



**Kamanda v Munga & another; Mwangi (Respondent) (Environment and Land Appeal E064 of 2021) [2023] KEELC 17111 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17111 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E064 OF 2021**

**JG KEMEI, J**

**APRIL 27, 2023**

**BETWEEN**

**B. GACHANJA KAMANDA ..... APPELLANT**

**AND**

**CHRISTOPHER MBAI MUNGA ..... 1<sup>ST</sup> INTERESTED PARTY**

**PETER WERU MUNGA ..... 2<sup>ND</sup> INTERESTED PARTY**

**AND**

**GEORGE GICHUKI MWANGI ..... RESPONDENT**

*(Being an appeal against the judgement of Hon J M NANG'EA  
(CM) in MCLE No 31 of 2019 delivered on the 10/8/2021)*

**JUDGMENT**

**Introduction & summary of suit in the trial Court**

1. The Respondent herein was the Plaintiff in the trial Court. The Appellant and the Defendant and the Interested Parties associated themselves fully with the case of the Defendant.
2. Vide a plaint filed on the 11/2/2019 the Plaintiff averred that he was the registered owner of the suit land parcel No Ruiru/Ruiru East Block 3/1584 (suit land) having purchased it from Brilliant Ventures Limited on 4/5/2018 who in turn acquired it from Karema Bernard Macharia on the 11/10/2017. That upon acquisition he entered into a sale agreement with a third party namely Zipporah Wairimu Wanjohi vide an agreement of sale dated the 16/10/2018. That on the 30/12/2018 the Defendant trespassed onto the suit land and threatened and cautioned the intended purchaser from buying the suit land on the grounds that he and others owned the suit land. He avers that he has been in possession since 2018. His claim against the Defendant and the Interested Party was for trespass and consequently sought the following orders;



- a. An order for permanent injunction restraining the defendant his servants and or agents' contractors' workmen from trespassing and interfering with the Plaintiff's property being the suit land.
  - b. A declaration that the suit land belongs to the Plaintiff
  - c. Costs of the suit.
3. The Defendant on the other hand denied the claim of the Plaintiff in his statement of defence filed on the 20/6/2019. He contended that the suit land belonged to John Nguti Kamanda (his deceased father), Christopher Mbai Munga and Peter Weru Munga having acquired it from One F K Tsuma who was a member of Mwalimu Investment Co. Limited on the 18/12/1984 at the consideration of Kshs 28,000/-, a tidy sum then. The land was allocated to Thomson F K Tsuma under No MICL/02/435 – Plot No 440 in 1983.
4. That his late father and his co-owners took possession of the suit land in 1984 todate.
5. He contends that unfortunately his father and his co-owners could not get the title of the land before the Company collapsed but later found out that the land had been registered as Ruiru/Ruiru East Block3/1584 and a title was illegally and unlawfully issued in the name of Karema Bernard Macharia. Alarmed by the state of affairs they lodged a caution on the title claiming beneficiaries' interest however the said caution was removed using fake orders allegedly issued in Civil Case No 985 of 2017 and the land transferred to the Plaintiff.
6. In his counterclaim the defendant pleaded particulars of fraud under para 17 of the Defence and contended that the Defendant's father and his two co-owners are the rightful owners of the suit land. He sought the following orders on the counterclaim against the Plaintiff;
- a. That the Plaintiff's suit be dismissed with costs.
  - b. An order directing the Land Registrar Thika to cancel the Title Deed in the name of the Plaintiff and all other entries with regard thereto.
  - c. A declaration that the parcel of land No. Ruiru/Ruiru East Block 3/1584 belongs to the Defendants father and the two IPs.
  - d. An order that the Defendant and his co-owners be registered as the proprietors of the suit land
  - e. Costs of the suit.
7. On the 15/10/2019 the Court allowed the 1<sup>st</sup> and 2<sup>nd</sup> Interested Party's Application dated the 25/7/2019 to be enjoined as parties in the suit.
8. The 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties filed their statements of defence separately on the 12/11/2019 and denied the Plaintiff's claim and rehashed the contents and the prayers similar to that of the Defendant.
9. Upon hearing of the case, the trial Court entered judgement in favour of the Plaintiff as follows;
- a. An order for permanent injunction and restraining the Defendant his servants and/or agents contractors and workmen from trespassing and interfering with the Plaintiff's property known as Ruiru/Ruiru East Block 3/1584.
  - b. A declaration that property known as Ruiru/Ruiru East Block 3/1584 belongs to the Plaintiff.
  - c. Costs of this suit.



- d. Any other order this Court may deem fit to grant.
10. Aggrieved by the said judgement the Appellant filed an appeal on the grounds as follows;
    - a. That the Learned trial Magistrate erred in law and in fact in failing to appreciate that the father of the Appellant and the Interested Parties were the joint owners and had been in possession of the suit property since 1984.
    - b. That the Learned trial Magistrate erred in law and in fact in failing to appreciate that there as a fraudulent transfer of the suit property into the names of the Respondent herein.
    - c. That the Learned trial Magistrate erred in law and in fact in failing to consider the documents produced by the Defendant to prove ownership of the suit property.
    - d. That the Learned trial Magistrate erred in law and in fact in failing to appreciate that the Respondent herein did not provide any document to prove how the title deed was registered in his name.
    - e. That the Learned trial Magistrate erred in law and in fact in failing to appreciate that the Appellant's late father and the Interested Parties were joint legal and the lawful owners of the suit property which they purchased from Thomson F. K. Tsuma in 18<sup>th</sup> December 1984.
    - f. That the Learned trial Magistrate erred in law and in fact in failing to appreciate that the Respondent herein intend to alienate the applicants right to property as enshrined in *the Constitution*.
    - g. That the Learned trial Magistrate erred in law and in fact in failing to appreciate that the Respondent fraudulently transferred Ruiru/Ruiru East Block 3/1584 into his name.
    - h. That the Learned trial Magistrate erred in law and in fact in refusing to allow the Interested Parties adduce evidence in Court.
  11. The Appellant sought the following orders on appeal;
    - a. The Judgment of the lower Court dated 10<sup>th</sup> August, 2021 in MCL & E No. 31 of 2019 be set aside.
    - b. The orders given on 10<sup>th</sup> August, 2021 be stayed.
    - c. This appeal be allowed with costs to the Appellant.
    - d. The Appellate Court upholds the Appellant's counterclaim in the lower Court.
    - e. Any other or further order be granted as this Honourable Court may deem just and expedient to grant.
  12. With leave of the Court the parties elected to prosecute the appeal by way of written submissions. I have read and considered the same.
  13. The firm of Ndungu Mwaura & Co Advocates filed the submissions on behalf of the Appellant and the IPs (collectively known as the Appellants thereon) on the 26/10/2022.
  14. On the issue of fraud counsel for the Appellants submitted that the Appellants have had actual and physical possession of the land since 1984 including construction of rental units on the premises to supplement their incomes.



15. Relying on Section 26 of the *Land Registration Act* the Appellants submitted that the title held by the Respondent was acquired fraudulently. In this proposition the Appellants relied on the decision of the Court in *Chemei Investments Limited Vs. the Attorney General & Others Nairobi Petition No. 94 of 2005* where the Court stated:-

“*The Constitution* protects a higher value, that of integrity and rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the Court in the case of *Milan Kumarn Shah & 2 Others v City Council of Nairobi & Another (Supra)* where the Court stated as follows, ‘We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relied on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.’”

16. Interalia the Appellants relied on the decisions of the Court in *Samuel Odhiambo Oludhe & 2 Others v Jubilee Jambo Limited & Anor [2018] EKLR* where the Court stated as follows ;

“The Court cannot turn a blind eye to sanitize irregularity and fraudulently acquired properties all in the name of indefeasibility of title. In the case of *Arthi Highway Developers Limited v West End Butchery Limited and Others Civil Appeal No. 246 of 2013* the Court of Appeal expressly stated that the law on fraud and indefeasibility of Title has been settled. The Court specifically referred to the law as stated in the case of *Dr. Joseph Arap Ngok v Justice Moijo Ole Keiwua & 5 Others, Nai. Civil Appeal No. 60 of 1997* where the Court categorically declared that:-

“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the *Land Registration Act*) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the titleholder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

17. Further the Appellants stated that the registration of the Respondents title in the face of cautions vitiated the validity of the Respondents title and the same should be cancelled under Section 80 of the *Land Registration Act*.
18. Referring to the documents presented in evidence the Appellants lamented that the Court disregarded the same and failed to put any weight on the documents which overwhelmingly favoured the Appellants. It was their submission that the Court should not turn a blind eye to the illegalities that accompanied the acquisition of the Respondents title, notwithstanding that it is registered in his name.
19. Finally, that the evidence of the interested parties was totally disregarded by the Court hence their right to be heard was not only violated but ignored.
20. With respect to ground 1, 3 and 5 of the Appeal, the Respondent submitted that the Appellants are claiming plot No 444 while no evidence was presented to show the nexus between parcel 444 and 1584.



21. Further that no evidence was produced to show that the Appellants have been in occupation of the suit land since 1984 as the same was vacant at the time of purchase. Furthermore that the Appellants failed to proof ownership of the suit land.
22. On grounds Nos. 2, 6 and 7 of the Appeal, the Respondent submitted that the suit land was legally acquired and denied any allegations of fraud. That there was no encumbrance registered on the title at the time of registration. That the trial Court noted no evidence to support any fraudulent removal of the caution. That the officials of Mwalimu Investments Company Limited were not called to confirm the sale of the suit land to the Appellants; the Land Registrar was not called to testify regarding the circumstances relating to the lodgement of the caution and its removal thereof.
23. On ground No 4 of the Appeal the Respondent stated that the Appellants have not provided any evidence to impeach the title of the Respondent.
24. Having read and considered the record of appeal, the written submissions of the parties, evaluation of the evidence led at the trial and all the material placed before this Court the following issues fall for determination;
  - a. Whether the Respondent acquired a good title in the face of the reinstated cautions on the register;
  - b. Whether the Court should interfere with the decision of the trial Court in the circumstances of the case;
  - c. Who meets the costs of the appeal?
25. The duty of this Court is set out in Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate Court to include the re-evaluation, reassessment and reanalyse of the record and draw its own conclusions. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing its own conclusions from the analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. Besides, that duty has been affirmed in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, as thus:

“... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
26. The centrality of this case is that there is a contest on who owns the suit land between the Appellants and the Respondent. The Respondent’s case in the trial Court was that of trespass and a permanent injunction against the 1<sup>st</sup> Appellant from interfering with his quiet possession of the land. The Appellants on the other hand contend that they are the rightful owners of the land having purchased from one Tsuma, a former member of Mwalimu Investment Limited. That though they have not obtained a title they have been in possession since 1984 todate. That the reason why they could not get a title is because the Company collapsed before they could be issued with titles.
27. It is not in dispute that the 1<sup>st</sup> Appellant herein is the legal representative of the estate of the late John Nguti Kamanda as evidenced by the letters of grant of representation issued on the 4/9/2019. Kamanda was one of the three co-owners of the ballot that was allegedly acquired from Tsuma in 1984.



28. It is common ground that the Respondent holds a title issued to him on the 13/6/18 according to the green card dated the 21/1/2019. It was the Respondent's case that he purchased the land from Brilliant Ventures on the 4/5/2018 who in turn purchased from Karema Bernard Macharia (Karema). There was however no title to evidence the ownership of Brilliant Ventures Limited and what was presented in evidence by the Respondent is a transfer by Karema to the Respondent on the 23/5/2018. It is his evidence that the Appellants trespassed onto the suit land in 30/12/2018 at the point when he was in the process of selling to a third party.
29. The Appellants have claimed that they have been in possession of the land since 1984 and that they have constructed some structures which are being rented out under a caretaker. In his Replying Affidavit on record the Respondent stated that the land was vacant but with some structures. This agrees with the claim of the Appellants that indeed there are structures on the ground belonging to the Appellants. I have seen a lease agreement to a third party for a period of 15 years for the cultivation of the land. The Appellants led unchallenged evidence that they have rental units on the suit land, cultivate some part and another part they have rented out to third parties. On this question, the Court on a balance of probability is satisfied that the Appellants are in possession. That explains why the claim of the Respondent in the trial Court is eviction and a permanent injunction. It is on record that the trial Court issued status quo orders on the property to mean that the Appellants having been in possession to so continue in possession. The Appellants led evidence that they have been on the suit land since 1984.
30. It is commonly acknowledged that the register for the suit land was opened on the 21/11/2007 and the first entry is in the name of Government of Kenya, followed by an entry in the name of Karema on even date. On the 14/9/2009 a caution was lodged and registered against the title by one Allan Ngau Nduru claiming beneficiaries' interest. The second caution was lodged on the 31/5/2019 by Christopher Mbai Munga (one of the Appellants) claiming beneficial interest. On the 3/5/18 the two entries were removed vide orders of the Court in Civil case No 985 of 2017. Forty days, later on the 13/6/18 the suit land became registered in the name of the Respondent. On the 26/11/2018 the cautions Nos 3 and 4 were reinstated on the register.
31. This registration has been challenged by the Appellants on the grounds that the same were fraudulent and conveyed no interest from Karema to the Respondent. Evidence was led that on the 12/2/2018 the Court removed the said cautions at the behest of Karema. Evidence was also led that the said orders were fake as seen by the letter dated the 19/11/2018 confirming that the parties in the alleged suit relate to different parties that is to say CMCC No 985 of 2017 – Netsol Kenya Limited v Mooreland Consolidated Hotel 2003 & John Ndungu Wariu and that the orders did not emanate from the Court. The parties in the alleged suit are Milimani Commercial Court No 985 of 2017 – Karema Bernard Mcharai v Allan Nagri Nduru & Christopher Mbai Munga. The Court having disowned the orders purporting to have removed the caution, this Court cannot turn a blind eye on the evidence on record and which was presented before the trial Court. The Respondent has argued that as at the time his title was registered there were no encumbrances.
32. The procedure for the removal of caution is set out in law under Section 73 of the [Land Registration Act](#) as follows;
- “73.
- (1) A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar.



- (2) The Registrar, on the Application of any person interested, may serve notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
- (3) If a cautioner has not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
- (4) If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.
- (5) After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.
- (6) On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under section 74 shall not be affected by the cancellation."

33. The process used in the removal of the cautions was neither through a valid order of the Court or the Land Registrar. A caution estops the registered owner from disposal of the suit land while the caution is in subsistence.
34. In this case Karema transferred land to the Respondent while the cautions subsisted. The question then would be in the face of the cautions having been reinstated, did Karema convey a good title to the Respondent. Put differently did the Respondent acquire a good title? Was the transfer vitiated by the reinstatement of the cautions which barred Karema from transferring the land to the Respondent and or any other party? Is the title of the Respondent impeachable under Section 26 (2) (b) of the [Land Registration Act](#)?
35. Though the Court did not find any evidence linking the so called fake orders to the Respondent but in as far as the cautions were reinstated on the title, the question that remains unanswered is whether Karema conveyed a good title to the Respondent.
36. The Appellants have led evidence detailing the acquisition of the land. That is to say that they acquired it from a member of the Mwalimu Investment Co. Limited. I have re-evaluated the documents with respect with the acquisition of the land by the Appellants including the ballot No 444. I note that there is a letter dated the 17/2/2020 by the law firm of Muhoho & Co Advocates which stated as follows;

"Our Ref: GMM/495/80 17<sup>th</sup> February 2020

Land Registrar

Ruiru Lands Registry

Ruiru

Dear Sir,

RE: Ruiru/Ruiru East Block 3/1584



Christopher Mbai Munga & 2 Others

This is to confirm that at some time, I acted for Mwalimu Investments Company Limited and had at times access to some of their records.

In regard to the parcel Ruiru/Ruiru East Block 3/1584 the records indicate that one Thomson F. K. Tsuma who was an employee of TSC but not a teacher applied for purchase of a six (6) acres portion. He was TSC employee number 100425 and company membership was MICL/02/435. He balloted for plot number 444 which entitled him to allocation of parcel Ruiru/Ruiru East Block 3/1584. Through its internal process, the company allowed the said Thomson F. K. Tsuma to transfer his unregistered interest or shares to Christopher Mbai Munga, John Nguti Kamanda and Peter Weru Munga. This was through their own Certificate of Transfer of land Reference No. MICL/TR/01 of 19<sup>th</sup> December 1984. These people have now found out that a Title Deed to the land was issued to one Karema Bernard Macharia. I have no records of such allottee. The persons to be issued with the Title Deed are the three I have mentioned above.

You can safely summon all the parties including the said Karema Bernard Macharia or his successor to produce their respective documents to prove their ownership.

Yours faithfully,

G. M. MUHORO.”

37. There is no evidence that the Advocate led evidence on this letter and perhaps if evidence had been presented to show what became of ballot No 444 the issue of the substantive claims of the parties would have been settled.
38. Arising from the forgoing therefore it is my humble and considered view that if the claim of the Appellants was to be heard, it would be undefended. If the position is taken that the reinstatement of the cautions vitiated the registration of the title in the name of the Plaintiff then his case would have no feet to stand on. In that scenario the title would then remain in the name of Karema. It is evident that the said Karema was not made a party to the suit. The Court is cognizant of the constitutional protections of the right to access justice and the right to be heard as espoused in art 48 and 50 of *the Constitution* of Kenya. It is my view that Karema ought to have been heard in the suit so as to defend his title. The question as to as to between Karema, the Respondent and the Appellants, has a better title remains unanswered.
39. I agree with the decision of Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A.*:

“... The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

## Conclusion

40. For the above reasons I find that the Learned Magistrate failed to consider the impact of the reinstatement of the cautions under entry Nos 4 and 5 in the green thus arrived at a decision that did not settle the rights of the parties to finality.



41. In the circumstances and being guided by Section 78 of the *Civil Procedure Act*, I therefore remit the suit for retrial but by a different Magistrate other than Hon Nang'ea CM and the matter to be heard on priority basis.
42. Each party bear their own costs.
43. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 27<sup>TH</sup> DAY OF APRIL, 2023  
VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms. Kiarie HB Ndungu Mwaura for Appellant, 1<sup>st</sup> and 2<sup>nd</sup> Interested Party

Kabaka for Respondent

Court Assistants – Kevin/Lilian

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