



Gathuri (Suing as the Legal Representative of the Estate of Ernest Gathuri Gachura) v Maringa & 2 others (Environment and Land Appeal 14 of 2022) [2025] KEELC 1238 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 14 OF 2022
JM MUTUNGI, J
MARCH 13, 2025**

BETWEEN

**EMMANUEL MACHARIA GATHURI APPELLANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ERNEST
GATHURI GACHURA**

AND

**SAMUEL NJERU MARINGA 1ST RESPONDENT
AGNES RUGURU NYAGA 2ND RESPONDENT
KIRINYAGA COUNTY GOVERNMENT 3RD RESPONDENT**

(Being an Appeal from the Judgment and decree of Hon. A.K. Ithuku, Chief Magistrate in Kerugoya CM Civil Case No. 14 of 2014 (Formerly ELC No. 633 of 2013) delivered and dated 31st May 2022)

JUDGMENT

1. This Appeal is against the Judgment delivered by Hon. A.K Ithuku (CM) on 31st May 2022 in Kerugoya Chief Magistrate Case No. 14 of 2014 (Formerly ELC No. 633 of 2013). By the Judgment, the Honourable Learned Magistrate dismissed the Appellant's case and determined that the 1st and 2nd Respondents acquired valid titles to Plot 248 A and 248 B, respectively.
2. The Appellant who was the Plaintiff in the suit before the Lower Court was dissatisfied with the Learned Magistrate's decision and has appealed against the Judgment to this Court. The Appellant has set out seven grounds of Appeal in his Memorandum of Appeal dated 29th June 2022 as follows:-



1. That the Learned Magistrate erred in law and in fact by holding that the Appellant was not the owner of plot number 248 Kutus Town whereas the evidence on record was sufficient to prove ownership.
 2. That the Learned Magistrate erred in law and in fact by failing to find that the Appellant was already in possession of plot Number 248 and therefore the subsequent subdivision of plot Number 248 without his knowledge and consent into plots Number 248A and 248B was illegal.
 3. That the Learned Magistrate erred in law and in fact by holding that the Appellant had failed to prove the particulars of fraud on the part of the Respondents whereas the evidence on record is sufficient to prove that the subdivision of plot Number 248 into plots Number 248A and 248B and transfer took place without the knowledge and consent of the Appellant.
 4. The Learned Magistrate erred in law and in fact by holding that the 1st and 2nd Respondents had acquired a good title, whereas they had failed to prove the evidential burden placed upon them in terms of Section 107(1) and (2) of the *Evidence Act*, CAP 80 Laws of Kenya.
 5. The Learned Magistrate erred in law and in fact by not properly considering the evidence on record and the submissions of the Appellants and decided case law.
 6. The Learned Magistrate erred in law and in fact by not finding that the Appellant had been in occupation of the suit plot since 1973, developed it extensively and paying the land rent and rates.
 7. The Learned Magistrate erred in law and in fact by not appreciating the fact that the Appellant had been transferred the suit property and had taken possession in the year 1973.
3. The Appellant prays that the Judgment and decree issued on 31st May 2022 be set aside with costs of this Appeal and of the Lower Court.
 4. The background of this matter briefly, is as follows: Michael Ndubai Njui was the original owner of Plot No. 248 in Kutus (the Suit Plot) which he allegedly sold to the Appellant, who had been in possession of the same since 1973 and had extensively developed it. The Appellant claimed that officials from the 3rd Respondent, on unknown dates, unlawfully, fraudulently, and without his knowledge or consent, subdivided the Suit Plot into two portions—Plots No. 248A and 248B—and allocated the same to the 1st and 2nd Respondents, respectively. The Appellant averred that the Respondents took the action with the intention of depriving him of his proprietary rights over the land. The Appellant contended that the Respondents' illegal and fraudulent action was concealed from him and that he only discovered the fraudulent action in 2010 when they attempted to forcibly and unlawfully evict him from the Suit Plot.
 5. In the Lower Court, the Appellant sought a declaration that the subdivision of his Suit Plot into the two new plots and their subsequent allocation to the 1st and 2nd Respondents was illegal and thus null and void. He also prayed for the cancellation and/or rectification of the land register and restoring the two plots to their original status as a single plot. Additionally, he sought a permanent injunction to prevent the Respondents, their servants, and agents from evicting him, destroying his property, trespassing, or interfering with his rights over the Suit Plot.
 6. The 1st and 2nd Respondents filed statements of defence, denying the Appellant's claims. The 3rd Respondent filed its statement of defence, dated 24th January 2011 where it denied the averments made



- by the Appellant against it and averred it had mandate to allocate plots to individuals and that after making such allocation had no control over how the owners of the plots managed the same.
7. The suit was heard before the Trial Court where the Appellant called 3 witnesses in support of his case. The 1st and 2nd Respondents testified in support of their defence while the 3rd Respondent presented the County Surveyor, Mr Stephen Wambugu as their witness. The Appellant's evidence before the Trial Court was to the effect that he purchased the suit plot No. 248 Kutus Township from Michael Ndubai (deceased) and that he had been in occupation and possession of the same since 1973. The Appellant called 2 witnesses PW3 and PW4 who affirmed that indeed the Appellant purchased the plot from Michael Ndubai and that they witnessed the agreement. PW1 Stephen Nkega Gatana, was the Executive Officer of the Court and he had been called to produce in evidence the Court file in respect of Kerugoya PMCC No. 53 of 1991 (Michael Ndubai –vs- Ernest Kathuri). The Appellant's assertion was that the 3rd Respondent had unlawfully and fraudulently caused the subdivision of plot 248 Kutus Township into plots 248A and 248B and allocated the same to the 1st and 2nd Respondents respectively who had sought to have him (Appellant) evicted and had demolished some of his structures on the plot.
 8. The 1st and 2nd Respondents testified that they purchased plots 248A and 248B from Michael Ndubai on 6th June 2001 and 29th January 2002 respectively. They asserted that they purchased their said plots procedurally and adduced evidence of payment of the full purchase price of Kshs 190,000/- each. They stated that transfers were legally and procedurally effected to them by the 3rd Respondent who issued clearance certificates in regard to the plots.
 9. The 3rd Respondent in their evidence stated that the disputed plot 248 Kutus Township was allocated to Michael Ndubai. The 3rd Respondent acknowledged they were made aware of Kerugoya Magistrate's Court Civil Case No. 53 of 1991 where Michael Ndubai was the Plaintiff and the Appellant herein was the Defendant. The decree in the said case had decreed Michael Ndubai as the owner of plot No. 248 Kutus and had allowed him to evict the Appellant from the plot. The decree issued by the Court on 11th December, 2000 was in the following terms:-
 1. That the Defendant (the Appellant in the present appeal) be and is hereby ordered to vacate Plot No. 248 Kutus Township and remove all materials and structures therein and give vacant possession of the plot to the Plaintiff (Michael Ndubai Njiru).
 2. That the Defendant do and is hereby ordered to pay the costs of the suit.
 10. The Learned Trial Magistrate, after reviewing the pleadings, the evidence, and submissions of the parties, concluded that the late NDUBAI was the legal owner of the suit plot. It was his view that the Appellant failed to prove that he had ever been the proprietor of the suit plot. The Trial Magistrate held that the 1st and 2nd Respondents were bona fide purchasers and had acquired good titles to their respective plots, No. 248 A and 248B respectively.
 11. The Appeal was argued by way of written submissions. The Appellant claimed to have purchased the suit plot in 1974 and took possession of it thereafter. He stated that he lived on the plot until 2010 when the Respondents attempted to demolish his structures. The Appellant further argued that the orders in Kerugoya PMCC No. 53 of 1991 determined that the legal ownership of the suit land was vested in him. He asserted that the transfer of the property to the 1st and 2nd Respondents occurred while the case was still pending in the Lower Court. He contended that the 1st and 2nd Respondents were not bona fide purchasers for value, as they failed to conduct adequate due diligence, such as visiting the suit plot. He argued that the 1st and 2nd Respondents did not discharge the evidential burden set forth in



Section 107(1) and (2) of the *Evidence Act*. The Appellant in support of his submissions placed reliance on the case of *Samuel Kamere Versus Land Registrar (2015) eKLR*, where the Court held thus:-

“In order to be considered a bona fide purchaser for value, a person must prove that he has acquired a valid legal title. Secondly, he must have undertaken the necessary due diligence to identify the lawful owner from whom he acquired legitimate title and must have paid valuable consideration for the property purchase.”

12. The Appellant further submitted the late Michael Ndubai obtained the suit plot through fraudulent and illegal means, thus he could not pass a good title to the 1st and 2nd Respondents. The Appellant in support of this proposition relied on the case of *Esther Ndegi Njiru & Another Versus Leonard Gatei (2014) eKLR*, where the Court held that where a person did not have a good title to the property, he could not pass a good title of that property to anyone else.
13. The Appellant maintained that there were lawful orders in existence that had not been set aside or appealed against, which declared him the legal owner of the suit plot. The Appellant thus urged the Appeal be allowed and Judgment be entered in his favour.
14. The 1st and 2nd Respondents filed their written submissions dated 4th October 2024, in which they asserted the Appellant had not adduced any evidence to prove that they acquired their titles fraudulently and/or illegally or through any unprocedural means. The 1st and 2nd Respondents submitted that they purchased the disputed properties after conducting due diligence, including official searches at the land office, which confirmed that Michael Ndubai was the legitimate registered owner and that no encumbrances were attached to the title deeds.
15. They argued that they are bona fide purchasers for value, without notice of any irregularities, and that they took possession of the land in 2001 and 2007, respectively, from Michael Ndubai. Since then, they submitted they had made significant developments on the land. The Respondents stressed that they purchased the properties in good faith for valuable consideration, without any knowledge of fraud, and were not informed of any fraudulent activities nor were they implicated in any such actions.
16. In support of their position, the 1st and 2nd Respondents placed reliance on several cases including: *Opiyo & Another v. Olunje (Civil Appeal 148 of 2018)(2023) KECA 1539 (KLR)*, *Ardhi Highway Developers Limited v. West End Butchery Limited & 6 Others (2015) eKLR*, *Kuria Kiarie & 2 Others v. Sammy Magera (2018) eKLR*, *Katende v. Haridar & Company Limited (2008) 2 E.A 173*, *Philip Muchiri Njihia & Another v. John Ndirangu Njoroge & Another E.L.C.A No. 11 of 2023*, *Sylvance Otieno Ondiek v. Musa Otago Nyamula & 8 Others ELC Appeal No. 54 of 2022*, *Alexander Maina Matati & Another v. Charles Songole Ikhungu & Another ELC Appeal No. E007 of 2023*, and *Ethics and Anti-Corruption Commission v. Nderitu Wachira & 2 Others Misc Civil App No. 19 of 2015*.
17. The 3rd Respondent filed its written submissions on 25th October 2024. The 3rd Respondent submitted that the suit property, Plot No. 248 Kutus, was previously involved in an ownership dispute between the Appellant and Ndubai Njui, the original allottee of the plot. The 3rd Respondent stated that, through orders issued on 16th February 1993 in *Kerugoya Civil Suit No. 53 of 1991*, the Court directed the parties to present themselves for arbitration with the town clerk. The deputy town clerk's award granted ownership of the plot to Ernest Gathuri; however, this award was set aside by a Ruling of the Court on 23rd September 1994.
18. The 3rd Respondent further explained that the matter went through a full hearing in Court and that the Court ruled that the Appellant should vacate the plot, remove all structures, and return the premises to Michael Ndubai Njui. On 15th December 2000, the Town Clerk received a Court decree from Michael



Ndubai directing a change of ownership from the Appellant, Ernest Gathuri, to Michael Ndubai Njui and Virginia Muthoni Kinyua, following which the transfer of ownership was executed.

19. The 3rd Respondent asserted that it acted in accordance with the decree dated 12th December 2000, and its role was purely administrative. The 3rd Respondent contended he was not aware of any Court Order that declared the Appellant as the legal owner of the suit plot, as it had never been served with such an order. Additionally, the 3rd Respondent submitted that the Appellant had not proved any fraud or wrongdoing by the defunct Municipal Council of Kerugoya/Kutus and prayed that the Appeal against it be dismissed.
20. This Court being an Appellate Court of first instance is obligated to consider and re evaluate the evidence and material that was before the Learned Trial Magistrate at the time he made the Judgment to satisfy itself that the decision was justified. This was in keeping with the principle established by the Court of Appeal in the Case of *Selle & Another –vs- East African Motor Boat & Others* (1968) EA 123.
21. I have reviewed the Record of the Appeal, the evidence presented in the Lower Court, and have considered the parties submissions. The issues that arise for determination in the Appeal can be summarized as follows:-
 1. Whether the Learned Trial Magistrate erred in concluding that Michael Ndubai was the legal owner of the suit plot No. 248 Kutus Township.
 2. Whether the subdivision and transfer of the suit parcel to the 1st and 2nd Respondents was unlawful and/or fraudulent.
 3. Whether the Learned Trial Magistrate erred in finding that the 1st and 2nd Respondents were bona fide purchasers for value without any notice and that they acquired good titles to the property.
22. There is no doubt that the suit plot was initially allocated to Michael Ndubai. The issue for determination is whether Michael Ndubai transferred ownership of the suit plot to the Appellant. The Appellant claims that he bought the suit land from Michael Ndubai in 1974 and took possession thereafter. According to the Appellant this action made him the owner of the suit plot, despite not having any documentation supporting his claim of ownership.
23. The Appellant explained that the suit plot had been the subject of numerous legal cases and that the Court in Kerugoya PMCC No. 53 of 1991 referred the dispute to arbitration by the Municipal Council who decided the dispute in his favour, but the award was set aside by the Court. The Appellant appealed the decision to the High Court and the High Court ordered that the suit be heard de novo before the Magistrate’s Court. However, he acknowledged that he did not know whether the matter proceeded any further. The Appellant asserted that the orders issued after the suit abated were in his favor, and he considered himself the rightful owner of the suit plot.
24. Conversely, the 1st and 2nd Respondents contended that the Appellant’s claim was untrue because they purchased their respective plots from Michael Ndubai, who sold them the plots with vacant possession. They maintained that after acquiring their plots, transfers were completed, and they received ownership documents. The 3rd Respondent stated that it acted on the instructions of Michael Ndubai, the initial allottee of the suit land. The 3rd Respondent emphasized that Michael Ndubai obtained ownership through Kerugoya PMCC No. 53 of 1991. The 3rd Respondent contended the order of the Court decreeing the suit plot to Michael Ndubai was not stayed and submitted they acted lawfully in acting on the instructions of the said Michael Ndubai in approving the subdivision and effecting transfers of the subdivisions to the 1st and 2nd Respondents.



25. Michael Ndubai upon obtaining the Court Decree issued in Kerugoya PMCC No. 53 of 1991 on 11th December, 2000 soon thereafter sought and obtained approval from the 3rd Respondent for the subdivision of Plot No. 248 Kutus Township into two portions vide a letter dated 22nd March 2001. The plot was subdivided into plot 248 A and 248 B.
26. The Learned Trial Magistrate was of the view that while Michael Ndubai received money from the Appellant, he did not transfer ownership of the plot to him. The Magistrate concluded that Plot No. 248 in Kutus Town was never legally owned by the Appellant at any time as no transfer was effected to his name at the Council Offices.
27. In my view, the Appellant did not provide any documentary evidence to prove ownership of the disputed plot. Even if we were to consider the order issued in Kerugoya PMCC No. 53 of 1991 after the suit had abated given on 11th August 2009, the status quo ordered by the Court could not have been retrospective. The 1st and 2nd Respondents who were not parties in the case had already been registered owners of plot Nos. 248A and 248B after the plot had been subdivided and the subdivisions sold and transferred to them by Michael Ndubai. The 1st and 2nd Respondents were bonafide purchasers and could not be faulted. As per the County Council records Michael Ndubai was the legal and lawful owner of the plot and the Learned Trial Magistrate cannot be faulted for making that finding.
28. In regard to the consent order purportedly recorded on 11th August 2009 on the application dated 29th April 2009, the Learned Trial Magistrate at paragraph 16 in his Judgment observes that the original file in respect of Kerugoya PMCC No. 53 of 1991 was produced as an exhibit and noted when parties on 11th August 2009 appeared before E. M. Nyaga (RM) the record taken was as follows:-
- Magee – We have a consent to record. By consent prayer 1 of the application dated 29th April 2009 be allowed.
- Kahiga – That is the position.
- Court – Consent entered -----.
29. The Learned Trial Magistrate noted the last two words were indecipherable but what concerned him was that the consent related to prayer 1 and not to the two prayers as per the extracted order. The prayers as per the application were as follows:-
1. That the suit be declared as abated as between the Plaintiff and the Defendant.
 2. That the status quo in suit property being plot No. 248 Kutus Market be maintained in that the same is registered in the names of the Defendant/Applicant who is in physical and legal possession of the same and those orders be served upon the Clerk Kerugoya – Kutus Municipality Council for compliance.
30. The Learned Trial Magistrate referring to the alleged consent order at Paragraph 19 of his Judgment stated as follows:-
- “ 19. The extracted order reproduced the two prayers. As noted by the 1st and 2nd Defendants counsel as extracted the orders have a problem. Once the suit was declared as abated no orders can be issued declaring ownership in favour of the Defendant. No suit was heard to determine those rights. A suit that has abated is a dead one. No order or decree save for costs against the estate. At the time Magee was recording a consent for Plaintiff it is not clear on whose instructions he was acting. His client had died more than two years before.”



31. The Learned Trial Magistrate was spot on. Once the Plaintiff had died, and had not been substituted, there could be no order that ostensibly vested ownership of the property on the Defendant(Respondent). In the suit Kerugoya PMCC No. 53 of 1991 the Plaintiff (Michael Ndubai) had sued the Defendant (Respondent) seeking orders of vacant possession and it could not be that after his death, the Defendant (Respondent) had become the legal owner of the plot without the suit being heard and determined.
32. The allegations of fraud by the Appellant against the Defendants have in my view not be proved to the required standard. Where fraud is alleged in Civil cases the standard of proof is higher than proof on a balance of probabilities though not as high as proof beyond a reasonable doubt as is the standard in criminal cases. This is in acknowledgment of the fact that allegations of fraud border on Criminal culpability and are serious indictments and there is therefore need for credible evidence to be offered in proof. It is never enough to allege fraud and leave it at that hoping for inferences to be made. It is the reason the law requires allegations of fraud to be specifically pleaded and to be specifically proved by evidence. In the case of Kinyanjui Kamau –vs- George Kamau (2015) eKLR the Court of Appeal stated as follows:-
- “ —It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo –vs- Ndolo (2008) 1 KLR 742 wherein the Court stated that:-
- “We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary Civil cases namely proof upon a balance of probabilities; but the burden on the Respondent was certainly not one beyond a reasonable doubt as in Criminal cases.”
33. In the instant case the Appellant made allegations of fraud against the Respondents but did not substantiate the allegations. The Appellant alleged forgery of documents of transfer, alteration of documents and subdivision of the plot without his involvement. The Appellant did not adduce evidence to demonstrate the suit plot had been transferred to him at any time so that he became the owner. The Appellant did not demonstrate that the 1st and 2nd Respondent had knowledge that he had had a sale transaction with the late Michael Ndubai relating to the suit plot. At any rate a Court order issued on 11th December 2000 in Kerugoya PMCC No. 53 of 1991 had vested the suit plot in Michael Ndubai and ordered the eviction of the Appellant and this order had not been stayed not withstanding that on Appeal, the order was set aside and the suit ordered to be heard denovo in 2007. At the time the order for denovo hearing was made, the order issued on 11th December 2000 had been implemented by the 3rd Respondent and the 1st and 2nd Respondents had acquired titles to plot Nos. 248A and 248B which were the resultant plots following the subdivision that had been approved by the 3rd Respondent.
34. I have held that the 1st and 2nd Respondents were bonafide purchasers as they were not privy to any transaction that the Appellant may have had with Michael Ndubai (deceased) who was the initial owner of the plot. At any rate the said Michael Ndubai had conducted a successful litigation with the Appellant (PMCC No. 53 of 1991) where the Appellant had been ordered to vacate the plot. The 1st and 2nd Respondents searches at the County Council Offices confirmed the property belonged to Michael Ndubai (deceased). I am satisfied the 1st and 2nd Respondents carried out the appropriate due diligence required of them before purchasing the property. The Court of Appeal in the case of Kukan & Another (Administrators of the Estate of the late Jason Kukan Lila –vs- Kibutha (2023) KECA



742 (KLR) affirmed the standard of due diligence defined by this Court sitting at Nairobi stating as follows:-

45. The standard of due diligence was, in our view, aptly laid down by Mutungi, J in the case of Esther Ndegi Njiru & Another –vs- Leonard Gatei (2014) eKLR. The Learned Judge held as follows:-

“The rampant cases of fraudulent transactions involving title to land has rendered it necessary for legal practitioners dealing with transactions involving land to carry out due diligence that goes beyond merely obtaining a search. Article 40(6) of *the Constitution* removes protection of title to property that is found to have been unlawfully acquired. This provision of *the Constitution* coupled with the provisions of Section 26(1)(a) and (b) of the *Land Registration Act*, in my view places a responsibility to purchasers of titled properties to ascertain the status of a property beyond carrying out an official search. In this era when there are many cases of what has been described as “grabbed public lands” it is essential to endeavor to ascertain the history and/or root of the title.”

We respectfully affirm the above holding.

35. The 1st and 2nd Respondents have demonstrated the process that they followed to become registered proprietors of the suit plots. Their due diligence confirmed Michael Ndubai was the registered owner and that was verified by the 3rd Respondent who was the allottee and custodian of the land documents. The 1st and 2nd Respondents availed sale agreements, transfer forms, applications for transfer, clearance certificates and payment receipts issued by the 3rd Respondent. They clearly were innocent buyers who did whatever was necessary to validate their transactions.
36. Upon a reevaluation of the evidence presented before the Trial Court, I see no basis upon which the Learned Trial Magistrate can be faulted in the decision he reached. I uphold his Judgment and I dismiss the appeal for lack of merit.
37. The costs of the Appeal are awarded to the Respondents.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 13TH DAY OF MARCH 2025.

J. M. MUTUNGI

ELC - JUDGE

