



REPUBLIC OF KENYA



**Kinyanjui & 5 others v Kinyanjui & another (Environment and Land Appeal 106 of 2022) [2023] KEELC 21538 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21538 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 106 OF 2022**

**JG KEMEI, J**

**NOVEMBER 15, 2023**

**BETWEEN**

**SARAFINA WANJIKU KINYANJUI ..... 1<sup>ST</sup> APPELLANT  
PAUL KAMAU KINYANJUI ..... 2<sup>ND</sup> APPELLANT  
PHYLIS WAIRIMU NJOROGE ..... 3<sup>RD</sup> APPELLANT  
LOICE WANJIRU NJERU ..... 4<sup>TH</sup> APPELLANT  
GEORGE NJOROGE KINYANJUI ..... 5<sup>TH</sup> APPELLANT  
JAMES MBURU KINYANJUI ..... 6<sup>TH</sup> APPELLANT**

**AND**

**GEOFFREY MUKUI KINYANJUI ..... 1<sup>ST</sup> RESPONDENT  
ELIZAPHANSON KINYANJUI MUKORA ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the Judgment of Hon H M Nganga (PM) in  
CMELC No 5 of 2020 - Gatundu delivered on the 26/10/2022)*

**JUDGMENT**

1. The appellants herein were the plaintiffs and the respondents were the defendants respectively in the lower Court.
2. It was the plaintiffs' case that they have resided on parcel 587 (suit land) for over 40 years without any interruption from the defendants but in the month of March 2018 their father Mukora secretly transferred the suit land to the 1<sup>st</sup> defendant (his son), an act they termed as dishonest and laced with malice. That the 1<sup>st</sup> defendant has embarked on eviction proceedings against them. That they were not consulted and the purported agreement between the defendants is defective and full of non-disclosure.



3. The plaintiffs averred that they have acquired the land under adverse possession having been in possession for over 40 years. That they have planted tea and carried out other investments on the suit land and stand to suffer loss and damage if they are evicted from the land. Consequently *vide* a Plaint dated 18/2/2020 they sought the following Orders;
  - a. A declaration that the purported transfer of the property known as title number Ndarugu/Karatu/587 from the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant was illegal, procedural, null and void and no legal effects.
  - b. A declaration that the plaintiffs have acquired the suit parcel number Ndarugu/Karatu/587 through adverse possession.
  - c. An order that the District Land Registrar Gatundu do rectify the register pertaining to the Title No. Ndarugu/Karatu/587 by cancelling the names of the 1<sup>st</sup> defendant and replacing them with the names of plaintiffs herein namely Sarafina Wanjiku Kinyanjui, Paul Kamau Kinyanjui, Phyllis Wairimu Njoroge, Loise Wanjiru Njuru, George Njoroge Kinyanjui and James Mburu Kinyanjui.
  - d. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants, their servants, agents, nominees and / or any other person (s) claiming through them from interfering in any manner with Land Parcel Number Ndarugu/Karatu/587 whatsoever.
  - e. Costs and interest of this suit.
  - f. Any other relief that this Honourable Court may deem just and fit to so grant.
4. The defendants denied the claim of the plaintiffs and state that save for the 2<sup>nd</sup> plaintiff the rest do not live on the suit land. That they reside in various places including the United States of America. They admitted that the sale of the suit land to the 1<sup>st</sup> defendant and aver that the sale was lawful having followed all due processes. That the 2<sup>nd</sup> plaintiff has refused to vacate the suit land hence the filing of the criminal case in Gatundu CMCR 989 of 2018 – *R v Paul Kimani Kinyanjui*. That the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs were present during the caution hearing before the Land Registrar and never objected to the sale. They admit that it is only the 2<sup>nd</sup> plaintiff who has lived on the land with the permission of the 2<sup>nd</sup> defendant. The tea bushes belong to Mukora who receives the tea income some of which he used to support the 2<sup>nd</sup> plaintiff.
5. Further the defendants state that the plaintiffs have been given land by Mukora in Nyandarua and that none of the children will be rendered destitute. That the 1<sup>st</sup> defendant is a bonafide purchaser for value of the suit land. The defendants sought orders for;
  - a. This suit be struck out in its entirety for lacking merit as it is premised on falsehood, inaccuracies and is maliciously pursued to frustrate and embarrass the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
  - b. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants acted legally and there is no lawful reason to render the transfer void.
  - c. That a permanent injunction be issued to all the plaintiffs restraining themselves, their servants, agents and / or nominees from further trespassing, erecting, cultivating and/or making any developments on the suit property.
  - d. The 2<sup>nd</sup> plaintiff be evicted forthwith as he has no color of right to continue occupying the 1<sup>st</sup> defendant's land which is the suit property to be compelled to pay for damages for loss of use amounting to Kshs. 145,000/-.



- e. Cost and interest of this suit be borne by the plaintiffs.
  - f. Any other relief that the Court deems fit.
6. Upon hearing the suit, the trial Court rendered itself as follows;
- “The plaintiffs have failed to prove their case on a balance of probability and the plaintiffs suit is dismissed in its entirety with no orders as to costs.”
7. It is this Judgement that has provoked the subject Appeal by the appellants (plaintiffs) on the grounds set out as follows;-
- a. That the trial Court erred in law and in fact by failing to recognize that the main witness being the 2<sup>nd</sup> defendant was not in existence (deceased) during the hearing and therefore his statement should not have been considered.
  - b. The trial Court erred in law and in fact by letting the matter to proceed while the 2<sup>nd</sup> defendant was already dead, the Court failed to consider the issue on substitution and no prayer was ever made by the 1<sup>st</sup> defendant.
  - c. The trial Court erred in law and in fact by failing to recognize that the subject of the suit was the family property whereby the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are residing there and have established some developments and managing the said property known as Ndarugu/Karatu/587.
  - d. The trial Court erred in law and in fact by failing to recognize that the 2<sup>nd</sup> defendant who was “the vendor” the registered owner of the disputed land parcel Title Number Ndarugu/Karatu/587 is the father of the plaintiffs and the 1<sup>st</sup> defendant herein and if at all there was to be a sale to one of the sons that is the 1<sup>st</sup> defendant proper procedure was never followed thereby disinheriting the plaintiffs to the advantage of the 1<sup>st</sup> defendant.
  - e. The trial Court erred in law and in fact by not recognizing that there were no sufficient evidence to prove purchase, despite there being a sale agreement, no receipts or bank statements to prove that purchase price was ever paid in installments amounting to six million (Kshs. 6,000,000/-).
  - f. The trial Court erred in law and in fact by failing to consider that the sale between the 1<sup>st</sup> and 2<sup>nd</sup> defendant (that is between father and son) and spousal consent given by the 1<sup>st</sup> defendant’s mother was unprocedural and illegal. The 2<sup>nd</sup> defendant had two wives and children, these are the plaintiffs and the 1<sup>st</sup> defendant, there was no consent of all the family members obtained before the sale and no minutes of a meeting held, if any.
  - g. The trial Court erred in law and in fact by holding that any claim for adverse possession was extinguished on transfer of land to the 1<sup>st</sup> defendant.
  - h. The trial Court erred in law and in fact by disregarding the evidence and submissions of the plaintiffs and went ahead to consider only the defendants evidence as adduced through his Attorney having the powers donated to him by the 1<sup>st</sup> defendant being his brother.
8. On the 27/3/2023 parties recorded a consent with respect to the status quo to be maintained pending the hearing and determination of the Appeal. That the 2<sup>nd</sup> appellant to continue to reside on the suit land and the 1<sup>st</sup> respondent not to execute the decree of the trial Court by way of eviction pending the hearing and determination of the Appeal.



9. On the 26/9/2023 the parties elected to canvass the Appeal by way of written submissions. The Court directed that the written submissions be filed by close of business on the 18/10/2023. As at the time of writing the Judgement only the appellants written submissions are on record.
10. The appellants submitted and recapped the history of the suit before the trial Court. It was submitted that the 2<sup>nd</sup> defendant had two wives one who lived at Nyandarua and the other at the suit land. The plaintiffs mother and her children lived and developed the suit land while the 2<sup>nd</sup> defendant and his second wife lived at Nyandarua. That on the suit land the 1<sup>st</sup> and 2<sup>nd</sup> appellants derive their livelihoods. That the suit land was inherited by the 2<sup>nd</sup> defendant from his father and therefore it is family and ancestral land. That when Esther died in 2012 a dispute arose in the family and the case was settled by the Court that ordered that she be buried in Kinangop, Nyandarua.
11. It was further submitted that the 1<sup>st</sup> defendant took advantage of the old age of the father and manipulated him to transfer the land to him to the advantage of the appellants, whose mother lived on the land until her demise.
12. It was submitted that unchallenged evidence was led that Sarafina and Paul have lived on the land for the last over 40 years. However, the trial Court put more weight on the defendants evidence that the 2<sup>nd</sup> appellant lived on the land with the permission of the 2<sup>nd</sup> defendant. That the Court failed to consider the evidence of the appellants.
13. On ground No 2 of the Appeal, the appellants questioned why the Court failed to guide the appellants with respect to the substitution of the deceased 2<sup>nd</sup> defendant and argued that the deceased witness statement cannot be relied on as evidence.
14. On the question of consent to transfer the land, the appellants submitted that to the contrary the 1<sup>st</sup> defendant failed to table any evidence that their father allowed all the children willing to purchase the land to pay for it. The appellants were not aware of the transaction. For that reason, the appellants submitted that the Court disregarded the evidence of the appellants hence dismissing the case.

### **Analysis and determination**

15. The key issue is whether the Appeal is merited.
16. This being a first Appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123, this principle was enunciated as thus:
 

“....this Court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to this Court .... is by way of retrial and the principles upon which this Court acts in such an Appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect ....”
17. With that in mind I shall now evaluate the evidence before me and draw conclusions accordingly.
18. All the parties in this suit are related. The 2<sup>nd</sup> defendant is (Mukora), the father of the plaintiffs and the 1<sup>st</sup> defendant (Mukui). He had two wives Esther Nyakahu Kinyanjui (Esther) and Fridah Njeri Kinyanjui (Fridah). The plaintiffs are the children of Esther while the 1<sup>st</sup> defendant is the son of Fridah. The 1<sup>st</sup> defendant therefore is the step sibling of the plaintiffs.



19. It is not in dispute that the land was registered in the name of Mukora. The suit land was transferred to Mukui in 2018. It is the appellants case that the land being family land was conveyed to Mukui without being consulted and yet they have lived on the suit land for over 40 years hence have acquired title by way of adverse possession. Interalia, that their mother together with the 1<sup>st</sup> and 2<sup>nd</sup> appellants have developed the suit land and hence their entitlement.

**Substitution of the 2<sup>nd</sup> respondent.**

20. It is the appellant's case that the Court erred in considering the statement of the 2<sup>nd</sup> respondent yet he had passed away. That the Court ought to have guided the appellants to substitute the witness who in their opinion was critical.

21. The Court has perused the proceedings in the trial Court and it is evident that on the 2/3/2022 Ms Muthoni counsel on record for the defendants informed the Court that the 2<sup>nd</sup> defendant had passed away on the 16/1/2022. Counsel then sought leave for the Court to adopt the witness statement of the deceased which statement was on record. Mr Gitari acting for the plaintiffs opposed the application by the defendants on the ground that the witness statement is inadmissible in the absence of testimony by the witness, given that at this time Mukora the author of the witness statement had passed on. The Court on hearing the oral arguments of the parties reserved a date for Ruling on the issue whether or not the statement of the late Mukora would be admissible in evidence.

22. In its Ruling delivered on the 8/4/2022 the Court rendered itself as follows;

“Section 33 of the *Evidence Act* provides for the admissibility of statements by persons who can not be called as witnesses Section 33 provides instances in which such statements are admissible. I have perused the said Section nothing under Section 33 provides for admission of statements of the deceased filed or dispute arose the only circumstances under which the statement of a deceased person can be admitted are-

- a. Where it relates to the cause of death.
- b. Mode in the course of business.
- c. Mode against the interest of maker.
- d. An opinion as to public right or custom.
- e. Relating to existence of a relationship before the question in dispute arose.
- f. Relative to family affair made before the question in dispute arose.
- g. Relating to a transaction creating or assertive a custom.
- h. Mandatory several persons and exercise fairness.

I have a chance to peruse the statement of Elizaphanson Kinyanjui Mukora (deceased). The stamen relates to a land transaction in respect to the suit property which he allegedly said to the 1<sup>st</sup> defendant who is his son. A sale of land is an issue of a contract which can be proved through documentary exhibit, since as sale agreement transfer forms etc, the 1<sup>st</sup> defendant is not prejudiced as he can rely on any documentary proof include oral evidence of person who witnessed the agreement. On the contrary admitting the statement without testing, the same in cross examination may prejudice the plaintiffs who have closed their case find that the statement does not fall within the audit of section 33 of the *Evidence Act* cap 80 Laws of Kenya and therefore in admissible. I however grant leave to the defendants



- to file any other witness statement against form 1<sup>st</sup> defendants of any other witness who witnessed the transaction and can corroborate the deceased statement.”
23. The gist of the ruling is that the court found that the witness statement of the deceased could not be admitted in evidence as it did not form part of the documents admissible under section 33 of the *Evidence Act*. Secondly the 1<sup>st</sup> defendant was given leave to call other witnesses as he deemed fit who may have witnessed the agreement of sale. The Court rightly found that admitting the witness statement without testing the veracity through cross examination would not amount to any probative value to the party relying on it.
24. It is therefore borne by the record that that neither the 1<sup>st</sup> defendant nor the plaintiffs called for the substitution of the deceased witness. It is never the duty of this Court to advise and or guide parties on how to prosecute their case as doing so will be descending to the arena of conflict. The Court must always remain an impartial umpire in the contest before it.
25. In any event the onus to proof their case rested with the plaintiffs as expressed under section 107 of the *Evidence Act* which states as follows;
- “107. Burden of proof
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
26. My perusal of the Judgment of the trial Court does not reveal that the Court admitted the witness statement of the deceased 2<sup>nd</sup> defendant. The Court finds that this ground fails.
27. With respect to whether the transfer of the suit land to the 1<sup>st</sup> defendant, the trial Court held that the plaintiffs failed to proof any factors that would vitiate such a transfer. Section 26 of the *Land Registration Act* provides as follows;
- “(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.”
28. The case of the appellants is that they were not consulted by their father when he sold the land to the 1<sup>st</sup> defendant without offering them to consider purchasing too. The appellants submitted that Mokuwa was 96 years old therefore susceptible to manipulation by the 1<sup>st</sup> defendant. There was no evidence led to show that the 1<sup>st</sup> defendant and his mother namely Fridah colluded or manipulated the old man into entering the agreement for sale with the 1<sup>st</sup> defendant. The appellants submitted and faulted the sale



agreement and in particular that the deceased 2<sup>nd</sup> wife, who is also the mother of 1<sup>st</sup> respondent gave consent as a spouse in the absence of the appellants.

29. The law with respect to spousal consent was introduced into our statutes with the land reforms that came after the promulgation of the new Constitution, 2010. Section 28 (a) of the Land Registration Act provides as follows;

“28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(a) spousal rights over matrimonial property.”

30. The Court heard evidence that Esther the mother of the appellants died in 2012. The agreement of sale was executed in 2018 and it is not in dispute that Fridah, the deceased 2<sup>nd</sup> wife gave the consent to the transfer. I find that the 2<sup>nd</sup> wife was the only surviving wife of Mukora at this time and validly gave spousal consent to the transaction. The law does not require the registered owner to seek the consent of the children before transferring his land. The place of spousal consent is special to the spouse of the land owner and the children cannot be substituted in their place.

31. The Court finds no error in the decision of the trial Court on this ground. The ground therefore fails.

32. On the issue of adverse possession, the Court finds that the decision of the trial Court is sound. No adverse can accrue where the applicant was occupying the land with the permission of the owner. Evidence was led that the late Mukora lived with his wife on the suit land but later relocated to a larger farm in Kinangop where they lived with Fridah the second wife and their children. That later the family agreed that Esther should move to the suit land so as to manage the family affairs on the land. She moved with the children who are the appellants. She and the appellants therefore occupied the land with the permission of the deceased father and husband. The 2<sup>nd</sup> defendant acquired the land in 2018 and by the time of filing the suit, adverse possession if any had not accrued.

33. The Court finds that this ground fails as well.

34. Finally a veiled issue on trust has been raised by the appellants however since the same was not pleaded and no evidence led, this Court is constrained to discuss the same.

35. In the upshot the appeal is devoid of merit. It is dismissed with costs in favour of the 1<sup>st</sup> respondent.

36. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms. Nyoro HB Ms. Ondande for 1<sup>st</sup> – 6<sup>th</sup> appellants

Muthoni for 1<sup>st</sup> and 2<sup>nd</sup> respondents

Court Assistants – Phyllis/Lilian

