



**Ngotho v Mukuri (Environment and Land Appeal E015 of 2022)
[2023] KEELC 21418 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21418 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E015 OF 2022
AK BOR, J
OCTOBER 18, 2023**

BETWEEN

SERA MUTHONI NGOTHO APPELLANT

AND

BEATRICE KIRIGO MUKURI RESPONDENT

JUDGMENT

1. Through the memorandum of appeal filed on 1/12/2022 the Appellant challenges the judgment of the Learned Principal Magistrate, Hon. Ben Mararo delivered on 8/11/2022. She faulted the Learned Magistrate for introducing new issues which she claimed were not pleaded and relying on them in arriving at his decision. She also faulted the Learned Magistrate for failing to analyse the evidence properly and proceeding on wrong principles. She claimed that the trial court disregarded her testimony and documentary evidence on the ownership of the suit land. Further, she faulted the Learned Magistrate for relying on a copy of the ballot and misapprehending the evidence which she adduced in court.
2. The court gave directions on 13/6/2023 that the appeal would be heard through written submissions and gave the parties time to file and exchange their submissions. Parties filed submissions which the court has considered. The Appellant submitted that according to the pleadings and submissions before the trial court, the Respondent claimed to have been in occupation of the suit land as a beneficiary yet she was not the legal representative of the estate of their late mother. Further, that the Respondent did not adduce any evidence to prove fraud on her part. In addition, the Appellant submitted that the Respondent did not produce the original ballot or a certified copy relating to the suit property from Gitugi Farmers Company Limited nor did she call the Company's chairman to produce the ballot and original member's register.
3. The Appellant submitted that it was not in dispute that their mother died, what was in dispute was whether their late mother owned the suit land. The Appellant faulted the trial court for finding that



the suit property belonged to the parties' late mother. The Appellant added that she told the trial court that she surrendered all the documents and that through the assistance of the company, a title deed was issued to her. Additionally, that she could not remember whether she kept copies of the payment receipts, ballots and clearance certificate. The Appellant challenged the Chief's letter produced by the Respondent which confirmed that the suit land belonged to the Appellant's mother while questioning how the Chief could have arrived at such a conclusion without the members' register.

4. The Appellant relied on Section 26 of the [Land Registration Act](#) on the legal position that a certificate of title is to be taken as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the conditions set out in that Section. She cited legal decisions in support of the point that where fraud is alleged, it must be pleaded and proved.
5. On her part, the Respondent submitted that there was nothing to indicate that the trial court introduced new issues or treated the Appellant's evidence superficially as she contends in the appeal. She emphasised that in arriving at its judgment, the court considered the pleadings and submissions. She reiterated that she produced copies of documents including the ballot card no. 146 from Gitugi Farmers Limited. Further, she submitted that their late mother, Nyaguthii Kariithi died on 5/8/2003, and was the original owner of the suit property. Further, that the Appellant was issued a title deed over the suit land being Daiga Umande Block 8/146 on 26/11/2013 yet no succession cause had been filed with respect to their late mother's estate. The Respondent pointed out that the trial court found that the Appellant was guilty of intermeddling with their deceased mother's estate.
6. The Appellant filed Further Written Submissions on 11/7/2023 in which she faulted the Learned Magistrate for not pronouncing himself on whether there was fraud and if it was proved to the required standard. The Appellant maintained that she had proved her case and that the court should have granted the permanent injunction against the Respondent.
7. The issue for determination is whether this court should allow the appeal and set aside the decision of the Learned Magistrate. In the plaint filed in court on 15/2/2021, the Appellant pleaded that she was the original owner and allottee of the plot known as Daiga Umande Block 8/146 (Gitugi) having been legally issued a title in her name by the Laikipia Land Registry. She claimed that the Respondent had invaded her land without her consent and proceeded to develop it thereby wasting it.
8. The Respondent denied the claim and pleaded fraud against the Appellant in registering the suit property in her name. She averred that the Appellant concealed material facts and did not disclose to the Land Registrar that the suit property belonged to their late mother.
9. From the typed proceedings, it is apparent that the Appellant produced copies of her national identity card, certificate of official search, copy of the title and the demand letter dated 14/9/2020 asking the Respondent to vacate the suit property. The court notes from the witness statement which the Appellant adopted in her evidence that the Appellant told the court that a neighbour called her in 2018 and informed her that an unknown person had moved to her land and was erecting structures on it. That she reported the incident to the area Chief who summoned the Respondent and questioned them about the ownership of the disputed land.
10. During cross-examination, the Appellant informed the court that she bought the land from Gitugi Farmers number 146 and that it was near her mother's. She stated that the Respondent had been on the land since 2010. She claimed that she bought the land for Kshs. 8,000/= which she paid through installments. Further, that she used the documents which the company gave her to process the title without keeping copies. She claimed that she had bought the land in 1984 and had a dispute with her mother and that she left her ballot at the Chief's Office. She stated that before their mother died, she



moved out of the Appellant's shamba to her own land. She confirmed that the Respondent moved onto her land and that they were sisters.

11. It was the Respondents' evidence before the trial court that the suit property belonged to their late mother and that the Appellant obtained a title over that land fraudulently. She stated that she was in occupation of the suit property as a beneficiary and that she had not disposed of any portion of the suit property because they had not taken out letters of administration for their late mother's estate. She produced a copy of their mother's death certificate and the Chief's letter regarding the dispute together with a copy of ballot card which Gitugi Farmers Company Limited issued to Nyaguthii Kariithi for plot no. 146. She emphasised in her evidence that the Appellant was not the original allottee of the suit land. She confirmed that she had not obtained any letters of administration and that she used to live with her mother on the suit property.
12. In the judgment, the Learned Magistrate found that the suit land belonged to the late Nyaguthii Kariithi and not the Appellant. The court went on to find that the Appellant had intermeddled with the estate of their late mother contrary to Section 45 of the *Law of Succession Act*. The Learned Magistrate relied on Section 26 of the *Land Registration Act* and concluded that the Appellants' title was obtained by fraud or misrepresentation even though there was no evidence pointing to the Appellant as being party to the fraud or misrepresentation. The court found that the Appellants' title was obtained illegally, unprocedurally or through a corrupt scheme and was therefore liable for cancellation. The court dismissed the Appellants' suit and found that the Respondent had proved her case on a balance of probabilities.
13. The Appellant filed suit alleging that she was member of Gitugi Farmers and that she bought land from the company in 1984. The Appellant did not explain why she did not take steps to process the title and possession of the land before 2018 if indeed she bought the land in 1984. She did not produce any documents to prove this fact including her ballot, receipts issued by Gitugi Farmers Company or the clearance certificate which she used to process her title. Section 107 of the *Evidence Act* requires that she who alleges must prove. The Appellant failed to prove that she was a member of Gitugi Farmers Company Limited or that she bought the suit land from the company.
14. The copy of ballot number 146 which the Respondent tendered in evidence bears the name Nyaguthii Kariithi and not the Appellant's name. The parties' mother died in 2003 and the title deed over the suit land was issued to the Appellant in 2013. The Appellant confirmed that the Respondent had been living on the suit land since 2010 and that even their mother lived on the land at some point before she died.
15. The Appellant's evidence is contradictory on when the Respondent moved into the suit land. On one hand she states that she was informed by a neighbour in 2018 that someone had trespassed on her land and on the other hand she stated on cross examination that she could not remember how long the Respondent had been on the suit land but that she was there since 2010.
16. The Appellant failed to establish that she was the one who bought the suit land from Gitugi Farmers Company and not her late mother. She failed to prove how she obtained the title over the suit land in her name ten years after their mother had died. She also failed to prove that the title over the suit land was procedurally issued to her.
17. The appeal lacks merit and is dismissed. Each party will bear her costs.

DELIVERED VIRTUALLY AT NANYUKI THIS DAY 18TH DAY OF OCTOBER 2023.

K. BOR



JUDGE

In the presence of: -

Mr. Victor Ondari for the Respondent

Ms. Stella Gakii- Court Assistant

No appearance for the Appellant

