



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, KIAGE & MURGOR JJA.)

CIVIL APPEAL NO. 97 OF 2004

BETWEEN

MAINGI MUTISYA NZIOKA APPELLANT

AND

MBUKI KISAVI RESPONDENT

(Appeal from the whole of the Judgment of Hon. Lady Justice R. Nambuye dated 17th January 2003 and her subsequent Decree issued on 1st April 2003 in Machakos

in

HCCC NO. 531 OF 1994)

JUDGMENT OF THE COURT

This appeal is from the judgment and decree of the High Court at Machakos (Nambuye, J. as she then was) given on 17.1.03 in favour of the plaintiff, who is the respondent herein, respecting a parcel of land known as KITETA/NDITUNI/42 which had been registered in the name of the appellant.

That judgment followed a trial in a suit filed by the respondent by way of a plaint dated **9.11.94** in which she averred, *inter alia*, as follows;

“3. The plaintiff was at all times material to this suit and prior to the year 1977 the owner of all that parcel of land measuring 0.38 Hectares or thereabouts, situate in Ndituni Sub-location, Kiteta Location, Makueni District and held the said land under customary law tenure as her share of the family land.

...

5. The plaintiff further states that in or about August, 1977, Ndituni Sub-location in Kiteta Location was declared an adjudication section and the plaintiff, who was and still is, illiterate, requested the defendant to assist the plaintiff in having the plaintiff’s land demarcated and registered in her (plaintiff’s) name and the defendant agreed to do so and did confirm to the plaintiff that the plaintiff’s land had been duly demarcated and

registered in the plaintiff's name as parcel number KITETA/NDITUNI/42 and the defendant continued to lease the said land from the plaintiff.

6. The plaintiff further states that in or about September, 1994 the plaintiff decided to cultivate her parcel of land No. 42 but was stopped from doing so by the defendant, defendant claiming to have purchased the said land from the plaintiff in or about 1980 at Kshs. 3,400/=.

8. By reason of the matters aforesaid, the plaintiff conducted an official search in the lands office only to her surprise to discover that the defendant had fraudulently dishonestly, illegally wrongfully and unlawfully had the suit land registered in the defendant's own name and obtained a title deed on 12th July, 1993 in breach of the specific instructions given by the plaintiff."

PARTICULARS OF FRAUD

The defendant was guilty of fraud in:-

- i. Failing to disclose to the adjudication officers that he was not the owner of Plot Number KITETA/NDITUNI/42, when he knew the said land belonged to the plaintiff.*
- ii. Exploiting the plaintiff's illiteracy.*
- iii. Secretly registering the land without the plaintiff's knowledge to enable the plaintiff lodge an objection with the Adjudication Department.*
- iv. Using his (defendant's) position as a member of the Land Board to intimidate the other members of the Board so as to prevent the name of the plaintiff from being included in the register.*

The respondent then made the following prayers;

"(a) A declaration that the defendant holds title number KITETA/NDITUNI/42 on trust for the plaintiff.

(b) An order for the rectification of the register substituting the name of the defendant with that of the plaintiff."

In response to that suit, the appellant filed a statement of defence by which he denied the claim and asserted the rights of a purchaser in the following terms;

"4. The defendant states that prior to 1977 the parcel of land now Kiteta/Ndithini/42 was property of the plaintiff who during the Land Adjudication on process was provisionally registered and by an oral agreement made on 29.9.1980 the plaintiff sold all her rights, interest over the whole of the said land to the defendant.

5. The defendant states that the plaintiff by a letter

dated 13.4.1981 to the Land Adjudication Officer and which letter was thump printed by the plaintiff, she appeared before the said Officer in presence of the defendant and authorized the deletion of her name and registration of that of the defendant and did voluntarily, willingly and knowingly and without any fraud and/or misrepresentation transferred (sic) the property to the defendant, who was subsequently registered and issued with title on 12.7.1993 in respect of Kiteta/Ndithini/42."

The issues being joined, the matter proceeded to trial before Nambuye, J. The respondent testified and called one other witness while the appellant did the same and called three witnesses at the end of which the learned Judge found for the plaintiff. Being dissatisfied, the defendant appealed to this Court raising some eight grounds of complaint vide the memorandum of appeal dated and lodged herein on 19.5.04.

At the hearing of the appeal, **Mr. Mutiso Makau**, learned counsel for the appellant stated, with justification, that the appeal boiled down to some three issues on which he proceeded to address us seriatim. The first contention by counsel was that the appellant was the beneficiary of a first registration. Counsel pointed to the learned Judge's finding at P29 of her judgment as follows;

“Can the defendant's title be impeached? The defendant has argued that it can't be rectified under Section 143(1) as it is a first registration even if it was obtained by fraud as in this case. Indeed the documents produced exhibits D3, 4, 2 being the adjudication record, green card and title deed, show that the defendant was the registered owner. In law fraud cannot fault the title.”

Having so found, counsel contended, the learned Judge should not have proceeded to take any further steps that compromised or defeated the first registration. The case of **CHACHA Vs. MANINI** [2002] 2 KLR 83 was cited in support of the position that a first registration was so sacrosanct that it could not be vitiated even in the face of fraud.

Mr. Makau next submitted that the learned trial Judge erred in finding that the respondent had established trust. This was the more so, contended counsel, in the face of the learned Judge's finding that the plaint had not pleaded trust and neither was the same particularized nor evidence led thereon. He cited the cases of **MUIRURI Vs. KIMEMIA** [2002] 2KLR 677, and **GICHUKI Vs. GICHUKI** [1982] KLR 285 where this Court held that a party relying on the existence of a trust must prove its existence through evidence.

The appellant's final complaint, is related to the issue of trust, and is that the High Court acted without jurisdiction in dealing with the matter that had not been pleaded. For that proposition counsel cited the High Court decision of **MWALILI VS. EDWARD & ANOR** [2000] KLR 204.

Opposing the appeal, **Mr. G. Gitonga Murugara** learned counsel for the respondent, first pointed out from the bar, and without contest or objection from the respondent, that the High Court's judgment which was rendered nearly eleven years ago, has long been fully effected and the respondent has been in possession of the subject property the title whereof she holds in her own name. Counsel spoke of that judgment in superlative terms lauding the trial Judge for doing “a fantastic job” and doing justice for his client whom he described as an elderly and illiterate lady.

On the issue of trust, **Mr. Murugara** submitted that a first registration was not free from statutory limitations under the Registered Land Act (now repealed). He contended that a first registration does not defeat the overriding interests set out under **Section 30** of the statute and that the learned Judge was therefore correct to rule as she did.

On whether trust was pleaded by the respondent, **Mr. Murugara** submitted that even through the term ‘trust’ was not used in the body of the plaint, it was clearly discernible from paragraph 5 thereof where the respondent averred that she had requested the appellant to assist her in the demarcation and registration of the land in the respondent's name. A registration by the appellant in his own name against the express request was, in the circumstances of this case, indicative of trust. It was for that reason, counsel asserted, and quite contrary to the appellant's claim that he did not know he was facing a claim under trust, that the first prayer in the plaint expressly sought a declaration of trust.

Mr. Murugara further submitted that the parties did in fact address the issue of trust in evidence with the respondent showing that she did make a request which the appellant unsuccessfully tried to counter by pleading and alleging purchase. In **Mr. Murugara's** view, even after the learned Judge held that the fraud on the part of the appellant could not defeat a first registration, she was perfectly entitled, as a court of equity to discern, find and hold that there was a trust in favour of the respondent. The issue of trust was

live before the Judge and she therefore could, on the authority of **ODD JOBS Vs. MUBIA [1970] EA. 476** and **VYAS INDUSTRIES Vs. DIOCESE OF MERU [1982] KLR 114** decide the issue notwithstanding that it may not have been fully pleaded. **Mr. Murugara** was categorical that trust does defeat a first registration and that once a court so found, then it was only logical that a rectification of the register be ordered as a natural consequence of such finding. He urged us to dismiss this appeal.

As we went through the entire record and examined all the evidence in exercise of our re-hearing duty as a first appellate court, we formed the clear opinion from the documents produced before the trial court as well as the testimony of the witnesses that the dispute herein pits an educated, connected and able appellant against an old and illiterate widow dueling over land that doubtless first belonged to the respondent but which, by some dubious process, ended up registered in the name of the appellant. The appellant did produce a letter before the trial court which formed the basis for his getting registered as proprietor of the land. The letter was drafted by the appellant's son in the English language before the respondent was asked to append her thumb print to it. The letter read as follows;

“TABITHA MBUKI KISAVI

P.O. TAWA

MACHAKOS

13-4-1981

THE LAND ADJUDICATION OFFICER

EASTERN DIVISION

P.O. BOX 1 TAWA

MACHAKOS

RE: THE CHANGE OF THE NAME

Dear Sir,

I request you to remove my name from plot number 42 in Ndituni Section, and register it to Maingi Mutisya because I have sold it to him.

Yours faithfully,

Tabitha Mbuki Kisavi”

The Assistant Land Adjudication Officer then proceeded to endorse on the letter that same day the instruction;

“D/Officer Cancel the name of Tabitha Mbuki Kisavi and register it in the name of Maingi Mutisya.”

In her testimony regarding the letter she thumb-pointed, this is what the respondent had to say;

“It is the defendant who called me to the office at Tawa. It is next to Tawa court. It is also adjacent to the road to Makueni. That is the road I use to go to the market from my home I was going to the market. He had taken a step of waylaying me. He is the one who called me. He was inside the office. You can see the main road from the office. He called me and told me to thumb print here and when I asked why he told me the titles were out. I thumb printed that Maingi was a member of the board and I know that when the titles were out he would bring to me and he knew my number. The

contents of the letter were not read to me. I just thumb printed. Maingi knew I was illiterate. If the contents had been read to me I would not have thumb printed. I came to know title had changed when Priscilla was fined. All along I had believed that Maingi would bring the title to me.

I have never received any purchase price from Maingi for this land. There has never been any sale agreement between us and no sale discussion between me and Maingi.”

She remained unshaken in searching cross examination by **Mr. Makau**, counsel for the defendant, the appellant herein. She maintained that she never sold the land to the appellant and went as far as to state that he had taken advantage of his membership on the adjudication board (the appellant said it was the Land Control Board) to ‘grab’ her land “because she had no husband.”

It is highly doubtful that any sale of land transaction occurred between the respondent and the appellant or that the respondent ever intended to transfer the subject land to the appellant. The testimony of the appellant himself when cross-examined is telling;

“In 1980 I was aware Tabitha was a widow. It is correct there is no sale agreement between me and the plaintiff. Nobody else was involved in the sale of the land. I agree it is inherited land....

She does not know how to read and write. As at 29.9.1980 she was illiterate ... The letter is in English. She does not know English

It is correct there is no place where she has signed saying that she received the purchase price from me.”

Given that state of the evidence, we find that the learned trial Judge was perfectly entitled to reject the purchase narrative as presented before her by the appellant. There was no agreement in writing as required by Section 4 of the Law of Contract Act for a disposition of an interest in land. There were no witnesses. There was no evidence of any consideration having passed. In short, there was no sale.

The learned trial Judge, who had the advantage of hearing the parties and their respective witnesses, believed and preferred the respondent’s version of events over that of the appellant. From our own reading of the record, we are unable to find a basis upon which we can overturn the learned Judge’s conclusion that the registration of the appellant as proprietor of the land in question was fraudulent. The conclusion was inevitable from the pleadings, the evidence and all the circumstances surrounding the registration.

Under **S143** of the **Registered Land Act**, the High Court (by dint of **Section 159** of the said Act) has jurisdiction to order rectification of the register of land where it is proved that a particular registration, not being a first registration, was obtained, made or omitted by fraud or mistake. As the appellant herein was himself implicated in the fraud, and not being an innocent purchaser for value, he would be unable, but for the first generation, to resist the rectification by order of court that should flow from the finding of fraud.

The issue of a first registration being immunized from enquiry and rectification, even in the face of patent fraud, in which the registered proprietor is implicated, is a strange and peculiar one. It seems to us highly doubtful that a perpetrator of fraud can in conscience be permitted by statute to keep the fruits of his fraud and wave a statutory protection as a cloak and shield no matter what salutary public policy considerations, if any, may have informed the provision. As the matter was not urged before us in that precise formulation, however, we shall not further delve into it. It is enough that the learned Judge proceeded on the face value statutory bar to impeachment of a first registration.

On the issue of trust, the learned Judge took the view that it should have been specifically pleaded,

particularized and proved, but was not. For this default she lay the blame upon the respondent's legal advisors who prepared the plaint. Our own reading of the pleadings and the record shows that the issue of trust was a live one. The first prayer in the plaint was for a declaration that the appellant held the land in trust for the respondent. The narration in the plaint, though not headed as particularization of trust, nevertheless sufficed to bring constructive trust into operation. We take the view that once the respondent pleaded and testified that she had requested the appellant to assist her in registering the land under her name but he converted that brief fraudulently to his benefit and her detriment, the issue of trust became live for the court's adjudication. We think that this is a case where the principle enunciated in **ODD JOBS Vs. MUBIA** and **VYAS Vs. DIOCESE OF MERU** (Supra) should have applied namely;

“The court may base its decision on an unpleaded issue [and we would add, an imprecisely or inadequately pleaded issue] if during the course of the trial the issue has been left for the decision of the court. In this instant, the issue was left to the court's decision when the appellant addressed the court and led evidence on the issue.”

The facts of the case clearly invited a finding of trust. In the title **Constructive Trusts** (The Law Book Company Ltd, 1992) cited to us by **Mr. Murugara**, Professor M. Cope addresses the acquisition of property by fraud, duress and undue influence as follows (at p 492-93);

“Fraud, duress and undue influence, as well as other forms of wrongful conduct such as misrepresentation and unconscientious (unconscionable) dealing may entitle a court to charge a person holding title to property, as a constructive trustee.... The transactions which result from such wrongful conduct are voidable and the most frequently used remedy for relief is that of recession. As previously noted the effect of this remedy is to require the recipient of the property to restore the property to the victim. Increasingly, English and Australian courts are also prepared to charge the recipient of the property as a constructive trustee of the property. There is general agreement that the party holding the property is a constructive trustee of the property and that the courts can make declarations to that effect with or without orders for the reconveyance or retransfer of the property....”

There is absolutely no reason why this broad equity approach cannot apply in Kenya as well and we think that the learned Judge dealt with the issue of trust and the consequential orders of rectification of the register consistently with the obligation that would be imposed by a proper finding that a constructive trust did exist herein. We affirm the general principle that “a court of equity converts a party who has obtained property by fraud into a trustee for the party who is injured by that fraud.” See **R.T. Oerton; Underhill's Law Relating to Trusts and Trustees** (12th Ed.) London, Butterworths, 1970 P243.

Being of that view, we conclude that the learned Judge was right in entering judgment for the respondent and the appeal herein must therefore fail for want of merit. It is accordingly dismissed in entirety with costs to the respondent.

Dated and delivered at Nairobi this 14th day of February, 2014.

E. M. GITHINJI

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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 REGISTRAR