IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO - ODEK, JJ.A.)

CIVIL APPEAL NO. 94 OF 2009

BETWEEN

GLADYS WANJIRU NGACHA.. APPELLANT

AND

TRERESA CHEPSAAT... 1ST RESPONDENT

PIUS KIBWETTI SERVEY... 2ND RESPONDENT

BERNARD KATHANGA... 3RD RESPONDENT

KERUGOYA COUNTY COUNCIL... 4TH RESPONDENT

THE ATTORNEY GENERAL... 5TH RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya

at Nyeri (Makhandia, J.) dated 28th November, 2008

in

H.C.C.C NO. 182 OF 1992)

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JUDGMENT OF THE COURT

1. This is an appeal from the judgment of the High Court (Makhandia, J.) dated 28th November, 2008 in which the learned judge dismissed the appellant's suit.
2. The appellant herein filed a suit in the High Court seeking *inter alia* a declaration that the parcel **No. Inoi/Kerugoya/250/282** which later became known as **Inoi/Kerugoya/19A** rightfully belongs to her; declaration that the fraudulent sale between 1st , 2nd and 3rd respondents (defendants in the High Court) was null and void; and an order directing the 4th and 5th respondents (defendants in the High Court) to rectify all records relating to the suit property. The appellant's case was that the Kirinyanga County Council resolved on 10th July, 1987 to allocate parcel **No.**

Inoi/Kerugoya/250/282 which later became known as **Inoi/Kerugoya/19A** (suit property) to the appellant and the 1st respondent as tenants in common. Subsequently, on 16th October, 1987 an allotment letter in respect of the suit property was issued in both the 1st respondent's and appellant's name. The 1st respondent's name was typed while the appellant's name was inserted by hand in the said allotment letter.

3. Thereafter, on or about 1989, the 2nd respondent (the 1st respondent's husband), approached the appellant and offered to sell to her the 1st respondent's portion of the suit property, for a sum of Kshs. 88,575/=. According to the appellant, the 1st respondent's portion was transferred to her after she paid the full purchase price to the 2nd respondent. She took possession of the suit property and paid the standing premium to the 4th respondent whenever it fell due. In preparation to develop the suit property, the appellant in the year 1992, purchased building materials at a cost of Kshs. 900,000/= and placed them on the suit property. She later discovered that the suit property had been sold by the 1st and 2nd respondents to the 3rd respondent without her knowledge or consent. She also discovered that the description of the suit property had been changed from **Inoi/Kerugoya/250/28** to **Inoi/Kerugoya/19A**. She claimed that the 3rd respondent removed her building materials from the suit property. Subsequently, the 3rd respondent leased out the suit property to a mechanic who operated a garage thereon. The appellant maintained that the subsequent transfer and registration of the 3rd respondent as the proprietor of the suit property was fraudulent. She also contended that both the 4th and 5th respondent facilitated the fraudulent conduct of the 1st , 2nd and 3rd respondents by registering the transfer and issuing title over the suit property to the 3rd respondent.
4. The respondents, in their respective defences denied the above mentioned allegations that were pleaded in the appellant's further amended Plaint. The 1st and 2nd respondents filed a joint Defence in which they denied that the suit property was allocated to both the 1st respondent and the appellant as tenants in common; the 2nd respondent denied selling any portion of the suit property to the appellant; and they maintained that they sold the suit property to the 3rd respondent who had since been issued with a certificate of title over the same. The 3rd respondent in his defence denied obtaining the suit property through fraud. He further maintained that his registration as the proprietor of the suit property, being a first registration could not be challenged by the appellant.
5. During the hearing of the suit, the 1st and 2nd respondents did not tender any evidence. The 3rd respondent testified that on or about 5th June, 1990 the 2nd respondent offered to sell the suit property to him. After viewing the suit property, he paid Kshs. 100,000/= being the purchase price to the 2nd respondent. The suit property was transferred to him on 15th November, 1990. He testified that the description of the suit property changed from **Inoi/Kerugoya/250/282** to **Inoi/Kerugoya/19A** when he was issued with a letter of allotment dated 23rd January, 1991. Subsequently, the 3rd respondent was registered as the proprietor of the suit land and issued with a certificate of title in the year 1993. He maintained that the suit property was vacant when he purchased it. He denied removing the appellant's building materials from the suit property. He maintained that the appellant's building materials were on her property described as **Inoi/Kerugoya/286** which was adjacent to the suit property. The 3rd respondent finally testified that after purchasing the suit property he leased it out to a mechanic who operates a garage thereon.
6. Oliver Njogu Ruirie, the then acting deputy clerk of the Municipal Council of Kerugoya-Kutus, testified that as per the council's records the suit property belonged to the 3rd respondent. He maintained that the appellant owned another parcel described as Plot 20A, which is adjacent to the suit property.
7. Based on the foregoing evidence, the learned Judge (Makhandia, J.) in his judgment dated 28th November, 2008 dismissed the appellant's suit and found, *inter alia,* that the appellant's cause of action which arose from an oral agreement could not be sustained under **Section 3 (3)** of the

Law of Contract; the suit property was vacant when the 3rd respondent bought it; and the 3rd respondent's registration could not be defeated being a first registration. Aggrieved with the said decision, the appellant has filed this current appeal based on the following grounds:

"1. The superior court erred in law when it held that the suit was unsustainable purely on the interpretation of section 3(3) of the Law of Contract, when there was evidence thatthe appellant had taken possession of the suit property.

2. ***The superior court held 'much as the plaintiff did claim that she took possession of the suit premises and started developing the same upon paying the purchase price,***
3. ***I doubt that indeed this is what happened' was a biased view of the appellant's evidence and a misdirection which materially affected the result of the case.***

4. In the absence of the evidence of the 1st and 2nd respondents this judgment lacked cohesive and cogent deliberation. (sic)"

8. Mr. H.K. Mahan, learned counsel for the appellant, submitted that the learned judge erred by finding that the oral contract which the appellant relied on, did not fall under the exception of **Section 3(3)** of the **Law of Contract**. **Section 3(3)** of the **Law of Contract Act** provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is written, executed by the parties and attested. **Section 3(7)** of the **Law of Contract Act** excludes the application of **Section 3(3)** of the said Act to contracts made before the commencement of the subsection. The current **Section 3(3)** of the **law of Contract Act**, commenced on 1st June, 2003.
9. Learned counsel for the appellant emphasised that the oral agreement between the appellant and the 1st and 2nd respondents, was made sometime in 1989 before **Section 3(3)** of the **Law of Contract** came into force. This oral agreement was not subject to the provisions of **Section 3(3)** of the **Law of Contract** but is an exception under **Section 3 (7)** of the **Act**. To fall within the exception in **Section 3 (7)** of the **Act**, there must be part performance of the oral agreement through taking possession of the property. The issue in this appeal is whether the appellant took possession of the suit property in part performance of the oral agreement.
10. The appellant submitted that the learned judge misdirected himself by finding that the appellant had not proved she had possession of the suit property. It was further submitted that the learned Judge erred in failing to find that the particulars of fraud pleaded by the appellant were proved by virtue of the fact that the 1st and 2nd respondents failed to tender evidence during the hearing of the suit.
11. Mr. J.P. Machira, learned counsel for the 1st, 2nd and 3rd respondents, in opposing the appeal maintained that the learned Judge properly analysed the evidence and arrived at the right conclusion. He submitted that the oral agreement which the appellant relied on, could not be sustained against the 1st, 2nd and 3rd respondents in view of **Section 3(3)** of the **Law of Contract**. He contended that the appellant did not prove the particulars of fraud she had pleaded. He further submitted that the 3rd respondent's title over the suit property being a first registration could not be challenged under **Section 27** and **28** of the **Registered Land Act**, **Chapter 300**, **Laws of Kenya** (repealed).
12. Mr. P.M. Muchira, learned counsel for the 4th respondent, associated himself with the submissions made by Mr. Machira. He added that the appellant had failed to establish that her claim fell within the exception of **Section 3(3)** of the **Law of Contract**. He contended that the appellant had never been in possession of the suit property. He maintained that the photographs that were produced by the appellant did not prove that the building materials therein were on the suit property. He further maintained that the building materials were on the appellant's property

described as **Inoi/Kerugoya/286** which was adjacent to the suit property. According to him, the learned Judge properly analysed the evidence on possession and came to the right conclusion. He finally submitted that the appeal had no merit and it should be dismissed.

13. As a first appellate court, it is our duty to subject the evidence and material tendered before the High Court to a fresh and exhaustive scrutiny and draw our own conclusions bearing in mind that we have not seen or heard the witnesses and giving due allowance for this. See ***Selle vs. Associated Motor Boat Company* (1968) E.A. 123.**
14. We propose to first deal with the issue of whether the oral agreement which the appellant relied on was subject to **Section 3(3)** of the **Law of Contract Act**, **Chapter 23**, **Laws of Kenya**. The learned judge in considering the said issue held:

"Although this oral agreement is alleged to have taken place sometime in the month of August 1989, it is trite law that such an oral agreement cannot sustain the instant action pursuant to the provisions of section 3(3) of the Law of Contract Act as amended."

Section 3(3) of the **Law of Contract Act** provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is written, executed by the parties and attested. **Section 3(7)** of the **Law of Contract Act** excludes the application of **Section 3(3)** of the said **Act** to contracts made before the commencement of the subsection. The current **Section 3(3)** of the **Law of Contract Act**, commenced on 1st June, 2003. The appellant herein relied on an oral agreement which was made in 1989 between herself, on one part and the 1st and 2nd respondents on the other part. We find that the learned judge misdirected himself in finding that said agreement was subject to the provisions of **Section 3(3)** of the **Law of Contract Act**. The oral agreement was concluded before the Act came into effect.

15. Prior to the current amendment of **Section 3(3)** of the **Law of Contract Act** the subsection read as follows:

"(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

(1) has in part performance of the contract taken possession of the property or any part thereof; or

(11) being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

Notwithstanding the fact that the sale agreement was not in writing, the appellant has to prove that she comes within the proviso to **Section 3 (7)** of the **Act**. This is done by adducing evidence that she either took possession of the suit property in part performance of the said oral contract, or that being already in possession of the suit property; she continued in possession in part performance of the oral contract. Having re-evaluated the evidence we concur with the finding of the learned Judge that the appellant did not prove she had possession of the suit property. The 3rd respondent pleaded in his defence that the appellant's property was Parcel **No. Inoi/Kerugoya/286** and not the suit property; that the said parcel was adjacent to the suit property; and that the appellant had placed her building materials on the said

parcel. The appellant did not tender any evidence to rebut the same. Furthermore, the appellant in her own evidence admitted that the 3rd respondent had leased out the suit property to a mechanic who was operating a garage. She also testified that the suit property had been leased out to the mechanic for a very long time. We are convinced based on the evidence that when the 3rd respondent bought the suit property it was vacant. In view of our finding, the appellant's claim cannot be sustained on the basis of the said oral contract. Therefore, the trial court was correct in holding that the appellant's suit was unsustainable.

16. Despite our above finding, we feel it is necessary to address Mr. Mahan's submissions to the effect that the appellant had proved the particulars of fraud as pleaded in the Plaint because the 1st and 2nd respondents had failed to tender evidence at the hearing to rebut the same. In ***R. G. Patel vs. Lalji Makani* (1957) E.A. 314**, the predecessor of this Court at pg 317 held:

"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In ***Mutsonga vs. Nyati* (1984) KLR 425**, at pg 439, this Court held: "***Whether there is any evidence to support an allegation of fraud is a question of fact".*** We find that the appellant did not prove fraud on the part of the respondents.

17. Accordingly, the appeal herein has no merit and is dismissed with costs to the respondents.

Dated and delivered at Nyeri this 6th day of June, 2013.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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