



REPUBLIC OF KENYA



KENYA LAW
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**Mbugi v Muriithi (Environment and Land Appeal E004 of 2021)
[2023] KEELC 21991 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21991 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E004 OF 2021**

AK BOR, J

NOVEMBER 23, 2023

BETWEEN

GERALD KINYUA MBUGI APPELLANT

AND

GERALD KINYUA MURIITHI RESPONDENT

JUDGMENT

1. The Appellant was aggrieved by the judgment of the Hon. L. Mutai Chief Magistrate delivered on 26/11/2021 vide which the court ordered him to vacate and deliver vacant position of the land known as Laikipia/Daiga/Umande Block 4/345(Nyariginu) (suit land) failing which he would be forcefully removed from the suit land. The court awarded the Respondent general damages of Kshs. 100,000/= for trespass together with costs of the suit.
2. The court delivered the judgment after conducting the hearing of the suit in which the Respondent sought to evict the Appellant from the suit land based on the fact that he was the registered proprietor of the suit land which he acquired from Nyariginu Farmers Company Limited where he was a member and that the Appellant had illegally entered his land, erected a fence and started cultivating it without any colour of right.
3. In his Defence and Counterclaim, the Appellant averred that the Respondent obtained registration as proprietor of the suit land by false pretense and denied that he had trespassed onto the suit land while averring that he had been lawfully occupying and utilising the land since the late 1970s. He claimed that he became a shareholder of Nyariginu Farmers Company Limited in 1977 and was allocated plot number 565 which was later registered as Laikipia Daiga Umande Block 4/345 (Nyariginu). He claimed that he was shown the land, occupied and fenced it and had been using it since 1977. He was issued a clearance certificate and when he went to process his title, he discovered that the Respondent had transferred the land to himself and a title had been issued to him. He pleaded particulars of fraud against the Respondent.



4. Being dissatisfied with the findings of the trial court, the Appellant filed a memorandum of appeal setting out four grounds of appeal being; - that the Learned Magistrate erred by finding that the Respondent was entitled to the reliefs he sought in the plaint and by failing to find that the Respondent obtained registration as proprietor of the suit land fraudulently. Further, that the trial court dismissed his counterclaim without analysing the evidence he tendered and that the trial court failed to consider the principles applicable in the award of general damages for trespass and therefore awarded excessive damages under the circumstances.
5. The court directed parties to file submissions which it has considered. The Appellant submitted that the court relied on the receipts from Nyariginu Farmers which the Respondent tendered in evidence for the purchase of the shares and the company register in proving his case. He submitted that on his part, he produced receipts from Nyariginu farmers, share certificate, clearance certificate and a ballot in evidence. He argued that the Respondent failed to produce the clearance certificate, share certificate, transfer and register of members' showing the title number allocated to him. Additionally, he argued that the Respondent did not prove how plot numbers 183 and 185 became title number Daiga Umade Block 4/345 (Nyariginu). He contended that the Respondent's title did not conform with the procedure and that he could not properly trace its roots without a break in the chain as was held in Hubert's case.
6. The Appellant relied on the definition of fraud in Blacks Law Dictionary and the particulars of fraud he pleaded in his counterclaim against the Respondent. He also relied on Section 312 of the *Penal Code* which defines false pretenses and gives the ingredients of that offence. He urged that had the trial court analysed his evidence, it would have arrived at a different finding.
7. As regards the award of general damages of Kshs. 100,000/= for trespass, he contended that the Respondent did not lead any evidence on the state of the suit land before and after the trespass and further, that the Respondent did not propose any sum in his submissions. The Appellant contended that the trial court proceeded on the wrong principles and awarded an inordinately high amount for general damages without giving any basis. The Appellant relied on *Teresia Wangari Mbugua v Jane Njeri Nduati & another [2020]* eKLR which gives the definition of fraud and makes reference to the grounds for challenging the title of a registered proprietor.
8. The Respondent submitted that he gave evidence on how he acquired the suit property from Nyariginu Farmers Company Limited after buying shares in that company and that he produced the payment receipts together with the company register to prove that he was a registered member of the company. Further, that he produced the ballot which showed that he was given plot no. 345 which is the suit property and that he stated during his re-examination that the old numbers 183 and 195 were temporary numbers and after the government surveyor resurveyed the land, it was given 345 as the new number.
9. He submitted that on the other hand, the Appellant testified that when he balloted he was issued plot no. 565 which is different from the suit property and that he did not lead any evidence to support the allegation that his plot number was allocated the new number for the suit property. He added that by the time the Appellant obtained a clearance certificate on 24/5/2011, he had already been issued with the title deed over the suit land on 15/12/1998.
10. The Respondent relied on *Kenya National Highway Authority v Shalien Masood Mughai & 5 Others [2017]* eKLR in support of the point that when a person's title is called to question, it becomes that person's burden to explain the root of his title. He maintained that he provided concrete evidence of the root of his title and was therefore entitled to the protection of his title as the law provides under the *Land Registration Act*.



11. Regarding the claim by the Appellant that he obtained his title fraudulently, he submitted that the burden of proving the legitimacy of his title fell on the Appellant who did not adduce any evidence of fraud against him. The Respondent cited Section 107 of the Evidence Act which provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts then he must prove that those facts exist. He added that it was settled law that fraud must be distinctly alleged and proved because fraud cannot be inferred from the facts of the case.
12. On the award of damages, the Respondent submitted that he issued the demand letter dated 7/11/2016 requiring the Appellant to vacate the suit land but he continued in occupation, erected a fence and was cultivating it without his consent which in his view constituted trespass. He added that the Appellant deprived and denied him the use of the suit land which entitled him to the award of damages made by the court of Kshs. 100,000/=.
13. This being a new appeal the court is required to reconsider the evidence, evaluate it and make its own findings. During the trial, the Respondent produced copies of the title deed, certificate of search, receipts bearing different dates from 1974 to 1978 issued by Nyariginu farmers company. He also produced receipts showing the membership fee he paid and a map showing the location of the suit land. He stated that he did not have the clearance certificate because he surrendered it to the office. He told the court that there was a register at the lands office showing that he was the registered owner of the land.
14. The Respondent told the court that he found out in 2016 that the Appellant was claiming the suit land. He stated that when he visited the land in 2016, the Appellant had not taken possession but that he later fenced the land. One of the directors of Nyariginu Farmers Company Limited, Wilfred Ndirangu Ngatia was called by the Respondent as a witness and gave evidence. He told the court that he had been a director since 3/11/1979. He confirmed that the Appellant's name did not appear on the company's register but that the Respondent's name was there. He produced the company register.
15. The witness took the trial court through the process of buying land from the company. He stated that a member had to pay entrance fees of 50/= and would then be given a number following which he was allowed to pay Kshs. 2,500/= over time. After paying this amount, one had to wait to ballot. He explained that balloting took place on 19/7/1979 and according to the company's book, it showed that the Respondent was allocated plot no. 195 and 183 because he had two shares. He explained that after the balloting had been done, there was a crisis because the company had oversubscribed the shares. An annual general meeting was held where it was resolved that each member was to contribute Kshs. 1,500/= to refund the shareholders who would miss out on the land. Further, they paid an additional Kshs. 1,200/= because there was no land left for public utility. He told the court that there was no register prepared after the balloting.
16. According to him, the second balloting was done in 1989 which brought about changes in the plot numbers. The Respondent was allocated the suit land according to him. He stated that the company did not approve the issuance of a clearance certificate dated 24/3/2011 to the Appellant. He told the court he had been a director since 3/11/1979. Regarding the Appellants ballot, he explained that the serial number on it was the number of the land which means the Appellants land should have been no. 565 which was on the ballot. He explained that a member had to submit his share certificate and receipt to be issued a title deed.
17. The Appellant stated that he was a shareholder of Nyariginu Farmers Limited. He produced the receipt for the amount he paid, membership share certificate, ballot and clearance certificate. He stated that the Respondent obtained his title through fraud because he did not have the share certificate and the ballot. He could not remember when he balloted but claimed that he took possession of the land 1977



- and that by that time the land had been subdivided. It emerged from the cross-examination that in 1977 he was sixteen years old. The receipt dated 6/10/1988 which he produced reads Gerald Kinyua Wambugi which he claimed was his name and that that receipt was an account of title deed fees. When he was referred to the second receipt dated 14/10/1988 being payment for title deed and survey fees, he conceded that he had paid for the title deed twice. On re-examination, he stated that he had been on the suit land since 1989 but maintained that he became a shareholder in 1977.
18. In her judgment, the Learned Magistrate noted that the Appellant did not explain why he obtained a clearance certificate 23 years after paying for the title in 1988. She also took issue with the Appellant's ballot reflecting plot no. 565 which is different from the suit property while pointing out that the Appellant did not adduce evidence to support the allegation that the land number was changed and allocated a new number which is the same as the suit property.
 19. The trial court relied on Sections 24 and 26 of the *Land Registration Act* together with Sections 107,109 and 112 of the *Evidence Act*. The court went on to state that the burden of proving that the suit land was acquired illegally fell on the Appellant once he questioned the legitimacy of the Respondent's title. The court found that fraud did not arise. The court also found that the Appellant had trespassed onto the suit land and that no evidence was required before damages for trespass to land could be awarded. In conclusion, the court found that the Appellant had failed to prove on a balance of probabilities that the Respondent acquired his title over the suit land fraudulently.
 20. The issue for determination is whether this court should set aside the judgment of the Learned Magistrate, dismiss the Respondents claim and enter judgment for the Appellants as he sought in the counterclaim. In other words, this court is required to make a determination on whether the Respondent proved his claim to the suit property to the required standard or whether the trial court should have entered judgment in favour of the Appellant.
 21. The Appellant claims to have become a member of Nyariginu Farmers Company Limited in 1977, at a time when it is apparent that he was 16 years old. It is highly improbable that he could afford to raise the share capital of Kshs. 2500/= in 1977. From the ballot card he produced it is clear that an identity card was necessary for a ballot to be issued which means he could not have had one in 1977 when he claims to have bought the land. The Appellant could not remember when he balloted for the suit land. His share certificate reads plot number 565. He failed to establish how that plot number translated into the suit land.
 22. There are contradictions in the Appellant's evidence and pleadings as to when he took possession of the suit land. He claims to have occupied it in 1977 and 1989. He also claimed that by 1977 the land was already surveyed. He could not explain why he waited until 24/3/2011 to obtain the clearance certificate from the company had he been on the land since 1977. The court prefers the evidence of the Respondent that the Appellant entered the suit land in 2016. The director of Nyariginu who gave evidence confirmed that the Appellant's name did not appear on the members' register but that the Respondent's name was in the register. By the time the Appellant got the clearance certificate dated 24/3/2011 a title deed had already been issued to the Respondent on 15/12/1998 which raises doubt as to its authenticity. The company's records ought to have shown that a title had already been issued to the Respondent going by the evidence of the director who gave evidence on the procedure followed in the issuance of a title deed to a member of the company.
 23. The Appellant failed to prove that he had a more superior title to the suit than that of the Respondent.
 24. The appeal lacks merit and fails. The Respondent is awarded the costs of the appeal.

DELIVERED VIRTUALLY AT NANYUKI THIS 23RD DAY OF NOVEMBER 2023.



K. BOR

JUDGE

In the presence of: -

Mr. Amos Chweya for the Appellant

Mr. Kebuka Wachira for the Respondent

Ms. Stella Gakii- Court Assistant

