



REPUBLIC OF KENYA



KENYA LAW
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**Nyamongo v Makana (Environment and Land Appeal
E002 of 2021) [2022] KEELC 71 (KLR) (10 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 71 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E002 OF 2021**

JM KAMAU, J

MAY 10, 2022

BETWEEN

BEATRICE BOSIBORI NYAMONGO APPELLANT

AND

EVERLINE NYAMORA MAKANA RESPONDENT

*(Being an Appeal against the Judgment and Decree of Honourable B.M.
Kimtai Principal Magistrate, Keroka dated and delivered on 19th
day of October 2021, in the original Keroka ELC Case No. 17 of 2019)*

JUDGMENT

- 1 This is an Appeal from the Decision of Hon. B.M. Kimtai, Principal Magistrate, in Keroka Principal Magistrate's Court Case Number ELC 17 of 2019. The date of the Decree is 19/10/2021. From the Complaint dated 20/09/2019 in the lower court the Plaintiff, Everline Nyamoita Nyamongo, sought for a Declaration that she is the registered and/or lawful owner of L.R. No. Matutu Settlement Scheme/1014, and a permanent injunction restraining the Defendant from entering, trespassing onto, cultivating, building on, interfering with and/or in any manner whatsoever dealing with the said suit land. She also prayed for costs and interest. According to the Plaintiff her claim is based on the averment that the suit land was registered in her name on 16/11/2016 but that the Defendant trespassed on the suit premises in the year 2017. On her part, the Defendant vehemently denied the claim of trespass and that of the Plaintiff being the registered proprietor of the suit property and that if the Plaintiff has a Title Deed to the suit property then the same was obtained fraudulently and through misrepresentation. She claimed that the Plaintiff must have forged transfer documents and presented the same to the Land Registrar after removing a caveat lodged by the Defendant and having deceived the initial owner to sign the transfer documents. The Defendant further averred that she had stayed on the suit premises openly and peacefully since her marriage to the late Gilbert Isoe Ongera who died on 27/12/2019 having been initially registered the owner of the suit land and who was even buried



on the aforesaid land. She asks for an order by way of counterclaim that the Court finds that the suit land was fraudulently transferred to the Plaintiff and that the same should now revert to her late husband by cancelling, nullifying and revocation of the Title issued to the Plaintiff on 16/11/2016 and a permanent injunction against the Plaintiff barring and restraining her from interfering with the Defendant's peaceful occupation and utilization of the suit land.

2. The learned trial magistrate condensed the evidence of the parties as follows: -

That the Plaintiff testified that she acquired the parcel of land known as L.R. No. Matutu Settlement Scheme/1014 from its previous owner, the late Gilbert Isoe Ongera at which time the Defendant was present and even signed the sale agreement dated 11/11/2016.

On her part, the Defendant testified that she was not informed that the deceased had sold the suit land in whose sale she did not participate.

The learned trial magistrate then analysed the evidence and concluded that the Defendant did not show in any way that the said transaction was conducted fraudulently and that in fact the Defendant was privy to the same and that she did not do anything to stop the process, she did not register any caution against the Land nor objected to the sale at the Land Control Board. The learned magistrate consequently dismissed the counterclaim and entered Judgment in favour of the Plaintiff as follows: -

“ In conclusion, I wish to enter Judgment for the Plaintiff in the following terms: -

- (a) A Declaration that the Plaintiff (now Respondent) is the registered and/or lawful owner of LR. No. Matutu Settlement Scheme/1014.
- (b) An order of eviction against the Defendant (now Appellant) her agents, and/or servant from LR. No. Matutu Settlement Scheme.1014.
- (c) Permanent injunction restraining the Defendant (now Appellant) either herself, agents, servants and/or anyone claiming under the Defendant (now Appellant) from entering, trespassing onto, cultivating, building on, interfering with and/or in any manner, whatsoever dealing with the suit land LR. Matutu Settlement Scheme/1014.
- (d) Considering the facts in this case each party to bear its costs.”

3. Subsequently, the Defendant has appealed to this court with the following grounds of appeal: -

1. The Leaned Trial Magistrate erred in fact and in law by ably not taking cognizance of the fact that the Appellant was not consulted by the time her late husband was selling their customarily acquired land.
2. The Learned Trial Magistrate failed to exhaustively consider the Appellant's evidence that she legally owns the land she occupies together with her family members.
3. The Learned Trial Magistrate erred in law and in fact by failing to exhaustively consider the Sections of the law as were quoted in the Appellants Written Submissions.
4. The Learned Trial Magistrate erred in law and fact by failing to follow precedents set by many Judgments of the High Court in similar cased in matters that have been determined.



5. The Learned Trial Magistrate generally failed to consider and/or analyse critically the evidence advanced by the Appellant through her testimony.
 6. The Learned Magistrate erred in law and in fact by holding the Respondents Title Deed without properly analysing how the Title was obtained.
 7. In the circumstances, the Learned Trial Magistrate gravely caused a miscarriage of Justice and misdirected himself on the laws governing ownership of land.
4. She then urges the court to grant the following orders: -
- (a) The Appeal herein be allowed and the Judgment and Orders of the Trial Magistrate dated 19th October, 2021 in Keroka MLC & E NO. 17 of 2019 be set aside and/or quashed wholly.
 - (b) The Honourable Court be pleased to substitute an Order dismissing the Respondent's suit in the subordinate Court vide the Keroka MLC & E NO. 17 of 2019 in the entirety and with costs.
 - (c) Costs of the Appeal herein and those incurred in the Subordinate Court be borne by the Respondent.
 - (d) Any such and/or further orders that the Honourable Court shall deem just and expedient in the circumstances.
5. In a nutshell, the Appellant's grounds of appeal are summarised as:
- (i) The trial court did not appreciate that she was not consulted when the land was being sold.
 - (ii) The trial court did not follow the law.
 - (iii) The learned magistrate did not follow precedent.
 - (iv) The court did not dig into how the Respondent obtained the Title Deed to the suit land.
 - (v) The learned magistrate misdirected himself on the laws governing ownership of land.
6. Accordingly, the Appellant seeks the intervention of this court in allowing the appeal and quashing the judgment of Keroka PMCC ELC NO. 17 of 2019, set it aside and substitute it with a dismissal of the lower court Judgment in its entirety. She also prays for costs for both the lower court case and this one as well.
7. We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and re-evaluate it.
8. From the proceedings of the lower court, the Respondent testified that Matutu Settlement Scheme/1014 was sold to her by the husband to the Appellant at a consideration of KShs. 2.4. Million vide an agreement of sale dated 11/11/2016. The Appellant further stated that it was the vendor who came looking for her and extended the offer to her. All parties appeared before the Land Control Board at Borabu, obtained consent and she even produced a copy of the Application for consent in court. The same was produced as Exhibit 2. She later obtained a Title Deed for the land. The Defendant was present when the transaction was taking place and the consideration was deposited in the account of the Appellant's husband. She concluded by saying that the Appellant equally signed the sale agreement.
9. PW2, Eric Mgali, the younger brother to the Appellant's late Husband, corroborated this evidence and said that after his late brother sold the suit land to the Respondent, he bought another parcel of land at Nyabioto and built a house thereon and even married another lady. He sold the land voluntarily.



- On cross-examination, Eric pleaded that the Appellant be given a small portion of the land because the husband is now deceased. On re-examination, he admitted that the land belonged to his late brother, Gilbert and that he had a right to sell it.
10. On her part, the Appellant said that she lives on the suit land. She said that the land was in the name of her mother in-law before it was transferred to her late husband, Gilbert Isoe Ongera before it was bought by the Respondent. Gilbert later hanged himself. She said that she was not a party to the sale contract. Her mother in-law did not assist the Appellant when requested by the latter to give her information on the intended sale. She disowned her signature appended in the sale agreement and also denied that she appeared before the Land Control Board. She admitted that her late husband did not complain of irregular transfer and that he was not forced to transfer the land. On re-examination, she said that she complained about the sale to the C.I.D, Nyaronde.
 11. DW2, Evans Bosire, another brother to the late husband to the Appellant, testified that he did not know that his late brother had sold his land. The latter committed suicide because of domestic issues.
 12. This is the evidence I have pieced from the proceedings of the lower court.
 13. As pointed out above, this being a first appeal, Section 78 of the *Civil Procedure Act*, Cap 21 Laws of Kenya requires that a first appellate court “re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions. This court is under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching its own conclusion in the matter. This was the holding in the case of *Peter M. Kariuki –vs- Attorney General* [2014] eKLR the court held that: -

“We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.”
 14. However, in carrying out this duty this court has to remember that it has no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. It is also a draconian thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanor of witnesses.
 15. Accordingly, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.
 16. An Appellate court will only interfere with the conclusions and findings of a trial court if these findings and conclusions were not supported by evidence or were premised on wrong principles of the law.
 17. In the instant case, I have reconsidered and evaluated the evidence afresh. There is no variation of the evidence I have truncated from the proceedings of the lower Court as compared to the summary made by the Trial learned Magistrate. I have also considered the law and the submissions by the parties in light of the Judgment of the learned trial court, and my considered view is that there is no discernable error on the part of the trial court in its conclusion and Decision. There is no evidence that the findings were based on no evidence or that the trial court applied the wrong principles of law in reaching the conclusions and findings thereon.



18. What are the essentials of a valid contract of sale of an agricultural land such as is the subject matter herein?
19. A contract of sale of an agricultural land in Kenya is valid and legally binding if the following Eight essential elements are present:
 1. Offer.
 2. Acceptance.
 3. Consideration.
 4. Intention to create legal relations.
 5. Legality and capacity.
 6. Certainty.
 7. Consent of the Land Control Board.
 8. The agreement upon which, the sale is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it.

Have the above conditions been met? And if so, what rights do the parties have?

20. Both parties are in agreement that all the above elements have been met save that the Appellant believes that her late husband lacked capacity to enter into the contract.
21. The contract of sale dated 11/11/2016 has not been challenged and the claim of the Appellant's Deceased husband having not been in charge of his mental faculties has not been established. All that came out of the evidence is that he had family issues as a result of which he committed suicide. This is not synonymous with mental incapacity.
22. Section 24(a) of the *Land Registration Act* states as follows: -

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

Sub -Section (b) further states:

“the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.”

23. The rights of a proprietor are enshrined under Section 25 as follows:
 - (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—



- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the unless the contrary is expressed in the register.

24. In the result, I find and hold that this appeal has no merit and is accordingly dismissed with costs to the Respondent.

Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 10TH DAY OF MAY, 2022.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Appellant: Ms. Gogi

Respondent: Mr. Mulisa holding brief for Mr. Ochwangi

