



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT THIKA

ELCA NO. 33 OF 2020

JAMES NJAMBI.....APPELLANT

VERSUS

JAMES KAMAU WAWERU.....RESPONDENT

(Being an appeal against the Judgment delivered by Hon. M. W. Wanjala (Mr.) SRM

on 23rd July 2020 in the Chief Magistrate's Court at Thika

in Civil Case No. 174 of 2016)

JUDGMENT

1. Dissatisfied with the trial Court judgment delivered in **Thika CMCC Case No. 174 of 2016** on 23rd July 2020, the Appellant filed her Memorandum of Appeal dated 18/8/2020 on grounds;

I. THAT the learned Honourable Magistrate erred in law and in fact in holding that the Respondent had proved to the required standard that he is the owner of the parcel of land in issue and in so doing;

a. Erred in law and in fact in holding that the Appellant had failed to sufficiently prove her ownership of the parcel in question.

b. Erred in law and in fact in failing to find that the title number RUIRU/MUGUTHA BLOCK 1 T6/2625 was not the same as title number RUIRU/MUGUTHA BLOCK 1/2625

c. Erred in law and in fact in relying on the uncorroborated evidence of PW2 on her alleged position of chairperson of Nyakinyua Investment Limited and the alleged ownership of the parcel of land number RUIRU/MUGUTHA BLOCK 1/2625 by the respondent's late wife one Lucy Njeri Kamau.

d. Erred in law and in fact in failing to uphold the Appellant's case on acquisition of the parcel of land number RUIRU/MUGUTHA BLOCK 1 T/2625 from one Ngang'a Kanini.

2. THAT the learned Honourable Magistrate erred in law and in fact in finding that the parcel of land number RUIRU/MUGUTHA BLOCK 1/2625 and RUIRU/MUGUTHA BLOCK 1 T/2625 referred to one and the same parcel of land and in so doing;

a. Erred in law and fact in relying on layman's evidence of Pw2 that the correct citation of the title was RUIRU/MUGUTHA BLOCK 1/T2625.

b. Erred in law and in fact in holding that the Appellant and the Respondent could not claim the correctness of their titles based solely on how entries therein appear.

3. THAT the learned Honourable Magistrate erred in law and in fact in approbating and reprobating at the same time in that;

a. The learned Honourable magistrate directed that title number RUIRU/MUGUTHA BLOCK 1T/2625 held by the

Appellant be cancelled; and

b. The learned Honourable magistrate held that title number RUIRU/MUGUTHA BLOCK 1/T2625 belongs to the respondent; and

c. The learned Honourable magistrate directed that the Respondent to make application for replacement of his title deed with the one that bears correct entries as relates to the parcel in issue within the next 45 days.

4. **THAT** the learned Honourable Magistrate erred in law and in fact in favoring the respondent's evidence and ignoring the Appellant's evidence thus arriving at a lopsided judgement in that;

a. The learned honourable magistrate faulted the failure by the Appellant to produce share certificate or ballot to authenticate the genesis of her title ignoring the agreement for sale between the Appellant and one Ngang'a Kanini.

b. The learned honourable magistrate upheld the respondent's claim based solely on alleged records at Nyakinyua Investment Limited which in any event did not show how the late Lucy Njeri Kamau was issued with a share certificate.

c. The learned honourable magistrate faulted the Appellant's evidence solely because she could not remember the name of the office where the transaction was carried out and could not tell the name of the member to whom the parcel was allocated at Nyakinyua Investment Limited before eventually moving to her.

d. The learned honourable magistrate failed to uphold the sanctity of the agreement for sale conferring the parcel of land to the Appellant.

5. **THAT** the learned Honourable Magistrate erred in law and in fact in ignoring the pleadings, evidence and submissions by the Appellant and giving more weight to the pleadings, evidence and submissions by the Respondent thereby making a lopsided and an unjust determination which determination is under appeal and in so doing;

a. The learned honourable magistrate failed to uphold the provisions of sections 45 and 82(b) of the Law of Succession Act thereby sanctioning the unlawful transfer of title number RUIRU/MUGUTHA BLOCK 1/2625 to the respondent.

b. The learned honourable magistrate ignored the law in relation to missing entries in title number RUIRU/MUGUTHA BLOCK 1/2625 to the respondent.

c. The learned honourable magistrate trivialized the legal issues raised by the Appellant.

6. **THAT** the learned honourable magistrate erred in law and in fact in upholding the respondent's claim and dismissing the Appellant's counterclaim.

7. **THAT** as a result of the above, the learned Honourable Magistrate displayed bias in the manner in which he heard and determined the matter.

2. The Appellant urges this Court to allow her appeal and set aside the impugned Judgment and allow her counterclaim as prayed.

3. The background of the appeal is that, the Respondent filed his suit against the Appellant in the trial Court vide a plaint dated 18/2/2015 (*sic*). He sought orders for specific performance compelling the Appellant to vacate from his land parcel no. RUIRU/MUGUTHA BLOCK 1/2625 (*the suit land*), general damages and costs of the suit. The Appellant opposed the suit through an amended statement of defence and counter claim dated 25/7/2019 where *inter alia* she urged the Court to dismiss the Respondent's suit, cancellation of the Respondent's title, a declaration that title number Ruiru Mugutha Block 1 T/2625 is different from Title number Ruiru/Mugutha Block 1/2625 does not relate to the suit property, that the Appellant is the registered owner of title number Ruiru Mugutha Block 1 T/2625 having bought it from Ng'ang'a Kanini and in the alternative she be declared owner of Ruiru Mugutha Block 1 T/2625 by way of adverse possession.

4. On 17/2/2020, the suit was set down for hearing. The Respondent called three witnesses in support of his case whereas the Appellant was the sole defence witness.

5. The Respondent's claim was that he was the registered owner of RUIRU/MUGUTHA BLOCK 1/2625 (**Block 1/2625**) having obtained it by transmission upon his wife's demise. That his deceased wife held ballot no. 2625 and share certificate No. 8526 from Nyakinyua Investment Ltd in respect of Block 1/2625. The Respondent testified as PW1 that in 1983, his late wife Lucy Njeri Kamau bought shares from Wanjiku Kimani and was allocated ballot No. 858 on 19/9/1991 and subsequently a title deed was registered as RUIRU/RUIRU EAST BLOCK 2/1632 in her name. That another balloting was done on 10/7/1996 and his wife got ballot No. 2625 for ¼ an acre and was later issued with an ownership certificate. That later they went to the said plot, they found the Defendant in occupation prompting them to report the discovery at the area chief who referred them to the Land Dispute Tribunal (LDT) for resolution. That through the DO a decree was issued on 10/5/2010 directing the Defendant to vacate the plot.

6. That upon his wife's demise, the Respondent petitioned for Letters of Administration of her estate and obtained registration of the suit land from Nyakinyua Investment Ltd.

7. He produced the documents listed in the List of Documents dated 18/2/2019 as **Pexh. 1 - 16** and testified that the Defendant had trespassed on his land. That the LDT decided the case in his favour and ordered the Defendant to vacate the suit land.

8. On **cross-examination**, PW1 maintained that his land is Block 1/2625 having obtained it through transmission from Nyakinyua Investment Ltd as an administrator of his wife's estate. He explained that he produced two ownership certificates; the first one dated 22/5/2008 being in his wife's name and the second one dated 7/12/2012 in his daughter's name. PW1 could not explain why his title deed as well as the green card lacked the registry map sheet number. He also admitted that the description of title, Ruiru/Mugutha/1/T2625, in a letter dated 23/11/2015 to Land Registrar was different from the suit property which is Block 1/2625. Indeed the copy of green card issued thereto was in respect of a title without letter 'T'.

9. The second witness was Nduta Ndirangu Chege, Chairlady of Nyakinyua Investment Ltd. She adopted her witness statement dated 20/11/2017 as evidence in chief. PW2 stated that the suit land belonged to Lucy Njeri Kamau before it was transferred to the Respondent. PW2 stated that suit land was No. 2625 parcel no. Ruiru Mugutha/Block 1/T2625 according to the clearance letter. That if the title deed did not indicate letter T then it was a mistake by the registrar. PW2 added that according to their records the title was Ruiru/Mugutha/T2625 without 'Block 1' and that the transfer was effected to PW1 since his wife had passed on and he had obtained letters of grant of administration.

10. The last witness was Nancy Waithera Magu, PW1's daughter. She also adopted her witness statement dated 20/11/2019. She informed the Court that upon her mother's demise, PW1 made arrangements for the land to be transferred in 2012. That since Nyakinyua Investment does not issue titles to women the certificate was issued in her name.

11. On the other hand, the Appellant testified as DW1 and adopted her statement dated 14/3/2016. She was emphatic that her title was different from the Respondent's. That her title was Ruiru/Mugutha/Block 1T/2625 issued on 13/6/2003. She produced the original title as Dexh.1. That she bought her land from Ng'ang'a Kanini and produced a copy of the sale agreement dated 14/9/2012 in support of her defence. Notably, DW1 could not tell how Ng'ang'a acquired the parcel of land. That according to an official search conducted in 2014, it confirmed that she was the registered owner of the land. She produced the copy of search and receipt thereof as **Dex. 3a&b**.

12. On cross-examination, the Appellant was categorical that the said Ng'ang'a used to deal in land but could not trace him to testify in the suit. That he handled all the land transactions and all the Appellant did was to pay him money.

13. The trial Court considered and analyzed the evidence adduced before it and allowed the Respondent's claim and dismissed the Appellant's counter claim for want of proof hence the appeal.

14. Directions were taken on 13/10/2021. Parties elected to prosecute the appeal by way of written submissions. Only the Appellant filed submissions dated 15/11/2021 through the firm of **Mwaniki Kariuki & Co. Advocates**.

15. The Respondent swore a Replying Affidavit (*sic*) on 14/10/2021 in opposition of the appeal.

16. In her written submissions, the Appellant rehashed the background of the suit, the rival evidence adduced during the hearing and trial Court findings. She maintained that she had sufficiently proved her ownership over land parcel no. RUIRU/MUGUTHA BLOCK 1 T/2625 by producing the original title deed thereof issued on 13/6/2003, a sale agreement dated 14/9/2012 confirming the purchase from Ng'ang'a Kanini and an official land search in her name dated 22/8/2014. That the Court failed to appreciate the process she had followed to purchase the said land whose title was issued on 13/6/2003, about 12 years before the Respondent's impugned title was issued. She faulted the Court for terming both titles as the same whereas the title were fundamentally distinct. Further that the Court approbated and reprobated on the issue of the two titles as by holding that the Respondent's title did not exist and making an order for cancellation of the Appellant's title and fresh registration of the Respondent.

17. The Appellant was adamant that the trial Court unduly placed more weight on the Respondent's case compared to her case and ignored her evidence thereto. That the final orders granted in favour of the Respondent were contrary to the prayers sought in the plaint. Reliance was placed on the decisions in **Danson Kimani Gacina & Anor. V Embakasi Ranching Co. Ltd [2014] eKLR** and **Patrick Njuguna Gitau v John Bethwel Kariuki [2021] eKLR**.

Analysis & Determination

18. The main issues for determination are; Are there two parcels of land/two titles over one parcel of land? Whether the parties proved their respective cases to the required standards; Whether the trial Court erred in reaching its determinations and who bears costs?

19. As a first appellate Court, this Court's duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. See **Selle & another -vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123**.

20. With that in mind the Court will then analyse the case. With respect to the first issue as to whether there are two parcels of land or two titles over one parcel of land? It is not in dispute that the suit land that the Appellant and the Respondent are claiming is the same. I say so because this is the land that was identified by the Respondent and his wife in 2009 when they visited and found the Appellant and her husband in occupation. It is also the land that the Respondent described as follows;

"I know the land is mine because I have a title. I took possession in 2000 and constructed a stone walled house. It was two roomed. I later extended one room made of iron sheets. The Plaintiff claimed the land for the first time in 2009. He went away and came back in 2014. It is true that this dispute had been canvassed at the Chief's office."

21. It is also not in dispute that the land traces its origin to Nyakinyua Investment Limited. According to the evidence of the parties the Appellant was issued with a title on the 13/6/2003 while the Respondent was issued with a title on the 31/7/2015. The title of the Appellant is Ruiru Mugutha Block 1 T/2625 while that of the Respondent is Ruiru/Mugutha Block 1/2625. Neither the Respondent nor the Appellant were aware of the variations in the registration nor could offer an explanation on the same until the hearing of the suit.

22. The object of the Land Registration Act is stated as follows;

“An Act of Parliament to revise, consolidate and rationalize the registration of titles to land, to give effect to the principles and objects of devolved government in land registration, and for connected purposes.”

23. Registration means the bringing of an interest in land or lease under the provisions of the Act and includes making of an entry note or record in the land register. Section 7 of the LRA dictates the content of the Register.

24. In the instant case the parties have found themselves with two different titles for the same parcel of land. It is trite that a parcel of land cannot have two titles. The law prohibits such a scenario and the law has given powers to the Land Registrar to so cancel titles under section 79 of the LRA. The Land Registrar has power to rectify title if there are errors omissions not materially affecting the interest of the proprietor; correction of dimensions, correction of names address or such other particulars.

25. The Learned Magistrate in directing the Respondent to seek the rectification of the respondent's title would be in tandem with the provisions of Section 79 of the LRA which donates power to the Land Registrar in such a case as this. I therefore find no ground to fault the Learned Magistrate in his decision.

26. Did the Appellant prove fraud illegality and or misrepresentation? In the case of **R. G. Patel v. Lalji Makanji (1957) EA 314** the former Court of Appeal for Eastern Africa stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

27. The Appellant pleaded fraud illegality and misrepresentation as follows; altering land documents and purporting them to have been properly executed and registered; connived to change the registration of the title from Ruiru Mugutha Block 1 T/2625 and purporting to acquire the registration of the Title Number Ruiru/Mugutha Block 1/2625 without her consent and transacting with the Appellant's land without her consent with a view of defeating her proprietary rights. However she did not discharge the burden for proving fraud to the required standard.

28. It is the Appellant's case that she purchased the land from one Nganga Kanini. She produced an agreement of sale in support. In addition, the other documents she relied to augment her case were the title and the official land search issued in 2015. In her evidence she stated as follows

“Nganga Kanini used to deal in land. ... I have never seen him since he sold the land to me in 2000. That is why I did not call him as a witness ... He told me that the title could issue in the name of the person he sold to. I could not be given a share certificate because I was not an original member of Nyakinyua. I was however given a ballot No 2625 {which was not produced in Court}. I did not buy the parcel directly from Nyakinyua. Nganga could not give me a clearance because he had only bought the parcel from Nyakinyua. We did not prepare any transfer forms. Ng'ang'a told me that the title will come out in my name. We did not go to the {land} board. I however filed an application for consent. It was between me and Nganga. All the transactions were done by Nganga. I used to give money to Nganga to process. I did not go to confirm with nyakinyua because I had title.”

29. In the Court of Appeal case of **Munyu Maina v Hiram Gathiha Maina Nyeri Civil Appeal No. 239 of 2009 [2013] eKLR** the Learned Judges stated that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.

30. Furthermore, in the case of **Danson Kimani Gacina & Anor Vs Embakasi Ranching Company Ltd [2014] eKLR** the Court held that;

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the Court must be left in no doubt that the holder of the documents proved is the one entitled to the property.”

31. Accordingly, I am satisfied that the Appellant did not explain the root of the title that she holds.

32. The said title when contrasted with the one that is held by the respondent, the Court finds as follows; Lucy acquired the land from Nyakinyua as shown in the certificate of land ownership; the Respondent had obtained a ballot; Land control board consent; the land was transferred from Nyakinyua to the Respondent resulting into the issuance of title. The evidence of PW2 was cogent and the Appellant did nothing to successfully assail it. There was no evidence laid before the Court to show that PW2 was not a chairperson of the Land buying company nor that she testified without authorization. It is the view of this Court that the root of the title held by the Respondent was explained and the same is protected under section 26 of the Land Registration Act.

33. In the end I find that the appeal has no merit and the same is dismissed with costs to the Respondent.

34. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 28TH DAY OF MARCH 2022 VIA MICROSOFT TEAMS PLATFORM.

J. G. KEMEI

JUDGE

DELIVERED ONLINE IN THE PRESENCE OF;

APPELLANT – KARIUKI

RESPONDENT– MWANGI HOLDING BRIEF FOR KAMONJO

MS. PHYLLIS – COURT ASSISTANT