



**Rugaru v Mwirigi (Environment and Land Appeal E066 of 2021)
[2023] KEELC 21862 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21862 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E066 OF 2021
CK NZILI, J
NOVEMBER 22, 2023**

BETWEEN

PRISCILLA RUGARU APPELLANT

AND

PURITY MUKIRI MWIRIGI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. D. W
Nyambu Chief Magistrate in Meru CM ELC Suit No. 110 of 2018)*

JUDGMENT

1. Before the court is a memorandum of appeal dated 7.6.2021, where the appellant, who was the defendant in the lower court, faults the judgment on the basis that the trial court;- failed to allow the appellant to tender her evidence contrary to rules of fair hearing; overlooked the ingredients of fraud; disallowed her advocate's application to represent her; held the transaction, lacked a land control board consent and based her findings on the resolutions between the litigants and the deceased as opposed to the issue of fraud; in not requesting for evidence on fraud to make the judgment watertight, and relying on one side, hence misdirecting itself on law and facts and lastly, for ignoring her evidence and written submissions.
2. As a first appeal, the court is mandated to appraise and rehearse on the lower court record and come up with independent findings on facts and law, while appreciating the trial court had the opportunity to see and hear the parties firsthand. See *Selle & another v Associated Motor Boat Company Limited & others* (1968) E.A 123.
3. The respondent filed an amended plaint dated 19.7.2019 at the lower court. She indicated she was the legal representative of the estate of the late Samuel M'Rimberia, the registered owner of LR No. Ntima/Igoki/2170, who died on 26.5.2012. The respondent's complaint against the appellant was that on 5.6.2012, the appellant, without her knowledge, consent, or approval, presented an undated



- application for consent to transfer the suit land to the land control board, purporting the Samuel M'Rimberia was already dead, which was surprisingly allowed, took out still an undated transfer form to the land registrar and caused the land to be transferred. A title deed was issued under her name on 19.7.2012 and 7.8.2012, respectively.
4. As a result, the respondent averred that she and the other beneficiaries were excluded from the estate contrary to the Law of Succession Act, as a consequence of which they have suffered loss and damages.
 5. The respondent sought the invalidation of the transfer and registration and reversal of the entries on the title in favor of the deceased's estate. The plaint was accompanied by witness statements and a list of documents dated 17.8.2017, another dated 29.7.2019, and a further list dated 17.10.2019.
 6. The appellant opposed the respondent's claim by a statement of defense dated 8.10.2019. She termed the suit brought by a party other than the widow and an administratrix of the estate of the late Samuel M'Rimberia. She pleaded that the plaintiff could not sue or be entitled to any reliefs sought for lack of capacity to sue. Further, the appellant denied the alleged fraud and considered the suit time-barred. The defence was accompanied by a witness statement and documents dated 8.10.2019.
 7. From the court record, the matter came for a hearing on 10.8.2020, and another date was taken for 21.9.2020. An order was made for the appellant to be served with the hearing date. When the matter came up again on 21.9.2020, a time allocation was given for 10.30 am in the appellant's presence. At 10.30 am, counsel for the respondent notified the trial court that Mr. Muthomi, advocate for the appellant, was before Hon. Mr. Justice Mabeya. The court directed the matter to proceed since the appellant was present.
 8. Purity Mukiri Mwirigi testified as PW 1. As a daughter to the late Rael Mwendwa, she told the trial court her mother was married to the late Samuel M'Rimberia as a second wife. She adopted her late mother's witness statement and her witness statement dated 29.7.2019. She said that after her father passed on, some people visited the land with a view of selling it, after which her mother conducted a search and established that the land they were farming had been transferred. Pw1 termed the transfer as illegal, for the consent from the land control board was issued on 5.6.2012, which was 10 to 12 days after the death of Samuel M'Rimberia on 26.5.2012. She said her mother obtained a limited grant in High Court Misc Succession Cause No. 140 of 2015, dated 14.4.2015. Similarly, PW 1 said she also obtained a limited grant to sue as per her further list of documents.
 9. PW 1 referred to a chief's letter dated 26.3.2013 confirming that her mother was the 2nd wife of the deceased, while the respondent was his daughter. She produced a copy of the register as P. Exh No. 1 death certificate of the late father as P. Exh No. (2), limited grand as P. Exh No. (3), undated application for land control board as P. Exh No. (4), consent letter as P. Exh No. (5), transfer form as P. Exh No. (6), Limited grant dated 26.2.2018 as P. Exh No. (7) and a chief's letter dated 26.2.2013 as P. Exh No. (8).
 10. PW 1 told the court that the late Samuel M'Rimberia was registered as the owner of the LR. No. Ntima/Igoki/2170 on 14.2.1972 as per P. Exh No. (1) . She said the land initially belonged to her grandfather, M'Mwario Ikunyua, who gifted it to his late father. She prayed the suit be allowed. Given an opportunity to cross-examine, the appellant said her lawyer was not within. The respondent marked her suit as closed. The court gave a judgment date of 13.10.2020.
 11. By an application dated 6.10.2020, the appellant sought to set aside the proceedings on the basis that the matter proceeded ex parte, counsel for the respondent had agreed to indulge counsel for the appellant who was engaged in the high court, there would be no prejudice to the respondent, and it was in the interest of justice to allow the application. The reasons were contained in the supporting



- affidavit of the appellant and her counsel Mr. John Muthomi advocate sworn on 6.10.2020 and the attached cause list before Hon. Justice A. Mabeya.
12. The application was opposed by the respondent through a replying affidavit dated 22.10.2020, on the basis that it was a delaying tactic, the date had been fixed by consent, no prior arrangements had been made to seek another counsel to hold brief the matter proceeded by 1.00 pm there was a delay of 15 days in applying for setting aside which was not explained. In a ruling dated 2.2.2021, the trial court dismissed the application and set a judgment date.
 13. Aggrieved by the ruling, the appellants filed a Meru ELC No. App E030 of 2021 and sought a stay of the judgment. This court declined to stay the proceedings. In a judgment dated 11.5.2021, the lower court found merits in the respondent's claim now appealed before this court.
 14. Parties were directed to put in written submissions by 25.10.2023. None have been filed to date. Having reviewed the pleadings, the grounds of appeal, and the law, the issues for my determination are:
 1. If the respondent in the lower court proved her case to the required standard.
 2. If the appellant was denied an opportunity to be heard.
 3. If the appeal has merits
 15. It is trite that parties are bound by their pleadings, and issues flow from those pleadings.
 16. In the lower court, the respondents had complained about transfers and registration of L.R No. Ntima/Igoki/2170, to the appellant's name on 19.7.2012 and 7.8.2012, respectively, while the registered owner had died on 26.5.2012. She termed the transfer as done without the due process of the law. Further, the respondent termed the processes before the transfer and during the registration tainted with illegalities, irregularities, and fraud. In support of her claim, the respondent produced P. Exh No's. 1-8 showing the entries on the copy of records, which indicated that the transfer occurred while the registered owner was deceased and before letters of grant were issued to his widow.
 17. By way of a defense dated 8.10.2019, the appellant made a general denial of the claim and specifically attached the suit as brought by parties lacking the capacity to sue for the estate of the deceased Samuel M'Rimberia. The defence was accompanied by a witness statement and a list of documents dated 8.10.2019.
 18. In her witness statement, the appellant admitted the deceased passed on on 26.5.2012 and alleged he had attended a land control board meeting on 2.5.2012, but the consent was only approved in June 2012 when she collected it. She stated she lodged all the documents and obtained the title deed since they all had been executed before her father passed on. She termed her actions as lawful.
 19. The appellant attached the application for consent, transfer form, death certificate, green card, search certificate, and photographs as documents Numbers 1-8 in the list of documents.
 20. In *Dari Ltd & 5 others v. East African Development Bank* (C.A No. 70 of 2020) (2023) KECA 454 (KLB) 20 (20th April 2023) (Judgment) the court observed allegations of fraud against Judge Toledano founded on the same allegations as the claim of perceived bias, must not merely be alleged, but must be particularized as expected or cogently proved as required.
 21. Order 2 Rule 4 of the *Civil Procedure Rules* provides that any allegations of misrepresentation, fraud, and illegality must be outlined in the pleadings. See *Kinyanjui Kamau v George Kamau* (2015) eKLR. In *Daudi Kiptugen v Commissioner of Lands and 4 others* (2015) eKLR, the court observed that the issuance of title cannot be construed as an end result, and the process leading to it was equally material.



22. In *Munyu Maina v Hiram Gathiba Maina* (2013) eKLR, the court observed that when a title to land was under challenge, the title holder must move beyond it and prove the legality of how he acquired it and show the acquisition was legal, formal and free from any encumbrances.
23. In this appeal, the respondent produced exhibits and testified that the appellant failed to follow the law, took a shortcut, and transferred the land without letters of administration yet the deceased was no more. The onus to impeach the title under Section 26 of the *Land Registration Act* on fraud and illegality, or out of unprocedural means used, was on the respondent.
24. In *Wambui v Mwangi & others* (C.A No. 465 of 2019) KECA 144 (KLR) 19th November 2022) Judgement the court cited Blacks Laws Dictionary 9th Edition 131, that fraud refers to a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment.
25. The respondent produced as exhibits the documents the appellant used to transfer the land. The same documents were relied upon and were listed in the appellant's list of documents accompanying the defense. She presented the documents to the land control board and the land registry, knowing the land owner was deceased. The appellant did not plead in her defense that the deceased had signed the application for the land control board and the transfer form before his death on 26.5.2012. The transfer form has no date before 25.5.2012. The land control board has nothing to show it was signed before 26.5.2012.
26. The date of attestation of the photographs and signatures to the transfer form was not indicated. The death certificate attached by the appellant was dated 23.4.2015. If the documents were signed by the deceased before he passed on, they would have contained a date of execution by him before he passed on. The inference is that while lodging the documents with the land control board and the land registrar, the appellant did not disclose that the registered owner was dead. Nothing shows the land control board meeting had been booked before 26.5.2012. In other words, the appellant misrepresented or concealed material facts in acquiring the title. She did not disclose the same to the widow(s) of the deceased and, by extension, her step-sister, the respondent. Such action amounts to deceit and procurement of title transfer and registration using deceitful means.
27. The trial court determined the issue of a fair hearing, and this court declined to stay the delivery of the lower court judgment. The appellant is aware of her other pending appeal yet has not sought to consolidate the two appeals. What is required in law is the quality, not the quantity of evidence. The appellant had admitted in her written statement that she sought the transfer of and presented the transfer documents to the land office after her father passed on and before letters of administration were issued. With that admission and the representation of the exhibits, the respondent discharged the onus under Sections 107 – 113 of the *Evidence Act*.
28. It is not the court's duty to direct parties on what evidence to produce in an adversarial system. It is the parties who set the agenda of the trial through pleadings. The court, unlike in an inquisitional system, is an impartial arbiter. Written submissions, however forceful, cannot replace evidence. See *Daniel Toroitich Arap Moi v Stephen Murithi* (2014) eKLR. The upshot is that I find the appeal lacking merits, and the same is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 22ND DAY OF NOVEMBER 2023**

In presence of

C.A Kananu/Mukam



Appellant

Kiirua for Kirimi for appellant

HON. CK NZILI

ELC JUDGE

