



Mugo & 2 others (Suing as Legal Representatives of the Estate of Samuel Kageni Irungu) v Kariuki (Suing on behalf of Samuel Waithaka) (Environment and Land Appeal 90 of 2021) [2023] KEELC 21054 (KLR) (18 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21054 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 90 OF 2021
BM EBOSO, J
OCTOBER 18, 2023**

BETWEEN

PETER IRUNGU MUGO, DANIEL KAMOCHU WARUGURU, LAWRENCE NDUNGU KAMAU (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF SAMUEL KAGENI IRUNGU) APPELLANT

AND

JOSEPHAT MUCHIRI KARIUKI (SUING ON BEHALF OF SAMUEL WAITHAKA) RESPONDENT

(Being an Appeal against the Judgment of Hon C. A OTIENO – OMONDI, Senior Principal Magistrate, delivered on 22/10/2021 in Ruiru Senior Principal Magistrate Court MCE & L Case No. 131 of 2019)

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered on 22/10/2021 by Hon C. A Otieno – Omondi, Senior Principal Magistrate, in Ruiru Senior Principal Magistrate Court MCE & L Case No. 131 of 2019. The suit was originally instituted at Nairobi [Milimani] as Nairobi ELC Case No 802 of 2012. It was transferred to Ruiru Senior Principal Magistrate Court in September 2019. The dispute in the suit and in this appeal brings to the fore the unending phenomena of parallel land registers and parallel land titles. Indeed, it does emerge that land parcel number Ruiru East/Juja East Block 2/4244, measuring 1.3 hectares, which is the subject matter of this appeal, had two parallel registers and two parallel titles. One set of registration documents [land register and title] was dated 1989 and had John Kuria Goko, Samuel Kingara Hezekiah and Samuel Waithaka [now all deceased] as the proprietors, registered to hold the land as Trustees of Gati – Iguru Men/Women Group. The second



set of registration documents [land register and title] had Samuel Kageni Irungu [also deceased] as the registered proprietor.

2. One of the key issues that fell for determination in the trial court was the question as to whether the parties alleging fraud against each other had proved fraud in the procurement of the parallel registration documents. The trial court found that the rival claimants in the primary suit and in the counterclaim had failed to prove fraud against each other. Based on the principle of the supremacy of the first title in time, the trial court upheld the title of Gati-Iguru Men/Women Group, held in the names of the three Trustees, and ordered the cancellation of the register and title bearing the name of Samuel Kageni Irungu. The broad question to be answered in this appeal is whether the trial court erred in its findings and disposal orders. I will outline a brief background to the appeal before I dispose the specific issues that fall for determination in the appeal.

Background to the Appeal

3. The primary claim was initiated by Samuel Waithaka through a plaint dated 6/11/2012. He disclosed that his co-trustee proprietors had died and that he was suing as the surviving registered trustee – proprietor of Gati – Iguru Men/Women Group. He became incapacitated during the pendency of the suit and he was substituted with Josephat Muchiri Kariuki [the respondent in this appeal]. For convenience, I will refer to Gati-Iguru Men/Women Group simply as “the Group”. Similarly, I will refer to the title registered and held in trust for the Group as “the Group’s title”.
4. In summary, the case of the Group was that in 1974/1975, Gati-Iguru Group Men/Women, a family self-help group, wanted to buy land in Juja. Members of the Group began contributing money. In 1976, they joined other groups and bought Juja Farm through Juja Farm (1976) Limited. In 1987, those who had purchased Juja Farm decided to subdivide the land and share it out through balloting. The Group balloted for and was allocated the suit property. The suit property was pointed out to them by the surveyor and they took possession. The suit property was subsequently conveyed to the Group’s trustees who were registered as trustee-proprietors in November 1989.
5. They contended that there was no dispute relating to ownership of the suit property until 2011 when the Group discovered that a parallel land register had been opened and a parallel title had been issued in 2003 in the name of Samuel Kageni Irungu. They protested to the Chief Land Registrar and subsequently initiated a suit through the surviving trustee, Samuel Waithaka, against Samuel Kageni Irungu, seeking: (i) an order declaring their title as the only valid title; (ii) an order declaring Samuel Kageni Irungu’s [the deceased appellant’s] title as irregularly and illegally obtained; (iii) an order directing the deceased appellant to deliver his title to the court for destruction; (iv) an order directing the Land Registrar to rectify the land register and do all things necessary to reflect the Group’s trustees as the only registered proprietors of the suit property; and (v) an award of costs of the suit.
6. On his part, Samuel Kageni Irungu filed a defence and counter claim dated 10/12/2012 in which he contested the Group’s claim and averred that he was the legitimate owner of the suit property. He contended that as a member of Juja Farm 1976 Ltd, he participated in a balloting exercise in 1990 and he was allocated the suit property. He added that he subsequently left the Country and upon his return into the country in 2003, he was registered as proprietor of the suit property. It was his case that the Group’s registration and title had been fraudulently obtained through backdating.
7. By way of counterclaim, he sought against the Group’s trustee: (i) an order that his registration as proprietor of the suit property was properly done and that he was the absolute owner of the suit property; (ii) an order that the title issued to the Group’s trustees was improperly, illegally and/or



fraudulently obtained; (iii) an order directing the Group's trustees to produce their title for cancellation by the Land Registrar; and (iv) an award of costs of the suit.

8. Upon conclusion of trial, the trial court rendered the impugned Judgment in which it found that the rival claimants had failed to prove the particulars of fraud levelled against each other and that the evidence before court disclosed a case of double allocation and double registration. The trial court held that the Group's title was issued first in time, hence adjudged the Group to be the lawful owner of the suit property and proceeded to nullify the subsequent title that was held by the appellant.

Appeal

9. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following six verbatim grounds:

1. That the learned magistrate erred in fact and law in holding that the title deed issued to the plaintiff is the only good valid title for Title Number Ruiru East/Juja East Block 2/4244.
2. That the learned magistrate erred in fact and law in declaring that the title deed issued to Samuel Kageni Irungu on 25th January 2003 is invalid.
3. That the learned magistrate erred in fact and law in issuing an order directing the land registrar, Ruiru to within 60 days of service of a copy of the judgment to rectify the register to show that Samuel Waithaka together with John Kuria Goko and Samuel Kingara Hezekiah are the only registered proprietors of Title Number Ruiru East/Juja East Block 2/4244.
4. That the learned magistrate erred in fact and law by dismissing the Counterclaim.
5. That the learned magistrate erred in law and fact by totally failing to take into account the evidence of the appellant witnesses.
6. That the learned magistrate erred in fact and law in failing to consider the submissions of the appellant counsel together with the case law in support.

10. The appellant urged the court to allow the appeal and set aside the Judgment of the trial court. The appellant also urged the court to award them costs of the appeal.

Appellant's Submissions

11. The appeal was canvassed through written submissions dated 17/6/2022, filed by M/s Muttisya & Company Advocates. Counsel for the appellant argued that Josephat Muchiri (PW1) neither produced a search certificate indicating that the respondent was the owner of the suit property nor produced copies of ballot cards or a receipt in support of his case. He added that despite PW2 [Josephat Njoroge Njuguna] alleging that he was a member of Gati-Iguru Men/Women Group, he failed to produce a membership certificate to confirm membership and the minutes of the meeting held by Gati-Iguru Men/Women Group to decide on buying of the suit property. Counsel contended that PW2 acknowledged during trial that backdating of a title could happen since entries were made manually in the records. Counsel submitted that the respondent failed to call the Thika Land Registrar as his witness. He added that the Thika Land Registrar failed to appear despite the Court summoning him.



12. Counsel for the appellant added that the appellant called three witnesses who testified that in the year 1990, the late Samuel Kageni, being a member of Juja Farms Limited, balloted via ballot serial number 4244 and he was consequently allocated the suit land and the suit land was pointed to him by the then surveyor of Juja Farm 1976 Limited. He further submitted that the appellant's witnesses testified that the deceased was registered as proprietor in 2003 because he had been away in the United Kingdom and only applied for registration upon his return to the Country. Counsel added that the late Samuel Kageni discovered the fraud committed by the respondent in the year 2011.
13. Counsel for the appellant added that the appellant's witnesses testified that the deceased's title was properly registered, hence he was the absolute owner of the suit property. Counsel for the appellant argued that the title held by the Group was fraudulently obtained as there was no proof of how balloting was done or any document in support thereof other than the backdated title deed. Counsel contended that the appellant produced the ballot papers, receipt and other relevant documents in relevant of his title.
14. Counsel for the appellant relied on Section 26 of the *Land Registration Act* No. 3 of 2012 and the decisions in the cases of Zacharia Wambugu Gathimu & Another v John Ndungu Maina [2019]eKLR and Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another[2013]eKLR. Counsel urged the court to allow the appeal with costs.

Respondent's Submissions

15. The respondent filed written submissions dated 14/4/2023 through M/s P. M. Kamaara & Associates Advocates. Counsel for the respondent submitted that the trial court properly determined that the title issued first in time takes pre-eminent recognition and legitimacy against the subsequent title. Counsel relied on the decision in the case of Wreck Motors Enterprises v The Commissioner of Lands and Others; Civil Appeal No. 71 of 1997 to buttress this point.
16. Counsel for the respondent further argued that the appellant failed to lead evidence to show the process through which their title was procured while the respondent gave a detailed account of how him and his co-trustees balloted for the suit land as members of Juja Farm 1976 Limited and how they surrendered their ballots and receipts to facilitate processing of their title at Kiambu Lands Registry. Counsel added that the trial court investigated the process of issuance of the respondent's title and the court was satisfied that the respondent's title was legitimately acquired. Counsel further submitted that the trial court properly directed itself on the principles relating to the investigation of title documents. Counsel relied on the decision in Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016]eKLR.
17. Counsel for the respondent further submitted that the suit property was registered in the names of the trustees of Gati-Iguru Men and Women Group in 1989, hence the suit property was not available for allocation to any other person subsequent to that. Counsel contended that as per the evidence tendered, the appellant's title was registered 14 years after the respondent's registration. Counsel added that the trial court applied the correct legal principle regarding double allocation and double registration of parcels of land and arrived at the correct decision. Counsel relied on the decision in the case of Gitwany Investment Ltd v Tajmal Ltd & 3 Others [2006]eKLR.
18. On whether the trial court erred in issuing an order directing the Land Registrar to correct the registers to reflect the trustees of the Group as the lawful registered proprietors of the suit property, counsel submitted that the trial court having found that the appellant's title was invalid, it made a logical decision to have the appellant's title revoked and the register cancelled. Counsel further contended that the court had powers under Section 80 (1) of the *Land Registration Act* to cancel, revoke and set aside title documents irregularly issued and to order rectification of the register accordingly.



19. Lastly, counsel submitted that the trial court considered all the evidence produced before it by both parties and upon analysis of the weight of the evidence, it firmly and unequivocally determined that the respondent had led sufficient evidence to prove that the Group's title was the legitimate title. Counsel added that the respondent failed to prove his allegations of fraud against the respondent, adding that the appellant failed to demonstrate how Samuel Kageni Irungu acquired his title 14 years after the Group's title had been registered and issued. Counsel urged the court to dismiss the appeal with costs.

Analysis and Determination

20. I have read and considered the original record of the trial court; the record filed in this appeal; the parties' rival submissions; the relevant legal frameworks; and the prevailing jurisprudence on the key issues that fall for determination in this appeal. Taking into account the grounds of appeal and the parties' respective submissions, the following are the four key issues that fall for determination in the appeal: (i) Whether the rival claimants in the trial court proved fraud in the procurement of the parallel land registers and the parallel titles; (ii) Whether the trial court erred in applying the principle that where there is double registration, the first registration and title in time prevails; (iii) Whether the trial court erred in ordering cancellation of the registration and title of Samuel Kageni Irungu; and (iv) What order should be made in relation to costs. I will dispose the four issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
21. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* [2013] eKLR as follows:-
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
22. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
23. The first issue is the question as to whether the rival claimants in the trial court proved fraud in the procurement of the parallel land registers and the parallel titles. I have carefully read the parties' pleadings and the evidence that was tendered before the trial court. The late Samuel Waithaka [suing as a trustee of Gati-Iguru Men/Women Group] was the original plaintiff in the primary suit. The late Samuel Kageni Irungu was the defendant in the primary suit and the counter-claimant [plaintiff] in the counterclaim. They both made allegations of fraud in the procurement of the parallel land registers and parallel titles that existed in relation to land parcel number Ruiru East/Juja East Block 2/4244. Did they satisfy the threshold for proof of fraud?



24. In *Elizabeth Kamene Ndolo v George Matata Ndolo* [1996] eKLR the Court of Appeal outlined the following threshold which a party alleging fraud must satisfy:

“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 of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases.”

25. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR the Court of Appeal outlined the following principle relating to the threshold which must be satisfied by a party alleging fraud:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out,

and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See *Davy v Garrett* [1878] 7 Ch. D 473 at 489.”

26. In *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR, the Court of Appeal outlined the following as the threshold that a party alleging fraud must satisfy:

“It is trite law that any allegation of fraud must be pleaded and strictly proved To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.”

27. The appellants in this appeal led evidence by Peter Irungu Mugo [DW1], Daniel Kamochu Waruguru [DW2] and Lawrence Ndungu Kamau [DW3]. None of them tendered evidence demonstrating fraud in the procurement of the Group’s registration and title. DW1 stated as follows during cross-examination:

“I do not know when deceased became a member of Juja Farm Limited as I was very young.”

28. DW1 added thus:

“I can’t tell if plaintiff’s title is a fraud or fake.”

29. On his part, DW2 stated as follows during cross-examination:

“I was not present when deceased bought the land. What I have recorded in the witness statement are mainly what I learnt later.”

30. DW2 added thus:

“I cant tell if PEXH1 [the Group’s title deed] is backdated My father told me deceased was the chairman of Juja Farm Limited. I do not know if he acquired the land when he was the chairman or after.”



31. A perusal of the evidence of all the appellant's witnesses does not disclose any attempt to demonstrate any element of fraud in the procurement of the Group's title. Put differently, the deceased appellant failed to discharge his burden of proof in relation to the allegation of fraud in the procurement of the registration and the title of the Group.
32. On his part, the respondent testified as PW1 and led evidence by Josephat Njoroge Njuguna who testified as PW2. They both testified that they were members of the Group who had contributed money to purchase land through Juja Farm 1976 Limited. They led evidence on how the Group acquired the suit property through balloting. They explained that the Group's share certificate and ballot had been surrendered to the Land Registry at Kiambu to facilitate processing of their title. The fact of presenting the original ballot and the original share certificate to the Land Registry to facilitate processing of titles was affirmed by DW1 during cross-examination.
33. Looking at the totality of the above evidence, it is clear that neither the appellant nor the respondent proved fraud. I do not therefore see a proper basis for faulting the finding of the trial court. I am in agreement with the trial court that neither of the rival claimants proved fraud against their opponent. That is my finding on the first issue.
34. Did the trial court err in applying the principle that where there is double registration and double titling, the first in time prevails? Kenya's land registration regime does not countenance the opening of more than one land register in relation to the same piece of land. Similarly, the law does not permit the issuance of more than one title in relation to the same piece of land. Where there exists more than one land register or title, this can only be attributed to one of the following: (i) fraud; (ii) misrepresentation; (iii) irregularity; (iv) corrupt scheme; (v) mistake. Double registration of land in Kenya is not and should not be a normal phenomenon. Indeed, the existence of more than one land register or more than one title in relation to the same parcel of land should be a trigger to the criminal justice system to go to the bottom of the matter and establish the cause of the duplicity. Criminal sanctions ought to be visited on the culprit(s).
35. In the suit giving rise to this appeal, the rival claimants waved parallel titles but were unable to satisfy the threshold for a finding of fraud. They both traced the roots of their parallel registrations and titles to Juja Farm 1976 Ltd, indicating that they acquired their titles through acquisition of shares, balloting and eventual registration by the Land Registrar. Neither of the rival title holders was able to prove fraud on part of the other.
36. A perusal of the Judgment of the trial court reveals that the trial court paid attention to and was guided by the prevailing jurisprudence in scenarios such as what was before it. The trial court properly relied on the decision of Lenaola J [as he then was] in *Gitwany Investment Limited v Tajmal Limited & 3 others* [2006] eKLR where he stated thus:

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs Commissioner of Lands*, C.A. No. 71/1997 (unreported):- is the “grant [that] takes priority. The land is alienated already.” Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its



sanctity. The Gitwany title fits this description and in fact upto the end of this case, the 3rd party has not sought to cancel it!”

37. I would add that, to the extent that the appellant’s title was issued while there subsisted a valid land register and a valid title in the name of the trustees of the Group, the subsequent land register and the subsequent title in the name of the Samuel Kageni Irungu should never have been issued. Its issuance was a mistake.
38. Taking into account the evidence that was placed before the trial court and the prevailing jurisprudence, I have no reason to fault the trial court. In my view, in the absence of proof of fraud by either of the rival claimants, the trial court properly invoked the principle of the supremacy of the first registration/ title in time. That is my finding on the second issue.
39. The trial court having found that the first title in time prevailed, the reliefs that it issued were prayed for and were properly aligned to the findings of the court. I therefore do not find fault in the trial court’s order cancelling the registration and title held in the name of Samuel Kageni Irungu. That is my finding on the third issue.
40. On costs, taking into account the circumstances that led to the dispute in the trial court and ultimately led to this appeal, parties will bear their respective costs of the appeal.
41. In the end, I do not find merit in this appeal. The appeal is dismissed for lack of merit. Parties will bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF OCTOBER 2023

B M EBOSO

JUDGE

Court Assistant: Osodo/Hinga

