



**Kondoro v Gitere (Civil Appeal 5 of 2019) [2022] KEHC 11079 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEHC 11079 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 5 OF 2019**

**JM NGUGI, J**

**JULY 28, 2022**

**BETWEEN**

**DAMARIS KONDORO ..... APPELLANT**

**AND**

**GACHANJA GITERE ..... RESPONDENT**

*((Being an Appeal from the Judgment/Decree of Hon J B Kalo - Chief Magistrate delivered on December 18, 2018 in Nakuru CMCC No 1329 of 2010))*

**JUDGMENT**

1. The respondent instituted a suit before the lower court, in which he sought eviction of the Appellant from Bahati/Bahati Block 1/317 (hereinafter ‘the Suit Property’). He also prayed for costs of the suit and any other relief. Each of the parties testified as the sole witnesses in their respective cases.
2. PW1, the Respondent, testified that the suit property belonged to him, having acquired it in 1994. He denied that the Land belonged to the Appellant and informed the Court that he had told the Appellant to vacate the land in 1995 when they were in Court over the same land, and it was decided that the Appellant vacates the land.
3. According to his testimony, the decision of Wazee in File No 285 of 1995 had been adopted in Court. He testified that the Appellant had again brought a suit before the High Court in in Civil Suit No, 127 of 2007 which was dismissed and that he himself had brought another suit but withdrew it. He maintained that he had gotten the land regularly and that the Appellant did not have any title to the suit property.
4. The Appellant testified as DW1. She told the Court that she lived on part of the suit property while the Respondent lived on 2 acres. It was her testimony that she was a Member of Nakuru Mukutanio Farmers Co Limited since 1972 and that she had bought shares from the said company and balloted for Plot No 317.



5. According to her Statement, she had been issued with a Share Certificate on March 01, 1982 and began living on the said plot with her family. She testified that she had later been told to collect her title from the District Officer's office but that when she went to collect it, her name was not called out and the title was instead issued to the Respondent. She told the Court that she had later been arrested for trespass. She confirmed there having been previous disputes on the suit property and testified that the Respondent had fraudulently obtained title documents to the suit property.
6. In a judgment dated December 18, 2018, the Trial Court found in favour of the Respondent and issued eviction orders against the Appellant. It also awarded the Appellant costs of the suit and interest thereof. The Court then allowed the Appellant 60 days to remove herself from the land, failing which she would be forcefully evicted.
7. In its Judgment, the Trial Court relied on the provisions of Section 24, 25 and 26 of the [Land Registration Act](#) and reasoned that the Respondent enjoyed legal protection as the registered proprietor of the suit property.
8. The Appellant was dissatisfied with the Judgment and Decree of the Trial Court and preferred the instant appeal against that Judgment. In her Memorandum of Appeal dated January 15, 2019, the Appellant raises the following 4 grounds:
  1. That the Learned Trial Magistrate erred in law and fact by failing to consider the evidence of the Appellant and critically analyse the same and accord it due weight to the extent that it was able to prove the case.
  2. That the Learned Magistrate erred in law and in fact in holding that the Appellant had established a prima facie case based on its pleadings and evidence but failed to award as per the prayers sought.
  3. That the Learned Magistrate erred in law and in fact by applying his own theory in assessing the pleadings, evidence and exhibits which made him fall into error of speculation and inserted his facts and findings which was not supported by the pleadings, evidence, and exhibits.
  4. That the Learned Judge (read Magistrate) erred in law and in fact in purporting to put into perspective materials and facts not contained in the pleadings, evidence, exhibits and submissions of parties.
9. In her submission dated March 10, 2021, the Appellant concedes that a Certificate of Title issued by the Registrar upon registration is to be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the title except on the ground of fraud or misrepresentation to which that person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The Appellant cites the case of [Agripina Khati v Richard Livondo Wiranga & Another](#) [2020] eKLR in that regard
10. Although the Appellant does not dispute that the Respondent has a title to the suit property, she contends that that she was allotted land prior to its registration. The Appellant relies on the case of [Elijab Makeri Nyang'wara v Stephen Mungai Njuguna & Another](#) [2013] eKLR to support her argument that a title in the hands of an innocent third party can be impugned if the same was obtained illegally.
11. The Appellant submits that both she and the Respondent are in occupation of the land: Herself having been allotted the land but not issued with a title, a fact she says, the Trial Court did not consider, despite having testified on the same.



12. She argues that she discharged the burden of proof that the Respondent had illegally acquired his title and relies on the case of *R G Patel v Lalji Makani*. The Appellant further relies on [John Kirui v Richard Rono](#) [2017] eKLR to the effect that a letter of allotment can be used to demonstrate that title held by a party has not been legally acquired.
13. The Appellant cites the provisions of Section 26(1) of the [Land Registration Act](#) and contends that the Respondent's failure to explain how he acquired the suit property that had been first allocated to the Appellant makes his registration irregular. She thus prays that the Appeal be allowed, and Judgment entered in her favour.
14. The Respondent's submissions are dated May 16, 2022. The Respondent approves the decision of the Trial Court. He maintains that he is the registered owner of the suit property, and that the Appellant was in its occupation without his consent.
15. The Respondent contends that the Appellant never made any pleadings regarding the validity of his title or that his title was acquired fraudulently. He argues that allegations of fraud, must be specifically pleaded as set out under Order 2 Rule 4(1) and (2) of the [Civil Procedure Rules](#). He contends that the Appellant never sought cancellation of his title and the issue has thus been introduced at the appellate stage.
16. The Respondent submits that the Appellant did not provide any evidence before the Lower Court to show that she was the initial allottee of the suit property and that the ballot she is keen on relying on has no bearing on the suit property. He contends that the Appellant never tendered any evidence from the allotting authority.
17. The Respondent maintains that in a prior judgment in Nakuru CMCC No 245 of 1989, a decision of elders in his favour was adopted as an order of the court as well as Nakuru HCCC No 127 of 2007 in which a claim to challenge the Respondent's title was found to be time barred and struck out with costs. Accordingly, the Respondent prays that the Appeal be dismissed.
18. This being the first appeal, my role is as recently stated in [Hardy Enterprises Limited & 3 others v Assets Recovery Agency](#) [2022] KECA 587 (KLR). That is; to consider the entire record which includes all the material presented, re- evaluate the same and make my own conclusions. I must also be cautious however to avoid interfering with the findings of fact by the Trial Court unless such findings were not based on evidence or were based on misapprehension of the evidence or if the Trial Court acted on wrong principles in reaching such findings.
19. Accordingly, the issue for determination is whether the Trial Court properly issued eviction orders.
20. Where a party is seeking eviction orders, Section 152E of the [Land Act](#) contemplates that there is no dispute on ownership of that land and that the occupation is unlawful. The Respondent filed the suit before the Trial Court, under the belief that he was the lawful owner of the suit property and that the Appellant was an unlawful occupant. Conversely, the substance of the Appellant's case before the Lower Court and before this Court is that she was the first allotted the Suit Property and is thus in lawful occupation.
21. The issue of ownership of the land had already been litigated and decided in Nakuru HCC 127 of 2004. I say this because the Court in that matter was of the view that the decision in Nakuru RMCC 245 of 1984 adopting the order of Elders had been decided by a Court without jurisdiction. The High Court instead found that the suit was time barred. The decision of the High Court, though a decision arising from a Preliminary Objection essentially sealed the issue of ownership.



22. Additionally, even if the issue of ownership was open for litigation, the Appellant has never at any stage of the protracted proceedings denied the validity of the Respondent's title. Instead, the Appellant has argued that the same was obtained fraudulently. Other than mentioning in her witness statement that the Respondent acquired the title fraudulently, the issue of fraud was never pleaded in the Appellant's Defence. The law is that a party alleging fraud must not only specifically plead the same, but also call evidence to that effect. (See the Court of Appeal in [Kinyanjui Kamau v George Kamau Njoroge](#) [2015] eKLR)
23. In this case, it was not enough for the Appellant to merely state that the Respondent had acquired his title through fraud. She ought to have specifically pleaded the particulars of fraud, then produce evidence to that effect. In the absence of such evidence, the Trial Court correctly applied the provisions of Section 26 of the [Land Registration Act](#) with the effect that the Respondent's Title meant he is the absolute and indefeasible owner of the suit property, with absolute ownership of the land and all ancillary rights and privileges. The Appellant not only failed to specifically plead fraud or corrupt scheme but also failed to produce evidence anywhere verging on the quantum of proof required under our law.
24. Consequently, while section 26 of the [Land Registration Act](#) contains the proviso that a Certificate of Title is not conclusive of ownership where fraud or corrupt scheme is proved, the Appellant in this case woefully failed to marshal any evidence to bring herself within the two provisos. The upshot is that the analysis and conclusion by the Learned Trial Magistrate cannot be faulted.
25. The result is that the Appeal herein is unmerited and is hereby dismissed with costs to the Respondent.
26. Orders Accordingly.

**Dated and Delivered at Nakuru this 28<sup>th</sup> Day of July, 2022**

.....  
**JOEL NGUGI**  
**JUDGE**

