Ngatuny & 2 others v Mosoiko & 2 others (Environment and Land Appeal 7 of 2022) [2023] KEELC 20163 (KLR) (25 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20163 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KILGORIS

ENVIRONMENT AND LAND APPEAL 7 OF 2022

EM WASHE, J

SEPTEMBER 25, 2023

BETWEEN

MOSES MEIBAKO NGATUNY ..... 1ST APPELLANT

KOIYAKI NGATUNY ALIAS KOIYIAKI TOBIKO ATETI ..... 2ND APPELLANT

SITONY NGATUNY ..... 3RD APPELLANT

AND

PEIPEI OLE MOSOIKO ..... 1ST RESPONDENT

THE LAND REGISTRAR, TRANSMARA ..... 2ND RESPONDENT

THE HON.ATTORNEY GENERAL ..... 3RD RESPONDENT

JUDGMENT

1. The Appellants herein are aggrieved by the Judgement and Decree of Hon.d.k. Matutu- (Principal Magistrate) (hereinafter referred as "the Trial Court") dated and delivered on the 10th of December 2019 (hereinafter referred to as the "the Trial Court Judgement").

2. The Appellants in challenging the said Trial Court Judgement filed a Memorandum of Appeal dated 3rd February 2020 (hereinafter referred to as "the present Appeal") premised on the following grounds;-

   i. The Learned Trial Magistrate erred in law and fact, in finding and holding that LR no.transmara/Moita/488 (hereinafter referred to as "the suit property"), did not form and/or constitute part of the estate of Ateti Ole Nembo, now Deceased , even through the documentary evidence on record confirmed and/or testament to the fact that the suit property was indeed part of the estate of the deceased.

   ii. In finding and holding that the suit property was not part of the estate of the Deceased, the Learned Trial Magistrate misapprehended and misconceived the import and tenor of the

provisions of the *Law Of Succession Act*, Chapter 160, Laws Of Kenya and essentially the provisions of Sections 3,71 and 82 thereof.

iii. The Learned Trial Magistrate erred in fact and law in finding and holding that the 1st Respondent (read the Plaintiff in the Sub-ordinate Court") was a bona-fide purchaser for value without notice of any defect in the title notwithstanding the fact that the 1st Respondent was privy to the fraud and/or illegality attendant to the transaction(s) affecting the suit property. In any event, the Learned Trial Magistrate misapprehended the import and tenor of the doctrine of Bona-fide purchaser for value.

iv. In finding and holding that the 1st Respondent (read the Plaintiff in the sub-ordinate Court) had proved his case on a balance of probabilities, the Learned Trial Magistrate sanctioned and/or sanitized an illegality that coloured the entire transaction.

v. The Learned Trial Magistrate failed and/or neglected to cumulatively and/or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and/or features of the suit before him (Trial Magistrate) and thus arrived at an erroneous conclusion, contrary to and in contradiction of the evidence on record.

vi. The Learned Trial Magistrate erred in law in disregarding and/or ignoring the submissions mounted and/or filed by the Appellants herein, without assigning any plausible explanation and/or reason, whatsoever. Consequently, the Appellants herein, has been subjected to unfair treatment and hence suffered a miscarriage of justice.

vii. The Judgement of the Learned Trial Magistrate is convoluted and the issues raised by the Learned Trial Marriage, as slanted and thereby camouflage the Judicial mind of the Trial Court from appreciating, discerning and/or understanding the true nature of the dispute. Consequently, the judgement of the Learned Trial Magistrate is a nullity.

viii. The judgement of the Learned Trial Magistrate does not capture the issue(s) for determination, the determination thereof and the reasons for such determination. Consequently, the judgement of the Learned Trial Magistrate contravenes the mandatory provisions of Order 21 Rule of the *Civil Procedure Rules*, 2010.

3. Based on the grounds outlined hereinabove, the Appellants are seeking for the following Orders from this Honourable Court;-

a. The judgement and decree of the Learned Trial Magistrate dated 10th December 2019, be set-aside and/or quashed and same be substituted with an order dismissing the 1st Respondent's suit vide Kilgoris PMCC ELC No. 9 of 2018.

b. The Honourable Court be pleased to vary and/or set-aside the limb of the judgement, dismissing the Appellants' Counter-Claim vide Kilgoris Pmcc No. 9 of 2018 and in lieu thereof, grant an Order allowing the Counter-Claim dated 4th April 2018.

c. The Respondents herein be condemned to bear costs incurred in the sub-ordinate Court.

d. Costs of the Appeal be borne by the Respondents.

e. Such further and/or other orders granted as this Honourable Court may deem fit and expedient.

4. The present Appeal was duly admitted by this Honourable Court and parties directed to canvass the same by way of written submissions.

5. The Appellants filed their Submissions on 3rd April 2023 while the Respondent filed his on the 13th of April 2023.

6. In the cited authority of *Selle & Anotherv Associated Motor Boat Co.ltd & Others* (1968) EA 123 the Court observed as follows;-

> " A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."

7. In essence therefore, this Honourable Court has a duty to evaluate the evidence placed before the Trial Court and again exhaustively scrutinise the same with a view of making its own conclusions, always being in mind that it did not have an opportunity to see and/or hear the witnesses first hand.

8. To be able to achieve this exercise, the Hounorable Court must look at the reliefs sought in the Trial Court by the parties and link the same to the evidence thereof.

9. In the present Appeal, the Respondent who was the Plaintiff in the Trial Court had filed an Amended Plaint dated 12th April 2018 seeking for the following Orders;-

   i. A permanent injunction barring the Defendants by their agents, assignees, or any other person working under their instructions from interring and or burying the body of one Moseka Daniel Ngatuny (Deceased) on the land LR No.Transmara/Moita/488.

   ii. A declaration that the Land Registrar had no power to cancel and rectify the register of LR No.Transmara under Section 79 (2) of the *Land Registration Act*, 2012.

   iii. An order for cancellation and rectification of the register in LR No.Transmara/Moita/488 in favour of the Plaintiff.

   iv. Costs of the suit be borne by the Defendants.

   v. Any other relief that this Honourable Court may deem fit to grant.

10. Upon service of the Plaint dated 19th March 2018, the Appellants herein filed a Statement of Defence and Counter- Claim dated 4th April 2018 seeking the following reliefs thereof.

    i. Declaration that the transactions and/or entries entered and/or endorsed in the register of LR No.Transmara/Moita/488 on the 28th of October 2015 to the 13th of November 2015, respectively, prior to and/or before the issuance of Grant of Letters of Administration in respect of the estate of Ateti Ole Nembo, now deceased, were unlawful, illegal and void and in any event, amounted to intermeddling in the estate of the deceased.

    ii. An order for cancellation and nullification of the Title Deed in respect of LR No.Transmara/Moita/488 fraudulently issued in the name of the Plaintiff/1st Defendant to the Counter-Claim and restoration of the name of Ateti Ole Nembo, the Deceased in the register.

    iii. Permanent injunction, restraining the Plaintiff/1st Defendant in the Counter-claim either by himself, agents, servants and/or anyone claiming under the said Plaintiff/1st Defendant to the Counter-Claim from re-entering upon, re-entering, taking possession, trespassing onto, cultivating, building structures, grazing, interfering with and/or in any other manner dealing with LR No.Transmara/Moita/488 and/or any portion(s) thereof.

iv. Costs of the cross suit be borne by the Defendants to the Counter-claim, jointly and or severally.

v. Such further and/or other reliefs as the Honourable Court may deem fit and expedient.

11. In response to the Statement of Defence and Counter-Claim dated 4th April 2018, the 1st Respondent filed a Reply to the 1st -3rd Defendants Statement of defence and the Reply to the Counter-Claim on the 3rd of May 2018 seeking for both the Defence and Counter-claim to be dismissed with costs.

1st Respondent's Case in the Trial Court as Plaintiff.

12. The 1st Respondent's case began on the 14/08/2018 with the testimony of the 1st Respondent who was the Plaintiff.

13. According to the 1st Respondent's testimony in the Trial Court, the suit property belonged to one Daniel Nga'tuny (now deceased) who approached him with an offer for sale of the entire piece of land.

14. The 1st Respondent visited the suit property and upon inspecting the same, accepted the offer to purchase it from Daniel Nga'tuny.

15. The 1st Respondent proceeded to undertake an official search in the offices of the Land Registrar Transmara and confirmed the same to reflect the name of Daniel Nga'tuny as the registered owner of the suit property.

16. An Agreement For Sale was then prepared and both the Vendor Daniel Nga'tuny and the 1st Respondent executed the same and the purchase price fully paid.

17. The 1st Respondent then processed the title Deed of the suit property into his name and was issued with the appropriate Title Deed on the 13th of November 2015.

18. The 1st Respondent informed the Trial Court that once an title deed of the suit property was issued in his name, he proceeded to take possession of the suit property through keeping cattle on the said portion.

19. The other portion of the suit property had been leased out by the Vendor for sugar cane planting and the mutual agreement was that once the cane was harvested, then the 1st Respondent would take possession of the entire suit property.

20. Unfortunately, in the year 2018, the Vendor of the suit property passed away and information reached the 1st Respondent that the family of the Vendor wanted to bury his remains on the suit property.

21. The 1st Respondent challenged this plan through the area chief but was informed that the suit property did not belong to him and had in fact be changed to another person's name.

22. The 1st Respondent through his advocates wrote a letter to the District Land Registrar, Transmara asking for the reasons as to why the title deed had been changed but up to the time of hearing the suit in the Trial Court, no response that been received.

23. In conclusion, the 1st Respondent asked the Honourable Court to cancel the new changes made in terms of the ownership of the suit property and his name reinstated into the register of the said suit property.

24. On cross-examination, the 1st Respondent reiterated that he had lawfully purchased the suit property.

25. The 1st Respondent stated that during the inspection, he was informed by the Vendor that the sugar cane on a portion of the suit property belonged to a Kisii person who had leased the same.

26. The 1st Respondent also saw a grazing field and two houses which the Vendor informed him that they belonged to him.

27. The 1st Respondent stated upon signing an Agreement for Sale, he applied for a Land Control Board consent which he presented to the Deputy County Commissioner and it was duly approved.

28. The 1st Respondent indicated that the Vendor was to periodically harvest the sugar cane on a portion of the suit property and the same would be cleared in 3 and half years.

29. However, before the said period would lapse and the sugar cane removed, the Vendor died and was buried on the suit property as some of his family members are still on the ground.

30. The 1st Respondent denied any knowledge of one Ateti Ole Nembo and indicated that at the time of conducting a search, there was no such name of the Green Card of the said property.

31. What the 1st Respondent confirmed was that the Vendor was the registered owner from the Search he obtained and held a title deed of the suit property.

32. The 1st Respondent denied knowledge of any succession proceedings ongoing and insisted that he acquired lawful and legitimate ownership over the suit property.

33. As regards the District Land Registrar's actions of cancelling the 1st Respondent's name on the suit property, he informed the Trial Court that the same was not done procedurally and such an act is erroneous.

34. The 1st Respondents stated that he occupies a portion of the suit property through grazing of cattle but admitted that the Vendor's family was still occupied another portion of the same suit property.

35. In re-examination, the 1st Respondent insisted that he followed the due process in processing his title deed without influencing any person.

36. The 1st Respondent confirmed that the District Land Registrar who issued him the Title deed was the same one that had challenged the same.

37. On the 13/11/2018, the 1st Respondent produced the following documents in support of his case;-

    Plaintiff Exhibit 1- Copy of Official Search dated 9th November 2015.

    Plaintiff Exhibit 2- Agreement for Sale dated 9th November 2015.

    Plaintiff Exhibit 3- Copies of the Vendor's Identification Card.

    Plaintiff Exhibit 4- Copy of the Transfer Form from the Vendor in favour of the 1st Respondent.

    Plaintiff Exhibit 5- Copy of the Stamp duty Assessment together with Receipt.

    Plaintiff Exhibit 6- Copy of Green Card of LR No.Transmara/Moita/488.

38. The 2nd witness in the 1st Respondent's case was Tore Ole Masuruma (PW 2) who is a brother in law to the 1st Respondent.

39. The PW 2 testified that he was called by the 1st Respondent to be a witness to the entire transaction regarding the suit property.

40. PW 2 stated that he accompanied the 1st Respondent to the offices of District Land Registrar, Transmara and conducted an official search on the suit property which confirmed the vendor to be the registered owner.

41. Thereafter, PW 2 accompanied the 1st Respondent to inspect the suit property and during the said visit, the suit property had sugar cane planted on a portion of it.

42. The mutual understanding was that the said sugar cane was to be removed upon maturing and the 1st Respondent takes full possession.

43. According to PW 2, the consideration was agreed upon and Agreement for Sale duly prepared and executed.

44. Thereafter, the Vendor transferred the suit property to the 1st Respondent lawfully.

45. However, after the demise of the Vendor, PW 2 came to learn that the 1st Respondent's title had been cancelled and the matter taken to court.

46. In conclusion, PW 2 stated that the suit property legally belongs to the 1st Respondent because he lawfully purchased and paid for it.

47. On cross-examination, PW 2 insisted that the suit property was in existence on the ground and that he was well versed with the said property.

48. PW 2 reiterated that the 1st Respondent had paid for the suit property in cash to the Vendor after witnessing the execution of the Agreement for Sale and conducting a search on the same.

49. PW 2 confirmed that the 1st Respondent was lawfully issued with a title deed of the suit property and did not understand why his title was subsequently cancelled.

50. PW 2 stated that the 1st Respondent does not live on the suit property.

51. PW 2indicated to the Trial Court that the Vendor's family still resides on the suit property although the sugar cane had now been removed.

52. In re-examination, PW 2 testified that he was present during the execution of the Agreement For Sale between the Vendor and the 1st Respondent.

53. PW 2 further stated that the suit property had been planted sugar cane which the Vendor had agreed to remove the same but died before it happened.

54. The 1st Respondent third witness was Moses Mosoiko Nayoma (PW 3).

55. PW 3 introduced himself as a nephew to the 1st Respondent.

56. PW 3 stated that Mosoiko Daniel Nga'tuny the Vendor had indeed sold the suit property to the 1st Respondent.

57. PW 3 informed the Trial Court that the purchase price was raised from sale of cattles by the 1st Respondent and paid in full.

58. PW 3 indicated that he was not present during the signing of the Agreement For Sale.

59. According to PW 3, the suit property was lawfully purchased by the 1st Respondent and it is his legitimate property.

60. On cross-examination, PW 3 denied being related to the Vendor of the suit property.

61. PW 3 reiterated that he was not present during the execution of the Agreement for Sale but was responsible for the selling to the cattle to raise the purchase price.

62. According to PW 3 knowledge, the owner of the suit property was Daniel Meoboka Ngatuny who has since died and was buried on the suit property as his family still lives on it.

63. PW 3 informed the Trial Court that the 1st Respondent does not reside on the suit property because it had sugar cane.

64. However, PW 3 stated that he had not seen the title deed for the 1st Respondent or the Vendor and was not even aware any of it had been cancelled.

65. In re-examination, PW 3 stated the suit property has had challenges after the demise of the Vendor but the 1st Respondent was not involved in any cancellation.

66. After the testimony of PW 3, the Plaintiffs closed their case thereof.

Appellants Case In Trial Court As Defendants.

67. The 2nd Appellant Koyaki Tobiko Atete was the first Defence witness (DW 1) in the proceedings before the Trial Court.

68. DW 1 stated that he was familiar with the Vendor Moses Ngatuny Meibako.

69. DW 1 further stated that Moses Ngatuny Moibeka the Vendor was his father and upon his demise, he was buried on the suit property.

70. DW 1 disputed that the 1st Respondent ever took possession and/or lived on the suit property.

71. DW 1 informed the Trial Court that he was the legal representative of the original owner of the suit property known as Ateti Ole Nembo.

72. According to DW 1, the suit property was among the assets of the deceased father Ateti Ole Nembo and the same had not been sold or transmitted to the 1st Respondent.

73. Consequently therefore, DW 1 disputed that the suit property belongs to the 1st Respondent and even the said Vendor was buried on the same suit property.

74. In conclusion, DW 1 sought the Trial Court to cancel the title registered in the name of the 1st Respondent and issue a permanent injunction against him from interfering with the said suit property.

75. During his evidence in chief, DW 1 produced the following documents in support of his defence;-

    Defence Exhibit No. 1- Copy of Letters of Grant Ad Litem of the late Ateti Ole Nembo dated 28th March 2018.

    Defence Exhibit 2- A copy of the Green Card showing the entries over the suit property.

    Defence Exhibit 3- Copy of the Death Certificate of Ateti Ole Nembo dated 10th November 2017.

    Defence Exhibit 4- Copy of an Official Search over the suit property dated 4th April 2018.

    Defence Exhibit 5- Copy of the Title Deed for the suit property in the name of the 1st Respondent.

Defence Exhibit 6- A copy of a Letter dated 28/02/2018 from the District Land Registrar, Transmara.

76. On cross-examination, DW 1 reiterated that the Vendor Meibaka Daniel Ngatuny was his father.

77. DW 1 confirmed that he knows the 1st Respondent only as a neighbour on the suit property.

78. DW 1 denied knowledge that one of his other uncle was also a witness to the Agreement For Sale.

79. However, according to DW 1, the suit property was registered in the name of the late Ateti Ole Nembo who he was not sure of when he died.

80. According to DW 1, he stated that he was not aware of any changes in the registration of the suit property from the name of the late Ateti Ole Nembo and therefore if such entries were made, then the same were illegal and fraudulent as no succession had been instituted and/or finalised.

81. DW 1reiterated that he resides on the suit property together with the brother and his wife.

82. On re-examination, DW 1 again stated that the suit property belongs to the late Ateti Ole Nembo who was his grandfather and therefore he was legally entitled to reside on the said property.

83. DW 1 reiterated that the Vendor Moses Ngatuny was his father but not the registered owner of the suit property as the same was in the name of his grandfather.

84. DW 1 informed the Honourable Court that they were yet to institute succession proceedings in regard to Moses Ngatuny who was the Vendor and his father but will do so at the appropriate time.

85. In re-examination, DW 1 stated that the suit property did not belong to the 1st Respondent.

86. DW 1 insisted that the suit property belonged to the father of the Vendor Moses Ngatuny.

87. So far the succession of Moses Ngatuny had not been instituted.

88. The second Defence witness(DW 2) was Sanare Atete.

89. DW 2 confirmed to the Trial Court that Vendor Moses Meibaka Ngatuny was well known to him.

90. DW 2 testified that the suit property belonged to Ateti Ole Nembo and not the deceased.

91. DW 2 denied knowledge of any sale relating to the suit property but stated that he became aware of the 1st Respondent's claim during the burial of the vendor Moses Meibaka Ngatuny.

92. DW 2 indicated that the 1st Respondent is not in possession or had any cattle on the suit property.

93. DW 2 stated that he was not aware of any fraud that had been done against the 1st Respondent.

94. On re-examination, DW 2 indicated that he was not a witness during the Agreement For Sale and had never seen any Agreement For Sale.

95. To his knowledge, the suit property belonged to Ateti Ole Nembo and not the 1st Respondent.

96. After the closure of the DW 2 evidence, the Appellants did not call any other witness but instead, judgement was entered against the 4th Defendant for failing to file any defence to the Plaint therein.

97. The 1st Respondent filed their submissions on the 27th August 2019 while the Appellants filed their submissions dated 23rd September 2019.

98. The Honourable Court having gone through the pleadings placed at the trial court, the exhibits produced therein and submissions of the parties, the issues for determination can be identified as follows;-

> Issue No. 1- Was The Suit Property Ever Registered In The Name Of The Late Ateto Ole Nembo?
>
> Issue No. 2- Was The Suit Property Ever Registered In The Name Of Moses Meibako Ngatuny.
>
> Issue No. 3- Was The Suit Property Lawful Transferred To The 1St Respondent?
>
> Issue No. 4- Is The 1St Respondent Entitled To The Prayers Sought In The Amended Plaint Dated 12Th April 2018?
>
> Issue No. 5- Are The Appellants Entitled To The Prayers Sought In The Counter-claim Dated 4Th April 2018?
>
> Issue No. 6 - Who Bears The Costs Of The Amended Plaint And/or Counter-claim?

99. The Honourable Court having identified the above issues for determination, the same will now be discussed therein below.

Issue No. 1- Was the Suit Property Ever Registered in the Name of the Late Ateti Ole Nembo?

100. The first issue for determination is whether the Late Ateti Ole Nembo was ever a registered owner of the suit property.

101. According to the testimony of the Appellants before the Trial Court, the suit property was originally registered in the name of the Late Ateti Ole Nembo.

102. The Appellants produced a copy of a Certificate of official search dated 4th April 2018.

103. The contents of the Certificate of Official Search dated 4th April 2018 indicates that the suit property was registered in the name of the Late Ateti Ole Nembo on the 10.12.1997.

104. The Appellants have also produced a Death Certificate relating to the Late Ateti Ole Nembo issued on the 10th November 2017 confirming that he died in the year 1989.

105. The issue then would be how did the Late Ateti Ole Nembo get registered on the 10.12.1997 yet he had passed away in the year 1989?

106. How had the late Ateti Ole Nembo created an ownership interest over the suit property that was recognised through the registration undertaken on the 10.12.1997?

107. The answer to this question can only be answered through an Adjudication Record from the Adjudication Office.

108. Unfortunately, the Appellants did not provide any Adjudication Record of the suit property which would have confirmed that the suit property was originally adjudicated and/or allocated to the late Ateti Ole Nembo and/or for the use of his family who includes the Appellants herein.

109. Be as it may, the Green Card produced by the Appellants has an entry to the effect that the first registered owner was one Ateti Ole Nembo.

110. Section 35(2) of the *Land Registration Act*, No.3 of 2012 provides as follows;-

> " Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document."

111. Based on this provision of the law, this Honourable Court makes a finding that indeed, the first registered owner of the suit property was the Late Ateti Ole Nembo.

Issue No. 2- Was The Suit Property Ever Registered In The Name Of Moses Meibako Ngatuny.

112. The second issue for determination is whether or not the Late Moses Meinabo Ngatuny was a registered owner of the suit property.

113. According to the 1st Respondent, the Late Moses Meinabo Ngatuny was a legitimate and registered owner of the suit property as at 9th November 2015 when an Agreement For Sale was executed.

114. The 1st Respondent testified that prior to entering into an Agreement For Sale with the Late Moses Meinabo Ngatuny, he undertook due diligence by conducting an official search over the suit property in the 4th Defendant's office and issued with a Certificate of Search dated 9th November 2015.

115. According to the Certificate of Search issued to the 1st Respondent by the 4th Defendant dated 9th November 2015, the suit property was duly registered in the name of the Moseka Daniel Ngatuny.

116. The Certified Copy of the Green Card relating to the suit property presented at the Trial Court also confirms that the late Moseka Daniel Ngatuny appears on the record and confirms that he was issued with a title deed on the 28.10.2015.

117. It is this entry of the late Moseka Daniel Ngatuny on the 28.10.2015 that the Appellants are challenging.

118. According to the Appellants, the purported transfer of the suit property from the original owner who was the Late Ateti Ole Nembo to the Vendor who is the Late Moseka Daniel Ngatuny was fraudulent, illegal and/or null and void for lack of property documentation.

119. The Appellants submitted that the suit property was subject of the Law of Succession upon the demise of the Late Ateti Ole Nembo and cannot in whatsoever manner be transferred to the Late Moseka Daniel Ngatuny.

120. The manner in which this suit property changed its ownership from the Late Ateti Ole Nembo to the Late Ateti Ole Nembo can only be disclosed and/or explained by the District Land Registrar who was the 4th Defendant.

121. The proceedings herein confirm that the District Land Registrar, Transmara during the hearing at the Trial Court was summoned a number of times but did not attend proceedings at the Trial Court for unknown reasons.

122. The reaction of the 4th Defendant on the complaint of the Appellants herein was to unilaterally cancel several entries in the Green Card of the suit property which included the entry of the Late Moseka Daniel Ngatuny and the 1st Respondent without giving any of them or their representatives a right to be heard.

123. The 4th Respondent in the letter dated 28th February 2018 which the Appellants produced at the hearing in the Trial Court reads as follows;-

> " Following the investigations done pertaining to the above-mentioned parcel, it has been noted that the title obtained of the said parcel of land was fraudulently obtained without following proper procedure.
>
> You are therefore required to return the same to this office within 14 days from the date hereof under Section 79 (2) of *LRA*, or file your objection if any within the time prescribed."

124. The first issue for discussion relating this particular letter dated 28th February 2018 is the question whether the said Moseka Daniel Ngatuny was alive at the time it was prepared and if he actually received it or not.

125. The Appellants did not present any evidence that this letter dated 28th February 2018 done by the 4th Respondent was indeed served on the Late Moseka Daniel Ngatuny to enable him file the intended objection.

126. Further to that, the issue of cancellation by Land Registrars using the provisions of Section 79 (2) of the *Land Registration Act*, No.3 of 2012 has been judicially discussed in numerous cited cases.

127. In a recent case of *Harrison Kiambuthi Wanjiru v District Land Registrar, Nairobi & 3 Others* (2022) eKLR, the Learned Judge stated as follows;-

> " The 1st Defendant has submitted that they relied on the provisions of Section 79(2) of the *Land Registration Act*. A reading of the said section shows that the Act makes reference to alteration of title without consent, if it is established that the error, mistake or omission was obtained by fraud or lack of proper care. The rectification is limited to errors, mistake or omission, which do not materially affect the rights of registered proprietor."

128. In an earlier cited case of Kisumu Misc. Application No. 80 of 2008 Between *Republic v District Lands Officer, Kisumu & Another* (2010) eKLR, the Court made the following finding; -

> " it is clear that it is only the Court that can cancel or amend if where the Court is of the view that registration has been obtained, made or omitted through fraud or mistake and only where it is not a first registration".

129. Lastly to confirm the decisions of the Superior Courts on this issue, in the case of *Super Nova Properties Limitedv District Land Registar, Mombasa & 2 Others Including The Kenya Anti-corruption & 2 Others (interested Parties)* (2018) eKLR, the Court of Appeal sitting in Mombasa reaffirmed this position as follows;-

> " The only institution with mandate to cancel a title to land on the basis of fraud or illegality is a Court of law".

130. In essence therefore, the entry of the Late Moseka Daniel Ngatuny on the Green Card of the suit property can not be cancelled and/or rectified by the District Land Registrar in the manner indicated on the letter dated 28th February 2018 whether it was done fraudulently or through misrepresentation as alleged by the Appellants.

131. In other words, it is this Honourable Court's considered view that the Late Moseka Daniel Ngatuny was lawfully registered as the proprietor of the suit property on the 28.10.2015 unless otherwise ordered by a competent Court of law.

Issue No. 3- Was The Suit Property Lawful Transferred to the 1st Respondent?

132. The third issue which is at the core of this Appeal is whether or not the Late Moseka Daniel Ngatuny lawfully alienated the suit property to the 1st Respondent herein.

133. This Honourable Court in issue No. 2 hereinabove has confirmed that the Late Moseka Daniel Ngatuny was a lawful and registered owner of the suit property from 28th October 2015.

134. Consequently therefore, the Late Moseka Daniel Ngatuny has lawful rights to alienate and/or transfer to the 1st Respondent upon following the prescribed transfer procedure.

135. According to the 1st Respondent's exhibits produced at the Trial Court, all the relevant documents required in the transfer of the suit property have been provided and this Honourable Court finds that same are in line with the requirements of the Law.

136. The 4th Defendant on the Transfer Form dated received in his office on the 13.11.2015 upon payment of the Stamp duty duly approves the entire process by signing the Transfer Form present by the Late Moseka Daniel Ngatuny in favour of the 1st Respondent and issues a Title Deed.

137. By the documents presented by the 1st Respondent and the signature of the 4th Respondent on the Transfer Form, this Honourable Court is satisfied that indeed the 1 st Respondent acquired proper and lawful ownership rights of the suit property from the Late Moseka Daniel Ngatuny.

Issue No. 4- Is The 1st Respondent Entitled to the Prayers Sought in the Amended Plaint Dated 12Th April 2018?

138. Based on the determination in Issues No. 2 and 3 hereinabove, the Honourable Court is of the considered opinion that the 1st Respondent is entitled to the prayers sought in the Amended Plaint dated 12th April 2018.

Issue No. 5- Are The Appellants Entitled To The Prayers Sought In The Counter-claim Dated 4Th April 2018?

139. As regards the Counter-Claim by the Appellants and the prayers sought therein, this Honourable Court is of the considered view that the 1st Respondent did not in any way participate in any fraudulent acts with the Late Moseka Daniel Ngatuny and/or with the 4th Defendant and therefore the prayers sought in the Counter-Claim are hereby denied.

Issue No. 6 - Who Bears the Costs of the Amended Plaint And/or Counter-claim?

140. It goes without saying that costs follow the events.

141. In this Appeal, the Appellants are hereby ordered to pay the costs of the proceedings in the Trial Court as well as this Appeal.

Conclusion.

142. In conclusion, this Honourable Court does not find any reason to tamper with the judgement and/ or decree of the Trial Court and therefore makes the following Orders in determination of the this Appeal;-

    A. The Memorandum Of Appeal Filed On The 3Rd Of February 2020 Be And Is Hereby Dismissed.

    B. The Judgement And Decree Of Hon.d.k.matutu, Principal Magistrate In The Proceedings Known As Kilgoris Pmcc No. 9 Of 2018 Is Hereby Upheld.

    C. Costs Of The Trial Court Proceedings As Well As This Appeal Shall Be Borne By The Appellant Herein.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 25TH OF SEPTEMBER 2023.

EMMANUEL.M.WASHE

JUDGE

In the presence of :

Court Assistant:Mr.Ngeno

Advocates for the Appellants: Ms.ochwal

Advocates for the 1st Respondent: Mr.nyambati