



**Mengere v Kuria & 9 others (Environment and Land Appeal  
E019 of 2021) [2023] KEELC 16832 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16832 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E019 OF 2021**

**BM EBOSO, J  
APRIL 13, 2023**

**BETWEEN**

**MWAURA MENGERE ..... APPELLANT**

**AND**

**ESTATE OF JOSEPH NGABA KURIA ..... 1<sup>ST</sup> RESPONDENT**

**BENSON MUCHOKI MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**ESTHER NJOROGE GACHERU ..... 3<sup>RD</sup> RESPONDENT**

**WILSON MUREITHI NJERU ..... 4<sup>TH</sup> RESPONDENT**

**JOH NDEGWA NJOROGE ..... 5<sup>TH</sup> RESPONDENT**

**MARTIN GATHECA KIRAGU ..... 6<sup>TH</sup> RESPONDENT**

**EMMAH NYAMBURA MUCHOKI ..... 7<sup>TH</sup> RESPONDENT**

**DANIEL MAINA NJERI ..... 8<sup>TH</sup> RESPONDENT**

**CAROLINE WAMBUI KIAMBUTHI ..... 9<sup>TH</sup> RESPONDENT**

**DANIEL MICOBO KARIUKI ..... 10<sup>TH</sup> RESPONDENT**

*(Being an Appeal arising from the Judgment of Hon. Ekhubi B. M (PM) delivered at Thika Chief Magistrate Court on 2/2/2020 in Thika CMC Civil Case No 795 of 2010)*

**JUDGMENT**

**Background**

1. This appeal challenges the Judgment rendered by Hon Ekhubi B M, Principal Magistrate, on 2/2/2020, in Thika CMC Civil Case No 795 of 2010. The appellant in this appeal, Mwaura Mangere,



- sued the respondents through a plaint dated 28/7/2010. The plaint was subsequently amended on 9/11/2010. The 1st defendant in the suit was Joseph Ngaba Kuria who died during the pendency of the suit [hereinafter referred to as “the deceased”]. On 9/10/2018, the trial court substituted him with the administrators of his estate.
2. At the centre of the dispute in the trial court was the question of validity of the title that was held by the deceased to land parcel number Ruiru/Kiu Block 2 (Githunguri) 3082 [hereinafter referred to as “the suit land”]. At the time of trial, the title had been transferred to the 2nd and 3rd respondents who had subdivided it into parcel numbers Ruiru/Kiu Block 2 (Githunguri) 6327 - 6336 and transferred the subdivision titles to the 4th - 10th respondents.
  3. Through the amended plaint, the appellant sought:
    - (i) a declaration that all the titles issued to the respondents in relation to the suit land and the subdivisions therefrom were invalid and void ab initio and should be cancelled and the suit land be registered in the name of the appellant;
    - (ii) a permanent injunction restraining the respondents together with their agents and servants against entering, trespassing on, subdividing, selling or interfering with the proprietary rights of the appellant and his lawful and quiet possession of the suit property; and
    - (iii) costs of the suit.
  4. The case of the appellant was that he acquired the suit land through balloting as a shareholder of Githunguri Constituency Ranching Company Limited [hereinafter referred to as the “the company”], having become a shareholder in 1968. He contended that he participated in a balloting exercise held on 15/3/1985 relating to the company’s subdivision scheme in which the suit land is located and he picked ballot number 1716, representing the suit land. It was his case that in 2010, he allowed his son to build a house on the suit land. When his son erected structures on the land, the structures were uprooted. At that point, he discovered that the deceased had caused the land to be registered in his name and had subsequently caused the title to be transferred into the names of the 2nd and 3rd respondents who in turn subdivided the title and caused the subdivision titles to be registered in the names of the 4th – 10th respondents. It was his case that the deceased had no valid title to convey to the 2nd and 3rd respondents and that the duo had no valid titles to pass to the 4th – 10th respondents.
  5. The deceased [1st respondent] filed a statement of defence dated 25/8/2010 and a second defence dated 10/3/2011 in which he denied the appellant’s claim. When the plaint was amended, the deceased’s estate filed a third defence dated 26/2/2019 in which it similarly denied the allegations made in the amended plaint.
  6. The 2nd – 10th respondents denied the allegations of fraud and contended that they had acquired registered titles.
  7. Trial commenced before Hon B A Owino (SRM). Subsequent hearings were conducted by Hon B M Ekhubi (PM). The appellant led evidence on how he acquired the suit property through purchase of shares in the company, balloting and obtention of a clearance certificate from the company.
  8. Mary Njeri testified on behalf of the estate of the deceased [1st defendant]. Her brief evidence was that the estate of the deceased had been distributed and there was nothing remaining to be distributed. She stated that she was not aware whether or not the deceased sold and transferred the suit land to the 2nd and 3rd respondents. It was her evidence that she was not privy to any transaction relating to the suit land.



9. Benson Muchoki Mwangi testified on his behalf and on behalf of the 3rd respondent. His evidence was that they purchased the suit land from the deceased in 2005 and that the deceased was the registered proprietor of the land at the time of purchase. He added that subdivided the suit land in 2009, sold nine subdivisions and transferred one subdivision to his daughter. He confirmed to the court that the suit land had not been developed.
10. Daniel Mucobo Kariuki testified as DW3 and tendered evidence on his own behalf and on behalf of the 4th – 6th and 8th – 10th defendants. His evidence was that they purchased the subdivision titles from the 2nd respondent who was a registered proprietor of the land. He added that when the dispute relating to their titles arose they went to the company in the presence of the deceased and the company was not able to resolve the dispute.
11. Ultimately, the trial court rendered the impugned Judgement in which it made a finding to the effect that the appellant had failed to prove fraud as pleaded against the respondents. Consequently, the trial court dismissed the appellant’s suit and decreed that the parties were to bear their respective costs of the suit.

## Appeal

12. Aggrieved by the findings and order of the trial court, the appellant brought this appeal advancing the following nine verbatim grounds of appeal:
  1. The Learned Principal Magistrate erred in law and in fact in failing to capture and consider in the Judgment all the evidence and documents presented by the appellant in proving of his case and therefore made a wrong decision.
  2. The Learned Principal Magistrate failed to consider and take into account a letter from the Chairman of Githunguri Ranching Company Limited dated 20th July 2010 and presented as Document/Exhibit number 4 in the List of Documents and therefore made the wrong decision.
  3. The Learned Principal Magistrate erred in law and in fact in failing to consider the contents of the said letter in (2) above which contents would have proved the particulars of fraud as pleaded in the plaint, as the said letter stated inter alia
    - “iii. The registered person at the Thika District Land Registry has been registered fraudulently and without approved clearance from the company”– and therefore made the wrong decision.
  4. The Learned Principal Magistrate erred in law and in fact in failing to find that the appellant had proved the particulars of fraud to the required standard in light of all the documents and oral evidence presented before the court and therefore made the wrong decision.
  5. The Learned Principal Magistrate erred in law and in fact in raising the standard of proof of fraud to a level of a criminal case of beyond reasonable doubt and therefore made the wrong decision.
  6. The Learned Principal Magistrate erred in law and in fact in failing to find that DW1 being the administrator of the estate of the 1st defendant needed to defend fully the allegations of fraud made against her husband and the estate, which she failed to do and therefore made the wrong decision.



7. The Learned Principal Magistrate erred in law and in fact in failing to find that Ngaba Kuria (deceased) being the perpetrator of the fraud and his estate needed to counter fully the particulars of fraud leveled against him and the said estate which they failed to do and therefore made the wrong decision.
  8. The Learned Principal Magistrate erred in law and in fact in failing to find that the appellant having balloted for the plot on 15th March, 1985 and getting a clearance certificate on 22nd January, 1992, there was no way the said plot could have been available for allocation on 15th October 1987 and sold on 21st September, 2005 by the deceased 1st defendant and therefore made the wrong decision.
  9. The Learned Principal Magistrate erred in law and in fact in finding that the particulars of fraud had not been proved and therefore dismissed the appellant's case and therefore made the wrong decision.
13. The appellant urged this court to reverse the dismissal order of the trial court and allow the appellant's claim as prayed in the amended plaint. He also sought costs of this appeal.

### **Submissions**

14. The appeal was canvassed through written submissions dated 21/2/2022, filed through M/s Jessee Kariuki & Co Advocates. Counsel submitted that whereas the appellant had tendered evidence demonstrating how he acquired the suit land, the estate of the deceased had elected to say nothing relating to the circumstances under which the deceased obtained registration of the suit land in his name. Counsel faulted the trial court for failing to consider or take into account the letter dated 20/7/2020 from Githunguri Constituency Ranching Company to the appellant's advocates yet the letter was critical in the determination of the dispute and in proving fraud as pleaded in the amended plaint.
15. Counsel faulted the trial court for failing to find that the appellant had proved fraud, contending that the appellant had demonstrated how he acquired the suit land and had further demonstrated that effective from 15/3/1985 when he balloted for the suit land, the suit land was not available for allocation to any other party. Counsel contended that the trial magistrate raised the standard of proof of fraud to the level of a criminal case. Counsel added that the administrator of the estate of the deceased, DW1 failed to counter the evidence of fraud which had been tendered by the appellant, adding that it was the duty of the estate to counter the evidence of fraud that had been tendered by the appellant.
16. Counsel for the appellant reiterated that the appellant having balloted for the suit land on 15/3/1985 and having been given a clearance certificate on 22/1/1992, the suit land was not available for allocation to the deceased in 1987 nor for sale by the 1st defendant in 2005. Lastly, counsel argued that the appellant had tendered sufficient evidence to prove fraud as pleaded.
17. The 1st respondent opposed the appeal through written submissions dated 22/3/2022, filed by M/s Wangui Kuria & Co. Advocates. Counsel for the 1st respondent identified the following as the key issues that fell for determination in the appeal:
  - (i) Whether the Learned Principal Magistrate erred in fact and in law by holding that the appellant did not prove his case to the required standard;
  - (ii) Whether the appeal should be dismissed; and
  - (iii) Who should bear costs of the appeal.



18. Counsel cited Section 26 of the *Land Registration Act* and contended that the deceased's title could only be impeached upon proof of fraud or misrepresentation to which the deceased was a party or upon proof that his title had been acquired illegally, unprocedurally or through a corrupt scheme. Counsel submitted that the deceased acquired the suit land procedurally as a member of the company. Counsel added that the appellant particularized fraud but failed to prove fraud in the acquisition of the deceased's title. Counsel urged the court to dismiss the appeal.
19. The 2nd and 3rd respondents opposed the appeal through written submissions dated 6/5/2022, filed by M/s Karanja Kangiri & Co Advocates. Counsel for the 2nd and 3rd respondents identified the following as the three issues that fell for determination in the appeal:
  - (i) Whether the appellant proved the allegations of fraud to the required standard;
  - (ii) Whether the 2nd and 3rd respondents are bonafide purchasers for value; and
  - (iii) Whether title number Ruiru/Ruiru/Kiu Block 2 (Githunguri) 3082 and the subsequent subdivision titles should be cancelled.
20. Counsel cited Section 26 of the Land Registration Act and submitted that the appellant had failed to establish fraud in the acquisition of the respondents' titles. Counsel contended that the 1st respondent (the deceased) had established the root of his title. Counsel for the 2nd and 3rd respondent further submitted that the 2nd and 3rd respondents had demonstrated that they were bonafide purchasers for value who had followed legal procedures in acquiring the title. Finally, counsel argued that the appellant having failed to prove fraud, there was no basis for cancelling the respondents' titles. Counsel urged the court to dismiss the appeal.
21. The 4th-10th respondents opposed the appeal through written submissions dated 7/6/2022, filed through M/s Kanyi Kiruchi & Co Advocates. Counsel for the 4th – 10th respondents identified the following as the four key issues that fell for determination in the appeal:
  - (i) Whether the 1st respondent's title was acquired fraudulently;
  - (ii) Whether the transfer/sale of the suit parcel to the 2nd and 3rd defendants was legit or above the law and whether the 4th – 10 respondents are innocent purchasers for value;
  - (iii) Whether this appeal is merited; and
  - (iv) Who should meet costs of this appeal for the 4th – 10th respondents.
22. Counsel for the 4th – 10th respondents submitted that the appellant failed to prove that the impugned titles were acquired fraudulently, adding that the root of the 1st defendant's title had been traced to the land allocating company. Counsel added that it had been demonstrated through evidence that the sale and transfer of the suit land to the 2nd and 3rd respondents was legit. Counsel contended that the 4th – 10 respondents were innocent purchasers for value whose titles were protected under the law. Counsel urged the court to dismiss the appeal for lack of merit.

### **Analysis and Determination**

23. I have read and considered the original record of the trial court; the record filed in this appeal; and the parties' respective submissions in the appeal. I have also considered the relevant legal frameworks and jurisprudence. The key issue that fell for determination in the trial court was the question of legality of the registration of title number Ruiru/Kiu Block 2 (Githunguri)/3082 in the name of Joseph Ngaba Kuria and the validity of the subdivision titles emanating from the said registration. That remains the key issue to be determined in this appeal.



24. The plaintiff's case was that he joined Githunguri Constituency Ranching Company Ltd [formerly known as Githunguri Constituency Farmers' Co-operative Society] in 1968 as a shareholder. Upon acquisition of shares through purchases he qualified to participate and indeed participated in a balloting exercise held on 15/3/1983 relating to land that had been acquired by the company in Ruiru. He got ballot number 1716 which, in the subdivision scheme, represented the suit land. The company subsequently issued him with a clearance certificate authorizing the Department of Lands to process a title in his name. He did not have funds to process the title immediately.
25. Subsequently, he discovered that a title relating to the suit land had been processed in the name of Joseph Ngaba Kuria [the 1st respondent] who had subsequently transferred the title to the 2nd and 3rd respondents who had in turn subdivided the title and transferred the subdivision titles to the other respondents. The appellant contended that the first and the subsequent registrations were fraudulent because the land belonged to him by dint of the balloting and clearance that had vested the land in him. The appellant presented a trial bundle containing documents reflecting the shareholding, balloting and clearance.
26. Joseph Ngaba Kuria died in 2016 while the suit was pending in the trial court. It does emerge from the record of appeal [page 83 to 88] that prior to his death, the late Kuria filed a trial bundle which contained a document indicating that the deceased similarly joined Githunguri Constituency Farmers' Co-operative Society Ltd in 1968.
27. From the totality of the pleadings that were before the trial court, it was clear that for the court to completely and effectually adjudicate upon and settle the question relating to the lawfulness of the registration of the deceased as proprietor of the suit land, Githunguri Constituency Ranching Company Ltd and the Land Registrar were necessary parties. The company owned the subdivision scheme in which the suit land was surveyed. It is the company that carried out the survey and the allocation of the various subdivisions to its shareholders. The Land Registrar is the one who is alleged to have registered and issued the impugned titles.
28. Given the above circumstances, it is clear that the finding which the trial court made was arrived at without joinder of key parties necessary for the complete and effectual adjudication and settlement of the key question in the dispute. The trial court had jurisdiction and powers under Order 1 rule 10 (2) to order joinder of the two parties. He failed to do so and proceeded to make a finding that did not answer the key issue in the dispute, namely, the question relating to the legality of the impugned registrations and titles.
29. For the above reason, I will set aside the Judgment of the trial court and direct that Githunguri Constituency Ranching Company Ltd and the relevant Land Registrar be joined as the 11th and 12th defendants in the suit and a fresh trial be conducted before a different Magistrate within twelve (12) months from today. Parties will bear their respective costs of this appeal. Those are the disposal orders of the court in this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 13TH DAY OF APRIL 2023**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Mr Macharia for the Appellant

Mr Ng'ang'a for the 1st Respondent



Ms Mugo for the 2nd and 3rd Respondents

Court Assistant: Hinga

