



REPUBLIC OF KENYA



KENYA LAW
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**Kitonga v Kamau (Environment and Land Appeal E003 of 2023)
[2025] KEELC 3448 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3448 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL E003 OF 2023**

JM KAMAU, J

APRIL 3, 2025

BETWEEN

JOSEPH MWATHI KITONGA APPLICANT

AND

CHRISTOPHER KIMANI KAMAU RESPONDENT

*(An Appeal from the judgment of Honourable C M Muhoro Senior Resident
Magistrate in Nyahururu C.M. ELC No. 211 of 2018 dated 16th October 2023)*

JUDGMENT

1. The entire judgment of Honourable C M Muhoro Senior Resident Magistrate in Nyahururu Chief Magistrate E.L.C No. 211 of 2018 delivered on 16/10/2023 is the subject of Appeal herein. In the said judgment, the learned trial Magistrate dismissed the Appellant's case against the Respondent with costs. In the suit, the Appellant had claimed in an Amended Plaint dated 26/6/2019 that in the 1980s Musyoka Mwengu was allocated Plot No. 344, Olkalou Salient Settlement Scheme (now Parcel No. Nyandarua/Olkalou Salient/344 by Settlement Fund Trustees and did pay all the requisite Premiums in 1984. The Appellant then purchased the plot from the said Musyoka Mwengu in 1987, was put in possession and, together with his family, settled thereon and built permanent houses on the suit land. He did pay the full purchase price on 13/12/1991 to the said Musyoka Mwengu. He then applied for and obtained the consent to transfer from the Olkalou Land Consent Board. But unfortunately, the Respondent illegally and fraudulently transferred to himself the parcel of land thereof He gave as particulars of fraud the following.
 - a. The Plaintiff avers that upon procuring consent to transfer Musyoka Mwengu executed transfer documents in favour of the Plaintiff as results of which the Plaintiff was documented as the owner of Parcel No. Nyandarua/Olkalou Salient/344 by Settlement Fund Trustees.



- b. The Plaintiff states that on a date and time unknown to the Plaintiff the Defendant unlawfully and without any colour of right and without the knowledge or authority of the Plaintiff purported to illegally and fraudulently acquire Parcel No. Nyandarua/Olkalou Salient/344.
 - c. The Plaintiff avers that he was in the process of registering the transfer of land over Parcel No. Nyandarua/Olkalou Salient/344 when he discovered that the said land had been registered in the name of Defendant who is a stranger to the Plaintiff.
 - d. The Plaintiff further avers that the transaction between him and Musyoka Mwengu before the officials of Settlement Fund Trustees in respect to land Parcel No. Nyandarua/Olkalou Salient/344 were above board and he sought to be registered as the owner of Parcel No. Nyandarua/Olkalou Salient/344 in place of the Defendant.
2. The Appellant therefore made the following prayers.
- a. A declaration that L.R. No. Nyandarua/Olkalou/Salient 344 exclusively belonged to him.
 - b. A declaration that the registration of the Respondent as the Owner of Land Parcel No. Nya/Olkalou /Salient 344 was illegal and unlawful.
 - c. A declaration that the Appellant was entitled to be registered as the owner of Nya/Olkalou / Salient /344
 - d. A declaration that all the entries.
3. In the alternative.
- a. Payment of Kshs. 6,000,000 being the assessed market value of Parcel No. Nyandarua/Olkalou/Salient 344.
 - b. Interest on (a) above at Court rates.
 - c. Any other further relief this Honourable Court deems fit and expedient to grant.
4. In the Respondent's Amended statement of Defence he averred that he was a stranger to the contents of the Amended Plaint and denied all the averments therein save the description of the parties therein and the jurisdiction of the Court to try the said suit. He equally denied the particulars of fraud attributed to him. He said he was the bona fide purchaser of the suit property on which he has been in actual possession and control. In his Reply to Defence filed on 23/7/2018 the Appellant repeated the contents of the Plaint.
5. It is important to note that this matter was initially filed in the ELC Court at Nakuru later on 16/1/2018 it was transferred to the Chief Magistrate's Court at Nyahururu for hearing and determination. The hearing commenced on 11/3/2021 when the Appellant, then aged 61 testified that the Respondent was unknown to him and that he bought the suit land from the late Musyoka Mwengu in 1991 after it had been allocated to him. That a house was built on the suit land before the Respondent demolished it. But that he was still paying rents for the land. Then Musyoka and the Appellant agreed that the latter would pay the purchase price by instalments awaiting the granting of the original allotment letters to the former. He cleared the purchase price on 10/10/1990. The
6. Respondent with the aid of goons destroyed the Appellant's house and trees worth Kshs. 500,000 on 26/9/2014 at 6.30p.m. The Appellant produced the following documents to prove his case;
- i. Invoice dated 4/7/2019



- ii. Receipt dated 29/7/2019
 - iii. Letter dated 21/3/2019
 - iv. Charge dated 15/1/1992
 - v. Transfer dated 23/1/1992
 - vi. Application for consent dated/certified dated 21/3/2019
 - vii. Letter of consent dated 13/12/1991
7. He said that that he bought the Suit Land at Kshs. 13,000 about nine (9) Acres. He also paid Kshs. 77,390/= in 2020 for the discharge. On cross examination Mr. Kitonga said the sale agreement was dated 9/7/1987 and that he was not refunded Kshs. 3,000/= by the Respondent nor did he sign any document to that effect and that he obtained consent to transfer on 13/12/1991, although he did not have the minutes of the Land Control Board. He said that the Respondent's documents were forgeries. On re-examination, the Appellant said that his agreement with Musyoka for the refund of money was on 9/7/1987 and that the other agreement was dated 9/7/1987.
8. PW 2 Phillip Mathama Musyoka, Musyoka Mwengu's son testified that he was a witness to the Appellant purchasing land from his father. The land is in Ndemi and that he was given another land instead of the suit land. The Appellant was accompanied by his wife at the sale. On cross examination Musyoka said he was born in 1957 and that therefore he was 30 years old in 1987. He could tell that the purchase price was 13,000/=. He also witnessed the sale agreement. On re-examination he said that the land the Appellant complained of was at Salient.
9. PW 3 Francis Kariuki Ndirangu, a son to the Appellant said that his father bought plot No. 344 from the late Musyoka. On cross -examination he said that he used to graze on Plot No. 344 and did not know that the late Musyoka had sold the land to any other person. He said he did not know the Respondent.
10. The Appellant having closed his case, the Respondent testified and called one other witness. He first adopted his recorded and filed statement and said that the original allottee of the suit land was the Late Musyoka Mwengu. He said that the late Mwengu had entered into a sale agreement with the Appellant but that the same did not go through since the Appellant did not pay the purchase price in full, which led him into getting into a consent with the deceased. He refunded the money paid by the Appellant. He then got the Consent to transfer form Olkalou Land Control Board and later on used the Title Deed as a collateral. He was unable to cultivate the land since he was staying far away and therefore allowed the neighbours to graze on it. He bought the land on 9/7/1987. He said he got the Title Deed in 1990, fenced and also cultivated thereon until 2013. He produced the following documents to buttress his case.
- i. Copy of title deed.
 - ii. O.B extract.
 - iii. Copy of agreement of refund.
 - iv. Copy of sale agreement.
 - v. Copies of statutory consent and transfer.
 - vi. Copies of receipts of payment.
 - vii. Copy of official search.



- viii. Photographs.
11. In cross examination, the Respondent said he met the Appellant in 1987 and gave him Kshs. 3,000/=. He also said the old number of the Suit Land was 745 and that the two (2) are one and the same parcel of land.
 12. The last witness, Mike Njoroge Ndungu said he knew both parties as well as the late Musyoka Mwengu. He testified that the Appellant had been refunded Kshs. 3,000/= in 1997 by the Respondent. That closed the Defendant's case and judgment followed.
 13. The Court observed that because the agreement dated 11/10/1990 between the Appellant and the late Musyoka Mwengu was after the Respondent had already obtained a Title Deed for the parcel of land then the same has no value. By the time the Appellant obtained Consent from the Land Control Board the Respondent had already obtained one. The Court then concluded that the Respondent had obtained a good Title to the suit land and dismissed the Appellant's case.
 14. Being aggrieved by the said Judgment, the Appellant approached to this Court on the following grounds.
 1. The Learned Magistrate erred in law and in fact in failing to note that the Respondent had produced a transfer of the parcel of land purporting that the suit property had bene transferred before it was purchased.
 2. The Learned Magistrate erred in law and in fact by failing to note that the Consent to transfer the suit property was issued on the 23rd October 1987 while the transfer was done on the 9th July 1987.
 3. The Learned Magistrate erred in law and in fact by failing to note that the purported agreement of sale of the suit property produced by the Respondent was dated on the 17th August 1987 after the transfer had been effected.
 4. The Learned Magistrate erred in law and in fact by refusing to note that the suit property had been allocated to One Kariuki Kwera on the 16th November 1981.
 5. The Learned Magistrate erred in law and in fact by failing to consider that Respondent exhibit produced in Court was Parcel No. Olkalou/Salient/745 and not Olkalou/Salient 344.
 6. The Learned Magistrate erred in law and in fact by failing to not considering the Appellants evidence produced in Court
 15. And prayed for the following.
 - i. That the aforementioned Judgment issued on the 16th October 2023 in Nyahururu C.M.C.C. ELC No. 211 of 2018 be set aside and judgment be entered in favour of the Appellant and Judgment be entered in favour of the Appellant.
 - ii. That the Appellant be awarded the costs of this Appeal and the trial in the Lower Court .
 16. The Appellant was able to show that he has made some payment to the Settlement Fund Trustees including some Kshs. 77,371/= on 28/7/2019. There is also a charge in favour of Musyoka Mwengu, the person from whom the Appellants claims to have bought the land from. The same is dated 15/1/1992. It is in respect of plot No. 344. There is then a latter charge for the same property dated 5/6/1992 in favour of Joseph



17. Mwathi. There is an Application for Consent of the Land Control Board in favour of the Respondent to the Olkalou Board purportedly signed by Musyoka as the Transfer and the Respondent as the Transferee. It is in respect of Plot No.344 nine (9) Acres (absolute). A letter of Consent was then issued on 13/12/1991 in favour of the Respondent. It is indicated that the same was in exchange of 9 Acres. There is also an agreement of sale for the said parcel of land where Musyoka Mwengu, the Vendor has thumb printed and where there are 2 witnesses to the same. It is dated 9/7/1987 and acknowledgment of the balance dated 9/4/1988.
18. On 10/11/1990 Musyoka Mwengu committed himself in writing to transfer Plot No. 344 to the Appellant. The Appellant also produced a letter form the Director of Land Adjudication and Settlement dated 18/2/2020 forwarding a Discharge and Transfer documents among others to the Appellant in respect to Nyandarua North/Olkalou / Salient /344. The same was copied to the County Commissioner Olkalou Land Registrar, a letter from the land Registrar Nyandarua/Samburu dated 6/5/2021 showing the land to belong to Christopher Kamau. The same was copied to Joseph Mwathi Kitonga, the Appellant herein. It has the reference of CM ELC No. 211 of 2018. There is a letter dated 19/10/2006 to District Commissioner Ndithini Division from the District Commissioner, Nyandarua talking of an unnamed parcel of land being sold to 2 different people. There was a follow up letter from the District Officer, Kakuzi Division saying the letter was by mistake and that the land should be transferred to the Appellant. The Respondent produced several documents. First the Title Deed in respect to the suit land showing that it was transferred to him on 26/3/1990, a copy of a letter showing that he gave the Appellant Kshs. 3,000/= being a refund of money paid to Musyoka Mwengu in respect to plot no. 344 in Olkalou Salient Scheme. The acknowledgment is dated 9/7/1987 long before the Appellant obtained a Consent of the Land Control Board. He then obtained Consent for the transfer of the land to himself and a transfer dated 23/10/1987.
18. It appears that the Appellant entered into an agreement with the Respondent to allow the Respondent buy him off and retain the Suit Land. In the alternative the late Musyoka Mwengu may have sold the land to 2 different people and since dead folks tell no tales we cannot verify this. The Respondent transferred the land to himself and I find it difficult to impeach his Title Deed.
19. With the above evidence it is difficult to fault the trial Magistral and I believe that the did address his mind properly to reach at the conclusion he arrived at.
20. I therefore disallow the Appeal but spare the Respondent costs and order that each party bears his own costs.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 3RD DAY OF APRIL, 2025 .

MUGO KAMAU

JUDGE

Ericfor court Assistant

Mr Munyiriri.....for appellant

Mr Gachomofor respondent

