



Gateru & another v Njeri (Sued as the legal representative and administrator of the Estate of the Late Elijah Murimi) (Environment and Land Appeal E033 of 2021) [2023] KEELC 20857 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E033 OF 2021
JO OLOLA, J
OCTOBER 19, 2023**

BETWEEN

CAROLINE WANJIKU GATERU 1ST APPELLANT

MARGARET MUTHONI 2ND APPELLANT

AND

AGNES NJERI (SUED AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE ELIJAH MURIMI) RESPONDENT

(An Appeal from the Judgment of the Honourable Agnes Mwangi, Principal Magistrate delivered on 2nd September, 2021 in Karatina SPM ELC No. 64 of 2018)

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable Agnes Mwangi, Principal Magistrate delivered on 2nd September, 2021 in Karatina SPM ELC No. 64 of 2018.
2. By their Complaint dated 28th January 2017, the two Appellants – Caroline Wanjiku Giteru and Margaret Muthoni who were the Plaintiffs in the Lower Court had sought the following reliefs against the Respondent herein:
 - (a) A declaration that the registration of the Defendant as proprietor of Iriaini/Gatundu/71 was fraudulently obtained and an order for rectification;
 - (b) Alternatively, that the Defendant holds 3.9 acres of Iriaini/Gatundu/71 in trust for the Plaintiffs, a declaration of the same and subsequent registration into the names of the Plaintiffs; and



(c) An order for costs.

3. Those prayers arose from the Appellants contention that at all times material, they were the daughters of the late Kangi Kamuri who was the first registered owner of the suit property. Sometime on or about 8th April, 1971, the late Kangi Kamuri purported to enter into an agreement for sale of the suit property with one Elijah Murimi Miano.
4. The Appellants asserted that the sale agreement was never completed as the purchaser did not complete the payment of the purchase price and the transaction became inoperative by law. Despite the said deficiencies, the late Elijah Murimi Miano proceeded to fraudulently register himself as the proprietor of the suit property, a fact which the Appellants only learnt about in the year 2016 and hence the prayers sought in the suit.
5. In the alternative, the Appellants contended that they have been and are in continuance exclusive occupation, possession and utilization of 3.9 acres of the suit property. Accordingly, the Appellants sought a declaration that they have a right to that portion of land and that the respondent held the same under an implied trust in their favour.
6. Agnes Njeri Murimi (the Respondent) sued in her capacity as the legal representative and administrator of the estate of the late Elijah Murimi Miano was opposed to the grant of the orders sought in the Plaint. In her Statement of Defence and Counter claim dated 13th March 2017, the Respondent stated that the sale agreement between the late Kangi Kamuri and Elijah Murimi Miano was valid and that the same passed a valid title over the suit property subject to a life interest in favour of the Appellant's mother, one Wangechi Kangi.
7. The Respondent averred further that subject to the said life interest, the proprietary interest of the late Kangi Kamuri were extinguished upon the registration of the late Elijah Murimi Miano as the proprietor of the suit land.
8. The Respondent further denied that the registration of the late Elijah Murimi Miano as the proprietor of the suit property was obtained fraudulently as stated by the Appellants. It was further her case that the Appellants had no capacity to bring the suit as they had not obtained any grant of letters of administration to the estate of the late Kangi Kamuri.
9. In addition, the Respondent asserted that the Appellants' suit was time-barred under the *Limitation of Actions Act*, Cap. 22 Laws of Kenya and that the same was res judicata as the issues raised therein had been heard and were finally determined in Nyeri High Court Succession Cause No. 311 of 2002 between the Respondent and the Appellants' said mother Wangechi Kangi.
10. By way of her Counterclaim, the Respondent asserted that her late husband Elijah Murimi Miano was the validly registered proprietor of the suit property subject to the life interest of the said Wangechi Kangi. Accordingly the Respondent urged the Court to dismiss the Appellants' suit and for:
 - (a) A declaration that the Plaintiffs have no interest in the suit land i.e L.R No. Iriaini/Gatundu/71 independent of or superior to that held by their mother, Wangechi Kangi;
 - (b) Costs of the suit and the Counterclaim plus interest; and
 - (c) Any other reliefs.
11. Upon hearing the Parties and in her Judgment delivered on 2nd September 2021 aforesaid, the Learned Trial Magistrate dismissed the Appellants' suit having determined that they had not proved any fraud



on the part of the Respondents and that the issue of customary trust was res judicata the same having been dealt with in Nyeri High Court Succession Cause No. 311 of 2002.

12. Aggrieved by the said determination, the Appellants moved to this Court and lodged a Memorandum of Appeal dated 22nd September, 2021 urging the Court to review the Judgment and decree of the trial Court on the grounds that:
 1. Whereas the trial Court rightly found the Plaintiffs to have had locus, it proceeded to err in fact and in law in failing to appreciate that the alleged sale and transfer of the suit land was void both for lack of payment of consideration and regulatory validity;
 2. The Learned Trial Magistrate erred in law and in fact in making a finding that the suit before her was res judicata the probate and administration suit being Nyeri High Court Succession Cause No. 311 of 2002 which finding was not only contrary to law but also to fact that the probate Court had refused to entertain the same for lack of jurisdiction.
 3. The Learned Trial Magistrate erred in fact and law in failing to appreciate that the totality of the Plaintiffs' case which was an independent claim traversing their mothers and whose trial and determination ought to have been so treated; and
 4. The Learned Trial Magistrate erred in fact and in law in misdirecting/non-directing herself on the procedural defect in the registration of the proprietor.
13. As the first Appellate Court, this Court is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and to 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 to make its own conclusions about it bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand (See *Selle & Another -vs- Associated Motor Boat Company Limited & Others* (1968) EA 123).
14. I have accordingly carefully perused and considered the Record of Appeal as well as the Judgment of the trial Court. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
15. By their Plaint dated 28th January 2017, the Appellants who were the Plaintiffs sought for a declaration that the registration of the Respondent's husband as the proprietor of the parcel of land known as Iriani/Gatundu/71 was fraudulently obtained and they sought to have an order for rectification of the register. Alternatively, the Appellants sought an order to the effect that the Respondent held 3.9 acres of the said parcel of land in trust for themselves and they urged the Court to declare the trust and to have themselves registered as the owners of the 3.9 acres of land.
16. The basis for those prayers was the Appellants contention that the suit property was their ancestral land and that their father, the late Kangi Kamuri had purported to sell the same on 8th April, 1971 to the Respondent's husband the late Elijah Murimi Miano. According to the Appellants, the sale transaction was never completed as the full purchase price was never remitted to their father. It was therefore their case that their father had not transferred the land and that the Respondent's husband had obtained registration as the proprietor of the suit property in a fraudulent manner.



17. In the alternative, the Appellants contended that they have been in exclusive occupation and possession of the said 3.9 acres portion of the suit property and that they had acquired a right thereto and that the Respondent held the same under an implied trust in their favour.
18. The Respondent on her part asserted that the sale agreement between the late Kangi Kamuri and her husband was valid and that the same passed a valid title over the suit property subject to a life interest in favour of the Appellant's mother, one Wangechi Kangi. She denied that her husband had obtained the title fraudulently as contended by the Appellants.
19. In addition, the Respondent further asserted that the Appellants' suit was both time-barred under the *Limitation of Actions Act* and res judicata as the issues being raised therein had been heard and determined in Nyeri High Court Succession Cause No 311 of 2002 which was between the Respondent and the Appellants' mother – Wangechi Kangi.
20. By way of her Counterclaim the Respondent sought a declaration that the Appellants have no interest in the suit property independent or superior to that held by their said mother Wangechi Kangi.
21. Having considered the issues being raised by the Parties, the Learned Trial Magistrate made a finding that the Appellants had failed to prove that the registration of the Respondent's husband as the proprietor of the suit property was fraudulent. The Learned Trial Magistrate further made a finding that the issue of trust being raised by the Appellants had been similarly raised by their mother against the Respondent in the said Nyeri High Court Succession Cause No. 311 of 2002 and that hence the same was res judicata.
22. By their Memorandum of Appeal herein dated 22nd September 2021, the Appellants contend that the Learned Trial Magistrate failed to appreciate the fact that the alleged sale and transfer of the suit land was void both for lack of payment of consideration and regulatory validity. They further assert that the finding on the issue of re judicata was not only contrary to the law but also the fact that the probate Court had refused to entertain the same for lack of jurisdiction. In addition, the Appellants contend that the Learned Trial Magistrate erred by failing to appreciate that their claim was an independent one traversing their mothers and that the same should have hence been treated accordingly.
23. From the material placed before the trial Court, it was apparent that the sale agreement between the Appellants' father Kangi Kamuri and the Respondent's husband Elijah Murimi Miano was executed on 8th April 1971. The suit property was subsequently transferred to the Respondent's husband on 10th May, 1971.
24. In support of their contention that the land was fraudulently registered in the name of the Respondent's husband, the 1st Appellant stated as follows at paragraphs 6 to 10 of her recorded Statement filed in Court on 3rd February, 2017.
 - “6. On or about 8th April, 1971 the deceased purported to enter into an agreement for sale with the deceased Defendant. However, the said agreement was not completed owing to failure to fundamental breaches (sic) including the payment of the balance of the purchase price and also the requisite regulatory and statutory approvals;
 7. We retained the original certificate of freehold title which is with us todate;
 8. We were surprised in 2016 when we did a search which reflected that the land is currently registered in favour of the deceased defendant since 10th May, 1971 and a certificate of title was issued to him;



9. We however remained and have been in occupation of the 3.9 acres of the land which we are in continuous possession and utilization; and
 10. It is our understanding that all along the land belongs to us the same was registered subject to a customary trust for and on behalf of the progeny and spouse of the late Kangi Kamuri.”
25. From the evidence of the Appellants themselves, it was apparent that their father passed away some three years after the sale transaction. There was however nothing to show that the Appellants father was unhappy with the transaction and/or that he had demanded any further payments to be made by the Respondent’s husband. As it were, the Appellants themselves were not yet born as at the time of the transaction and all that they knew about it could only be what they were told by someone else, most likely their mother Wangechi Kangi. The said mother was not called as a witness in the proceedings before the trial Court.
 26. In the particulars of fraud listed at paragraph 9 of the Plaint, the Appellants had accused the Respondent’s husband of failing to obtain Land Control Board consent and of purporting to procure registration in the absence of the original Certificate of Title which they stated had remained in their possession.
 27. As it were, while fraud was alleged, there was no proof of the same. In support of their case, the Appellants called the Land Registrar Nyeri (PW3). As it turned out, the Land Registrar produced all the documents in their file which gave an indication as to how the registration of the Respondent’s husband as the proprietor of the suit property were procured. These included the transfer of land documents, the application for consent of the Land Control Board, the Consent of the Board itself as well as the Abstract of the title.
 28. In his testimony before the Court (Page 69 to 70 of the Record), the Land Registrar did indicate that stamp duty was paid and that the transfer was duly executed by both Parties to the transaction and witnessed by one Peterson Ndegwa. It was further the testimony of the Registrar that he could not vouch for the Certificate of Title in the custody of the Appellants as the same was not reflected on their records.
 29. That being the case, I could not but agree with conclusion of the Learned Trial Magistrate (Page 83 to 84 of the Record) where she states as follows:

“The evidence by the Plaintiffs witness Nathan Gathaiya (PW3) the Land Registrar Nyeri County leaves no doubt at all that the registration of Elijah as proprietor was procedural. He testified that after perusing the parcels file, he got a transfer instrument dated 10th May, 1971 executed in the presence of the then Land Registrar by Kaingi in favour of Elijah Murimi, an application for consent of the Land Control Board dated 4th March, 1971 and a letter of consent signed by the Chairman of Mathira Land Control Board.

He also confirmed that stamp duty for the transfer was paid. The Land Registrar further indicated that the transfer was for a consideration of Kshs.7,400/-. The transactions were done in 1971 when both plaintiffs had not been born. If their father transferred the land to Elijah at the price of 7,400 he must have been satisfied with the consideration price hence the Plaintiffs cannot challenge the transfer on allegations of non payment of the full purchase price yet their father sanctioned it as testified by PW3.”



30. As to whether the suit was res judicata the probate and administration cause being Nyeri High court Succession Cause No. 311 of 2002, it was submitted by the Appellants that whereas the High Court has unlimited original jurisdiction in all civil cases, its jurisdiction in dealing with succession matters is limited by statute. It was accordingly the Appellants case that when an issue of trust arises, the Court ought to have downed its tools and referred the matter to an appropriate Court for hearing and determination after which the probate Court would then take up its role.
31. A perusal of the record herein reveals that the Appellants had produced in their List of Documents before the Lower Court a copy of the Ruling delivered on 18th November, 2005 by the Honourable H. M. Okwengu J. (as she then was) in Nyeri High Court Succession Cause No. 311 of 2002; In the Matter of the Estate of Elijah Murimi Miano (Deceased).
32. That Ruling was a result of an Affidavit of Protest filed by the Appellant's mother Wangechi Kangi against the Respondent herein. In her said protest, the Appellants' mother had stated that her late husband was the previous proprietor of the suit property and that he had sold it to the Respondent's husband on condition that the protestor was to have a life interest over 3.9 acres thereof. It was the Protestor's case that the full purchase price had not been paid and she sought to have the suit land shared between herself and the Respondent so that she could retain the 3.9 acres.
33. At Page 2 of the Ruling, the Learned Judge captures the Protester's claim as follows:

“Mr. Karingithi who appeared for the Protester submitted that although the deceased became registered as the proprietor of Iriani/Gatundu/71 in May 1971, the Protester remained on the land in accordance with clause 7 of the agreement of sale even though the deceased failed to register her life interest. He therefore submitted that the deceased was holding Iriani/Gatundu/71 as trustee for himself and the protestor. He submitted that the actual occupation and possession of the land by the protestor amounted to an overriding interest under Section 30(g) of the Registered Land Act and need not therefore be registered.”
34. Having heard the Parties, the Learned Judge determined that Wangechi Kangi was not entitled to absolute ownership of the 3.9 acres as claimed and that she was only entitled to a life interest.
35. A perusal of that Ruling reveals that contrary to the Appellant's submissions that the Probate and Administration Court had refused to entertain the issue for lack of jurisdiction, the Court actually dealt with the same at length and made a determination thereon.
36. At the hearing in the Lower Court, both Appellants admitted that they were aware their mother had filed the protest claiming the same 3.9 acres that they are claiming and that the Court had dismissed the claim based on trust and only allowed their mother a life interest over the same.
37. Arising from the foregoing, I was again unable to fault the Learned Trial Magistrate's finding that the claim based on trust was res judicata. The matter before the Court had been substantially and directly in issue in the matter before the High Court. The same was between the same Parties or between the Parties under whom they on any of them claim, litigating under the same title and it had been heard and finally decided by a competent Court.
38. In the premises I did not find any merit in the Appeal. The same is dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 19TH DAY OF OCTOBER, 2023.

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J. O. OLOLA
JUDGE

