



Nyang'au & another v Mang'era (Suing as an Administratrix of the Estate of Vincent Matwere Mogaka - Deceased) (Environment and Land Appeal E019 of 2022) [2023] KEELC 18087 (KLR) (19 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18087 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E019 OF 2022**

JM KAMAU, J

JUNE 19, 2023

BETWEEN

FLORENCE NYAKERARIO NYANG'AU 1ST APPELLANT

MARK ANARIKO ONUNDA 2ND APPELLANT

AND

EBISIBA BOCHABERI MANG'ERA RESPONDENT

**SUING AS AN ADMINISTRATRIX OF THE ESTATE OF VINCENT MATWERE
MOGAKA - DECEASED**

(Being an Appeal from the Judgment and Orders of Hon. M.C. Nyigei – PM dated and delivered on the 30th day of November 2022 in MC. ELC Case No. 6 of 2020 at Nyamira)

JUDGMENT

1. In Nyamira Chief Magistrate Court ELC Case No. 6 of 2020, the Plaintiff now Respondent, as an administrator of the Estate of Vincent Matwere Mogaka the registered owner of North Mugirango/Mokomoni/293 sued the Defendants, now Appellants, the 2nd Appellant being the father of one Joshua Anariko whose body was lying at the mortuary and the 1st Appellant the Deceased's grandmother. They intended to bury the Deceased on the suit land and the Respondent sought restraining orders against this in the following terms: -
 - i. The Judgment and/or Decree of the Learned Magistrate dated and delivered on 30th of November 2022 be set aside and/or quashed.
 - ii. The Honourable court be pleased to order the Plaintiff/Respondent's suit dismissed.



- iii. That the Defendant/Appellant pray for a stay of the Judgment issued by the subordinate court pending the Hearing and determination of this Appeal.
 - iv. That in the alternative, and without prejudice for the foregoing prayers, this court to revisit the issues raised by the Defendants/Appellants.
 - v. Costs be borne by the Respondents.
 - vi. Any such and/or further orders that the Honourable Court shall deem just and expedient in the circumstance.
2. Contemporaneously with the Plaint, an Application under certificate of urgency to restrain the burying of the body on the suit land was made and relevant orders made by the Chief Magistrate positively on 17/01/2020. On 31/01/2020 the Respondents amended the Plaint arguing that the body of the late Joshua had been interred on the suit land on the night of 20th/21st January 2020 and prayed that an order of exhumation be made including a prayer for General Damages for non-use of the land. On 26/02/2020 the Appellants filed Defence and Counter-claim urging the court to cancel the Title to the suit land which they claimed was illegally obtained through fraud and that the Respondent do hive off 1 ½ Acres out of the suit land and have it transferred to them. They also claimed that the suit was Res-Judicata.
 3. The case was eventually heard and determined on 30/11/2022.
 4. The Appellants testified that only a portion of the parcel of the suit land had been sold to the Respondent's husband but he ended up having the entire land registered in his name. The Trial Court held that the suit was not Res-Judicata because the cases filed earlier were not between the parties in the suit before court. No documents were produced to show that there were such cases as would lead the suit to be Res-judicata. The only documents produced in court by the Appellants were Death Certificates to confirm the intended burial of their kin on the suit land and no other documents and therefore there was nothing to show that the case was Res-judicata. On the issue as to whether the Respondent was fraudulently registered as the owner of the suit land, the court held that it was not furnished with any particulars of fraud as required by law. Secondly, the Appellants were prosecuting the case on behalf of the Estate of Nyangau Nyandiko in respect of whose Estate they had not obtained letters of Administration either full Grant or otherwise. The Respondent's Title was therefore not impeached.
 5. Subsequently, the Appellants filed an Appeal against the said Judgment on the following grounds: -
 1. The Learned Magistrate erred in law and fact in entering the Judgment in favour of the Plaintiff against the Defendants in spite of the Plaintiff's miserable failure to establish her case, especially on the sale of the said land parcel LR.No North Mugirango/mokomoni/293.
 2. The Learned Magistrate erred in law and fact in that the Plaintiff/Respondent's husband the late Vincent Matwera Mogaka did not buy the land from Ikweri Nyandiko but the land was bought by Ndubi Mogaka.
 3. That the Learned Magistrate erred in law and fact that Ndubi Mogaka did not buy the entire parcel of land LR. No. North Mugirango/Mokomoni/293 but only 1 ½ Acres (one and a half).
 4. The Learned Magistrate erred in law and fact in failure to appreciate the impeccable defence of the Defendants/Appellants and thereby arriving at a wrong erroneous conclusion.



5. The Learned Magistrate erred in law and fact in failing to appreciate the impeccable evidence of the Defendants/Appellants thereby arriving at a wrong erroneous conclusion by condemning the Defendants/Appellants to a permanent injunction, order of exhumation of the remains of Yoshua Anariko without giving alternative where he will be interned.
6. The Learned Magistrate erred in law and fact in failing to appreciate long occupancy of the Defendant/Appellant in the land.
7. The Learned Magistrate erred in law and fact in failing to appreciate the long established principle of *res judicata* precedent law thus bringing law into confusion and thereby deriving to an erroneous finding/conclusion in particular ordering for eviction, permanent injunction and exhumation of Yoshua Anariko remains.
8. The Learned Magistrate erred in law and fact in failing to appreciate as follows: -
 1. A Plaintiff/Respondent's reading and evidence tendered in support thereof was in capable of leading to a conclusion of the order of permanent injunction, eviction and exhumation of Yoshua Anariko remains.
9. The Learned Magistrate erred in law and fact in failing to appreciate the fact that the Plaintiff/Respondent's husband fraudulently transferred the suit parcel of land to the detrimental of the Defendants/Appellants.
10. The Learned Magistrate erred in law and fact in failing to appreciate the Defendants/Appellants have a right to adverse possession having occupied the land since 1978.
11. The Learned Magistrate erred in law and fact in failing to appreciate the Defendants/Appellants Mark Anariki Onunda was never served with a court order to bar him from burying his son Yoshua Anariko thus arriving to a wrong conclusion of ordering exhumation of his body.
12. The Learned Magistrate erred in law and fact in failing to appreciate the impeccable evidence produced by the Defendants/Appellants that, that the land was not Nyang'ua Nyandiko's Estate but Nyandiko Onunda's Estate whom the Plaintiff/Defendant claims that his wife sold without his consent, since he is not mentioned in what the Plaintiff/Defendant claim as the Gesima Land Case No. 103 of 1965.
13. The Learned Magistrate erred in law and fact in failing to appreciate the fact that in 1965 women did not own land thus the reason why all the early Title Deeds were written let all men know if Kemunto Nyandiko sold the land that is against the law then.
14. The Learned Magistrate erred in law and fact that the land tribunal of Ekerenyo sited in this case had different findings and the Submissions or decisions are different.
15. The Learned Magistrate erred in law and fact when all the witnessed of the Defendants/Appellants appeared before her they were never accorded the hearing but were subjected to embarrassment of being in court but judged as per their written Submissions.
16. The Learned Magistrate erred in law and fact in failing to appreciate that in court Case 128 of 2014 witness One Nyang'aya W.G.N. Joseph ID No. 730xxxx states that Ikweri Nyandiko the father of Mark Anariko he is the one who sold the land but in the court case ELC No. 6 of 2020 he changed the statement and says Kemunto Nyandiko sold the land alone as per the evidence adduced in court. This is erroneous in the part of the Hon. Magistrate to have come



up with the Judgment and orders of permanent injunction, eviction, and exhumation of the remains of Yoshua Anariko.

17. The Learned Magistrate erred in law and fact in failing to appreciate the fact that the Plaintiff did not produce any evidence in court to prove her case. All the evidence cited were produced by the witness who did not from the time on stated that he was an interested party in this case.
18. The Learned Magistrate erred in law and fact in failing to appreciate the fact that the so called Gesima Land Case No. 103 of 1965 is not a court document since it did not have a Magistrate's signature nor did the so called elder signature appear anywhere.
19. The Learned Magistrate erred in law and fact in failing to appreciate that when the producer of this document was close examined he changed the tune and called this document an agreement. Are sale agreements done in court? If so where are the signatures of the seller and buyer?
20. The Learned Magistrate erred in law and fact because she quotes the case of 03/01/1978 which she did not have a copy of the Judgment nor the proceedings of the same.
21. The Learned Magistrate erred in law and fact in failing to appreciate that the case she sites of No. 45 of 2005, Nyang'ua Nyandiko responded and it is in record of the court, how come he did not attend the court hearings since he was aware of the case? The court record does not show that he attended even one single day, why?
22. The Learned Magistrate erred in law and fact in failing to appreciate that in this case there were two Defendants/Appellants Florence Nyakerario Nyang'au and Mark Anariko Onunda, the entire Judgment was about the Estate of Nyang'ua Nyandiko who is not the father of Mark Anariko Onunda. Mark is a son of Ikweri Nyandiko who mentioned in the Ekerenyo tribunal as the seller of 1 ½ (one and a half) Acres of the land parcel LR. No. North Mugirango/Mokomoni/293, which is divided into four portions untitled for the four sons of Nyandiko Onunda as follows: -
 1. Ikweri Nyandiko.
 2. Nyauma Nyandiko.
 3. Ariemba Nyandiko.
 4. Nyang'ua Nyandiko.
23. The Learned Magistrate erred in law and fact in failing to appreciate that Mark Anariko Onunda, the son of Ikweri Nyandiko lives in his father's Estate, which has a clear demarcation and boundary from the Estate of Nyang'ua Nyandiko's Estate as indicated in the Judgment of this case. This leads to the erroneous conclusion reached in this case.
24. The Learned Magistrate erred in law and in fact in giving arbitrary orders without caring about the livelihood of the people who live on that land since 1978 that which is their ancestral land they have no other place to live. When ordering a permanent injunction did she consider that these people live in the same land since 1978, where are they expected to go? Is it practical? Does that mean they become landless, homeless and in turn into street people?
25. The Learned Magistrate erred in law and fact by ordering to restrain Mark Anariko Onunda from the land when the only time they have instructed on this matter of land is in the case Civil Case No. 128 of 2014 and we were ordered to each stay where nobody has a dispute.



26. The Learned Magistrate acted in error when the same failed to properly evaluated evidence on record, thus reaching an erroneous decision.
6. I have heard the privilege of going through the parties' written Submissions in favour of and against the Memorandum of Appeal. On the issue of the suit in the lower court being Res-judicata, I agree with the trial magistrate that in the absence of any pleadings and/or Judgment/Decree from a competent court and which shows that the issue before court was ever litigated and decided upon, the court cannot determine that the case at hand is Res-judicata. There is a handwritten "Judgment" produced an exhibit by the Appellants which is devoid of Title as well as parties whose origin the court cannot discern.
7. On the issue of whether the Respondents' Title has been impeached, the starting point is Section 25 of the [Land Registration Act](#): -
25. Rights of a proprietor
1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
8. It is not in dispute that the Respondent is registered as owner of the suit land. The rights of a proprietor are enshrined under Section 25 of the [Land Registration Act](#) which states that a certificate of Title issued to a proprietor shall be taken as prima facie evidence that the named proprietor is the absolute and indefeasible owner subject to such encumbrances, easements restrictions and conditions endorsed on the Title. It gives an absolute and indefeasible Title to the owner of the property. The Title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the Title holder under the [Act](#).
9. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto.
10. Appurtenant to is derived from the Norman French word which means to belong to, anything corporeal or incorporeal which is an incident of, and belongs to some other thing as principal, an addition to, adjoining to, enjoyed with, an adjunct of, usually occupied with or attached to a more important thing and passing with it upon sale, transfer, or conveyance.
11. As was held in the case of [Esther Ndegi Njiru & Another =vs= Leonard Gatei](#) [2014] eKLR:
 “the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which a person must



be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme”.

12. It is trite law that once a person is registered as a proprietor of land, he is to enjoy all rights and privileges appurtenant thereto. Having established that the Respondent’s husband was the registered owner of the suit property, I find that he was entitled to all the rights and privileges belonging or appurtenant thereto and hence to occupy, possess and do all that is legally appurtenant to his rightful ownership. The Respondent is therefore entitled to the protection of the law.
13. Section 26 provides that:
 1. The certificate of title issued by the Registrar upon registration, or to a Purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge,.....
14. In *Solomon Omwega Omache & another -v- Zackery O. Ayiko & 2 others* (2016) eKLR it was stated that the court has the duty to uphold the sanctity of the records from the Lands office.
15. Section 80 (1) of the *Land Registration Act* No. 3 of 2012 provides as follows:

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
16. But such allegations must go beyond imaginations. They must be proved. In *RG Patel vs Lalji Makanji* (1957) EA 314 the court expressed itself as follows:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required”
17. Given the seriousness of the allegations, the onus was on the Appellants to provide evidence to the Court of the alleged fraud which evidence must meet the standard of proof as was underscored by the Court of Appeal in *Central Bank of Kenya Limited v Trust Bank Limited & 4 Others* [1996] eKLR as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the Court rendered itself as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case.”
18. In the case of *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another* [1979] eKLR, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.
19. The position that emerges is that evidence of especially high quality and strength is required to prove fraud in land cases. It is a daunting and burdensome task to prove fraud in any civil case. In the instant case, the Appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of the Respondent.



20. Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable doubt, but above balance of probabilities. However, from the evidence tendered in Court, the Appellants did not prove fraud at all. No evidence was tendered to this end by the Appellants at least to verify her allegations.
21. In the absence of evidence, I am therefore unable to impeach the Respondent's Title Deed in respect to LR. No. North Mugirango/Mokomoni/293 or even find that it was acquired fraudulently and the Appellants then accordingly fail in their claim over the parcel of land No. North Mugirango/Mokomoni/293.
22. In the premises I do not see any reason to interfere with the Judgment of the lower Court. I would therefore not fault the Trial Magistrate's decision. In the result, I find and hold that this appeal has no merit and is accordingly dismissed with costs to the Respondent.

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 19TH DAY OF JUNE 2023.

MUGO KAMAU

JUDGE

In the presence of: -

Appellant: N/A

Respondent: Ms. Ochwal

