



**Nderi v Nyaga (Environment and Land Appeal 13 of 2020)  
[2023] KEELC 21656 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21656 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL 13 OF 2020  
A KANIARU, J  
NOVEMBER 16, 2023**

**BETWEEN**

**NYAGA NDERI ..... APPELLANT**

**AND**

**JAMES KINYUA NYAGA ..... RESPONDENT**

*((Being an appeal against the judgement delivered on 30th September 2019 by  
the Hon M.N Gicheru Chief Magistrate at Embu ELC Case no. 153 of 2018))*

**JUDGMENT**

1. This appeal arose from the Judgement of the lower court in Embu ELC 153 of 2018 - Nyaga Nderi v James Kinyua Nyaga (Hon M.N Gicheru, as he then was). The Appellant – Nyaga Nderi - was the plaintiff in the lower court while the Respondent – James Kinyua Nyaga – was the Defendant. In the lower court, the Appellant had sued the Respondent seeking to have title to land parcels Ngandori/ Ngovio/5744 registered in favour of the Respondent, and parcels No. 5745 and 5746, registered in his own name cancelled and the same be reverted to original parcel No. Ngandori/Ngovio/531. It was his case that he had transferred title to land parcel Ngandori/Ngovio/5744 to the Respondent who is his son by mistake and that is why he wanted the title reverted to him. The lower court heard the plaintiff's case and in its judgment delivered on 30/9/2019 dismissed the same. That is what provoked this appeal.
2. An amended memorandum of appeal was filed on 7<sup>th</sup> August 2020 whose substance is as follows;
  1. The learned magistrate erred in law and fact when he failed and ignored the plaintiff's evidence which included the fact that the land which was the subject of the suit (ELC 153 of 2018) was family land and the plaintiff was very clear that he transferred the land to the Defendant by mistake and wrote to the Registrar immediately he realized he had made a mistake.
  2. The learned magistrate erred in law and fact in his summary of the issues for determination when he omitted very crucial issues which went to the core of this suit.



3. The appellant then prayed that the judgement be set aside and the suit land be re-transferred to him.
4. The appeal was canvassed by way of written submissions. The Appellants submissions were filed on 20.09.2023. He submitted that the purpose of subdividing the land was to distribute it equally to his children but made a mistake of transferring parcel No. 5744 to the Respondent. That after realizing the mistake, he moved the court to cancel the title deed. He submitted further that the defendant did not testify in his case and therefore the court erred in considering his defence which was not supported by the defendant in court.
5. The Respondent filed his submissions on 28.02.2022 and he submitted that as the registered proprietor of parcel No. 5744 he is protected by the law under section 26 of the *Land Registration Act*. That the said Act provides that the title of a proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. That the appellant failed to prove any of the above requirements and therefore he cannot ask the court to overturn the trial court's decision. He submitted further that the Appellant failed to reply to the issues raised by the Respondent in his defence, particularly the averment that the land was not transferred to him absolutely but to hold it in trust for his other siblings. That the court did not err in framing its own issues for determination as these were issues that emanated from facts that were pleaded by the parties; and that the said issues properly grasped the subject for determination from the facts pleaded by the parties. He stated that the court gave a well reasoned judgement based on all the evidence placed before it and therefore the appeal should be dismissed with costs.
6. I have considered the appeal as filed, the rival submissions, and the lower court record including the contested judgement. My duty as the first appellant court is to re-evaluate and re-assess the evidence that was before the lower court and make my own conclusions while bearing in mind that the lower court had the advantage of handling the evidence first hand. The decided cases of *Selle v Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo v Shah* [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower court unless I am completely convinced that the lower court was wholly wrong in its appreciation of the evidence before it.
7. From a consideration of the parties pleadings, submissions, the court record and the applicable law, the issue arising for determination is whether the appeal before me has merits.
8. According to the record appeal, the suit herein was instituted by way of plaint filed on 08.05.2017 seeking to have title to land parcels Ngandori/Ngovio/5744, parcel 5745 and 5746 which are resultant subdivisions of Ngandori/Ngovio/531 cancelled and the same reverted to original parcel No. Ngandori/Ngovio/531. The Appellants case was that he had subdivided land parcel Ngandori/Ngovio/531, which belonged to him, into the three parcels and that he had made a mistake by transferring land parcel Ngandori/Ngovio/5744 to the Respondent who is his son. He wanted the titles to be cancelled and reverted to him on this ground. The Respondent on the other hand filed a defence denying that the transfer of the land to him was by mistake. It was his case that the Appellant had transferred the same to him consciously and willingly and that the reason he had subdivided the land was to share it out among his two wives; that is the Respondents mother, who is now deceased, and another wife. It was also his case that the Appellant transferred to him his deceased mothers share to hold the same in trust for himself and his siblings.
9. At the hearing, only the plaintiff testified by adopting his witness statement as evidence together with his list of documents which included; certificate of official searches for land parcels No. Ngandori/Ngovio/5744, 5745 and 5746; Green Card for land Parcel No. Ngandori/Ngovio/531; and a letter



dated 10.01.2017 addressed to the Ministry of Lands and requesting for cancellation of subdivision of parcel No. Ngandori/Ngovio/531. It was then agreed that submissions be filed.

10. The Appellant claims that his case was unchallenged since the defendant did not participate in the hearing. In as much as that is true, the defendant did file a defence and while the defendant's non-participation in the trial may have implications on the court's assessment of the evidence and the drawing of inferences, it does not automatically lead to the disregarding of the defense filed. The court will still consider the defense and the evidence presented in support of it, in line with the principles of natural justice and the right to a fair trial as enshrined in the Constitution of Kenya 2010.
11. Again, the burden of proof still lay on the appellant as plaintiff in the lower court to prove that on a balance of probability he was entitled to have the title to the suit land herein cancelled and reverted back to him. The circumstances under which a title to land can be challenged is provided for in Section 26 of the Land Registration Act which provides.

Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
12. From the proceedings of the lower court and the pleadings by the Appellant, his only reason for challenging the Appellant's title is on the ground of mistake. The law is very clear on the circumstances under which a party may challenge the title of a registered proprietor of land. Again, I'm finding myself puzzled just as the trial court as to how the mistake occurred because the Appellant admits that he is the one who transferred the land to the Respondent. He says he did it without taking into consideration that he had other children. This seems odd to me. Can someone really forget they have children? Unless there is another underlying reason, I am not persuaded at all that there was any mistake. Transfer of land is a long process and takes time. It is not possible to believe that the appellant went through all these stages making a mistake in each of them and not realizing it at all.
13. I agree with the trial court that the process of transferring land is an involving process that takes time including filing numerous documents and executing them. The fact that the Appellant participated fully in the said exercise means that he did so consciously. In the absence of any evidence of coercion or any form of undue influence, I find that the Appellants allegation of mistake cannot hold. I agree with the trial court findings that the Appellant has not proved his case on a balance of probability. I therefore uphold the lower court decision. Ultimately, I find no merit in this appeal and dismiss the same.
14. I will not make an order as to costs given the fact that the parties are family members.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**In The Presence Of**

Mutiso For Njiru Mbogo For Appellant



Mabonga For M/s Maina For Respondent

CA: Leadys

**A.K. KANIARU**

**JUDGE**

**16.11.2023**

