



**Kagakii v Kimatta & 2 others (Environment and Land Appeal
E007 of 2023) [2024] KEELC 6074 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6074 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E007 OF 2023
MAO ODENY, J
SEPTEMBER 25, 2024**

BETWEEN

SAMSON NGAHU KAGAKII APPELLANT

AND

GEDRAPH MUIRURI KIMATTA 1ST RESPONDENT

WILSON NJAU THAIRU 2ND RESPONDENT

PETER MUKIRAI WANJAU 3RD RESPONDENT

*(Being and Appeal arising from the Judgement of the Honourable J.B Kalo
C.M delivered on 19th August, 2022 in Nakuru CM ELC No 342 of 2018)*

JUDGMENT

1. This appeal arises from the Judgment delivered on 19th August, 2022 in Nakuru CM ELC No 342 of 2018. The Appellant being aggrieved by the said judgment lodged a Memorandum of Appeal dated 27th July, 2023 and listed the following grounds:
 1. That the learned Magistrate erred in law and in fact in making a finding that the 3rd Defendant now Appellant was a bona fide purchaser for value without notice with respect to his plot known as Bahati/Bahati Block 1/4836.
 2. That the learned Magistrate erred in law and in fact in failing to appreciate that the 3rd Defendant now Appellant was protected under the law of equity since the doctrine of innocent purchaser for value without (sic) was applicable in the circumstances and as such the title deed he held for Bahati/Bahati Block 1/4836 could not be impeached.
 3. That the learned Magistrate erred in law and in fact in failing to appreciate the fact that the 3rd Defendant was the registered owner of all that parcel of land known as



Bahati/Bahati Block 1/4836 and that the same could only be challenged in exceptional circumstances as provided under Section 26 (1) of the [Land Registration Act](#).

4. That the learned Magistrate erred in law and in fact in revoking the 3rd Defendant now Appellant's title deed for Bahati/Bahati Block 1/4836 on the basis of circumstantial evidence and by error inferred fraud as against him yet the same was not and had not been proved to the required threshold for a claim of fraud to succeed.
5. That the learned Magistrate erred in law and in fact in inferring fraud as against the 3rd Defendant now Appellant yet the claim of fraud in land matters is a serious claim/allegation and the threshold is quite high than in civil matters and cannot be inferred by a court as was done by the trial magistrate in this matter.
6. That the learned Magistrate erred in law and in fact in holding that the Plaintiff had proved fraud as against the 3rd Defendant now Appellant while the evidence adduced did not prove the said claim and did not show that the 3rd Defendant now Appellant was a party to the alleged fraud since he was an innocent purchaser for value without notice and was never a party to any fraud whatsoever.
7. That the learned Magistrate erred in law and in fact in failing to appreciate that the 3rd Defendant now Appellant had a valid sale agreement and had gone ahead and obtained the requisite land control board consent prior to having the plot known as Bahati/Bahati Block 1/4836 transferred to him. On the other hand, the Plaintiff now the 1st Respondent failed to provide these requisite documents with respect to Bahati/Bahati Block 1/4836 but the trial magistrate failed to consider this and relied on the sole testimony of the 1st Defendant now 2nd Respondent to rule in favour of the Plaintiff now 1st Respondent.
8. That the learned Magistrate erred in law and in fact in relying on an illegal sale agreement entered by the Plaintiff when the 1st and 2nd Defendants were yet to petition for letters of administration and as such did not have capacity to enter into such a sale agreement whereas the sale agreement entered as between the 3rd Defendant now Appellant and the 1st and 2nd Defendants was entered while they had capacity and allowed by the law to enter into such a sale since they had already finalized to petition for letters of administration.
9. That the learned Magistrate erred in law and in fact in failing to consider the evidence and testimony of the 3rd Defendant now Appellants and testimony of his other witnesses in arriving at his determination and in a show of biasness only relied on the testimony of the Plaintiff and the 1st Defendant. The failure by the 2nd Defendant to testify was also used against the 3rd Defendant and the trial Magistrate used that fact to infer fraud as against the 3rd Defendant now Appellant. Just because the 2nd Defendant did not testify the testimony of the 3rd Defendant was questioned and not considered.
10. That the learned Magistrate erred in law and in fact in dismissing the 3rd Defendant's now Appellant counter claim while the same was meritorious having had been proved on a balance of probability.
11. That the learned Magistrate erred in law and in fact in condemning the 3rd Defendant now Appellant to pay costs.



12. That the learned magistrate erred in law and in fact by applying his own theory in assessing the pleadings and evidence which made him fall into error of speculation and inserted his own facts and findings which were not supported by pleadings and evidence.
 13. That the learned magistrate erred in law and in fact in purporting to put into perspective materials and facts not contained in the pleadings, evidence and submissions of parties.
 14. That the learned magistrate erred in law and fact in failing to consider the evidence on record, the 3rd Defendant's pleadings, submissions and the circumstances of the case prior to making his findings.
 15. That the findings of the learned magistrate are totally unsupported in law and by the evidence on record.
2. A brief background to this appeal is that the 1st Respondent filed suit against the Appellant, 2nd Respondent and 3rd Respondent in the lower court seeking the following orders:
 - a. A declaration that that the Plaintiff is the lawful owner of parcels of land known as Bahati/Bahati Block 1/4835, Bahati/Bahati Block 1/4836, Bahati/Bahati Block 1/4837 and Bahati/Bahati Block 1/4838 by virtue of purchase from the 1st and 2nd Defendants.
 - b. An order that the title for the parcel of land known as Bahati/Bahati Block 1/4836 registered in the name of the 3rd Defendant be revoked and a fresh one issued in the Plaintiff's name.
 - c. An order that the 1st Defendant be compelled to effect transfer for land parcels number Bahati/Bahati Block 1/4835, 1/4837 and 1/4838 in favour of the Plaintiff in default of which the Deputy Registrar be authorized to execute the said transfer forms in place of the 1st Defendant.
 - d. Costs of the suit plus interest at Court rates till payment in full.
 - e. Any other or further relief that this Honourable Court may deem fit and just to grant.
 3. The Appellant filed a counterclaim at the lower court dated 1st November, 2018 and he prayed for judgment against the defendants jointly and severally for:
 - a. A declaration that he is the bona fide legal and registered owner of all that parcel of land known as Bahati/Bahati Block 1/4836 and an order for eviction against the Plaintiff, a perpetual permanent injunction restraining the defendants from selling, charging, remaining on, trespassing into or in any way interfering with the 3rd Defendant's (now plaintiff) quiet use and occupation of the plot known as Bahati/Bahati Block 1/4836.
 - b. An order for damages for trespass against the Plaintiff together with mesne profits.
 - c. Costs and interests of the suit.
 4. The suit was heard and the trial Magistrate in his judgment dated 19th August, 2022 found that the Plaintiff proved his case against the Defendants. The trial Magistrate further found that the 3rd Defendant failed to prove his counter-claim and consequently entered judgment for the Plaintiff against the Defendants as follows:



- a. A declaration is hereby issued that the Plaintiff is the lawful owner of the four parcels of land known as Bahati/Bahati Block 1/4835, Bahati/Bahati Block 1/4836, Bahati/Bahati Block 1/4837 and Bahati/Bahati Block 1/4838.
- b. An order is hereby issued that the title to the parcel of land known as Bahati/Bahati Block 1/4836 registered in the name of the 3rd Defendant be revoked and cancelled and a fresh one issued in the Plaintiff's name.
- c. The Plaintiff shall have costs of the suit and interest thereon to be borne by the 2nd and 3rd Defendants jointly and severally.
- d. The 3rd defendant's Counter-Claim is hereby dismissed with costs to the plaintiff and 1st defendant.

Appellant's Submissions

5. Counsel for the Appellant filed submissions on 15th July, 2024 and identified the following issues for determination:
 - a. Whether the Appellant is a bona fide purchaser for value without notice?
 - b. Whether the 1st Respondent proved fraud in the place of the Appellant?
6. On the first issue, counsel relied on the case of *Ketende vs Harisdas & Co Ltd* and submitted that the Appellant followed the lawful process and got the title to the suit property.
7. It was counsel's submission that the Appellant bought the land BAHATI/BAHATI BLOCK 1/4836 from the 2nd and 3rd Respondent vide a sale agreement of 28th November, 2012 which was presented to court as evidence and that prior to the purchase, the Appellant obtained search receipts as well as the consent from the Land Control Board in line with the provisions of Section 6 of the [Land Control Act](#).
8. Counsel further submitted that it is on record that the Appellant (through his father) executed a sale agreement dated 28th November 2012 with the beneficiary Peter Mukirai Wanjau for the sale of land for valuable consideration of Kenya Shillings One hundred and Twenty Thousand (Ksh 120,000/=) which was duly paid in full, a fact which was not in dispute.
9. Counsel also submitted that after the execution of the sale agreement and subsequent settlement of the consideration, the Appellant lawfully transferred the property to his name and got a title deed for BAHATI/BAHATI BLOCK 1/4836 on 5th September, 2013 and relied on Section 26 of the [Land Registration Act](#) and the case of *Obuba v Nyabwatana (Civil Appeal 30 of 2019)* [2022] KECA 1425 (KLR).
10. Mr. Kahiga submitted that the finding from the trial Magistrate that the Appellant participated in a scheme of fraud with the 3rd Respondent without involving the 2nd Respondent the Co-administrator in selling the parcel of land is not tenable as no evidence has been presented by the 1st Respondent that the Appellant obtained the suit property without good faith.
11. On the second issue, counsel submitted that the only way to impeach the certificate of title held by the Appellant is proving fraud as per Section 26 and 80 of the [Land Registration Act](#) and that any allegations of fraud must be pleaded and strictly proved.
12. Counsel relied on the cases of *Kinyajui Kamau vs George Kamau (2015) eKLR* and *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another [2000] eKLR*, and urged the court to allow the appeal and find that the Appellant was a bona fide purchaser.



1st Respondent's Submissions

13. Counsel for the 1st Respondent filed submissions on 17th July, 2024 and submitted that the appeal should be dismissed with costs and the judgment of the lower court be upheld.

Analysis and Determination

14. The Appellant raised fifteen grounds of appeal but I will condense them to two issues for determination, namely whether the Appellant is a bona fide purchaser for value without notice and whether the Appellant's purchase of the suit land was tainted with fraud and illegality.
15. In the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court of Appeal stated:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. An appeal court cannot properly substitute its own factual findings for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but his is a jurisdiction which should be exercised with caution”

16. In respect of the first issue as to whether the Appellant was a bona fide purchaser for value without notice, the extract of the trial court's Judgment dated 19th August, 2022 which is the subject of this appeal states as follows:

“The 3rd Defendant testified that he bought the plot from the 1st and 2nd Defendants. He stated in his statement that the plot was transferred to him by the 1st and 2nd Defendants. However, the sale agreement dated 28.11.12 that he produced in support of that he produced in support of that proposition bore only the name of the 2nd Defendant. He admitted that it was signed by his father (PW4) and the 2nd Defendant only. He stated in his statement that “they” sought the consent of the land control board. The Application for Consent form that he produced in evidence bears only one signature where it is indicated signature of owner, lessor, mortgagor, chargor or authorized agent etc, evidence enough that only one seller was involved in the application for consent to transfer. In all likelihood, it was the 2nd Defendant who signed for the application for consent, since the 1st Defendant has denied ever signing the consent application form nor appearing before the land control board. The 3rd Defendant also admitted that he did not appear personally before the land control board but did so through PW2, who is his mother. He did not produce any document authorising his mother to attend the board control meeting on his behalf. These are clear indicators that the 3rd Defendant either deliberately or inadvertently participated in as (sic) scheme by the 2nd defendant to sell the plot to him without the involvement of the 1st Defendant, with whom they jointly administered the estate of the deceased and were joint owners of the land.....It is to be noted that while the 2nd Defendant was entering into the sale agreement with the 3rd Defendant on 28.11.2012, he was at the same time receiving money from the plaintiff as noted in the receipt of 40,000 on 5.12.2012. It means the 2nd defendant deemed the sale agreement with the plaintiff as being alive...”



17. In the case of *Weston Gitonga & 10 others v Peter Rugu Gikanga & another* [2017] eKLR the Court of Appeal held as follows as regards a bona fide purchaser:

“23. Black’s law Dictionary 8th Edition defines “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.”

24. In the Ugandan case of *Katende v. Haridar & Company Limited* [2008] 2 E.A.173 it was held: - “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;
- g. he was not party to any fraud.

A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

18. From the evidence on record, it is clear that the suit land had been sold to the plaintiff by the time the 3rd defendant entered into a sale agreement with the 2nd defendant to the exclusion of the 1st defendant who was a Co-administrator of the estate of the deceased. To make matters worse the appellant admitted that the agreement was only signed by the 2nd defendant and his father on his behalf. That it is the mother who appeared at the Land Control Board on his behalf together with the 2nd defendant.

19. The Appellant also admitted that apart from conducting a search he did not visit the suit land and had he visited it, he should have known that the 1st respondent was already in occupation.

20. The 1st defendant in the lower court gave evidence that they had sold the suit parcels of land to the 1st respondent who paid the purchase price in full and transferred to his name apart from the plot in dispute which the 1st respondent had not completed payment.

21. It is noted in the judgment that the defendants received the purchase price during the pendency of the suit and transferred the purchased parcels to the plaintiff apart from the one which had been illegally been transferred to the Appellant.

22. The Respondent pleaded fraud in the manner the transaction between the Appellant and the 2nd defendant was carried out and proved that it was done illegally without the knowledge of the Co-Administrator who were joint owners. The Co-administrator confirmed that they had sold the parcels to the Respondent which strictly proved through evidence that the transaction was tainted with fraud and illegality.



23. The 1st Defendant (now 2nd Respondent) denied ever signing the consent application form or appearing before the Land Control Board. The 2nd Respondent in his testimony to the trial court testified as follows on cross-examination:

“...The agreement between the 2nd and 3rd Defendants dated 28th November, 2012 does not bear my name. The application for consent form does not bear my signature. The letter of consent shows that the land is being transferred from Wilson Thauru Neru and Peter Mukirau to Samson Ngalu. I did not sign the application for consent. To the best of my knowledge, the land belongs to the plaintiff. I did not participate in the transfer of the land to the 3rd Defendant.”

24. I have considered the record of appeal, the submissions by counsel and find that appeal lacks merit and is therefore dismissed with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF SEPTEMBER 2024.

M. A. ODENY

JUDGE

