



**Wanjuki v Nyaga (Environment and Land Appeal 5 of 2021)  
[2022] KEELC 3991 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3991 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL 5 OF 2021**

**A KANIARU, J  
JUNE 28, 2022**

**BETWEEN**

**LAURENZIA WANJUKI ..... APPELLANT**

**AND**

**HENRY GITARI NYAGA ..... RESPONDENT**

*(Being an appeal against the Judgment of Runyenjes PM Hon. J.W.  
Gichimu dated 30.3.2021 in Runyenjes MCL & E No. 38 of 2018)*

**JUDGMENT**

1. Before me is this appeal contesting the outcome of the lower court's ruling of Hon JW Gichimu, Principal Magistrate, in Runyenjes MCL & E No 38 of 2018. The appellant– Laurenzia Wanjiku – was the 2<sup>nd</sup> plaintiff in the suit while Henry Gitari Nyaga – was the defendant. The 1<sup>st</sup> plaintiff was Njagi Nyaga and was not a party to this appeal.
2. The lower court case was a consolidation of two suits. The first was ELC 28 of 2016 filed by the appellant together with the 1<sup>st</sup> plaintiff against the respondent. The 1<sup>st</sup> plaintiff stated to be the rightful owner of suit parcel No Kagaari/Weru/540 measuring 11 acres while the 2<sup>nd</sup> plaintiff was said to have beneficial interest over the land by virtue of having lived in the suit land for over 16 years. Their case was that the respondent had illegally and fraudulently been registered as the owner of the suit land. They set out the particulars of fraud in which the respondent was alleged among other things, not to have obtained a consent from the land control board, not have paid the consideration stated in the green card, to have conspired with his mother to remove the 1<sup>st</sup> plaintiff's name from the register and finally that the succession indicated on the register was non-existent. A declaration was sought for the respondent's name to be removed from the title and be replaced with the 1<sup>st</sup> plaintiff's name who was said to be original owner. The parties therein also sought costs of suit and exemplary damages to be awarded to them.



3. The second one was Embu ELC No 20 of 2017 (formerly Kerugoya ELC 116 of 2016) instituted by the respondent against the appellant. The respondent had averred to be the registered owner of land parcel No Kagaari/Weru/540 which land he stated to have acquired from his mother. That he had been issued with title for the land in the year 2009. That however in 2016 he was summoned by the Assistant County Commissioner Runyenjes/Kieni Division to discuss the suit land. He averred that in the meeting he was informed to surrender the land to the defendant but no reasons were given. He resolved to leave the meeting but later conducted a search and realized that the respondent had placed a restriction on the land. In that suit, he sought for a declaration that the restriction placed on the land was illegal, an order for removal of the restriction, general damages, and costs of the suit.
4. This suit was defended by the appellant who filed a statement of defence dated September 2, 2016. The defence was basically a denial of the averments in the plaint save for an admission that the plaintiff had indeed been summoned by the assistant commissioner to confirm whether he had obtained Land Control Board consent in order to obtain the title to the land. It was argued that this case had been filed by the respondent after he had been served with summons to enter appearance in Embu ELC No 28 of 2016.
5. Both suits were consolidated and orders issued on April 19, 2017 for the lead file to be ELC Case No 28. The case was later transferred to Runyenjes for hearing and disposal. According to the court record, the 1<sup>st</sup> plaintiff passed on during the pendency of the trial before the lower court and was substituted by the appellant and one Kenneth Nyaga Njagi. During the hearing only the appellant presented her case as the respondent despite having been duly served with the hearing notice, failed to participate in the hearing. The plaintiff was the only witness and he basically adopted her witness statement and relied on her list of documents in support of the case.
6. The trial court delivered its judgment on March 30, 2021. The court narrowed the case to one issue which was whether the appellant had proven that the respondent's registration was fraudulent to warrant cancellation of the title in his name. The court was of the view that the suit land had been registered in the plaintiff's name in the year 1962 and there had been two subsequent registrations in favour of Patrick Nyaga in the year 1974 and Cecilia Nyaga in the year 1977 prior to the respondent's registration in the 2009, yet according to that court, the appellant had been silent on whether the subsequent registrations were fraudulent as well. The appellant was said not to have asserted his right on the land for a period of over 42 years and finally that he had failed to prove that the respondent's registration was done illegally, unprocedurally or through a corrupt scheme. Ultimately the plaintiff's case was said not to have been proven on a balance of probability and subsequently dismissed with no orders as to costs.
7. That judgment is what prompted this appeal. The appellant being dissatisfied with the decision of the Hon. Magistrate, filed the memorandum of appeal dated April 26, 2021. The appeal has twelve(12) grounds, which are as follows;
  - "1) The learned magistrate erred in law and in facts in not finding that the appellant had proved her case on a balance of probabilities to warrant judgment being entered for her as prayed.
  - 2) The learned magistrate erred in law and in facts in not finding that land parcel number Kaagari/Weru/540 was fraudulently transferred to the respondent.
  - 3) The learned magistrate erred in law and in facts in not finding that the purported transfer of land parcel number Kagaari/Weru/540 was fraudulent and that no consent for transfer from the Land Control board was ever obtained by the respondent from the Land Control Board by the registered proprietor of land parcel Kaagari/Weru/540.



- 4) The learned magistrate erred in law and in facts in not finding that the respondent's registration was illegal, null and void since the previous proprietors had fraudulently acquired the suit land and had no capacity to transfer the land to the respondent herein.
- 5) The learned magistrate erred in law and in fact in not finding that the plaintiffs had proved all elements of fraud as pleaded in the plaint and that the plaintiffs' evidence was not rebutted by the defendant who did not cross examine the appellant or challenge the evidence produced in court.
- 6) The learned magistrate erred in law and in fact in finding that the plaintiff had not proved or alleged fraud against the other proprietors who had previously owned land parcel number Kagaari/Weru/540 and as such she could not successively allege fraud on the part of the respondent who was only registered as the proprietor in 2009.
- 7) The learned magistrate erred in law and in facts in arriving at findings that were against the weight of evidence.
- 8) The learned magistrate erred in law and in facts in not finding that the defendant had obtained the registration of land parcel number Kagaari/Weru/540 fraudulently for lack of Land Board consent for the transfer and registration of the suit in his name.
- 9) The learned magistrate erred in law and in facts in not finding that there was no succession cause done to estate of the late Patrice Njeru Nyaga for transfer of land parcel number Kagaari/Weru/540 by way of transmission to Cecilia Wanjira Nyaga and therefore the said transfer by way of transmission was fraudulent and illegal and subsequent transfer to the respondent was also illegal null and void.
- 10) The learned magistrate erred in law and in fact in no considering the plaintiffs exhibits produced in court and especially the extract of register and letter from the Assistant County Commissioner proving that there are no records of the land control board for the transfer of land parcel number Kagaari/Weru 540 to the respondent.
- 11) The learned magistrate erred in law and in facts in not finding that there was no consideration indicated in the register for land parcel number Kagaari/Weru/540 from original owner to the other proprietors.
- 12) The learned magistrate erred in law and in fact in holding the appellant had not proved her case on a balance of probabilities yet the evidence produced in court was not challenged or rebutted by the respondent and thus it remained as the only credible evidence for the court to consider in making its determination.

Reasons wherefore the appellant prays for orders;

- a) That the appeal be allowed.
- b) That the judgment of Honourable JW Gichimu Principal Magistrate dated March 30, 2021 in Runyenjes MCL & E case number 38 of 2081 be quashed and/or set aside.
- c) That the judgments be substituted with an order allowing the appellant's prayers in the plaint dated April 14, 2016 in ELC Case Number 28 of 2016 in the High Court at Embu.
- d) That the appellant be awarded costs of this appeal and MCL & E Case Number 38 of 2018 in the Senior Principal Magistrate's Court at Runyenjes."



## Submissions

8. The appeal was canvassed by way of written submissions. The appellant filed his submissions on March 16, 2022. He argued out all grounds jointly. He stated that he had beneficial interest over the suit land for reason that he had occupied the land from the year 1963 to 1978. It was said that the registration of the respondent on the suit land was illegal and fraudulent for reason that the respondent did not provide any evidence in order to get registered on the suit land. According to the appellant the respondent did not produce even a letter of consent to prove such registration.
9. The respondent was said to have conspired with his mother to remove one Njagi Nyaga (the 1<sup>st</sup> plaintiff in the lower court suit) from the land registry records and that there was no evidence as to how the respondent had obtained title to the land. It was argued that the burden of proof therefore shifted to the respondent to provide proof of how he acquired the land. The transmission to Cecilia Wanjira Nyaga was said to be fraudulent for reason that there was no succession proceedings filed in court.
10. The allegations on fraud were said to have been proven and further that the case had been proven on a balance of probabilities since her evidence was not challenged or rebutted by the respondent. The court was urged to find that the appeal was meritorious, to quash the decision of the trial court and to award costs of the suit to the appellant.

## Analysis And Determination

11. I have considered the appeal as filed, the lower court record, the pleadings and the submissions by the appellant. This being a first appeal, I am reminded of my duty as a first appellate court, which is to re-evaluate, reassess and reanalyze the evidence in the trial court and draw my own independent conclusion, of course not forgetting that I did not have the privilege to see or hear the witnesses and therefore should give due allowance to that. This duty was well restated in the case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123 where Sir Clement De Lestang stated:

This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally.

Further the court in the case of *Mwangi v Wambugu* [1984] KLR 453, pronounced itself as follows:-

“A court of appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take into account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

12. I have therefore considered this appeal in which the appellant raised twelve (12) grounds of appeal for consideration by this court. I have looked at each ground raised and the grounds to me are basically revolving around the same issues. I am of the view that there is only one issue that can best dispose this appeal which is whether the appellant has proven his case on a balance of probability.



13. The appellant, together with Njagi Nyaga, now deceased filed this suit seeking declaratory orders for the respondent's name to be removed from the title of land Kagaari/Weru/540 and in its place the land be registered in the name of Njagi Nyaga (deceased) who was said to be the original owner of the land. Their case was that Nyaga Njagi, the 1<sup>st</sup> plaintiff in the lower court suit, was the original owner of the land and that the respondent had fraudulently and illegally caused himself to be registered as owner of the suit land. The appellant on his part had stated to have stayed on the land for a period of 16 years and therefore had beneficial interest in the land. They had outlined the particulars of fraud against the respondent who was said to have registered the land without obtaining consent from the Land Control board, that the consideration indicated on the green card was false, that no succession had been undertaken prior to the transmission, and finally that the registration was done without the consent and permission of Nyaga Njagi.
14. Before I determine the merits of the appeal, I find it worthwhile to give a brief history of the ownership of the land based on the copy of green card that has been attached in support of the appellant's case. From the records the suit land was registered in the name of Nyaga Njagi as a first registration on April 17, 1962 and title issued in his favour on March 25, 1974. The ownership then changed and one Patrick Njeru Nyaga was registered as owner of the land on 20.05.1974 and was issued with title to the land on the same day. A further transfer was made in favour of Cecilia Wanjira Nyaga on 16.05.1977 and title issued in her favour on the same day. The respondent is the latest owner of the land having become registered as owner on September 22, 2009 and title issued in his name on September 25, 2009.
15. The suit before the trial court was hinged on allegations of fraud by the respondent who is said to have fraudulently transferred the land to himself without the consent or permission of the alleged owner of the land Nyaga Njagi. It is worth noting that the respondent never participated in the hearing of the suit despite evidence of service to attend to the hearing. However, that notwithstanding the court had a duty to determine the suit on its merits based on the evidence placed before it and in so doing made a determination that the appellant did not prove his case on a balance of probability.
16. As already stated, the appellant in the lower court sought to have the title in the respondent's name cancelled and the same be registered in favour of the appellant. The circumstances under which a title can be cancelled are well set out under section 26 of the [Land Registration Act](#);
- “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.”
17. The appellant in this case is seeking cancellation of the respondent's title on allegations of illegality and fraud on the part of the respondent. The court expressed itself in the case of [Vijay Morjaria vs](#)



Nansingh Madhusingh Darbar & another [2000] eKLR, where 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

18. Further the court in the case of Benson Wandera Okuku vs Israel Were Wakho [2020] eKLR well-articulated itself on the required standard of proof in a case of fraud where it stated as follows :-

“And what about the standard of proof? The plaintiff said he has proved the case on a balance of probability. Is that the standard required in law. Certainly not. The law has been clear all along. In R G Patel v Lalji Makanji (1957) EA 314 the court expressed itself as follows:-

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

19. What can be deduced from the above cases is that a claim based on fraud must be pleaded specifically and the grounds of fraud ought to be proved distinctly. Further the standard required for proof of fraud is higher than balance of probability but slightly lower than proof beyond reasonable doubt. Lastly, the burden of proof in a claim of fraud lies squarely on the one alleging the fraud.

20. From my reading of the case the appellant claim is that the respondent had illegally transferred the land in his name without obtaining the land control board consent; that the appellant’s name was illegally removed from the register, and finally that no succession cause existed to warrant the transfer from one Patrick Nyaga to Cecilia Nyaga.

21. To support her claim, the appellant relied on a letter issued by the assistant commissioner dated August 22, 2017. Apart from that letter there are several other documents produced as evidence in support of the appellant’s case. I will start with the letter drawn by the assistant commissioner Runyenjes Division, dated August 22, 2017. In the said letter the assistant commissioner, confirms that the land initially belonged to Njagi Nyaga and the same was passed on to other owners. It is equally stated that one Cecilia Wanjira Nyaga obtained the land through a court grant acquired in the year 1977. Further that there were no records of Land Control Board consent to support the transfer or at least none had been adduced when the parties were summoned before the court. There is another letter authored by the land registrar, Embu, addressed to the respondent. In the said letter the land registrar requested the respondent to appear before him on a specific date to sort out the complaint made by the appellant, which was that the land belonged to Njagi Nyaga and that he had never sold it to anyone. The other documents are a copy of green card, official search and identity card of the deceased Nyaga Njagi.

22. I have perused these two letters which I consider key in the appellant’s case. From my reading of the first letter it confirms that the respondent indeed was summoned by the assistant commissioner and in the meeting did not adduce evidence to prove that there had been a grant that enabled the transmission in favour of Cecilia Nyaga. The respondent was also said not to have produced documents to prove that he obtained a land control board consent prior to initiating the transfer.

23. Though it appears that the documents were not produced, I am of the view that failure to produce the documents did not prove fraud or illegality on the respondent’s part. The law is clear that he who



alleges must prove. It is my considered view that the onus of proving that the documents did not exist was squarely on the appellant who, save for producing the letters by the assistant commissioner, should have gone a step further to confirm from the land registry the manner in which the said transfers were made. It is evident that issues of transfer are handled at the land registry which is the custodian of land documents. The appellant, if at all convinced that there was fraud, ought to have joined the land registrar as a party to the suit or better still sued the office of the registrar alongside the respondent in order for the land's office to authenticate the truthfulness of the issue.

24. I also find that the allegation that no grant existed or no succession was conducted to enable the transfer from Patrick Nyaga to Cecilia Nyaga was an issue that did not in any way concern the respondent. Such an issue, if it at all existed, then required the appellant to have joined Cecilia Nyaga as a party to this suit for her to defend herself. Merely stating that the grant was not produced does not in itself prove fraud.
25. The second letter on the other hand makes reference to a complaint made by the appellant and its' purpose was merely to summon the respondent to appear and address the complaint but beyond that I do not think it has any purpose and neither does it prove any element of fraud on the respondent's part.
26. I have already stated that the appellant has not proved fraud based on the evidence before the trial court. I also take issue with the fact that the appellant has sued the respondent in this case only yet he seems to suggest that the allegations of fraud emanated from the previous transfers to the land. The suit parcel of land as earlier alluded was first registered in the year 1962 in favour of the deceased, then the land was transferred to Patrick Nyaga in the year 1974, then to Cecilia Nyaga in the year 1977 and finally to Henry Nyaga in the year 2009. As rightly stated by the trial magistrate, the appellant are only challenging the transfer in the respondent's favour but say nothing about the previous transfers. However I note that on ground 4 and 9 of the memorandum of appeal the appellant faulted the trial magistrate for failing to find that the previous owners lacked capacity to transfer the land to the respondent.
27. I have looked at the pleadings before the lower court and I note that the only thing mentioned is that there was no succession done in respect of the estate of Peter Nyaga that enabled the subsequent transmission in Cecilia Nyaga's favour. I have already tackled this issue and I have stated that this allegation was not proved. The appellant at ground 11 equally argues that there was no consideration indicated in the register for the transfer of land from the original owner to the other proprietors. All these issues revolve around the previous owners of the land whom I note were never made parties to this suit.
28. I find that entertaining the allegations against the previous registered owners of the suit would be against the rule of natural justice on right to be heard. The appellant clearly never joined the previous owners or their representatives as parties to this suit and the court is therefore being called upon to condemn them unheard, something that the trial magistrate was right in refraining from doing. Any allegations of fraud or illegality are serious allegations that a court cannot just determine without the knowledge and involvement of the party who is alleged to have committed the fraud.
29. There is the other issue on the time period within which this suit has been brought before the court. From the green card record produced before the court, Nyaga Njagi was the original owner of suit parcel Kagaari/Weru/540 but ceased being the owner in the year 1974 when the land was transferred to Patrick Nyaga. The parties have not explained why they did not file the suit in the said year 1974 when the transfer was made and title issued in favour of another person. The appellant on his part argued that he had been residing on the land for over 16 years. However save for her testimony she did not call any witness to corroborate this. But now she even admits that she is no longer in possession of the land as she ceased being in occupation in the year 1978. The appellant has not stated when exactly they were



seized with the information as to transfer of land from Nyaga Njagi's name to Patrick Nyaga's favour. Though this is not stated, the appellant who is said to have been residing on the land, lost possession of it in the year 1978. I find it curious that the appellant has failed to give an explanation as to the circumstances that led to him losing possession of the land and the silence on it can only mean that there was possibly exchange of ownership of the land which the appellant was probably aware of.

30. Further the deceased cannot be said to have only recently come to learn that his land was fraudulently transferred yet his ownership of the land ceased in the year 1974 when the land was transferred to Patrick Njeru Nyaga. I have already stated that the appellant ceased being in possession of the land in the year 1978. I am certain that the deceased was duly informed when this happened which therefore leaves one in doubt as to why no action was also taken by the owner to even ascertain what would have caused the change in the circumstances. I am of the view that both the appellant and the deceased were being economical with the truth as the evidence before the court suggests otherwise.
31. The trial court was of the view that the appellant had purported to assert his right after 42 years as he had failed to take any action from the year 1974 when the land changed hands until 2016 when they filed the present suit. I agree with the trial magistrate that the appellant had taken quite a long period of time to bring a claim to assert his right before the court. The effect of this is that this suit is statutory barred and in contravention of the provisions of section 7 of the Limitation of Actions Act which that  

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
32. The appellants herein are bringing a claim on recovery of land so many years later after the cause of action arose. The cause of action in this case can be said to have arisen in the year 1974 when the transfer in favour of Patrick Njeru Nyaga was made or the year 1978 when the appellant stopped being in possession of the land. This is an excessively long period for the appellant and the deceased to have waited before seeking to assert their alleged right on the land. The suit before the lower court was therefore a stale claim.
33. The purpose of the law of limitation was stated in the case of *Mehta v Shah* [1965] EA 321, as follows;  

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”
34. This can be said to be a classic case where such purpose comes into play especially relating to the part of the appellant and the deceased. The two seem to have sued the respondent only yet their claim is originally against the previous owners of the land. The said owners have not been sued and neither has the relevant evidence been attached to prove the claim against them. The appellant's claim therefore cannot be sustained in the circumstances, as the appellant cannot purport to bring an action for recovery of land after the 12 year statutory period for recovery of land has lapsed.
35. Having found that the claim by the appellant is statute barred then, this divests the court of jurisdiction to even entertain the claim before it. The issue may not have been addressed by the trial court as the suit was not defended and no one raised it. However issues of jurisdiction can be raised by the court suo moto. I find that this suit is statute barred and the trial court lacked jurisdiction to entertain it. As the trial court had already dismissed the suit, I see no need to interfere with the final findings of the



court and hold that this appeal is dismissed. I equally make no orders as to costs since the respondent did not actively participate in the suit or in this appeal.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 28<sup>TH</sup> DAY OF JUNE, 2022.**

In the presence of the appellant and in the absence of the respondent.

Court Assistant: Leadys

**AK KANIARU**

**JUDGE**

**28.06.2022**

