



IN THE COURT OF APPEAL

AT KISUMU

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

CIVIL APPEAL NO. 285 OF 2007

BETWEEN

RICHARD ODUOL OPOLE.....APPELLANT

AND

THE COMMISSIONER OF LANDS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

MICHAEL THOMAS KINYANY.....3RD RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kisumu (Tanui, J) dated 17th September, 2002

in

H.C.C.C. NO. 112 of 2000)

JUDGMENT OF THE COURT

In this appeal, *the appellant, Richard Oduol Opole*, seeks the recall and cancellation of Land Reference No. Kisumu Municipality/ Block /12/213 (*“the suit property”*) registered in the 3rd respondent’s name, as well as the rectification of the Land Register to transfer the suit property back into his name.

The suit concerned the alleged fraudulent transfer of the suit property which was registered in the name of the appellant as the legal owner, for a term of 99 years from 1st March 1973 under the Registered Land Act, Chapter 300, (*the Act*) (*now repealed*).

The appellant contended that the 1st respondent, acting through the Land Registrar, Kisumu, in breach of his public duty to the appellant, carelessly and fraudulently transferred the suit property to the 3rd respondent. The particulars of fraud against the 1st respondent were:

1. *consenting to transfer the said property to the 3rd defendant without verifying the authenticity of the transferor*

2. *causing the property to be registered in the name of the 3rd defendant without the execution of transfer forms by the plaintiff without regard to the procedure;*
3. *deleting the interest of the plaintiff;*
4. *effecting the said transfer in a hasty manner in total disregard of statutory requirement of identification;*
5. *backdating the second certificate of lease issued to the 3rd defendant.*

On account of the purported fraudulent transfer the appellant sought:

- a. *A declaration that the transfer of Kisumu Municipality Block 12/ 213 to the 3rd defendant was fraudulent null and void;*
- b. *The cancellation of the sale and transfer effected by the 1st defendant to the 3rd defendant;*
- c. *An order for the rectification of the title to read the name of Richard Oduol Opole as the registered lessee of Kisumu Municipality Block 12/213;*
- d. *Costs and interest.*

In his defence, the 3rd respondent denied the allegations of fraud set out in the plaint and further stated that the particulars did not disclose any fraud on the part of the respondents. Instead, the 3rd respondent averred that he purchased the suit property for a sum of Kshs 800,000/- from one Richard Oduol Opole Identity Card No. [particulars withheld] with whom he had entered into a sale agreement dated 16th April 1997. He further contended that the seller had represented to him that he had lost his title deed for the suit property, and that prior to purchasing the suit property he had conducted a search of the title which confirmed that the suit property belonged to Richard Oduol Opole of P.O. Box Kabete. He further stated that, he had paid a sum of Kshs 1980/- to the Land Registrar for the advertisement of the lost certificate of lease, and that the amount was forwarded to the Government Printer on 21st April 1997.

It was his case that he then lodged a caution against the title to restrain any adverse dealings in the suit property pending the completion of the transfer, which caution was not at any time objected to, and which the 1st respondent removed following registration of the title in his name. The vendor signed the transfer forms on 16th April 1997, and consent to transfer was thereafter obtained from the 1st respondent. The vendor was at all times identified to the 3rd respondent by the Land Registrar, Kisumu and by the particulars of the national identity card no [particulars withheld].

The 3rd respondent maintained that at all times he was an innocent purchaser for value without notice of an interest adverse or superior to the vendor from whom he purchased the suit property, and that he undertook all the requisite steps to establish the owner of the suit property. It was his final contention that the plaint did not challenge his bona fides or the validity of the sale agreement.

In their defence, the 1st and 2nd respondents stated that the appellant sought consent to transfer the suit property on 30th April 1997, which was granted on 19th June 1997. The allegations of fraud were denied. The 1st and 2nd respondents also contended that the suit filed by the appellant was time barred, and further, as the notice of intention to institute proceedings had not been served on the Attorney General in accordance with section **13 A** of the **Government Proceedings Act** the suit was incompetent.

The appellant testified that, he was aware that certain persons who had since been charged with impersonation had attempted to impersonate him and sell his land. He confirmed that he was aware of the criminal trial in Winam Magistrate's Court where Andrew Owiti Makoyo and Wilson Ochola Ohanya were charged with the offence of impersonation in the sale and transfer of the suit property. He also stated that it was not true that he had sold his land to the 3rd respondent or that he had lost the title. He further stated that he did not sign any transfer forms transferring the suit property to the 3rd respondent, and neither did he receive a cheque in settlement of the purchase price. He prayed that the court reverses the registration of the transfer in favour of the 3rd respondent.

The 3rd respondent reiterated the contents of his defence in his testimony, while the 1st and 2nd respondents did not testify.

Upon hearing both parties, the learned trial judge concluded that the appellant did not discharge the burden of proving each of the allegations of fraud levelled against the respondents. The court went on to state that;

“Infact the plaintiff did not show who had impersonated him and had transferred the suit land to the 3rd defendant. The criminal case at Winam did not prove that the accused was the person who had entered into the sale agreement with the 3rd defendant. It was necessary for the plaintiff to prove that the person who infact had transferred the suit land was a thief who could not in law confer a valid title to the 3rd defendant.”

Being aggrieved by the decision of the High Court, the appellant has filed this appeal which is before us specifying the following grounds,

1. *The learned judge disregarded material contradictions in the 3rd respondent’s testimony and thus arrived at the wrong decision;*
2. *The judgment was against the weight of the evidence;*
3. *The learned judge erred in failing to find that the sale of Land Parcel Kisumu Mun/Block/12/213 to the 3rd Defendant was fraudulent null and void;*
4. *The learned judge erred in holding that the 3rd Defendant was an innocent purchaser for value who acquired good title;*
5. *The learned judge erred in failing to find that the 3rd Defendant having obtained title on the 30th April and consent to transfer on 26th June 1997, the transfer was void;*
6. *The learned judge erred in failing to find that the 3rd Defendant’s action of registering a caution on 29th April 1997 he was privy to the fraudulent transaction;*
7. *The learned judge erred in law in holding that good title to land had passed from a thief to the 3rd defendant against the spirit of section 23 and 24 of the Sale of Goods Act;*
8. *The learned judge erred in law in finding that the case against the 1st and 2nd defendants was time barred;*
9. *The learned judge also erred in Law in holding that the suit against the 1st and 2nd defendants was incompetent for want of Notice under section 13 A of the Government Proceedings Act.*

Mr. Mwamu, learned counsel for the appellant, addressed grounds 1 to 3 together on the issue of fraud, grounds 4 to 7 together on whether the 3rd respondent was a bona fide purchaser for value without notice, and grounds 8 and 9 together on whether the suit was time barred.

Turning to the allegations of fraud, counsel submitted that, certain individuals had impersonated the appellant in order transfer his land; the suspects were arrested and criminal charges were preferred against them; that the trial magistrate in the Winam criminal proceedings observed the suspicious manner in which the Mr. Siwa, Land Registrar, Kisumu, handled the transaction, and found that indeed there was fraud; there was also testimony from the 3rd respondent that he was suspicious about the manner in which the Land Registrar handled the transaction, and also an acknowledgement that the appellant had not sold the suit property to him, yet he still went ahead with the transfer. Based on these facts, counsel submitted that the learned judge wrongly concluded that fraud was not proved.

As to whether the 3rd respondent was a bona fide purchaser for value without notice, counsel asserted that, the 1st respondent did not await the expiry of the mandatory 60 days’ notice period to advertise the missing certificate of title before registering the transfer of the suit property to the 3rd respondent. Counsel faulted the learned judge for reaching the wrong conclusion that the 3rd respondent was a bona fide purchaser for value, despite the obvious lapse in the registration process. Counsel also referred to **sections 23 and 24** of the **Sale of Goods Act**, and concluded that given the nature of the transaction, good

title was incapable of passing to the 3rd respondent in the circumstances.

On the issue that the suit against the Government was time barred, counsel submitted that, the court ought to have considered the Registered Land Act and the Public Authorities Limitations Act, as read together with the Limitations of Actions Act. Though counsel conceded that **section 13A** of the **Government Proceedings Act** was not complied with, he went on to argue that matters of fraud are addressed at the time of discovery of the fraud as provided by the Limitations of Actions Act.

Mr. K'Opot learned counsel for the 3rd respondent submitted that where matters in dispute concerned the rectification of the Land Register, the court should be informed of the state of the title at the time of hearing of the land dispute, and any changes in the register, regard being had for whether the rectification sought was possible. Counsel referred us to **Order XXI rule 10** of the **Civil Procedure Rules**.

On the question of fraud, counsel submitted that, from the pleadings, allegations of fraud were made against the 1st respondent, but not against the 3rd respondent. Counsel referred us to **Order VI rule 8** of the **Civil Procedure Rules** which provides that fraud must be pleaded and particularized. In the instant case, no allegations of fraud were made against the 3rd respondent, neither was fraud particularized, nor proved.

Counsel continued that for title to be reinstated under **Section 143** the **Registered Land Act**, a defendant's complicity must be evident. No complicity was established on the 3rd respondent's part before the High Court or in the criminal case before the trial magistrate's court at Winam. In any event by, the time the criminal proceedings were concluded, the appellant was aware of the persons who had carried out the fraud, in the criminal proceedings, namely Mr. Andrew Magogo or Mr. Ohanga, and not the 3rd respondent.

Counsel conceded that he would not contest the requirement of service of the notice under **section 13A** of the **Government Proceedings Act**. But on the issue of limitation, counsel submitted that the law required that proceedings against the Government be filed within one year. As this had not been declared as bad law, it required to be complied with. Under the Public Authorities Limitations Act, all civil actions were covered including fraud, and when read together with **section 144** of the **Registered Land Act** the period for instituting an action for rectification was limited to one year.

Ms. Aliongo, learned State counsel submitted that grounds 8 and 9 concerned the 1st and 2nd respondent, whose defence was filed on 2nd November 2000, and by that time the suit was already time barred, as the action accrued in 1997. The court arrived at the finding that the suit was time bared as limitation was apparent from the pleading itself. The issue was not controverted by the appellant during the proceedings, and as a consequence it amounted to an admission. The trial court was right in holding that the suit was incompetent.

With respect to **section 13A** of the **Government Proceedings Act**, counsel submitted that the provision was mandatory and was in force by the time the suit was filed. The appellant was aware of the requirement as reference was made to the Government Proceedings Act in the plaint. It was counsel's contention that the appellant had slept on his rights, and squandered his opportunity to seek redress.

In reply Mr. Mwamu argued that the issue of fraud was an inherent issue for the consideration and determination by the Court.

We have considered the record, and the canvassed submissions of the parties and take the view that in order to reach a determination of this appeal we must arrive at a finding of the following issues:

1. Was fraud against the 1st respondent proved?
2. Was the 3rd respondent a bonafide purchaser for value without notice?
3. What is the effect of the failure to serve a notice of intention to sue the Attorney General under

- section 13 A of the Government Proceedings Act?
4. Was the claim time barred taking into account the provisions of the Public Authorities Limitations Act?

This is a first appeal, and as stated in *Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212*;

“On a first appeal from the High Court , the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or heard the witness and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence.”

Before dealing with the main issues in contention, we consider it necessary to begin by disposing of the issue that no good title was passed on to the 3rd respondent by virtue of **section 23 and 24** of the **Sale of Goods Act**. When we consider the purpose for which the Sale of Goods Act was enacted, and take into account **section 2 (1)** of the Act which defines **“goods”** to include all chattels personal other than things in action and money, and all emblements, industrial growing crops and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale, we find that the Sale of Goods Act is inapplicable to the circumstances of this case. This is for reasons that the Act is concerned with the sale of movable items, while the instant case involves dispositions of land, which is immovable and not included within the definition of goods under the Act.

Returning to the main the issues, concerning the allegations of fraud, the appellant’s complaint was that the High Court wrongly concluded that the 1st respondent’s part in perpetuating the fraudulent transfer had not been proved. In this regard the court stated,

“I have carefully perused the record to satisfy myself whether the plaintiff adequately proved the fraud he had pleaded in paragraph 8 of his plaint as his case entirely rests on it. To establish this claim it was incumbent upon the plaintiff to prove each of the five particulars of the fraud he attributed to the first defendant on the balance of probabilities. In my view the plaintiff did not discharge his burden on each of these grounds. In fact the plaintiff did not show who had impersonated him and transferred the suit land to the 3rd defendant. The criminal case at Winam Court did not prove that the accused person who had entered into the sale agreement with the 3rd defendant. It was necessary for the plaintiff to prove that the person who had in fact transferred the land was the thief who could not in law confer a valid title to the 3rd defendant.”

From the outset, we find it curious that the plaint only particularized fraud against the 1st respondent, but did not disclose any particulars of fraud as against the 3rd respondent.

Order VI rule 8 (1) 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—

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

In *Gudka vs Dodhia Civil Appeal No. 21 of 1980* Law, JA (as he then was) stated,

“the respondent was in effect being accused of fraudulent conduct and allegations of fraud must be strictly proved. The fraudulent conduct must be strictly proved more than a mere balance of probabilities as required in R G Patel Lalji Makanji [1957] EA 314.”

Mr. Mwamu sought to convince us that though the plaint did not disclose any fraud on the part of the 3rd respondent, there was glaring evidence in his testimony in the Winam Magistrate's Court, which showed that the 3rd respondent acted fraudulently, and was a party to the fraud, which this Court ought not to disregard.

Bearing the settled position in mind, that *fraudulent conduct must be specifically pleaded, particularized and proved*, we hesitate to delve into unparticularised allegations of fraud against the 3rd respondent. Allegations of fraud are not to be taken lightly, and in order to discharge such a burden, a party must be accorded adequate opportunity to rebut such allegations. If we were to accede to the appellant's request to disregard the basic tenets of adversarial litigation it would amount to an ambush on the 3rd respondent and further, tantamount to denying the 3rd respondent a fair hearing. To adopt such a procedure would be an abuse of the court process. In the circumstances, we hold that as fraud against the 3rd respondent was neither pleaded nor proved, it was not an issue for determination.

This leads us to the next issue, which was whether the suit property was transferred to the 3rd respondent fraudulently. The contention here was that, the 1st respondent acted fraudulently when it hastily registered the suit property in the name of the 3rd respondent without verifying the identity of the transferor, in total disregard of statutory requirements.

Black's Law Dictionary, 9th Edition page 731 defines "fraud" as

"a knowing misrepresentation of the truth or a concealment of a material fact to induce another to act to his or her detriment. Fraud is usually a tort, but in some cases, especially when the conduct is willful, it may be a crime. A misrepresentation made recklessly without belief in its truth to induce another person to act."

In the instant case, the representative of the 1st respondent, Mr. Washington Siwa, the Land Registrar Kisumu, did not testify. However, his actions in relation to the sale and transfer of the suit property, can be discerned from the first hand evidence of the 3rd respondent who as the purchaser of the suit property dealt with Mr. Siwa. According to the 3rd respondent, the documents that formed the basis of verification by Mr. Siwa included the identity card no. 4681667/61 which identified Richard Oduol Opole as the registered proprietor of the suit property, and the transfer document made between Richard Oduol Opole and the 3rd respondent duly executed by one Richard Oduol Opole and witnesses by an advocate, one Miruka Odour. The 3rd respondent also testified that it was Mr. Siwa who identified the alleged Richard Oduol Opole, the seller to him, who was selling his property because he was sick and needed money for treatment. This evidence was not controverted in any way.

Nothing untoward would have turned on this evidence, but for the issue of the lost certificate of title which brings the subsequent actions taken by Mr. Siwa into sharp focus.

It was the 3rd respondent's testimony that, when the matter of the missing title deed was brought to Mr. Siwa's attention, an original certificate of title in the name of Richard Oduol Opole was promptly produced bearing Mr. Siwa's signature. The 3rd respondent testified that he became suspicious and uncomfortable about accepting this certificate of lease, as Mr. Siwa was not the Land Registrar at the time the original certificate was issued. Clearly, the instantaneous production of an original certificate bearing Mr. Siwa's signature, was highly irregular, and a Land Registrar in Mr. Siwa's position ought to have known better than to issue an original certificate without following the stipulated procedures.

That was not all. Mr. Siwa's suspicious conduct was also evident when he attempted to regularize the erroneously issued certificate of lease. According to the 3rd respondent, Mr. Siwa then wrote to the Government Printer requesting for the lost title to be advertised. The advertisement was paid for by the 3rd respondent. This evidence is supported by the record and has also not been controverted.

Section 33 of the **Registered Land Act** provides that a title deed or a certificate shall be produced on the registration of any dealing with the land or lease to which it relates, and if the disposition is a transfer, the certificate if produced shall be destroyed, and in that case a new certificate may be issued to the new proprietor.

Where the certificate is lost or destroyed, **Section 35** stipulates;

“(1) If a title deed or a certificate is lost or destroyed, the proprietor may apply to the Registrar for the issue of a new title deed or certificate, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous title deed or certificate.

(2) The Registrar may require a statutory declaration that the certificate has been lost or destroyed.

(3) The Registrar, if satisfied with the evidence as to the destruction or loss of the certificate, and after the publication of such notice as he may think fit, may issue a new certificate.”

The purpose of production of a certificate of title in support of any transaction or dealing in land is to effectively link the title holder to the ownership of the property, as well as to the transaction in question. In the event that such title is lost or cannot be traced, an elaborate procedure was set out by the retired Registered Land Act for replacement of such title.

In order to replace a lost or misplaced title, the registered owner requires to show evidence of the loss. In most cases, this would be by way of a police abstract or similar document. A statutory declaration made by the registered proprietor may also be required. It is also provided that the loss must be advertised in a publication, although no period of advertisement is expressly stipulated. Such procedure is intended to ensure that as far as possible, an erroneous or fraudulent issuance of a replacement title to a person other than the registered proprietor is avoided.

From the record, no police abstract or statutory declaration was produced by the alleged Richard Oduol Opole evidencing the loss of the certificate of lease in question by the registered proprietor. Yet interestingly enough, Mr. Siwa, took it upon himself to immediately write to the Government Printer to place a notification of the lost certificate of lease in the Kenya Gazette so that a new certificate could be issued. The letter dated 21st April 1997 read:

21st April 1997

The Government Printer

P.O. Box 30128

NAIROBI

RE: ISSUE OF NEW LEASE CERTIFICATE

KISUMU MUN. /BLOCK 12/213

Enclosed herewith please find postal money order for Kshs 1980/= for advertisement of lost Certificate of Lease in respect of the above title in the Kenya Gazette.

(W.O. SIWA)

DISTRICT LAND REGISTRAR

KISUMU

c.c

MR RICHARD ODUOL OPOLE

P.O.BOX 75

MUHORONI

MR MICHAEL THOMAS KINYANY

KISUMU (for information)

It is also instructive that the 3rd respondent and not the title holder paid for the publication.

Subsequent to the letter to the Government Printer, no evidence was also produced to show that the notification was published in the Kenya Gazette or any other publication. What is clear is that a few days after writing to the Government Printer, in total disregard of the requirement of publication of a notification of this nature, Mr. Siwa proceeded to register the transfer of the suit property to the 3rd respondent on 30th April 1997, and to promptly issue a certificate of lease in the 3rd respondent's name.

In this regard the observations made, in the trial magistrate's judgment in in the Winam Court of Mr. Siwa's conduct are of pertinence. That court stated thus;

“Indeed the land registrar Mr. Siwa should have been the correct person to charge because he played an active but suspicious role in issuing this certificate of lease. He admitted in his evidence that he did not wait for the land to be advertised for 60 days as should have been the case but the same day a report of loss was made and indeed without an abstract in support thereof and without advertisement of this land proceeded to sign the certificate of lease and later without even obtaining consent from the commissioner went ahead to sign the transfer forms. What was the hurry for? What was at stake? These actions do not leave Mr. Siwa's hands clean...”

Our analysis of the evidence surrounding the lost title, its reckless replacement and the hastily registered transfer suggests that, at all times the intention behind Mr. Siwa's conduct was aimed at defrauding the appellant of the suit property. We say this because, according to the 3rd respondent it was Mr. Siwa who introduced the imposters to him as the registered proprietor, Richard Oduol Opole, whom he said he knew. Since the imposters did not have a certificate of lease, it was Mr. Siwa who promptly issued another original certificate albeit, bearing his signature, which ought not to have been the case. When the 3rd respondent questioned the irregular issuance of the certificate, it was again Mr. Siwa who wrote to the Government Printer, requesting for the publication of the notice of the lost title. So intent was Mr. Siwa on completing the registration, that he disregarded the laid down procedures in the replacement of the certificate of title. To the extent that, no police abstract as proof of loss was obtained, and further there was nothing to show that the notification of the lost certificate was advertised. In short, the conduct of a proper due diligence to ascertain the true identity of the title holder of the suit property by Mr. Siwa was severely compromised.

As a direct consequence of Mr. Siwa's reckless and careless actions, the appellant suffered the loss of his proprietary interest in the suit property, as he was denied an opportunity to secure his interest, under the very provisions that were enacted for the purposes of protecting and safeguarding such interests.

When we consider the chain of events leading to the registration of the suit property in the 3rd respondent's name, we find that the one common factor was Mr. Siwa. We further find that, on account of his ill intent and willful acts, the appellant was ultimately defrauded of his property. Consequently, we find that on a balance of probabilities fraud was proved as against the 1st respondent.

We turn next to the issue whether the 3rd respondent could be considered a bonafide purchaser for value without notice. In addressing this issue, the learned judge stated thus,

“I now turn to the plaintiff’s case against the 3rd defendant. I note that the plaintiff in his plaint did not allege that the 3rd defendant committed any wrongful acts against him and the said property. The 3rd defendant advanced a defence that he is an innocent purchaser for value without notice and that his right to the suit (sic) cannot be defeated. In support of that claim he put in a copy of the sale agreement executed by himself and one Richard Oduol Opole, before an advocate, a copy of official search certificate and copies of cheques for payment of the agreed consideration.”

Section 28 of the **Registered Land Act** provides that the right of a proprietor whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the court shall not be liable to be defeated except as provided by this Act.

Section 143 of the **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 were fraud or mistake is established, unless it can be shown that such proprietor had no knowledge of the omission, fraud or mistake, or did not cause such omission, fraud or mistake or substantially contribute to it by his act, neglect or default. In other words, did the 3rd respondent’s act in any way to deny him the status of a bona fide purchaser for value without notice?

It was the appellant’s case that the transfer of the suit property was irregularly effected by the 1st respondent, and further that the 3rd respondent having been so intimately involved with the process of transfer could not be considered a bona fide purchaser for value without notice.

No doubt, the 3rd respondent was a purchaser for value evidenced by the sale agreement and the payment of Kshs. 800,000/- made out in various cheques towards the purchase price. From the owner’s ID card no. [particulars withheld], he concluded that the individual from whom he was purchasing the suit property was one Richard Oduol Opole of P.O. Box Kabete. A transfer executed before an advocate also showed that the transferor was Richard Oduol Opole.

But as to his bonafides, when we analyse the registration procedure in relation to the role the 3rd respondent played, it is evident to us that he was as involved in the irregular transfer of the suit property as Mr. Siwa. We say so as, it was the 3rd respondent who drew Mr. Siwa’s attention to the missing title, and queried the manner in which the new original title was erroneously issued by Mr. Siwa, (which he found suspicious). He was present when Mr. Siwa lodged the advertisement for the replacement title, and finally, it was he who ultimately benefited from the subsequent registration of the transfer into his name. To compound it all, he ought to have noticed that by the time of registration the consent to transfer was yet to be granted. The 3rd respondent received notification of the consent to transfer on 26th June 1997, which was well after the transfer was registered in his favour.

Being the seasoned land dealer that he said he was, such blatant omissions and dubious actions on the part of the 1st respondent could not have gone unnoticed by the 3rd respondent. We take the view that the 3rd respondent had cognizance of the inadequacies and shortcomings which suggests to us that, he indeed had

a role to play which substantially contributed to the unprocedural and unlawful transfer of the suit property from the appellant. In so saying, we are satisfied, and find that the role played by the 3rd respondent deprived him of the status of a bona fide purchaser for value without notice.

Having reached this conclusion, by virtue of **section 143** of the **Registered Land Act**, we find that the very foundation upon which the 3rd respondent's title is said to be founded stands extinguished, and is rendered void.

Our position in this respect is further fortified by **section 38 (1)** of the **Registered Land Act** which stipulates thus,

“No land, lease or charge shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of land lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or effect any estate, right or interest in the land, lease or charge.”

Accordingly, we find that the High Court misdirected itself in failing to evaluate and analyse the evidence and as a consequence, reached the wrong conclusion that the 3rd respondent was a bona fide purchaser for value without notice. As such, we must interfere with the judgment of the High Court.

On whether the suit was incompetent for reasons of failure of the appellant to issue a 30 days' notice to the Attorney General of his intention to institute proceedings against the Government as stipulated by **section 13A** of the **Government Proceedings Act**, we share the view expressed by the High Court ***Kenya Bus Service Ltd & Another vs Minister for Transport & 2 Others (2012) eKLR*** where Majanja, J. held that **Section 13A** of the **Governments Proceedings Act** violates **Article 48 of the Constitution**, on the basis that ***“...the law should not impose hurdles on accountability of the Government through the Courts”***. In so saying, we need say no more in respect of this issue.

The final issue was whether the appellant's suit was time barred. On this the High Court stated that,

“The first of these defences was that this suit is time barred by virtue of the provisions of the Public Authorities Limitations Act which stipulates that any action against the Government and its officers has to be brought within 12 months. The cause of action in this case is indicated to have arisen in 1997 but the suit was filed in the year 2000 which was far beyond the twelve Months period”.

Section 3 (1) and (2) of the **Public Authorities Limitation Act, Cap 39** stipulated,

“(1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

(2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.”

Section 2 (1) of the **Public Authorities Limitation Act** specifies **“proceedings”** as civil proceedings in the High Court or the subordinate court, which are specified as subsection and (2) as proceedings against the Government and includes proceedings against the Attorney General or any Government department or any public officer as such.

Equally, **section 42** of the **Limitation of Actions Act**, provides that the Limitation of Actions Act does not apply to proceedings to which the Public Authorities Limitations Act applies.

But the answer to whether the provisions of the **Limitation of Actions Act, Cap 22** may be read together with the provisions of the **Public Authorities Limitation Act**, would probably be found in **section 6** of the **Public Authorities Limitation Act** which states thus:

“Notwithstanding the provisions of Section 31 of the Limitation of Actions Act, Sections 22 of the Act shall not apply in respect of the provisions of this Act; and in Section 27 of the Limitation of Actions Act the reference to Section 4 (2) of that Act shall be read and construed as reference to section 3 (1) of this Act; but subject thereto and notwithstanding Section 42 of the Limitation of Actions Act, part III of that Act shall apply to this Act.”

From the above provision, it is evident that the Public Authorities Limitation Act in and of itself incorporates **Part III** of the **Limitation of Actions Act**, more particularly, **section 26** of the latter Act which stipulated thus;

“Where, in the case of action for which a period of limitation is prescribed, either-

- a) the action is based upon the fraud of the defendant or his agent, or any person through whom he claims or his agent; or**
- b) the right of action is concealed by fraud of any such person as aforesaid; or**
- c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.**

Provided that this Section does not enable an action to be brought to recover,...or set aside any transaction affecting, any property which-

- i. in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or**
- ii. in the case of mistake, has been purchased for valuable consideration, after the consideration in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.” (emphasis ours)**

In this case, we have found, that the 1st respondent fraudulently transferred the suit property which belonged to the appellant. The suit property was transferred to the 3rd respondent on 30th April 1997. The appellant discovered the fraud on 30th March 1998, and through his lawyer, one Siganga & Company Advocates, wrote to the 1st respondent seeking cancellation of the 3rd respondent’s title. The limitation period applicable in matters of tort and/or fraud is 12 months. Even with the discovery of fraud occurring on 30th March 1998, and the suit having been filed on 27th April 2000, the period was over two years from the date the cause of action arose on 30th March 1998. Evidently, the suit was filed out of time, and as such was time barred as against the 1st and 2nd appellants.

The same is not true in the case of the 3rd respondent, following the conclusion reached that the 3rd respondent was not a bonafide purchaser for value without notice in this suit.

The appellant has prayed for the cancellation of the title of the suit property. According to **section 7** of the **Limitations of Actions Act**, the cause of action would not normally be time barred for a period of 12 years from the date the cause of action arose. Consequently, by the time the suit was filed, there was still a substantial period left to lapse before limitation could be invoked. With this finding, the 3rd respondent is denied a defence under the Limitations of Actions Act Cap 22.

Having found that the High Court misdirected itself in failing to address and determine the issue of whether the 3rd respondent was a bona fide purchaser as prayed, we find that there is reason to interfere with that decision.

We therefore partially allow this appeal. We uphold the judgment of the High Court dated 17th September 2002 against the 1st and 2nd respondents, and set aside the judgment against the 3rd respondent.

Consequently, we order;

1. The cancellation of the purported sale and transfer of Kisumu Municipality Block 12/213 effected by the 1st respondent to the 3rd respondent;
2. A rectification of the title to Kisumu Municipality Block 12/213 to read Richard Oduol Opole as registered Lessee;
3. With regard to costs, given the findings made against the 1st, 2nd and 3rd respondents herein, we order that the appellant shall have the costs in the High Court and the costs of this appeal.

It is so ordered.

Dated and delivered at Kisumu this 5th day of November, 2015.

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR