



REPUBLIC OF KENYA



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**Mwathe & another v Mukundi & another (Environment and Land
Appeal 3 of 2020) [2022] KEELC 3138 (KLR) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3138 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 3 OF 2020**

BM EBOSO, J

MAY 24, 2022

BETWEEN

LAWRENCE KIRURI MWATHE 1ST APPELLANT

SCHOLASTICA WANGARI KIRURI 2ND APPELLANT

AND

DUNCAN KARANJA MUKUNDI 1ST RESPONDENT

**GITHUNGURI CONSTITUENCY RANCHING COMPANY LIMITED 2ND
RESPONDENT**

*(Being an Appeal arising from the Judgment of the Chief Magistrate
Court at Thika by Hon G. Omodho, Senior Resident Magistrate,
delivered on 28/11/2018 in Thika CMC Civil Suit No 122 of 2011)*

JUDGMENT

1. This appeal arose from a Judgment rendered by Hon G Omodho, Senior Resident Magistrate, on November 28, 2018 in Thika CMC Civil Case No 122 of 2011. The 1st respondent was the plaintiff in the said suit. He sued the two appellants together with the 2nd respondent. The dispute in the suit revolved around the question of ownership of land parcel number Ruiru East/Block 1 (Githunguri)/583 [the suit property]. The trial magistrate made a finding to the effect that the 1st respondent was the lawful proprietor of the suit land. Aggrieved by the Judgment of the trial court, the appellants brought this appeal. I will give a brief background to the appeal before I analyze and make findings on the issues that fall for determination in the appeal.
2. Through a plaint dated 29/3/2011, the 1st respondent [Duncan Karanja Mukundi] sought, among other reliefs, a declaration to the effect that he was the legitimate proprietor of the suit property. He also sought a permanent injunction restraining the two appellants and the 2nd respondent against dealing with the suit property. His case was that he purchased the suit property from one Gerald Gathue



- Kinyati who was the original allottee of the suit property under Share Certificate Number 4371 and Ballot Card Number 267, both issued by the 2nd respondent [Githunguri Constituency Ranching Company Limited]. He contended that upon applying for issuance of a title in respect of the suit property, he discovered that the 1st and 2nd appellants had fraudulently procured a title to the suit property in their names. That is what triggered his suit.
3. The appellants filed an amended statement of defence and counterclaim dated 14/10/2013. Their case was that they purchased the suit property from one Ann Ruguru Gathigi in 2006. They contended that the said seller was the original allottee of the suit property and holder of Share Certificate Number 2569 and Ballot Card Number RW 00266. Upon purchase, they were issued with a clearance certificate which they used to procure a certificate of title in their names. Through the counterclaim, they sought orders restraining the respondents against interfering with the suit property. They also sought a declaration that they were the absolute proprietors of the suit property.
 4. The 2nd respondent filed a defence dated 3/11/2014. Their case was that the 1st respondent was the bonafide proprietor of the suit land. They denied issuing the documents which the appellants were relying on.
 5. At trial, viva voce evidence was taken. The 1st respondent testified as PW1 and closed his case. The two appellants testified as DW1 and DW2 respectively and closed their case. The 2nd respondent [Githunguri Constituency Ranching Company Limited] led evidence by one witness, John Maina Mburu, who testified as DW3. Thereafter, parties filed and exchanged written submissions.
 6. On 28/11/2018, the trial court rendered a Judgment in which it made a finding that the 1st respondent who was the plaintiff in the trial court had proved his case to the required standard. The trial magistrate awarded the 1st respondent the reliefs sought in the plaint. Further, he awarded the 1st respondent general damages assessed at Kshs 300,000. He ordered the appellants to pay the 1st respondent costs of the suit.
 7. Aggrieved by the findings and disposal orders of the trial court, the appellants brought this appeal through a memorandum of appeal dated 16/1/2022. They advanced the following verbatim grounds of appeal:
 1. The learned magistrate erred in law and fact by granting a permanent injunction in favor of the 1st respondent which the 1st respondent did not establish the existence of the elements required for the grant of an injunction.
 2. The learned magistrate erred in law and fact by declaring that the suit property title number Ruiru East Block 1(Githunguri)/583 belongs to the 1st respondent when in fact, the appellants are the legitimate title holders of the suit property.
 3. The learned magistrate erred in law and fact in granting orders for the cancellation of the title to land in respect of the suit property on grounds of fraud when in fact, no evidence of fraud was tendered and that no proof of fraud was ever demonstrated to have been occasioned by the appellants, whether by commission or omission, whether directly or indirectly, or in the process of the appellants' acquisition of the suit property.
 4. The learned magistrate misdirected himself and therefore erred in law and fact by relying on company returns for the 2nd respondent which returns did not accurately reflect the list of members during the material times when the 1st respondent alleges to have acquired his supposed interests in the suit property.



5. The learned magistrate erred in law in finding that the 1st respondent is the rightful owner of the suit property while clearly disregarding the fact that the appellants are the lawful title holders of the suit property.
 6. The learned magistrate erred in law in making a finding that the appellants had trespassed onto their own land.
 7. The learned magistrate erred in law in making an order compelling the appellants to transfer the suit property to the 1st respondent since there was no sufficient cause to warrant such transfer.
 8. The learned magistrate erred in law and fact in having ordered the appellants during the hearing of the matter to surrender to court the original title of the certificate of lease of title number Ruiru East Block 1(Githunguri)/583 ostensibly on the basis that the appellants could have used it in a manner that was adverse to the interests of the 1st respondent.
 9. The learned magistrate's judgement was based on conjecture, speculation and insinuations and the said decision is therefore bad in law, indefensible and has resulted in serious miscarriage of justice as against the appellants.
 10. The learned magistrate erred in law in failing to analyze the issues before him critically, wholly, independently and properly, or at all, that his decision was clearly pre-determined, biased and flawed.
 11. The learned magistrate erred in assigning the quantum of damages.
8. The appeal was canvassed through written submissions dated 5/8/2021, filed through the firm of Japheth Kenvine Felix & Smith Advocates LLP. Counsel condensed the eleven grounds of appeal into the following five (5) thematic issues: (i) Failure by the learned magistrate to frame relevant issues and therefore failure to independently analyze the issues before him; (ii) Was the alleged fraud proved? (iii) Which party should obtain a permanent injunction; (iv) Who is the rightful owner of the suit property; (v) That the learned magistrate erred in assigning the quantum of damages.
 9. Counsel submitted that whereas the 1st respondent's plaint raised issues relating to fraud on part of the appellants; trespass by the appellants; and the relief of a permanent injunction against the appellants, the trial magistrate framed only one issue:- the question as to who is the rightful owner of ballot number 266 who should own the suit property. Counsel for the appellant argued that by framing only one issue, the trial magistrate "convulated" separate issues and joined them into one. Citing order 21 rule 4 of the Civil Procedure Rules, counsel argued that judgments in defended suits ought to contain concise statements of issues and the court ought to state its findings on each issue. Counsel contended that failure to frame more than one issue led to the rendering of an ambiguous Judgment.
 10. On whether fraud was proved, counsel for the appellants submitted that the party alleging fraud had a duty to tender evidence proving the alleged fraud. Counsel argued that failure to frame fraud as one of the issues completely defeated any purported finding on the alleged fraud. Counsel contended that the 1st respondent had failed to satisfy the requirements of section 26 of the Land Registration Act. Counsel argued that the fact that the Directorate of Criminal Investigations advised the 1st respondent to take the dispute to a civil court was evidence that the allegation of fraud had not been established against the appellants. Counsel submitted that the 1st respondent failed to lead evidence to prove fraud on part of the appellants.
 11. On the question as to which party should obtain the relief of permanent injunction, counsel for the appellants faulted the trial court for failing to frame the question of permanent injunction as one of



the issues to be determined. Counsel faulted the trial magistrate for failing to be guided by the law on grant of injunctions.

12. On who is the rightful owner of the suit property, counsel submitted that the 1st respondent failed to prove that he was the rightful owner of the suit property. Counsel contended that the 1st respondent had, in his pleadings, stated that his property was reflected in ballot number 267 while the appellants had stated that their property was derived from ballot number 266. Counsel contended that the appellants had tendered evidence demonstrating how they acquired their title documents and their evidence was not controverted. Counsel argued that the documents exhibited by the 1st respondent could not extinguish the title conferred to the appellants by the certificate of lease exhibited by them.
13. On the contention that the learned magistrate erred in assigning quantum of damages, counsel submitted that the 1st respondent had not demonstrated a basis for the award of damages, adding that in any event, the 1st respondent had failed to prove ownership of the suit land. Counsel contended that the appellants could not be trespassers on their own land. Counsel added that the evidence adduced by the appellants demonstrated that they were innocent purchasers for value without notice and that they had acted in good faith. Counsel urged the court to allow the appeal.
14. The 1st respondent opposed the appeal through written submissions dated December 20, 2021, filed by the firm of Muchoki Kangata Njenga & Co Advocates. Counsel for the 1st respondent submitted that this appeal is incompetent because it was filed out of time and the appellants had failed to present a certificate of delay to explain the delay.
15. On the totality of the appellants' evidence before the trial court, counsel for the 1st respondent submitted that the appellants were unable to explain material aspects relating to their purported purchase of the suit property and acquisition of title thereto, contending that the appellants did not carry out a search at Githunguri Constituency Ranching Company Ltd to confirm ownership of the suit land by Ann Ruguru; the appellants were unable to provide proof of the identity of the said Ann Ruguru; the appellants failed to explain how they identified the suit property; the appellants had failed to present to the court transfer documents relating to the title they hold; the appellants had failed to produce the actual lease which generated the certificate of lease; the appellant had failed to demonstrate whether any survey was done; the appellants had failed to demonstrate that stamp duty was paid to procure their registration as proprietors of the suit property; the appellants had failed to lead evidence by a witness from Githunguri Constituency Ranching Company to verify their documents; the appellants failed to produce evidence of consent of the land control board; and that there were discrepancies in the exact size of the land which the appellants purportedly purchased.
16. On the evidence tendered before the court by Githunguri Constituency Ranching Company, counsel for the 1st respondent submitted that John Maina Mburu who was the chairman of the company tendered evidence which supported the 1st respondent's case. On the Judgment of the trial court, counsel submitted that the trial magistrate correctly applied himself to the facts available and the applicable law and arrived at a correct decision that should not be disturbed by this court.
17. On the grounds of appeal, counsel argued that the appellants had presented generalized complaints against the Judgment of the lower court without pointing out any specific errors or mistakes on part of the trial court. Counsel submitted that the trial court had set out the evidence of the parties in extenso and that the evidence of the 1st respondent consistently explained his ownership of the suit land, adding that the 2nd respondent led evidence which corroborated the 1st respondent's evidence.
18. Counsel for the 1st respondent submitted that the trial court was correct in finding that a title obtained unlawfully is not valid and could only have been fraudulently procured hence liable to cancellation. Counsel added that the lower court was correct in finding that a company acts only through its



registered directors and that the registered directors of a company are the custodians of its documents. Lastly, counsel cited section 80 of the [Land Registration Act](#) and submitted that the trial court had jurisdiction to cancel the appellant's title.

Analysis & Determination

19. I have considered the entire record of the trial court; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. Parties did not agree on a common statement of issues falling for determination in this appeal. Secondly, although the appellants itemized eleven (11) grounds of appeal, they submitted on five thematic issues itemized as (a) to (e). I will analyze and dispose this appeal based on the five thematic issues that the appellants identified and submitted on.

20. The principles upon which a first appellate court exercises jurisdiction are well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of [Susan Munyi v Keshar Shiani](#) (2013)eKLR in the following words

“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.

The above principle was similarly outlined in [Abok James Odera t/a A/Odera & Associates v John Patrick Machira t/a Machira & Co Advocates](#) [2013] eKLR in the following words:

“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. See the case of *Kenya Ports Authority v Kustron (Kenya) Limited* 2000 2EA 212.”

21. The first thematic issue on which the appellants submitted is that the trial magistrate failed to frame relevant issues and, as a result, he failed to independently analyze the issues before him. I have looked at the pleadings, and evidence that were before the trial court. I have also looked at the Judgment of the trial court. It was a long Judgment. It contains summaries of the parties' respective cases and a summary of the evidence tendered by the parties. It also contains an analysis of the key issue. The trial magistrate rendered himself on the key issue falling for determination as follows:

“Having considered the evidence on the submissions the main issue arising is who is the rightful owner of the said ballot number 266 who should own the resultant parcel of land.”

22. The appellants [on one part] and the 1st respondent [on the other part] were waving parallel ballot cards which they contended denoted the suit land. The key dispute in the suit was the legitimate ownership of the suit land. Having identified the above as the key issue, the trial magistrate proceeded to address himself to the question of ownership of the suit land. Reading the above statement on the key issue alongside the analysis of the trial magistrate, this court is satisfied that the key issue in the dispute was ownership of the suit land and that the issue was reasonably identified and analysed by the trial magistrate through the above quoted statement and the analysis that followed. The Judgment does not leave any doubts as to what the dispute was about and what the key issue in the dispute was. I do not, in the circumstances, find merit in the appellant's contention that failure to itemize more than one issue resulted in a miscarriage of justice.



23. The second thematic issue on which the appellants submitted was the question as to whether the alleged fraud was proved. The 1st respondent pleaded in paragraph 6 that upon applying for issuance of a title deed in respect of the suit property, he discovered that the appellants had fraudulently procured a title in their names. There was common ground that the suit land was a subdivision out of a subdivision scheme owned by the 2nd respondent. The 1st respondent led evidence demonstrating that he purchased the suit land from Gerald Gathue Kinyati who was the original allottee of the land under Share Certificate Number 4371 and Ballot Card Number 267, issued by Githunguri Constituency Ranching Company Limited. The 2nd respondent was the owner of the subdivision scheme and custodian of share registers and balloting records. The 2nd respondent led evidence by their chairman. The evidence led by the company confirmed that the 1st respondent was the legitimate owner of the suit land, having purchased it from Mr Gerald Gathue Kinyati. The 2nd respondent disowned the share certificate and ballot card held by the appellants. The 2nd respondent led evidence to the effect that the company was not privy to the title held by the appellants.
24. On their part, the appellants, though claimants in the suit by dint of their counter-claim, did not lead evidence by the vendor who purportedly sold to them the suit land and gave them the share certificate and ballot card they were waving. They did not lead evidence by the alleged director of the 2nd respondent with whom they transacted. They did not lead evidence relating to crucial documents in the generation of the title they were waving, such as consent to transfer and the lease issued by the Government.
25. Given the above circumstances, the court is satisfied that the evidence led by the two respondents properly established that the 1st respondent was the legitimate proprietor of the suit property. Similarly, the evidence sufficiently established that the appellants' title was procured fraudulently. That is my finding on the second thematic issue.
26. The third thematic issue on which counsel for the appellant submitted is the question as to which party should obtain a permanent injunction against the other. The fourth thematic issue is who is the rightful owner of the suit property. I will address the two thematic issues simultaneously because they are intertwined.
27. I have observed in one of the preceding paragraphs in this Judgment that the two respondents in this appeal led evidence which sufficiently established that the 1st respondent was the legitimate proprietor of the suit land and that the title which the appellants were waving was procured fraudulently.
28. The Court of Appeal outlined the following principle about the duty of the holder of a challenged title in *Munyu Maina v Hiram Gathiba Maina* [2015]eKLR
- “We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
29. The appellants bore the above duty, moreso because they had a counter-claim. They are the ones who procured the title they were waving. They alleged that they had procured the title on the basis of documents handed to them by one Ann Ruguru. They elected not to call the said Ann Ruguru as a witness to establish the source of the documents that had been disowned by the allocating company. Similarly, the director alleged to have been privy to the said documents was not called as a witness by the appellants.



30. The conclusion I make from the totality of the foregoing and the totality of the evidence before the trial court is that the evidence led by the two appellants sufficiently established that the 1st respondent was the rightful owner of the suit property. The trial court was therefore justified in granting a permanent injunction to the 1st respondent. Those are the findings of this court on thematic issue numbers 3 and 4.
31. The fifth thematic issue on which counsel for the appellants submitted is that the trial magistrate erred in assigning the quantum of damages. The appellants contended that the 1st respondent should not have been awarded damages because damages were not proved and that the 1st respondent had failed to prove ownership of the suit land. They add that the appellants were innocent purchasers of a title without notice of any defect in the time. I do not agree with the appellant. First the award of Kshs 300,000 was made as general damages for trespass. In my view, the trial court having found that the title documents held by the appellant were fraudulent and that the appellants were trespassers on the suit land, in the absence of any evidence that the appellants purchased a registered title from a supposed registered proprietor, the trial court was justified in making the award. I say so because the appellants did not purchase a registered title. They are the ones who procured the title. They were not able to demonstrate the root of the title. In the circumstances, the award of general damages in the nominal sum of Kshs 300,000 was justified.
32. The result is that this court does not find merit in this appeal. The appeal is rejected. The appellants shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 24TH DAY OF MAY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Odhiambo for the Appellants

Ms Mwangi for the 1st and 2nd Respondents

Court Assistant: Ms Lucy Muthoni

