David Nderi Kamau t/a Lukaka Services v Nderitu & another (Environment and Land Appeal 47 of 2020) [2024] KEELC 4974 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4974 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 47 OF 2020

JG KEMEI, J

JUNE 24, 2024

BETWEEN

DAVID NDERI KAMAU T/A LUKAKA SERVICES .... APPELLANT

AND

EUNICE MUTHONI NDERITU .... 1ST RESPONDENT

GRACE WATARE MURIUKI .... 2ND RESPONDENT

(Being an appeal against the Judgment and Decree of Hon J A Agonda, SPM in MCLE No. 59 of 2019 in Ruiru delivered on 19/10/2020)

JUDGMENT

1. This appeal arises from the Judgment of Hon. J. A. Agonda, SPM delivered on 19/10/2020 in MCLE No. 59 of 2019, Ruiru.

2. The Appellant was the Defendant in the trial Court while the 1st and 2nd Respondents were the Plaintiff and the Interested Party respectively.

3. Vide a Plaint filed on 24/6/2019 the 1st Respondent filed suit against the Appellant seeking the following Orders:-

   a. An order of injunction restraining the Defendant, his agents, servants and any person claiming from interfering and or transferring to a third party all that piece of land known as Land Reference No. 4863 Plot No. 12 pending the hearing and determination of this suit.

   b. An order for vacant possession and in default, an order for eviction and compensation to the Plaintiff of any damage to the suit property.

   c. A declaration that the Plaintiff is the legitimate owner of the parcel of plot Nos. 11 and 12 Land Reference No. 4863 and the Defendant be compelled to issue one title deed to both plots.

d. Costs of this suit.

e. Any other relief that this Honourable Court may deem fit to grant.

4. It was the 1st Respondent's case that in 2003 her husband (Kevin Nderitu Wanguli (now deceased) purchased two plots from the Appellant being plots No. 11 and 12 out of parcel No. 4863. That plot No. 11 was purchased outrightly and a Certificate of Ownership was issued by the Appellant. However, the payments for plot No. 12 were agreed to be by instalments over a period of time. That despite the payment of the full purchase price in respect to plot No. 12, the 1st Respondent averred that the Appellant without any colour of right trespassed onto the property and unlawfully sold plot No. 12 to a stranger, in this case the 2nd Respondent. That the disposition was without her consent and has occasioned her, inter alia, damages for loss of property and mesne profits. Further the 1st Respondent termed the actions of the Appellant as illegal and fraudulent. Particulars of illegality and fraud were particularised and itemised under paragraph 7 of the Plaint.

5. In opposing the 2nd Respondent's case, the Appellant filed a defence dated 12/7/2019. Simply put, the Appellant argued that the issue surrounding plot No. 12 is the subject of the suit case. That though the 1st Respondent and her deceased husband purchased two plots, they only managed to pay for plot No. 11. That there was breach of the oral agreement in paying for plot No 12 within the agreed period by the 1st Respondent and her husband. That arising from the breach, the purchase price for plot No. 12 was increased from Kshs. 150,000/- to Kshs. 200,000/- a fact within the knowledge of 1st Respondent's husband. It was his argument that as a result of the default in paying for plot No. 12 he proceeded to sell the land to the 2nd Respondent on the grounds that the oral agreement between the 1st Respondent's husband and the Appellant had been breached by the 1st Respondent's husband. Further that the 1st Respondent paid the balance of Kshs. 50,000/- against advice of the Appellant. That despite several requests to the 1st Respondent to collect the refunds from the Appellant she has remained obstinate in doing so.

6. The 2nd Respondent having been enjoined as an Interested Party to the suit in 2018 filed a defence dated 6/10/2019 where she denied allegations of illegality and fraud claimed by the 1st Respondent. It was her case that she entered into an agreement with the Appellant on 10/6/2019 for the purchase of Ruiru/Ruiru East Block 2/16246 in the sum of Kshs. 450,000/- which sum was paid in full. That on completion of the payment of the purchase price, she was put in possession where upon she developed the said property by constructing a house, fencing and dug a water well of 12 meters deep. In sum, she pleaded the defence of innocent purchaser for value without notice.

7. Upon hearing the suit, the Learned trial Magistrate pronounced the Judgment in favour of the 1st Respondent on 19/10/2020. The learned trial Magistrate found that the 1st Respondent had acquired a legitimate interest in Plot No. 12 also known as Ruiru/Ruiru East Block 2/16246. Similarly, the Court found that the 2nd Respondent acquired no interest in the property and therefore the defence of bona fide purchaser for value without notice was not available to the 2nd Respondent. Guided by Section 80 of the *Land Registration Act*, the Hon. Learned Trial Magistrate cancelled the title of the 2nd Respondent and directed the Land Registrar to issue a title in the name of the 1st Respondent.

8. Aggrieved by the decision of the Court delivered in the impugned Judgment the Appellant filed this Appeal against the said Judgment based on lengthy 22 grounds as follows:-

a. That the learned trial Magistrate erred in law and fact in holding that the Respondent had proved her case on a balance of probability that she is the owner of the suit parcel LR. 4863 plot number 12 despite the overwhelming evidence and uncontested documents tendered before

her which sufficiently proved the Appellant's case on a balance of probability that he was the registered owner of the suit property.

b. That the learned trial Magistrate erred in law and fact by not taking into consideration that the Appellants and the 2nd Respondent's title were duly registered and property were issued first in time.

c. That the learned trial Magistrate erred in law and fact by finding and holding that the 1st Respondent had possession of the suit property a fact not proved.

d. That the learned trial Magistrate erred in law and in fact by finding and holding that there was a legally binding sale of the suit property.

e. That the learned trial Magistrate erred in law and in fact by failing to recognize that there was no sale agreement and the 1st Respondent was already in breach of the terms of sale.

f. That the learned trial Magistrate erred in law and in fact by failing to address herself properly on the issues of law of contract with regard to sale of land and consent to transfer.

g. That the learned Magistrate misdirected herself in finding that the 1st Respondent had a registered title a fact not alleged nor pleaded by the Respondent.

h. That the learned Magistrate totally misdirected herself on the facts of the case and ordered the 2nd Respondent to render vacant possession of the suit property. The property which in law and fact is not in the 2nd Respondent's possession.

i. That the learned trial Magistrate erred in law and in fact by finding and holding that the Appellant's documents of title were a fraudulently obtained a fact not pleaded nor alleged.

j. That the learned trial Magistrate erred in law and in fact by finding and holding that the Appellant caused a transfer to be registered in his name yet the property had all along been the property of the Appellant a fact admitted by the 1st Respondent who purchased a plot from the Appellant.

k. That the learned trial Magistrate erred in law and in fact by finding and holding that the 1st Respondent is the legitimate owner of the suit property.

l. That the learned trial Magistrate erred in law and in fact by conclusively relying on the receipts issued to the 1st Respondent as the only document to prove ownership disregarding the fact that the 2nd Respondent also had receipts and certificates issued by the Appellant and the 1st Respondent was in breach of the contract sand was entitled to a full refund of the purchase price.

m. That the trial Magistrate erred in law and in fact in disregarding the registration number of the plot in question.

n. That the trial Magistrate erred in law and fact in disregarding the entirety of the Appellant's evidence and believing the evidence of the 1st Respondent without any basis occasioning the Appellant monumental injustice.

o. That the learned trial Magistrate erred in law and in fact by finding and holding that ownership of the suit property passed in 2017 and disregarding the agreement receipts and certificates of ownership of the 2nd Respondent issued by the Appellant.

p. That the learned trial Magistrate erred in law and in fact by finding and holding that the Appellant acted illegally in the transfer and registration of the property in the name of the 2nd Respondent.

q. That the learned trial Magistrate erred in law and in fact by finding and holding that the 1st Respondent is the owner of the land known as LR 4863 plot 12 property neither belonging to the Appellant nor the Respondent.

r. That the learned trial Magistrate erred in law and in fact by failing to recognize the 2nd Respondent as an innocent purchaser for value and according her the necessary protection of the law.

s. That the learned trial Magistrate erred in law and in fact by finding and holding that the land register cancel transactions on the suit property and register the 1st Respondent as the owner and issue a title deed to Eunice Muthoni the administrator.

t. That the learned trial Magistrate erred in law and in fact by failing to consider the Appellant's submissions and exhibited actual bias against the Appellant.

u. That the learned trial Magistrate's Orders have occasioned grave injustice to the Appellant and 2nd Respondents dispossessing the Appellant of his parcel of land and ordering the Appellant to pay costs.

v. That in view of the circumstances set out herein above, the learned trial Magistrate totally misdirected herself in delivering Judgment in favour of the 1st Respondent by failing to consider and appreciate the evidence on record tendered on behalf of the Appellant.

9. The Appellant sought orders allowing the Appeal, varying or setting aside the impugned Judgment dated 19/10/2020.

10. On 16/3/2023 parties elected to canvass the appeal by way of written submissions. The Appellant's submissions were filed on 11/5/2023 by the firm of D. W. Gichio & Co. Advocates while the submissions of the 1st Respondents were filed on 20/6/2023 by the firm of Wanjama & Co. Advocates. The law firm of Musa, Boaz & Thomas Advocates filed submissions on behalf of the 2nd Respondent.

The Appellants submissions

11. In support of the appeal, Counsel for the Appellant framed the following issues; suit property/ property in question; actual ownership of the property; fraud in the registration of the suit property; contract of sale and consequences of the Breach of Contract of sale and whether the 2nd Respondent is a bonafide purchaser for value.

12. Counsel for the Appellant submitted that the suit land being plot No. 12 (Ruiru/Ruiru East Block 2/4863) was a subdivision of LR No. 4863 registered in the name of the Appellant. The Counsel for the Appellant faulted the Court for issuing orders with respect to parcel No. 16246 instead of 4863 from where plot No. 12 emanated from. Further it was argued that the 1st Respondent acquired no interest in the suit land. That the learned trial Court was faulted for introducing fraud in the registration of the property in Appellant's name which issue was not pleaded in the suit. It was the Appellant's case that at the point of transfer of the suit land to the 2nd Respondent, the title to the suit land being plot No. 12 was already registered in the name of the Appellant way back in 2014 and transferred to the 2nd Respondent in 2017. The Counsel for the Appellant therefore concluded that the Court misdirected itself in making a finding that the root of the 2nd Respondent's title had not been

established yet evidence was led that the property was already registered in the name of the Appellant before the commencement of the transaction with the 2nd Respondent.

13. Counsel for the Appellant submitted that the transaction between the Appellant and the 1st Respondent's deceased husband was based on an oral agreement and that subsequent negotiations of the increase of the purchase price between the 1st Respondent's husband was also orally made. Counsel for the Appellant further argued that due to the default of the 1st Respondent in making payment for plot No. 12, the said oral agreement collapsed and the interest in plot No. 12 remained vested in the Appellant. It was further stated that the agreement being oral is unenforceable in a Court of law. Relying on the provisions of Section 3(3) of the *Law of Contract Act*, Counsel for the Appellant submitted that in the absence of a written contract between the Appellant and the 1st Respondent it cannot be said that the transaction was lawful. That no Certificate of Ownership with respect to plot No. 12 was issued to the 1st Respondent.

14. It was further submitted that the 1st Respondent acquired no interest in the suit property. That there was no evidence led during the trial to support that the 1st Respondent was ever put into possession of the suit land for over a period of 12 years. Indeed the 2nd Respondent upon acquiring an interest in the property proceeded to take possession and commenced developments therein. That at the point that the Appellant conveyed the property to the 2nd Respondent, the Appellant held no interest in the suit property in favour of the 1st Respondent.

15. Counsel for the Appellant submitted that the 1st Respondent had no capacity to make any payment on behalf of the estate of her deceased husband in 2017 and therefore the payment of Kshs. 50,000/- made by the 1st Respondent remains inconsequential to the terms of the contract, if any.

16. The Appellant further submitted and faulted the Court for holding that the payment for plot No. 12 had been made in total disregard of the agreement of the parties revising the purchase price from Kshs 150,000/- to Kshs. 200,000/- for the plot. On the basis of the variance in price between the Appellant and the 1st Respondent, Counsel for the Appellant submitted that the agreement if any was vitiated by the uncertainty surrounding the purchase price for plot No. 12.

17. Is the suit time barred? Counsel for the Appellant answered the question in the affirmative and stated that it is the 1st Respondent's indolence that caused the transaction to be stale. That the attempt by the 1st Respondent to complete a failed agreement was not enough to resuscitate the transaction as the same stood time barred in law. Counsel for the Appellant submitted that the suit was filed 12 years after the alleged final payment of the property and therefore both recovery of land and refunds remain time barred ousting the jurisdiction of the Court to entertain the dispute. That the 1st Respondent has herself to blame for having catnapped on her rights, if any.

18. Further the Court was also faulted for disregarding the evidence of the Appellant with respect to the absence of the Land Control Board consent noting that this was a controlled transaction and the Land Control Board consent was not obtained within six months as provided for under Section 7 of the *Land Control Act*.

19. Counsel for the Appellant submitted and urged the Court to apply its mind on the following issues; that a proprietor cannot dispose off land that is not subdivided; there must be a written contract; a suit cannot be brought after the lapse of more than 12 years and that an action for breach of contract must be pursued within six months from the date of breach and failure to comply with the above voids the contract.

20. Was the 2nd Respondent a bona fide purchaser for value? Counsel for the Appellant relied in the decision of the Court in Katende Vs. Haridas & Company Ltd (2008) 2 EA 174 where the Court stated:-

> " For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:-
>
> a. he holds a certificate of title;
>
> b. he purchased the property in good faith;
>
> c. he had no knowledge of the fraud;
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> d. he purchased for valuable consideration;
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> e. the vendors had apparent valid title;
>
> f. he purchased without notice of any fraud;
>
> g. he was not party to any fraud."

21. Counsel for the Appellant concluded that the 2nd Respondent is deserving of the protection of this Court on account of being a bona fide purchaser of a legal estate without notice.

The 1st Respondents Submissions

22. Counsel for the 1st Respondent framed the following issues for determination by the Court; whether the 2nd Respondent conducted due diligence of the suit property; whether the 2nd Respondent can be regarded as Equity's Darling – Innocent Purchaser for value without notice; whether there was fraud in the acquisition of Ruiru/Ruiru East Block 2/16246 and whether the 2nd Respondent was a party to the fraud; whether the Title acquired by the 2nd Respondent is valid and/or legally binding and whether the 1st Respondent pleaded fraud against the Appellant.

23. On the question of due diligence, Counsel for the 1st Respondent submitted that had the 2nd Respondent visited the suit property she would have discovered that plot No. 12 belonged to the 1st Respondent. That the plot was being used as a parking lot by the 1st Respondent's tenant who lived on plot No.11. Equally plot No. 12 served as a storage for the tenant's construction materials.

24. On whether the 2nd Respondent was an innocent purchaser for value, Counsel for the 1st Respondent stated that the action of the 2nd Respondent and her agents or staff fleeing the site on 9/10/2017 when she in the company of the police is a testament that the 2nd Respondent was not innocent. Equally, on the day the Appellant realised that the 1st Respondent had reported the matter to DCI, Ruiru, he promptly promised to give the 1st Respondent another plot at bypass area. Similarly, the Appellant failed to disclose the details of the 2nd Respondent to the 1st Respondent despite having clandestinely sold the suit land to the 2nd Respondent. That the Appellant and the 2nd Respondent forcefully removed the lorries and building material of the 1st Respondent's tenant from the plot as well as the fence along the frontal part of the plots Nos 11 and 12. Despite evidence of possession of the suit land by the 1st Respondent through her tenant, the 2nd Respondent sent ahead and entered into an agreement to purchase land that had already been sold to the 2nd Respondent. That all these actions do not support bonafides on the part of the Appellant and the 2nd Respondent.

25. In addition, it was submitted that the Appellant intentionally failed to disclose all the material facts to the 2nd Respondent in regard to the suit property with the sole purpose of inducing the 2nd Respondent to part with her money for a property that was not available, it having been sold to the 1st Respondent by the Appellant. That the Appellant did not disclose the dealings that he had with the 2nd Respondent and elected the devious route of deceiving the 2nd Respondent into purchasing a non-existing property. On the other hand, the 2nd Respondent cannot be absolved of any blame as she purported to acquire the property with the full knowledge that the same was already in possession of the 1st Respondent who had dug a borehole of 35 metres, fenced the two plots parking the lorries, storing the building materials by the tenant and constructed a toilet spanning both sides of the plots. That the 2nd Respondent's evidence during the trial that she dug a borehole of 12 metres was not only misleading but false, actions that do not commend her to the an innocent purchaser for value also known as equity's darling. Further Counsel for the 1st Respondent submitted that the Appellant in collusion with the 2nd Respondent forcefully removed the vehicles and construction materials from the suit land. In addition, that she also cut the 1st Respondent's toilet under construction into two. All these actions were termed as acts of aggression disentitling the 2nd Respondent of the title of equities darling and protection as an innocent purchaser.

26. On the question of fraud, Counsel for the 1st Respondent submitted that the act of accepting the balance of the purchase price from the 1st Respondent and issuing a receipt thereof was an acknowledgement of the full purchase price for plot No. 12 and also an acceptance of the completion of the sale transaction between the Appellant and the 1st Respondent. The action of the Appellant in concluding the sale transaction between himself and the 1st Respondent and then entering into another contract with the 2nd Respondent seven years later is a clear conduct of fraud. Clearly the Appellant acted intentionally by selling the land to the 2nd Respondent which land at that time belonged to the 1st Respondent, the interest in the said property having been conveyed to the 1st Respondent. That the Appellant concealed material facts that he had sold the property to the 1st Respondent and the act of the Appellant in selling a property that he had no interest amounted to double unjust enrichment.

27. Did the 2nd Respondent acquire a valid title? Counsel for the 1st Respondent submitted that if the 2nd Respondent had made enquiries from the 1st Respondent's tenants who was in occupation from 2014 she would have known that the land belonged to the 1st Respondent. Also, the act of completion of the premises on the suit land by the 2nd Respondent while there was an existing Court order of injunction shows that the 2nd Respondent's actions were deceitful. It was further submitted that the 2nd Respondent having acquired a title through collusion or misrepresentation or a corrupt scheme she did not acquire a good title and the 1st Respondent submits that the said title in the name of the 2nd Respondent is a good candidate for cancellation. That by contrast, the 1st Respondent acquired a perfect title which should not be deprived by a fraudster in the name of the Appellant. The Appellant having sold the plot to the 1st Respondent the same was not available for resale to the 2nd Respondent and that the 2nd Respondent's remedy, perhaps lies in pursuing the Appellant for recovery of her money and damages, if any.

28. As to whether the 1st Respondent pleaded fraud, Counsel for the 2nd Respondent pointed the Court to the particulars of illegality and fraud in the plaint contrary to the allegations in paragraph 9 of the Memorandum of Appeal that the Court erred in finding fraud when the same was not pleaded or alleged.

29. On the question of validity of the sale agreement between the Appellant and the 1st Respondent, Counsel for the 1st Respondent submitted that the 1st Respondent completed the purchase of the suit

property on 17/11/2006, took possession of plot Nos. 11 and 12, constructed a house on plot No. 11 leaving plot No. 12 as part of the compound, dug a borehole on plot No. 12 as well as a toilet which was positioned partly on plot No. 11 and 12. Further the Appellant has not refuted receipt of the balance of the purchase price at all. Counsel for the 1st Respondent, while relying on the decision of the Court in the case of James Kendagor Simatei Vs. Philip Kipruto Simatei [2019]eKLR concluded that the Appellant is now estopped by the doctrine of proprietary estoppel as he cannot be allowed to keep the money and the land having entered into a valid agreement, accepted the full purchase price and put the 1st Respondent in possession of the suit land.

30. In summary, Counsel for the 1st Respondent urged the Court to dismiss the Appeal with costs to the 1st Respondent.

The 2nd Respondent's submissions

31. Counsel for the 2nd Respondent submitted that the Court fell in error when it allowed the 1st Respondent's claim in plot No. 12 in LR No. 4863. That the 1st Respondent failed to demonstrate or exhibit title document for parcel No. 12 and in whose entity it was registered in. That there is no parcel No. 4863 existing in the Lands Registry, Ruiru and as such the orders of the trial Court are not only ineffective but are incapable of execution. That the entire Judgment is premised upon a parcel of land that does not exist at Lands record at Ruiru. That the title of the 2nd Respondent being parcel No. Ruiru/Ruiru East Block 2/16246 was never challenged and therefore the act of cancellation of the 2nd Respondent's title was baseless. That there was no evidence to show that the pleadings of the 1st Respondent were amended so as to describe the property as parcel No. Ruiru/Ruiru East Block 2/16246 and the Court fell in error in deciding on a non-existent parcel of land. The Court was further faulted for issuing orders based on an imaginary parcel of land thus adversely affecting the suit property of the 2nd Respondent who was not even sued by the 1st Respondent in the first place. That the 1st Respondent did not lead any evidence to show that she was in possession of the parcel of land and infact, by the time of filing suit the 1st Respondent duly admitted that the possession was in the hands of the 2nd Respondent. That the 2nd Respondent purchased plot No. 12 which was vacant and undeveloped as at 2017. Further that the 1st Respondent failed to tender any evidence of any transaction of the suit property described as LR 4863 /Plot No. 12 or Ruiru/Ruiru East Block 2/16246.

32. It was further submitted that the suit having been premised on a contract contrary to Section 3(3) of the *Law of Contract Act* and Section 38 of the *Land Act* it is incompetent and ought to have been struck out by the trial Court. To buttress this point, the 2nd Respondent cited the decision of the Court in Nyeri Teachers Investment Company Ltd VS. Solio Ranch (2017) eKLR where the Court stated that;

> "… where Section 3 has not been complied with, neither party may move the Court for assistance. It is for that reason that noncompliance of Section 3(3) has severally been invoked by parties to impugn the legality or validity of contracts for disposition in interest in land …"

33. In addition, the trial Court was faulted for agreeing with the Appellant and the 1st Respondent that there was no agreement in writing and yet proceeded to make a finding of a valid agreement. The Court was faulted for basing its decision upon an oral contract on a transaction involving land contrary to the provisions of the law. Further the Court was faulted for allowing a prayer for revocation of title when none was pleaded by the 1st Respondent contrary to the policy that parties are bound by their pleadings. That in any event the two plots are not registered in any known land registry and therefore the Court was clearly in error. The Judgment of the trial Court was further impugned on general and fundamental errors imputed to the said Judgment.

34. Lastly, the Court was urged to set aside the Judgment of the trial Court.

Analysis and determination

35. Having considered the trial Court record, the record of appeal, the rival submissions and all the material placed before the Court, the following issues fall for determination;

    a. What was the description of the property sold?

    b. Whether fraud was pleaded and proved?

    c. The validity of the oral agreement in law and, if valid, whether it was breached and by whom?

    d. Whether the recovery of the land was time barred?

    e. Whether the 2nd Respondent was a bonafide purchaser for value without notice.

36. As a first Appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the *Civil Procedure Act* which espouses the role of a first Appellate Court which is to: '... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.'

37. Besides, that duty has been affirmed in numerous decisions of the superior Courts. Notably in the case of Selle & Another Vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was pronounced thus:

> "... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ..."

38. Bearing the above duty in mind, I shall now analyse the appeal.

What was the description of the property sold?

39. It was the contention of the 2nd Respondent that parcel No. Ruiru/Ruiru East Block 2/16246 and plot 12 or LR No 4863 is incorrect and that the Court fell in error in issuing orders on a non-existent plot. Further that the purported LR No 4863 is not the same as Ruiru Ruiru East Block 2. The Appellant submitted as follows;

> "The plots in question were contained in LR 4863. It was the Appellant's case that at all material times he was the owner of the suit property. The suit property owned by the Appellant is Ruiru Ruiru East Block 2, a fact admitted by all the parties to the suit. The Appellant has never owned and did not purport to own LR 4863 a property unknown to the Appellant."

40. The Appellant stated that the 1st Respondent was given plot No 12 -LR No 4863 which plot does not belong to the Appellant. He confirmed that plot No 12 sits on Ruiru Ruiru East Block 2/48631 which

upon subdivision yielded Ruiru Ruiru East Block 2/16246. That the orders having been premised on LR No 4863 remain erroneous.

41. The 2nd Respondent deponed in her supporting affidavit sworn on the 16/9/2019 and avowed under para 2 that she was the registered proprietor of plot No 12 denoted by title No Ruiru/Ruiru East Block 2/16246. Further that the land purchased by the Plaintiff as per the agreement of sale dated the 10/6/2013 was parcel 16246 measuring 0.0213 ha which agrees with the measurements on the title. Taking the explanation of the Appellant at para 40 and the receipts Nos. 750, 745 735 and 212 issued to the 1st Respondent by the Appellant, it is the finding of the Court that plot No 12 emanated from plot 4863 which on further subdivisions became parcel 16246. This position is supported by the evidence of the 2nd Respondent when she stated in evidence that;

> " The plot No 12 and the current title is one and the same land."

42. The current title referred to here is parcel 16246. The Court agrees with the Hon Trial Court when it held that;

> " There is no difference between plot 12 , LR 4863."

Oral agreement

43. The Appellant and the 2nd Respondent have joined issues that the oral agreement is null and void for being contra law. Section 3 (3) of the Law of Contract states as follows;

> " No suit shall be brought upon a contract for the disposition of an interest in land unless:
>
> a) the contract upon which the suit is founded:
>
> i. is in writing
>
> ii. is signed by all the parties thereto; and
>
> b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party."

44. The provisions above are a replica of the provisions of Section 38 of the *Land Act*. The Law of Contract provided the exceptions such as where the contract was made before the commencement of Section 3(3) which section came into force on the 1/6/2003. The other exception is found in Section 3(i) and (ii) of the Law of Contract of 2003 the applicable law at the time of purchase of the suit property where an intending purchaser has in part performance taken possession or continues to take possession of the property or part thereof.

45. It is mutually agreed that the oral contract was entered on 8/9/2003. Evidence was led by the 1st Respondent that upon purchase of the two plots she was put in possession. It is not in dispute that the Appellant has no issue with the purchase of plot No 11 which was also purchased vide an oral agreement. Going by the evidence led on record the Court finds that there was a common intention between the parties that they would be bound by the oral agreement. The rights of the parties were therefore governed by the oral undertakings between them that is to say the receipt of monies by the Appellant in exchange for the interest in the two plots in favour of the 1st Respondent.

46. In the case of RTS Flexible Systems Ltd Vs. Molkerei Alois Müller GmbH & Co KG (UK Production) [2010] UKSC14,[45] :

> “ The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

47. The Court finds that by their conduct and intention (receiving monies and putting the 1st Respondent in possession) the parties availed themselves to be bound by the oral contract

48. Having found that both parties bound each other by their oral agreement, the doctrine of equitable estoppel kicks in to stop the Appellant from refuting the oral contract which for all purposes and intends was duly performed by both parties. I am guided by the case in Steadman Vs Steadman (1976) AC 536 where the Court stated that;

> “ If one party to the agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable.”

49. I hasten to add that Courts have pronounced themselves on delinquent sellers who enter into agreements and breach them at will. In the case of Eldo City Ltd Vs. Corn Products Kenya Ltd & Another (2013) eKLR where the Court when confronted with a similar case held:

> “ In my view, to uphold the position where a party can pull out of a transaction when the parties are already at consensus ad idem, will not be prudent in the world of economics. To my mind, that freedom should be limited up to the point the parties are still negotiating. Once all terms have been agreed and settled, that freedom should dissipate. Otherwise mischievous parties with no intention of selling their merchandise may engage serious purchasers in a wild goose chase knowing very well that they can pull out at any stage. I think this is not to be encouraged.”

50. Further in the case of James Muchangi Gachemi Vs. Solio Ranch Limited & Chief Land Registrar [2017] eKLR where Nambuye J (as he was then) respectively pronounced himself as follows:

> “ …The trial Court would have gone a long way to fortify this principle by establishing that although a property owner has a right to sell or not to sell it, he has no right to dangle it with impunity before the eyes of a serious intending buyer and where he does so, he has to be made to meet the consequences for his impunity by either being put on hold in the exercise of his right of sale to a 3rd party, pending the trial or to ultimately be told to specifically perform the contract in favour of the serious intending purchaser before whose eyes the sale was dangled with impunity as alleged by the Plaintiff.”

51. The Court answers the question in the affirmative. Upon full payment of the purchase price, the Appellant held the title and interest in plot No 12 in trust for the 1st Respondent.

Was Fraud pleaded and proved?

52. The Appellant has faulted the trial Court for determining the issue of fraud in the absence of a plea. A close perusal of the plaint shows that fraud was not only pleaded but particularised under para 7 of the plaint.

53. The facts of the case are rather straight forward. Unchallenged evidence was led that in 2003 the 1st Respondent and her husband were introduced to the Appellant by a land broker namely Gichohi to purchase a plot. True to their word they visited the office of the Appellant on 8/9/2003 and purchased plot No 11 and paid the full purchase price of Kshs 150,000/-, a receipt No 744 of even date was issued. While at it they were invited to purchase plot No 12 which was next to plot No 11 but on instalments at the same price of Kshs 150,000/-. They paid the 1st instalment of Kshs 50,000/- and were issued with the receipt No 745 with a narrative that;

> " Balance Kshs 100,000/-."

54. Unchallenged evidence was further led by the 1st Respondent that she paid the second instalment on the 13/10/2003 in the sum of Kshs 50,000/- vide receipt No 750. The last instalment was made on the 17/11/2006 vide receipt No 1265 indicating that it was the balance of the plot Nos 11 and 12.

55. From the above it is clear that the Appellant was well aware that the two plots were being sold at Kshs. 150,000/- each and that the 1st Respondent paid for the plots in full. The contention by the Appellant that the 1st Respondent defaulted in the oral agreement with respect to plot No 12 forcing him to sell that land to the 2nd Respondent is an afterthought and not tenable. As at the 17/11/2006 the payment of plot No 12 was complete. The Appellant held the land in trust for the 1st Respondent. It is noted that the Appellant instead of processing the title for plot 12 in the name of the 1st Respondent did register the same in his name.

56. Fraud is defined as some deceitful practice or wilful deceit resorted to with intent to deprive another of his right or in some manner to do him an injury.

57. In the case of Vijay Morjaria Vs. Nansingh, Madhusingh Darbar & Another [2000]eKLR the Court stated as follows;

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

58. Section 26 of the *Land Registration Act* gives two (2) ways in which a title may be impeached; that is through;

    a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

    b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

59. In this case, the actions of the Appellant in reselling the property to the 2nd Respondent falls under actions that are termed fraudulent for the following reasons:-

> "The sale of the land to the 1st Respondent was concluded at the very least on the receipt of the last instalment in 2006. Title passed to the 1st Respondent in 2003 and the only thing owed to the Appellant was receipt of the purchase price. It is not disputed that the Appellant sold the land to the 2nd Respondent vide an agreement dated 13/6/2013. By this time the Appellant had been divested of all the interest and title in plot No. 12. He therefore held no interest or title in the plot No. 12 and therefore transferred nothing to the 2nd Respondent. I can only agree with the decision of the Court in Daniel Kiprugut Maiywa Vs. Rebecca Chepkungat Maina [2019]eKLR where the Court stated that one cannot give what he does not have. In other words nothing begets nothing."

60. The Court finds that fraud was not only pleaded and particularised but also proved to the required standard.

Time bar

61. The Appellant has argued that the 1st Respondent's suit was time barred. That the suit was filed in 2019 for recovery of land whose transaction occurred in 2003, a period of 16 years.

62. The Court has found that following the completion of the sale of the plot to the 1st Respondent the Appellant held the title in plot No. 12 in trust for the 1st Respondent. It is trite that time bar is not applicable to trust. The title held by the Appellant was under a constructive trust in favour of the 1st Respondent.

63. The Court finds that the suit was not time barred.

Bonafide purchaser

64. The Black's Law Dictionary 9th Edition defines a bona fide purchaser as:-

> "One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."

65. The Court of Appeal in Uganda in Katende Vs. Haridar & Company Ltd [2008] 2 E A 173, defined a bona fide purchaser for value as follows:-

> "For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:
>
> a. he holds a certificate of title;
>
> b. he purchased the property in good faith;
>
> c. he had no knowledge of the fraud;
>
> d. he purchased for valuable consideration;
>
> e. the vendors had apparent valid title;

f. he purchased without notice of any fraud; and

g. he was not party to the fraud.”

66. Adding its voice to the same doctrine, the Court of Appeal in Samuel Kamere Vs. Lands Registrar, Kajiado Civil Appeal No. 28 of 2005 [2015] eKLR stated as follows:

> “ … in order to be considered a bona fide purchaser for value, they must prove; that they acquired a Valid and Legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property …”

67. In the Court of Appeal case in Munyu Maina Vs. Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013] eKLR, the Court held that where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.

68. It is trite that to establish whether the Appellant is a bona fide purchaser for value therefore, the Court must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.

69. In this case the Court has made a finding that the Appellant held no interest nor right in plot No 12, the same having been passed to the 1st Respondent. The 2nd Respondent therefore received nothing from the Appellant. Further the Court received evidence that the 1st Respondent took possession of plot No 12, dug a borehole of 35 meters, fenced the plot Nos 11 and 12 at the front, constructed a house on plot No 11 and rented to PW2. With the permission of the 1st Respondent, PW2 used plot No 12 for parking his lorries as well as storing building materials until one day when he found that the lorry and the materials had been removed by the Appellant and kept along the road. The 2nd Respondent informed the Court that she had no knowledge that the plot had been sold to the 1st Respondent. She stated that she dug a water well of 12 meters and that the well the 1st Respondent was referring to was hers. The Appellant added that the well was existing before the entry into the property by the 2nd Respondent, a position that is true save that he failed to lead evidence when he dug the well. The Court believes the evidence of the 1st Respondent that she is the one who dug the well. I say so because her neighbours drew water from the well long before the 2nd Respondent showed up. It has not been disputed that the 2nd Respondent despite the existence of a Court order stopping the construction of the land, continued construction in total disobedience of the said orders. Further the 2nd Respondent failed to carry out due diligence on the plot before purchasing the same. Had she done that she would have been put on notice about the ownership of the 1st Respondent given the developments enumerated earlier including the fence and the construction of the toilet that straddled both plots.

70. The Court therefore finds that the Appellant had no apparent title and secondly the lack of due diligence as to the actual ground status ousts the 2nd Respondent from equity’s darling that is bonafide purchaser without value.

71. Having demonstrated that the suit land is plot No 12 – LR 4863 now registered as Ruiru/Ruiru Block 2/16246 the orders of the trial Court are upheld with modification as follows;

a. A declaration be and is hereby issued that the 1st Respondent is the legitimate owner of land title L.R. No. 4863 Plot No. 12 (now referred to as Ruiru/Ruiru Block 2/16246).

b. A permanent injunction be and is hereby issued restraining the Appellant, his agents, servants and any person claiming from interfering and or transferring to a third party all that parcel of land L.R. No. 4863 Plot No. 12 (now referred to as Ruiru/Ruiru Block 2/16246).

c. That all transactions registered on L.R. No. 4863 plot No. 12 (now referred to as Ruiru/Ruiru Block 2/16246) be cancelled and the Land Registrar, Ruiru be and is hereby directed to rectify the land register of land title L.R. No. 4863 Plot No. 12 to reflect the names of the 1st Respondent Eunice Muthoni Nderitu as its proprietor.

d. A declaration that the 1st Respondent is the legitimate owner of the parcels of land L.R. No. 4863 Plots No. 11 and 12 (now referred to as Ruiru/Ruiru Block 2/16246) and the Appellant be compelled to issue title deed of both plots, upon the 1st Respondent paying transfer and title processing fees.

e. The 2nd Respondent be and is hereby ordered to grant vacant possession of land she occupies in L.R. No. 4863 Plot No. 12 (now referred to as Ruiru/Ruiru Block 2/16246 within ninety (90) days from the date of this Judgment.

f. The costs of this suit to the 1st Respondent.

72. In the end I affirm the decision of the trial Court with the modification stated above and dismiss the appeal with costs to the 1st Respondent.

73. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF JUNE, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Maina HB Mrs. Gichio for Appellant

Mrs. Githaiga for 1st Respondent

2nd Respondent – Absent but served

Court Assistants – Phyllis & Oliver