



**Mutunga & another v Mitu (Suing as the Administratrix of the Estate of M'Itimitu M'Imaana – Deceased) (Environment and Land Appeal 20 of 2018) [2023] KEELC 17916 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17916 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL 20 OF 2018**

**CK YANO, J**

**JUNE 14, 2023**

**BETWEEN**

**DICKSON BAIBURI MUTUNGA ..... 1<sup>ST</sup> APPELLANT**

**JOSEPH KIBANYA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PRISCILLA KABIRITHU MITU (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF M'ITIMITU M'IMAANA – DECEASED) ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The respondent filed suit in the subordinate court vide a plaint which was later amended seeking for an order for cancellation of the 2<sup>nd</sup> appellant as the registered owner of LR NO Kianjai/Kianjai/6109 and the same to be registered in the name of M'Itimitu M'imana (deceased) and an order of permanent injunction. The respondent pleaded that the deceased who died on August 30, 1985 was the registered owner of the original parcel of land No 4312 measuring approximately 2.48 acres situated within Kianjai Adjudication Section. That since the lifetime of the deceased, the deceased's family has been in occupation and use of the said land and has put up permanent houses, planted trees and cultivated subsistence crops thereon and when the deceased died, he left his family in occupation and use of it.
2. The respondent pleaded that in the year 2006, the 1<sup>st</sup> appellant herein staking a claim on the deceased's land prompting the respondent to file Tigania SRMCC NO 33 of 2006 which was struck out on a technicality. That in the month of July 2009, the respondent learnt that the 1<sup>st</sup> appellant fraudulently caused P/No 4312 to be subdivided into three portions Nos 4312, 6109 and 6595 and registered P/No. 6109 in his name and later transferred it to the 2<sup>nd</sup> respondent. The respondent enumerated particulars of fraud on the part of the appellants.



3. The 2<sup>nd</sup> appellant filed a memorandum of appearance and defence denying the respondent's claim while the 1<sup>st</sup> appellant's counsel filed a notice of appointment.
4. The respondent testified and called four witnesses which the defendants also testified and called one witness.
5. In his judgment delivered on May 18, 2018 the learned trial magistrate (Hon S Ambuya SRM) found that the respondent had proved her case against the Appellants and granted the reliefs sought. Being dissatisfied with the judgment, the appellants lodged this appeal.
6. In the memorandum of appeal dated June 11, 2018 the appellants raised the following grounds:-
  1. The learned magistrate erred in law and fact in holding that the deceased land was transferred while he had died.
  2. The learned magistrate erred in law and fact in holding that the 1<sup>st</sup> appellant had an ability to change records of land parcel Number Kianjai/Kianjai/4312.
  3. The learned magistrate erred in law and fact by not holding that the 1<sup>st</sup> defendant was unable to deal with land parcel No Kianjai/Kianjai/4312 and 1609 (sic) without involvement of the office of Land Adjudication and settlement Officer who were supposed to be enjoined in this suit.
  4. The learned magistrate erred in law and fact by ordering cancellation of the 2<sup>nd</sup> defendant's title deed.
  5. The learned magistrate erred in law and fact in disregarding the defence evidence in entirety.
  6. The learned magistrate erred in law and fact by allowing respondent's suit despite existence of glaring inconsistencies and contradictions in respondent's evidence.
  7. The learned magistrate erred in law and fact by failure to consider the application of [Land Consolidation Act](#) Chapter 283 Laws of Kenya in the suit land.
7. The appellants pray for the appeal to be allowed and the judgment of the lower court to be set aside and in its place, an order do issue dismissing the respondent's suit in the lower court with costs to the appellants in this appeal and in the lower court.
8. Pursuant to directions given by the court, the parties agreed to canvass the appeal by way of written submissions. However, only the appellants filed their submissions on February 20, 2023 through the firm of M/S Mutembei & Kimathi Advocates. The respondent's advocate informed the court that he no longer has instructions from the respondent and therefore did not file any submissions.

### **The Appellants' Submissions.**

9. The appellants submitted that the respondent made allegations of fraud but the same was not proved. It is the appellants' submissions that the 1<sup>st</sup> appellant is unable to commit any fraud in land offices as he is not a lands officer and never worked in the department of lands and that no officer in the lands office was enjoined (sic) as a co-defendant in the lower court. That no civilian is capable of accessing any lands office records and do exchanges as the respondent alleged.
10. The appellants submitted that D exhibit 2 shows clearly that the 1<sup>st</sup> appellant acquired the suit land honestly which was supported by Dw 2. That there was a partial exchange of the respondent father's land and the 1<sup>st</sup> appellant's land in accordance with the [Land Consolidation Act](#) and that the evidence



- was not controverted. That it is the 1<sup>st</sup> appellant who should be claiming since his land is in a prime area. The appellants submitted that the respondent's deceased father had no dispute with any of the appellants at all. That if his land had been stolen he was better placed to bring suit during his lifetime.
11. The appellants challenged the evidence given by Pw 1 and the death certificate which was initially missing in Tigania Cmcc no 33 of 2006 and Meru Cmcc 168 of 2009 filed by the respondent and which were dismissed as the respondent had not obtained grant.
  12. It is the appellant's submissions that there was no evidence to show the alleged subdivision of parcel No 4312 to numbers inter alia, 6109. The appellants submitted that Pw 1 exhibited open bias and lack of independence and that he was not working in the adjudication area at the time where the suit land falls and had no records to support his allegations of fraud. That he admitted receiving Kshs 8,000/= from the respondent in order to testify in this matter and was contradicted by Dw 2. The appellants further submitted that the evidence by Pw 2 is hearsay while that of Pw 4 was inconsistent.
  13. The appellants submitted that their evidence was clear and was not challenged even during cross examination. That the 1<sup>st</sup> appellant bought the suit land from the 2<sup>nd</sup> appellant in the year 2005 and started living therein and has developed it extensively. That there was no evidence produced by the respondent to establish any fraud on the part of the appellants.
  14. The appellants submitted that the 2<sup>nd</sup> appellant is a bona fide purchaser for value and cited Section 26(1) of the Land Registration Act 2012 and relied on the case of Lawrence Mukiri Vs Attorney General & 4 others [2013] eKLR and Nairobi HCCC NO 298 of 2014 Denis Noel Mukhulo & another V Elizabeth Murungaru Njoroge & another. It is the appellants' submissions that the appeal should be allowed as prayed.

### **Analysis And Determination**

15. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law. The issues for determination in this appeal as I can deduce from the grounds of appeal are whether or not the respondent proved fraud as pleaded in the plaint and whether the decision of the learned trial magistrate is against the weight of the evidence and the law.

### **Whether or not fraud was proved as pleaded**

16. In this case, it was the respondent's case that she is the administratrix of the estate of her late father M'itimitu M'imana (Deceased) who died on August 30, 1985. The evidence on record indicates that the deceased was the owner of land parcel No 4312 Kianjai Adjudication Section measuring 2.58 acres and after the deceased's death, the said land was left to the respondent and her family.
17. As rightly stated by the learned trial magistrate, it is trite law that once a proprietor of land has died, his estate can only be administered by his administrators who of necessity must obtain letters of administration from the court and it is only after confirmation of the grant would the administrators be seized with legal authority to deal with capital assets of the deceased constituting his estate.
18. The evidence on record shows that parcel No 4312 was subdivided into three portions namely Nos 6109 under the 1<sup>st</sup> appellant's name and 6596 and 4312 after the 1<sup>st</sup> appellant lodged an objection and sold parcel No 6109 to the 2<sup>nd</sup> appellant who is the current registered owner.



19. In this case, the material on record shows that the 1<sup>st</sup> appellant lodged an objection to the District Land Adjudication and Settlement Officer on September 16, 1991 and a decision was given by the committee on May 5, 1993 giving the 1<sup>st</sup> appellant one acre from the original land parcel No 4312. As already stated, it is not in dispute that the deceased died on August 30, 1985. Whereas the 1<sup>st</sup> appellant allegedly lodged an objection on September 16, 1991 and a decision given on May 5, 1993 giving him one acre from the original land parcel No 4312 it is clear that the said objection was lodged long after the demise of the deceased. From the record, there is no evidence to show that any of the deceased's beneficiaries or anyone else applied for grant of representation in respect of the estate of the deceased. Therefore, all dealings touching on the deceased's original land parcel No 4312 by way of subdivision and sale were illegally done as the deceased was already dead by the time the said transactions took place, and grant of letters of administration in respect of his estate had not been issued. In this case, I am in agreement with the finding of the trial court that from the evidence on record, it is quite clear that the appellants' registration was not procedurally and legally entered and therefore the entry and issue of title to the 1<sup>st</sup> appellant and the subsequent transfer to the 2<sup>nd</sup> appellant was obtained illegally and fraudulently. This is so because the subdivision of the original parcel and the transfer of a portion thereof by the 1<sup>st</sup> appellant to the 2<sup>nd</sup> appellant was done after the death of the deceased and without a confirmed grant having been issued to distribute the estate of the deceased. In my view, the trial magistrate was correct in making a finding that due process was not followed in dealings with the deceased's land parcel subject of the suit herein as far as there was no confirmed grant of letters of administration. In the result, the title deed that was issued to the 2<sup>nd</sup> appellant was issued illegally and fraudulently and the same is null and void.
20. Under Section 26 of the [Land Registration Act](#) No 3 of 2012, any title procured illegally is liable to be cancelled and this court cannot fault the trial magistrate in arriving at his finding to that effect. Moreover, Section 80 of the said Act empowers the court to order rectification of the register by directing that any registration be cancelled if it is satisfied that any registration was obtained, made, or omitted by fraud or mistake.

**Whether the decision of the learned magistrate was against the weight of the evidence and the law.**

21. From the material on record, and particularly the evidence of DW 2 and Dw 3 an objection to the District Land Adjudication and Settlement Officer was lodged against the respondent's father over the suit property in the year 1991 and a decision was made by the committee in 1993. The evidence on record indicates that the respondent's father died on August 30, 1985. The objection was therefore lodged against a deceased person and no grant of letters of administration had been issued in respect of the estate of the deceased. It is trite law that only a living person can be sued or against his/her legal representative. In this case, it is clear that the alleged objection was lodged and a decision given against a person who was already dead and when there was no legal administrator in respect to his estate. It is therefore clear that the purported objection and the subsequent decision and all transactions resulting therefrom were null and void. I am in agreement with the holding of the learned trial magistrate that the respondent and her witnesses discharged the burden and proved that the 1<sup>st</sup> appellant's title to the suit property was acquired through fraud and illegality and the 2<sup>nd</sup> appellant was not a bona fide purchaser for value. My evaluation of the evidence on record is that the respondent succeeded in showing that the registration of the suit property in the 2<sup>nd</sup> appellant's name was fraudulent and therefore null and void and the respondent's case was rightly allowed by the trial court.
22. It is my view that based on the evidence that was adduced before the subordinate court, the learned trial magistrate was justified in arriving at the decision he made. The findings and holding by the trial magistrate were well founded and I find no basis to interfere with the same.



23. In the result, I find no merit in the appeal herein and the same is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF JUNE, 2023**

**IN THE PRESENCE OF**

Court Assistant- V. Kiragu

No appearance for Mutembei & Kimathi for appellant

Carlpeters holding brief for Narangwi for respondent - present

**C.K YANO**

**JUDGE**

