



REPUBLIC OF KENYA



KENYA LAW
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**Kianyaga v Nyabero (Environment and Land Appeal 2 of 2021)
[2022] KEELC 3964 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3964 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL 2 OF 2021**

JM KAMAU, J

JULY 28, 2022

BETWEEN

WILLIAM OSANO KIANYAGA APPELLANT

AND

MATOKE NYABERO RESPONDENT

*(Being an Appeal against the Ruling of Hon. M. C. Nyigeti– PM
Nyamira dated and signed on the 7th day of April 2021 in the
original Nyamira Chief Magistrate’s Court ELC Case No. 35 of 2019)*

JUDGMENT

1. According to the Record of Appeal the Respondent filed a suit in the Chief Magistrate’s Court at Nyamira being CMCC ELC Case No. 33 of 2019 for the following reliefs: -
 - “(i) A declaration that he is the registered and/or lawful owner of the parcel of land known as LR No. North Mugirango/boisanga/934.
 - (ii) An order of eviction against the defendants i.e. the Appellant and 2 other defendants from the above parcel of land.
 - (iii) A permanent injunction restraining the aforesaid persons from entering, re-erecting, trespassing onto, interfering with and/or in any manner dealing with the said suit property.
 - (iv) General Damages.
 - (v) Interest on (iv) above.
 - (vi) Costs of the suit.”



2. The Appellant denied the claim and averred that he and the Respondent fraudulently transferred the suit land while a suit was still pending in court viz. Kisii High Court Civil Suit No. 69 of 2011 and that later this suit was withdrawn by the said Patroba Onserio Mikae and another one was filed and the Respondent was fraudulently registered the owner of the suit land on 30/9/2011. Mr. Mikae then filed a Succession Cause in Kisumu High Court 678 of 2003 and that the suit land was transferred without a court order. The Respondent's evidence was that the Appellant alongside his co-defendants resided on his land LR NO. North Mugirango/Boisanga/934 which measures 4 Acres i.e. 1.6 Hectares which he bought from Patroba Onserio Mikae in 2015. He produced a Green Card but which has not been included in the Record of Appeal. He said he had a Title Deed in respect to the suit land but that when he went to the suit land to take possession he was chased away by the Appellant and his co-defendants in the lower court. On cross examination the Respondent said that when he bought the land it was being used by the Appellant and his co-defendant Johannes Onserio Mikae who were still in occupation at the time of trial. He also admitted that Patroba (the vendor) is a step brother to the Defendant but that he bought the land for value at Kshs. 2,000,000/= and consent to transfer was properly sought and obtained. Stamp Duty was also duly paid. He was aware that the Defendants were in occupation since 2011, four years before he purchased it. The said Patroba Mikae also testified and said that the land was transferred to him through transmission from his grandmother through his mother. He decided to sell the land after being beaten up and chased from the land by the Defendants. He sold it to buy another land elsewhere for the sake of his peace. The Appellant on his part testified that Patroba is his first cousin. He said in his adopted witness statement that the suit land belonged to his late father Kianyaga Osano and that he did not know the Respondent who was a stranger to him. Patroba Mikae is his nephew and did not know how he got Title to the land. On cross examination, the Appellant said that Patroba stole the Title Deed. After giving his evidence his co-defendants gave similar evidence which I did not see the need to reproduce here.
3. This is the summary of the evidence I am obligated to analyse it being a first appeal.
4. I must state from the onset that I would have dismissed this Appeal for want of prosecution but I decided to decide the Appeal in substance and not on technicality. The Appellant did not turn up to prosecute it yet the Respondent filed his submissions and attended court with his Advocate indicating to Court that he wished to rely on his written submissions without highlighting the same.
5. In her judgment, the Learned Trial Principal Magistrate, Hon. Nyigei held that the Respondent obtained Title to the suit land through purchase from one Patroba Mikae who had had it transferred to him by way of transmission in Kisumu Cause No. 678 of 2003 on 10/6/2003. The Grant was never challenged nor revoked and that the trial Magistrate had no capacity to challenge or revoke the Grant. The fact that it was filed and granted in Kisumu and not Kisii where the Appellant preferred is of no consequence. The Learned Principal Magistrate did not detect any fraud in the acquisition of Title to the land and applied Section 24 (a) of the Land Registration Act and Section 26 (1) of the same to dismiss the Appellant's allegations and grant Judgment in favour of the Respondent. She could also not trace any misrepresentation in the process of transfer of the suit land from the original owner, through to Patroba and finally to the Respondent. The court held the Plaintiff's Title as indefeasible where transfer was void of fraud. The Title, according to the lower court, was good and acquired regularly. The court finally ordered that since the Respondent is the absolute owner of the suit land he ought to enjoy all the rights and privileges appurtenant thereto and the Appellant was ordered to vacate the suit land. I have been told to find that the Learned Trial Magistrate erred in law by declaring that the Respondent is the registered and lawful owner of LR No. North Mugirango/ Boisanga/934 and in ordering the Appellant to vacate the suit land within 60 days from the date of Judgment, that the court dwelt on extraneous matters which were not the components of matters before the court, made a



decision against the weight of the evidence on record and that the court did not appreciate the evidence adduced by him and his co-defendants. I am of a contrary opinion to the above sentiments. I have not seen any extraneous matters relied upon by the trial Magistrate and I am satisfied that the court appreciated all the evidence adduced by the Appellant as well as that of his co-defendants, including their witness' statements. The ground of Appeal that the Judgment was against the weight of the evidence on record is farfetched.

6. The upshot of the above is that I am not inclined on interfering with the Judgment of the Lower Court and the Appeal dated 4/5/2021 is hereby dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF JULY 2022.

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Mr. Ogenga for the Respondent

N/A for the Appellant

