



**Uwazi Enterprises Limited v Karia & 4 others (Environment and Land Appeal E113 of 2021) [2023] KEELC 19024 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19024 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E113 OF 2021**

**BM EBOSO, J**

**JULY 17, 2023**

**BETWEEN**

**UWAZI ENTERPRISES LIMITED ..... APPELLANT**

**AND**

**PATRICK MUKUMBO KARIA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH NGURU GICHIA ..... 2<sup>ND</sup> RESPONDENT**

**PETER NJOKA KARIA ..... 3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR THIKA ..... 4<sup>TH</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. This appeal challenges the Judgment rendered by Hon M W Wanjala on November 25, 2021 in Thika Chief Magistrate Court MCL & E Case No 273 of 2018. Patrick Mukumbo Karia [the 1st respondent in this appeal] was the plaintiff in the said suit. Joseph Nguru Gichia [the 2nd respondent in this appeal] was the 1st defendant. Uwazi Enterprises Limited [the appellant in this appeal] was the 2nd defendant. The Land Registrar - Thika and the Attorney General were the 3rd and 4th defendants respectively. Peter Njoka Karia was the 5th defendant. It does emerge from the record of appeal that Patrick Mukumbo Karia and Peter Njoka Karia are brothers.
2. The dispute in the trial court revolved around a transfer effected on May 20, 2013 in the land register relating to land parcel number Ruiru East/Juja East Block 2/2394. The land was registered in the name of Patrick Mukumbo Karia on August 17, 1989. On May 20, 2013, the impugned registration was effected, transferring the land to Joseph Nguru Gichia. On July 4, 2013, Joseph Nguru Gichia transferred the land to Uwazi Enterprises Limited. The land was subsequently subdivided and on



28/8/2013, the land register relating to the land, was closed. Entry No 8 which relates to the subdivision of the land and closure of the land register indicates that the 32 resultant subdivision registers are Ruiru East/Juja East Block 2/16573 to 16604.

3. For clarity and for convenience purposes, I will, in this ruling, refer to Uwazi Enterprises Limited as the appellant. Patrick Mukumbo Karia, Joseph Nguru Gichia and Peter Njoka Karia will be referred to by their respective first names; Patrick, Joseph and Peter. Land parcel number Ruiru East/Juja East Block 2/2394 will be referred to as parcel number 2394. Before I delve into the issues that fall for determination in this ruling, I will outline a brief background to the appeal.

## **Background**

4. Through a plaint dated December 19, 2018, Patrick sued: (i) Joseph; (ii) the appellant; (iii) the Land Registrar - Thika; (iv) the Attorney General; and (v) Peter. He sought against them: (i) a declaration that Ruiru East/Juja East Block 2/2394 belonged to him; (ii) an order directing the Land Registrar to rectify the land register relating to Ruiru East/Juja East Block 2/2394 by cancelling the registers relating to the resultant parcels, ie Ruiru East/Juja East Block 2/16573 to 16604, to reflect Patrick as the bonafide owner of the land; (iii) general damages; and (iv) costs of the suit.
5. The case of Patrick was that he was at all material times the registered proprietor of land parcel number Ruiru East/Juja East Block 2/2394. In 2013, Peter purported to illegally sell the land to Joseph and the duo, together with the Land Registrar, caused the land to be fraudulently transferred to Joseph who in turn fraudulently caused the land to be transferred to the appellant. He contended that he was not privy to the alleged fraudulent sale and transfers. It was his case that Peter had been investigated and criminal charges had been preferred against him.
6. Joseph and Peter filed a joint statement of defence dated February 21, 2019. They admitted that indeed Patrick was the registered proprietor of parcel number 2394. They contended that parcel number 2394 was sold to Joseph by Patrick through “legal and proper procedure” pursuant to which Joseph “gained legal title” to the land after which he transferred the land to the appellant. They contended that Joseph purchased the land from Patrick and not from Peter, adding that any involvement by Peter was “as an agent and/or assistant” of Patrick.
7. The appellant filed a statement of defence dated February 21, 2019 in which it denied Patrick’s contention that the registrations were fraudulent. It added that it was an innocent purchaser who acquired the land for value from Joseph after conducting proper due diligence which revealed that Joseph was the registered proprietor of the land. It was the case of the appellant that the transaction between it and Joseph was “a basic contract of willing buyer willing seller and all formalities were followed to the letter.” The appellant urged the trial court to dismiss Patrick’s suit.
8. The original record of the trial court and the records filed in this appeal do not contain the defence that was filed by the Attorney General. They only contain Patrick’s reply to the defence.
9. During trial, Patrick testified as PW1 and closed his case. It was his evidence that he neither sold nor transferred parcel number 2394 to Joseph. It was his further evidence that when he learnt about the alleged sale, he reported the matter to the Police and Police investigations established that Peter and Joseph had purported to enter into a sale agreement relating to the land. Among the 17 exhibits that Patrick produced was a hand written sale agreement attributed to Peter and Joseph, which he said he had obtained from the investigating officer. Also produced was a statement which Joseph allegedly tendered to the investigating officer, in which Joseph had indicated that Peter sold to him the land on behalf of Patrick.



10. Joseph testified as DW1. He maintained his position that he purchased parcel number 2394 from Patrick. He was, however, not able to tender any documentary evidence relating to the relevant sale contract, consent of the Land Control Board, transfer instrument and payment of purchase price to Patrick. He disowned the hand written sale agreement attributed to him and Peter. During cross-examination, he admitted signing the written statement that he made to the police investigating officer but stated that some of the contents of the written statement he made to the police were not true.
11. Peter testified as DW2. His evidence in cross-examination was that his brother, Patrick, told him “to sell the land on his behalf.” He conceded that he did not have a power of attorney to sell the land. He stated that his brother’s instructions to him to sell the land on his behalf were not in writing. He disowned the sale agreement attributed to him and Joseph. It was his evidence that there was no written agreement between him and Joseph. He added that the criminal case against him was fabricated.
12. The appellant led evidence by George Gacheru Gitau who testified as DW3. His testimony was that the appellant purchased the suit property from Joseph at Kshs 3,200,000 through a sale agreement dated May 31, 2013. He added that the appellant conducted a search before entering into the sale agreement. It was his evidence that the appellant was an innocent purchaser for value.
13. The Land Registrar did not tender evidence. Secondly, the land registers relating to the subdivisions were not tendered as evidence.
14. Upon receiving submissions from the parties, the trial court [Hon M W Wanjala] rendered the impugned Judgement in which he made a finding that Patrick [the 1st respondent] had proved his case to the require standard. The trial court granted the reliefs that were sought in the plaint. Joseph [the 2nd respondent] and Peter [the 3rd respondent] were condemned to pay costs of the suit.

## **Appeal**

15. Aggrieved by the findings and award of the trial court, the appellant brought this appeal through a memorandum of appeal dated December 21, 2021. The appellant advanced the following nine (9) grounds of appeal.
  1. That the learned trial magistrate erred both in fact and in law in failing to consider the appellant’s defence which raised triable issues.
  2. That the learned trial magistrate erred in law and fact by failing to consider adequately or at all the evidence placed on record by the appellant.
  3. That the learned trial magistrate erred in law and in fat by failing to consider adequately or t all the matters raised in the appellant’s submissions together with the authorities referred to therein.
  4. That the learned trial magistrate erred inholding that the applicant/appellant is the current holder of the resultant 32 titles of Ruiru East/Juja East Block 2/2394, being Ruiru East/Juja East Block 2/16573 to Ruiru East/Juja East Block 2/16604, despite the applicant/appellant indicating in their pleadings and testimony that the resultant titles had all been transferred to third parties.
  5. That the learned trial magistrate erred in law by holding that on the balance of probabilities favoured cancellation of the resultant titles while not considering that the said resultant titles are held by seral third parties.



6. That the learned trial magistrate erred in law by not taking into consideration sanctity of the title that at the time the applicant/appellant purchased the property, the records held by the Registrar of Lands indicate that the property belonged to Joseph Nguru Gichia.
  7. That the learned trial magistrate erred in law by not holding that the applicant/appellant was an innocent purchaser for value despite the applicant/appellant providing binding precedents.
  8. That the learned trial magistrate misdirected himself by failing to find that by dint of the fact that the Lands Registrar was not called upon to testify as to the validity or lack thereof of the process of transfer of land from the 1st respondent to the 1st appellant, the 1st respondent was estopped from pleading invalidity of the transfer.
  9. That the learned trial magistrate erred in law and fact by making general statement without giving reasons or arriving at proper conclusions.
16. The appellant prayed for an order setting aside the Judgment of the trial court. He further prayed for costs of the appeal and costs of the suit in the trial court.

### **Application**

17. Together with the memorandum of appeal, the appellant brought a notice of motion dated December 21, 2021, seeking: (i) an order staying execution of the Judgment of the trial court pending the hearing and determination of this appeal; and (ii) an order granting the appellant leave to tender new evidence in this appeal. The application was supported with an affidavit sworn on December 21, 2021 by George Gacheru Gitau. It was canvassed through written submissions dated June 14, 2022. The said application is the subject of this ruling.
18. In summary, the case of the applicant is that on August 24, 2021, the trial court rendered a ruling in Thika Chief Magistrate Court Criminal Case No 5236 of 2016 in which it acquitted Peter under Section 210 of the *Criminal Procedure Code* of the charge of stealing contrary to Section 275 of the *Penal Code*. The applicant contends that the allegation in the said charge was that on December 12, 2013, in Mutero Village, Gatundu District, within Kiambu County, jointly with others, Peter stole a title deed relating to land parcel number Ruiru East/Juja East Block 2/2394 [the suit property], the property of Patrick Mukumbo Karia. The applicant contends that by the time trial closed in the subordinate court, the said ruling had not been rendered, hence they could not tender it as evidence before the trial court.
19. With regard to the plea for an order of stay of execution pending the hearing and determination of this appeal, the applicant contends that unless a stay order is granted, substantial loss will be suffered by them and by the owners of the 32 subdivision titles that were parcelled out of land parcel number Ruiru East/Juja East Block 2/2394.
20. The 1st respondent opposes the application through his replying affidavit sworn on January 20, 2022 and further affidavit sworn by Daisy Wanjiru Njaramba on March 28, 2022. The case of the 1st respondent is that the applicant has not demonstrated the substantial loss which it stands to suffer should the plea for an order of stay of execution be declined. He further contends that the applicant has failed to satisfy the requirements of Order 42 rule 6(2) in relation to security.
21. The 1st respondent further contends that the plea for leave to adduce new evidence is an afterthought and an attempt to patch up the appellant's case, adding that the appellant was at all times aware of the existence of the criminal case. The 1st respondent adds that no application was made to the trial court



to re-open trial for the purpose of adducing the new evidence. The 1st respondent urges the court to dismiss the application.

22. The 2nd and 3rd respondents filed a replying affidavit dated July 7, 2022. The replying affidavit does not address the application dated December 21, 2021.
23. The application was canvassed through written submissions dated June 14, 2022. The 1st respondent opposed the application through written submissions dated July 12, 2022. The Attorney General filed written submissions dated October 25, 2022 focusing on the appeal itself as opposed to the application dated December 21, 2022. I have read the written submissions. I will not rehash them in this ruling.

### **Analysis & Determination**

24. I have considered the application, the response to the application and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The following are the two key questions that fall for determination in the application: (i) Whether the application satisfies the criteria upon which a first appellate court exercises jurisdiction to grant an order of stay of execution pending the hearing and determination of an appeal; and (ii) Whether the application satisfies the criteria upon which an appellate court exercises jurisdiction to admit fresh or additional evidence in an appeal. I will make brief sequential pronouncements on the two issues.
25. This court's jurisdictions to grant an order of stay of execution pending appeal is regulated by the framework in Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides as follows:
  - (2) No order for stay of execution shall be made under subrule (1) unless—
    - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
    - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
26. Suffice it to state that an appellant seeking an order of stay pending appeal is required to demonstrate that he stands to suffer substantial loss should a stay order not be granted. Secondly, the applicant is required to furnish the court with security for the due performance of the ultimate decree in the event that the appeal does not succeed. Lastly, the application for stay of execution should be brought timeously.
27. The decree of the trial court consists of a declaration that land parcel number Ruiru East/ Juja East Block 2/2394 belongs to the 1st respondent and an order directing the Land Registrar to rectify the land register relating to the above land by cancelling the registers relating to all the subdivisions that were parcelled out of the title.
28. The appellant filed written submissions dated June 14, 2022. Nothing was said about the plea for an order of stay of execution in the said written submissions. At the very least, the applicant should have addressed the court on the plea for an order of stay of execution. If the applicant obtained a stay order in the lower court, it owed this court a duty of disclosure.
29. Suffice it to state that, in the absence of submissions on the limb of the application relating to the plea for an order of stay of execution pending the hearing and determination of this appeal, the same will be treated as abandoned. I will turn to the plea for leave to adduce new evidence in this appeal.



30. The Supreme Court of Kenya laid down the following principles in *Mohamed Abdi Mobamud v Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR which guide our appellate courts when exercising jurisdiction to admit fresh evidence:

“Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;
- (b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
- (c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;
- (d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- (e) the evidence must be credible in the sense that it is capable of belief;
- (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
- (g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;
- (h) where the additional evidence discloses a strong *prima facie* case of willful deception of the Court;
- (i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.
- (k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.”

31. In the present application, the applicant seeks leave of this court to adduce additional evidence. The additional evidence relates to the ruling rendered on August 24, 2021 by Hon B. M Ekhubi, Principal



Magistrate, in Thika Chief Magistrate Court Criminal Case No 5236 of 2016. Peter was the accused person in the said criminal case. The charge related to the allegation that Peter stole the original title relating to the suit property in this appeal.

32. Taking the above into account, it does emerge that although the findings and verdict of the criminal court may not be decisive in the final adjudication of this appeal, they are relevant and necessary for the adjudication and just settlement of the key questions that fall for determination in the appeal. Secondly, the applicant was not a party to the criminal case and there is no evidence placed before this court to suggest that the applicant was aware of the verdict prior to the delivery of Judgment by the trial court in the suit leading to this appeal. For the above reasons, the court is satisfied that the application under consideration meets the criteria for admission of new evidence in an appeal.
33. Whereas the applicant sought leave to tender only the ruling dated August 24, 2021, this court is of the view that for it to fully understand the context in which the said verdict was made, complete certified copies of the proceedings and the ruling would be necessary. The ruling alone may not provide this court with a proper context of the verdict of the criminal court.
34. Other key records which are necessary but do not appear anywhere in the original record of the trial court and in the record of appeal are the certified copies of the impugned subdivision titles and or land registers. Order 21 rule 6 of the Civil Procedure Rules required the trial court to demand to be furnished with certified copies of the titles relating to the subdivisions. The practice in our courts has been that a certified copy of the land register is availed to the court prior to delivery of judgment in a case where an order for cancellation of a title or rectification of a land register is sought.
35. In light of the requirements of Order 21 rule 6 of the *Civil Procedure Rules*, this court, suo motto, hereby orders the Land Registrar to file certified copies of the land registers relating to Ruiru East/Juja East Block 2/16573 to 16604 as at November 25, 2021. Once filed, the Court Registry shall avail to the parties' copies of the said registers.
36. In the end, the appellant's notice of motion dated December 21, 2021 is disposed in the following terms:
  - a. The plea for an order of stay of execution of the judgment of the trial court is marked as abandoned by the applicant/appellant.
  - b. The appellant is granted leave to adduce, as new evidence, the ruling rendered by Hon B. M Ekhubi on 24/8/2021 in Thika Chief Magistrate Court Criminal Case No 5236 of 2016 together with a certified copy of the proceedings in the said criminal case.
  - c. In addition, in tandem with the mandatory requirements of Order 21 rule 6 of the Civil Procedure Rules, the Land Registrar shall furnish this court with certified copies of the land registers relating to land parcel numbers Ruiru East/Juja East Block 2/16573 to 16604 as at November 25, 2021.
  - d. Once the land registers are availed, the Court Registry shall avail copies of the land registers to the parties in this appeal.
  - e. Costs of the application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF JULY 2023**

**B M EBOSO**

**JUDGE**



**In the Presence of: -**

Ms Wairimu for the 1st Respondent

Court Assistant: Hinga

