



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwangi v Marite (Environment and Land Appeal E003 of 2023)
[2025] KEELC 3430 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3430 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

MN GICHERU, J

APRIL 28, 2025

BETWEEN

JOSEPH NJUGUNA MWANGI APPELLANT

AND

BETH NJERI MARITE RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment of the Senior Principal Magistrate Kigumo in Case No. 7 of 2016. In the Judgment dated 13-7-2016 the learned Senior Principal Magistrate made the following orders.
 - a. A declaration is made that L.R. No. Loc.2/Kangari/4119 belongs to the Defendant.
 - b. An order is issued for immediate cancellation of the resultant title deeds numbers Loc.2/Kangari 5074 and 5075.
 - c. An order of injunction is issued restraining the Plaintiff and/or his agents from entering , encroaching, trespassing, cultivating or in any way interfering with the quiet possession of the Defendant’s land.
 - d. Defendant is awarded both costs of the main suit and those of the counterclaim together with interest.
2. Aggrieved by the decision of the learned Magistrate, the Appellant, through counsel on record, filed a memorandum of appeal on 1-8-2023 in which he seeks an order as follows.

“The Judgement of the lower court be set aside and the appellant be declared the owner of his parcel of land No. Loc.2/Kangari 5075 to hold possess and occupy the same freely and uninterrupted.”

The memorandum of appeal has the seven grounds of appeal as follows.



The learned magistrate erred in law and/or fact by-

- i. issuing an order for cancellation of title No. Loc.2/Kangari/5075 suit land, as held by the Appellant on the basis of incredible, unbelievable, contradictory and insufficient evidence by the defence,
- ii. purporting to ignore and trash the credible evidence of the Appellant as to how he acquired his land and title while favouring and being biased in favour of the defence thus erring on the principle of proof applicable in civil matters,
- iii. by her failure to note from the clear record of the court that the Respondent had signed documents and also had signed the L.C.B forms and documents in favour of a transfer to the appellant,
- iv. by purporting to rely on unexhibited and inadmissible evidence and documents thus reached a wrong finding and judgement,
- v. by hastening to cancel the appellant's title to his land yet the same had been acquired legally and above board and the Land Registrar (and the County Surveyor) as the authorities who had issued the title were never called as parties and witnesses,
- vi. by her reference to extraneous facts not reflected in the record and evidence and
- vii. by purporting and holding that a sale of agreement was void and bad for nonpayment of stamp duty thus proceeded to trash the same; this was wrong exercise of judicial discretion and most unreasonable.

3. The facts of the case, according to the Appellant, who was the Plaintiff in the lower court are as follows.

He was the registered owner of the suit land, Loc.2/Kangari 5075 which measures 0.120 Ha. Secondly, he bought the land from Peter Kihiko Marite, a son of the Defendant/Respondent. Thirdly, it is the Defendant herself who transferred the suit land to the Plaintiff because her son died before he could transfer the land to the Plaintiff. Fourthly, the Defendant owns L.R. No. Loc.2/Kangari/5074 which borders the suit land. Fifthly, the Plaintiff filed the lower court suit because the Defendant had trespassed thereon and he wished to have the boundary between the two parcels demarcated. Finally, the Defendant did not want the boundary demarcated and the only reason the Plaintiff filed the lower court suit was to have the court issue an order for boundary determination by the registrar, security provided during the exercise and the Defendant restrained from entering or trespassing upon the suit land.

4. The facts of the case, according to the Defendant, who is the Respondent herein are as follows. Firstly, she is the registered owner of L.R. No. Loc. 2/Kangari/4119 and she is unaware that it has ever subdivided into two(2) parcels. Secondly, she is not aware how the Plaintiff came to be registered as the owner of the suit. Thirdly, the subdivision documents especially the mutation form is a forgery and the signature thereon does not belong to the Defendant. Fourthly, the Plaintiff does not occupy any part of L.R. No. 4119. For the above and other reasons, she sought to have the Plaintiff's title revoked and his suit dismissed.

5. In her judgment dated 13-7-2023, the learned trial magistrate found as follows. Firstly, at the time of the sale agreement on 2-11-2010 L.R. No. Loc.2/Kangari 5075 was nonexistent because it was created on 8/1/2013 when L.R. No. Loc.2/Kangari /4119 was closed on subdivision into 5074 and 5075. Secondly, it was the finding of the trial magistrate that the Plaintiff did not pay stamp duty. Thirdly,



the Plaintiff bought only 0.3 acres from L.R. No. 5075. Fourthly, the Plaintiff bought the land from the son of the Defendant who was not the registered owner of the suit land. Fifthly, the suit land was transferred to the Plaintiff by an unknown person after the death of Peter Kihiko Marite, the seller. Sixthly, the Plaintiff did not produce receipts as proof of payment for all the requisite transfers. Finally, he failed to conduct due diligence before buying the suit land.

6. Counsel for the Appellant and the Respondent filed written submissions dated 28-10-2024 and 6-1-2025 respectively. The Appellant's counsel did not identify the issues for determination. On the other hand, the Respondent's counsel identified only one issues,

i. Whether the judgment of the lower court should be set aside.

I find that the seven grounds in the memorandum of appeal should be treated as the issues for determination in this case so that the dispute is resolved effectively.

7. I have carefully considered the appeal in its entirety including the seven grounds of appeal, the record of appeal, the judgment of the learned trial magistrate and the reasons therefor and I make the following findings. "This being a first appeal, this court must reconsider the evidence of the trial court, 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. In particular this court is not bound necessarily to follow the trial magistrate's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally." See *Selle v Associated Motor Boat Company Ltd* and [1968] E.A.123.
8. On the first ground, I agree with the Appellant's counsel that the order of cancellation of the title deed to the suit land was not based on cogent and sufficient evidence. In the case of *Ndolo v Ndolo Civil Appeal No. 128 of 1995* it was held that where fraud is pleaded, it must be proved to a standard higher than the ordinary one of a balance of probabilities. The court had this to say in part.

"We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities, but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in Criminal cases.."

Before ordering the cancellation of the Appellant's title, the trial magistrate should have addressed herself to the higher standard required in cases where fraud or forgery are the grounds for ordering cancellation. To exacerbate this issue of fraud and forgery, the Respondent, in her defence and counterclaim dated 19-8-2019 did not specifically plead the particulars of fraud and forgery contrary to Order 2 rule 10(1) (a) of the Civil Procedure Rules which provides as follows.

10. (1) Subject to subrule(2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including , without prejudice to the generality of the foregoing-
 - a. Particulars of any misrepresentation fraud, breach of trust, willful default or undue influence on which the party pleading relies."

Going by the above provision, the Defendant was required to not only plead the particulars of fraud but to also prove them. Had the Respondent specifically pleaded these particulars, the Appellant would have had a chance to file a reply to the averments by way of reply to defence and counterclaim.



9. The trial magistrate at page 11 of the judgment dated 13-7-2023 had this to say. “Further the land was transferred by unknown person to him away, after the death of Peter Kihiko thus proving the Plaintiff was dishonest and fraudulent in his dealings with respect to the suit property.” At pages 26 and 27 of the proceedings the Appellant had this to say. “I got parcel No. 4119 from Beth Njeri and she is the one who transferred it to me... At first Beth Njeri had declined to sign but she later signed the documents and gave her ID card and her PIN certificate and transferred the land to me. Beth Njeri is the one who applied for the board consent...”

The trial magistrate ought to have stated in her judgment why she did not believe the Appellant when he said that it is the Respondent who transferred the land to him. She should also have said why she believed the Respondent more than the Appellant. This finding covers the third ground of appeal which relates to signing of the application for the consent of the land control board. It is my finding that the Respondent has signed the verifying affidavit dated 1-4-2019 by affixing the letters BMN, the same with the supporting affidavit of the same date but thumprinted the witness statement dated 19-8-2019 and the verifying affidavit of the same date. In her testimony in court on 14-4-2022 the Respondent said this at page 29 of the proceedings. “... I don’t know how to write. I didn’t sign the supporting affidavit and the verifying affidavit filed in court...”

In her judgment, the trial magistrate did not deal with this glaring discrepancy on the part of the Respondent’s testimony. Obviously, the Respondent was not being truthful. The first verifying affidavit and the supporting affidavit had her signatures .

10. In the judgment dated 13-7-2023, one of the findings by the trial magistrate was that the Appellant did not pay stamp duty. This was not captured anywhere in the pleadings or in the witness statement filed by the Respondent. This was an issue that was abruptly brought up in cross-examination on the date of hearing. It was used to the detriment of the Appellant. The Appellant should have been forewarned that such an issue would be raised so that he could get time to get the records to rebut the allegation. It was not fair to ambush him and it was not proper for the court to use the answer he gave to reach a finding that was to decide the case.
11. For the court to understand how the tile deed for the suit land was issued, it was necessary to call the land registrar as a witness. This burden was on the respondent who is the one who sought the court to find that the appellant had committed fraud. Without the evidence of the land registrar, the court did not have sufficient material to make a finding of fraud on the part of the Appellant. Further to the above, the learned trial magistrate was not right in saying at page 7 of the judgment that the 0.3. acres of land that the appellant was buying was not determinable. The certificate of official search dated 14-8-2025 clearly shows that the suit land is 0.120 hectares. If one multiplies 0.120 Ha by 2.471 to get the size of the land in acres, the answer one gets is 0.29652 which is approximately 0.3 acres.
12. For the above stated reasons, I find merit in the appeal which I allow and order as follows.
- a. The judgment and decree of the lower court dated 13-7-2023 is hereby set aside.
 - b. There shall be a retrial before a magistrate other than the learned trial magistrate who wrote the judgment dated 13-7-2023.
 - c. Parties at liberty to amend their pleadings so that all the issues in dispute can be adjudicated upon once and for all.
 - d. Parties to consider resolving the dispute through court annexed mediation or any other out of Court mechanism.
 - e. Each party to bear its own costs both in this Court and the lower Court.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 28TH DAY OF APRIL, 2025.

M.N. GICHERU

JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Appellant's counsel – Mr Mwangi Ben

Respondent's counsel – Miss Bundi

