



REPUBLIC OF KENYA



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Musui v Pentecostal Evangelistic Fellowship of Africa (Environment and Land Appeal 28 of 2019) [2023] KEELC 17724 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17724 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 28 OF 2019**

**A NYUKURI, J
MAY 31, 2023**

BETWEEN

TELA MUSUI APPELLANT

AND

PENTECOSTAL EVANGELISTIC FELLOWSHIP OF AFRICA RESPONDENT

(Being an Appeal from the judgment Hon. D. Orimba, Senior Principal Magistrate Kangundo Law Courts delivered on 19th June 2019 in Kangundo ELC Case No. 58 of 2019 (Formerly Civil Suit No. 33 of 2013))

JUDGMENT

Introduction

1. The appeal herein arose from the judgment of the Senior Principal Magistrate's Court delivered on June 19, 2019 in Kangundo ELC Case No. 58 of 2019 (Formerly Civil Suit No. 33 of 2013) by the Senior Principal Magistrate Hon. D. Orimba. In his Memorandum of Appeal dated July 1, 2019, the Appellant stated the grounds of his appeal as follows;
 - a. The learned magistrate erred in law and in fact by dismissing with costs the Appellant's Defence dated April 25, 2013.
 - b. The learned magistrate erred in law and fact in failing to take into consideration the fact that Appellant and the vendor of the property are brothers and were born and raised in the subject property.
 - c. The learned magistrate erred in law and in fact by ignoring the fact that the Appellant's and vendor's mother, two brothers and the Appellant's wife namely Teresia Kalondu Musui, Richard Kamau Musui and Esther Mbenge respectively.



- d. The learned magistrate erred in fact and in law by not taking into consideration that the subject property belonged to one Teresia Kalondu Musi, the Appellant and the vendor's mother and the vendor of the property was not the legal and beneficial owner of the subject property and deficient in proper title to the property and therefore could not transfer good title to the Respondent.
 - e. The learned magistrate erred in fact and in law by ignoring the fact that the vendor of the property had not acquired the property from his and the Appellant's deceased mother through the proper and laid out procedures in the *Law of Succession Act* in order to acquire proper and legal title to the subject property.
 - f. The learned magistrate erred in law and in fact by failing to take into consideration that the property was sold to the Respondent without the consent of the rest of the beneficiaries of the estate of Mrs. Teresa Kalondu Musui.
 - g. The learned magistrate erred in fact and in law in failing to take into consideration that the Appellant had a lifetime interest in the subject property as the son of the deceased Teresia Kalondu Musui the owner of the property.
 - h. The learned magistrate erred in law and in fact by ignoring the contents of the Appellant's defence and the prayers sought in the Appellant's counterclaim.
 - i. The learned magistrate erred in law and in fact by taking into account irrelevant considerations which were not in issue before the magistrate court.
 - j. The learned magistrate erred in law and in fact in ignoring express averments by way of witness statements made by the Appellant and his witnesses and making a decision that contradicts the express averments on record.
 - k. The learned magistrate erred in law in ignoring evidence in favour of the Appellant to the detriment and prejudice of the Appellant and manifested bias against the Appellant.
 - l. The learned magistrate erred in law, in fact and in principle by effectively denying the Appellant justice.
2. The Appellant sought the following orders;
 - a. The Appellant's appeal be allowed.
 - b. The judgment and orders of Hon. D. Orimba made on June 19, 2019 be set aside.
 - c. The defence and counterclaim of the Appellant be allowed in full as against the Respondents.
 - d. The costs of the suit and appeal.

Background

3. By a plaint dated April 12, 2013 and filed on even date, the Plaintiff (Respondent herein) averred that they were the registered proprietor of all that land known as Matungulu/Katine/3080 measuring 0.045 Ha situated in Tala (herein referred to as the suit property). They further stated that the Defendant had without any legal right, trespassed on the suit property and constructed structures thereon and despite being asked to vacate, he continues in the trespass and damage of the suit property. They sought the following orders;



- a. A permanent injunction do issue to restrain the Defendant from trespassing, occupying or dealing with the Plaintiff's property known as Matungulu/Katine/3080.
 - b. An eviction order against the Defendant on Matungulu/Katine/3080.
 - c. Costs of the suit.
4. On May 2, 2014, the Defendant filed an amended statement of defence and counterclaim denying the Plaintiff's claim and averred that he was born on the suit property in 1952 and has been living there ever since. Further that his mother Teresia Kalondu Musui who passed on in 1997 together with his late brothers Richard Makau Musui, Dominic Mutua Musui and Wanza Musui as well as the Defendant's wife Esther Mbenge, were buried on the suit property.
 5. The Defendant also faulted the Plaintiff's actions stating that the Plaintiffs are to be blamed for purchasing land registration No. Matungulu/Katine/2076 without establishing the history of the said property and without seeking the approval of family members as well as buying property that was already occupied.
 6. It was also the Defendant's position that his mother Teresia Kalondu Musui was the beneficial owner of the suit property and no succession cause has been filed in respect of her estate. He sought to be declared as being in adverse possession of the suit property.

Evidence

7. The Plaintiff presented six witnesses. The Plaintiff's evidence was that on December 3, 2004, they purchased the suit property from one Munyao Musyimi and that the property had never been family property or property owned by the late Teresia. One of the witnesses was Peter Munyao Musui PW2 who sold the suit property to the Plaintiff. The Plaintiff further testified that they were unable to take possession of the suit property as the Defendant had blocked their entry and had trespassed on the land. They maintained that his relatives are not buried on the portion sold to the church. According to the Plaintiff, Parcel Nos. 2075 and 2076 were amalgamated to form Parcel No. 3067 then subsequently subdivided to create 7 parcels namely Parcel Nos. 3078 to 3084. That the Plaintiff's Parcel No. 3080 was among the 7 created titles. The Plaintiff produced green cards for the suit property, agreements and searches for the suit property and property registered in the name of the late Teresia.
8. The Defendant was the only witness for the defence. His testimony was that he did not know the suit property was sold. He maintained that the suit property belonged to his family and that the same was sold without his consent or knowledge. He stated further that he was not aware that Parcel No. 2076 had been purchased by his brother Munyao Musui. No documents were produced by the defence.
9. Upon hearing the matter, the trial court dismissed the Defendant's counterclaim and entered judgment for the Plaintiff as sought in the plaint and found as follows;

The Defendant did not produce any supporting documents in support of his claim.

The Defendant's counterclaim filed herein is not supported by any document or evidence. The same is therefore dismissed.

After considering the evidence on record, I do find that the Plaintiff has proved their case and will enter judgment in their favour. I proceed to allow the prayers 1, 2 and 3 as contained in the Plaint.
10. It is the above decision that provoked this appeal. The appeal was canvassed by written submissions. On record are the Appellant's submissions filed on February 10, 2022 as well as the Respondent's submission filed on March 11, 2022.



Appellant's Submissions

11. Counsel for the Appellant submitted that the appeal herein raised two issues, namely;
 - a. Whether the property in dispute formed part of the estate of the Appellant's mother; and
 - b. Whether the sale and transfer of the suit property was done in compliance with the law of Succession Act.
12. It was contended for the Appellant that the evidence of the Appellant and his nephew's was that they have always known that the suit property belonged to Teresia Kalondu Musui, the Appellant's mother. Counsel argued that the suit property formed part of the estate of Teresia Kalondu Musui.
13. Further, counsel argued that there were discrepancies in the Respondent's evidence, which pointed to the fact that the Respondent's claim was a scheme by Peter Munyao Musui to illegally acquire his mother's property by virtue of being the eldest sibling and illegally selling the same to the Respondent. Counsel pointed out that according to the testimony of Daniel Nzioka Waita PW5, the suit property was first sold to PW2 in 1974, however the Respondent produced a copy of title showing that land Parcel No. Matungulu/Katine/2076 was already registered in the name of PW2 as at 4th February 1998. Counsel argued that the green card produced by the Respondent showed that Parcel Matungulu/Katine/2075 was registered on May 8, 1995 in the name of one Mutisya Kioko and transferred to PW2 on February 17, 2010. In addition, counsel stated that the sale agreement produced by the Respondent dated 19th March 2008 for sale of property known as Matungulu/Katine/2076 yet the same parcel was registered in the name of PW2 in 1998 and therefore the question as to why the sale agreement was entered into 10 years after the property had been registered in the purchaser's name ought to be addressed.
14. Counsel also contended that the sale agreement dated March 19, 2008 did not meet the threshold of an agreement envisaged under the Land Act of 2012 and the Law of Contract Act as the same had not been executed by the parties thereto and no consideration was indicated. It was the Appellant's position that there was no sale agreement in relation to Parcel Matungulu/Katine/2076.
15. Counsel observed that the agreement of March 19, 2008 was prepared after the death of Teresia Kalondu Musui. It was counsel's argument that the suit property was as a result of amalgamation of Matungulu/Katine/2075 and Matungulu/Katine/2076 and that the same was sold to the Respondent on 3rd December 2004. Further that that was before the title for Matungulu/Katine/2076 came into existence on February 17, 2010. In addition, counsel observed that no agreement for sale of Matungulu/Katine/2075 from Mutisya Kioko to PW2 was produced in court.
16. It was also argued for the Appellant that PW2 did not produce a copy of the Land Control Board consent duly executed deed of transfer, stamp duty payment and receipt in respect of parcel Matungulu/Katine/2075. Counsel argued that the trial court failed to interrogate whether the acquisition of the said property met the requirements under section 26(1) of the Land Registration Act. Counsel relied on the case of Alice Chemutai Too v. Nickson Kipkurui Korir & 2 others [2015] eKLR, for the proposition that a mere title is not conclusive evidence of ownership of land.
17. It was argued for the Appellant that the Respondent's position that they obtained a search certificate before purchase of the suit property was not sufficient due diligence. It was counsel's position that the suit property was acquired through fraud and therefore the same cannot be protected in law by virtue of section 26 of the Land Registration Act. Reliance was placed on the case of Elijah Makeri Nyangwara v. Stephen Mungai Njuguna & another, Eldoret Case No. 609 B of 2012 for the proposition that under



section 26(1) of the Land Registration Act, there is no protection of a title acquired by an innocent purchaser, if the same was obtained illegally, unprocedurally or through a corrupt scheme.

18. In addition, counsel faulted the trial court for not interrogating the context or the property referred to in an agreement dated August 9, 1979 between Teresia Kalondu Musui and Mutisya Kioko Mutesi for Kshs. 7,150/-. Counsel argued that the Appellant was not accorded a fair trial as the court failed to interrogate all the evidence provided and all the facts before court. It was the view of the counsel that the trial court failed to show the evidence and facts relied upon in reaching the findings made in the judgment. It was counsel's submission that the evidence on record showed that the suit property formed part of the estate of Teresia Kalondu Musui.
19. On whether the sale and transfer of the suit property was done in accordance with the Law of Succession, counsel submitted that PW1 did not obtain grant of letters of administration before selling the suit property to the Respondent. Counsel argued that section 45 of the Law of Succession Act provided that selling a deceased person's property amounted to intermeddling.
20. Counsel relied on section 82 of the Law of Succession Act to argue that it is only the personal representative of the estate of a deceased person who can sell a deceased person's property. Reliance was placed on the case of Re estate of Isaac Kaburu Marete (Deceased) [2017] eKLR for the proposition that Section 82 (b) (ii) of the Law of Succession Act prohibited sale of a deceased person's immovable property before confirmation of grant.
21. In conclusion, counsel argued that the sale of the suit property to the Respondent was void *ab initio* and the same ought to revert to the estate of Teresia Kalondu Musui. Counsel referred to the case of Macfoy v. United Africa Co. Ltd [1961] 3 All ER 1169 at pg 1172, which this court has considered.

Respondent's Submissions

22. Counsel for the Respondent submitted that the appeal raised the following four issues;
 - a. Whether the appeal is defective.
 - b. Whether fraud was proved.
 - c. Whether the Appellant was accorded fair hearing.
 - d. The costs of the suit and appeal.
23. It was contended for the respondent that the record of appeal is defective for failure to include the judgment appealed against and other documents produced in the subordinate court. Counsel relied on the decisions in the cases of Barasa Mohamed Bwana v. Silvano Buko Bonaya & 2 others [2015] eKLR, Elizanya Investments Limited v. Lean Energy Solutions [2021] eKLR and Nabashon Mutuku Ndungu v. Anthony Kusu Wambua [2021] eKLR. Counsel argued that in the absence of judgment, this court cannot re-evaluate and subject the evidence to fresh analysis so as to reach an independent conclusion.
24. On whether the appeal is merited, counsel submitted that there was no evidence before court by the Appellant to show that the suit property formed part of the Appellant mother's estate. Besides, counsel submitted that the Appellant did not place before court any material to show he had locus to file or defend any suit on behalf of the estate of his mother, as he did not have a grant of letters of administration in regard to the estate of his mother.
25. Counsel further contended that the Appellant's argument that the Appellant was not granted a fair hearing on March 20, 2019 is untenable as no appeal or review was preferred against the order of March 20, 2019.



26. On whether fraud was proved by the Appellant, counsel argued that the Appellant failed to prove fraud as against the Respondent. Reliance was placed on the cases of *Urmila W/O Mabendra Shah vs. Barclays Bank International Ltd & another* [1979] eKLR, *Vijay Mursaria v. Nasingh Madhusingh Darbar & another* [2000] eKLR and *Central Bank of Kenya v. Trust Bank Limited & 4 others* [1996] eKLR for the proposition that allegations of fraud must not only be specifically pleaded, but must also be proved.
27. On the question as to whether the Appellant was granted sufficient opportunity to present his case, counsel submitted that from the record before the trial court, it is clear that the Appellant was accorded sufficient time to present his case and call his witnesses and that the decision to close his case was not appealed against. In conclusion, counsel emphasized that the appeal lacked merit and urged the court to dismiss it with costs.
28. On September 21, 2022, this court having noted that the record of appeal did not include the judgment appealed against as well as the exhibits produced in the trial court, ordered the Appellant to file the same, which the Appellant complied with.

Analysis and Determination

29. I have carefully considered the appeal, submissions and the entire record. In my considered view, the issues before this court are whether the suit property belonged to the Respondent or the late Teresia Kalondu Musui.
30. This being a first appeal, the duty of this court is to re-evaluate, re-analyze and re-assess the evidence on record afresh and to arrive at its own independent conclusion, but bearing in mind that it did not see or hear the witnesses and make due allowance for that.
31. In the case of *Gitobu Imanyara & 2 others v. Attorney General* [2016] eKLR, the Court of Appeal aptly captured the duty of the first appellate court as follows;

An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
32. The crux of the instant appeal is who owns the suit property between the late Teresia Kalondu Musui and the Respondent.
33. The Respondent's pleadings and evidence was that they are the registered proprietors of the suit property which they purchased from one Munyao Musui, the Appellant's brother and that therefore the Appellant's presence on that land amounts to trespass. On the other hand, the Appellant maintained that the suit property belongs to Teresia Kalondu Musui his late mother, whose estate has not yet been succeeded. The Respondent produced a sale agreement, a search and a title deed which showed that the suit property was in their name. Although the Appellant testified that the suit property was family property and could not be sold without him being consulted, no evidence or document was produced to show that the suit property was owned by the Appellant's family.
34. Section 26 of the *Land Registration Act* No. 3 of 2012 provides for indefeasibility of title conferred by registration and the same cannot be challenged except where the title is obtained unlawfully, fraudulently, unprocedurally or through a corrupt scheme. While the Appellant extensively submitted that the Respondent's title was obtained by fraud, having considered the Appellant's amended defence and counterclaim dated May 26, 2014 and filed on May 27, 2014, I note that fraud was not pleaded.



- Besides, there was no evidence to prove fraud as against the Respondent. It is trite that fraud should not only be pleaded, but it must be strictly proven, for the court to cancel title. Therefore I reject the submissions made by the Appellant that there was fraud and I find that no fraud was pleaded or proved by the Appellant.
35. While the Appellant's case was that Parcel Nos. Matungulu/Katine/2075 and 2076 belonged to his late mother. However the evidence of the Respondent and his witnesses was clear that the suit property was purchased by PW2 one Peter Munyao Musui from one Mutisya Kioko in 1975. The Respondent produced the agreements as well as the searches for the properties which were amalgamated leading to the title of the suit property. From the green cards produced by the Respondent, Parcel No. Matungulu/Katine/2075 was registered in the name of Mutisya Kioko as the first registered proprietor thereof on May 8, 1995. On February 17, 2010, the property was transferred to Mr. Munyao Musui and on February 16, 2012, it was combined to give a new No. 3067.
 36. On the other hand, Parcel No. Matungulu/Katine/2076 was registered in the name of Munyao Musui as the first registered proprietor and the title was closed on combination on February 16, 2012. Therefore the allegation that these properties belonged to the Appellant's mother are baseless as her name does not appear in any records. The Plaintiff produced searches for Parcel Nos. Matungulu/Katine/137, 2276 and 2312 showing that those three parcels are registered in the name of the Appellant's mother Teresia Kalondu Musui. Therefore the allegation that because Teresia was buried on the land part of which was purchased by the Respondent does not mean the land was hers. Burial of a deceased's remains does not confer any rights to the deceased's estate. Therefore the claim by the Appellant that the suit property was sold without consent of the rest of the beneficiaries of the estate of Teresia, has no basis as Munyao Musui did not need his family's consent to sell the suit property, as the same belonged to him alone to the exclusion of his family members, the burial of his mother on the remaining piece notwithstanding. Therefore, I find that Munyao Musui passed good title to the Respondent.
 37. In any event, while the Appellant's claim is based on the allegation that the suit property belongs to the late Teresia, the Appellant argued that no grant of letters of administration had been issued in respect of her estate and therefore on that ground alone, the Appellant has no locus or standing to make a claim on behalf of the estate of the late Teresia as he is not the personal representative of the estate of the late Teresia. According to section 82 of the *Law of Succession Act*, for a person to file suit on behalf of the estate of a deceased person, they must be in possession of grant of letters of administration for them to have the requisite standing to sue as such. In this case the Appellant has no such grant of letters of administration and therefore he has no locus to make the counterclaim herein.
 38. The respondent having proved ownership of the suit property by lawful acquisition by purchase of the same, they deserved the orders granted by the trial court.
 39. In the premises, the appellant has not laid down any justification for this court to interfere with the findings of the trial court. The upshot is that this appeal lacks merit and the same is hereby dismissed with costs to the Respondent.
 40. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31ST DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE



In the Presence of;

Mr. Oyunge for Appellant

Mr. Munguti for Respondent

Josephine – Court Assistant

