



Ndegwa v Misingu; King'ori & 2 others (Interested Parties) (Environment and Land Appeal 1 of 2023) [2023] KEELC 21981 (KLR) (21 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21981 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 1 OF 2023
AK BOR, J
NOVEMBER 21, 2023**

BETWEEN

ROSE NJERI NDEGWA APPELLANT

AND

SAMUEL SOBI SOSIAN MISINGU RESPONDENT

AND

GEORGE MUCHIRI KING'ORI INTERESTED PARTY

CATHERINE GATHONI MURAKARU INTERESTED PARTY

LOISE WANJIRU KING'ORI INTERESTED PARTY

JUDGMENT

1. The Respondent filed Nanyuki Chief Magistrates Environment and Land Court (ELC) Case No. 18 of 2017 against the Appellant on 17/02/2017, seeking a declaration that he was the lawful allottee of the plot registered as Laikipia/Ngobit/Supuko Block 11/1982 (Wiumiririe) ("the suit property"). He sought to be registered as proprietor of the land and cancellation of the Appellant's title over the suit property. Additionally, he sought general damages for trespass and mesne profits.
2. The Respondent averred that he was a shareholder of Wiumiririe Farmers' Co-operative Society where he bought shares and was allocated plot no. 1982 measuring 0.74 hectares. When he went to collect his title deed in 2000, he found that the suit property had already been registered in the Appellant's name with a title having been issued to her on 30/05/2004. The Respondent lodged the dispute before the Land Disputes Tribunal, Lamuria which found in his favour. However, the Tribunal's decision was set aside by the High Court. In the suit, he sought mesne profits of Kshs. 20,000/= per year from 2007 until he was given vacant possession of the suit property.



3. In her defence, the Appellant denied the Respondent's claim and averred that she acquired title to the suit property from the previous registered proprietor for valuable consideration without notice of any irregularity. Further, that the previous owner's title was a first registration hence it was incapable of rectification under Section 143 of the repealed Registered *Land Act*. She also contended that the Appellant's claim was statute-barred under the *Limitation of Actions Act* and added that the court lacked jurisdiction to determine the suit by dint of Article 162 (2) (b) of *the Constitution* as read with Section 13 of the *Environment and Land Court Act*.
4. The suit was initially heard by Hon. E. Ngigi, Senior Resident Magistrate, and later by the Honourable Ms. Njoki Thuku, Principal Magistrate, who in her judgment delivered on 20/12/2018, found that the Respondent had proved his case and declared him the lawful allottee of the suit property. The Learned Magistrate declined to award the Respondent general damages for trespass or mesne profits.
5. Being aggrieved by the decision of the Learned Magistrate cancelling her title over the suit property, the Appellant lodged this appeal before the ELC at Nyeri. The appeal was transferred to this court in April, 2023. The Respondent sold and transferred the suit property to the Interested Parties which prompted the Appellant to seek leave to amend the appeal to add the Interested Parties to the appeal.
6. The main grounds of appeal set out in the Amended Memorandum of Appeal are that the Learned Magistrate erred in law by holding that the Appellant's title to the suit property was obtained unprocedurally and by making a finding that the Respondent was the lawful owner of the suit property. She faulted the Learned Magistrate for finding that the previous owner, Jane King'ori could not have transferred a good title to her despite the fact that she was not a party to the suit. She also faulted the Learned Magistrate for relying on the documents which the Respondent never produced and challenged the extract of the members' register of the Wiumirire Farmers' Co-operative Society which the 1st Respondent tendered in evidence.
7. The appeal was canvassed through written submissions. The Appellant submitted that she acquired the suit property from its previous owner, Jane Wanjiru King'ori for valuable consideration without notice of any irregularity, fraud or mistake. She relied on the sale agreement dated 26/03/2004, the clearance certificate dated 2/07/1996, the extract of the green card and copy of the title. The Appellant's mother gave evidence at the trial, and stated that after being issued with the title over the suit property, she had been using the land until 2007 when the 1st Respondent served her with an application filed before the Magistrates' Court for the adoption of the award made by the Lamuria Land Disputes Tribunal. That award was successfully challenged and set aside by the High Court. The Appellant reiterated that she was a bona fide purchaser for value without notice of any irregularity on the title.
8. The Appellant contended that the 1st Respondent's suit was time-barred by virtue of Section 7 of the *Limitation of Actions Act*. She contended that the 1st Respondent did not plead fraud or mistake and that time therefore began to run when she was registered as proprietor of the suit property on 30/05/2004. She went further to urge that by the time the suit was filed on 27/02/2017, it was 13 years after she had been registered as proprietor of the suit property.
9. The other point which the Appellant took up on appeal was that the trial court failed to consider the fact that during the trial, the 1st Respondent tendered documents which were marked for identification but which were never produced as evidence, including the share certificate and ballot card. She emphasised that the documents marked for identification were not of any evidentiary value and should not have been considered by the trial court as part of the 1st Respondent's evidence. The Appellant relied on *South Nyanza Sugar Co. Limited v Mary A. Mwita & Another* [2018] eKLR and *Kenneth Nyaga Mwigye v Kiguta & 2 Others* [2015] eKLR where the court held that a document marked for



identification must be proved, and that if the document is not marked as an exhibit, then it was not part of the court record.

10. The Appellant also relied on Section 107 of the *Evidence Act* in support of her argument that since she produced the sale agreement which she entered into with the previous owner, the clearance certificate issued to Jane King'ori and the extract of the green card while the Respondent only produced receipts and an unauthenticated members' register, then she proved her claim that she was an innocent purchaser for value without notice but the Respondent failed to discharge his burden of proof.
11. Regarding her claim against the Interested Parties, the Appellant submitted that the Respondent acted contrary to the orders issued by the court on 17/12/2019 for the preservation of the suit property pending the determination of the appeal. She submitted that the Respondent's conduct was intended to frustrate the appeal. She relied on the further supplementary record of appeal through which she introduced the pleadings filed in Nyahururu Chief Magistrates' Court ELC Case No. 51 of 2020, in which the 1st Interested Party was sued as a defendant, to support her contention that the Interested Parties were aware of the court proceedings between the Appellant and the Respondent regarding ownership of the suit property.
12. The Appellant submitted that the orders which the trial court issued to the Respondent were not justified based on the fact that the trial court relied on Section 26 of the *Land Registration Act*. The Appellant contended that being the first registered proprietor of the suit property, Jane King'ori's title over the suit property was protected by the law. She pointed out that Jane Kingori was not a party to the proceedings yet the trial court went ahead to issue orders for the rectification of the register including cancellation of the registration in her favour. The Appellant faulted the trial court for focusing on the discrepancy in the date shown on the green card and the title while contending that the court should have considered Section 80 of the *Land Registration Act*. The Appellant cited various authorities in support of her appeal.
13. On his part, the Respondent submitted that the suit property lawfully belonged to him following subdivision of the land by Wiumiririe Farmers' Cooperative Society and its registration. He maintained that he had demonstrated how he acquired the suit property from the co-operative Society where he was allocated plot number 1982 measuring 0.740 hectares. That on learning that the Appellant had been registered as the owner of the suit property, he filed his claim before the Tribunal whose decision was later quashed by the High Court owing to the Tribunal's want of jurisdiction.
14. The Respondent contended that the Appellant did not conduct due diligence before purchasing the suit property. He added that the fact that the suit land was registered in the name of Jane Wanjiru Kingori and transferred to the Appellant on the same day showed that the transaction did not go through the Land Control Board (LCB) which made the transaction irregular. He urged the court to dismiss the appeal.
15. The Interested Parties submitted that the Respondent was the lawful owner of the suit property and added that the trial court properly analysed the documents before rendering its decision. They urged the court to uphold the decision of the Learned Magistrate and dismiss the appeal.
16. The Interested Parties took issue with the filing of the further supplementary record of appeal which introduced the issue of Nyahururu CMELC No. 51 of 2020 and urged the court not to consider that document because it was not part of the evidence which the trial court considered. They maintained that the Appellant obtained a title over the suit property unprocedurally and fraudulently. They pointed out that the Appellant did not produce the LCB consent or the transfer lodged at the lands office. They questioned why the Appellant did not call Jane Wanjiru Kingori as a witness to prove that the Appellant acquired a good title over the suit property. The Interested Parties cited decisions dealing



- with the issuance of two certificates of title over the same parcel of land and the place of the title that was first in time. They urged that it beats logic how a purchaser could obtain a title before the vendor.
17. The Interested Parties maintained that they were bona fide purchasers for value without notice, and pointed out that they did not participate in the trial before the Learned Magistrate. They claimed that they were denied the right to be heard and the right of appeal. They claimed that they entered into a sale agreement on 20/09/2019 vide which they purchased the suit property from the Respondent at the agreed consideration of Kshs. 2.8 million. According to them, this was a year after a determination of the suit before the Learned Magistrate, before the Appellant had sought stay of execution. He claimed that they conducted a search which showed that the Respondent was the owner of the registered land. They applied for LCB consent and the transfer was registered in their favour on 21/07/2021.
 18. The issue for determination is whether the court should allow the appeal and reverse the cancellation of the Appellant's registration as proprietor of the suit property pursuant to the decree issued in Nanyuki CM ELC Case No. 18 of 2017.
 19. The Learned Magistrate delivered her judgment on 20/12/2018. From the record of appeal, the court notes the bill of costs was assessed on 29/7/2019. The proceedings do not indicate that the Appellant applied for stay of execution after the judgment was delivered. The Appellant filed a supplementary record of appeal containing the pleadings in Nyahururu CM ELC Case No. 51 of 2020 Rose Njeri Ndegwa v George Muchiri Kingori claiming that she was the registered proprietor of the suit land. She filed that suit after delivery of the impugned judgment in favour of the Respondent who transferred the suit property to the Interested Parties.
 20. The order issued by the Senior Resident Magistrate in Nyahururu CMELCC No. 51 of 2020 barring the 1st Interested Party from dealing with the suit property was made on 28/9/2020. There is no record of that order being registered against the suit land. The title deed included in the Interested Parties' Affidavit in response to the appeal shows that the Respondent was registered as proprietor of the suit land on 26/6/2019 while the title deed bearing the names of the Interested Parties was issued on 21/7/2021. The supplementary record of appeal contains an order for the registration of an inhibition against the suit property issued by Olola J. on 27/1/2022. The same order granted the Appellant leave to add the Interested Parties to this appeal.
 21. No evidence has been placed before the court to show that the court orders restraining dealings with the suit property were ever registered against the suit land. Instead of applying for stay of execution soon after delivery of the judgment declaring the Respondent as the lawful proprietor of the suit land, the Appellant filed a different suit against the persons to whom the Respondent transferred the land. The courts generally frown upon the practice by parties who rush to transfer land while court proceedings challenging their ownership of the land are still pending in court. This not only convolutes the issues but it also complicates the dispute by introducing myriad parties with divergent claims which prolongs resolution of the dispute unnecessarily.
 22. The Learned Magistrate was persuaded that the Appellant's title was irregularly issued based on the fact that it was issued on 30/5/2004 yet the green card shows that Jane Wanjiru Kingori who sold the land to the Appellant was registered as proprietor of the land on 31/5/2004. In the ordinary course of business of registration of transfers, it is unusual to find two transfers over the same piece of land being registered at the lands office on the same day as it happened in the Appellant's case. The Appellant did not produce the necessary documents tendered at the lands office to effect the transfer from Jane to her name. It is also absurd that her registration on 31/5/2004 preceded registration of Jane done on 31/5/2004 yet it was Jane transferring the land to her.



23. It is not in dispute that the suit property initially belonged to Wiumiririe Farmers Company Limited and that it was later subdivided and the parcels created registered in the names of the members who balloted for plots. The Appellant faulted the Respondent for not producing the original ballot for the plot yet she also did not produce any documents evidencing the propriety of the process through which Jane Wanjiru Kingori acquired the suit land from Wiumiririe Farmers Company. She only produced the clearance dated 11/7/1996 and did not produce the ballot card which the land buying issued to Jane to prove her membership in the company and the allocation of the suit property to her. Once her title was challenged, the Appellant was expected to call Jane Kingori to give evidence of her membership in the land buying company and how she acquired the land to buttress the Appellant's claim to the suit land based on Section 107 of the *Evidence Act*.
24. The court agrees with the Appellant's contention that the documents marked for identification which were not produced by the Respondent as exhibits should not have been taken into account by the trial court. The court notes that the Respondent produced receipts which Wiumiririe Co-operative Society issued in his name in 1972, 1974, 1978 and 1979. He also produced a copy of the register of members' of Wiumiririe Company which had his name entered against plot number 1982. These documents are persuasive that the Respondent was a member of Wiumiririe Company and was most probably allocated land by this company unlike in Jane Wanjiru Kingori's case where her membership in the company was not established.
25. It was the Respondent's evidence that he learned in 2007 that a title over the suit land had been issued to the Appellant. He lodged a claim before the Land Disputes Tribunal in 2007 but the award was cancelled by the High Court vide the judicial review orders. He filed suit on 27/12/2017, which was ten years after he discovered that a title had been issued to the Appellant. His claim was not barred by the *Limitation of Actions Act* because 12 years had not elapsed from the time he learned that the Appellant had obtained a title over the suit land.
26. Based on the evidence which was tendered before the trial court, this court cannot fault the Learned Magistrate for arriving at the conclusion she did. The appeal fails. Each party will bear its costs for the appeal.

DELIVERED VIRTUALLY AT NANYUKI THIS 21ST DAY OF NOVEMBER 2023.

K. BOR

JUDGE

In the presence of: -

Ms. Wangeci Gathua for the Appellant

Ms. Muthoni Kibaara for the Interested Parties

Ms. Stella Gakii- Court Assistant

No appearance for the Respondent

