



REPUBLIC OF KENYA



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**Gitau v Muchiri & 3 others (Environment and Land Appeal
E008 of 2022) [2023] KEELC 18535 (KLR) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18535 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E008 OF 2022**

BM EBOSO, J

JUNE 27, 2023

BETWEEN

JAMES THENDU GITAU APPELLANT

AND

PETER NG'ANG'A MUCHIRI 1ST RESPONDENT

WANJIKU MWANGI 2ND RESPONDENT

LAND REGISTRAR, RUIRU 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

*(Being an Appeal against the Judgment of Hon C. A OTIENO –
OMONDI Senior Principal Magistrate, delivered on 1/2/2022 in Ruiru
Senior Principal Magistrate Court MCL & E Case No. 163 of 2019)*

JUDGMENT

Background

1. This appeal challenges the Judgment rendered on 1/2/2022 by Hon C A Otieno – Omondi, Senior Principal Magistrate, in Ruiru SPMC MCL & E Case No 163 of 2019. The suit was initially instituted at Nairobi as Nairobi ELC Case No 69 of 2013. The appeal brings to the fore the phenomena of land fraud that has continued to bedevil Kenya's Land Sector. It does emerge from the original record of the trial court that the Land Registrar testified before the trial court that the Land Registry held two parallel land registers relating to the same parcel of land. The Land Registrar did not, however, present to the court the requisite documents that informed the opening of the two parallel land registers. The appellant was the holder of one of the resultant parallel titles.
2. The appellant was the plaintiff in the trial court. He sought an order upholding his title. The 1st respondent was the defendant in the primary suit and a counter-claimant in the counterclaim. He



sought an order annulling the two parallel titles and an order recognising him as the legitimate owner of the suit property, land parcel number Ruiru/ Kiu Block 2 (Githunguri)/1064 [hereinafter referred to as “the suit property”]. The trial court made a finding to the effect that the 1st respondent was the legitimate owner of the suit property and cancelled the two parallel titles that were held by the appellant and the 2nd respondent. I will outline a brief background to the appeal before I dispose the key issues that fall for determination in the appeal.

3. From the original record of the trial court, it does emerge that through a sale agreement dated 13/9/2011, the 1st respondent purchased the suit property from one Margaret Wanjiku Mwangi who held Share Certificate Number 1273 issued by Githunguri Constituency Ranching Company Limited [hereinafter referred to as “the Company”]. The company effected transfer of the suit land within their internal records to the 1st respondent. The 1st respondent proceeded to plant trees on the land.
4. In 2012, the appellant went to the land and uprooted the 1st respondent’s trees. At the behest of the 1st respondent, the appellant was arrested by the police and arraigned in court to answer criminal charges relating to the destruction of the trees.
5. The appellant in turn filed Nairobi ELC Case No 69 of 2013 contending that he was the registered proprietor of the suit property and seeking, among other reliefs, a declaration that he was the lawful owner of the suit property. He also sought a permanent injunction restraining the 1st respondent against trespassing on the suit property. Nairobi ELC Case No 69 of 2013 was subsequently transferred to Ruiru Senior Principal Magistrate Court and registered as Ruiru Senior Principal Magistrate Court MCL & E Case No 163 of 2019.
6. In response to the appellant’s claim, the 1st respondent filed a defence dated 10/4/2014. He subsequently amended his pleadings to incorporate a counterclaim against the appellant; the 2nd respondent; the Land Registrar; and the Attorney General. He re-amended the pleadings to correct the name of the 2nd respondent to read Margaret Wanjiku Mwangi. His case was that he was the legitimate proprietor of the suit property and that the parallel titles that were held by the appellant and the 2nd respondent had been procured fraudulently. By way of counterclaim, he sought an order annulling the parallel title deeds that were held by the appellant and the 2nd respondent.
7. The 2nd respondent did not enter appearance in the suit. The Land Registrar and the Attorney General filed a defence to the counterclaim in which they averred that they were strangers to the allegations of fraud which the 1st respondent had pleaded in the counterclaim. By way of an alternative defence, they averred that if any registrations were done and titles issued by the Land Register, the same were done and issued procedurally and within the confines of the law.
8. Upon taking evidence and receiving submissions, the trial court rendered the impugned Judgment in which it found that the 1st respondent was the lawful owner of the suit property and nullified the parallel titles that were held by the appellant and the 2nd respondent.

Appeal

9. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following seven verbatim grounds:
 1. That the learned magistrate erred in law and facts in finding that the Land Registrar-Ruiru, had fraudulently issued a title deed to the Appellant herein without any evidence of fraud being adduced by the 1st defendant/respondent.



2. That the learned magistrate erred in law and facts by relying on the evidence of John Maina Mburu who was not the Chairman of Githunguri Constituency Ranching Company Ltd the land was allocated to the Appellant. [sic]
 3. That the learned magistrate erred in law and facts in relying on a register of Githunguri Constituency Ranching Company Ltd that was clearly erroneous.
 4. That the learned magistrate erred in law and facts in dismissing the title deed of the Land Registrar Ruiru that the title deed issued to the Appellant was not a fraudulent.[sic]
 5. That the learned magistrate erred in law and facts in using clerical mistakes if any on documents of the appellant from Githunguri Constituency Ranching Company Ltd to find that they were not authentic.
 6. That the learned magistrate erred in law and facts in not finding that the 1st respondent did not file his counterclaim to the required standards. [sic]
 7. That the whole judgment is biased and influenced by the current Chairman of Githunguri Constituency Ranching Company Ltd who has interest in the property.
10. The appellant urged the court to set aside the Judgment of the trial court and make such other orders as may be just in the circumstances of the appeal.

Appellant's Submissions

11. The appeal was canvassed through written submissions dated November 18, 2022 and further written submissions dated 6/2/2023, filed by M/s Prof Kiama Wangai & Company Advocates. Counsel for the appellant faulted the trial court for basing its findings on mistakes that he described as trivial. Counsel argued that the trial court relied on trivial errors of documentation between the plaintiff [the appellant] and one Alice Waceke Nderu to arrive at an erroneous conclusion. Counsel contended that there was evidence that the documents held by the appellant came from Githunguri Constituency Ranching Company Ltd [the Company].
12. Counsel for the appellant added that despite there being evidence demonstrating that the company issued a clearance certificate to the appellant on 30/6/2009, the trial court “mised” itself by indicating that the said clearance certificate did not bear a share certificate number. Counsel contended that the omission to capture the share certificate number was that of the company and the appellant should not have been faulted for the omission. Counsel added that the sale agreement which the trial court faulted was faultless, contending thus:

“Clearly, the transaction between the vendor and purchaser had commenced way before the signing of the agreement and the sale agreement does capture that.”
13. Counsel for the appellant further argued that the “Wanjiku Mwangi” who was alleged to have illegally procured a title relating to the suit property in 2004 is the same as the “Margaret Wanjiku Mwangi” who sold the suit property to the 1st respondent, and that the allegation that there were two parallel titles was a creation of the 1st respondent aimed at procuring a cancellation of the appellant’s title. Counsel argued that there was “fraud in the eyes of the court orchestrated by the 1st respondent, the Chairman of Githunguri Constituency Ranching Company Ltd and the Registrar of Land at Ruiru”.



14. Counsel for the appellant faulted the evidence of the Chairman of Githunguri Constituency Ranching Company Ltd, contending that whereas he testified that the suit property previously belonged to Michael Ndichu Karanja, the register which was presented to the court bore the name “Michael Ndichu” and did not bear the name “Michael Ndichu Karanja”. Counsel further contended that the Land Registrar’s testimony on how a title is generated supported the case of the appellant to the effect that having procured a land register and a title, it was to be presumed that due process was followed.
15. In the further submissions dated 6/2/2023, counsel for the appellant argued that Alice Waceke Nderu did not require a grant to sell the suit property to the appellant. Counsel added that DW2, John Maina Mburu, was not the chairman of the company at all material times and could not determine the authenticity of the appellant’s documents. Counsel described the 1st respondent’s case as a “fantasy” and a “fraud”. Counsel urged the court to allow the appeal.

1st Respondent’s Submissions

16. The 1st respondent filed written submissions dated November 17, 2022 through M/s R M Njiraini & Co Advocates. Counsel submitted that the trial court properly analysed the evidence of the parties, adding that there was no error of law or fact on part of the trial court. Counsel argued that the trial court properly relied on the evidence of John Maina Mburu, adding that there was no contest or objection to his evidence nor to the fact that he was the Chairman of Githunguri Constituency Ranching Company. Counsel objected to the appellant’s attempt to raise a contestation in this appeal through written submissions.
17. Counsel for the 1st respondent further argued that the trial court properly relied on the register of Githunguri Constituency Ranching Company Limited, adding that the trial court properly applied Sections 26 and 80 of the [Land Registration Act](#) after it had analysed the evidence that was before it. It was the position of counsel for the 1st respondent that the 1st respondent proved his counterclaim to the required standard while the appellant was unable to do so. Noting that the suit property had two titles, a scenario which was irregular, counsel for the 1st respondent argued that the trial court made the right determination after taking into account the evidence of the parties. Lastly, counsel submitted that the trial court applied the correct jurisprudence that guides trial courts when they are confronted with parallel titles and parallel claims of ownership. Counsel urged the court to dismiss the appeal. The 2nd, 3rd and 4th respondents did not file written submissions.

Analysis and Determination

18. I have read and considered the original record of the trial court; the record filed in this appeal; the parties’ rival submissions; the relevant legal frameworks; and the jurisprudence applicable to the issues that fall for determination in this appeal. The appellant itemized seven grounds of appeal. He did not condense the seven grounds into concise issues. Similarly, the 1st respondent filed written submissions but did not frame concise issues.
19. Taking into account the grounds of appeal and the parties’ submissions in this appeal, the following are the three key issues that fall for determination in this appeal: (i) Whether, based on the law and the evidence that was before it, the trial court erred in finding that the appellant had failed to prove his claim to the required standard; (ii) Whether, based on the law and the evidence that was before it, the trial court erred in finding that the 1st respondent had proved his counterclaim to the required standard; and (iii) What order should be made in relation to costs of this appeal? Before I dispose the above issues, I will outline the principle which guides this court when exercising appellate jurisdiction.



20. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013) eKLR as follows:-
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
21. The above principle was similarly outlined in *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
22. The first and second issues are intertwined. I will therefore dispose them simultaneously. Did the trial court error in its findings? First the 2nd respondent neither entered appearance nor filed a defence. The 1st respondent’s counterclaim against the 2nd respondent was therefore undefended. No evidence was tendered by any of the other parties in defence of the parcel register and the title that existed in the name of the 2nd respondent. The Land Registrar confirmed that a land register (green card) existed in the name of the 2nd respondent but there were no corresponding parcel documents in support of the land register. In the circumstances, the trial court cannot be faulted for coming to the conclusion that the land register and the title in the name of the 2nd respondent were fraudulent.
23. The appellant’s case was that he purchased the suit property from one Alice Waceke Nderu through a sale agreement dated 28/8/2010 at a purchase price of Kshs 580,000. At the time of signing the sale agreement on 28/8/2010, the appellant allegedly paid the vendor Kshs 450,000 leaving a balance of Kshs130,000 which was to be paid “upon transfer”. Under recital clause No 1, the sale was by way of transfer of Share Certificate No 1075 and Ballot Card No 3179 “of Githunguri Constituency Ranching Company Limited” from the vendor to the appellant.
24. The appellant relied on a registration anchored on a parcel register that was alleged to have been opened on 8/3/2011 in the name of Githunguri Constituency Ranching Company Limited. The land register showed that on 8/3/2011, Githunguri Constituency Ranching Company Ltd was registered as proprietor of the land. It further showed that on 29/4/2011, Githunguri Constituency Ranching Company Ltd transferred the land to the appellant. It further showed that on 12/7/2011, a title was issued to the appellant.
25. During trial, it emerged that the share certificate which the appellant contended was issued to him to signify internal transfer of the suit property after he purchased the suit property predated the sale agreement that he was relying on. To be precise, the share certificate was dated 30/6/2009 while the sale agreement which was alleged to have given rise to the share certificate was dated 28/8/2010. This was a grave inconsistency that would not be ignored in a dispute where the validity of a title is challenged.
26. This was not the only glaring defect in the appellant’s case. The appellant’s title was supposed to be the product of a transfer by Githunguri Constituency Company Ltd to the appellant. Indeed, if the exhibited land register was anything to go by, the company was alleged to have been registered as proprietor of the suit property on 8/3/2011 and to have transferred the land to the appellant on 24/4/2011. Conveyance of the title to the appellant could only be effected through an instrument



- of transfer duly executed by the company, stamped by the Collector of Stamp Duty, booked for registration and registered. No instrument of transfer was tendered as evidence by the appellant. No evidence of payment of stamp duty was tendered. No evidence of presentation for registration was tendered. No evidence of consent of the Land Control Board was tendered.
27. The trial court record shows that the Chairman of Githunguri Constituency Ranching Company Limited testified as DW2. He tendered the Company's records relating to the subdivision scheme. The records contained a record of the successive owners of the suit property. Neither the appellant nor Alice Waceke were reflected as having owned the suit property.
 28. Counsel for the appellant faulted the trial court for relying on the evidence of the Chairman of Githunguri Constituency Ranching Company Limited. I do not agree with the position of counsel for the appellant. The suit property is a subdivision within a scheme that was owned by the company. The company is the one that allotted the various parcels to its shareholders. The company is the one that holds the primary records of allotment. In the circumstances, there could not have been a better witness in the adjudication of the dispute than a duly authorised director of the company. The appellant had the opportunity to present, as witnesses, the persons who purportedly gave them the documents that were disowned by the company. He elected not to call them as witnesses.
 29. The totality of the foregoing is that the appellant failed to tender evidence in support of the legitimacy of the title he was waving. He failed to prove his claim to the required standard. The duty of a title holder whose title is challenged through evidence of fraud or irregularity was outlined by the Court of Appeal in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR in the following words:-

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interest which need not be noted on the register.”
 30. Did the 1st respondent prove his counterclaim? The 1st respondent led consistent evidence on how he acquired the suit property. His evidence was that he purchased the suit property from Margaret Wanjiku Mwangi who held a share certificate and a ballot relating to the suit property. Although he did not call her as a witness, the company that owned the subdivision scheme, through its chairman, corroborated the evidence of the plaintiff and confirmed that indeed Margaret Wanjiku Mwangi owned the suit property and transferred it to the 1st respondent. The company further denied being privy to the two parallel land registers and the two parallel titles and affirmed the 1st respondent as the legitimate proprietor of the suit property. They confirmed that they cleared the 1st respondent for registration as proprietor of the suit property.
 31. The land Registrar's evidence was that there were two parallel land registers and neither of them had the corresponding parcel file documents. It was the evidence of the Land Registrar that only the company could confirm the person to whom the suit property was allocated.
 32. Given the above evidence, this court has no proper basis upon which to fault the trial court for finding that the 1st respondent had proved his case. That is my finding on the second issue.
 33. On costs, no basis has been laid to warrant a departure from the general principle in Section 27 of the *Civil Procedure Act*. Consequently, the appellant will bear costs of the appeal.



34. The result is that I do not find merit in this appeal. The appeal is accordingly dismissed. The appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 27TH DAY OF JUNE 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Njraini for the Respondents

Court Assistant: Hinga

