



**IN THE COURT OF APPEAL**

**AT NYERI**

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

**CIVIL APPEAL NO. 5 OF 2014**

**EVANSON WAMBUGU GACHUGI.....APPELLANT**

**VERSUS**

**SIMON WAINAINA GATWIKI.....1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR, NYERI DISTRICT.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

*(An appeal against the Judgment of the High Court of Kenya at Nyeri*

*(Sergon, J.) dated 27<sup>th</sup> May, 2011*

*in*

**H.C.C.C. No. 38 of 2003)**

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**JUDGMENT OF THE COURT**

[1] This is an appeal against the judgment of Sergon, J. delivered on 27<sup>th</sup> May, 2011 in *Nyeri H.C.C.C. No. 38 of 2003*. In that judgment the following orders were made:

- a. *The 1<sup>st</sup> defendant and his agents, servants or anybody claiming right through the 1<sup>st</sup> defendant are restrained from entering, cultivating, digging, building, alienating, selling, charging, licensing or otherwise dealing with the Land Parcel No.Chinga/Gikigie/800, until the determination of this suit.*
- b. *A declaration that the Land Parcel No. Chinga/Gikigie/800, was illegally and fraudulently transferred to the 1<sup>st</sup> defendant's name and that its rightful owner is the said Josiah Gichau Gatwiki (deceased).*
- c. *An order is issued directing the 2<sup>nd</sup> and 3<sup>rd</sup> defendants herein to rectify official records on Chinga/Gikigie/800, to cancel the title deed issued to the 1<sup>st</sup> defendant and to issue a new title for Chinga/Gikigie/800, in the name of the plaintiff.*

d. *Costs of the suit is awarded to the plaintiff.*

[2] Evanson Wambugu Gachuhi (*appellant*) was aggrieved by the said orders. He filed this appeal which is predicated on six grounds of appeal as follows:

- a. *That the learned trial Judge erred in law and in fact in failing to note that fraud must be proved under Section 143 to warrant a cancellation of title; which fraud was never proved in evidence in this matter.*
- b. *That the learned trial Judge erred in law in failing to appreciate that attestation of an agreement to sale does not of itself vitiate a sale agreement where both transacting parties are at consensus-ad-iem.*
- c. *That the learned trial Judge erred in failing to note that a transfer or land form duly attested by an Advocate who it is alleged does not have a practicing certificate does not ipso facto render the transfer itself fraudulent and does not go to the root of the transaction for sale at all, as property in agricultural land passes as at the point of granting a Land Control Board Consent.*
- d. *That the learned trial Judge erred in failing to appreciate that the plaintiff had not proved any fraudulent intent on the part of the defendant appellant thereby arriving at the wrong decision especially where the transaction had apparently been blessed with the requisite Land Control Board Consent.*
- e. *That the learned trial Judge erred in law and in fact in arriving at a decision against the law and weight of evidence.*
- f. *That the learned trial Judge erred in law and in fact at failing to note that the plaintiff had no valid claim whatsoever as against the defendant appellant.*

[3] During the hearing of this appeal, Mr. Karweru, learned counsel for the appellant, argued that the particulars of fraud that were the basis of the 1<sup>st</sup> respondent's claim before the High Court, were not proved. The suit land being **Chinga/Gikigie/800**, was transferred to the appellant according to the law. There was a valid consent to transfer the suit premises to the appellant. The original owner of the suit property one Josiah Gichau Gatuiku (deceased), entered into a sale agreement, he was paid consideration, signed all the transfer documents in favour of the appellant, thus the transfer was effected lawfully. It was not necessary to involve the estate of the deceased, as there was no such requirement for the deceased or his personal representative to attend the Lands Office for the transfer. Counsel faulted the conclusion by the trial Judge that the transfer documents were prepared and witnessed by an advocate who did not have a practicing certificate. Counsel was of the view that the registered proprietor of the suit premises and the appellant both submitted to the said advocate who prepared the transfer, thus, it was unfair to penalise the appellant for the mistakes by a counsel which should not be visited on an innocent client.

[4] Moreover, there was no prayer in the 1<sup>st</sup> respondent's suit seeking for a declaratory order that the transfer which was prepared by unqualified person be declared a nullity for want of attestation. Further, the transfer had been effected by the time the suit was filed and a title had already been issued in the name of the appellant. The trial Judge also failed to take into account the fact that the appellant did not know that the advocate who prepared the documents regarding the sale transaction did not hold a valid practicing certificate and, therefore, lacked the necessary powers to commission them. According to the provisions of **Section 143 (2)** of the repealed **Cap 300**, a title cannot be cancelled or amended to affect a proprietor who is in possession and who had acquired the land for valuable consideration unless such proprietor had knowledge of the omission, fraud or mistake for which the rectification is sought, or, he caused the omission or fraud or substantially contributed to it by his act, neglect or default. The court was faulted for shifting the burden of dealing of unqualified advocates only upon the appellant despite the fact that, the maker of the document of transfer was the deceased. It is the deceased who authenticated the document before the advocate. It was, therefore, wrong for the Judge to find the appellant was the one who was at fault.

[5] Counsel submitted that even if there was fraud, the orders that commended themselves was an order that the property do revert to the name of the deceased as opposed to the order that directed the property to be registered in the name of the 1<sup>st</sup> respondent. On the issue of whether there was collusion between the appellant and the Registrar of Lands at Nyeri; Mr. Karweru was of the view that none was disclosed by the evidence on record. He argued that once the appellant and the deceased entered into a sale agreement, and the appellant paid a sum of Ksh. 375,000/= towards the purchase price and the consent of the Land Control Board was obtained, the ownership in the suit premises passed to the appellant at the point when consent was obtained. There was no requirement for the presence of the deceased during the transfer of the suit property. That was not necessary as the property had already passed on before the death of the deceased and the transfer at Lands Office was merely a formality.

[6] This appeal was opposed; Miss Mwai, learned counsel for the 1<sup>st</sup> respondent, submitted that the suit property belonged to the deceased who died on 17<sup>th</sup> July, 2002. The transfer of the property was effected ten days later on 27<sup>th</sup> July, 2002, before the letters of administration in respect of the deceased estate were obtained. The 1<sup>st</sup> respondent who subsequently became the administrator of the deceased's estate was not aware the suit land had been sold. He got to know about the sale when the family was preparing to bury the deceased in the suit land and they were presented with a Court Order by the appellant claiming that he had purchased the land. The 1<sup>st</sup> respondent contended that the consideration for the suit property was not paid properly according to the purported sale agreement. Therefore, the title to the property could not have passed.

[7] The said agreement was written a day before the consent to transfer was obtained and before the full purchase price was paid as stipulated in the agreement. Moreover the original title of the suit property was with the 1<sup>st</sup> respondent. It was never surrendered to the Lands Office in support of the transfer as the original must be surrendered for cancellation before a new title is issued. In the event that the original transfer was unavailable, it was incumbent upon the Land Registrar to publicise its loss in the Kenya Gazette which was not done in this case.

[8] During the hearing of the matter before the High Court, the Land Registrar who testified could not support the contention that the transfer was validly effected because they did not produce any of the documents. It was alleged that the offices were broken into and all the documents were stolen. Miss Mwai submitted that there is a long line of authorities where the Courts have held that an advocate who works for a client without a valid practicing certificate, the transaction conducted by such an advocate is a nullity. Counsel cited the following cases:

**National Bank of Kenya Ltd., vs Wilson Ndolo Ayah, Nairobi C.A. No. 119 of 2002,**

**Abraham Mwangi Njihia vs Boundaries Commission & 2 Others, Milimani H. C. Election Appeal No. 3 of 2013,**

**Kenya Power and Lighting Co. Ltd., vs Mahinda T/A Nyeri Trade Centre, Civil Appeal (Application) No. 148 of 2004 (2005) KLR,**

**Charles Mwangi Karingithi vs Benson G. Macharia & Kimotho Mugambi, Nyeri H.C.C.C. No. 315 of 1996.**

[9] This is a first appeal, that being so, we are conscious of our duty to re- evaluate the evidence before the trial court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify. See the case of **Selle v Associated Motor Boat Company, [1968] EA 123,** at page 126 where it was held:

***“...this Court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in that respect...”***

[10] The facts of this case as can be deciphered from the record before us, are in our view, brief and straight forward. We wish to revert to them, first the pleadings. By the amended plaint, the 1<sup>st</sup> respondent, the son of the late Josiah Gachau Gatwiku, who was the registered proprietor of the suit premises, alleged that his father died on 17<sup>th</sup> July, 2002, and was buried on 26<sup>th</sup> July, 2002. On 25<sup>th</sup> July, 2002, prior to the burial of his father, the appellant is alleged to have connived with the Land Registrar, Nyeri, and caused the transfer of the suit premises to the appellant. The particulars of collusion are set out in the plaint. The Land Registrar was also accused of failure to exercise due diligence and for compromising the interest and rights of the deceased regarding the ownership of the suit property when a transfer was effected after the death of the deceased without first seeking to be furnished with the letters of administration and the original title to the property. The particulars of lack of exercise of the duty of care are also stated in the amended plaint.

[11] The 1<sup>st</sup> respondent contended that he learnt about the transfer on 25<sup>th</sup> July, 2002, when they were served with a court order barring them from burying their father on the suit land. The 1<sup>st</sup> appellant filed this suit seeking for an order to restrain the appellant from dealing with the suit land. He sought for an order of declaration that the suit land was illegally and fraudulently transferred to the appellant when the registered owner had died. Lastly, he prayed for an order directing the Land Registrar, to rectify the official records of the suit premises by cancelling the title issued to the appellant and to restore the title in the name of the 1<sup>st</sup> respondent.

[12] The appellant filed a defence denying all the allegations by the 1<sup>st</sup> respondent and in particular, he challenged the form of the suit which he contended should have been by way of an originating summons. The joinder of the Land Registrar and the Attorney General were also challenged on account of limitation of period and lastly, as the title was transferred to the appellant, it was contended the prayers for rectification of the title were not properly founded in law.

[13] During the hearing of the suit, the 1<sup>st</sup> respondent gave evidence and reiterated that he filed the suit as the legal representative of his late father to recover the suit premises from the appellant. He produced as exhibits a copy of the Letters of Administration issued on 16<sup>th</sup> April, 2003. The 1<sup>st</sup> respondent told the trial Judge that his family was served with an order stopping them from burying their father on the suit land. After they buried their father, he conducted a search at the Lands' Office, that is when he discovered that the appellant had caused the suit premises to be transferred to him on 25<sup>th</sup> July, 2007. This shocked the 1<sup>st</sup> respondent because he was still in possession of the original title which he produced as an exhibit. He also faulted the Land Registrar, Nyeri, for transferring his father's property when his father was deceased and without establishing the whereabouts of the original title. He testified that the Land Registrar was in collusion with the appellant. He also testified that the agreement for sale between the appellant and his late father was drawn by an advocate by the name Nyawira Gitonga & Company, who did not have a practicing certificate. He also produced a letter from the Law Society of Kenya showing the said Advocate had no practicing certificate at the time and could not draw valid legal documents. He contended that if there was a sale agreement, his family that was in possession of the suit land was not consulted.

[14] The appellant also tendered evidence of how he purchased the suit land vide an agreement dated 27<sup>th</sup> February, 2002, which was signed before an advocate and he paid a consideration of Kshs.375/= as per the acknowledgment receipts which he produced in evidence. The land was transferred to him on 25<sup>th</sup> July, 2002, as per the original title which bore his name. He narrated to the Judge how on 20<sup>th</sup> February, 2002, he applied for Land Control Board Consent, they appeared before the board on 12<sup>th</sup> March, 2002, and he was issued with consent to transfer which was also produced as an exhibit. The transfer of the suit land was also signed by the vendor Josiah Gachau Gatwiku and he was given possession of the suit land. He agreed that the transfer was effected after the death of the vendor but he claimed that he was in possession of a valid consent and transfer. All the documents were drawn by the firm of Nyawira Gitonga & Company because he said he was not aware that she was not holding a valid practicing certificate.

[15] Agnes Wangu Kuria, the Land Registrar, Nyeri, testified that the suit land was transferred to the appellant on 25<sup>th</sup> July, 2002. She denied there was collusion with the appellant and denied the title was illegally transferred as the Lands' Office usually issues titles on the basis of the documents presented. She could not however produce the documents of transfer that was presented to the lands' office but produced a letter written by her colleague indicating that the lands' office Nyeri, was broken into and, therefore, they could not produce any documents to show how the transfer was effected.

[16] Parties also filed written submissions in support of their respective propositions which were considered by the learned trial Judge alongside the pleadings and the evidence adduced. The Judge identified three issues for determination as follows:

- i. ***Whether or not the Defendants colluded to fraudulently transfer L.R. NO. CHINGA/GIKIGIE/800, to the 1<sup>st</sup> defendant.***
- ii. ***Whether or not the aforesaid parcel was properly transferred.***
- iii. ***Whether or not the claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is maintainable?***

[17] The learned Judge in his judgment addressed those three issues in some considerable details, he found there was evidence to support the allegation of collusion because the transfer was effected when the deceased had passed away. The sale agreement stated that the land was to be sold for Kshs.425,000/= and the purchase price was to be paid in full before the transfer. The acknowledgment receipt that was produced shows that the deceased received a Kshs.375,000/= being the final payment of purchase price. It was thus clear the payment was made in instalments despite the provision in the agreement that the entire consideration was to be paid at once. The Land Control Board Consent indicated the consideration for the suit property as Kshs.200,000/=. The Judge noted it was curious that the land was transferred without the surrender of the original title as ordinarily, if the original title cannot be found the loss is usually published in the Kenya Gazette. The Land Registrar did not help the court because they offered no explanation as to how the land was transferred without the original title. The appellant was also unable to explain how he effected the transfer before paying the entire consideration and further, there was no explanation as to why the parties indicated the consideration when obtaining the Land Control Board Consent as Kshs.200,000/= when indeed the property was to be sold for Kshs.425,000/=.

[18] On all this, the Judge concluded as follows:

***“The evidence of such litigants cannot be trusted by this court. The letter dated 26<sup>th</sup> July, 2010, produced as an exhibit by the District Land Registrar is a clear indication that certain documents were either lost or deliberately concealed from court. It is alleged that the Lands' Office was broken into and documents related to the land in dispute were lost. In my view, that is another method of cover-up. The above analysis clearly shows that there was a collusion between the Lands' Office and the 1<sup>st</sup> Defendant to unlawfully transfer the land in question to the 1<sup>st</sup> Defendant”.***

[19] The Judge also found the documents namely the sale agreement, the acknowledgment receipts and the transfer were drawn and witnessed by Nyawira Gitonga who did not have a valid practicing certificate. Relying on the case of;- ***National Bank of Kenya vs Wilson Ndolo Ayah,(supra)***; the Judge found the documents were invalid and could not pass an interest in the property.

On the validity of the suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the Judge was of the view that the cause of action arose on 25<sup>th</sup> July, 2002, and the suit was filed on 5<sup>th</sup> May, 2003, and although the ***Government's Proceedings Act*** provides that the Government be served with a 30 days' notice. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were joined in the suit later when it was not possible to serve them with a demand notice. The 1<sup>st</sup> respondent's suit was allowed as prayed.

[20] These are the brief facts of the matter that was before the High Court which we have considered. The issues before us remain the same that is, whether the Judge erred by holding that the suit land was illegally and fraudulently transferred to the appellant and by ordering the rectification of the title and issuance of the title in the name of the 1<sup>st</sup> respondent. It is not disputed that when the title was transferred to the appellant on 27<sup>th</sup> July, 2002, the registered proprietor of the suit premises had passed away. The 1<sup>st</sup> respondent was issued with the Letters of Administration in April, 2003. The appellant contended that he was possessed of the required documents that enabled him to effect a valid transfer. This was, however, challenged. The Judge who heard and saw the witnesses testify found fault in the said transfer and gave his reasons.

[21] The reasons advanced by the Judge are in our view valid, the appellant was dealing with the property of a deceased. There is no indication in the records that he was not aware that the vendor of the property had died. Indeed, he had obtained an order of the court barring the vendor's family from interring the body of the deceased on the suit property. Questions were raised on how the transfer was effected without the original title which was still in possession of the 1<sup>st</sup> respondent. The issues of the validity of the sale agreement and the transfer documents were also raised. The learned trial Judge found those documents which formed the basis of the transfer of the suit premises wanting in two fundamental ways. Firstly, the documents were drawn by a lawyer who did not hold a valid practicing certificate. It is now trite law that any legal instrument, or pleading prepared or filed by an advocate without a valid practicing certificate are invalid and of no legal effect.

[22] Counsel for the appellant argued that his client should not be penalised for the mistakes of the lawyer as he was not aware that the said advocate did not hold a valid practicing certificate. Also, the burden of bearing the blunt, and consequences of consulting unqualified advocate should not be visited on him alone because the vendor had a part to play. The problem we find with this line of submission is that the appellant effected the transfer after the deceased had passed away and he did not deem it fit to involve the estate of the deceased. He who comes to equity must do so with clean hands. If the appellant did not want to take a short cut or probably take advantage of the deceased vendor, he would have involved the estate of the deceased who could have taken the blame (if there was any to be attributed to the deceased). As matters are, the appellant was bound to have judicial notice of all the lawyers who have a valid practicing certificate. This is as it was held in the case of;- ***National Bank of Kenya Limited vs Ndolo Ayah*** (supra), where this Court held:

***“Besides, the Law Society of this country publishes annually, a list of advocates who hold a practicing certificate, for general information. This is a fact we take judicial notice of as courts are also provided with such a list for purposes of denying audience to advocates who do not appear on the list. For that reason, the public is deemed to have notice of advocates who are unqualified to offer legal services at a fee. It is also noteworthy that the Advocates who are unqualified to offer legal services at a fee. It is also noteworthy that the Advocates Act itself makes provision for the recovery of the fees paid to such an advocate. So the innocent party is reasonably covered, although in our view provisions similar to Section 19 of the Stamp Duty Act, should have been included in the Advocates Act to remove any doubt as to the validity of documents drawn by unqualified advocates.***

***It is public policy that courts should not aid in the perpetuation of illegalities. Invalidating documents drawn by such advocates we come to the conclusion that will discourage excuses being given for justifying the illegality.***

***A failure to invalidate the act by an unqualified advocate is likely to proved an incentive to repeat the illegal Act. For that reason alone, the charge and instrument of guarantee in this matter are invalid, and we so hold”.***

[23] On this issue of the validity of the transfer documents, we cannot fault the learned Judge for the conclusions that he made regarding the legality of the instruments of transfer that dispossessed the estate of the deceased of the suit land. On the other issue of whether the Judge could have ordered the transfer to the name of the 1<sup>st</sup> respondent. The Judge having found collusion on the part of the appellant and the

Land Registrar in the manner in which the transfer was effected, under **Section 143 (1)** of the **Repealed Registered Land Act**, the court is empowered to order the rectification of the Register by directing a registration to be cancelled if it was obtained by fraud or mistake. There is also no dispute that the 1<sup>st</sup> respondent is the administrator of the estate of the deceased and we find no fault in the order that directed title be registered in his name in that capacity as the administrator of the estate.

[24] Accordingly we find no merit in this appeal. We agree with the judgment of the High Court. The appeal is hereby dismissed with costs to the 1<sup>st</sup> respondent.

***Dated and delivered at Nyeri this 22<sup>nd</sup> day of July, 2014.***

***ALNASHIR VISRAM***

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***JUDGES OF APPEAL***

***MARTHA KOOME***

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***JUDGES OF APPEAL***

***OTIENO-ODEK***

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***JUDGES OF APPEAL***

I certify that this is a

true copy of the original.

**DEPUTY REGISTRAR**