REPUBLIC OF KENYA

Court of Appeal at Nairobi

Civil Appeal 225 of 2006

BETWEEN

CHARLES KARAITHE KIARIE ..... 1ST APPELLANT

THOMAS WANYOIKE WAINAINA..... 2ND APPELLANT

KALANG ENTERPRISES LIMITED …..... 3RD APPELLANT

AND

THE ADMINISTRATORS OF THE ESTATE OF JOHN

WALLACE MATHARE (DECEASED) …..... 1ST RESPONDENT

THE ADMINISTRATORS OF THE ESTATE OF

DENIS WAWERU RIMUI (DECEASED) …..... 2ND RESPONDENT

JOYCE WANJA GITAU (DECEASED) …..... 3RD RESPONDENT

GEORGE HEZRON MWAURA …..... 4TH RESPONDENT

JAMES MAINA …..... 5TH RESPONDENT

ERICK MWANIKI …..... 6TH RESPONDENT

(Appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Mary Ang'awa J.) dated 16th August, 1999

in

HCCC NO. 2325 OF 1995)
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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (Angawa J) given on 16th August

1999 by which the High Court granted the relief of specific performance of an agreement for the sale of land and ordered the cancellation of title to property in favour of the 3rd appellant.

The Parties

2. It is appropriate to start by describing the many parties involved in this appeal and their relationship to each other.

3. John Wallace Mathare (Mathare) and Dennis Waweru Rimui (Rimui) were the plaintiffs in the High Court suit. They were brothers. They are both deceased. We will refer to them as Mathare and Rimui. The administrators of their respective estates are the 1st and 2nd respondents in this appeal. Mathare and Rimui entered into an agreement for sale dated 18th September 1990 with Joyce Wanja Gitau, the 1st defendant to purchase 2.5 acres of land being a portion of a proposed subdivision of L R. No. 2243/3.

4. Joyce Wanja Gitau, now deceased, was the 1st defendant in the High Court suit. The administrators of her estate is the 3rd respondent in this appeal. She was registered as owner of a parcel of land L R. No. 2243/3 from which the 2.5 acres subject of the purchase by the Mathare and Rimui was to be excised. We will refer to her as Wanja.

5. George Hezron Mwaura Gitau is the 2nd defendant in the High Court suit. He is the 4th respondent in this appeal. He is the son of Wanja. We will refer to him as Hezron. Following subdivision of his mothers property L R. No. 2243/3 into several plots, he became registered on 6th August 1991 as owner of one of the resultant plots known as L. R. No. 13459/5 measuring 4.047 hectares or thereabouts.

6. Charles Karathe Kiarie and Thomas Wanyoike Wainaina were the 3rd and 4th defendants respectively in the High Court suit. They are the 1st and 2nd appellants respectively in this appeal. We will refer to them as Kiarie and Wainaina respectively. They entered into an agreement for sale dated 2nd June 1992 to purchase a plot, being a subdivision of L. R. No. 13459/5 from Hezron.

7. Kalang Enterprises Limited is the 7th defendant in the High Court suit. It is the 3rd appellant in this appeal. We will refer to it as the company. Kiarie and Wainaina are directors in the company. The company became registered as owner of the plot subject of the agreement for sale dated 2nd June 1992 referred to in paragraph 6 above, which became registered as L. R. No. 13459/41 measuring 1.00 hectares or thereabouts. The company became registered as owner thereof pursuant to a transfer, which was registered on 23rd October 1992.

8. James Maina is the 5th defendant in the High Court suit. He is the 5th respondent in this appeal. He entered into an agreement with the company on 3rd July 1995 to purchase a subdivision of L. R. No. 13459/41 measuring 0.20 hectares or thereabouts. We will refer to him as Maina.

9. Eric Mwaniki is the 6th defendant in the High Court suit. He is the 6th respondent in this appeal. He entered into an agreement with the company on 29th June 1995 to purchase a subdivision of L. R. No. 13459/41 measuring 0.20 hectares or thereabouts. We will refer to him as Mwaniki.

The Facts

10. The facts as they emerge from the record are that Rimui met Hezron in late 1989. Hezron was offering land for sale.

11. The land Hezron was offering for sale was a portion of a bigger parcel of land known as L. R. 2243/3, which was registered in the name of his mother, Wanja.

12. According to Rimui, Hezron informed him that as a beneficiary of his late fathers estate, Hezron was entitled to a portion measuring 10 acres of L.R. 2243/3.

13. Mathare and Rimui commenced negotiations with Hezron to purchase 2.5 acres of Hezron's 10-acre portion of land.

14. Having identified the portion of 2.5 acres on the ground, Mathare and Rimui agreed to purchase that portion from Hezron at a price of Kshs.667, 500.00.

15. By an agreement for sale dated 18th September 1990 made between Wanja as vendor on the one part and Mathare and Rimui as purchasers on the other part, Wanja agreed to sell and the purchasers agreed to purchase the 2.5 acres to be curved out of L. R. 2243/3 for a price of Kshs.667, 500.00 on the terms and conditions set out in that agreement.

16. As Hezron did not have title to the property at the time, the agreement for sale, according to Rimui, was entered into with Hezron's mother Wanja who was the legal owner of the property at the time.

17. The special conditions in the agreement for sale provided *inter alia* that:

"1. The purchasers have seen and identified the parcel of land being sold to them.

2. The agreement is subject to the proposed subdivision being approved by the necessary authorities.

3. The purchasers have paid the vendor the sum of shilling Three Hundred thirty Three Thousand Five Hundred only (Kshs. 333,500.00) (the receipt whereof the vendor hereby acknowledges).

4. The purchasers shall pay the balance of the purchase price to the vendor on completion of this agreement which shall be sixty (60) days after the vendor obtains the approved deed plans from Nairobi City Commission.

5. The vendor shall deliver possession of the said parcel of land to the Purchasers on execution of this agreement.

6. That the survey fees shall be borne by both parties jointly.

7. ***All the monies paid herein has been paid to vendor's agent and beneficial owner of the property George Hezron Mwaura, with the consent of the vendor."***

18. Sometime in the year 1991, Wanja obtained the requisite approvals for the subdivision of her property and proceeded to subdivide L.R No. 2243/3.

19. On 26th June 1991 Wanja transferred a subdivision of the original title comprising of 10 acres being L.R. No. 13459/5 to her son Hezron. The portion that had been identified by Mathare and Rimui and which was the subject of the agreement for sale dated 18th September 1990 was part of L.R. No. 13459/5.

20. Hezron then subdivided L.R. No. 13459/5 into four portions. One of the four portions was L.R. No. 13459/41 ("the property") comprising of 2.5 acres, which was the subject of the agreement for sale between Wanja and Mathare and Rimui dated 18th September 1990.

21. On 2nd June 1992 Hezron entered into an agreement for sale with Kiarie and Wainaina under which Hezron agreed to sell the property to Kiarie and Wainaina for a consideration of Kshs.750, 000.00.

22. On the 23rd October 1992 the property was transferred by Hezron and registered in the name of the company, Kalang Enterprises Limited.

23. The company then subdivided the property into five sub plots registered as L.R. No. 13459/44, 13459/45, 13459/46, 13459/47, and 13459/48.

24. By agreements for sale dated 29th June 1995 and 3rd July 1995 the company agreed to sell two of the sub plots to Maina and Mwaniki for a consideration of Kshs. 800,000.00 for each sub plot.

The Suit

25. Mathare and Rimui considered that they were wrongfully deprived of the property. On 21st July 1995 Mathare and Rimui filed suit in the High Court of Kenya at Nairobi, being HCCC No. 2325 of 1995 against Wanja, Hezron, Kiarie and Wainaina.

26. Maina, Mwaniki and the company were subsequently joined in the suit through a further amended plaint filed in court on 30th May 1997.

27. Mathare and Rimui pleaded that the sale of the property to Kiarie and Wainaina and the subsequent transfer of the property to the company were fraudulent and sought declarations to that effect and for an order for specific performance of the agreement dated 18th September 1990.

28. The specific reliefs that Mathare and Rimui sought from the High Court in their further amended plaint are:

" (a) A declaration that the agreement of sale dated 2nd June 1992 between 3rd and 4th defendants and the 2nd defendants and the subsequent transfer was fraudulently entered into to defeat the plaintiffs' title and interest in LR 13459/41 (IR No 53362) and consequently the same is null and void.

(b) A declaration that the transfer dated 19th October, 1992 and registered as I.R 53362/4 made between the 2nd defendant and the 7th defendant for the transfer of L.R No 13459/41 was was fraudulently entered to defeat the plaintiffs' title and interest in the said piece of land and consequently the same is null and void and should be struck out.

(c) A declaration that the purported sales of the portions of the suit land by the 7th defendant to The 5th and 6th defendants are null and void.

(d) [sic] An order for specific performance of the agreement dated 18th September 1990 between the plaintiffs and the 1st defendant.

(f) The costs of this suit.

(g) Any other or further relief deemed fit to grant."

(h) An order for the transfer of the parcels of land known as L.R Nos. 13459/44, 13459/45, 13459/47, 13459/46 and 13459/48 from the 7th defendant to the plaintiffs.

(i) alternatively but without prejudice to a, b, c, d, & h above, judgment against the 1st and 2nd defendants for special damages amounting to Kshs. 465,850.00 and general damages for Breach of contract.

(j) interest at court rates until payment in full."

29. In his defence Hezron denied the claims by Mathare and Rimui and denied having received payment towards purchase price.

30. In their defence Kiarie, Wainaina and the company also denied the claims by Mathare and Rimui and contended that they are innocent purchasers for value without notice of Mathare and Rimui's claims to the property.

31. The suit was heard and in a judgment delivered on 16 August 1999 the learned trial judge made the following findings:

a. That Wanja sold a portion of land measuring 2.5 acres to Mathare and Rimui to be excised from Land Reference number 2243/3.

b. That Hezron, the son of Wanja, as heir of his father's estate consented to the sale of the property by Wanja to Mathare and Rimui.

c. That Kshs. 465,850.00 of the purchase price had been paid.

d. That Mathare and Rimui took possession of the property on signing the agreement for sale.

e. That Kiarie and Wainaina were aware of the sale transaction between Wanja and her son on the one part and Mathare and Rimui on the second part.

f. That Wanja subdivided her property Land Reference number 2243/3 into several portions one of which became L R No. 13459/5 which was transferred to her son Hezron.

g. That Hezron subdivided L R No. 13459/5 into several portions including the portion sold to the Mathare and Rimui which became L R No. 13459/41.

h. That Hezron sold L R No. 13459/41 to Kiarie and Wainaina with the knowledge of the sale agreement between his mother and the Mathare and Rimui.

i. That the transfer of the property to the company Kalang Enterprises limited was fraudulent.

j. That when the property was transferred to the company on 19th October 1992, the company (which was registered on 23rd October 1992) was not in existence and the registration of the transfer of the property in favour of company was therefore null and void.

k. That the company, with no capacity to do so, sub divided the property L R No. 13459/41 into Land Reference Numbers 13459/44, 13459/45, 13459/46, 13459/47 and 13459/48.

l. That Wanja and Hezron breached the sale agreement dated 18th September 1990.

32. Based on those findings the trial court in its judgment delivered on 16th August 1999 decreed:

a. That Mathare and Rimui are entitled to specific performance.

b. That the title in favour the company be cancelled due to fraud.

c. That the property be transferred to Mathare and Rimui.

d. That there was an element of fraud in the case.

e. The claim for special damages was not proved.

f. ***Mathare and Rimui are awarded costs of the suit.***

The appeal and submissions by counsel

33. Kiarie, Wainaina and the company, the 1st, 2nd and 3rd appellants respectively,

have appealed the judgment of the High Court on 23 grounds. The grounds of appeal can be compressed into the following;

a. *The learned trial judge erred in ordering specific performance;*

i. *When the prerequisites for ordering specificperformance were not satisfied.*

ii. *Against strangers to the contract and in failing to heed the doctrine of privity of contract.*

iii. *When, on the evidence before the court, that relief could not be granted.*

b. *The learned trial judge erred in ordering the cancellation of the title in favour of the company on the ground that it was procured by fraud when there was no evidence of fraud.*

34. The appellants have asked us to set aside the judgment of the High Court, re-evaluate the evidence on record and reach a favourable and just conclusion and or in the alternative, the Court to order the matter to be heard afresh before another judge of the High Court.

35. The appeal came up for hearing before us on 7th February 2013. Mr. C.N Kihara with Mr. Kenneth Wilson appeared for the appellants. Mr. Muriuki Mugambi and Mr. Ayisi Austin appeared for Mathare and Rimui. Mr. Githinji appeared for Hezron and Mr. Kiarie J Njenga for Wanja. All Counsel relied on their respective written submissions filed in this Court in addition to oral arguments advanced during the hearing of the appeal.

36. Mr. C. N. Kihara learned counsel for the appellants adopted his written submissions and submitted that the learned trial judge erred in granting orders that were not sought and in ordering specific performance to be performed by Hezron, a person who was not a party to the agreement for sale between his mother Wanja and Mathare and Rimui.

37. He submitted that the prerequisites for the grant of the remedy of specific performance include existence of a contract between the parties and certainty in the subject matter of the contract. In this case, Mr. Kihara argued that the property that was being sold and with respect to which the order for specific performance was made was not ascertained, as it was not identified in the sale agreement dated 18th September 1990. According to Mr. Kihara, that agreement referred to a survey plan that was not annexed.

38. Mr. Kihara further submitted that the purchase price of Kshs.667, 500.00 stipulated in the agreement for sale was never paid and in the circumstances specific performance could not be ordered.

39. He submitted further contended that there were allegations of fraud that were not proved and that the learned trial Judge wrongly imputed fraud on basis that the company, the 3rd appellant as a limited liability company, was not in existence at the time of transfer of property in its favour.

40. He contended that the trial court erred in finding that the transfer dated 19th October 1992 transferring L.R. No. 13459/41 to the company was registered on 23rd October 1992 contrary to the evidence adduced by Mrs. Elizabeth Gicheha, a Registrar at the lands office who gave evidence that the transfer was presented for registration on 23rd October 1992 but that the same was subsequently

registered upon confirmation that the company was a limited liability company as opposed to a business name.

41. He argued that under **section 23** of the Registration of Titles Act, Cap 281 titles registered thereunder are conclusive proof that the person named as proprietor of land is the absolute and indefeasible owner thereof and the court must be satisfied that the same was acquired through fraud or misrepresentation before revoking the same.

42. Mr. Kihara went on and submitted that from the evidence adduced before the trial court there was no proof that the appellants had engaged in any fraudulent activities in respect of L.R. No. 13459/41.

43. Mr. Kihara maintained there was no evidence before the trial court to establish that the appellants were aware of the sale agreement or the transaction between Mathare and Rimui and Wanja. He further submitted that Hezron was not privy to the agreement for sale between his mother Wanja, and Mathare and Rimui and was therefore not bound by the terms of that agreement.

44. He further stated that the learned trial judge wrongly ordered cancellation of title with respect to Land Reference number 13459/41 in the name of the company when the same was not in the name of any of the parties to the contract.

45. Mr. Kihara argued that the trial judge misdirected herself when she found that Hezron transferred the property to the company "***during adjournments…despite an order for status quo by the court***" when in fact the transfer to the company was done in October 1992, prior to commencement of the suit, and thereby wrongly proceeded on the basis that the transfer was undertaken in contempt of court.

46. Mr. Muriuki Mugambi who appeared with Mr. Ayisi Austin, learned counsel for Mathare and Rimui (the 1st and 2nd respondents) opposed the appeal and urged this Court to uphold the decision of the High Court.

47. He adopted his written submissions and submitted that the appellants were not entitled to be heard because they disobeyed the orders of this court issued on 30th July, 2012 giving time lines with regard to when the written submissions were to be filed. According to Mr. Mugambi this was yet another instance of abuse of the court process by the appellants and the appeal ought to be dismissed.

48. He further submitted that Wanja held the property in her name for her son who had the beneficial interest and that they entered into the agreement for sale with Mathare and Rimui.

49. Mr. Mugambi also argued that despite the agreement for sale, Wanja and Hezron fraudulently had the property registered in the name of Hezron who in turn, and in record time, had the property transferred to the company despite also having continued to receive payments from Mathare and Rimui.

50. Mr. Mugambi submitted that on the evidence the learned trial judge correctly found that there was fraud in the acquisition of the property maintaining that based on the evidence before the High Court, the trial judge saw through the ingenious scheme perpetrated by Wanja and Hezron that included transferring the property to a non existent company, and came to the correct decision. He accordingly submitted that the findings of the High Court should not be upset.

51. He argued that the effect of the ingenious scheme was that a non-existent company acquired a property based on a sale agreement between different parties. He said that reversing the judgment of the High Court would result in allowing a non-existent company to own property, which is not known in the law.

52. Mr. Mugambi further submitted that the company did not pay stamp duty on the transaction and recognizing the transaction in favour of the company would result in stamp duty fraud.

53. He further submitted that the learned trial judge correctly held that Mathare and Rimui are

entitled to specific performance as the amount required to have been paid under the sale agreement in the sum of Kshs. 333,500.00 was in fact paid and acknowledged, possession passed and payment for the balance of the purchase price was not payable until completion.

54. With regard to the submission by the appellants that the learned judge erred in granting relief that was not sought, Mr. Mugambi submitted that the relief for specific performance was pleaded and specifically included in the statement of agreed issues submitted to the court for determination.

55. Mr. Kiarie Njenga learned counsel for Wanja adopted his written submissions which in short are that, summons to enter appearance were never served on Wanja and the suit ought to have been dismissed against her after the expiry of twelve months from the date of filing the suit.

56. According to Mr. Njenga there was no valid suit against Wanja when the matter proceeded for hearing at the trial court and the decree against his client is therefore a nullity. He further submitted that there was no evidence that Wanja was notified of the hearing dates at the trial court and was condemned unheard.

57. Mr. P. M. Githinji learned counsel for Hezron relied on his written submissions, referred to the notice of cross appeal and submitted that the learned trial judge erred in ordering specific performance against Hezron who was not a party to the agreement for sale.

58. On the strength of the case of **Mwangi vs. Braeburn Ltd [2004] 2 E A 196**, Mr. Githinji submitted that one cannot breach an agreement to which one is not privy and only the parties to the contract could perform the obligations.

59. Mr. Githinji submitted that no cause of action was disclosed against Hezron and the orders issued by the High Court against Hezron are therefore not sustainable.

60. He submitted that Hezron became the registered owner of land reference number 13459/5, un-encumbered title, on 6th August 1991 with full rights of ownership when the transfer in his favour was registered and a Certificate of Title issued in his favour and did not hold the same in trust or otherwise for anybody else.

61. That as owner Hezron was at liberty to deal with the property as he chose and in that regard entered into an agreement for sale dated 2nd June 1992 with Kiarie and Wainaina (the 1st and 2nd appellants) who agreed to purchase the property for which he received payment in full.

62. He stated that Kiarie and Wainaina were at liberty to assign and did assign their interest to the company, which, before incorporation, was a business name.

63. Mr. Githinji submitted that Hezron's cross appeal should be allowed, the judgment of the High Court set aside and be substituted with an order dismissing Mathare and Rimui's suit or alternatively this Court should re evaluate the evidence and make a favourable and just conclusion.

64. On the cross appeal, Mr. Mugambi for Mathare and Rimui submitted that Hezron cannot feign ignorance of the agreement for sale having received as he did payments towards the purchase price under that agreement for sale.

65. In reply, Mr. Kihara for the appellants submitted that with regard to the contention that the transfer to the company was affected to a non-existent entity, a limited liability company could approve or ratify pre existing contracts.

66. On the question of alleged stamp duty fraud, he submitted that this could still be paid.

Court's decision

67. We have considered the appeal, the submissions and the authorities cited. This being a first appeal from the decision of the High Court, our task, as stated by this Court in **Selle v Associated Motor Boat Company Limited [1968] E A 123**, is to review the evidence before the High Court and to draw our own conclusions bearing in mind that we have not heard or seen the witnesses.

68. In the case of **Mwangi v Wambugu (1984) K L R 453** this Court held that:

"***A Court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on the wrong principles in reaching the finding, and an appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally***."

69. In **Mwanasokoni v Kenya Bus Services Ltd [1985] KLR 931**, this Court held that the Court of Appeal will interfere with findings of fact by the High Court where the finding is based on no evidence, or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the finding. See also the pronouncement by this Court in **Makube v Nyamuro** [1983] KLR 403.

70. Applying those principles to the present appeal, the first issue, which we need to address, is whether the learned trial judge was right in ordering specific performance?

71. An argument that was advanced for the appellants is that the learned trial judge granted a relief that was not sought. In that regard we observe that one of the reliefs sought by Mathare and Rimui in their further amended plaint was an order for specific performance of the agreement dated 18th September 1990 between them and Wanja.

72. Indeed two of the issues framed by the parties for determination by the High Court as captured in the statement of agreed issues submitted to the High Court related to the question of specific performance. The two issues are:

"a. Did the 1st and 2nd defendant breach the sale agreement dated 18th September 1990 between the 1st defendant and the plaintiffs?

b. If the 1st and 2nd defendant breached the said agreement, are the plaintiffs entitled to specific performance or in the alternative an award for general and special damages?"

73. In her judgment dated 16th August 1999 the learned trial judge, stated, "***I find that the plaintiffs are entitled to specific performance. I say so due to the element of fraud in this case***."

74. The question of specific performance was clearly before the High Court and the trial judge rightly in our view dealt with it.

75. What then was the evidence before the trial court in that regard? An agreement for sale dated 18th September 1990 made between the Wanja as vendor on the one part and Mathare and Rimui as purchasers on the other part was produced before the High Court. The interest sold was described as ***"2.5 acres of land being a portion of the proposed sub-division Y of the intended sub-division of L. R. NO 2243/3 more particularly described on the survey plan number annexed hereto."*** The purchase price was Kshs. 667,500.00.

76. The special conditions in the agreement for sale included provision that the purchasers had seen and identified the parcel of land being sold; that the agreement was subject to the proposed subdivision being approved by the necessary authorities; that the purchasers have paid Kshs. 333,500.00

and the balance was to be paid on completion which shall be 60 days after the vendor obtains approved deed plans from Nairobi City Commission; that the vendor shall deliver possession to the purchasers on execution of the agreement; that the survey fees shall be borne by both parties jointly; that all monies paid has been paid to the vendors agent and beneficial owner of the property George Hezron Mwaura, with the consent of the vendor.

77. Based on the evidence presented before the High Court, we are satisfied that the High Court rightly found that Wanja agreed to sell and Mathare and Rimui agreed to purchase 2.5 acres of land to be excised from her property L. R. No. 2243/3 for a price of Kshs. 667,500.00 out of which a sum of Kshs.333, 500.00 was acknowledged as paid to Hezron as the vendors agent and as ***"the beneficial owner of the property."***

78. There was Rimui's testimony before the High Court that the 2.5 acres to be excised from the vendor's property L. R. No. 2243/3 was surveyed and the purchasers took possession.

79. Under the agreement for sale the balance of the purchase price was not due until ***"60 days after the vendor obtains approved deed plans from Nairobi City Commission".*** The obligation to obtain approved deed plans from the Nairobi City Commission was the vendors.

80. In our view the terms of the contract were sufficiently stated. The necessary terms are set out in the agreement for sale. The parties to the agreement are clearly identified. The property sold under the agreement for sale is sufficiently described and clearly identified. The price is also indicated. We are not persuaded, as submitted by counsel for the appellants that the remedy of specific performance was not available to Mathare and Rimui on account of uncertainty as to the property that was being sold.

81. We are satisfied, as the trial judge was, that a valid and enforceable contract existed between the vendor and the purchasers and an order for specific performance was correctly made against Wanja.

82. The trial judge, who had the benefit of hearing the evidence, accepted Rimui's testimony, that the purchasers attempts to obtain deed plans from Wanja and Hezron were unsuccessful and that Hezron became evasive. The judge also found that the purchasers were ready, able and willing to pay the balance of the purchase price.

83. In **Openda v Ahn [1984] KLR 208**, this Court held that a condition precedent for specific performance of an agreement is that the purchaser must pay or tender the purchase price to the seller or such person as he directs at the time and place of completing the sale. In this case, the time for completion never came having been frustrated or defeated by the sale and transfer of the property to another party.

84. The only error, in our view, the learned trial judge made was in giving a blanket order of specific performance without making a distinction between Wanja and her son Hezron in terms of who was privy to the agreement for sale. The order for specific performance should have been limited to Wanja. However, that error did not in our view impact the overall outcome with which we agree.

85. The next question for consideration is whether the learned trial judge erred in ordering the cancellation of the title in favour of the company. That question is in turn dependent on two other questions. Firstly, whether Hezron was aware of the purchaser's interest in the property. Secondly, whether Kiarie and Wainaina are innocent purchasers for value without notice and whether the transfer of the property to the company was procured by fraud. In answering those questions, we think the credibility of Hezron, Kiarie and Wainaina is critical.

86. We have reviewed the evidence that was presented before the trial court. We caution ourselves that, unlike the trial judge, we have not heard the evidence. Without that advantage it is not for us as an appellate court to substitute our own assessment of the evidence on the state of mind of the parties. We must however examine the effect of the findings by the trial judge as a matter of law.

87. Based on the record of proceedings, Hezron does not come across as a truthful and credible

witness. The record is replete with instances in which Hezron seeks refuge on ‘his poor English' and 'limited education' when failing or refusing to answer direct questions put to him. In one instance when his testimony appeared to go against an earlier sworn statement he tried to explain away the apparent contradiction by stating that he swore the affidavit ***‘under confusion.’***

88. Hezron denied any knowledge of the agreement for sale between his mother Wanja and Mathare and Rimui. In his attempt to cement that denial he got dramatic and stated that he almost fainted when he learnt of the existence of that agreement after the inception of the proceedings in the High Court.

89. Yet, according to Rimui, whose testimony the trial court believed, Hezron with whom Rimui negotiated the purchase of the property, held himself out as the beneficial owner of a portion of his mother’s undivided parcel of land before the sale agreement was entered into. Rimui’s testimony in that regard is, in our view, supported by the provision in the sale agreement to the effect that payments of the purchase price were made to Hezron as “***agent and beneficial owner of the property***.”

90. There was evidence before the trial court of acknowledgments of payments by Hezron from Rimui received from Mathare and Rimui “***being part of the purchase price of a portion of land measuring 2.5 acres to be excised from L.R. No. 2243/3 currently registered in the name of Joyce Wanja Gitau***”

91. The trial court also found that Hezron continued to receive payments from Mathare and Rimui even after entering into agreement for sale with Kiarie and Wainaina.

92. There was also evidence before the learned trial judge that after Wanja transferred the 10 acres to Hezron, he submitted a subdivision scheme to the city council for subdivision into 5 portions. Hezron was unable to meet the conditions imposed by the Council and Mathare and Rimui expended their own resources to assist Hezron to comply. Indeed Hezron applied for a partial release of the property to enable him sell it to meet the conditions of the subdivision scheme. Once that was done Hezron became evasive prompting Mathare and Rimui to conduct investigations, which revealed that Hezron had entered into a sale agreement with Kiarie and Wainaina with respect to the property. That prompted Mathare and Rimui to commence suit in the High Court.

93. We think there was overwhelming evidence before the trial court on the basis of which the trial court found that Hezron not only knew of the sale agreement but also actively participated in its consummation and execution.

94. The upshot is that we are satisfied that Hezron was privy to the negotiations leading up to the agreement for sale dated 18th September 1990 and was the beneficiary of and received payments towards the purchase price under that agreement.

95. It is also not lost to us that the suit in the High Court was commenced on 21st July 1995. Simultaneously with the plaint Mathare and Rimui took out a chamber summons to restrain Wanja, Hezron, Kiarie and Wainaina from disposing of the property. Wanja appointed the firm of Njenga Mbugua & Co advocates who filed a notice of appointment of advocates and grounds of opposition.

96. Wanja did not find it necessary to counter by affidavit the factual matters deposed to by Mathare and Rimui in the affidavit in support of the application for injunction. Indeed it is somewhat intriguing that Wanja hardly took part in the proceedings to tell her side of the story but the administrators of her estate now impugn the judgment of the High court on basis that Wanja was not served with summons to enter appearance in the suit. We think her silence speaks a lot.

97. Turning to the question whether Kiarie and Wainaina are innocent purchasers for value without notice, based on the evidence before the trial court, when Kiarie and Wainaina entered into an agreement for sale to purchase the property from Hezron, they knew that Mathare and Rimui were in possession, as the property was fenced and under cultivation. Indeed it was Rimui’s testimony that Kiarie and Wainaina were aware of the transaction between the purchasers and Wanja and Hezron and assisted

in the survey and subdivision of Wanja's property.

98. Furthermore, Kiarie and Wainaina are the directors of the company to which the property was ultimately transferred. By a letter dated 11th October 1994, the company through its advocates wrote to Mathare accusing him of trespass on the property L R No. 13459/41 " ***by fencing with barbed wire, erecting a temporary structure and cultivating***" and demanded that Mathare should "***clear out***" of the property. In the totality of circumstances, we do not think the protection accorded under **Section 23** of the repealed Registration of Titles Act Cap 281 is available.

99. We are satisfied that on the evidence, the trial court correctly held that Kiarie and Wainaina were not innocent purchasers for value without notice of Mathare and Rimui's interest in the property

100. Further, having found as a fact that the company did not exist when it was purportedly registered as owner of the property we think the learned trial judge was right in holding that a non existent company could not hold title. We were referred to the case of **Haiderali Bhimji Motani v N. K. Thobani & Anor [1945] 12 EACA 37** for the proposition that a transaction preceding incorporation of a company cannot bind the company.

101. On the whole we think the learned trial judge came to the correct conclusion in ordering specific performance and the cancellation of title. On the evidence we do not think we could have reached a different conclusion from the learned trial judge and are therefore unable to interfere with the judgment of the High Court.

102. We however think that the learned judge ought also to have directed the payment of the balance of the purchase price. Having found as a fact that the Mathare and Rimui paid the sum of Kshs. 465,850.00 towards the purchase price, the administrators of the estates of Mathare and Rimui should pay the balance of Kshs. 201,650.00 to the administrators of the estate of Wanja. We so order.

103. For those reasons save for the order of payment of Kshs. 201,650 to the estate of Wanja, the appeal fails and is dismissed with costs.

Dated and delivered at Nairobi this 26th day of April 2013.

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL