



**Nthiga v Kimani & 7 others (Environment and Land Appeal
007 of 2021) [2023] KEELC 19353 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 19353 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL 007 OF 2021
A KANIARU, J
MARCH 16, 2023**

BETWEEN

AMBROSE NJERU NTHIGA APPELLANT

AND

EUSTACE NYAGA KIMANI 1ST RESPONDENT

GERALD KAMAU MWANIKI 2ND RESPONDENT

KENNEDY CHEGE WAICHUHI 3RD RESPONDENT

GEOFFREY MOSES MUGENDI 4TH RESPONDENT

FRANCIS MWANGI IRUNGU 5TH RESPONDENT

DAVID NJOROGE WAMBUI 6TH RESPONDENT

**DARU KARIGI , PETERSON MACHOKA GATUIKI & JULIUS MAGONDI
MWINCIA (BEING THE TRUSTEES OF KIAMUGI GATU SELF HELP
GROUP) 7TH RESPONDENT**

JOSEPH GICOVI MURIUKI 8TH RESPONDENT

JUDGMENT

1. This appeal arose from the judgement of the lower court (Hon. M.N. Gicheru, CM – as he then was) in CMCC No. 58 of 2018. It was a case filed by the appellant – Ambrose Njiru Nthiga (chairman Of Mbandi Clan) – against the respondents – Eustace Nyaga Kimani, Gerald Kamau Mwaniki, Kennedy Chege Waichuhi, Geoffrey Moses Mugendi, Francis Mwangi Irungu, David Njoroge Wambui, Trustees of Kiamugi Gatu Self Help Group (the Trustees Being Daru Karigi, Peterson Machoka Gatuiki, and Julius Magondu Mwincia) and Joseph Gicovi Muriuki. The appellant and the respondents were plaintiff and defendants respectively in the lower court suit.



2. In the lower court, the appellant was seeking to wrestle ownership of land parcels No. Mbeere/Kirima/1405 and 1406 from the respondents. One of the land parcels – parcel No. 1405 – had already been subdivided into 23 portions parcels Nos 4904 to 4926. Seven (7) of the parcels – parcels Nos 4904, 4905, 4906, 4911, 4916, 4919, and 4920 – had been sold and/or transferred by 1st respondent to 2nd to 8th respondents. Such selling or transferring was said to be fraudulent. The respondents filed their defences in the lower court denying the appellants claim. The lower court heard the matter and in a judgement delivered on 14/12/2020 the appellant’s entire claim was dismissed. It is that dismissal which provoked this appeal, which is premised on six (6) grounds.
3. The grounds of appeal are specifically as follows:
 1. That the learned trial magistrate erred in law and fact in failing to appreciate and reasonably determine the issues for determination as raised during trial.
 2. That the learned trial magistrate erred in law and fact and misdirected himself in failing to consider the issues of fraud raised by the appellant as to the mode of acquisition of the suit properties.
 3. That the learned trial magistrate erred in law and fact and misdirected himself in finding that the appellant did not establish how he effected the judicial review order as issued.
 4. That the learned trial magistrate erred in law and fact and misdirected himself in finding that the appellant lacked capacity to institute and prosecute the suit.
 5. That the learned judge (*sic*) erred in law and fact in failing to take into consideration the appellants submissions.
 6. That the learned judge (*sic*) erred in law and fact and as a result arrived at a wrong decision by dismissing the appellants suit with costs.

The appellant wishes that the appeal be allowed; that the judgement dated 14/12/2022 be set aside; that costs of this appeal be awarded to him; and/or that this court grants any other or further order that it may find fair and just to grant.

4. The appeal was canvassed by way of written submissions. The appellants submissions were filed on 1/11/2022. The appellant submitted that it was wrong for the trial court to make a finding that the appellant had no capacity to file the lower court matter. It was pointed out that the respondents side only belatedly raised the issue in their submissions in the lower court and that the records made available by the appellant show well that he was the chairman of Mbandi clan. He was said to have conducted other past disputes in that capacity. Such capacity, the appellant submitted, has never been doubted.
5. The focus then shifted to the tort of fraud. In this regard, the trial court was said to have failed to address itself to the issues of fraud raised by the appellant. It was emphasized also that vide court’s decision on Judicial Review Misc. No. 55 of 2003, the ownership of the disputed parcels of land had reverted to Mbandi clan. Implicit in this submission is that the registration of the 1st respondent and his subsequent transfer of some parcels to the other respondents were fraudulent and/or unlawful. In the words of the appellant

“.....Defendants fraudulently colluded to commit an illegality to the detriment of the appellant and his Mbandi clan.”



6. Further, the trial court was faulted for finding that the appellant did not show how he effected or implemented the judicial review orders. The appellant emphasized that the 1st respondent was a party in the judicial review process and was aware of the orders issued.
7. The appellant also felt that his submissions in the lower court were neither considered nor given sufficient weight, hence the wrong findings by the trial court.
8. The respondents submissions were filed on 1/2/2023. According to the respondents, the lower court was correct in its findings and determination. The appellant was said to have lacked capacity to file the lower court suit as a representative of Mbandi clan. He was faulted for not demonstrating that he had authority of the clan to file the suit on its behalf. He was said to have failed to comply with order 8 rules 8 and 13 and order 4 rule 4 of Civil Procedure Rules.
9. He was also said to have failed to prove his interest or the interest of the clan in the matter. According to the respondents, the proceedings which the appellant seek to rely on as the basis of his claim that the land belongs to Mbandi clan show that the appellant was acting or representing Jim Alex Nthiga and two others. The clan was said not to be a party in the proceedings. The proceedings referred to took place at the land adjudication level and the clan did not feature anywhere.
10. Further, the appellant was said to have failed to prove fraud. It was submitted that though the appellant states that the ministers decision was quashed by the court, he did not attach documents to prove his allegation. It was the respondents position that it was not demonstrated that the 1st respondent acquired the land fraudulently and/or that he was supposed to surrender the title deeds for cancellation. It was asserted too that it was not shown that any demand was made to the 1st respondent to surrender the title deeds.
11. According to the respondents, as the 1st respondent was not shown to have been fraudulent in the manner he acquired the title deeds, then he can not be said to have been fraudulent in the way he transferred some portions of the land to the other respondents.
12. It was pointed out too that the identity of the parcels of land captured in the judicial proceedings that the appellant sought to rely on is different from the parcels of land which are the subject matter before the court now.
13. I have considered the appeal as filed, the rival submissions, and the lower court record as made available. My duty as the first appellate court is as stated in several decided cases including *Selle v Associated Motor Boat Company Limited* [1968] EA 123, *Jabane v Olenja* [1986] KLR 661, 664, *Duncan Mwangi Wambugu* [1982-88 1 KAR 278, and *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR. The duty involves re-evaluating, re-assessing and re-analyzing matters of both law and fact and a re-consideration of the evidence afresh in order to come up independent conclusions. While doing this, the court is required to bear in mind that it didn't see or hear the witnesses and it is required to make due allowance in that regard.
14. As pointed out earlier, the appeal is premised on six (6) grounds. The first ground faults the trial magistrate for failing to appreciate and reasonably determine issues raised during trial. It turned out during submissions that what the appellant meant is that the trial court was wrong in finding that the appellant had not demonstrated that he represented the Mbandi clan. According to the appellant, his authority to represent the Mbandi clan has never been contested. The respondents were faulted for raising the issue at a point where the appellant was not in a position to respond. It was submitted that the appellant represented the clan in the appeal to the minister. He was said to have had the locus



- standi to represent the clan. While submitting on this ground, the appellant also submitted on ground 4, which had raised the same issue in a more express manner.
15. The respondents on the other hand posited that the appellant had not demonstrated his capacity to represent the Mbandi clan. They invoked the provisions of Order 8 rules 8 and 13 and order 4 rule 4 of *Civil Procedure Rules* and asserted that the appellant had not complied with the requirements of those provisions. The appellant was thus said to have fallen short of proving that he represented the Mbandi clan. The provisions cited require compliance with some formalities – such as giving notice, or advertising or giving written consent or authority – where a person or persons are acting in a representative capacity. The appellant was said to have failed comply yet he alleged to have been representing Mbandi clan. As can be seen, this aspect of respondents submissions is decidedly legalistic.
 16. But the respondents then shifted focus and approached the issue from a factual standpoint. In this regard, the respondents submitted that a look at the proceedings in the appeal before the minister shows that the appellant was representing Jim Alex Ireri and Joseph Nyaga. He is not shown there as representing the Mbandi clan.
 17. On this issue, the court is with the respondents and here is why: It is clear to me that the appellants' position is that he has represented the clan in the past, particularly in the appeal before the minister, and nobody seemed to question whether he was representing the clan or not. But the appellant seems not to understand the difference in the conduct of proceedings at that past level and the conduct of proceedings at the present level. The past level was at the adjudication stage. The proceedings at that level are more informal and largely lack the legal and procedural finesse associated with court proceedings. Infact, at that stage, parties are discouraged, indeed even prohibited, from instituting court proceedings relating to land matters in areas under adjudication. The aim is to keep formalities to bare minimum at that stage. Court proceedings on the other hand are a totally different game. They are more formal and are usually characterized by strict adherence to both procedural and substantive law. The appellant therefore has no excuse for not complying with the applicable law at this present stage.
 18. The appellant therefore needed to be ready to be subjected to the rigours of court proceedings. The law to be complied with by a party who is representing others in court proceedings is largely as stated by the respondents. The appellant needed to comply with that law. It is no good excuse to say that he was not questioned about it in the past proceedings. It is also no good excuse to say that the respondents raised the issue at a stage where he couldn't respond it. It is clear that the respondents had raised the issue in their submissions. Nothing prevented the appellant from seeking leave to file supplementary submissions in order to respond to the issue.
 19. The other issue (ground 2) raised by the appellant related to fraud. The pleadings and proceedings in the lower court show that illegality is alleged to have occurred at two levels. The first level is when the 1st respondent is said to have caused the transfer of the parcels of land to himself despite the existence of an alleged court order that reverted the ownership of the land parcels to Mbandi clan. The second level took place when the first respondent caused the transfer of some resultant parcels of land to 2nd to 8th respondents and/or to some other third parties. No fraud is attributed to the first level. The illegality of the tort of fraud is attributed to the second level. A look at the particulars of fraud given shows that it is the 1st respondent who is largely blamed for it. The 2nd to 8th respondents pleaded that they are innocent purchasers of the parcels of land sold to them. The appellant was duty-bound to demonstrate that the 2nd to 8th respondents averments were not true. They needed to show that the 2nd to 8th respondents knew of the alleged fraud or were part of it or could, with application of due diligence, have known about it. Mere allegation that the 2nd to 8th defendants were not innocent purchasers was not enough.



20. With the 2nd to 8th defendants not having been shown to be party to and/or part of the fraud, and with their averment of innocent purchase not having been displaced, it stands to reason that the titles they have can not be cancelled. Yet if title to parcel No. 1406 is cancelled, their titles would also go with it as they are resultant titles from the subdivision of that parcel of land.
21. The respondents also raised the issue of the parcels of land in dispute in this matter – Land parcels No. Mbeere/Kirima/1405 and Mbeere/Kirima/1406 – being different from the parcels of land described in the order issued on 30/5/2006, which the 1st respondent is said to have violated. The parcels of land stated in the order are Mavuria/Kirima and are also captured alternatively as Kianjiru/Kirima 1405 and 1406. It is prima facie apparent that there is a discrepancy in description or identity and the appellant needed to come clear on this issue. The respondents were raising a valid issue which the appellant did not explain.
22. Still on the issue of the order, I note that when it was issued, the respondents and/or their counsel were not shown to have been present. What this means is that the respondents and/or their counsel needed to be served. The appellant did not show they were served. The averment that the 1st respondent was aware of the order when he transferred land to the 2nd to 8th respondents can only have weight if service was demonstrated. It also clear to me that the order could only be effected if the relevant office that could reverse registration was served. It is also not shown that the office was served.
23. It is important also to realize that the 1st respondent is said to have transferred parcel No. 1405 to “other unsuspecting third parties” (see paragraph (i) in the particulars of fraud stated in the plaint). These third parties are much like 2nd to 8th respondents. One would wonder why the appellant saw the need to join 2nd to 8th respondents in the suit but failed to see the need to join the “other unsuspecting third parties” in the suit also. The 2nd to 8th respondents are beneficiaries through purchase of parcels arising from subdivision of parcel No. 1406. The “other unsuspecting third parties” are transferees of the resultant subdivisions of parcel No. 1405. The court needed to hear their side of the story in much the same way that it heard the story of 2nd to 8th respondents. The right of hearing is sacrosanct. It is protected by our constitution. In *Halsbury Laws of England*: 5th Edition 2010 Vol. 61 para 639, it is captured as follows

“the rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the Audi alteram partem rule) is a fundamental principle of justice”
24. It is important to appreciate that when a court of law realizes that an order it is asked to issue will result in condemning some parties unheard, it is always reluctant to grant the order however compelling the reasons for its issuance may be. And this is always because the right of hearing is always dear to the mind and heart of the court.
25. When all is considered, it is clear that the appellant has not persuaded the court that it should allow his appeal. The upshot, in light of the foregoing, is that the appeal before this court is for dismissal. I hereby dismiss it with costs to the respondents.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 16TH DAY OF MARCH, 2023.

In the presence of M/s Nzekele for appellant and Njiru Mbogo for Rose Njeru for respondents.

Court Assistant: Leadys

A.K. KANIARU



JUDGE

16/3/2023

