



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muchai & another v Mungania (Environment and Land Appeal  
E064 of 2022) [2023] KEELC 21646 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21646 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E064 OF 2022  
CK NZILI, J  
NOVEMBER 15, 2023**

**BETWEEN**

**CYPRIAN KITHINJI MUCHAI ..... 1<sup>ST</sup> APPELLANT**

**GIDEON KIMATHI M'ARIMI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**RUTH MWITU MUNGANIA ..... RESPONDENT**

*(Being an appeal from the judgment of the Hon. S.K Ngetich  
Principal Magistrate in Nkubu PM ELC No. 73 of 2018)*

**JUDGMENT**

1. The respondent as the plaintiff had sued the appellants, as the defendants in the lower court, for fraudulently and illegally transferring into their names L.R. No's. Nkuene/Ukuu/1422 – 1424 being the resultant subdivisions of L.R. No. Nkuene/Ukuu/791, given there was an inhibition order in existence and without the registered owner's consent.
2. The respondent (posthumous) had sought the cancellation of the 2<sup>nd</sup> appellant's names in the register for the titles, a declaration that he held the suit parcel of land in trust for the respondent, and registration in the name of M'Mungania M'Bagiri and or in the alternative, declaration of trust, cancellation of the name of the 2<sup>nd</sup> appellant, cancellation of the subdivisions and for the land to revert to L.R. No. Nkuene/Ukuu/791, in the name of M'Mungania M'Bagiri or the respondent.
3. The appellants had denied the claim through defenses dated 3.3.2021 and the 2<sup>nd</sup> appellant's defense and counterclaim dated 4.3.2021.
4. The 1<sup>st</sup> appellant admitted the respondent's late husband was the initial owner of L.R. No. Nkuene/Ukuu/150 before it created L.R. No. Nkuene/Ukuu/791, the suit land that was legally transferred to him as a gift by the respondent's late husband through consent in the presence of the respondent and



- her late husband. The 1<sup>st</sup> appellant averred he sold the land for value. He averred that the respondent was his mother-in-law, illegally occupying the land, yet the 2<sup>nd</sup> appellant was entitled to enjoy the fruits of the sale agreement dated 5.6.2013.
5. The 2<sup>nd</sup> appellant, in his defense and counterclaim, averred he was legally registered as the owner of the initial suit land. He denied the alleged fraud or illegality leveled against him, for he was a bonafide purchaser for the value of L.R. No. Nkuene/Ukuu/791 from the 1<sup>st</sup> appellant. He denied any alleged trust or breach thereof. He denied knowledge of Land Dispute Tribunal Case No. 35 of 2008. Additionally, the 2<sup>nd</sup> appellant averred that as a bonafide purchaser for value without notice, he was entitled to actual possession more after Meru CMCC No. 146/2014 which the respondent. The 2<sup>nd</sup> appellant averred he was in occupation of and had extensively developed his land until recently.
  6. By way of counterclaim, the 2<sup>nd</sup> appellant indicated he had incurred expenses to develop the land to the tune of Kshs.162,306.25/=, suffered losses and immense profits. He sought the dismissal of the suit plus damages and mesne profits for his developments on the land.
  7. In reply to the amended defense and defense to counterclaim dated 29.9.2021, the respondent reiterated the contents of the amended plaint. She termed the averments in paragraphs 12-15 of the defense and counterclaim as false, an afterthought, misguided, and in bad faith. The respondent denied the 2<sup>nd</sup> appellant had set foot on LR No. Nkuene/Ukuu/791 since all developments thereon were hers.
  8. At the trial, Isabela N. Stephen testified as PW 1 and adopted his witness statement dated 29.9.2021 as her evidence in chief. Her evidence was that she was a former elder of the Land Dispute Tribunal Nkuene Division, which in 2008 handled a complaint lodged by the late M'Mungania M'Bagiri in 2008, against the 1<sup>st</sup> appellant, a son-in-law who alleged to have illegally transferred one acre out of L.R. No. Nkune/Ukuu 791 to himself, which land was where the deceased had built his matrimonial home for his family after illegally subdividing his land, yet he knew he was incapacitated and subjected him to sign the transfer forms without his knowledge, yet he was partially deaf and illiterate.
  9. PW 1 told the court the verdict was that he could claim back his land due to the illegality of the transfer. In cross-examination, PW 1 said she never knew the court had quashed the decision.
  10. Naman Gitonga testified as PW 2 and adopted his witness statement dated 29.9.2021 as his evidence in chief. As a former elder of the land dispute tribunal, he associated his evidence with that of PW 1.
  11. PW 3 was Justin Gitonga Muthinja, who adopted his witness statement dated 29.9.2021 as his evidence in chief. He told the court the respondent was her mother-in-law from the same village and neighborhood. He said he was allowed to cultivate the suit land from 1979 by his father-in-law and that in 2008, some strangers visited the land from Kenya Industrial Estate wanting to value the land after the 1<sup>st</sup> appellant applied for a loan with them using the land as security.
  12. PW 3 told the court that he had been informed that the 1<sup>st</sup> appellant had presented to them a loan application letter and a title deed for the suit land. Upon inquiry, PW 3 said his father-in-law denied the transfer of the land to the 1<sup>st</sup> appellant, and he visited the land registry, searched, and established that the land had been registered in the name of the 1<sup>st</sup> appellant. Additionally, PW 3 said the deceased placed a caution on the title and filed a complaint with the land dispute tribunal, which rendered a verdict. Further, PW 3 told the court that the 1<sup>st</sup> appellant was his brother-in-law and that the land was occupied and used by Ruth Mwiru, the respondent, since 1960. He was categorical that the appeal had never taken possession of the land as pleaded.
  13. In cross-examination, PW 3 told the court he had known the suit land since 1979 when he married into the family and was unaware of any event in 2000. He said the 1<sup>st</sup> appellant must have used tricks over



- the deceased to procure his land. He said he was in occupation of the land in 2008, and the deceased was buried on the land in 2011.
14. PW 4 was M’Muiruki Ndwiga Rugiri. His evidence, as per his witness statement dated 29.9.2021, was that the deceased, his uncle, had one wife, the respondent. He said he was brought up by the deceased and was confident that he never sold the land to his son-in-law. He said that during the burial in 2011, the 1<sup>st</sup> appellant who was in attendance did not complain or object to the burial.
  15. The respondent testified as PW 5, adopted her witness statement dated 16.12.2016 as her evidence in chief, and produced the green card for L.R. No. Nkuene/Ukuu/791 as her exhibit no. 4 her testimony was that the transfer was illegal, for it is on land where she lived and where her husband was buried. She confirmed that her husband filed a land dispute tribunal case against the son-in-law upon discovering the fraud. She said she occupied the land and since the transfer was done without their consent or knowledge, the title was due for cancellation.
  16. In cross-examination, PW 5 said the 1<sup>st</sup> appellant was only allowed to cultivate the land but not transfer it to himself. She said that following the differences, the appellant had never stepped into the suit land where she had been living; she would not tell her what the original title deed was.
  17. Cyprian Kithinji Muchai testified as D.W. 1 and adopted his witness statement dated 24.3.2021 as his evidence in chief. His evidence was that following a family discussion, the deceased and the respondent agreed to subdivide L.R. No. Nkuene/Nkubu/150 and transfer one acre to him. D.W. 1 said the deceased went with him, and the respondent, before the land control board chaired by the area District Commissioner, obtained and signed the forms and transferred the land to him. D.W. 1 said he took vacant possession of the suit land and sold it to the 2<sup>nd</sup> appellant, who took vacant possession and commenced developments on it, which the respondent destroyed. On her agents, he said some of their members misadvised the respondent’s family to look for prospective buyers, yet the land was legally sold to him. D.W. 1 produced the mutation form, title deed dated 28.11.2000, sale agreement dated 5.6.2013, copy of land control board consent dated 11.6.2013, copy of transfer dated 12.6.2013, and judgment in Meru Judicial Review No. 22B of 2011 as D. Exh. No’s. 1, 2, 3, DMF 1 No. (4), 5 & 6 respectively. He said he sold the land in 2000 to the 2<sup>nd</sup> appellant.
  18. In cross-examination, he said the 2<sup>nd</sup> appellant never took vacant possession since the respondent has been in occupation; therefore, he has never utilized the land. Further, D.W. 1 said the verdict of the Land Dispute Tribunal was that the land be returned to the deceased, which award was quashed by the court for lack of jurisdiction.
  19. DW 2 was Gedion Kimathi M’Arima the 2<sup>nd</sup> appellant. He adopted his witness statement dated 24.3.2021 and said the 1<sup>st</sup> appellant offered him the land, and after conducting a search, he established ownership, bought it, and was registered as the owner. He said he took vacant possession and effected developments thereon, but the respondent came one day with goons who destroyed all his developments without notice and forcibly entered the land. He urged the court to dismiss the claim and allow his counterclaim.
  20. In cross-examination, D.W. 2 told the court he was unable to take vacant possession after a caution was registered against the title as well after he was chased away. He said he knew the respondent was in occupation but never consulted her while he was buying the land since she had no title. Further, he confirmed that the respondent and her children also occupied the land. In re-examination, the 2<sup>nd</sup> appellant said the respondent was like a mother to him, and he did not want to evict her from the land. He added that he had planted nappier grass on the land before he was told to cease occupying it.



21. With the preceding pleadings and evidence, the trial court rendered its judgment now sought to be overturned vide memorandum of appeal dated 28.5.2022, because the trial court misunderstood the law; wrongly interpreted it, and reached a wrong conclusion; erred in finding the title as fraudulently obtained; failed to find the 2<sup>nd</sup> appellant as a bonafide purchaser with a good title, unfairly dismissed the counterclaim; ruled against the weight of the evidence tendered and reached a wrong decision. The appellant relied on written submissions dated 19.10.2023.
22. The first appellate court is obliged to review, rehearse, and re-appraise the lower court record while mindful that the trial court benefited from seeing and hearing the witnesses firsthand. The appellants submitted that the respondent, the mother-in-law, was not happy with the legally transferred gift by the father-in-law, which she opted to challenge only after he passed on through a land dispute tribunal case, which was quashed by the high court only for her to file this suit.
23. The appellants, relying on Sections 24 and 25 of the [Land Registration Act](#), submitted that their titles were indefeasible since the subdivisions and transfers were legal and procedural as per the testimony of D.W. 1 & D.W. 2, based on a valid sale agreement which was not challenged. Reliance was placed on Harrison Kiambati Wanjiru & another vs. District Land Registrar Nairobi and others (2022) eKLR, Gichinga Kibutha vs. Caroline Nduku(2018) eKLR and sections 107 – 109 of the [Evidence Act](#), Mbuthia Macharia vs Anna Mutua Ndwiga & another (2017) eKLR, Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 others (2015) eKLR, NWK vs JKM (2013) eKLR, Moses Kariuki Wachira vs Joseph Murithi Kanyitta & others (2016) eKLR Kiebia vs M'Lintari (2018) eKLR, Muriuki Mariga vs Richard Marigi Muriuki & 2 others C/A No. 189 of 1996, Peter Ndungu Njenga vs Sophia Watiri Nduga (2000) eKLR. On written submissions, none were received from the respondents by 21.10.2023. The court has reviewed the pleadings, evidence tendered, grounds of appeal, and written submissions.
24. The issues for my determination are:
  - i. If the respondent pleaded and proved fraud, illegality, trust, and breach of the same.
  - ii. If the appellants were entitled to the reliefs sought.
  - iii. If the 2<sup>nd</sup> appellant had a competent counterclaim.
  - iv. If the 2<sup>nd</sup> appellant had pleaded and proved, that he was a bonafide purchaser for value without notice.
  - v. If the 2<sup>nd</sup> appellant had pleaded and proved mesne profits and damages.
  - vi. If the 2<sup>nd</sup> appellant was entitled to the reliefs in his counterclaim.
  - vii. If the appeal has merits.
  - viii. What is the order as to costs?
25. The respondent's claim as pleaded in paragraphs 6, 7, 7(a), 7(b), 8, 9 & and 10 of the amended plaint dated 4.2.2021 was based on fraud, illegality, trust, and breach of trust in the manner a son-in-law caused subdivisions and transfer of the suit land from L.R No. Nkuene/Ukuu/150 to L.R. No. 1422 – 1424 in violation of a court order and inhibition 15.2.2019 and 4.8.2017, respectively, and registered the same in his name and the 2<sup>nd</sup> appellant without her consent.
26. The particulars of fraud or illegality were pleaded as transferring the land without the registered owner's consent and or procuring through tricks, misrepresentation, misleading him, taking advantage of his health and literacy status, cheating him, stealing his matrimonial home, and transferring the land.



27. Regarding trust, the particulars given were taking the land absolutely when it was family land, transferring it to defeat the claim, transferring it while there were no marked boundaries for the subdivisions, failing to effect the subdivisions on the ground, and rendering her landless.
28. Responding to the particulars, the appellants filed their defenses and counterclaim on 4.3.2021. The 1<sup>st</sup> appellant did not admit his fiduciary capacity with the respondent as a son-in-law. Instead, he generally denied the contents of paragraph 6 of the amended plaint. He pleaded that the transfer of his parcel was a gift by the father-in-law lawfully given to him procedurally and after lawfully procuring the necessary approval and consent from both the respondent and the deceased. In paragraphs 7 (a) (b) of the defense, the 1<sup>st</sup> appellant averred that all the other family members were aware of the transaction and craved leave at the hearing to order the respondent to answer sensitive family issues and personal matters.
29. The 1<sup>st</sup> appellant termed his sale and transfer to the 2<sup>nd</sup> appellant as legal and procedural. Further, the 1<sup>st</sup> appellant termed the occupation of the land he had sold by his mother-in-law as illegal for she had not reported any fraud and more so, when the 2<sup>nd</sup> appellant was entitled to enjoy the fruits of the sale agreement dated 5.6.2013, who should not be disturbed by anybody using his name.
30. On the part of the 2<sup>nd</sup> appellant, he admitted that the 1<sup>st</sup> appellant was a son-in-law to the respondent, who was legally registered as the owner of L.R. No. Nkuene/Ukuu/791. He denied any fraud or illegality in that registration. The 2<sup>nd</sup> appellant admitted the deceased was the initial owner but denied any fraud or illegality in the transfer of the land to the 1<sup>st</sup> appellant and himself. He termed himself a bona fide purchaser for value. He further denied the alleged trust or breach of it by the 1<sup>st</sup> appellant or himself, since he had paid full consideration. He referred to Meru CMCC No. 146 of 2014, which the respondent had withdrawn.
31. It is trite that law parties are bound by their pleadings. Order 2 Rule 10 of the Civil Procedure Rules provides that necessary particulars of misrepresentation, fraud, breach of trust, willful default, or undue influence must be given and where a party pleads a condition of mind of any person, whether a disorder or disability of mind or any malice, fraudulent intention or others condition of the mind except knowledge, particulars of the facts must be stated.
32. In Sub-Rule (3) thereof, the law provides that where a party alleges that a person had knowledge or notice of some fact, matter, or a thing, the court may order that party to be served.
33. Order 2 Rule 4 of the Rules provides that performance, release, payment and fraud must be pleaded and that in a suit for recovery of land, a defendant must plead every ground of his defense and that a plea of possession will not be sufficient.
34. In his pleadings, the 1<sup>st</sup> appellant pleaded knowledge of the transaction by all other family members of the respondent. He pleaded that the respondent was privy to the family meetings, resolutions to the subdivision, and his gift for one acre. The particulars of the meeting, intention, frame of mind, knowledge, and participation of the respondent and her family members were not provided or pleaded. The dates participants and issues were discussed, and the resolutions made were not pleaded. The frame of mind of the respondent and her late husband was not stated in the determination, nor was the specific participation by the respondent and her family members before, during, and after the transfers.
35. The respondent had pleaded that there was a pending court order and inhibition orders against the transactions. The appellants never pleaded against the said particulars as given to show that the transfer and registration were lawful and regular. The respondent had pleaded that no land survey had been



- undertaken on the ground and beacons fixed after the subdivisions; hence, all that happened were paper entries without a corresponding placement of the subdivisions on the ground.
36. The appellants never pleaded to deny the assertions and to state when the land survey occurred on the ground with the knowledge and participation of the deceased and the respondent. In support of their defense, the appellants never produced DMF 1 No. (4) as an exhibit to show that the subdivisions and transfers were procedural and done with full knowledge and approval of the land owner.
  37. Documents marked for identification are not exhibits in law. The maker was not called to testify and produce it. There is no evidence that the deceased signed or approved it. Its date of registration was not proved. The signature of the land registrar on the document was missing too. How the caution placed on a copy of the records on 21.11.2000 by the deceased was removed by the appellant to show the deceased was involved, for he had expressed dissatisfaction with it was not pleaded or proved. The caution had been placed by the deceased and not the respondent. If the deceased was alive up to 2011, It is unclear why he was not summoned before it was removed on 21.5.2008. The appellants never called the land registrar or the members of the land control board to clarify and support their assertions that all procedural and legal requirements were followed in the subdivisions and transfer of the land from its initial status to ownership by the 2<sup>nd</sup> appellant.
  38. Evidence shows that the deceased passed on on 6.11.2011, and a limited grant was issued to the respondent on 13.8.2013 in Meru HC P/A 320 of 2013. The order of this court issued on 1.8.2017 by way of inhibition and was received at the land's office on 14.8.2017. Entries numbers 12, 13, 14, and 15 on the copy of the records of L.R. No. 791 occurred after the court order. The title deed to the 2<sup>nd</sup> appellant was issued on 15.12.2019. How and in which way it occurred while the court the order was subsisting remains a mystery. This is a clear case of illegality and irregularities, which the appellants did not explain in their pleadings and evidence before the trial court.
  39. Court orders are not made in vain. The order was to be subsist until the hearing and determination of the suit. The 1<sup>st</sup> appellant went against it and transferred the land to the 2<sup>nd</sup> appellant. The title held by the 2<sup>nd</sup> appellant cannot pass the legality, regularity, and procedural test.
  40. The 2<sup>nd</sup> appellant cannot be heard to say he was a bonafide purchaser for value without notice or holding a valid title. The 1<sup>st</sup> appellant knew there was a pending Meru CMCC No. 146 of 2014 against him by the respondent. It was only withdrawn on 27.9.2019. Still, there was a pending in Meru ELC No. Judicial Review No. 22 B of 2011, which the 1<sup>st</sup> appellant had brought to quash a decree made on 14.1.2011 challenging his title to the land. The decree was only quashed by the court on 18.10.2018, by which time another order of inhibition by this court made in judgment 2017 was subsisting.
  41. While aware of all these facts, the 1<sup>st</sup> appellant proceeded unperturbed and changed the titles, as seen in entries numbers 7-12 in the copy of the records. The sale agreement dated 5.6.2013 between the 1<sup>st</sup> appellant acknowledgment receipts in 2014, 2015, and 2018, the land control board application form dated 5.6.2013 consent dated 11.6.2013, transfer form dated 12.6.2013, letter to remove caution dated 25.7.2013 mutation form dated 11.5.2018 and entries made on the title were all done contrary to existing court orders or against the doctrine of lis pendens. All these were acts premised on nullities and cannot be legitimate or legal.
  42. Fraud includes deceit, concealment of the truth or material facts, misrepresentation, and the intention to deceive or induce another to act against their detriment.
  43. In *Wambui vs Mwangi & others* C.A No. 465 of 2019 (KECA 144 9KLR) 19 November (2021) (Judgment), the court said no court should sanction and pass as valid any title to property founded on



fraud, deceitfulness or a construed decree, illegality, nullity, irregularity, unprocedurally or otherwise a product of a corrupt scheme.

44. In this appeal, the court has highlighted a sequence of deceitful events orchestrated by the 1<sup>st</sup> appellant, who took advantage of his parents-in-law and devised a scheme to deprive them of their only matrimonial home. He appeared before the land control board and presented or pretended to have authority to subdivide and transfer their land. He has not produced any minutes showing such a family meeting and its resolutions. PW 2 & 3 disowned such a meeting. After his parents-in-law showed dissatisfaction with his scheme in 2011, the 1<sup>st</sup> appellant continued unperturbed even when there were court orders or restrictions. The 1<sup>st</sup> appellant took advantage of his trust, fiduciary capacity, and marital relationship, which he also abused to enrich himself unjustly. He never rebutted in his testimony that there was no constructive or resultant trust over his title and successors in title.
45. In *Twalib Hatayan & another vs Said Saggar Ahmed Al Heidy* (2015) eKLR, the court said it does not imply trust unless in cases of absolute necessity. This is a clear case where the court should step in and impose one.
46. The upshot is that I find the trial court was in order to dismiss the incompetent counterclaim under Order 7 of the Civil Procedure Rules. The judgment is upheld. Costs to the respondent.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 15<sup>TH</sup> DAY OF NOVEMBER 2023**

**In presence of**

C.A Kananu/Mukami

Nyamu Nyaga for Rimita for appellants

Gatari Ringera for respondent

**HON. CK NZILI**

**ELC JUDGE**

