



IN THE COURT OF APPEAL

AT NYERI

(CORAM: GITHINJI, NAMBUYE & MARAGA JJ.A.)

CIVIL APPEAL NO. 111 OF 2007

BETWEEN

AGRICULTURAL FINANCE CO-OPERATION.....APPELLANT

AND

JULIA MUTHANJE JOSEPH.....RESPONDENT

As consolidated with

CIVIL APPEAL NO. 116 OF 2007

BETWEEN

ISAIAH TITO NYAGA KAGOCE.....APPELLANT

AND

JULIA MUTHANJE JOSEPH.....RESPONDENT

*(Being appeals from the proceedings and Judgment of Embu High Court (Khaminwa J) dated 4<sup>th</sup> May, 2007.*

in

**Embu High Court HCCC NO. 82 of 2005)**

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**JUDGMENT OF THE COURT**

This judgment is in respect of Nyeri Civil Appeal Nos.111 and 116 of 2007 as consolidated by an order of this court made on the 2<sup>nd</sup> July, 2012. The appellant in CA. No.111 of 2007 is the Agricultural Finance Corporation (the first appellant) while the appellant in Nyeri CA NO.116 of 2007 is **Isaiah Tito Nyaga Kagoce** (the second appellant). The original plaintiff was **Julius Njiru Joseph** (now deceased) will hereinafter be referred to as the deceased while the current respondent **Julia Muthanje Joseph** who was substituted as a plaintiff in the place of the deceased will be referred to as the respondent.

The undisputed facts forming the background information to this appeal are that the deceased was the registered proprietor of all that piece of land situate in Kyeni and known as **TitleNo. Kyeni/Mufu/1540** (the suit land) which he charged to the first appellant for a loan advanced to him. It was the contention of the deceased that he fully repaid the loan and was issued with a discharge of charge and that the first appellant was therefore in error when it purported to realize the security by disposing off the suit land firstly to itself and then subsequently to the second appellant. On that account the deceased urged the Superior Court to set aside both sales and revert the title to him.

In response, the first appellant stated in its defence that the deceased having defaulted in the loan repayment, the sales of the suit land first to itself and later to the second defendant were lawful and proper. The second appellant on his part pleaded that he was an innocent purchaser for value without notice and was therefore entitled to seek for the deceased's eviction from the suit land as he did in Embu SRMCC 218/98. In the circumstances both appellants urged the Superior Court to dismiss the deceased's claim against them with costs.

After hearing the parties on merit, on 4<sup>th</sup> May 2007 Khaminwa J found for the respondent. Both appellants were aggrieved by that decision and they filed separate appeals. In summary both appellants contended that the proceedings before the Superior Court were a nullity as the respondent lacked locus standi having not obtained a grant of representation to the estate of the deceased and secondly because she had not been properly substituted by a court order; that the learned trial Judge erred in admitting into evidence documents she had earlier, upon the appellants' objection held inadmissible; that the learned trial Judge misapprehended the Agricultural Finance Act, Cap 323 Laws of Kenya, when she ruled that the first appellant unlawfully transferred the suit land to itself; that the learned trial Judge also erred in finding both the appellants had by conspiracy and fraud transferred the suit land to the second appellant without any basis as the respondent had not pleaded conspiracy and/or fraud; and lastly that the learned trial Judge erred in failing to find that the second appellant was an innocent purchaser for value without notice. On those grounds, they urged us to allow both appeals overturn the learned trial judges' decision and substitute it with an order dismissing the respondent's suit with costs.

At the hearing before us, **Mrs. Manyrkiy**, learned counsel for the 1<sup>st</sup> respondent urged us to allow the first appellant's appeal on the grounds that it is not disputed that the deceased took a loan from the first appellant which he failed to repay and that after requisite notices were issued the first appellant had a right to realize the security. The sale was by way of public auction at which the first appellant was the highest bidder after which it transferred the property to itself and thereafter sold it by private treaty and transferred it to the second appellant. It is learned counsel's further argument that all the documentation relied upon by the deceased in support of his assertions that he had fully repaid the loan and a discharge of charge issued to him by the first appellant's agent do not hold as these were mere forgeries in the first instance. In the second instance, these should not have been relied upon by the court as a basis for granting a relief to the respondent as the copies tendered to court had been objected to by the first appellant which objection had been upheld by the court. The court therefore fell into an error when it turned round and relied on those same documents.

Counsel further argued that failure to offer an explanation as to what happened to the documents allegedly taken by **Mr. Aboma**, the 1<sup>st</sup> appellant's officer at Embu office, did not prejudice the respondent. Lastly, she submitted that the transaction of sale and transfer of the suit land from the first appellant to the second appellant was proper and should be upheld by this Court.

In his submissions, **Mr. Wahome Gikonyo**, learned counsel for the 2<sup>nd</sup> appellant argued that the respondent had no locus standi to prosecute the suit on behalf of the deceased as she did not have a Grant of letters of representation to the estate of the deceased on the one hand and on the other hand, that there was no court order substituting the respondent in place of the deceased and as such the entire proceedings were a nullity and void ab initio a matter which had not been controverted by the respondent in their submissions on appeal. In the alternative, he argued that even if there was proof of existence of an order for substitution on the court record, the same could not help the respondent as the suit had, before substitution, abated and had not been revived by an order of court. On fraud, conspiracy, and dubious means, learned counsel urged us to find that these were mere allegations the particulars of the which had

neither been pleaded by the respondent nor proved by any evidence.

**Mr. Kariithi**, learned counsel for the respondent, urged us to dismiss both appeals on the ground that the respondent had repaid the balance of the outstanding loan in lump sum on the 14<sup>th</sup> day of April, 1982 and had been issued with a receipt and a discharge of charge, both of which were later collected by **Mr. Aboma**, the first appellant's manager then based at Embu who refused to return them prompting the deceased to seek assistance of the CID but the 1<sup>st</sup> appellant requested and was allowed to carry out internal investigations but never told the court the outcome of those investigations. In the circumstances the learned trial Judge was therefore entitled to hold that the discharge of charge tendered in evidence by the respondent was genuine as it had the seal of the 1<sup>st</sup> appellant and signatures of the first appellant's officers, matters which were not controverted by the first appellant.

Learned counsel contended further that there was no Land Control Board consent transferring the suit property from the deceased to the appellant as there was only one Land Control Board consent transferring the suit property from the first appellant to the second appellant. Lastly, he argued that the first appellant sold the deceased's property at a price much more than what was due to it but never satisfactorily accounted for the excess amount.

We have considered these submissions. This being a first appeal, we are reminded of our primary role as a first appellate court namely to reassess and re-evaluate the evidence tendered before the Superior Court and then determine whether the conclusions reached by the Superior Court are to hold or not giving reasons either way but bearing in mind that we neither saw nor heard the witnesses. This principle was summarized in the case of **Sumaria & Another v. Allied Industries Limited (2007) KLR1** by this Court in the following words:-

***“being a first appeal the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing mind that court of appeal would not normally interfere with a finding of fact by the trial court unless if it was based on misapprehension of the evidence or that the Judge was shown demonstrably to have acted on wrong principle in reaching the finding he did”***

And the case of **Musera v. Mwechelesi & Another (2007) KLR 159** this Court held inter alia that:

***“ As an appellate court, the court had to be very slow to interfere with the trial Judge's finding unless it was satisfied either that there was absolutely no evidence to support the findings or that the trial Judge had misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”***

In accordance with these principles, having revisited the evidence on the record, re-evaluated and re-assessed it, we find that the rival arguments centered around the following issues:-

- a. Whether the respondent had locus standi to prosecute the suit on behalf of the deceased and, if not, whether the proceedings giving rise to this appeal were a nullity and void ab initio?
- b. Whether the deceased fully repaid his indebtedness to the first appellant as at the time the suit was instituted.
- c. Whether the first appellant procedurally vested itself with title to the deceased's land.
- d. Whether the second appellant was procedurally vested with title to the suit land by the first appellant.

On the locus standi of the respondent, **Julia Muthanje Joseph**, in these proceedings, it is common ground that the deceased person instituted the suit giving rise to this appeal but died before the proceedings were concluded forcing the respondent to come on board as a personal representative. On substitution of the respondent, in her Judgment, the learned trial Judge made the following observations:-

***“Further issue raised in this matter is of the substitution of the widow Julia Mathanje in the place of her deceased husband original plaintiff...I note on record an application was made***

*on 25<sup>th</sup> day of April, 1990 for her to be substituted instead of her husband. She stated that her husband died on 7<sup>th</sup> day of February, 1990 therefore she was not out of time to apply for substitution. In any case no objection has been taken by any of the defendants, in their evidence and it is clear a court order was issued to substitute her in this suit. ...”*

On our part we find as the learned trial Judge did, that the respondent testified to court that she was substituted in the place of the deceased and when she tendered a limited grant of letters of administration to the deceased's estate. There was no evidence that the said limited grant was ever challenged either in the proceedings leading to this appeal or in the proceedings where it had been obtained. Nowhere in the evidence of (DW1) **James Shamalla** and (DW2) **James Kuria** did the issue of lack of locus standi of the respondent arise. Moreover the learned trial Judge observed that it was undisputed that the respondent did on the 7<sup>th</sup> day of February, 1990 make an application to substitute him and the substitution was made on the 25<sup>th</sup> day of April, 1990 in Misc. Application No.3/90. As we have no access to the proceedings in that Misc. Application No.3/1990, it is not clear to us as to the exact date the substitution order was made. However, on the basis that the application for substitution had been made in time and in view of the fact that nowhere in the appellants' amended defences which were filed after 1990 or in the proceeding did the appellants raise the issue of lack of locus standi of the respondent, we find that they are estopped from raising the issue in these appeals. See the case of **Kenyaga versus Ombari (2001) 2EA416-420** wherein this Court ruled, inter alia, that a relief not founded on pleadings cannot be granted. We therefore find that the respondent had locus standi in the matter and that the proceedings were not a nullity as the appellants contended.

It is not in dispute that the deceased took a loan from the first appellant. It is also not in dispute that he defaulted in the repayment but there is evidence on record that on 30<sup>th</sup> day of December, 1987, the first appellant wrote to the deceased enclosing a receipt for Kshs.90, 856.46. There is also a discharge of charge ref number CCI Embu/63/23-19/39/9/TC A/c 2775994 dated the 14<sup>th</sup> day of May, 1982 and signed by the first appellant's chairman in relation to LR. Kyeni/Mufu/1540 vide which the first appellant discharged the suit land in consideration of the deceased having fully repaid the loan. There is also an acknowledgement of collection of documents from the deceased by **Mr. Aboma** from 1<sup>st</sup> appellant's officer at Embu office for scrutiny. When those documents were not returned and the deceased reported the matter to CID, the first appellant requested the CID to allow it to carry out internal investigations. The CID obliged but nothing was heard of those investigations. In the suit the first appellant alleged that the discharge of charge and the letter forwarding it were forgeries and that they were mere photo copies whose production in evidence was objected and upheld by the court and as such the learned trial Judge should not have relied on them in the assessment of the evidence. There is no evidence of how or when the first appellant held the auction, having at the request of the CID halted the realization of the security pending investigations which investigations the appellant took over.

The said documents bore a seal which only employees of the first appellant could affix. They also bore signatures purported to be those of the 1<sup>st</sup> appellant's officials who, without any explanation, were never called to dispute those signatures. Even **Mr. Aboma** who, admittedly took those documents from the deceased, was never called to testify. In the circumstances, we find that the learned trial Judge had no alternative but to draw adverse inference against the first appellant on its failure, first, to offer an explanation as regards their findings on their internal investigations on the authenticity of those documents, and secondly on its failure to call evidence to controvert the signatures and the seals on those documents.

On the alleged objection to the production of documents, we find that it is only the acknowledgment of their collection by **Aboma** which was upheld. The other two letters evidencing that the CID were looking into the said allegations and a receipt for payment of sale for cancellation fees were never objected to and these were produced as evidence. There is nothing to show that these were forgeries. **Mr. Aboma**, the first appellant's officer having taken the original documents, we find that the learned trial Judge was entitled to rely on copies of those documents. If the written acknowledgment by **Aboma** is discarded, there was on record oral evidence supported by the CID's letter that the documents had been taken by **Mr. Aboma** whom the first appellant admitted was in office. That evidence stood

uncontroverted and in the circumstances, we find that the learned trial Judge was right in relying on it. It follows therefore that the purported sale to the first appellant of suit land had no basis. In any case the sale itself, if at all there was one, was opaque. There is no evidence of any auction. As we have said, the CID having halted the sale, there is no evidence of when the suit land was again advertised for sale. Although **James Kuria** (DW2) claimed in his testimony that he was the instructed Auctioneer and that he advertised the sale of the suit land in the Kenya Times News Paper, we have not traced on the record his Auctioneers license at the material time or the alleged advertisement. There is also no evidence of the first appellant having authorized any of its officers to bid at the auction.

We must also add that we have not traced on record a consent of the area Land Control Board to transfer the suit property from the deceased to the first appellant. We are therefore satisfied that the first appellant did not comply with all the prerequisites to be vested with title of property acquired through such a process.

Although Section 33(3) of the Agricultural Finance Act permits the 1<sup>st</sup> appellant to pass title to a 3<sup>rd</sup> party that can only happen when it has properly acquired it. Having faulted the first appellant's title to the suit property, it had nothing to pass to the second appellant.

Despite the foregoing faulting of the first appellants title to the suit land, we are obliged to interrogate the 2<sup>nd</sup> appellants own version of how he acquired the suit property from the first appellant. According to the 2<sup>nd</sup> appellant, he is an innocent purchaser for value without notice. The sale is alleged to have been by way of private treaty. The initiating document is an undated and an unsigned notice of sale which was allegedly placed at the first appellant's Embu offices inviting bids for the sell of the suit land. The bids were to be received not later than the 6<sup>th</sup> day of December 1985. It is our finding that such an undated and an unsigned document cannot be taken to be authentic and as such it cannot be taken to be forming a basis for any transfer of an interest in the suit land in favour of any party. That apart, almost a year and 9 months passed before the 2<sup>nd</sup> appellant expressed a wish to purchase the suit land on the 22<sup>nd</sup> day of September 1987. The bid was allegedly accepted, the purchase price paid for on the 23<sup>rd</sup> day of September,1987 consent to transfer the land from the first appellant to the second appellant granted on 4<sup>th</sup> December,1987 and title allegedly passed on to the 2<sup>nd</sup> appellant thereafter.

We are therefore satisfied that the learned trial Judge was justified in rejecting the sale transaction. Although fraud and conspiracy had not been pleaded and no evidence was adduced on them, we find that to be the learned trial Judges' own appreciation and conclusion on the matter given the evidence before her. It simply demonstrates what the learned trial Judge made of the said transactions for lack of better words to describe the said transactions.

In the result we find no merit in these consolidated appeals and we accordingly dismiss them with costs to the respondent both on appeal and the court below.

**Dated and delivered at Nyeri this 10<sup>th</sup> day of October, 2013.**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**D.K. MARAGA**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**