



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT KAJIADO**

**CIVIL APPEAL NO. E002 OF 2020**

**PAULINE CHEMUGE SUGAWARA.....APPELLANT/APPLICANT**

**-VERSUS-**

**NAIRUKO ENE MUTARAKWA KIRUTI (sued in her**

**capacity as the Administratrix of the Estate of**

**MUTARAKWA KIRUTI LEPASO, alias MUTARAGWA**

**KIROTI LEPOSO and her own.....1<sup>st</sup> RESPONDENT**

**MOSES ORIKAE MUTARAKWA.....2<sup>nd</sup> RESPONDENT**

**JOHN LESIAN MUTARAKWA.....3<sup>rd</sup> RESPONDENT**

**ADMINISTRATORS OF THE ESTATE OF THE**

**ESTATE OF KIRUTI LEPASO.....4<sup>th</sup> RESPONDENT**

**(being an Appeal from the Judgment and Decree of Principal Magistrate at Ngong Chief Magistrate's Court in CASE NO. 74 OF 2018 delivered on 28<sup>th</sup> October, 2020)**

**JUDGMENT**

(1) This Appeal arises from a Judgment by Principal Magistrate, Ngong Magistrates Court, delivered on 28<sup>th</sup> October, 2020.

(2) By that Judgment, the learned trial Magistrate dismissed the Appellant's suit which had sought that she be declared the bona fide proprietor of land parcels numbers KAJIADO/KITENGELA/10624, 10625, 10630 and 10631.

(3) The reasons for the dismissal of the Appellant's suit even though she was in occupation of the suit property and had the title deeds thereto were that the Appellant, who was the Plaintiff in the Lower Court's case could not produce an agreement for sale, land control board consent, application for transfer and evidence of payment of stamp duty.

Secondly, the land was transferred to the Appellant in August and November, 2003 yet the registered proprietor had passed away in August, 2002, a year earlier, and the administrators of his estate had not been appointed at the time of transfer.

Finally, there were allegations of fraud by the Respondents against the Appellant and the evidence of Land Registrar did not exonerate the Appellant from the allegations of fraud because none of the documents requisite for a lawful transfer were available in the registers for the parcels in question at the Land Registry.

(4) Aggrieved by decision of the learned Magistrate, the Appellant filed this Appeal vide a Memorandum of Appeal dated 29<sup>th</sup> October, 2020.

In total, there are fourteen grounds but I can reduce them to a handful namely that the trial Magistrate should have found that the Appellant was entitled to the land through adverse possession for having occupied the land for over 12 years.

That the land records for the suit parcels were missing and the Appellant should not have been blamed for this; that the Defendants'

Counterclaim was defective, statute barred and not supported by a verifying affidavit; that the first Defendant had come to court with unclean hands having admitted she had intermeddled with the estate of her deceased husband; that the Defendants have not proved fraud on the part of the Plaintiff; that the Appellant was an innocent purchase for value and should have been treated as such and finally that the first Defendant is estopped from denying that she had authority to sell and transfer the suit property to the Appellant.

(5) The Appellant's counsel filed written submissions dated 21<sup>st</sup> September, 2021 which contain several authorities that expound on and support the grounds of Appeal enumerated above.

On the Respondent's Counterclaim failure to be accompanied by a verifying affidavit, the authority of ***Priska Onyango Ojuang and another -versus- Henry Ojwang' Nyabende (2018) eKLR*** where it was held that such failure was fatal and the Counterclaim struck out, was relied upon.

Regarding the indefeasibility of the Appellant's Certificates of Title, ***Section 26 (1) of the Land Registration Act*** was cited.

As for the doctrine of adverse possession, several authorities were relied upon by the Appellant especially ***Jacob Kiprono Kiplagat -v-s Mary Kobil Barkwang & another (2017) eKLR***.

It is the Appellant's Counsel's contention that since adverse possession applies, the provisions of the Land Control Act would not apply. The authority relied upon in this regard, is ***Public Trustee -vs- Wanduru Ndegwa (1984) KLR 314 at 320 and 326***.

The doctrine of constructive trust in favour of a party in possession as was applied in the case of ***Willy Kimutai Kitilit -vs- Michael Kibet (2018) eKLR*** was cited in support of the Appellant's case.

It is urged too that the standard of proof regarding fraud is not merely on a balance of probabilities but beyond reasonable doubt. In this regard, the case of ***Gichinga Kibutha -vs- Caroline Nduku (2018) eKLR*** was cited as the relevant law.

The Appellant relied heavily on ***Sections 32 and 33 of the Law of Succession Act*** which exclude property in Kajiado County from the Act and where Customary Law takes priority.

It is the Appellant's submissions that the trial Magistrate should have applied this law to the case before her.

***Order 21 Rule 6 Civil Procedure Rules*** which provides that a copy of the Title Deed to be altered be produced in Court before Judgment was cited in favour of the Appellant.

(6) The Respondents in opposing the Appeal filed Written Submissions dated 3<sup>rd</sup> December, 2021.

It is the Respondents case that ***Under Section 26(1) (b)*** of the Land Registration Act, it is provided that where the Certificate of Title has been acquired illegally, unprocedurally or through a corrupt scheme, then such a Certificate cannot be taken as prima facie evidence that the person named as the proprietor of the land is the absolute and indefeasible owner.

Secondly, it is submitted for the Respondents that failure to obtain the consent from the Land Control Board is fatal to the Appellant's ownership of the suit property. ***Section 6 of the Land Control*** is cited as the authority for this. In addition, the authority of ***Joseph Kibet Tumei -vs- LJT and another (2014) eKLR*** was relied upon in support of this proposition where the Judge held, inter alia;

***"It follows that there could not have been a proper consent issued by the Land Control Board giving consent for transfer of the suit premises from Mesa Mokoro to LJ. I therefore, hold that of the suit properties .....was irregular and unprocedural and the same cannot be allowed to stand".***

Regarding the doctrine of presumptive trust, the Respondent's Counsel distinguished this case from that ***Willy Kimutai Kitilit (Supra)*** on the grounds that in the Kitilit case, sale was not dispute and only the consent of the Land Control Board was missing.

When it comes to striking out the counterclaim for failure to be accompanied by a verifying affidavit the Respondents Counsel urged that this Court should be persuaded by the decision of the Court of Appeal in ***Nicholas Kiptoo Arap Korir Salat -vs- IEBC and 6 others (2013) eKLR*** where the Court held that striking out pleadings is a draconian measure and Courts should strive to sustain a suit rather than strike it out on technical grounds. A suit should be struck out only on weighty grounds such as jurisdiction or issues that go to the root of the dispute.

On the applicability of ***Sections 32 and 33 of the Law of Succession Act***, the Respondent's Counsel urged that this is a new point that has been raised on Appeal and was not in contention at the trial.

In any case, urged counsel, no expert on Customary Law was ever called by the Appellant to prove that land could be transferred to the Appellant by a third party when the registered owner is dead.

(7) I have carefully considered the Appeal in its entirety including the Record of Appeal, the submissions by both sides as well as the jurisprudence in the authorities cited.

I have also considered the grounds of Appeal and the salient issues in the entire Appeal.

This being a first appeal, I am aware of my role of reconsidering the entire evidence, evaluate it a fresh and draw my own independent conclusion but bearing in mind that I never saw nor heard the witnesses and should make due allowance in this respect (see **Selle and another –vs- Associated Motor Boat Co. Ltd & others (1968) E.A 123.**

Again a Court of Appeal will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of evidence, or the Magistrate is shown demonstrably to have acted on wrong principles in reaching the finding he did (see **Ephantus Mwangi & another –vs- Dancan Mwangi Wambugu (1982-88) KAR 278.**

I find that the following facts are not in dispute.

Firstly, the Appellant is in occupation and has title deeds to the suit parcels.

Secondly, no consent from the Land Control Board was obtained to transfer the land from the registered owner to the Appellant. Also, lacking are the necessary transfer documents like transfer form, evidence of payment of stamps duty and even an agreement for sale of land.

Thirdly, the Appellant has been in occupation of the suit parcels since the year 2003.

Fourthly, the registration of the suit parcels to the Appellant took place after the death of the registered proprietor and before any dependant had been appointed as an administrator of his estate.

Arising from the above undisputed facts, I find that the following issues come up for determination.

- (1) Did the trial Magistrate have jurisdiction to declare that the Appellant was entitled to the said parcels through adverse possession even if adverse possession had been pleaded and proved?
- (2) Is fraud the only ground under which a Certificate of Title can be defeated or are there other grounds recognized under **Section 26 of the Land Registration Act?**
- (3) Can the Respondent's Counterclaim be defeated by the absence of a verifying affidavit?
- (4) Can the Appellant be described as a purchaser for value without notice of any defect in title?
- (5) Are the Respondents estopped from seeking to recover the suit parcels? Are they time barred?
- (6) What is the effect of **Section 32 and 33 of the Law of Succession Act** on this case?

On the first issue, I find that the trial Magistrate had no jurisdiction to declare that the Appellant had become entitled to the suit parcels, through adverse possession even if this had been pleaded and proved.

This is because **Section 38(4)** of the **Limitation of Actions Act** gives that jurisdiction exclusively to the High Court. It provides;

**38 (4) "The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section".**

This provision ousts the jurisdiction of the Magistrates' Court from any matter adverse possession. Closely connected to this finding is another finding to the effect that consent of the Land Control Board was necessary in all the four transactions as the doctrine of adverse possession does not apply.

On the second issue, I find that fraud is not the only ground that can defeat a Certificate of Title issued to a proprietor. Other grounds include acquisition of a certificate illegally, unprocedurally or through a corrupt scheme. **Section 26** of the **Land Registration Act** provides,

**(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.**

In this case, I find that the Appellant's certificates of title were acquired unprocedurally because no consent of the Land Control Board was obtained prior to the transfer, no stamp duty was paid and no transfer documents were executed by the vendor and the purchaser as required by procedure.

On the third issue, I find that the Respondent's counterclaim cannot be defeated merely by the essence of a verifying affidavit. I am persuaded by the reasoning of the Court of Appeal in the case of **Nicholas Kiptoo Arap Korir Salat (Supra)** that the mere absence of the verifying affidavit does not go to the root of the case and it would be a draconian measure to strike out a weighty pleading on this ground

alone.

On the fourth issue, I find that the Appellant cannot be described as an innocent purchaser for value because he has no agreement for sale or evidence of payment of consideration to any person. She is not therefore proved to be a purchaser.

On the fifth issue, I find that the Respondents are not estopped from bringing this action nor are they time barred. Under **Section 26 of the Limitations of Actions Act**, there is no time limit set where land is transferred by mistake.

I find that it was a mistake to transfer land to the Appellant without following the laid down procedure. An action to correct such a mistake cannot be said to be time barred or affected by estoppel.

Finally, I find that **Sections 32 and 33 of the Law of Succession Act** have No effect on this case because it is a land case and not a Probate and Administration Cause.

To borrow the words of Munyao Judge in the case of **Joseph Kibet Tumei (Supra)** ;

***“.....I therefore hold that the transfer of the suit properties was irregular and unprocedural and the same cannot be allowed to stand”.***

Similarly in this case, I find that it would be wrong to sanction transfer of land parcels without the blessings of the Land Control Board, without transfer forms being executed, without stamp duty being paid to name but a few of the irregularities and lack of procedure.

For the above reasons, I find no merit in the Appellant’s Appeal dated 29<sup>th</sup> October, 2020 and I dismiss it with costs to the Respondents.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18TH DAY OF JANUARY, 2022.**

**M.N. GICHERU**

**JUDGE**