



**IN THE COURT OF APPEAL AT KISUMU**

**(Coram: Madan, Law & Potter JJA**

**CIVIL APPEAL NO 12 OF 1980**

**Between**

**CHAUHAN.....APPELLANT**

**AND**

**OMAGWA.....RESPONDENT**

*(Appeal from the High Court at Kisii, Cotran J)*

**JUDGMENT**

June 13, 1980 **Madan JA** delivered the following Judgment.

The appellant was the second defendant in a suit instituted by the respondent against him in the High Court with one Solomon B Kenyanya as the first defendant.

The first defendant was the registered owner under the Registered Land Act of Title Number Central Kitutu/Daraja Mbili/258 which he agreed to sell to the respondent for the agreed purchase price of Shs 17,500 under the terms of an agreement of sale made between them dated August 27, 1976. Clauses 4 and 5 of the agreement of sale provided:

“4. That the vendor is hereby restrained from entering into any other contract of sale with third parties in respect of the same piece of land.

5. That the vendor shall put the purchaser (respondent) into possession of the said piece of land on the signing hereof.”

According to a Transfer of Land Form the first defendant on August 31, 1977 sold the same piece of land for Shs 10,000 to the appellant who is now registered as the absolute proprietor and he holds a Land Certificate in respect of it.

The respondent said in his evidence in court that he went into possession on signing the agreement and began to build a house thereon which was almost completed. The respondent also produced a letter dated August 2, 1977 written by the first defendant to the Town Engineer, Kisii, in which the first defendant said that he had come to an agreement with the respondent concerning the land and “give my go ahead to the creation of buildings and all in the said piece of land.”

The appellant gave evidence in court during the course of which he said that he did not know the first defendant has sold the land to someone else, that he fenced the plot but he was stopped when he wanted to develop it.

The averments in paragraphs 8 and 9 of the Amended Plaintiff stated that the first defendant with intent to defraud and/or deceive the respondent and knowingly and with non-disclosure to the respondent and/or the appellant did enter into a contract of sale with a third party, ie the appellant, and purported to sell the land to the appellant which sale was illegal and false; that the first defendant

“falsely and without just cause and while knowing that he had legally sold the Daraja Mbili parcel No 258, in fraud of the plaintiff (respondent) proceeded to transfer the said sold land to the 2nd purchaser, the 2nd defendant (appellant):

**PARTICULARS OF FRAUD:**

(i) Specific knowledge in him (the first defendant) that he had already sold to the plaintiff the same parcel of land.

(ii) Non-disclosure to the 2nd defendant that the same parcel of land had already been sold to the plaintiff.

(iii) Non-disclosure to the 2nd defendant that the buildings now erected and still on the said parcel of land were those of the plaintiff.

(iv) Deceiving the 2nd defendant that the said parcel of land was free of any encumbrances when he (1st defendant) actually knew of his contract of sale with the plaintiff.”

Cotran J granted the respondent’s prayer in the plaint being a declaration that the sale and transfer of plot Central Kitutu/Daraja Mbili/258 made by the first defendant to the 2nd defendant (appellant) on October 31, 1977 was null and void. The learned judge also directed under section 143 of the Registered Land Act that the registration of Plot 258 in the 2nd defendant’s name be cancelled and the register rectified to show the respondent as the absolute proprietor.

The appellant has appealed. Summarized, his grounds of appeal are that the learned judge (1) erred in law in holding that the sale and transfer of Plot No 258 made by the first defendant to the appellant was null and void and in directing under section 143 that the registration of Plot No 258 in the appellant’s name be cancelled; (2) failed to consider the provisions of section 143(2);(3) erred in relying upon certain facts in the evidence to conclude that the appellant acquiesced in the huge fraud by the first defendant against the respondent; (4) erred in holding that the appellant was not a *bona fide* purchaser of Plot No 258 for valuable consideration without any notice or knowledge of the previous transaction between the 1st defendant and the respondent; (5) erred in not considering that the amended plaint did not disclose any cause of action against the appellant.

This is an appropriate stage to acquaint ourselves with the provisions of section 143 of the Registered Land Act which are:

“143. (1) Subject to sub-section (2) of this section, 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 or substantially contributed to it by his act, neglect or default.”

The Transfer of Land Form shows that the transfers in favour of the appellant was not a first registration; there was a previous registration in favour of the first defendant which may or may not have been a first registration. It is only the first registration which may not be attacked even if obtained, made or omitted by fraud. Before us Mr. Fernandes for the appellant conceded that the registration in favour of the appellant was a second registration.

The provisions of section 143(2) did not prevent the learned judge from making an order for rectification of the register for even if the appellant did not acquiesce in the fraud by the first defendant or even if he was a *bona fide* purchaser of the land for value without any knowledge of the previous transaction between the first defendant and the respondent, the appellant was not in possession of the land as stated in subsection (2) which is a pre-requisite to immunity against rectification of the register.

Apart from the respondent's evidence to that effect, it was clear from the appellant's own evidence that he did not have possession of the land which was with the respondent from the date of the agreement between him and the first defendant. The respondent's principal cause of action was against the first defendant to whom the learned judge appropriately referred as a dishonest crook; it was necessary to join the appellant as a party as the registered owner of the land. The learned judge having been satisfied that the registration in favour of the appellant was made by fraud by the first defendant he was authorized by section 143 to order rectification even if the plaint did not disclose a cause of action against the appellant provided the appellant was not in possession of the land which he was not as I have pointed out. It was the registration made by fraud of the first defendant which permitted an order for rectification to be made by the court under section 143(1).

Mr. Fernandes submitted the appellant was in possession because he fenced the plot. I think possession means actual possessing of the land. The appellant admitted he was prevented from developing the plot which must mean that he was ousted from possession if he ever had it and did to have it at the time of the making of the order. The respondent said he went into possession on the signing of the agreement and then he began to build a house which was almost complete. There was no cross-examination of the respondent about that, and this was virtually an admission that possession was with the respondent.

Mr. Fernandes also asked us to order a re-trial so that the question of possession may be properly pleaded and ventilated. I think it is too late for that. The suit in the High Court was fought and determined after the original plaint was amended twice, and altogether 4 statements of defence were filed.

With respect the learned judge's decision was right and I agree with him, and in particular when he said:

"I do not accept for one moment that the second defendant was a *bona fide* purchaser. He was born and bred in Kisii and is a businessman in the Town. The Plot is only 1 ½ miles from the centre of the town. He admits he knew the land well and went to inspect it before buying. He could not have failed to see the operations on it which the plaintiff had started.

Furthermore it appears that the first and 2nd defendants are business partners. It is hard to believe that the 2nd defendant would have agreed to become the partner of a man who allegedly cheated him and sold him a plot which he had sold to someone else over a year previously. The truth is that the 1st defendant was involved in a huge fraud against the plaintiff and the 2nd defendant, at the very least, acquiesced in it. The fact that the price was Shs 10,000 when the same land fetched 17,500 over a year earlier again speaks for itself."

I would dismiss the appeal with costs.

As Law and Potter JJA agree it is so ordered.

**Law JA.** I agree with the judgment delivered by Madan JA and I concur in the order proposed by him. This is a case of a fraudulent sale of the same piece of land to two separate persons, first to the respondent and later to the appellant. The appellant has secured a registered title, but the respondent is and always has been in possession. The respondent claimed rectification of the Register; the registration in favour of the appellant was obtained or made as a result of the transferor's fraud (as he had already disposed of his interest to the respondent for value), and the learned judge was entitled to order rectification of the Register into the respondent's name unless the appellant could invoke the protection of sub-section (2) of section 143 of the Registered Land Act. The first pre-requisite of that sub-section is that rectification can not be ordered so as to affect the title of a proprietor who is in possession. The appellant was not in possession, so that sub-section (2) does not avail him. In these circumstances, the judge was free to order

rectification as he did, in favour of the party with the prior claim. I have no reason to doubt that, in proceeding as he did, the learned judge correctly exercised his discretion. For these reasons I would dismiss this appeal.

**Potter JA.** I agree with the judgments of Madan JA and Law JA and with the order proposed and I have nothing useful to add.

**Dated and delivered at Kisumu this 13th day of June , 1980.**

**C.B MADAN**

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**JUDGE OF APPEAL**

**E.J.E LAW**

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**JUDGE OF APPEAL**

**K.D POTTER**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**