



REPUBLIC OF KENYA



**Ghani v Seroney; Talei (Objector) (Environment & Land Case 405 of 2015)
[2024] KEELC 6241 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6241 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 405 OF 2015
EO OBAGA, J
SEPTEMBER 26, 2024**

BETWEEN

MOHAMEDI GHANI PLAINTIFF

AND

VICTOR KIBET SERONEY DEFENDANT

AND

LIVINGSTONE CHEBOI TALEI OBJECTOR

JUDGMENT

1. The plaintiff filed this suit against the Defendant in which he claimed the following reliefs:-
 - a. The Plaintiff prays that he be declared the legal owner of all that part and parcel of land known as Uasin Gishu/Kimumu/3045; and be registered and the proprietor thereof and an eviction order to issue against the defendant herein and in the alternative the purchase price paid herein be refunded to him.
 - b. Costs of this suit.
 - c. Interest at court rates.
 - d. Any other or further relief that this honorable court shall deem fit and proper to grant.

Background:

2. The Defendant neither entered appearance nor filed a defence. The case proceeded by way of formal proof and a judgement was delivered on 8.2.2018. When the plaintiff started the process of execution, the Interested party filed an application in which he sought stay of execution and setting aside the ex-parte judgment on the ground that he was the registered owner of Uasin Gishu/Kimumu Scheme/



3045 (suit property). The application by the interested party was allowed and he was given 14 days to file his papers with effect from 21.11.2018.

3. The Interested party filed his defence on 5.12.2018 in which he urged the Court to dismiss the plaintiff's suit with costs. The suit property was registered in the name of Stephen Chege Mbatia (Mbatia). On 11.7.2008 the Defendant and Mbatia entered into an exchange of land agreement. The Defendant was given the suit property which was in the name of Mbatia and the Defendant gave Mbatia his property in Nakuru known as Nakuru/Municipality Block 17/532.
4. On 13.11.2009 the Defendant entered into an agreement with the plaintiff in which the plaintiff offered title documents to the suit property as security for a loan of Kshs 750,000/= which the plaintiff advanced to him. As part of this agreement, the Defendant surrendered the original title in the name of Mbatia, transfer forms in favour of the plaintiff from the Defendant and forms for application of consent of the Land Control Board duly executed by Mbatia in favour of the Defendant. The Defendant did not repay the loan as at 15.1.2010 as agreed. This is what prompted the plaintiff to file this suit.

Plaintiff's case;

5. The plaintiff testified that on 13.11.2009, he lent Kshs 750,000/= to the Defendant under agreement dated 13.11.2009. The amount lent was to be repaid by 15.1.2010. The Defendant deposited with him original title, transfer forms and Land Control Board forms duly executed by Mbatia as Security. The Defendant refused to repay the amount lent and has refused to transfer the suit property to him. He prays that judgment be entered for him for transfer of the suit property to him or in the alternative entry of judgement for the sum of Kshs 750,000/= with interest at court rates thereon from 13.11.2009.

Interested party's case;

6. The interested party testified that he is the registered owner of the suit property which he purchased from the Defendant. As at the time of purchase of the suit property, the same had not been transferred into the Defendant's name. The Defendant introduced him to Mbatia who signed the requisite documents which enabled him to have the suit property transferred to him.
7. The interested party took possession of the suit property and thereafter took a loan from Credit Bank Limited which he is still servicing. He stated that he purchased the suit property after he carried out due diligence and was convinced that the registered owner was Mbatia who had exchanged it with the Defendant's property in Nakuru. He stated that the plaintiff is at liberty to recover the money lent to the Defendant and that the suit property cannot be transferred to him as he claims as the agreement between him and the Defendant was not for sale of land.

Plaintiff's submissions;

8. The plaintiff submitted that he had proved his case on a balance of probabilities. The plaintiff relied on a holding by Lord Denning in *Millers -vs- Ministry of Pensions (1947) 2 ALL ER 372* where he stated thus:-

“The (Standard of proof) ... It is well settled it must carry a reasonable degree of probability ... If the evidence is such that the tribunal can say “we think it more probable than not” the burden is discharged, but if the probabilities are equal, it is not.”

9. The plaintiff further submitted that time was of essence and relied on a passage from Halsbury's laws of England (4th Edition) Vol 19 at paragraph 481. He submitted that repayment was to be on 15.1.2010 and in default thereof, he was to transfer the suit property to him. He further submitted that this is



why the Defendant handed to him the original title and transfer forms and forms for consent of the Land Control Board duly executed by Mbatia.

10. The plaintiff further submitted that the contract of 13.11.2009 between him and the Defendant complied with section 3(3) of the Law of Contract Act. The plaintiff further submitted that the registering of the suit property in the name of the interested party was done unprocedurally and that his title can be impeached. He relied on the case of Chemey Investments Ltd –vs- the Attorney General & others Nairobi Petition No. 94 of 2015 and Athi Highway Developers Limited –vs- West End Butchery Limited and others Civil Appeal No 246 of 2013. The plaintiff further relied on the case of Alice Chemutai Too and Nickson Kipkurui Korir & 2 others 92015) eKLR.

Interested Party’s submission;

11. The Interested party submitted that the agreement between the plaintiff and the Defendant was that of a lender and a debtor. The suit property was only used as a security. The interested party submitted that the court should look at the intention of the parties. In this regard he relied on the case of S. Percy Trentham Ltd –vs- Archital Luxfer Ltd (1993) 1 Llyds Re. 25 where Lord Staya stated as follows:-

“... it is important to consider briefly the approach to be adopted to the issue of contract formation.... It seems to me that four matters are of importance. The first is that Law generally adopts objective theory of contract formation. That means that in practice our law generally ignores the subjective expectations and the unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest me... that means that the yardstick is the reasonable expectations of sensible businessmen”.

12. The plaintiff submitted therefore that the intention of the parties was to use title to the suit property as security and not for transfer of the property to the plaintiff. The interested party submitted that he is the legal owner of the suit property as he was a bonafide purchaser. He adopted the definition of a bonafide purchaser in Black’s Law Dictionary 8th Edition which defines a bonafide purchaser as “one who buys something for value without notice of another’s claim to the property and without actual constructive notice of any defects in or infirmities, claims or equities against the seller’s title, one who has good faith paid valuable consideration for property without notice of prior adverse claims.

13. The interested party also relied on the case of Katende –vs- Haridar & company Limited (2008) 2 EA 173 where it was held as follows:-

“... it suffices to describe a bonafide 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 bonafide doctrines, 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; he purchased without notice of any fraud;
- f. He was not party to nay fraud.

Analysis and determination;



14. I have considered the evidence adduced herein as well as the submissions filed. There is no doubt that the Defendant neither entered appearance nor filed a defence. This notwithstanding, the plaintiff was expected to prove his case against him on a balance of probabilities. The issues which emerge for determination are firstly, whether the plaintiff has proved his case against the Defendant on either of the reliefs he is seeking. Secondly whether the title held by the interested party is impeachable. Thirdly which order should be made on costs.
15. On the first issue, there is no contention that the plaintiff and the Defendant entered into an agreement dated 13/11/2009 in which the plaintiff lent the Defendant a sum of Kshs 750,000/=. The title to the suit property which was in the name of Mbatia was handed over to the plaintiff. The agreement was produced as plaintiff exhibit 1. A copy of title in Mbatia's name was produced as exhibit 2. The title and other documents were given as security.
16. As there is no challenge to the fact that the plaintiff lent the Defendant Kshs 750,000/= I find that the plaintiff is entitled to the refund of this amount with interest with effect from 13.11.2009. On whether the plaintiff can have the title to the suit property transferred to him, it is the finding of this court that this is not possible. The reason why it is not possible is that the title is now in the name of the interested party.
17. It is clear from the evidence adduced by the plaintiff that the Defendant had no intention to repay the loan or have the suit property transferred to the plaintiff in case of default. This is so because Mbatia had signed transfer forms and forms for Land Control Board Consent in favour of the Defendant. The Defendant did not bother to lodge the documents to have the title transferred to his name. He instead cleverly duped the plaintiff by signing blank transfer forms in his favour without ensuring first that the title was in his name. The Defendant had nothing which would have been transferable unless he first transferred the land from Mbatia to himself. As I will demonstrate in the next issue, the plaintiff has no basis of claiming transfer of the suit property to himself. His only remedy is to pursue the Defendant for a refund of the money lent.
18. On the second issue, it is important to trace the history on how the interested party came to be registered as owner of the suit property. The interested party entered into a sale agreement dated 30.6.2012. The agreement was between the Defendant and Exodus Investments Limited where the interested party is a director. The purchase price was Kshs 3,050,000/=. After payment of the purchase price, the Defendant introduced the interested party to Mbatia who signed transfer forms in his favour as well as the application for consent of the Land Control Board. The consent of the Land Control Board was obtained and title in favour of the interested party was issued on 31.7.2015.
19. There is no evidence adduced to show that the plaintiff was ever introduced to Mbatia in whose name the title was registered. The plaintiff appears to have been satisfied with the signed transfer forms by Mbatia in favour of the Defendant. What he forgot to know that as long as the Defendant had not transferred the suit property to himself, he could not purport to sign blank transfer forms in favour of the plaintiff.
20. The plaintiff filed a further list of documents on 20.12.2019. He introduced a copy of the green card which shows that the title to the suit property was re-issued on 9.12.2008 pursuant to Gazette Notice No. 9436. A new title was then issued to the interested party on 31.7.2015. The interested party charged the suit property on 6.4.2016. This green card was produced as plaintiff exhibit 11.
21. The Land Registrar was not called to come and testify on how the transfer to the interested party was done. Had the Land Registrar been called, she/he would have stated the details. However, this



notwithstanding, it is clear that the interested party was a bonafide purchaser without any notice of prior claims to the title. He satisfied the conditions in the Katende case supra.

22. There is no evidence to show that the interested party was aware that title had been given to the plaintiff. According to the interested party, he conducted due diligence and established that though the suit property was registered in the name of Mbatia, he had exchanged it with the Defendant. He was introduced to Mbatia who signed transfer to him which finally enabled him to have the title registered in his name. There is therefore no basis of impeaching the interested party's title. In any case, the plaintiff did not file any claim against him which would have been the basis of interrogating on how he obtained his title.
23. On the third issue, it is important to note that this suit was filed on 5.11.2015. As at this time, the interested party had obtained title to the suit property. Had the plaintiff conducted a search before filing the suit he would have known that the suit property was in the name of the interested party. It is the execution process by the plaintiff on the basis of the ex-parte judgement which made him to come to court to defend his interest. All this was because of the actions of the Defendant.

Disposition:

24. From the analysis, it is clear that the Plaintiff's claim succeeds for refund of the amount lent to the Defendant. I therefore enter judgment for the plaintiff against the Defendant in the sum of Kshs. 750,000/= together with interest at court rates from 13.11.2009 until payment in full. The costs of the interested party shall be paid by the Defendant who was the cause of this litigation.

DATED, SIGNED and DELIVERED at ELDORET on this 26th day of SEPTEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Mathai for plaintiff.

Court Assistant -Laban

E. O. OBAGA

JUDGE

26TH SEPTEMBER, 2024

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