



**Kariuki v Kiragu (Environment and Land Appeal 10 of 2021)  
[2023] KEELC 21454 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21454 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND APPEAL 10 OF 2021  
AK BOR, J  
OCTOBER 26, 2023  
(FORMERLY NYERI ELC APPEAL NO. 17 OF 2021)**

**BETWEEN**

**PETER MUCHIRI KARIUKI ..... APPELLANT**

**AND**

**ELIZABETH WANGUI KIRAGU ..... RESPONDENT**

**JUDGMENT**

1. Being aggrieved by the judgment of the Honourable Njeri Thuku, Principal Magistrate delivered on 7/5/2020, the Appellant lodged this appeal following the dismissal of his suit by the trial court and entry of judgment in terms of the Respondent's counterclaim. The Learned Magistrate found that the Respondent was the lawfully registered proprietor of Nanyuki Marura Block 5/736 (North Tetu) ("the suit land") and that the Appellant's land was Nanyuki Marura Block 5/777 (North Tetu). The court directed that the caution placed by the Appellant against the suit land was to be removed.
2. In the Memorandum of Appeal dated 5/6/2020, the Appellant faulted the Learned Magistrate for finding that fraud was not proved and that the Respondent's registration as proprietor of the suit land was lawfully done. The Appellant faulted the trial court for failing to consider and determine material questions of law and facts while pointing out that there were contradictions in the testimony of the Respondent's witnesses who testified. He further faulted the trial court for failing to give credence and relevance to the documentary evidence he adduced and instead basing her decision on the procedure adopted in the acquisition of the title deed. In this appeal, the Appellant seeks to have the judgment of the Learned Magistrate set aside, the Respondent's counterclaim dismissed with costs and judgment entered in his favour as prayed in the plaint.
3. The court gave directions on the hearing of the appeal through written submissions and gave parties time to file and exchange their written submissions, which they did. The court has considered the submissions of the parties.



4. The Appellant in his submissions relied on the definition of fraud in Black's Law Dictionary and the quotation in *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR. He submitted that he gave particulars of fraud in his plaint, one of which was that the Respondent obtained registration as proprietor of the suit land by false pretenses. He relied on Section 312 of the Penal Code creating the offence and giving the ingredients of that offence. Further, he relied on the receipts, ballot and the register in support of his case while urging that the Respondent did not give her share number in her Defence or witness statement but merely pleaded that her title number was Nanyuki Marura Block 5/736 (Eleri). He referred the court to the receipts which the Respondent tendered in evidence which according to him showed that she had two shares and another receipt had an alteration.
5. Regarding the new number 777, the Appellant urged the court to go by the evidence of his second witness who clarified that the new number 777 did not reflect the title number because if it were so, then the Respondent's land would have been parcel number 1009 which is the new number indicated on the Respondent's receipts. The Appellant relied on the documents relating to the office bearers of North Tetu farmers and argued that Joseph Nderitu Wanjohi who issued the clearance certificate to the Respondent was not the chairman of the company.
6. The Appellant faulted the court for relying on Section 26 of the *Land Registration Act* and the judicial decisions supporting the Respondent's case. He argued that the trial court did not address the Respondent's counterclaim by giving consideration to the documents produced by the parties in support of their respective cases. Further, he faulted the trial court for declaring him the proprietor of Nanyuki Marura Block 5/777 (North Tetu). The Appellant relied on *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR.
7. The Respondent submitted that the Appellant had no right to place a caution against the suit property which she claimed she had already sold to a third party in whose name she claimed that the land was registered in. She relied on the receipts issued to the Appellant on 6/3/1992 which bore new number 777. Further, she explained that there was litigation on the subject matter of this suit and after the issues were settled, parties were issued titles for their respective shares. The Respondent maintained that the trial court properly determined that the caution placed against her land was unlawful. She added that there was no issue to be determined in this appeal because the property was transferred to a purchaser soon after the caution was removed. She urged the court to dismiss the appeal. She maintained that the Appellant's land was reference number 777 indicated on the receipt he produced in court.
8. The issue for determination is whether the court should allow the appeal and set aside the findings of the trial court. In the suit before the Learned Magistrate, the Appellant pleaded that he was a shareholder of North Tetu Farmers Company Limited and that he was allocated ballot No. 0379 and the land known as Nanyuki Marura Block 5/736 (Eleri) and was issued a clearance certificate. He claimed that he was shown the suit land in 1994, took possession and had been occupying it up to the date he filed suit on 26/1/2017. Further, he averred that the Respondent fraudulently and irregularly transferred the suit land and got it registered in her name on 7/2/2014. He pleaded particulars of fraud as obtaining registration by false pretense, irregularly obtaining registration during the pendency of a restriction and obtaining registration without first obtaining transfer documents. He asserted that the Respondent had never taken possession or occupation of the suit land despite holding a title deed. He sought to be declared the rightful owner of the suit land and rectification of the register to remove the Respondent's name from the register.
9. In the Amended Defence and Counterclaim filed on 17/10/2018, the Respondent denied the Appellant's claim and asserted that she was the first and absolute registered proprietor of the suit



- property and that she was procedurally registered after remitting all dues to North Tetu Farmers Company. She claimed that she had been in possession of the suit land and counterclaimed a declaration that she was legally registered as the proprietor of the suit land and an order for the removal of the caution which the Appellant placed against the suit land.
10. The matter was heard and the court notes that during the trial, the Appellant mentioned that he was given ballot no. 0379 which became the suit land. Further, that his ballot was for ten shares which is equivalent to 10 acres. He stated that the Respondent's ballot was no. 210 and that her title was Nanyuki Marura Block 5/579. In addition, that she had two shares which would entitle her to two acres only. He defended the caution which he placed against the suit land and urged that it should not be removed.
  11. During cross-examination, the Appellant conceded that ballot no. 0379 was not signed and that the receipt dated 6/3/1992 showed the new number as 777. He also confirmed that the payment he made for the title deed also referred to new number 777. He confirmed that the clearance certificate was dated 25/5/2016 while the Respondent's title was issued on 7/2/2014. He also conceded that the register which he tendered in evidence showed plot no. 0379 and the new number being 777. He told the court that he discovered in 2016 that there was fraud on his land which is when he paid for the clearance certificate.
  12. John Gatuguta, the Chairman of North Tetu Farmers Company Limited gave evidence and confirmed that the Appellant and Respondent were both members of his company. Among the documents he relied was the field sheet and the registry index map (RIM), to explain how the Appellant's plot number 0379 became parcel number 736. Unfortunately, this court did not have the benefit of scrutinising the amended RIM because during the copying and compilation of the record of appeal, the document was shrunk and is therefore not legible. Mr. Gatuguta stated that the Respondent only bought two shares and that her ballot number was 201 which according to him translated to parcel number 579 on the RIM. He confirmed that the Appellant's ballot was not signed. He clarified that the company had bought four farms and that the clearance certificate issued to the Appellant referred to Farm Two even though the unsigned ballot and the receipts were written on Farm Three. He explained that they issued new numbers for those who were able to complete payments and that is how parcel no. 777 came to be. He stated that the Appellant paid for his title deed on 9/3/1992 but could not be issued a clearance certificate due to the pending court case.
  13. The Respondent gave evidence and stated that she discovered that a caution had been placed against her land when she did a search on 29/11/2017. She denied obtaining registration as proprietor of the suit land by false pretenses or that she obtained the title while there was a restriction. She recalled that the Chief Land Registrar removed the restrictions on the land through the letter dated 20/12/2013. She relied on the register of the company and conceded that the register produced by the Appellant showed that she had two shares.
  14. She told the court that she served as treasurer of the company from 2013 to 2015 and maintained that she had receipts to show how she bought the suit land. She relied on the members' list which she tendered as evidence to prove that she had ten shares in the company. She explained that plot 210 which translated to parcel 579 belonged to her mother and she held it in trust. The Respondent called Joseph Nderitu Wanjohi, a founder member of North Tetu Farmers Company since 1971, to give evidence. Mr. Wanjohi confirmed that he signed the clearance for the Respondent and that she had ten shares. He explained that the valid register was stolen.
  15. The court notes that the receipt dated 28/6/1991 issued to the Appellant had new number 777 inserted by ink while that of the Respondent had 1009 inserted as the new number on the register. When the



- Appellant paid survey fees and fees for issuance of title on 6/3/1992, 777 was inserted in the receipt as the new number. Even the receipt issued to the Appellant on 19/11/1995 has new number 777 inserted in it.
16. The Appellant placed emphasis on the leadership wrangles within the land buying company and the court cases as the reason why he had not processed his title. However, no evidence of the orders which the court issued stopping dealings with the company's land was adduced. It is not clear when the leadership dispute started and when it was resolved. It is only the letter dated 24/4/2014 from North Tetu Farmers Company Limited to the Chief Land Registrar which clarified that the court had dealt with the review and ordered that the prohibitory orders granted were to be discharged.
  17. The Appellant claimed that his ballot number 0379 is what became parcel number 736. He did not lead evidence to connect the two numbers including the full register of shareholders prepared by the company after subdivision of the company's land showing the parcel allocated to each shareholder. As it were, there is nothing to confirm what new parcel numbers were given to the land allocated to both parties based on their shareholding in the company.
  18. The Appellant maintained that the Respondent was only entitled to two acres of land based on her two shares. No evidence was adduced to show how much a member was paying for a share. A close scrutiny of the receipts produced by both parties does not indicate the number of shares each one of them bought in North Tetu Farmers. The receipts which the Appellant relied on do not indicate that he was paying for ten shares. Mr. John Gatuguta, who claimed to be a director of the land buying company stated in his testimony that after balloting one would be issued a signed ballot. The ballot which the Appellant produced was not signed which raises doubt as to his shareholding in the company in light of the fact that the ballot which the Respondent produced was signed by the company's officials.
  19. One of the grounds for fraud which the Appellant pleaded against the Respondent was obtaining registration without first obtaining transfer documents. One would be expected to submit transfer documents if they were buying the land from the shareholder but where it is being allocated by the company directly to a shareholder, no transfer would be necessary. The practice was that the company would forward the list of members who had been cleared to the Land Registrar to process their titles over the land allotted to them.
  20. Fraud must not only be pleaded but it must be proved to the required standard. The Appellant only pleaded that the Respondent obtained title over the suit land by false pretense and relied on the offence created in the Penal Code. For that section to apply, the Respondent would have been prosecuted for that offence and convicted which did not happen in this case. The Appellant failed to prove that the Respondent procured registration as proprietor of the suit land through fraud.
  21. The Respondent submitted that the suit land had already been transferred to a third party. The Appellant did not address the court on this point. There is no indication that the Appellant sought orders for stay of execution of the decree issued by the trial court. If indeed the suit land was transferred then that would convolute the matter because the third party did not participate in these proceedings.
  22. The Respondent was registered as proprietor on 7/2/2014. She did not explain how she was allocated the suit property. Based on this, the court declines to award her the costs for the appeal. By the time the Appellant obtained the clearance certificate from the company in 2016 the suit land was already registered in the Respondent's name. It would seem that this fact was not known to the officials who issued the clearance certificate to the Appellant. There may well have been multiple allocation of the same parcel of land to different people by the different sets of officials of the land buying company
  23. The appeal fails and is dismissed. Each party will bear its costs for the appeal.



**DELIVERED VIRTUALLY AT NANYUKI THIS 26<sup>TH</sup> DAY OF OCTOBER 2023.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Amos Chweya for the Appellant

Mr. David Osoro for the Respondent

Ms. Stella Gakii- Court Assistant

