documents. She went into possession, paid the installments to clear the loan the then Nairobi City Council had advanced to the 2<sup>nd</sup> respondent on account of that plot. By doing that the 2<sup>nd</sup> respondent was expected to assign the suit property to the 1<sup>st</sup> respondent. While in possession, she finished the

construction on the plot. Then on/about 30<sup>th</sup> October, 1997, City Hall informed the 1<sup>st</sup> respondent that although the loan advanced to the 2<sup>nd</sup> respondent had been fully repaid, the suit property had, nonetheless, been assigned to the deceased, and so she could not get transferred to her at all.

The 1<sup>st</sup> respondent took that assignment as fraudulent. In her plaint, she set out the particulars of fraud, mainly, on the basis that the 2<sup>nd</sup> respondent having sold the suit property in 1998 to her, he could not assign the same plot to the deceased. She had the agreement which had not been rescinded; the purchase price had fully been paid and therefore the deceased could not buy the same property as a *bona fide* purchaser for value. So the 1<sup>st</sup> respondent prayed the court to declare that the purported assignment by the 2<sup>nd</sup> respondent to the deceased was illegal, fraudulent, null and void. She also prayed that the suit property be registered in her name and a perpetual injunction do issue against the deceased and the 2<sup>nd</sup> respondent from interfering with her quiet enjoyment of the suit premises. The plaint was drafted by **Mr. Timan Njugi**, Advocate, whom we were told during the hearing of this appeal that he was the lawyer for both the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent in the transaction.

M/S Wachira Mbutia & Company Advocates filed a defence on behalf of the deceased in which he averred that he bought the suit premises from the 2<sup>nd</sup> respondent for Sh.120,000/= whereupon he was assigned the property by an instrument dated 22<sup>nd</sup> June, 1997. He denied any claims of fraud in his part in any event. The 2<sup>nd</sup> respondent did not enter appearance or file a defence. The trial began. The 1<sup>st</sup> respondent gave evidence with effect from 28<sup>th</sup>

October, 2009 before **Onyancha, J.**, then, finished testifying before **Muchelule, J.**, producing documents on either occasion.

The 1<sup>st</sup> appellant, **Magdalene Chemirmir** (DW1), gave evidence and also called **Simon Kongori Ndirangu** (DW2) in defence. Parties were heard in submissions and judgment (**Muchelule, J.**), now impugned followed without participation of the 2<sup>nd</sup> respondent. As stated earlier, he did not enter appearance despite being served with due summons or file a defence or be present at the trial.

In his judgment the learned judge was satisfied on evidence tendered that:

***“...after the 2<sup>nd</sup> defendant sold the plot to the plaintiff and handed ownership documents to her, he lost the capacity with the same. He had no further interest in the plot that he could sell to the 1<sup>st</sup> defendant.”***

After observing that the agreement of sale between the deceased and the 2<sup>nd</sup> respondent stated that the plot was being sold in “its present state,” the trial judge noted that:

***“By this time, according to the uncontroverted evidence of the plaintiff, she was in possession and had developed it. It follows that the 1<sup>st</sup> defendant was buying, and the 2<sup>nd</sup> defendant was selling a plot that was already occupied and developed by the plaintiff. All those facts, taken together, would indicate to me that both defendants were engaging in acts of fraud when they entered into the agreement over the plot and subsequently obtained the assignment over it. The 1<sup>st</sup> defendant cannot claim to be an innocent buyer for value without notice.”***

Therefore the assignment of the property to the deceased was nullified and the plot declared to be the property of the 1<sup>st</sup> respondent, in whose name City Hall was required to register it. A perpetual injunction issued against the deceased and the 2<sup>nd</sup> respondent as had been prayed. They were also ordered to pay costs of the suit to the 1<sup>st</sup> respondent. That decision provoked the present appeal.

The appellants filed a memorandum with seven grounds. At the hearing of the appeal **Mr. A Odoyo** learned counsel, condensed the grounds and argued them together. **Ms. Muyai**, learned counsel holding

brief for **Mr. Mugambi** for the 1<sup>st</sup> respondent, opposed the appeal. The 2<sup>nd</sup> respondent who did not appear before the High Court was not represented.

Basically, **Mr. Oduyo's** main point was that the deceased was wrongly found to have been engaged in acts of fraud when he bought the plot from the 2<sup>nd</sup> respondent. He entered into the sale agreement in 1994, he paid the purchase price and the suit property was assigned to him by the 2<sup>nd</sup> respondent. His position was that we should set aside the High Court decision so that the 1<sup>st</sup> respondent is directed to hand over vacant possession of the suit plot to the appellants. Counsel attempted to impeach the validity and completion of the sale agreement between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent with hardly any success since that agreement did not concern his clients.

On her part, **Ms. Muyai** told us that the sale transaction between the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent was completed when the purchase sum was paid, the 2<sup>nd</sup> respondent handed over the original plot documents to the 1<sup>st</sup> respondent who then went into possession in accordance with their sale agreement. Full payment was acknowledged by **Mr. Timan Njugi** Advocate's letter dated 7<sup>th</sup> January, 1997. Thus the payments the 1<sup>st</sup> respondent made to City Hall to clear the loan which had been advanced to the 2<sup>nd</sup> respondent, did not in any way impact on the sale agreement. The agreement between the two, we heard, was performed; it was never rescinded and so when the 2<sup>nd</sup> respondent purported to sell the same property to the deceased in 1994, he had nothing to give him.

This being the first appeal, we are cognizant of the principle that ours is a duty to conduct a fresh trial, based on the recorded evidence and we do not have to agree with the trial judge's findings. In essence, we will arrive at our own conclusions (see ***Selle vs Associated Motor Board C. Ltd & Others [1968] EA 123.***) With that, we proceed to set out the evidence laid before the trial court.

The 1<sup>st</sup> respondent (PW1) told the trial court that she bought the subject plot from the 2<sup>nd</sup> respondent as per the sale agreement (Exh.P1) dated 9<sup>th</sup> June, 1988. He gave her the plot card No.1470 issued by the City Council, bearing the 2<sup>nd</sup> respondent's photograph. She paid the purchase price of Sh.30,500/= through the advocate, and took possession. It was an empty undeveloped plot, except for a toilet. She began paying the monthly loan installments to City Hall (Exh.P3) because she was told that she could not get the plot transferred to her until the loan given to the 2<sup>nd</sup> respondent was fully repaid to City Hall. While in possession, the 1<sup>st</sup> respondent built 2 rooms on the plot. When she finished paying the installments of the loan that City Hall had advanced to the 2<sup>nd</sup> respondent, City Hall declined to transfer the plot to the 1<sup>st</sup> respondent:

***"...on the basis that someone had purchased it."***

So she instructed a lawyer to sue. The 1<sup>st</sup> respondent, who did not know the deceased before, was firm that:

***"I bought the plot and developed it before this subsequent sale."***

And in cross-examination, she told the trial court that:

***"I deposited Sh.30,500/= with Timan Njugi who paid him Sh.10,000/= before the agreement."***

Further, the 1<sup>st</sup> respondent testified that:

***"I completed payment before 30<sup>th</sup> June, 1988,"***

And she paid the loan of Sh.47,600/= owed to the City Council by the 2<sup>nd</sup> respondent, in his name

(Ex.P3).

The 1<sup>st</sup> appellant (DW1) told the court that she got a grant to administer the estate of the late **Jonah Chemirmir** and among the documents she came by, was the sale agreement dated 30<sup>th</sup> August, 1994 showing that he bought the suit property from the 2<sup>nd</sup> respondent (Exh.D2). She had also found the balloting number 1594, in favour of the deceased, together with other documents and receipts pertaining to the suit plot. DW1 acknowledged the document (Exh.4B) dated 1<sup>st</sup> December, 1999 which stated that the suit plot could not be transferred to the 1<sup>st</sup> respondent because the 2<sup>nd</sup> respondent had sold it to the deceased.

**Simon King'ori Ndirangu** (DW2), a community development officer at City Hall in his brief testimony, told the trial court that the subject plot was allotted to the 2<sup>nd</sup> respondent on 1<sup>st</sup> February, 1988. He complied with all conditions. The file DW2 brought to court contained the agreement of sale of the suit property between the 1<sup>st</sup> and the 2<sup>nd</sup> respondent dated 9<sup>th</sup> June, 1988 and it also had an instrument of assignment of the same plot between the 2<sup>nd</sup> respondent and the deceased. However, the plot still remained in the name of the former (Exh.D8).

In cross-examination DW2 told the trial judge that the property in issue was still in the name of the 2<sup>nd</sup> respondent and on the file, was a copy for assignment of the property. On 19<sup>th</sup> January, 1995 the assignment of the property from the 2<sup>nd</sup> respondent to the deceased **Chemirmir** was sanctioned by a minute entered in City Hall records. There was no clearance to effect that.

The trial closed; parties filed submissions and the judgment herein followed.

On our review of the evidence on record including exhibits and in light of the pleadings and submissions both in the High Court and before us, we are of the view that the grounds of appeal point to one main issue for determination: who between the estate of the late **Jonah Kiplangat Chemiormir** and the 1<sup>st</sup> respondent is the owner of the suit property?

We find that the allottee of the suit property was the 2<sup>nd</sup> respondent as per the letter dated 1<sup>st</sup> February, 1988 issued by the then Nairobi City Council.

By the sale agreement dated 9<sup>th</sup> June, 1988, the 2<sup>nd</sup> respondent sold that property to the 1<sup>st</sup> respondent at Sh.30,500/= . Sh.10,000/= was paid directly to the seller/2<sup>nd</sup> respondent before the agreement was signed, in the presence or through the office of **Mr. Timan Njugi**, their joint advocate. The balance was paid before the date of completion, 30<sup>th</sup> June, 1988, and that, too, is not disputed. Also not disputed is the fact that on 7<sup>th</sup> January, 1997 **Mr. Njugi** in communication to City Hall by the letter copied to the 2<sup>nd</sup> respondent as well as the deceased, confirmed that the 1<sup>st</sup> respondent paid the full purchase price, moved into possession and paid off the loan that the 2<sup>nd</sup> owed City Hall.

**Mr. Njugi's** letter required City Hall to explain why it had then transpired that as at the date of his letter, the suit property appeared to have been assigned to the deceased. There was no explanation, it seems, from City Hall and the present suit was filed.

From the evidence of DW1, the late **Jonah Chemirmir's** widow, and DW2, the documents exhibited indicate that by the agreement dated 30<sup>th</sup> August, 1994 the deceased bought the suit property from the 2<sup>nd</sup> respondent and City Hall sanctioned that it be assigned and transferred to him. Apparently, that was not to be with the suit herein having been instituted. The sale agreement between these two stated, *inter alia*, that

***“The vendor has agreed to sell the said plot and the purchaser has likewise agreed to buy the same it (sic) its present state...”*** (underlining added).

The foregoing, it can be taken, implies that both the 2<sup>nd</sup> respondent/seller and the deceased/purchaser had visited and inspected or knew “the present state” of Plot No.427/4 Type B, Umoja Phase II, the suit property. And that state can only be that the 1<sup>st</sup> respondent had taken possession and even done some development. In the instrument of assignment by which the 2<sup>nd</sup> respondent wished to relinquish all his interest „in all that piece of land? in issue, the plot would go:

**“...together with the buildings and improvements erected and being thereon.”**

Indeed, there were buildings and improvements on the plot which the 1<sup>st</sup> respondent effected when she bought and occupied the plot way back in 1988.

Again by this instrument, the 2<sup>nd</sup> respondent and the late **Chemirmir** knew that there were buildings on the plot. **Chemirmir** passed on before the hearing of the suit and so we need not speculate whether he asked the 2<sup>nd</sup> respondent about the buildings on the plot and the occupier thereon. However, all put together, we find that the 1<sup>st</sup> respondent by their sale agreement, was seised of the subject property long before the later sale agreement between the 2<sup>nd</sup> respondent and the deceased was entered into. We therefore, are unable to accept the argument that in the circumstances, late **Chemirmir** was a buyer for value without notice. The 2<sup>nd</sup> respondent was trying to sell him a plot in the state it was, and that state was with buildings and improvements of the 1<sup>st</sup> respondent who was in possession.

Accordingly, we conclude as the learned trial judge did, that as at the time of the later sale agreement of 30<sup>th</sup> August, 1994, the 2<sup>nd</sup> respondent had in 1988, sold off all his interest in the suit plot to the 1<sup>st</sup> respondent; he had been paid in full. Accordingly, he had no more interest to sell to the deceased.

And that the 2<sup>nd</sup> respondent knew that the property had long been sold to the 1<sup>st</sup> respondent and yet engaged in a second sale of the same property to the deceased, that constituted acts of fraud as against the 1<sup>st</sup> respondent. The trial judge found so and we agree with him, in the circumstances of this case.

As this Court said in the case of **Benja Properties Ltd vs H. H. Dr. Syedna Mohammed Burhannudin Sahed & Others C.A. NAI 79 of 2007**:

**“The alienation to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents is the grant that takes priority. At the time another grant was being made to the appellant, the suit land had already been alienated. There was nothing for the 5<sup>th</sup> respondent to allot and alienate to the original allottees.”**

In the foregoing case, the Government gave a grant of lease over the suit land to the 1<sup>st</sup> to 3<sup>rd</sup> respondents many years ago. Then later, by whatever methods the said original allottees obtained a letter of allotment over the same land issued by the Commissioner of Lands (5<sup>th</sup> respondent). Those allottees sold “the letter” to the appellant company and that provoked the respondents to sue seeking orders including cancelling the title issued to the appellant over the land. The High Court decided and this Court agreed that the first grant to the respondents ranked in priority over the later allotment to the appellant. And by the operation of law, the allotment to the appellant was of no effect since there was no land to alienate, the respondents having been given the land long before.

In our context here, once the 2<sup>nd</sup> respondent sold the whole of the suit premises to the 1<sup>st</sup> respondent in 1988, he was paid in full and the 1<sup>st</sup> respondent took possession, he had nothing more to sell and therefore assign to the late **Jonah Chemirmir**. And so, have we found. In the result, we dismiss this appeal with costs to the 1<sup>st</sup> respondent. We therefore confirm the decision and orders of the High Court.

**Dated and delivered at Nairobi this 31<sup>st</sup> day of July, 2015.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**J. W. MWERA**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**