



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

APPEAL CASE NO. 24 OF 2019

LUCY WAIRIMU KIMANI1ST APPELLANT

DAVID KIMANI KAROGO2ND APPELLANT

VERSUS

TERESIAH WANJIKU WAINAINA.....RESPONDENT

ATTORNEY GENERAL1ST INTERESTED PARTY

CHARLES MWANGI CHEGE 2ND INTERESTED PARTY

ROSE WAMBUI MWANGI 3RD INTERESTED PARTY

(Being an Appeal from the Judgment of Thika Chief Magistrate Court (Honourable M. W Wanjala SRM) delivered on 8/2/2019 in CMC Civil Case No. 450 of 2007 consolidated with Thika CMC Civil Case no 587 of 2005)

JUDGMENT

Background

1. This appeal challenges the judgment rendered on 8/2/2019 by **Hon M W Wanjala** in **Thika CMC Civil Case No 450 of 2007** [consolidated with **Thika CMC Civil Case No 587 of 2005**]. The suit property in contest in the two consolidated causes was land parcel number **Ruiru/Ruiru East Block 2/4798**. For a clear perspective, I will outline, in summary, the respective cases of the parties in the two consolidated causes that gave rise to this appeal.
2. In **Thika CMC Civil Case No. 587 of 2005**, **David Kimani Karogo** [the 2nd appellant in this appeal] and **Lucy Wairimu Kimani** [the 1st appellant in this appeal] sued **Charles Mwangi Chege** [the 2nd interested party in this appeal] and **Rose Wambui Mwangi** [the 3rd interested party in this appeal]. They contended that they were the lawful owners of the suit property and that the duo had illegally trespassed on the suit property. They sought, among other reliefs, an order of permanent injunction restraining the duo against interfering with their possession of the suit property. The two defendants in **Thika CMC Civil Case No 587 of 2005** [Charles Mwangi Chege and Rose Wambui Mwangi] filed a statement of defence dated 16/5/2005 in which they contended that, to the best of their knowledge, the registered proprietor of the suit property was **Teresia Wanjiku Wainaina** [the respondent in this appeal]. They denied being trespassers on the suit property.
3. In **Thika CMC Civil Case No 450 of 2007**, **Teresia Wanjiku Wainaina** [the respondent in this appeal] sued the **Attorney General** [the 1st interested party in this appeal]; **Lucy Wairimu Kimani** [the 1st appellant in this appeal]; and **David Kimani Karogo** [the 2nd appellant in this appeal]. She contended that she was the rightful registered owner of the suit property, having acquired it from Nyakinyua Investments Limited and having been registered as proprietor in 1988. It was her case that upon obtaining a search on the suit property in 2004, she discovered that a fraudulent parcel register had been made reflecting the two appellants in this appeal as the registered proprietors of the suit property. She sought, among other reliefs, an order cancelling the names of the two appellants from the parcel register.
4. The Attorney General filed a statement of defence dated 26/6/2007, denying fraud on part of the Land Registrar. The appellants filed a defence dated 7/2/2008 stating that they were the rightful and lawfully registered proprietors of the suit property.
5. The two causes were subsequently consolidated and heard before Hon M. W Wanjala SRM. The learned magistrate subsequently rendered a judgment dated 8/2/2019, in which she made a finding to the effect that the respondent was the legitimate proprietor of the suit property and granted the respondent the reliefs sought in **Thika CMC Civil Case No 450 of 2007**.

Appeal and Reliefs

6. Aggrieved by the judgment and award of the trial court, the appellants brought this appeal, advancing the following verbatim grounds of appeal:

- a) *That the learned trial magistrate erred in law and in fact by delivering a judgment that was against the weight of the evidence and submissions.*
- b) *The learned trial magistrate erred in law and in fact by failing to appreciate the fact that the then Land Registrar stationed at Thika testified that the plaintiff's title and green card relating to land parcel Ruiru/Ruiru East Block 2/4798 were not genuine.*
- c) *The learned trial magistrate erred in law and in fact by failing to appreciate that the plaintiff did not adduce as evidence any receipt to show that she was indeed a member of Nyakinyua Investment Limited or how she allegedly bought land parcel Ruiru/Ruiru East Block 2/4798.*
- d) *The learned trial magistrate erred in law and in fact by failing to appreciate that the plaintiff did not adduce any evidence to show any fraud allegedly perpetrated by the defendants in acquiring land parcel Ruiru/Ruiru East Block 2/4798.*
- e) *The learned trial magistrate erred in law and in fact by relying on the plaintiff's title documents relating to land parcel Ruiru/Ruiru East Block 2/4798 yet the Land Registrar had declared them as not genuine.*
- f) *The learned trial magistrate erred in law and in fact by failing to consider the evidence adduced by the appellants.*

7. The appellants sought the following verbatim reliefs in this appeal:

- a) *That the appeal be allowed.*
- b) *That the judgment and decree of the honourable Senior Resident Magistrate delivered on 8th February, 2019 be set aside.*
- c) *That the plaintiff's suit be dismissed with costs to the appellant.*
- d) *That costs of this appeal be provided for.*

Appellant's Submissions

8. The appeal was canvassed through written submissions dated 3/6/2021, filed by the firm of *J K Ngaruiya & Co Advocates*. Counsel summarized the parties' respective cases and submitted that it was clear that there were two competing claims over ownership of the suit property. Counsel added that even though it seemed that the respondent's title was registered first, the said title stood impeached by the Land Registrar's evidence to the effect that the said title document seemed to have been issued prior to the date when it was printed by the Government Printer. Counsel contended that, that was an irregularity because titles are printed by the Government Printer before they are issued. Counsel further submitted that the Land Registrar had impeached the respondent's title on the basis of the positioning of the word "Thika District" [sic] on the seal on the ground that it was slightly lower than where it should have been.

9. Counsel cited the decision in the case of *Hubert L Martin and 2 others v Margaret J Kamar & 5 others [2016]eKLR* where the court held that whenever a court is faced with two or more titles over the same piece of land, the court is enjoined to make an inquiry to establish which of the two titles should be upheld. Counsel contended that the appellants not only presented their title documents but also gave a clear history of how they acquired the suit property. Counsel added that the plaintiff's case had been supported by a letter dated 23/8/2004 by the Chairman of Nyakinyua Investments Company Limited. Counsel urged the court to allow the appeal.

Respondent's Submissions

10. The respondent filed written submissions dated 28/7/2021 through the firm of *Kiaritha & Associates*. Counsel identified the following as the two issues falling for determination in the appeal: (i) Was the judgment delivered by the trial magistrate against the weight of the evidence? and (ii) Was there evidence that proved fraudulent registration of the suit property in the appellant's name [sic]?

11. On whether the judgment delivered by the trial court was against the weight of the evidence, counsel submitted that the respondent produced ownership documents giving a "story" dating back to August 1980 when she became a shareholder of Nyakinyua Investments Limited and showing how she got to be registered as proprietor of the suit property in August 1988. Counsel added that the respondent led evidence that she applied for and got an official search in August 2001 and a certified copy of the land register. Counsel faulted the appellants for failing to lead evidence to demonstrate that **Hannah Gathoni Chege** owned the suit property. It was the position of counsel that the finding of the court was in tandem with the evidence before it.

12. On whether there was evidence to prove fraudulent registration of the suit property in the appellant's name [sic], counsel submitted that the Land Registrar's evidence was of no assistance to their case because the Land Registrar was unable to demonstrate that the title held by the respondent was fake. Counsel added that the Land Registrar had failed to produce any document for comparison of signatures and seals with the document produced by the respondent. Counsel argued that without the evidence of a documents examiner, the evidence of the Land Registrar was of no evidential value. Counsel faulted the Land Registrar for failing to explain why the parcel register was missing and argued that disappearance of the parcel register was intended to defraud the respondent of her property. It was the contention of counsel for the respondent that from the extract of the register produced by the respondent, it was clear that the suit property had never belonged to Hannah Gathoni Chege.

13. Counsel for the respondent contended that because the respondent was registered as proprietor of the suit property in 1988, her title was indefeasible. Counsel added that the appellants had failed to explain why it took them 11 years to obtain the title they were holding, adding that throughout that period, the respondent had been in possession of the suit property. Lastly, counsel submitted that the appellants had admitted that they were not original shareholders of Nyakinyua Investment Ltd while the respondent tendered evidence that she was a balloting member of the company. It was the position of counsel for the respondent that the findings of the trial court were in tandem with the evidence presented to the court. Counsel urged the court to dismiss the appeal.

Analysis and Determination

14. I have perused and considered the entire record of the trial court, the grounds of appeal; and the parties' respective submissions in this appeal. I have also considered the relevant legal frameworks and jurisprudence. Although the appellants listed six grounds of appeal, their counsel made brief general submissions pointing to the fact that the trial court's finding was not in tandem with the evidence placed before the trial court. He did not submit on each ground separately. Similarly, he did not frame specific issues that fell for determination. On his part, counsel for the respondent identified two issues, both focusing on the totality of the evidence vis-à-vis the finding of the trial court. In my view, the key issue in this appeal is whether the finding of the trial court was in tandem with the weight of the evidence placed before it.

15. This court is invited to exercise jurisdiction as the first appellate court. The principle that guides a first appellate court when exercising jurisdiction is well settled. The Court of Appeal outlined the principle in the case of **Susan Munyi v Keshar Shiani (2013)eKLR** as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

16. The same principle was outlined in **Abok James Odera t/a A. J. Odera & Associates v. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

17. There was common ground that the parcel register [green card] relating to the suit property was missing from the binder where it was expected to be. Secondly, there was common ground that the suit property was a parcel of land within a sub-division scheme owned by Nyakinyua Investments Limited. Thirdly, the two appellants on one part and the respondent on the other part were waving parallel titles, one purportedly issued in 1988 and the other one purportedly issued in 2004.

18. The respondent was the first one to take to the witness box in the trial court. She testified that she was a shareholder of Nyakinyua Investments Limited and personally participated in the balloting exercise in 1983 at Murera. Her ballot was No. 10-B which translated into the suit property. The surveyor of the company pointed out the suit property and she took possession of it. She had been in possession of the suit property throughout. The company processed her title and the title was issued to her in 1988. In the year 2000, she obtained a certified copy of the land register which similarly confirmed that she was the registered proprietor of the suit property. In 2001 she obtained an official search which similarly confirmed that she was the registered proprietor of the suit property. She produced the ballot card, share certificate number 04658 for 100 shares dated 10/8/1982, receipt No. 3800 dated 12/10/1983 for Kshs 600 issued by Nyakinyua Investment Ltd, ballot card number 10-B, title deed issued on 26/8/1988, official search dated 29/8/2001, and copy of the land register certified on 1/2/2000.

19. On their part, the appellants testified that the 1st appellant bought the suit property from one **Hannah Gathoni Chege** in **April 1992** through purchase of 100 shares and she was issued with share certificate number 5350 dated 27/7/1992. They were issued with a title relating to the suit property on 2/1/2004. They did not, however, call **Hannah Gathoni Chege** to demonstrate to the court the precise property she sold to the 1st appellants through disposal of the 100 shares and how she got the property. They had never been in possession of the suit property. When they attempted to take possession in 2007, the respondent moved to court to challenge their title.

20. The Land Registrar who is expected to be the custodian of land records was of no assistance to the court. Under his watch, the land register had disappeared. He did not present evidence from the Land Registrars who served in the Land Registry at the time when the two parallel titles were allegedly issued and when the certified copy of the register was allegedly issued. He did not present evidence from the Government Printer relating to the date of printing of title deeds.

21. What emerges from the above evidence is that the respondent was a balloting shareholder of Nyakinyua Investments Limited and the suit property was allocated to her in 1983 through the balloting exercise conducted by the company in 1983. The respondent took possession and has been in possession since then. The respondent was issued with a title deed in 1988. A parcel register existed in the Lands Registry in the name of the respondent up to 2001 when she was issued with a certified copy of the land register. A parallel title was issued to the appellants in 2004 and at that point the parcel register went missing. The parcel register was missing up to the point when the Land Registrar testified.

22. The appellants were not original members of Nyakinyua Investments Ltd. They did not participate in the balloting exercise. They got their share certificate through Hannah Gathoni Chege. They did not call the said Hannah Gathoni Chege to demonstrate if she balloted for any parcel of land and the exact parcel which was allocated to her through balloting.

23. Given the above evidence, it is clear that the roots of the title held by the respondent were clearly established. If the appellants were

subsequently issued with a title in 2004, that subsequent title was and remains irregular. I therefore find no reason to fault the trial court in its finding that the respondent was and is the legitimate proprietor of the suit property.

24. In light of the foregoing, it is my finding that the finding of the trial court was properly supported by the evidence before it. The trial court did not make an error in finding that the respondent, **Teresiah Wanjiku Wainaina**, was the legitimate proprietor of the suit property.

25. The result is that I find no merit in this appeal. The same is dismissed. The appellants shall bear the respondent's costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 15TH DAY OF FEBRUARY 2022

B M EBOSO

JUDGE

IN THE PRESENCE Of: -

MS NJOKA FOR THE APPELLANTS

MS KIARITHA FOR THE RESPONDENT

COURT ASSISTANT: LUCY MUTHONI