



IN THE COURT OF APPEAL OF KENYA
AT NYERI
Civil Appeal 343 & 345 of 2002

JANE GACHOKI GATHECHAAPPELLANT

AND

PRISCILLA NYAWIRA GITUNGU 1ST RESPONDENT

KABITAU KANJA 2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at

Nyeri (Juma, J.) dated 27th February, 2002

AS CONSOLIDATED WITH

Civil Appeal 345 of 2002

PRISCILLA NYAWIRA GITUNGUAPPELLANT

AND

GEORGE KARIUKI KABUGU 1ST RESPONDENT

KABITAU KANJA 2ND RESPONDENT

(An appeal from part of the judgment of the High Court

of Kenya at Nyeri (Juma, J.) dated 27th February, 2002

in

H.C.C.S. NO. 56 OF 2985)

JUDGMENT OF THE COURT

By an order of this Court made on 31st October, 2007, Civil Appeal No. 343 of 2002 and 345 of 2002 were consolidated for hearing together. By a further order made on 12th May, 2008, one **KABITAU KANJA** was joined in both appeals as the second respondent. The appeals arose from the decision of the superior court (Juma, J.) made on 27th February, 2002 in HCCC NO. 56 of 1985.

The dispute revolves around a freehold parcel of land measuring approximately 2.63 hectares (or 6.4 Acres) situate in Ndia Division of Kirinyanga District otherwise known as **MWERUA/KIANDAI/321** (Plot 321). It is common ground that the said parcel of land was lawfully owned and was registered in the name of one **GITUNGU KABIRU** alias **JAPHET GITUNGU KABIRU** (“*the late Kabiru*”) who died in the year 1970. It is also common ground that the late Kabiru had a daughter who survived him and her name was **Priscilla Nyawira Gitungu** (Priscilla). Priscilla was the only child and she resided with the late Kabiru on the land. She says she was married for sometime but left her husband and returned to live with her late father never to remarry, and she bore four children who resided with her on the land. She also says her late father left with her all his property including the title deed to plot 321 when he died in 1970 and she continued to live and work on the land.

About ten years after the late Kabiru’s death, and unknown to Priscilla, Plot 321 was transferred to Kabitau Kanja (“*Kabitau*”). That was on 22nd May 1980. Upon discovering the transfer, which she maintained was illegal and fraudulent, Priscilla reported the matter to the Criminal Investigation Department of the Police Force (CID) and Kabitau was arrested and arraigned in court. It transpired that Kabitau had sworn a false affidavit stating that he was the only son of the late Kabiru. That affidavit was in support of an application in a succession cause which sought certification of Kabitau as the lawful successor to the estate of the late Kabiru. Kabitau went ahead and testified on oath before the Succession Cause magistrate that he was the only son of the late Kabiru. In reliance of the affidavit and the oral testimony, the magistrate granted the certificate of succession. Kabitau then used the certificate to transfer plot 321 to his name. Soon after, he subdivided the land into two portions: Mwerua/Kiandai/629 (Plot 629) measuring approximately 3.4 acres and Mwerua/Kiandai/630 (Plot 630) measuring approximately 3 acres. Plot 629 was then sold to the first respondent in CA 345/02, **George Kariuki Kabugu** (George) in October, 1980 and was registered in his name on 6th March, 1981. Plot 630 was sold by public auction when Kanja failed to repay some dubious debt he owed, and it was purchased by **Samwel Gathecha Mbutia** in 1981. Samwel Gathecha died in 1995 and was succeeded by his wife **Jane Gachoki Gathecha** (Jane) the appellant in CA 343/02.

Kabitau’s prosecution came in 1981 when the two portions of the land comprising the original plot 321 had already been alienated. It was proved beyond reasonable doubt that Kabitau had lied in his affidavit and had perjured himself before the Succession Court. He was convicted on the two counts and was sentenced to serve one year in prison on each count. The succession certificate issued to him was cancelled. That was on 3rd November, 1982. His appeal to the High court was subsequently dismissed.

Priscilla went to court on 2nd April, 1985 and sued Kabitau, George and Samuel Gathecha Mbutia (“*the deceased*”). She asserted that plot 321 was fraudulently and illegally acquired by Kabitau and was improperly, illegally and fraudulently sold to George and the deceased. The particulars of fraud were stated as follows: -

“i). The 1st defendant misled the succession court into issuing him with a certificate of succession, when in fact he was not entitled.

ii). The 1st and 2nd defendants ignored the pleas of the plaintiff during sub-division of the land parcel Title No. MWERUA/KIANDAI/321.

iii) All the defendants ignored the fact that the plaintiff was not only in occupation of the said land but had also effected tremendous improvement in the said land, prior to their obtaining registration thereof.

iv) The 2nd and 3rd defendants arranged to buy land when they knew or ought to have known that proprietorship had been obtained by fraud.”

Priscilla prayed for a declaration that the land portions 629 and 630 were obtained by fraud, and an order for rectification of the land register. George in his defence pleaded that he was a bona fide purchaser without any notice of impropriety by Kabitau. He further pleaded that Priscilla had no right of

inheritance under Kikuyu customary law because she was a married woman; that the land was given to Kabitau by clan elders; and that Priscilla's action lay in damages. The deceased 3rd defendant simply pleaded that he knew nothing about the succession problems relating to the land which he bought in a public auction. He denied the particulars of fraud. Kabitau did not file any defence to the action.

All the parties including Kabitau testified before the superior court (Juma, J.) and called witnesses. At the end of it all, Juma J. made this profound finding: -

“On the evidence before me it is quite clear that the First Defendant, KABITAU KANJA, is a crook, a conman. He fraudulently got himself registered as the owner of Parcel No. 321 belonging to the Plaintiff's father. He then fraudulently got it subdivided into two portions.”

The learned Judge then considered whether George was a party to the fraud before he purchased plot 629 and had it registered in his name. He answered the issue in the negative and found for George stating: -

“The registration of the 2nd Defendant was not a first registration. The 2nd Defendant has taken possession and I am satisfied, on the evidence before me, that he was not aware of the fraud by the 1st Defendant. The 1st Defendant as a person with grant transferred the property to the 2nd Defendant.”

As for the deceased who purchased plot 630 in a public auction, the learned Judge found for Priscilla and gave his reasons thus: -

“Section 93 of the Law of Succession Act does not apply in this case since it is not the 1st Defendant who transferred Plot No. 630 to the 3rd Defendant. The Judgment Creditor, Charles Kariuki was under the impression that the land belonged to the 1st Defendant and caused the same to be auctioned to recover his debt. The fact is that the 1st Defendant was not the owner of the property. The evidence on record is that the Plaintiff and her children reside on Plot No. 630. The 3rd Defendant was duty bound to ascertain not only the title but the occupation as well. Had the 3rd Defendant carried out diligent search, he would have discovered that though the land was registered in the name of the 1st Defendant, it was occupied by the Plaintiff and her family. This would have put him on notice. He decided to buy the property, he bears the encumbrances. Furthermore there was no evidence that he took possession. Section 143 (2) does not therefore aid the 3rd Defendant. The Plaintiff's suit against the 3rd Defendant succeeds.”

It is from those findings that Jane filed C.A No. 343/02 and Priscilla filed CA 345/02. Jane put forward the following grounds of appeal through M/S. A.J. Kariuki & Co. Advocates: -

“The learned Judge erred in law and in fact in: -

- *pronouncing a judgement which sought to impeach the rights of the Appellant over the suit land parcel No. MWERUA/KIANDAI/630 whereas the same was absolute and indefeasible;*
- *peremptorily revoking a sale by public auction whereas the same had already been confirmed and certified by a Court of competent jurisdiction in proceedings to which no appeal lies or had been successfully brought;*
- *placing undue weight on purported over-riding interests at the expenses (sic) of the appellant's absolute rights thereto, whereas no such overriding rights had been lawfully established;*
- *ordering the rectification of the Register relative thereto against the express provisions of the Registered Land Act, (cap. 300 Laws of Kenya), and the Civil Procedure Act and Rules (Cap 21 Laws of Kenya) and the Law of Succession Act (Cap. 160, Laws of Kenya).”*

On the other hand, Pricilla's appeal through **M/S. Gacheru & Co. Advocates** raised the following issues:

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1. *The learned Judge erred in law in holding that the transfer of Land Parcel NO. MWIRUA/KIANDAI/629 to the respondent was valid whereas he had earlier held that the transfer to the 3rd defendant was invalid the same having been effected by the 1st defendant whose title was tainted with illegality and he therefore had no valid title to pass to the respondent or at all.*
2. *The learned Judge misapprehended the provisions of Section 93 of the Law of Succession Act in that the grant had not been revoked.*
3. *The learned Judge erred in law and fact in failing to hold that the 1st defendant's title having been cancelled in the criminal case no valid title capable of being passed to the respondent existed.*
4. *The learned Judge misdirected himself in law in failing to hold that the respondent having fully participated in the legal steps that led to his registration as the proprietor of land parcel No. MWERUA/KIANDA/629 he was estopped from pleading that he was an innocent purchaser for value without notice.*
5. *The learned Judge erred in law in failing to take judicial notice of section 47 A of the Evidence Act the same having been brought to his attention in the opening remarks by counsel for the appellants."*

Mr. J. Macharia, advocate, argued the two appeals before us on behalf of Jane and George. He argued all the grounds of appeal as one, and submitted on behalf of Jane that her land (plot 630) should never have been taken away from her. Her husband had purchased it openly in an advertised auction and there was no objection to it. The order for sale of the land, he submitted, was lawfully issued by the court and all the provisions of **Order 21** of the Civil Procedure Rules were complied with. In his view, the remedy for Priscilla was in the Law of Succession Act which she could have invoked to seek revocation of the grant but did not. As it is, the deceased and through him, Jane, acquired all the rights protected under **sections 27 and 28** of the Registered Land Act once the plot was transferred in his name. Additional justice for a purchaser is also spelt out in **sections 143 and 144** of the Registered Land Act (RLA).

As for George, Mr. Macharia submitted that the finding made by the superior court that he was a *bona fide* purchaser for value without notice should not be disturbed. It would be grossly unjust to deprive George of the land which he took possession of and developed to a level where the value is many times over the price he paid for it. If the appeal was allowed, George would lose his land together with the investment since Kabitau was a man of straw and, in any event, limitation period for recovery of the loss would have set in.

On the other hand, learned counsel for Priscilla, Mr. Gacheru, submitted that the evidence on record established that Priscilla was still in possession of the land certificate for plot 321 which was given to her by the late Kabiru. She produced it as an exhibit in the criminal trial of Kabitau. The evidence also established that she was in physical possession of the plot before, during and after the purported subdivision and transfer to George and the deceased. The most important finding by the superior court was that plot 321 was "stolen" by Kabitau who was convicted for his criminal actions. Mr. Gacheru drew our attention to the documents seeking the Land Control Board's consent for subdivision of plot 321 and transfer of the two plots. The Board was informed by George and Kabitau, both of whom signed the application for consent without the knowledge or participation of Priscilla, that plot 629 would be transferred to George while plot 630 would be transferred to Priscilla. Plot 630, however, mysteriously ended up in the name of Kabitau and it should have been obvious to the creditor who sought to attach it, and the deceased who bought it subsequently, that the plot was never intended to be Kabitau's at any time. At all events he submitted, Kabitau had no right to any title which he could transfer to anyone and it was erroneous for the superior court to invoke **section 93** of the Law of Succession Act to found legality in the transfer made to George by Kabitau. The section, in Mr. Gacheru's submission, would only apply if there was an application made by Priscilla for revocation or variation of any grant of representation but there was no such application. This was a case of pure stealing and fraudulent dealing

with the land in issue. It was no wonder, therefore that Kabitau did not file any defence to the suit he concluded.

As stated earlier, Kabitau was enjoined as the 2nd respondent in both appeals since any orders made in the appeals would affect him. He was served with the record and he addressed us on the appeals. Even though he had filed no defence to the action, he asserted that he was given the land by the late Kabiru because Priscilla was a married woman who could not inherit the land under Kikuyu customary law. He nevertheless admitted his conviction for false swearing and perjury. He further disclosed that he had his own father and other siblings who were alive at the time and they all had their family land elsewhere. According to him, however, he never inherited anything from his own family and he has absolutely nothing now after selling the late Kabiru's land.

We have carefully and anxiously considered the two appeals and the submissions of both counsel. We are alive to our duty as the first appellate court, and the final one, to reconsider, assess and re-evaluate the evidence and come to our own conclusions about it. We should nevertheless be cautious and always bear in mind that the trial court had the advantage of seeing and hearing the witnesses testify. As O'Connor P. said in **Peters v Sunday Post Ltd [1958] EA 424** at Pg 429:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses.”

We can nevertheless interfere with the findings of the trial court if they are based on no evidence or on a misapprehension of it, or the Judge demonstrably acted on wrong principles in reaching those findings. This Court is also not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take 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 – See **Mwangi v Wambugu [1984] KLR 453**.

The most important finding made by the superior court was that Kabitau was a crook, a criminal and a fraudster in relation to the dealings with plot 321. We agree with that finding. The issue is the legal consequence of that finding on the transactions affecting the first respondent, George, and the appellant, Jane. In our view, the most obvious consequence is that Kabitau had no rights or interest over plot 321 or any part of that plot which he could transfer to any other person. But the plea by George was that he was not aware of, and was not a party to, the fraudulent dealings with the title in issue and was therefore not only protected under **S.93 (1)** of the Law of Succession Act (Cap 60) but also **section 143** of the Registered Land Act. Both Sections were indeed cited and relied on by the superior court to find in favour of George. They provide as follows: -

· **S.93 (1)**

“A transfer of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

· **S. 143**

(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

We think, with respect, that there is a fallacy in invoking and applying the provisions of **section 93(1)** of the Law of Succession Act and the superior court fell into error in reliance of it. The section would only be applicable where, firstly, there is a “*transfer of any interest in immoveable or moveable property*”. Kabitau had no interest in plot 321 or any part thereof and therefore he could not transfer any. A thief acquires no right or interest which is transferable in stolen property. The transaction would be void *ab initio* and the property is traceable. Secondly, there was no revocation or variation of any grant in the case before us, as provided in the section. The section envisages a grant made under **section 67** or confirmed under **section 71** of the Act which may be altered, amended, revoked or annulled under **sections 74, 75 and 76** of the Act. There is no evidence on record that Kabitau had obtained such a grant or that Priscilla had made any application for revocation or variation of such grant under the provisions of the Act. Kabitau was a thief and fraudster simpliciter.

Was George, in terms of **section 143 (2)** of the Registered Land Act, in possession of the land? Did he acquire it for valuable consideration? Did he have knowledge of the fraud or cause it or substantially contribute to it by his act; neglect or default? The learned Judge of the superior court simply made a finding that George “*has taken possession*” and “*was not aware of the fraud by Kabitau*”. But there is more to the provisions of **section 143 (2)**, which he was considering than being in possession or being aware of the fraud. No effort was made to examine the evidence to establish whether George caused the fraud or substantially contributed to it by his act, neglect or default.

There is evidence on record from Priscilla, both at the trial of Kabitau before the criminal court and before the superior court, that she was living with her father, the late Kabiru, on plot 321 and that she remained in possession of that plot throughout. The fact that she was not residing or utilising every inch of the plot did not detract from her claim to possession of the whole plot. When, at some stage during the hearing of the suit before the superior court, George applied to have her restrained by injunction from utilizing plot 629 by digging terraces, ploughing, planting and cultivating and constructing a building Priscilla swore that: -

“I have stayed, cultivated and developed the said land for more than 40 years and it is the land which my family entirely depends upon.”

The injunction was not granted as prayed but the Judge seized of the application (Osiero, J.) stated: -

“Each party claims to be in occupation of the suit land in exclusion of the other. The court is left wondering as to who is actually in occupation of the suit land. Be it as it was (sic) I decline to issue orders sought and make the following order. The status quo as at the time when the suit was filed are maintained until this suit is heard and determined.”

So that, the possession claimed by George and found by Juma J. was not an undisputed possession. Both parties lay claim to possession and it is not clear why the superior court completely ignored the claims of Priscilla to possession of the entire plot 321 which included plot 629. The claim to possession of the land by George was protected by the temporary court order and he still had to apply for eviction of Priscilla and her family when ownership of the plot was finally decreed in his favour. It is our view that the finding made that George was in possession of the land did not avail him the protection of **section 143 (2)** of the Registered Land Act. We answer the first question posed above in the negative.

We also think George had knowledge of the fraud or substantially contributed to it by his act, neglect or default. The learned Judge himself made the following finding in his judgment: -

“The exhibits indicate that the 2nd Defendant (George) together with the 1st Defendant (Kabitau) were instrumental in the obtaining of the Land Control Board Consent to subdivide the land. The two called the Surveyor to carry out the actual subdivision. Indeed according to the Mutation Form dated 23.10.80 the people shown as being interested in the land i.e Parcel No. 321 are 1st Defendant, 2nd Defendant and the Plaintiff (Priscilla). The sketch plan of the form shows that the 2nd Defendant is to get Plot No. 629 while the Plaintiff is to get Plot No. 630. In the end the first

Defendant got himself registered as owner of Plot No. 630 instead of the Plaintiff. The 2nd Defendant got his Land Certificate on the 6.3.81.”

We have examined the documents referred to in that excerpt and we are persuaded that Priscilla, to the knowledge of George, had an interest in the land and yet George went along with the fraudster, Kabitau, to draw up, sign, and present forms before the Land Control Board which Priscilla had no knowledge about although she was purportedly a party to the transaction. George was already aware, from entries made in the Land Registry where he made a search, that there were cautions registered against the Title by other persons and he negotiated the clearance of those cautions. He was even present during the survey and subdivision of the land and never bothered to enquire about the extent of Priscilla’s interest in the land although he saw obvious evidence of occupation by her, and she was not invited in that meeting. He testified that the surveyors’ meeting was held on 23rd October, 1980 at some market called Kiandai near the land and Priscilla was not at that meeting. In the end he paid the purchase price of Shs.34,000/= for the land by instalments and a further Shs.6000/= which Kabitau, for some reason, insisted on being paid. George was not ignorant of land transactions and was not illiterate. Unlike Kabitau who testified he was a peasant or stone-cutter and did not know how to read and write except his name, George was an Army Officer to boot. He was instrumental in the subdivision and sale to himself of a portion of plot 321, but cared less about the authenticity of the entire transaction. He contributed to the fraud by his neglect or default and he cannot therefore, in our judgment, claim the protection offered under **section 143 (2)** of RLA.

For those reasons we must interfere with the findings made by the superior court in respect of plot 629 and the finding that George was the rightful owner of it. We allow Civil Appeal No. 345 of 2002. We set aside the order dismissing the suit against the respondent **George Kariuki Kabugu** and substitute therefor judgment against the said George Kariuki Kabugu as prayed in the plaint together with costs. The appellant, Priscilla Nyawira Gitungu shall also have the costs of the appeal.

As regards C.A 343 of 2002, the learned Judge was of the view that the deceased who purchased the land in a public auction was reckless in failing to ascertain, as was the case, that Priscilla and her family were in occupation of the land he was purchasing. **Section 143 (2)**, he held, did not therefore assist him. There is certainly some disquiet about the annulment of a transaction ostensibly carried out on the orders of a court of law on the assumption that the transaction was above board. But we know of no law that prohibits the impeachment of a transaction made through a public auction once it is established that it was tainted by fraud or illegality and that the successful bidder was either a party to the fraud or illegality or substantially contributed to it by his neglect or default. We agree with the learned Judge that the transaction which the deceased entered into in this matter was so tainted and we decline to disturb the findings made and orders issued by the superior court. In the result the appeal by Jane Gachuhi Gathecha is hereby dismissed with costs.

Dated and delivered at Nyeri this 6th. day of June, 2008.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR