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Court:	Environment and Land Court at Nakuru
Case Action:	Judgment
Judge:	Francis Mwangi Njoroge
Citation:	Aaron Kiplagat Kamoing v Wilson Koitaba & another [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Nakuru
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Case Outcome:	Application allowed
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Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

LAND CASE NO. 452 OF 2016 (O.S.)

AARON KIPLAGAT KAMOING.....PLAINTIFF

VERSUS

MAJOR WILSON KOITABA.....1ST DEFENDANT

JOEL KIBET KOECH2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed an Originating Summons dated **13/8/2008** which he subsequently amended on **18/11/2009**. In the amended originating summons he seeks the following orders:

1. THAT the Honourable court do nullify the transfer of plot no. Olenguruone/Keringet Block 1/20 to the 2nd defendant since the said transfer was effected fraudulently by virtue of the existence of the agreement dated 30/4/1982 between the plaintiff and the 1st defendant.

2. THAT this honourable court be pleased to issue an order compelling the defendants/respondents to execute a transfer/conveyance of Plot No. 20 measuring 40 acres in land reference No. 548 Keringet estate, Molo otherwise known as land title No. Olenguruone/Keringet Block 1/20 to the plaintiff upon the plaintiff depositing in court Kenya shillings seventy thousand (Kshs.70,000/=) for onward payment to the 1st defendant in the event that the 1st defendant refuses to receive the said Kenya shillings seventy thousand (Kshs.70,000/=) only from the plaintiff directly.

AND/OR IN THE ALTERNATIVE

This honourable court be pleased to issue an order compelling the High Court Deputy Registrar and/or executive office to execute the transfer/conveyance by signing the necessary consents and all the requisite documents for the facilitation of the transfer on behalf of the defendants for the said plot No. 20 measuring 40 acres in land reference No. 548 Keringet estate, Molo otherwise known as land title No. Olenguruone/Keringet Block 1/20 if the defendants fails to effect the transfer to the plaintiff upon the plaintiff depositing Kenya shillings seventy thousand (Kshs.70,000/=) only in court for onward forwarding to the 1st defendant or upon payment of the defendant directly.

AND/OR IN THE FURTHER ALTERNATIVE

a. The Honourable court do order the 1st defendant to refund the plaintiff Kshs.50,000/= together with interest at the commercial rate of 20% per annum with effect from 30th April 1982 till payment in full.

b. The Honourable court do order the 1st defendant to pay general and special damages for the breach of contract entered into between the plaintiff and the 1st defendant on 30th April 1982.

3. a) THAT the Honourable court be pleased to issue such orders as it may deem necessary and reasonable in the circumstances of this matter.

4. b) The costs of this suit be borne by the defendants.

2. The grounds upon which the originating summons is brought are that the plaintiff and the 1st defendant allegedly executed a sale agreement over the suit land on **30/4/1982**. The suit land was then known as **plot number 20** within **Land Reference No 548 Keringet Estate Molo** and it measured **40 acres**. It is alleged that the 1st defendant did not immediately demarcate and transfer the said parcel to the plaintiff because the title to the main parcel was not yet issued by that time. However title issued in the year **2001** and the 1st defendant had the entire land parcel registered in his name whereupon the plaintiff lodged a caution over the land claiming a purchaser's rights. The 1st defendant subsequently transferred the suit land to the 2nd defendant.

3. The 1st defendant filed a notice of preliminary objection to the first originating summons on **29/9/2008** claiming that the claim is time barred and the agreement mentioned was null for want of the land control board consent and that the suit land had already been transferred to a third party prompting an amendment to the motion.

4. The substantive response by the 1st defendant to the originating summons by way of affidavits is that he rescinded the contract in **December 1984** after demand for the balance of consideration addressed to the plaintiff yielded no payment, and that the plaintiff had been formally advised of the rescission in the year **2001**. The 1st defendant also claimed that the plaintiff has never been in possession of the suit property and that the land control board consent was not obtained for the transaction. As he had done in the preliminary objection he pleaded that the plaintiff's claim was statute barred and that in any event the orders sought against him were not available to the plaintiff as he had already transferred the land to the 2nd defendant who had been issued with a title deed for the same.

5. The 2nd respondent's reply contained in his sworn replying affidavit filed on **25/5/2017** is that he purchased the suit property in **2005** from the 1st defendant after a search at the lands office revealed he owned the land and that there were no encumbrances on the title; that the 1st defendant pointed out beacons to the vacant land, paid the full purchase price, obtained an LCB consent and subsequently took possession thereof. He averred that he was not privy to any transaction between the plaintiff and the 1st defendant and he is thus an innocent purchaser without notice.

The evidence of the plaintiff

6. The plaintiff testified on **28/1/2020** and adopted his supporting affidavit filed on **13/8/2008** as his evidence-in-chief. He stated that the sale agreement between him and the 1st defendant was dated **30/4/1982**; that he paid **Ksh 50,000/=** deposit as required by the agreement; that the balance of **Ksh 70,000/=** was to be paid after the 1st defendant transferred the suit land to him; that it was incumbent upon the 1st defendant to do everything necessary to transfer the suit land to the plaintiff; that the 1st defendant transferred to the plaintiff the shares in the Kirobon Farmers Company Limited but never did anything to transfer the suit land to him; that the 1st defendant kept on telling the plaintiff that the land had not been demarcated until the year **2000** when the plaintiff learnt from the assistant chief that the title deeds were ready. However he soon thereafter learnt from the chairman of Kirobon Farmers Co Ltd that the title to the suit land had been issued in the name of the 1st defendant who had also collected it; that a search at the land registry confirmed that the land had been indeed so registered; that the plaintiff then went to the 1st defendant's office to collect the title and he confirmed that he had collected the title; that the 1st defendant later wrote him a letter through PJ Kakad & Co Advocates claiming that he had not paid the balance of the consideration; that later the plaintiff learnt that the land had been transferred to the 2nd defendant in **2005** for **Ksh 4,000,000/=**; that the sale was fraudulent; that the plaintiff does not know how the caution he had lodged over the property in the year **2001** was removed. The plaintiff produced the various copies of documents attached to his supporting affidavit as evidence in the suit. It was the plaintiff's evidence that after **PEXh 10** was served on him he went and discussed the same with the 1st defendant who assured him not to be anxious about the issue as he was waiting for the land to be surveyed.

7. Upon cross-examination by Mr Wena the plaintiff conceded that **clause (g)** of the agreement provided for payment of the balance of the purchase price after transfer of shares was effected in the company books. He further admitted that the 1st defendant sold his shares to him on **25th August 1982** and transferred to him **500** shares; that the executed share transfer forms were left with the company; that the 1st defendant gave the plaintiff his share certificate; that he paid for the transfer of the shares. However he maintained that he was to pay the balance after the demarcation and transfer of the land to him and that his intent was buying the land and not the shares. He stated that after the execution of the shares transfer forms he met the 1st defendant several times yet the latter never asked for payment of the balance of the purchase price; that he never replied to **PEXh 10**; Instead, he went to see the defendant; that he received **PEXh 6** (a letter dated **21/9/2001** notifying him that the agreement had been rescinded by the 1st

defendant on **30/5/1985** for breach on his part;) that the agreement has never been rescinded as claimed by the defence. Under cross-examination by Mr Andolo the plaintiff averred that the company is no longer in existence and that he learnt that the 1st defendant had transferred the land after he filed the instant suit. At that juncture the plaintiff closed his case.

The evidence of the 1st defendant.

8. The 1st defendant testified on **20/9/2021** and adopted his affidavit and further affidavit sworn on **6/10/2008** and **22/6/2009** respectively. His evidence is that according to the sale agreement he was selling to the plaintiff some **500 shares** in the Kirobon Farmers Co Ltd for the consideration of **Ksh 120,000/=** and **Ksh 50,000/=** thereof would be paid by cheque and the balance after the shares were transferred; that after the signing of that agreement he gave the plaintiff the transfer of shares form which he signed, and all the plaintiff needed was to have the shares registered in his name; that however the plaintiff failed to register the shares in his name as expected and failed to give reasons for the default; that in **1984** he reminded the plaintiff of the default in writing and the letter elicited no response; that in **1995** he went to the lawyer for both parties who said the plaintiff was not interested in the land and advised the cancellation of the agreement and refund of the **Ksh 50,000/=** that the plaintiff had paid and the 1st defendant agreed; that the lawyer then wrote to the plaintiff and rescinded the agreement and the 1st defendant made out a cheque for **Ksh 50,000/=** which he gave to the lawyer for collection by the plaintiff who failed to collect it. In the year **2001** the shares translated into title to the land and the plaintiff lodged a caveat on the title. After the registration of the caution the 1st defendant waited until **2005** and the plaintiff did nothing and so the 1st defendant sold the land. In the year **2008** while the land had already been sold the plaintiff lodged another caution on the title. The 1st defendant produced the copies of document attached to his affidavits as evidence at the hearing.

9. Upon cross examination by Mr. Sumba the 1st defendant stated that it was his shares that he sold to the plaintiff and that those shares were to translate into the suit land later on; that he cancelled the agreement because the plaintiff had failed to register the agreement with the land control board; that he was not aware that the shares had been effectively transferred to the plaintiff; that the plaintiff was to transfer the shares into his name and the land title would later on be issued in his name; that he never retrieved the **Ksh 50,000/=** from their joint lawyer when he informed him that the plaintiff had failed to collect the money; that he sold the suit land to the 2nd defendant for **Ksh 200,000/=**; that the plaintiff's caution over the title was removed in **2008** at the 1st defendant's instance and reinstated in **2009**; that the plaintiff had tried to challenge the cancellation of the agreement and failed. The 1st defendant does not see anything fraudulent about transfer of the suit land to the 2nd defendant. At that point the 1st defendant closed his case.

Evidence of the 2nd defendant.

10. The 2nd defendant testified on **21/10/2021** and adopted the contents of his replying affidavit dated **22/5/2017** as his evidence in chief and the annexures as exhibits. He stated that the suit land was formerly owned by Nosliw Ltd and he did not know the plaintiff.

11. Upon cross-examination by Mr Wena the 2nd defendant stated that the land was registered in the name of Nosliw Ltd and that he had already subdivided it and given portions thereof to third parties.

12. Upon cross-examination by Mr Sumba the 2nd defendant stated that Mr. PJ Kakad did not reveal to him that he had acted for the 1st defendant in another transaction with the plaintiff over the suit land; that he was not aware of any restriction over the suit land; that he conducted a search on the property and in the year **2005** he bought the land free from all encumbrances. At that point the 2nd defendant closed his case.

Submissions

13. The plaintiff filed submissions on **17/11/2021**. I have perused the court record and I have found no submissions filed on behalf of the defendants.

Issues for determination

14. It is indubitable facts of this are that there was an agreement entered into by the parties on **30/4/1982**; that the shares mentioned

in the agreement were meant to and did indeed translate into the suit land; that the land was registered in the name of the 1st defendant in **2001**; that the suit land was subsequently sold to the 2nd defendant and registered in his name and that the person who entered into the agreement for sale to the 2nd defendant was not the 1st defendant but a company in which the 1st defendant apparently held shares. The main issues for determination in this case are as follows:

- a. Under what circumstances was the 1st defendant was entitled to rescind the agreement between the plaintiff and the 1st defendant;**
- b. Whether there was effective rescission of the agreement between the plaintiff and the 1st defendant;**
- c. Whether the agreement was for the sale of shares or of land and**
- d. Whether sale of the land to the 2nd defendant was fraudulent and whether it ought to be nullified and an order be issued that the land be registered in the plaintiff's name;**
- e. Who should pay the costs of these proceedings"**

15. As to whether the 1st defendant was entitled to cancel the contract, it is all predicated on whether the plaintiff was in breach of the agreement in which event the 1st defendant would not be faulted. Was he in breach"

16. The main grounds relied on by the 1st defendant for the alleged rescission are that the agreement was for the sale of shares and the plaintiff failed to adhere to a term therein that required him to pay the balance of the purchase price and that a land control board consent was not obtained. At **paragraphs 7 - 9** of his affidavit dated **22/6/2009** the 1st defendant states as follows:

"7. That indeed the plaintiff /respondent and I executed a transfer of shares form to be filed and/or effected on obtaining the consent of the land control board and upon the payment of the balance of the purchase price.

8. That however the plaintiff /respondent did not raise the balance of the purchase price and the consent of the land control Board was therefore neither sought nor obtained.

9. That as a result the said sale agreement lapsed through the operation of the law."

17. The 1st defendant relies on the letter dated **30/5/1985** written by CK Patel Advocate as evidence of the rescission. Since the said letter does not state the clause in the agreement relied on, and parties must be held fast to the covenants they make, this court has to examine the agreement to decipher whether the rescission claimed in that letter was justified or not.

18. The agreement dated **30/4/1982** acknowledges in its recitals that by virtue of his shareholding in the company 1st defendant has already been allocated land in **LR NO 548** and that the subplot is known as **plot No 20** which he agreed to sell to the plaintiff under terms. The plaintiff is therefore right in stating that he bought land. In this court's thinking the transfer of shares to the plaintiff was merely meant to make the transfer of the land to the plaintiff's name easier once shares were registered in his name since he would automatically be issued with title in his name without going through the 1st defendant. The balance of the purchase price, default of which the 1st defendant has seized upon as his *cassus belli*, was to be paid "*after the transfer of the said property has been effected, in company's books and the boundaries being marked.*" Possession was to be given to the purchaser "*immediately on the vendor receiving the full purchase price.*" By clause 6 of the agreement the vendor was to do all acts that were "*necessary to effect the transfer of his plot to the purchaser.*"

19. So, the parties were aware that there was an identifiable plot on the ground besides the shares in the company. It appears however that since titles had not issued the parties were still fuzzy about the boundaries thereof hence the provision in clause 4 of the marking of boundaries. It became the contractual duty of the seller to have the boundaries identified and marked on the ground. Secondly, it also became his duty to inform the buyer of that development so that the latter could pay the balance of the purchase price and be put into possession. Thirdly, the seller was to have the plot transferred to the buyer so that the buyer would pay the balance of the purchase price. The payment of the balance of the purchase price was condition precedent to several other duties by

the 1st defendant. In this court's view that the seller had not complied with such vital conditions in the agreement with the buyer should disentitle him from claiming any right to rescission of the agreement they entered into voluntarily.

20. The second issue that arises is whether there was effective rescission of the agreement between the plaintiff and the 1st defendant. The discourse on the previous point indirectly addresses this point. I am only to make it more clear at this juncture that the 1st defendant could only have been entitled to rescind the agreement if he had complied with the terms of the agreement condition precedent to the payment of the balance of the purchase price. The answer to this issue therefore is that there was no effective rescission of the agreement between the plaintiff and the 1st defendant.

21. As to whether the agreement was for the sale of shares or of land, the parties have taken diametrically opposed positions. However, as stated earlier in this judgment, a perusal of the agreement shows that there was land and there were shares. The shares had in this court's view translated into land which had been issued with an identification number and the only step that remained was the precise demarcation of the boundaries on the ground and the issuance of title to the 1st defendant. It was at this point that the parties entered into a transaction. It has also been observed that the transfer of the shares to the plaintiff was only a part of the process, and it was meant to make the issuance of title to the plaintiff without it having to be first issued to the 1st defendant. The reference in the agreement to the shares is overshadowed by the reference to land, and that per se is evidence that the parties were transacting over a particular subdivision of **LR NO 548**.

22. Now I will address the issue of whether the sale of the land to the 2nd defendant by the 1st defendant was fraudulent and whether it ought to be nullified and an order be issued that the land be registered in the plaintiff's name. The 2nd defendant claims to be a bona fide purchaser for valuer without notice.

23. The definition of a *bona fide purchaser* is one who genuinely intends to purchase the property offered for sale and does not intend to acquire it wrongly. A *bona fide* purchaser may successfully rely on the *bona fide* doctrine if he proves 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. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

24. In **Joyce Wairimu Karanja v James Mburu Ngunjiri & 3 others [2018] eKLR** the court stated as follows:

“32. In similar vein, the Court of Appeal had this to say in Nancy Kahoya Amadiva v Expert Credit Limited & Another:

“The 2nd respondent argues that he was an innocent purchaser for value and was not party to the fraud. This brings us to the question; what is the extent of due diligence to be exercised by a purchaser” In **Captain Patrick Kanyagia and Another v Damaris Wangeci and others, this court held that there is no duty cast, in law, on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell. This was also reiterated by this court more recently in **David Katana Ngomba v Shafi Grewal Kaka [2014] eKLR**. In **Priscilla Krobought Grant v Kenya Commercial Finance company Ltd and others Civil Appeal No.227 of 1995 (unreported)**, this court held that a purchaser at a public auction was protected by section 69(B) of the Indian Transfer of Property Act and could only lose the protection if it was proved that there was an improper or irregular exercise of the statutory power of sale of which the purchaser had notice.”**

25. Though the case **Nancy Kahoya Amadiva v Expert Credit Limited & Another** relates to power of sale the same *bona fide purchaser* principle is applicable even in ordinary transactions. This court has sought out evidence of fraud and found that the mere

fact that the 1st defendant admits that a caution had been registered over the said land was evidence and a public notice of the plaintiff's interest in it. Other than state that his advocate wrote to the Land Registrar in respect of that caution, there is no evidence from the defendants of how the caution was dealt with, or that the caution that the plaintiff lodged over the suit title was procedurally removed. The evidence of proceedings before the Land Registrar for the removal of the caution would have gone a long way in establishing that the procedure employed was proper and that the plaintiff was involved in it. A mere letter by the 1st defendant's advocate without more was insufficient to occasion the removal of the caution. In his evidence the 1st defendant stated as follows:

“The caution on the land was removed in 2008 and reinstated in 2009 as the land had already been transferred to Joel. The agreement had been cancelled so I removed the caution.”

26. Section 112 of the Evidence Act provides that:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

27. It is hardly plausible that in the current scenario where the 1st and 2nd defendants would be required to prove that the law was followed in the removal of the caution that the omission to adduce such evidence was accidental. These were facts that are presumed to have been within their knowledge; that is the evidence that would have saved the defendants from a declaration that the sale between them was fraudulent. As found in the case of **Serraco Limited v Attorney General [2016] eKLR** only an adverse conclusion can be drawn from the defendant's failure to bring that kind of evidence, and that conclusion is that they overrode the proper method of removing the caution to effect the transfer between them fraudulently.

28. The plaintiff having lodged a caution, it would have been expected that the 2nd defendant would upon conducting an official search at the land registry find that the land was encumbered and sought the discharge of the encumbrance before the sale. The only evidence that the 2nd defendant gave at the hearing regarding the caution was as follows:

“I am not aware of any restriction registered against the land. in 2005 I bought the land free from all encumbrances. I had no idea there was a restriction on the title. I conducted a search. We also went through a land control Board. I have not produced the search.”

29. It would be against good practice to have every party that fails to conduct proper due diligence plead for the protection of this court over matters in which he could have had control over. If there was a search done, the 2nd defendant ought to have produced it, in default of which this court can only presume either that no search was conducted, or that the certificate of official search if produced would reflect that the 2nd defendant knew of the existence of the registration of the plaintiff's caution over the suit land; besides, it was incumbent on the 1st defendant to disclose as a measure of good faith that he had been involved in a previous transaction with the plaintiff. In this court's view, the 2nd defendant failed to conduct proper due diligence or is concealing the findings he got upon conducting a search over the title. Either way, he has failed to establish that he is a *bona fide* purchaser for valuer without notice. The conclusion of this court is that both defendants entered into a conspiracy or collusion to unjustifiably deny the plaintiff his rights in the land by having it registered in the 2nd defendant's name. The further evidence of such a conspiracy is that in his agreement 1st defendant used a company to transfer the land while the land to the 2nd defendant while he had as a natural person sold it to the plaintiff; the 2nd defendant clearly stated that the company was owned by the 1st defendant and a member of his family and therefore this kind of action is akin to an adult man hiding behind a blade of glass, and is further evidence of fraud on the part of the defendants.

30. The provisions of Section 26 of the Land Registration Act are as follows:

“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(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.”

31. Given the tenor and import of the foregoing statutory provisions, the 2nd defendant can not escape their effect as he is evidently culpable for fraud alongside the 1st defendant. Consequently, I find that his title is liable to be cancelled by this court.

32. In the end I find that the plaintiff has established his claim against both defendants and the issue arises as to who should pay costs of the suit. Having considered the circumstances of this case, I find that the defendants are equally culpable for wrongful and fraudulent action against the plaintiff's interest in the land and that they ought to bear the costs of these proceedings jointly and severally.

33. I therefore enter judgment in favour of the plaintiff against the defendants jointly and severally and I issue the following orders:

a. The transfer of title No. Olenguruone/Keringet Block 1/20 to the 2nd defendant is hereby nullified by reason of fraud of which the 2nd defendant was part and the Land Registrar Nakuru shall rectify the land register to reflect the registration of the land as it was before the said transfer;

b. The title deed issued in favour of the 2nd defendant over title No. Olenguruone/Keringet Block 1/20 is hereby cancelled.

c. The plaintiff shall within 30 days of this judgment pay to the 1st defendant Kenya shillings seventy thousand (Kshs.70,000/=), or in the event that the 1st defendant refuses to receive the said Kenya shillings seventy thousand (Kshs.70,000/=) only from the plaintiff directly, deposit in court the sum Kenya shillings seventy thousand (Kshs.70,000/=) being the balance of the purchase price stated in the agreement dated 30/4/1982 for onward payment to the 1st defendant;

d. The 1st defendant shall execute all requisite documents to effect transfer to the plaintiff all right and interest in land title No. Olenguruone/Keringet Block 1/20 to the plaintiff within 14 days of the plaintiff either paying directly to the 1st defendant or depositing in court the sum Kenya shillings seventy thousand (Kshs.70,000/=) for onward payment to the 1st defendant as the case may be as ordered in prayer no (c) above.

e. In default of execution of the documents requisite for the transfer of the suit land by the 1st defendant to the plaintiff the Deputy Registrar of this court shall execute all documents necessary to effect the transfer of land title No. Olenguruone/Keringet Block 1/20 into the plaintiff's name;

f. The costs of these proceedings shall be borne by the defendants jointly and severally.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 27TH DAY OF JANUARY, 2022

MWANGI NJOROGE

JUDGE, ELC, NAKURU



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