



REPUBLIC OF KENYA



KENYA LAW
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**Triserve Limited v Manja & another (Environment and Land Appeal
25 of 2020) [2022] KEELC 3319 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3319 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 25 OF 2020**

**JO OLOLA, J
JUNE 16, 2022**

BETWEEN

TRISERVE LIMITED APPELLANT

AND

MURAGE MWANGI MANJA 1ST RESPONDENT

PETER KIMONDO MBUTHIA 2ND RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment and decree of the Honourable N Kariuki dated July 16, 2020 in Nyeri Magistrates Environment and Land Court Case No 80 of 2018; Murage Mwangi Manja v Peter Kimondo & Triserve Limited.
2. The 1st Respondent herein – Murage Mwangi Manja had instituted the proceedings in the Lower Court as the Plaintiff seeking judgment against Peter Kimondo Mbuthia (the 2nd Respondent) and Triserve Limited (the Appellant) for:
 - (a) A declaration that the transfer of land parcel number Ruguru/Gachika/1525 to the 2nd Defendant (the Appellant herein) on September 25, 2014 was null and void;
 - (b) Cancellation of the 2nd Defendant (Triserve Limited) as the proprietor of land parcel number Ruguru/Gachika/1525 and subsequent registration of the Plaintiff as the proprietor of the same;
 - (c) Costs of the suit with interest; and
 - (d) Any other relief which the Court may deem fit to grant.
3. Those prayers, arose from the 1st Respondent’s contention that he had vide an agreement dated June 9, 2013 purchased from the 2nd Respondent herein land parcel No Ruguru/Gachika/1525 measuring



0.101 Ha. at a consideration of Kshs 980,000/=. The 1st Respondent told the Court that the suit land was transferred to his name on July 16, 2013 after complying with all formalities. It was the 1st Respondent's case that subsequently, the suit land was fraudulently transferred by the 2nd Defendant to the Appellant on September 25, 2014.

4. In his Statement of Defence dated October 26, 2015, Peter Kimondo Mbuthia (the 2nd Respondent) denied that he had fraudulently transferred the property to the Appellant. While admitting that he sold the property to the 1st Respondent, the 2nd Respondent contended that the Appellant had required him to deposit the title deed of the property as security for the settlement of an alleged debt.
5. The 2nd Respondent further stated that he had handed over the property to the Appellant under coercion and that the Appellant subsequently without his knowledge or consent did transfer the property to its name fraudulently and illegally. Accordingly the 2nd Respondent sought contribution and/or indemnity from the Appellant.
6. On its part Triserve Limited (the Appellant) denied knowledge of the alleged agreement between the 1st and 2nd Respondent. In its Statement of Defence dated October 27, 2015, the Appellant contended that the 2nd Respondent having delivered the title for the suit property to itself and having executed all the documents, the 2nd Respondent did not have anything to sell to the 1st Respondent.
7. The Appellant further accused the 1st and 2nd Respondent of colluding to tarnish its name asserting that there was nothing fraudulent as the land was transferred to itself by the 2nd Respondent on September 25, 2012. The Appellant further asserted that it acquired the title from the 2nd Respondent and that there was no privity of contract between itself and the 1st Respondent.
8. The matter proceeded for hearing before the Honourable Nelly Kariuki, Senior Resident Magistrate who in a decision rendered on July 16, 2020 found that the transfer of the property by the 2nd Respondent to the Appellant was illegal and thereby gave orders as follows:
 - (a) A declaration is hereby granted that the transfer of land parcel number Ruguru/Gachika/1525 to the (Appellant) on September 25, 2014 was null and void;
 - (b) Pursuant to Section 80 of the *Land Registration Act 2012*, (the Appellant's) name as the proprietor of land parcel number Ruguru/Gachika/1525 is hereby cancelled. The Land Registrar is hereby ordered to effect subsequent registration of the Plaintiff as the proprietor of the same within 30 days from the date of this Judgement;
 - (c) The (1st Respondent) shall have the costs of this suit with interest at Court rates from the date of Judgment till payment in full.
9. Aggrieved by the said determination the Appellant moved to this Court on August 12, 2020 and lodged a Memorandum of Appeal dated August 7, 2020 seeking to have the Judgment reviewed and set aside on the grounds that:
 1. The Learned Trial Magistrate erred in fact and in law in failing to appreciate that the Plaintiff's suit against the Appellant did not disclose a valid and or legal cause of action known to law;
 2. The Learned Trial Magistrate erred in fact and in law in misapprehending and misdirecting herself thereby failing to consider and appreciate the defence of the Appellant as against the Plaintiff's case;



3. The Learned Trial Magistrate erred in fact and in law in failing to find that the Plaintiff had not established a prima facie case against the Appellant. In so doing she ended up shifting the burden of proof to the Appellant.
 4. That the Learned Trial Magistrate erred in taking into account irrelevant matters and failing to take into account relevant matters in that it was clear that the 1st Defendant had never complained against the Appellant to warrant any interference in the manner she did;
 5. The Learned Trial Magistrate erred in speculating on the evidence on record and entertaining hearsay evidence in reaching her conclusion; and
 6. The Learned Trial Magistrate erred in fact and in law in failing to appreciate the issues raised in the case thereby reaching a wrong conclusion on the facts and the law.
10. Following directions given herein on November 17, 2021, it was agreed that the Appeal be canvassed by way of written submissions. I have accordingly perused and carefully considered the Record of Appeal, the rival submissions as well as the authorities placed before me by the Learned Advocates representing the parties herein.
11. A first Appeal is by way of retrial and this Court therefore has a duty to re-evaluate, re-analyse and reconsider the evidence and draw its own conclusion, of course, bearing in mind that it did not see the witnesses testifying and therefore give due allowance for that. As was long stated in *Peters v Sunday Post Limited* (1988) EA, 424:

“Whilst an appellate Court has jurisdiction to review the evidence to determine whether the conclusion of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial Judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate Court will not hesitate so to decide.”

12. In the matter before me, the 1st respondent who testified as PW1 adopted his Statement dated July 10, 2015 as his evidence-in-chief. In the said Statement, he states as follows in the relevant portion:

“That vide the agreement dated June 19, 2013, I bought land parcel number Ruguru/Gachika/1525 measuring 0.101 Hectares at a cost of Kshs 980,000/= which amount the 1st Defendant acknowledged receipt thereof.

That on July 16, 2013 the aforesaid land was transferred to me by the 1st Defendant after adhering to all statutory formalities.

That I have learnt that on September 25, 2014, the 2nd Defendant fraudulently transferred the suit land to itself, the particulars of fraud are spelt out in the plaint herein.

That upon enquiring from the 1st Defendant he stated that he has never sold the suit land to the 2nd Defendant, but had used the title deed as security for a loan which he has already repaid.

That I contend that the aforesaid transfer is unlawful and void and the land should be reinstated into my names and/or in alternative the consideration plus interest should be paid.

That I also pray for costs and any other relief which this honourable Court may deem fit to grant.”



13. On being cross-examined by Counsel for the 2nd Respondent herein, the Record captures the 1st Respondent to have stated as follows:

“I (was) sold the land as per the letter dated July 3, 2013. I do not know about the debt. The transfer was done without my consent. The Defendant got the transfer done by committing himself in writing to the Land Registrar. The question of the title was dispensed with by the letter he did. There was no process done to transfer the land with my involvement. I do not know how my name was deleted from the Register. I do not know how the 2nd Defendant got the title. I do not know how the present title was issued. The 1st Defendant is the one who was selling the land to me. I do not know if he participated in having the 2nd Defendant registered as the owner of the land. I do not know if they had a transaction to ensure the transfer of the land to the 2nd Defendant. I have no evidence of fraud against the 1st Defendant. It is the Court was dealing with respect to the suit land (sic).

When the title deed was not available, the seller committed himself to avail it to the Registrar. It was in my favour that commitment.”

14. And on being cross-examined by Counsel for the Appellant Company herein, the 1st Respondent is captured stating as follows:

“The agreement was between me and the 1st Defendant ... The company was not a party to the agreement. My entry is not signed in the Register because the title deed was never availed by the 1st Defendant to the registrar. I have not produced the letter to the Court. I can produce it.

15. Finally on re-examination by his Counsel, PW1 stated thus:

“The letter indicated July 3, 2013 (sic) shows that the 1st Defendant undertook to produce the original title to the Land Registrar. The 2nd Defendant is sued because they are the ones who wanted to evict me. They were registered as the owners without my knowledge. The 1st Defendant took the 2nd Defendant to the Land Control Board and signed the transfer. That is fraud.”

16. It was apparent from a perusal of the impugned Judgment that on the basis of the above evidence, the Learned Trial Magistrate concluded that the 1st Respondent had been properly and duly registered as the proprietor of the suit land and that as such proprietor, he was entitled to the protection provided for under Section 26(1) of the *Land Registration Act* which exhorts the Courts to take such titles as prima facie evidence that the person named therein is the absolute and indefeasible owner of the land.

17. That much is clear from a reading of Paragraph 9 (Page 3) of the Judgment in which the Learned Magistrate states as follows:

“9. I have looked at the Plaintiff’s list of documents and witness list. The Land Registrar was to be availed as the Plaintiff’s witness. However on during (sic) the hearing of the Plaintiff’s case on September 10, 2019, the Plaintiff opted to close his case without calling the Land Registrar. I have looked at the green card for the suit land opened on September 23, 2009. On September 16, 2013, the Plaintiff was placed in the register with the initials EIE placed next to his details. The entry was not signed like other entries. Without the Land Registrar’s evidence, the Court can only presume that the registration was partly on account of the 1st Defendant’s request pending the submissions of the original title deed and upon being



satisfied by the 1st Defendant's admission that he had received the consideration for the sale. So why was the Plaintiff's name cancelled from the register without his knowledge?"

18. That was, with respect, the wrong question to ask in the circumstances. Having looked at the Green Card on the history of the registration of the suit property and having herself noted that the entry on the Plaintiff's name was not signed like other entries by the Land Registrar and that it was instead placed therein with the initials E.I.E, the Court ought to have asked itself if the 1st Respondent was indeed registered as the proprietor of the land on the said September 16, 2013.
19. In respect of the registration of a new proprietor of land, Section 31 of the [Land Registration Act](#) No 3 of 2012 provides as follows:

“ 31. Production of certificate

- (1) If a certificate of title or a certificate of lease has been issued, then unless it is filed in the registry or the registrar dispenses with its production, it shall be produced on the registration of any dealing with the land or lease to which it relates, and if the certificate of title or the certificate of lease shows all subsisting entries in the register, a note of the registration shall be made on the certificate of title or the certificate of lease.
- (2) Where the disposition is a transfer, the certificate shall, when produced, be cancelled, and in that case a new certificate may be issued to the new proprietor.
- (3) ...

20. Section 33 of the said Act on the other hand provides as follows where the certificate of title is lost, destroyed or cannot be found:

“(1) Where a certificate of title or certificate of lease is lost or destroyed, the proprietor may apply to the Registrar for the issue of a replacement certificate of title or certificate of lease, and shall produce evidence to satisfy the Registrar of the loss or destruction of the previous certificate of title or certificate of lease.”

(2) The Registrar shall require a statutory declaration to be made by all the registered proprietors, and in the case of a company, the director, where property has been charged, the chargee that the certificate of title or a certificate of lease has been lost or destroyed;

(3) If the Registrar is satisfied with the evidence proving the destruction or loss of the certificate of title or certificate of lease, and after the publication of such notice in the Gazette and in any two local newspapers of nationwide circulation, the Registrar may issue a replacement certificate of title or certificate of lease upon the expiry of sixty days from the date of publication in the Gazette or circulation of such newspapers; whichever is first.”

21. In the matter herein, the 1st Respondent had not placed any evidence before the Trial Magistrate that the 1st Respondent's purported registration had been validated by the Land Registrar as required. I was unable to find any provision in law which would authorize the Land Registrar to issue another title pending the production of another one. The 1st Respondent did not provide evidence that it had applied to the Land Registrar to dispense with the production of the original and/or that such a request had been allowed and his failure to call the Land Registrar to verify the authenticity of his purported registration was fatal to his claim to have been registered proprietor of the land as at September 30, 2014 when the title was registered in the name of the Appellant.



22. As it turned out, the 1st Respondent was all along aware even as he paid the purchase price to the 2nd Respondent that the 2nd Respondent was not in possession of the original title to the suit property. That title in his own testimony-in-chief had been committed by the 2nd Respondent to the Appellant over an alleged debt owed by the 2nd Respondent. And while it was doubtful if the Appellant could transfer the land to itself over the failure by the 2nd Respondent to pay the debt, it was the 1st Respondent's testimony during re-examination as captured above that he was aware it was the 2nd Respondent who took the Appellant to the Land Control Board and signed the transfer for the property.
23. From the material placed before me it was apparent that even as he purported to sell the land to the 1st Respondent, the 2nd Respondent knew that he had executed transfer forms for the suit land in favour of the Appellant. That in part explains his failure to testify at the trial to ventilate his position and/or to file a claim for indemnity against the Appellant.
24. In the circumstances herein, I was persuaded that the Learned Trial Magistrate had failed to appreciate the weight or bearing of the evidence placed before her in arriving at the decision dated July 16, 2020.
25. The upshot is that I allow the Appeal and set aside the Judgment of the Learned Magistrate dated July 16, 2020 in so far as the same relates to the Appellant.
26. The Appellant shall have the costs of this Appeal and of the proceedings in the Lower Court.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 16TH DAY OF JUNE, 2022.

In the presence of:

Ms Mwikali holding brief for Nderi for the Appellant

Mr. Kinyua for 1st Respondent

No appearance for 2nd Respondent

Court assistant – Ndung'u

.....

J. O. Olola

JUDGE

