



REPUBLIC OF KENYA



**Nyagaki v Muturi & 2 others (Environment and Land Appeal  
53 of 2020) [2022] KEELC 3297 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3297 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 53 OF 2020**

**JG KEMEI, J**

**MAY 26, 2022**

**BETWEEN**

**LUCIA NYAGAKI ..... APPELLANT**

**AND**

**REGINA WANJIKU MUTURI ..... 1<sup>ST</sup> RESPONDENT**

**NYAKINYUA INVESTMENTS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, RUIRU ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the judgment rendered on  
October 29, 2020 in Ruiru MCL&E Case No 25 of 2019.)*

**JUDGMENT**

1. The appellant instituted this appeal vide a memorandum of appeal dated November 20, 2020 against the trial court judgment rendered on October 29, 2020 in Ruiru MCL&E Case No 25 of 2019. The said memorandum of appeal contains thirteen grounds of appeal that:-
  - a. The learned magistrate erred in law and in fact in disregarding the evidence and submissions tendered by the appellant.
  - b. The learned magistrate erred in law and in fact in shifting the burden of proof of the 1<sup>st</sup> respondent's averments in the plaint to the appellant.
  - c. The learned magistrate erred in law and in fact in misinterpreting the doctrine of 1<sup>st</sup> registration in view of certificate of ownership produced by the parties during the trial.
  - d. The learned magistrate erred in law and in fact in failing to note that the 1<sup>st</sup> respondent's evidence contradicted her pleadings.



- e. The learned magistrate erred in law and in fact in applying section 24(a) 25(1) and 26(1) (a) and (b) in favor of the 1<sup>st</sup> respondent.
  - f. The learned magistrate erred in law and in fact in holding that the appellant did not file defence while she filed defence and counterclaim.
  - g. The learned magistrate erred in law and in fact in disregarding the clearance certificate issued by the 2<sup>nd</sup> respondent yet it is the custodian of members register and or records.
  - h. The learned magistrate erred in law and in fact in holding that Ruth Mburu acquired the suit property fraudulently and illegally while no evidence was tendered by the 1<sup>st</sup> respondent to that effect.
  - i. The learned magistrate erred in law and in fact in relying on extraneous and irrelevant matters thus arrived at a wrong conclusion.
  - j. The learned magistrate erred in law and in fact by failing to record the actual evidence tendered by the parties.
  - k. The learned magistrate erred in law and in fact in holding that the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents colluded to disinherit the 1<sup>st</sup> respondent yet the matter was not a succession matter.
  - l. The learned magistrate erred in law and in fact in that the evidence tendered and the analysis of evidence as contained in the judgement differ and contradict each other.
  - m. The learned magistrate erred in law and in fact in making a finding in favour of the 1<sup>st</sup> respondent against the weight of evidence.
2. The 1<sup>st</sup> respondent opposes the appeal. The 2<sup>nd</sup> respondent is not opposed to the appeal whilst the 3<sup>rd</sup> respondent did not participate in the appeal.
  3. On November 2, 2021, directions were taken to canvass the appeal by way of written submissions. The appellant through the firm of Milimo, Muthomi & Co Advocates filed submissions dated November 24, 2021 while the firm of Waithera Mwangi & Co Advocates filed submissions dated January 10, 2021 on behalf of the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent's submissions were filed out of time directed by this court but later admitted vide a consent herein dated February 18, 2022 between the appellant and the 1<sup>st</sup> respondent.
  4. The appellant recounted the genesis of the suit and summary of the evidence adduced in the trial court. The appellant itemized four issues for determination whether the trial court erred firstly in relying on extraneous matters in holding that Ruth Mburu acquired the suit land illegally; secondly in applying section 24, 25 and 26(a) and (b) in favour of the 1<sup>st</sup> respondent, thirdly in misinterpreting the doctrine of first registration and lastly who bears the costs. The gist of her submissions is that the appellant rightly defended her title and traced its history from Ruth and later registration in the 2<sup>nd</sup> respondent's name. That the respondent testimony was inconsistent and contradictory to her pleadings and as such failed to meet the required standard of proof. Several persuasive decisions of this court including *Peter Kiruri Karanga v Daniel Mbithi Wanyoike* [2019] eKLR *Grace Wairimu Njibia v Joanina Wairimu Mburu* [2019] eKLR and *Violeti Kavulani Ayumba (Suing as the Administratrix of the Estate of late Peter Ayumba S/O Vugundu) v Lawrence Ling'ondo Vugundu* [2018] eKLR were cited in imploring the court was urged to allow the appeal with costs.



5. In opposition, the 1<sup>st</sup> respondent recapped the trial court case and hearing and drew three issues for determination; whether the trial court erred in law in relying on extraneous and irrelevant matters to hold that Ruth Mburu fraudulently and illegally acquired the suit land; whether the trial court erred in applying section 24a, 25(1) and 26(1) in favour of the 1<sup>st</sup> respondent and whether the trial court erred in misrepresenting the doctrine of first registration.
6. The 1<sup>st</sup> respondent defended the trial court decision and maintained that as a director, the appellant fraudulently used undue influence and powers to transfer the suit land to herself at the expense of an elderly poor widow. That the appellant's move to transfer the suit land to herself from a member amounted to conflict of interest. That the trial court rightly applied the said legal provisions to protect the right of a proprietor being the 1<sup>st</sup> respondent who tendered proof of valuable consideration. That the trial court did not misrepresent the doctrine of first registration and in this case the purported first registration was fraudulent. Reliance was placed on the cases of Peter Kiruri supra, Mount Kenya Investment Ltd v Allan Ngethera & 2 others (sic) and urged this court to dismiss the appeal with costs.

### **Analysis & Determination**

7. 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. The duty of the court in a first appeal such as this one was stated in *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 in the following terms:

“I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, 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 judge'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 (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 EACA 270).”

8. The guiding parameters for this court are therefore, on first appeal; the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; secondly, in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and lastly it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
9. Sections 107, 108 and 109 of the *Evidence Act* cap 80 provide for burden of proof and who is to prove it that;

“107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

10. To begin with I shall give the background of the suit that provoked this appeal. Vide a plaint filed on the May 8, 2019 the plaintiff filed suit MCLE No 25 of 2019 Regina Wanjiku Muturi v Lucia Nyagaki & 2 others at Ruiru Court. The Plaintiff averred that she was a member of the 2<sup>nd</sup> Defendant, Nyakinyua Investments Limited since incorporation. She stated that she acquired the suit land in 1997 when the land buying company subdivided the land in Mugutha Ruiru and successfully got ballot No 4257. That she was issued with plot ownership for plot no 4257 and she took possession of the same. Later she pursued the title and when the same was not forthcoming she carried out a search when she learned that the 1<sup>st</sup> defendant had fraudulently caused the suit land to be registered in her name. She pleaded fraud under para 10 of the plaint and proceeded to give particulars thereof. She averred that the 1<sup>st</sup> defendant has deprived her of her land. She sought the following orders;
- a. A declaration that the plaintiff is the lawful owner of the suit land
  - b. The title issued to the 1<sup>st</sup> defendant is in respect to the suit land be cancelled.
  - c. The new title be issued in the plaintiffs name.
  - d. Costs of the suit.
11. The 1<sup>st</sup> defendant resisted the plaintiffs claim vide her defence and counter claim filed on the June 20, 2019. The 1<sup>st</sup> defendant stated that she is a director and shareholder of Nyakinyua investments Limited. She denied the plaintiffs claim and stated that she purchased the suit land on the August 20, 2008 from a member of Nyakinyua Investments Limited namely Ruth Wambui Mburu vide share certificate No 6386. That upon transfer of the suit land she was issued with share certificate No 8591 and later got a title. She denied signing the plot ownership certificate produced by the plaintiff and termed it a forgery. She accused her of forging her signature on the certificate. She stated that her possession of the land was interfered by the Plaintiff who kept trespassing and carrying out acts of waste on the suit land. That when the dispute was submitted to the local chief in 2015, the plaintiff was unable to proof ownership of the land.
12. In her counterclaim she sought the following orders;
- a. A declaration that the defendant Lucy Nyagaki Mburu is the *bonafide* owner of the suit land.
  - b. A permanent injunction be and is hereby issued restraining the plaintiff her agents or employees and or anybody else claiming under or through her from trespassing entering encroaching selling transferring constructing any structure and or interfering in whatever manner with the 1<sup>st</sup> defendants land.
  - c. Costs of the suit.



13. The 2<sup>nd</sup> defendant similarly denied the appellant's averments vide a statement of defence dated July 20, 2020. It is important to note that the respondent's counsel, Mr Kimani had initially filed a joint defence dated August 27, 2019 (for the appellant and 2<sup>nd</sup> respondent) but on the July 13, 2020, the court record shows that he sought leave to withdraw it and later filed the above mentioned defence for the 2<sup>nd</sup> respondent only. The 2<sup>nd</sup> respondent refuted the 1<sup>st</sup> respondent's claims in toto and affirmed the appellant's ownership of the suit land.
14. The 3<sup>rd</sup> defendant filed a statement of defence dated August 8, 2019. It denied the 1<sup>st</sup> respondent's allegations and refuted any fraudulent dealing on its part. That according to its record, the suit land register was opened on May 26, 2011 in the 2<sup>nd</sup> respondent's name and the appellant was registered as the owner on the same date. That a title deed was later issued in the appellant's name on May 27, 2011.
15. At the hearing the plaintiff singly led evidence and whilst adopting the contents of her witness statement dated the May 21, 2019 informed the court that she is a shareholder of the 2<sup>nd</sup> defendant. That she paid Kshs 500/- to participate in the ballot on the 26/8/97 for the allocation of the suit land. That she got ballot No 4257 and later was given land ownership certificate on even date. That the plot ownership certificate was signed by the 1<sup>st</sup> defendant who was the director of the 2<sup>nd</sup> defendant alongside another director namely Nduta Ndirangu. In addition that she was given a receipt dated the 26/8/97 for the sum of Kshs 500/-. She informed the court that though she has occupied the land she could not tell the duration. She denied any fraud with respect with the two documents that she relied on and asserted that all the documents emanated from the 2<sup>nd</sup> defendant.
16. In cross examination, the plaintiff stated that she did not do balloting and that she was sold the land by a person named David. She informed the court that she does not know whether David was given the land by the 2<sup>nd</sup> defendant. She was emphatic that she was given the land by Nyakinyua. That she has no share certificate in the name of David. That she was not issued with a clearance certificate. That she was never a member of the said Nyakinyua but only purchased the land from David. With that she closed her case.
17. The evidence of the defendant was led by two witnesses. The 1<sup>st</sup> defendant, PW1 adopted her witness statement of June 19, 2019. She averred that she is a director and shareholder of the 2<sup>nd</sup> defendant. That on the August 20, 2008 she purchased the suit land from a member of the 2<sup>nd</sup> defendant namely Ruth Wambui Mburu who was in possession of share certificate No 6886 and plot No 4257. That upon the transfer of the land she was issued with share certificate No 8591 and later a title deed in respect to the suit land. She denied ever signing the plot ownership certificate and the receipt in the name of the plaintiff and contended that the signature on the document is a forgery. That she did not report the matter of the forgery with respect to the plaintiff to the police. That she paid transfer fees in the sum of Kshs 2000/- and obtained a share certificate, ballot clearance certificate and the plot. That she used to farm on the land but she stopped when the plaintiff filed the suit.
18. In cross the witness stated that her clearance certificate was signed by Nduta and herself. She admitted that the 2<sup>nd</sup> defendant maintained members' records although they do not bring them to court. That there are no male names in the record except where a man or child has inherited his wife or mother. That she started farming in 1994 and whenever she fenced the plaintiff would demolish it.
19. DW2, Nduta Ndirangu Chege testified for the 1<sup>st</sup> defendant and relied on her witness statement dated the August 28, 2020 which was duly adopted by the court. She informed the court that the plaintiffs plot ownership certificate and the receipt dated the August 26, 1997 were not issued by the 2<sup>nd</sup> defendant. She confirmed that the documents in possession of the 1<sup>st</sup> defendant were genuine. In support of the 1<sup>st</sup> defendants case she testified and informed the court that the 1<sup>st</sup> defendant bought



- the suit land in 1994 and was issued with a clearance certificate in 2009. She stated that the plaintiff visited their offices (2<sup>nd</sup> defendants) seeking that the land be transferred to her but she did not have the documents to support her alleged ownership. That she did not sign the plaintiffs documents and hence were forged. That the receipts of the company are cut from a receipt book and not ordinary papers.
20. With that the 1<sup>st</sup> defendant closed her case.
  21. Neither the 2<sup>nd</sup> nor the 3<sup>rd</sup> defendants lead any evidence during the hearing of the suit.
  22. In its Judgment dated October 29, 2020, the learned magistrate was satisfied that the 1<sup>st</sup> respondent had proven her case. That the appellant and 2<sup>nd</sup> respondent's denial of the 1<sup>st</sup> respondents documents were mere denials to defeat the ends of justice. That though the 1<sup>st</sup> respondent did not proof her first registration, she stood firm in cross examination and further that fraud allegations against her were controverted. In addition, she held that the appellant's counter claim was unproven and proceeded to allow the 1<sup>st</sup> respondent's suit as prayed hence this appeal.
  23. The sole issue for determination is whether this appeal is merited.
  24. In the case before the trial court, the 1<sup>st</sup> respondent bore the burden to prove her case. In analyzing whether or not she did so, the starting point is in her pleadings. According to her plaint and witness statement, the 1<sup>st</sup> respondent was clear that she was a member and shareholder of Nyakinyua Investment Ltd since its incorporation. See para 5 of the plaint. In her list of documents dated March 21, 2019, she listed copies of Pexh.1- 5 and during the hearing (on September 1, 2020) her counsel sought leave to produce the originals in the next hearing date. At the same hearing, PW1 contradicted her pleadings by testifying that she had bought land from David but was given a certificate by Nyakinyua. From the evidence led by PW1 she failed to produce a share certificate to prove that she indeed was a shareholder of Nyakinyua. I have examined the documents produced by her to wit the receipt and the plot ownership certificate but not a share certificate. I find that she did not prove that she was a shareholder/member of the Nyakinyua Investment limited.
  25. The 1<sup>st</sup> respondent led evidence that she bought the land from a man called David. From the record she failed to produce any documents to wit; a sale agreement, transfer in her favour. It is also noted that in her evidence she stated as follows;

“I bought the land and did not do balloting and the land was sold to me by David. I donot know whether David was given the land by Nyakinyua . I was issued land by Nyakinyua. I do not have share certificate for David but I have one in my names. I was not issued with clearance certificate....”
  26. It is clear from the above evidence that the 1<sup>st</sup> respondent failed to table any evidence to support that David had any legitimate interest in the suit land. This would have been in form of a share certificate, ballot number, clearance certificate and a title if he had one. These documents were missing. It is also noted that the said David was never called to testify in court.
  27. DW1 and DW2 evidence to the effect that the plot certificate and the receipt did not emanate from the 2<sup>nd</sup> defendant's company was uncontroverted. It was upon the 1<sup>st</sup> respondent to proof that indeed PW1 and PW2 did sign the documents. It is to be noted that the said documents are not on the letterhead of the 2<sup>nd</sup> defendant and I would agree with the evidence of the said witnesses that there is no evidence that the same did emanate from Nyakinyua Investments Limited. This court has taken cognizance that DW1 and DW2 are directors of Nyakinyua and therefore are familiar with the official documents of the company.



28. In the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR the court stated as follows;

“We state 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.”

29. Even if the plot ownership certificate was to be taken as authentic, the plaintiff had to do more to prove her ownership of the land. The appellant led evidence that she purchased the suit land from Ruth Wambui Mburu in 1994. She produced a share certificate No 6886 in the name of Ruth Wambui Mburu dated the 4/10/94. Had the 1<sup>st</sup> respondent carried out a search at the land buying company she would have discovered that the land was already registered in the name of Ruth Wambui Mburu and was not available for purchase.

30. Another important document that the 1<sup>st</sup> respondent failed to produce in support of her claim was a ballot and the clearance certificate to show that she is the owner of the land.

31. Given the documents produced by the appellant to wit; share certificate in the name of Ruth Wambui Mburu, clearance certificate, ballot, her own share certificate it is the conclusion of the court that the appellant explained the root of her title and which undoubtedly originated from Nyakinyua before being allotted to Ruth Wambui and later the appellant.

32. The 1<sup>st</sup> Respondent had gone further and pleaded fraud. The Court of Appeal in the case of *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another* [1979] eKLR, held that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madbusingh Darbar & another* [2000] eKLR, Tunoi, JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

33. The standard of proving fraud was discussed by the Court of Appeal in *Central Bank of Kenya Limited v Trust Bank Limited & 4 others* [1996] eKLR as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the court rendered itself as follows:

“The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of *prima facie* proof was much heavier on the appellant in this case than in an ordinary civil case.”

34. From the forgoing, it was not enough to plead fraud without tendering cogent evidence to support it. Indeed the trial court stated that though the 1<sup>st</sup> respondent had not proffered evidence, but placed reliance on her firmness in her cross-examination. That alone in my view does not satisfy the criteria set above for proving a case hinged on fraud. Secondly, the 1<sup>st</sup> respondent stated that she reported the matter at the DO’s office but failed to produce evidence to that effect. The court finds that fraud was not proved.



35. Section 26 of the *Land Registration Act* provides as follows;

“26. Certificate of title to be held as conclusive evidence of proprietorship

(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.”

36. It is not in dispute that the appellant holds a title registered in 2011. The law provides the manner in which a title may be challenged. Looking at the evidence placed before the court, I find that the title of the appellant was not successfully assailed by the 1<sup>st</sup> respondent. I did not find any evidence to support the allegations of the 1<sup>st</sup> respondent that the appellant took advantage of her position as a director to fraudulently transfer the land to herself with the help of her co-director, DW2.

37. The upshot is that the appeal is merited. The same is allowed.

38. Final orders and disposal

a. The judgement of the lower court dated the October 29, 2020 be and is hereby set aside in its entirety.

b. The counterclaim is allowed

c. Costs of the suit in the lower court and that of appeal are in favour of the appellant.

39. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 26<sup>TH</sup> DAY OF MAY 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Muthomi for the appellant.

Waithira Mwangi is absent for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Court Assistant - Phyllis.

