



REPUBLIC OF KENYA



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**John v Ndamathia; Kimani (Interested Party) (Environment and Land
Appeal 8 of 2017) [2023] KEELC 18283 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 8 OF 2017**

JM MUTUNGI, J

JUNE 21, 2023

BETWEEN

LOUIS WAHOME JOHN APPELLANT

AND

DUNCAN GITHOME NDAMATHIA RESPONDENT

AND

WANYINA KIMANI INTERESTED PARTY

(Being an Appeal from the Judgment and Decree of the Learned Hon. Y. M. Barasa Senior Resident Magistrate in Kerugoya MCCC 447 of 2007 delivered on 31st May, 2017)

JUDGMENT

1. This Appeal arises from the Judgment and Decree of the Learned Hon. Y. M. Barasa –Senior Resident Magistrate in Kerugoya MCCC No. 447 of 2007 delivered on 31st May 2017. The Learned Trial Magistrate by the Judgment declared that the Appellant, who was the 2nd Defendant in the suit before the Lower Court, had unlawfully acquired LR Kiine/Rukanga/775 and ordered the rectification of the title register by cancellation of registration No. 2 and 4 of the register.
2. The Appellant being dissatisfied and aggrieved by the Judgment of the Subordinate Court has appealed to this Court and has listed 11 grounds of Appeal through the Memorandum of Appeal dated 27th June 2017 filed in Court on 28th June 2017. The grounds of Appeal are as hereunder:-
 1. That the Learned Magistrate erred in law and fact in holding that the Respondent and proved the existence of fraud on the part of the interested party yet the Respondent did not adduce any evidence at all to show how the transfer in favour of the Interested Party was affected.



2. That the Learned Magistrate erred in holding that the appellant committed acts of fraud yet no particulars of fraud were pleaded against him.
 3. That the Learned Magistrate erred in holding that the Appellant committed acts of fraud yet no such evidence was tendered to show how he committed such acts.
 4. That the Learned Magistrate erred in inferring and speculating as to how the transfer of land parcel No. Kiine/Rukanga/775 was effected on 3rd July, 1997 in favour of the Interested party contrary to settled Law and practice.
 5. That having ruled and found that the suit against the Interested Party had abated by reason of the death of the Interested party, Learned Magistrate erred in failing to hold that the suit against the Appellant ought to have also failed since the success of the Respondents suit was fully dependent on an adverse finding against the Interested Party.
 6. That the Learned Magistrate erred in holding that the Respondent had the Locus stand to file and prosecute the suit yet:-
 - a. The suit property was not part of the estate of the deceased Mwangi Nguri.
 - b. The names of the deceased on the Title Deed were different from the ones in the Succession proceedings.
 - c. The Respondent had filed the succession proceedings 12 years after the alleged death of the deceased.
 7. That the Learned Magistrate erred in law in failing to make a finding that he did not have the pecuniary of legal jurisdiction to hear and determine the suit despite an objection being raised before the hearing of the suit commenced.
 8. That the Learned Magistrate erred in failing to find that the provisions of the Registered Land Act (cap. 300 – now repealed) and in particular Section 143(2) of the said Act were applicable in this suit and the application of the act would have resulted in the dismissal of the Respondents suit.
 9. That the Learned Magistrate erred in shifting the burden of proof to the Appellant by making adverse findings against him yet there was substantial evidence of the purchase of the suit property from the Interested Party.
 10. That the Learned Magistrate erred in failing to take heed of the various binding authorities that were produced by the Appellant and attached to his written submission and if he had done so, he would have arrived at a different decision.
 11. That the decision of the Learned Magistrate was based on very weak and non-existent evidence and the reasoning for reacting the said decision was seriously flawed.
3. In the suit before the Subordinate Court, the Plaintiff who is the Respondent in the Appeal suing as the Legal Representative of Benson Mwangi Nguri Alias Mwangi Nguri(Wambui) filed suit against Wanyina Kimani (1st Defendant) and Louis Wahome John (2nd Defendant) claiming that Benson Mwangi Nguri alias Mwangi Nguri (deceased) was before his death on 4/12/1995 the registered owner of L.R Kiine/Rukanga/775 and that on 3/7/1997 the 1st Defendant fraudulently caused the said land to be registered in his name before he (1st Defendant) fraudulently caused the land to be transferred to the 2nd Defendant (the Appellant) on 9/5/2003. The Respondent claimed the 1st Defendant (Interested party in the Appeal) forged the deceased signature to effect the transfer to his



name before purportedly selling and transferring the land to the Appellant. The Respondent in the suit before the Subordinate Court prayed for Judgment against the Defendants for:-

- a. A declaration that they were unlawfully and fraudulently registered as proprietors of LR Kiine/Rukanga/775 vide entries number 2 and 4 of the register.
 - b. An order for rectification of the register by cancellation of entries number 2 and 4 of the register forthwith.
 - c. Costs of the suit.
4. At the initial stage Judgment was entered against the Defendants for non appearance and failure to file a defence. However, the 2nd Defendant (present Appellant) applied and the *ex parte* Judgment against him was set aside and he filed a statement of defence. The 1st Defendant never appeared and did not file a defence and/or participated in the proceedings.
 5. The 2nd Defendant in his statement of defence averred that he was a bonafide purchaser for value of the suit property and denied all the allegations of fraud pleaded against him by the Plaintiff. The 2nd Defendant/Appellant contended that he lawfully and validly acquired title to the suit property, took possession and occupation and that he had since acquiring the land been utilising the same for commercial cultivation. He denied the Plaintiff was entitled to the reliefs sought in the Plaintiff.
 6. The suit was heard by the Trial Court where the Respondent as Plaintiff testified in support of the Respondent's case. It was the Respondent's evidence that his son Benson Mwangi who died on 4/12/1995 owned land parcel Kiine/Rukanga/775. He testified that the 1st Defendant (now interested party in the Appeal) unprocedurally procured the transfer of the parcel of land to his name. The Respondent in his evidence averred that the Interested party (1st Defendant) stole his son's title and caused the ownership of the land to be changed at the Lands Office in 1997. The Respondent explained that the Interested Party had married his daughter and he (Interested Party) had died though he didn't know the year he died. The Respondent testified that he was informed in 1997 that somebody was clearing his son's land and that as per the abstract of title (green card) exhibited, the Interested Party changed the ownership to his name before transferring the land to the Appellant in 2005.
 7. The Appellant testified that he was introduced to the Interested Party in 2003 in Sagana Town. He testified that he had land in Sagana where he was farming French beans. He stated the Interested Party indicated he had 8 Acres land near Makutano Town which he was selling and that he went and saw the land and agreed to buy. He stated he carried out a search that confirmed the land was land parcel Kiine/Rukanga/775 and was registered in the name of Wanyiha Kimani the Interested Party in the Appeal. The Certificate of Official search dated 3/2/2003 was produced in evidence as ("DEXI"). The Appellant testified that the vendor (Interested Party) had the ownership documents save that the original title had been destroyed/lost but he had commenced the process to obtain a duplicate through the gazette of loss by the Land Registrar. He stated that after due process the Interested Party was issued with a new replacement title by the Land Registrar, Kirinyaga.
 8. The Appellant testified that after the vendor (Interested Party) was issued with the replacement title, they applied for the Land Control Board consent which was duly given and the vendor transferred the land to him. He maintained he never acquired title to the suit land fraudulently as alleged by the Respondent. The Appellant in his evidence disputed the Respondent was the father of the original owner of the land parcel one Mwangi Nguri. He tendered documents in evidence showing that the Respondent had apparently sued the person described as Mwangi Nguri vide a Plaintiff dated 24/11/1995 in Kerugoya SRM CC No. 250 of 1995 and the said Mwangi Nguri had filed a defence



dated 10/1/1996 in Court on the same date yet as per the death certificate Benson Mwangi Nguri had died on 4/12/1995.

9. After evaluating and analysing the evidence adduced by the Respondent and the Appellant, the Learned Trial Magistrate made a finding that the Appellant failed to demonstrate how he acquired title to the suit land and for that reason held that there must have been some aspect of fraud. The Learned Trial Magistrate held that since the Appellant had not shown how he acquired the land from the Interested Party, he did not think that he acquired the land legally. The Learned Magistrate in concluding his Judgment stated as follows:-

“In my conclusion it has emerged that the deceased Benson Mwangi Nguri was the 1st registered owner of land parcel Kiine/Rukanga/775. The subsequent registration by the 1st and 2nd Defendants have been shrouded in mystery. In such case it is safe to have the land revert to the original owner.”

10. With that the Learned Trial Magistrate held that the Respondent had proved his case on a balance of probability as required and proceeded to enter Judgment in favour of the Respondent as against the Appellant. The Judgment was in the following terms:-
- a. A declaration is hereby issued that the 2nd Defendant unlawfully acquired LR. Kiine/Rukanga/775 vide entry 4 of the register.
 - b. An order is hereby issued for the rectification of the register by cancellation of entries No. 2 and 4 of the register forthwith.
 - c. Each party shall bear its own costs of the suit.
11. The Learned Magistrate’s findings and Judgment provoked the present Appeal by the 2nd Defendant as per the grounds set out earlier in this Judgment.
12. The Appeal was canvassed by way of submissions and both the Appellant and the Respondent filed their respective submissions. The Interested Party as per the evidence led at the trial was said to have died though no proof of death was given. He did not participate at the trial or in the Appeal proceedings.

Appellant’s Submissions.

The Appellant argued grounds 1,2,3,4,5,8,9,10 and 11 together and ground 6 separately. Ground 7 of the Appeal on the Court’s jurisdiction was abandoned. The gist of the Appellant’s submission was that the Respondent did not prove the allegations of fraud attributed to the 1st Defendant (Interested Party) under paragraphs 5 and 6 of the Plaintiff. Under paragraphs 5 and 6 of the Plaintiff the Plaintiff (Respondent) pleaded as follows:-

5. On 3/7/1997 the 1st Defendant fraudulently caused land parcel registration Number Kiine/Rukanga/775 to be transferred to his names vide entry 2 of the Register.

Particulars of Fraud

- i. Purporting to have bought the said parcel of land from Benson Nguri Mwangi alias Mwangi Nguri (Wambui) whilst the said person had been dead for almost 2 years.
- ii. Forging or causing to be forged the signature or mark of the deceased Benson Nguri Mwangi Alias Mwangi Nguri (Wambui) so as to facilitate transfer to his names.
- iii. Intermeddling with the estate of a deceased person.



6. On 9/5/2003 the 1st Defendant fraudulently transferred Land Parcel No. Kiine/Rukanga/775 to the 2nd Defendant vide entry 4 of the register.

Particulars of Fraud

- i. Purporting to transfer the aforesaid parcel to the 2nd Defendant while aware that he did not have a good title to the same.
 - ii. Purporting to have bought the aforesaid parcel of land from Benson Nguri Mwangi Alias Mwangi Nguri (Wambui) while well aware that the said fact was untrue.
 - iii. Conspiring with the 2nd Defendant so as to transfer the aforesaid parcel of land to him thereby attempt to cover up the perpetrated fraud.
13. The Appellant submitted the Respondent was obligated and had the burden to prove and establish fraud which he failed to do. The Appellant stated the Respondent did not produce any evidence to prove the 1st Defendant had forged the signature of Mwangi Nguri (Wambui) to facilitate transfer of the land to his name. The Appellant further submitted that the Respondent did not demonstrate that the person named as Benson Mwangi Nguri (deceased) in respect of whom he took Letters of Administration and filed the suit on behalf of, was the same person as Mwangi Nguri (Wambui) who was registered as the owner of the suit land. The Appellant contended the Death Certificate tendered in evidence was for one Benson Mwangi Nguri and not Mwangi Nguri (Wambui) who was the initial registered owner of the suit land. The Appellant maintained there was no evidence to show Benson Mwangi Nguri and Mwangi Nguri (Wambui) were one and the same person intimating that there was no evidence that indeed Mwangi Nguri (Wambui) had died.
14. The Appellant submitted that the Learned Trial Magistrate erred in holding that the Respondent had locus standi to institute the suit when it was not established that Mwangi Nguri (Wambui) was deceased and the Respondent was the Administrator of his estate. The Appellant pointed to a suit Kerugoya SRMCC No. 250 of 1955 Dancan G. Ndamathia –vs- Mwangi Nguri and Contended the Respondent as Plaintiff had sued Mwangi Nguri vide a Plaint dated 29th November 1995 and that the said Mwangi Nguri filed appearance and defence in the suit on 10th January, 1996. The pleadings in the suit, the Plaint, appearance and defence, were exhibited by the Appellant in his evidence and were not objected to. It was the Appellants position that there was credible evidence that Mwangi Nguri was alive on 10th January, 1996 and could not have been the Benson Mwangi Nguri who died on 4th December 1995. The Appellant further submitted it was unlikely that Benson Mwangi Nguri was the person registered as the owner of the suit property in 1971 as he was then a minor aged about 11 years as per the death certificate which showed he died when he was aged 34 years. The registration did not indicate he was registered as a minor.

Respondents Submissions.

The Respondent in his submissions submitted that the Appellant had raised issues in submissions and in the Appeal that had not been raised and canvassed during the trial. The Respondent submitted that the issue whether Benson Mwangi Nguri and Mwangi Nguri was one and the same person was not an issue before the Lower Court and therefore was not an issue for determination in the Judgment. The Respondent contended that parties are bound by their pleadings and the Appellant in his defence and his witness statement never adverted to the issue that Benson Mwangi Nguri and Mwangi Nguri were not the same person. The Respondent contended that the Appellant was precluded from raising issues that were not raised before the trial Court and ruled upon.



The Respondent placed reliance on the Case of County Government of Migori –vs- Hope Beef Help Group (2020) eKLR where R. Wendo, J cited with approval the Court of Appeal Case of Kenya Hotels Ltd –vs- Oriental Commercial Bank Ltd (2018) eKLR where the Court considered the applicable principles where new grounds are raised on Appeal.

The Court stated:-

“Where the Applicant seeks to introduce an entirely new point, there are well known strictures that seek to ensure firstly, that an Appellate Court does not, in disguise metamorphose into a Trial Court and make first instance determinations without the benefit of the input of the Court from which the Appeal arises ---

Due to these fundamental concerns, the Courts have developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal: In Openda –vs- Ahn (ca 42/1981) this Court identified some of the principles to include that all grounds of Appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the Applicant’s case as conducted in the Trial Court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial Court.”

The Respondent on this point also relied on the Case of Kenya National Highways Authority –vs- Paleah Stores Ltd & 2 Others (2020) eKLR where G. V. Odunga, J (as he then was) held that where an issue was not placed for determination before the trial Court, it cannot be properly made a basis for determination of the Appeal owing to the reason that its determination required that a factual finding needed to be made on the same by the trial Court. Odunga, J cited with approval the holding by Platt, JA in Wachira –vs- Ndanyeru(1987) KLR 252 where he expressed himself thus:-

“The principles can be summarised as follows: the discretion to allow a point of law to be taken for the first time on Appeal will not be exercised, unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise in Appeal, a case totally inconsistent with that which he raised in the trial Court, even though evidence taken in that Court supports the new case”.

15. The Respondent further in his submissions submitted that the Appellant did not prove or demonstrate he was a bonafide purchaser for value without any notice and that the burden of proof rested with him as per Section 112 of the Evidence Act. The Respondent denied that the Learned Trial Magistrate shifted the burden of proof to the Appellant arguing that the Appellant had the burden to prove how he acquired the suit property.
16. On the issue of fraud, the Respondent submitted that on the evidence he had proved that the 1st Defendant /Interested Party had fraudulently transferred the suit property to his name two (2) years after the original proprietor’s death. The Respondent pointed to the death certificate which showed Benson Mwangi Nguri died on 4/12/1995 while the Interested Party was registered on 13/7/1997 as proof of the alleged fraud. The Respondent thus submitted the Interested Party never acquired a good title and could equally not pass a good title to the Appellant.
17. Regarding the Judgment against the Interested Party that the Appellant had argued was irregularly entered against a party who had died, the Respondent submitted at the time the suit was filed, the Interested Party was alive and was duly served but failed to enter appearance prompting the entry of Interlocutory Judgment against him. Following formal proof Judgment was entered in favour of



the Respondent and only the Appellant applied and had the Judgment against himself set aside. The Respondent denied the suit against the 1st Defendant/Interested Party had abated at the time Judgment was entered against him. He contended that the death of the Interested Party was not proved as no death certificate was availed.

18. On the issue of lack of locus standi to institute the suit on the basis that he was not the father of the registered owner, Mwangi Nguri (Wambui), The Respondent asserted that he obtained Grant of Letters of Administration on 27/1/2005 which he exhibited. The Respondent contested the pleadings in Kerugoya SRMCC No. 250/1995 exhibited in the Record of Appeal showing the supposed deceased entered appearance and filed a defence in the suit on 10/1/1996. The Respondent contended the pleadings were not certified and the person; Samuel Mugo, who allegedly gave the Appellant the documents was not called as a witness.

Analysis, Evaluation and Determination:

19. I have outlined the evidence and the rival submissions by the parties. This Court as an Appellate Court is duty bound to consider and re evaluate the evidence adduced before the Lower Court to determine whether the decision reached by the Lower Court was justified. The principles that an Appellate Court applies in considering an Appeal was well articulated in the Court of Appeal case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the Court stated as follows:-

“----- 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 that respect.”

20. I have accordingly re-evaluated and considered the evidence that was presented before the Lower Court. The Respondent’s evidence was that he was alerted there were some people clearing what he stated was his son’s parcel of land. He stated his son Benson Mwangi Nguri had died on 4/12/1995 and he had obtained grant of Letters of Administration to represent his estate (“PEXI”). He stated that the Interested Party who had married his daughter had stolen his son’s title deed to the suit property and had caused it to be fraudulently transferred to his name. The Respondent’s basis for stating that the Interested Party had acted fraudulently was because his son had died on 4/12/1995 while the transfer to the Interested Party’s name was effected on 3/7/1997 more than 1 ½ years from the date of his son’s death. It is noteworthy that the instrument of transfer that was used to cause the transfer and/or any other supporting documents in the registration of the transfer were not tendered in evidence. The Respondent took the position that the transfer from the Interested Party to the Appellant was fraudulent since the Interested Party did not acquire a good title.
21. The Appellant for his part gave evidence as to how he purchased the suit property from the Interested Party. He asserted that all the due process was adhered to including applying and obtaining the consent of the Land Control Board for the transfer. He maintained that he carried out due diligence which revealed the Interested Party was the registered owner and the land had no encumbrances and he was thus a bonafide purchaser for value without any notice of any defect in the title. The Appellant argued that the Respondent did not prove the allegations of fraud levelled against the Interested Party and the Appellant as particularised under paragraphs 5 and 6 of the Plaint.



Whether Fraud was Proved.

22. The Lower Court's Judgment was to the effect that the Interested Party and the Appellant fraudulently acquired their respective titles and that was the reason for ordering the register to be rectified by cancelling the entries that gave effect to the transfers. Fraud in Civil Litigation is considered a serious allegation which borders on criminality. Where fraud is alleged it is a requirement that it be specifically pleaded and the particulars of the alleged fraud be given. The Respondent sought to comply with that legal requirement under paragraphs 5 and 6 of the Plea where he pleaded as follows:-

5) On 3/7/1997 the 1st Defendant fraudulently caused land parcel registration Number Kiine/Rukanga/775 to be transferred to his names vide entry 2 of the register.

Particulars of Fraud

- i. Purporting to have bought the said parcel of land from Benson Nguri Mwangi alias Mwangi Nguri (Wambui) whilst the said person had been dead for almost 2 years.
- ii. Forging or causing to be forged the signature or mark of the deceased Benson Nguri Mwangi Alias Mwangi Nguri (Wambui) so as to facilitate transfer to his names.
- iii. Intermeddling with the estate of a deceased person.

6. On 9/5/2003 the 1st Defendant fraudulently transferred Land Parcel No. Kiine/Rukanga/775 to the 2nd Defendant vide entry 4 of the register.

Particulars of Fraud

- i. Purporting to transfer the aforesaid parcel to the 2nd Defendant while aware that he did not have a good title to the same.
- ii. Purporting to have bought the aforesaid parcel of land from Benson Nguri Mwangi Alias Mwangi Nguri (Wambui) while well aware that the said fact was untrue.
- iii. Conspiring with the 2nd Defendant so as to transfer the aforesaid parcel of land to him thereby attempt to cover up the perpetrated fraud.

23. The issue to determine is whether the Respondent did in fact prove the allegations of fraud itemised herein above. The standard of proof in regard to fraud allegation is higher than the usual standard in Civil cases where proof is on a balance of probabilities though the standard is not beyond a reasonable doubt as in Criminal cases. The Courts have routinely held that it is not enough to merely make allegations of fraud. The allegations of fraud must not only be specifically pleaded but also must be strictly proved. In the Case of *Vijay Morjaria -vs- Nansingh Madhu Singh Darbar & Another (2000)* eKLR Tunoi, JA (as he then was) stated thus:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The Acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distractively alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

24. The Court of Appeal in the Case of *Kinyanjui -vs- George Kamau Njoroge (2015)* eKLR where the Land Registrar in his evidence had affirmed the land records of the property were missing, the Court



held that fraud could not be imputed merely on the basis of the missing records. The Court stated thus:-

“In this case, fraud cannot be imputed on the part of the Respondent by the mere fact that the record in relation to the subject property was missing at the Lands Registry. To succeed in the claim for fraud the Appellant needed to not only plead and particularise it, but also lay a basis by way of evidence, upon which the Court would make a finding-----“

25. In the present matter the Respondent based his claims of fraud on the fact that his son who he claimed was the registered owner of the suit property had died on 4/12/1995, and that the transfer to the Interested Party had been effected on 3/7/1997 long after his son’s death. He alleged that the signature or mark of the deceased proprietor was forged to facilitate the transfer to the name of the Interested Party. There was no evidence of forgery adduced and neither was the alleged forged instrument of transfer produced in evidence. The Respondent did not explain why the copy of the transfer was not availed for scrutiny or why the Land Registrar could not be summoned to produce the documents which ordinarily would be held by the Land Registry on the parcel file of the subject property as required under Section 6 (1) (c) of the Registered Land Act, Cap 300 Laws of Kenya (now repealed) which provides:-

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- (1) There shall be maintained in each registration District a Land Registry, in which there shall be kept –
- a. -----
 - b. -----
 - c. Parcel files containing the instruments which support subsisting entries in the Land Register and any filed plans and documents;

26. The Respondent alleged forgery of the transfer and not only did he not offer any evidence to support the allegation, he also never tendered the alleged forged instrument of transfer in evidence. Section 109 (1) of the Registered Land Act (repealed) provides:-

“Every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument.”

27. The Respondent further appeared to peg his case of fraud on the fact that the transfer to the Interested Party was effected after the death of Mwangi Nguri (Wambui) the registered owner. This cannot be proof of fraud as there was no indication of the date the instrument of transfer was executed by the parties. The transfer takes effect from the date of execution and not registration. Thus where a person executes a transfer and dies before the transfer is registered, the death does not invalidate the transfer where such transfer was properly and validly executed. The registration of such a transfer can be processed notwithstanding the death of the transferor. The critical issue would be the date of execution of the transfer, if it was before the death of the transferor and was validly executed, the transfer would be registrable even after the death.

28. In the present matter, without having sight of the transfer instrument that effected transfer of the suit property to the Interested Party, it is not possible to know when it was executed and the Court would be entitled to hold that since the Land Registrar was satisfied the instrument met the criteria for registration, it was validly executed as required under the law. On my own evaluation and analysis of



the evidence I am not persuaded the Respondent proved the allegations of fraud and I hold that the allegations of fraud against both the Interested Party and the Appellant were not proved to the required standard and that the Learned Trial Magistrate erred in holding that the transfer to the Interested Party, and the Appellant were obtained fraudulently. There was simply no evidence of any fraud adduced.

29. On the evidence the Appellant obtained his title validly through due process. There is evidence he paid monies to the Interested Party, applied and obtained consent of the Land Control Board and eventually got the transfer registered in his name. Section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya provides:-

“No suit shall be brought upon a contract for disposition of an interest in land unless:-

- i. It is in writing
- ii. It is signed by all the parties thereto;
- iii. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

30. The Learned Trial Magistrate misapplied this provision to hold that the Appellant did not prove how he acquired the suit land since he had no agreement in writing. This provision had no application in the circumstances of this case since the Appellant had title to the land and was not basing his suit on any sale agreement and he was not seeking the enforcement of any contract.

31. On the issue of Respondent’s lack of capacity to sue and the issue of abatement of the Interested Party’s suit, nothing turns on them. I however wish to note that the identities of Benson Mwangi Nguri and Mwangi Nguri (Wambui) was inadequately dealt with by the parties. The death certificate was issued in the name of Benson Mwangi Nguri while the Land Register was in the name Mwangi Nguri (Wambui). There was also the question of the suit Kerugoya SRMCC No. 250 of 1995 (Dancan G. Ndamathia –vs- Mwangi Nguri) where it would appear the Respondent sued his son. Although the Respondent denied filing the suit, the Court suo moto in an endeavour to further the overriding objective to administer justice as it is enjoined to do under Section 1A of the Civil Procedure Act and Section 3 of the Environment and Land Court Act took the liberty to request the Registry to avail the file for perusal if it was available. The file was infact availed to the Court and the Court was able to scrutinise the original record and these were the observations/findings:-

- i. Complaint dated 24/11/1995 was filed by Dancan G. Ndamathia in person on 28/11/1995 and Court fees of Kshs 1,950/- paid and summons were issued.
- ii. A defence was filed on 10/1/1996 by Mwangi Nguri in person and Court fees of Kshs 150/- paid for both Memorandum of Appearance and defence.

32. The address for the Plaintiff was given as P.O Box 93483 Mombasa and that of the Defendant as P.O. Box 53 Sagana.

33. No action appears to have been taken by the parties to prosecute the case and the suit was on 27/2/2006 dismissed by Hon. J. N. Onyiego SRM for want of prosecution. It would thus appear that the person named as Mwangi Nguri was alive on 10/1/1996 when he entered appearance and filed defence in the above suit. Was he the same person who was said to have died on 4/12/1995? Certainly not and it remains a mystery whether Benson Mwangi Nguri as per the death certificate and Mwangi Nguri (Wambui) who was registered as proprietor of land parcel Kiine/Rukanga/775 was one and the same person.



34. The other puzzle in this matter is when the 1st Defendant/Interested Party died, if at all. During the time the Respondent was giving evidence, he stated the 1st Defendant died but gave no details though the 1st Defendant was his son in law. The Respondent has argued that since there was an *ex parte* Judgment against the 1st Defendant and he never moved the Court to set the same aside, the Judgment remained since it was rendered when he was alive. The interested party was a son in law to the Respondent, and it was therefore intriguing for the Respondent to state when he gave evidence that he did not know when he died. The Appellant filed an application dated 25/5/2017 seeking to have the suit as against the 1st Defendant/Interested Party declared as having abated. There was no death certificate annexed to this application and it was never prosecuted. The Learned Trial Magistrate somehow in his Judgment disposed of the application by simply stating “since it is said that the 1st Defendant is dead, I allow the application.” There was no evidence that the 1st Defendant had died and it was an error on the part of the Magistrate to dispose of the application in the manner he did.
35. Be it as it may be, the *ex parte* Judgment entered against the 1st Defendant/Interested Party and the 2nd Defendant/Appellant was joint and several and the suit before the Lower Court was intrinsically intertwined as against the 1st and 2nd Defendant such that once the Judgment against the 2nd Defendant/Appellant was set aside the Judgment against the 1st Defendant could not stand. Whether or not the 1st Defendant participated in the trial, the Respondent was obligated to prove the allegations of fraud as against the 1st and 2nd Defendants. I have held that the Respondent did not prove his case against both the 1st and 2nd Defendant and that the trial Magistrate was not justified in reaching the decision that he did.
36. For the reasons given herein above, I hold that the Learned Trial Magistrate erred and misdirected himself in the evaluation of the evidence and came to the wrong conclusion. The Appeal herein has merit and I allow the same. The Judgment of the Learned Trial Magistrate delivered on 31st May, 2017 is hereby set aside and is substituted with an order dismissing the Plaintiff’s suit with costs to the 2nd Defendant.

The Appellant is awarded the costs of the Appeal.

JUDGMENT DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 21ST DAY OF JUNE 2023.

J. M. MUTUNGI

E.L.C - JUDGE

