



**Gichuki v Njoroge & 2 others (Environment and Land Appeal  
7 of 2021) [2023] KEELC 16378 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16378 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND APPEAL 7 OF 2021  
AK BOR, J  
MARCH 23, 2023**

**BETWEEN**

**GIBSON GICHUKI ..... APPELLANT**

**AND**

**PAULINE NYAKINYUA NJOROGE ..... 1<sup>ST</sup> RESPONDENT**

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

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

**JUDGMENT**

1. Being dissatisfied with the judgment delivered on December 17, 2018 by Hon W J Gichimu, the Appellant filed Nyeri ELC Appeal No 19 of 2018 on December 21, 2018. The ground of appeal was that the Learned Magistrate erred in law and fact when he entered judgment without considering the unique legal and factual circumstances of the case contrary to the law and that he therefore arrived at a wrong decision.
2. The Appellant filed Nyeri ELC No 2018 of 2013 seeking an injunction to restrain the Respondents from canceling and gazetting the cancellation of the title deed he held over Mugunda/Karemeno/Block 1563, which he claimed he purchased from the 1<sup>st</sup> Respondent for Kshs 250,000/= . He claimed that he conducted a search, did valuation, attended the land board and that the 1<sup>st</sup> Respondent signed the consent and he paid the fee for the title deed and subsequently the land was transferred to his name.
3. He averred that he was summoned to appear before the District Officer, Kieni on February 8, 2011 when the 1<sup>st</sup> Defendant alleged that he had illegally taken her land. He was again summoned vide the letter dated August 3, 2011, to appear before the 2<sup>nd</sup> Respondent on December 20, 2011 based on the allegations of fraud which the 1<sup>st</sup> Respondent made. He pleaded that he was summoned by other Government officers and was apprehensive that his title could be cancelled.



4. In her defence and counterclaim filed in February 2015, the 1<sup>st</sup> Respondent averred that the suit property originally belonged to her husband who died on March 22, 2008. She claimed that she discovered that the suit property had been transferred to her name and to the Appellant's name.
5. She denied that there was any agreement or that the Appellant purchased the suit property from her. She gave particulars of fraud and illegality on the part of the Appellant including intermeddling with the estate of the original owner of the land without administration, coercion of the 1<sup>st</sup> Respondent in respect of a purported sale and transfer of the suit property, purporting to effect an illegal sale of the property contrary to the law.
6. The 1<sup>st</sup> Respondent sought rectification of the register in respect of the suit property by cancellation of the Appellant's name and registration of the land in her late husband's name or her name as part of the estate of Johana Njoroge Githitho (deceased).
7. An order was made by the Nyeri High Court to transfer the suit to the Environment and Land Court (ELC) on May 3, 2018. The court record shows that the suit was transferred to the Chief Magistrates Court in Nanyuki on May 3, 2018, which is the court that heard the matter and delivered the judgment the subject of this appeal.
8. From the judgment delivered by the Learned Magistrate, it would seem that the parties agreed to adopt their witness statements and pleadings without calling oral evidence or going to trial. The Learned Magistrate analysed the evidence and identified the pertinent issue as the transfer of the suit property to the Appellant without any written agreement of sale.
9. The court found the oral contract for the disposition of the land unenforceable, null and void under Section 3 (3) of the [Law of Contract Act](#). The court found that the Plaintiff could not enforce an oral agreement which contravened the expression provisions of the [Law of Contract Act](#). Further, that the suit property was transferred to the Plaintiff contrary to the law and that the transfer could not therefore stand. The court found that the 1<sup>st</sup> Respondent had proved her counterclaim against the Appellant and ordered rectification of the register by cancellation of the Appellant's name and its registration in the name of the original owner, Johana Njoroge Githitho. The court also awarded the costs of the suit and counterclaim to the 1<sup>st</sup> Respondent.
10. The appeal was transferred from Nyeri ELC to Nanyuki ELC in September 2021. It came up for mention severally without parties appearing until March 22, 2022 when the Appellant's advocate attended court. The court gave directions on the hearing of the appeal and directed parties to file submissions. The Appellant filed his submissions but the Respondents did not file theirs. There is evidence of service on the court record.
11. The Appellant submitted that the 1<sup>st</sup> Respondent approached him to purchase the suit property because she did not have a child who could inherit her assets. That she went through a succession cause which was confirmed and the title was issued in her name before she sold it to the Appellant. After completion of payment, she attended the land control board and a new title was issued in the Appellant's name. The Appellant contended that the trial court erred in fact and in law when it failed to appreciate that there was a valid sale after a successful succession. Further, that apart from the sale price, the Appellant had spent substantial amounts of money to develop the suit land. The Appellant urged the court to allow the appeal.
12. The issue for determination is whether the appeal has merit. The Learned Magistrate's finding is pegged on Section 3(3) of the [Law of Contract Act](#) which prohibits the filing of a suit upon a contract for the disposition of an interest in land unless there is a written contract that meets the requirements



- stipulated in that sub-section. The trial court found that the Appellant could not enforce an oral agreement which in his view contravened Section 3(3) of the Law of Contract.
13. Parties agreed to adopt their witness statements and pleadings without calling oral evidence. The Appellant filed a copy of the 1<sup>st</sup> Respondent's temporary card giving her account number together with evidence of payment of Kshs 100,000/= made on September 28, 2010, Kshs 80,000/= paid on May 29, 2010 and Kshs 70,000/= paid on May 11, 2011. He produced a copy of the letter dated May 11, 2011 addressed to the 1<sup>st</sup> Respondent vide which he forwarded the final payment of Kshs 70,000/= . He produced a copy of the letter written by the Assistant Chief of Tigithi Location confirming that the 1<sup>st</sup> Respondent was the wife of the late Johana Njoroge Githithi and that she was not blessed with any children. He also produced a copy of the affidavit which the 1<sup>st</sup> Respondent swore on April 22, 2010 requesting the Secretary of Kieni East Farmers Company Limited to have the parcel of land transferred to her name.
  14. The Appellant produced a copy of the title issued to the 1<sup>st</sup> Respondent on May 6, 2010, the receipt for the payment for the title, a copy of the application for consent from the land control board which the 1<sup>st</sup> Respondent executed and the consent of the board given to the 1<sup>st</sup> Respondent on May 26, 2010 approving the sale of the suit property to the Plaintiff.
  15. While it is not in doubt that there was no sale agreement produced to support the sale, it is clear from the documents which the Appellant tendered in evidence that he did not bring the suit upon a contract for the disposition of land. The suit filed, as can be gleaned from the plaint, was to perfect and protect the title which was already registered in the Appellant's name and which was under threat of cancellation. The Learned Magistrate erroneously applied the requirements of Section 3(3) of the Law of Contract Act to the case.
  16. Since the Appellant was already registered as the owner of the suit land, Sections 24, 25 and 26 of the Land Registration Act come into play. The Appellant would be deemed to enjoy the rights safeguarded by those provisions unless the 1<sup>st</sup> Respondent proved on a balance of probabilities that the Appellant acquired title over the suit property through fraud or misrepresentation which he participated in; or that he acquired the title illegally, unprocedurally or through a corrupt scheme.
  17. In the counterclaim, the 1<sup>st</sup> Respondent pleaded particulars of fraud and illegality by the Appellant in getting registered as the owner of the suit property but she did not produce any documents to support her claim or controvert the documents which the Appellant produced to show that she executed the documents that transferred ownership of the suit land to the Appellant.
  18. The 1<sup>st</sup> Respondent's list of documents had three items on it, two being letters from the Land Registrar dated August 3, 2011 and September 18, 2013 while the third was indicated to be her bank statement. In this court's view, it would be an arduous task to prove fraud merely by filing documents in court without leading additional evidence to substantiate such a claim as the 1<sup>st</sup> Respondent did before the trial court. The 1<sup>st</sup> Respondent needed to adduce evidence to show how the suit land came to be registered in her name and how the Appellant coerced her as she pleaded in her counterclaim. She termed the transaction as a purported sale and transfer of the suit property to the Appellant.
  19. The transfer of land which the Appellant produced was executed by the 1<sup>st</sup> Respondent through a right-hand thumb print. The 1<sup>st</sup> Respondent's photograph was affixed to the transfer form and her identity card number given as well as the KRA pin. Denis Mandi advocate witnessed the execution of the transfer and verified that the 1<sup>st</sup> Respondent appeared before him on June 7, 2010 and was identified by her identity card. The Appellant also produced a copy of the valuation for stamp duty, evidence of payment of the stamp duty and the title issued in his name on June 25, 2010. He produced the



summons issued by the District Officer Kieni West Division and the District Land Registrar Nyeri. The 1<sup>st</sup> Respondent did not lead evidence to challenge the validity of the documents which the Appellant relied on to prove that she executed those documents to facilitate the transfer of the suit land to the Appellant. Fraud must not only be pleaded but it must be proved to the required standard.

20. The 1<sup>st</sup> Respondent failed to prove that the certificate of title over the suit land was issued to the Appellant illegally, unprocedurally or through a corrupt scheme.
21. The appeal is allowed. The judgment delivered on December 17, 2018 is set aside. An order of injunction is issued restraining the Defendants, their servants or agents from cancelling and gazetting cancellation of the Appellant's title over the land known as Mugunda/Karameno/563.
22. The Appellant is awarded the costs of the appeal and the suit to be borne by the 1<sup>st</sup> Respondent.

Delivered virtually at Nanyuki this day 23<sup>rd</sup> day of March 2023.

**K BOR**

**JUDGE**

**In the presence of: -**

Mr Dola Indidis for the Appellant

**Ms Stella Gakii - Court Assistant**

No appearance for the Respondents

