



REPUBLIC OF KENYA



KENYA LAW
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**Ngeny v Saina & 2 others (Environment and Land Appeal 9 of 2021)
[2022] KEELC 13342 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13342 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL 9 OF 2021
MN MWANYALE, J
SEPTEMBER 22, 2022**

BETWEEN

DAVID NGENY APPELLANT

AND

JEMIMA CHEPCHUMBA SAINA 1ST RESPONDENT

NIMROD KIPROTICH SAINA 2ND RESPONDENT

RODAH JEPTEPKENY SAINA 3RD RESPONDENT

(Being an appeal against the judgment and decree of Hon Jacinta Orwa (SPM) delivered on June 29, 2021, in Kapsabet SPMCC No 25 of 2017.)

JUDGMENT

1. The appellant being dissatisfied by the judgment and decree of Hon Jacinta Orwa (SPM) delivered on June 29, 2021, in Kapsabet SPMCC No 25 of 2017 has lodged an appeal before this court.
2. The appellant has listed 9 grounds of appeal in *vide* the memorandum of appeal dated July 19, 2021 and seeks that the appeal be allowed and the respondents counterclaim be dismissed. The appellant further seeks costs of the suit and the counterclaim in the trial court as well as costs of this appeal be awarded to the appellant.
3. The grounds of appeal in the memorandum of appeal dated July 19, 2021 are;
 - i. The learned magistrate erred in law and fact in allowing the counterclaim by the respondents and cancelling the appellants title to land parcel known as Nandi/Ndulele/1150 without ensuring that the respondents had complied with order 21 rule 6 of the [Civil Procedure Rules 2010](#), which in mandatory terms required that the certified extract of the Register of the land be produced before judgment is delivered.



- ii. That the learned magistrate erred in law and in fact in failing to find that alteration of the register of the suit land would not lead to a finding in favour of the respondents but it would revert the land to Hellen Jeptoo who had not been impleaded by the respondents and by proceeding to enter judgement on the counterclaim would be making adverse orders against not only the appellant but Hellen Jeptoo who was not a party in breach of article 50 of the [Constitution of Kenya 2010](#).
 - iii. That the learned magistrate erred in law and fact in finding that fraud had been established against the appellant while the juridical threshold had not been met by the respondents as no witness from the Land Control Board, and the Land Registry were called to substantiate the allegation that Hellen Jeptoo and the appellant were involved in fraud and the allegation of forgery were never substantiated by an expert report or criminal charges being brought against the appellant and Hellen Jeptoo.
 - iv. That the learned magistrate erred in law and fact in failing to uphold the provisions of section 80 (2) of the [Land Registration Act](#), as the appellant had tendered valuable consideration to the acquisition of the land to the late Sarah Job Saina and was in possession of the land while the Respondent had not established the exceptions for the invocation of the remedy of rectification prescribed in law.
 - v. That the learned magistrate erred in law and fact in failing to find that the respondents were obligated by dint of section 112 and 116 of the [Evidence Act](#) cap 80 to refute the claims that the appellant was a purchaser for value of the suit to demonstrate that the appellant's despite being in possession of the land he was not the owner.
 - vi. That the learned magistrate erred in law and fact in failing to find that it was equitable to uphold the application of the [Land Control Act](#) cap 302 and also it was inconsistent with the spirit of section 7 (1) of the transitional and consequential provisions in the sixth schedule to the [Constitution of Kenya, 2010](#), as it would cause unjust enrichment to the respondent who would retain the appellants purchase price and also deprive him of the interest in the suit land.
 - vii. That the learned magistrate erred in law and fact in granting an order of injunction amounting to an eviction against the appellant who was in possession and occupation of the land while the respondents had not sought for relief to obtain possession of the land in tandem with section 41 of the [Land Act, 2012](#), and in failing to uphold the unequivocal term of the sale agreement between the appellant the late Sarah Job Saina in respect of the suit land.
 - viii. That the learned magistrate erred in law and in fact in making contradictory orders in the judgement by requiring that the land reverts to the original owner of whom in the register is Hellen Jeptoo and by decreeing amendment of Land Register to the original proprietor Sarah Ngeny Saina who was never a party to this matter and had no dealing with the land.
 - ix. That the learned magistrate erred in law and in fact in failing to grant the relief sought by the appellant and instead of proceeding to dismiss the counter – claim.
4. The dispute giving rise to this appeal was commenced by way of a plaint dated February 15, 2017 drawn by the appellant as plaintiff acting person.
 5. In his plaint the appellant as the plaintiff therein sought declaratory owners to the extent that he is the absolute owner of land parcel number Nandi/Ndulele/1150 and that the defendants were trespassing on his said property.



6. The defendants entered appearance through Messrs Nyairo & Company Advocates filed a defence and counterclaim. In their defence, they alleged that their late mother Sarah Job Saina had never given up ownership and of the suit property.
7. They pleaded fraud on the part of the plaintiff; in that he misrepresented to the Land Control Board that he had an existing purchase and transfer of land with the deceased Sarah Job Saina.
 - ii) Fraudulently procuring registration in his name without obtaining the consent to transfer.
 - iii) Fraudulently representing to the Land Registrar that there was a valid Land Control Board consent for a transaction between the plaintiff and the deceased.
8. In the counterclaim, the defendants reiterated the defence but in paragraph 14 thereof acknowledged that the late Sarah Job Saina and the plaintiff had entered into an agreement for sale of an unknown parcel of land which sale never materialized.
9. That the plaintiff had demanded payment of the purchase price but at the time of the demise of the late Sarah Job Saina the issue had not been resolved.
10. That without the knowledge and participation of the late Sarah Job Saina the plaintiff proceeded to transfer and register himself as the owner of the land parcel, Nandi/Ndulele/1150.
11. The defendants thus sought the;
 - i. Declaration that the LCB consent, transfer and consequent issue of title No Nandi/Ndulele/1150 was null and void.
 - ii. That the court be pleased to nullify the transfer and issuance of title to land parcel Nandi/Ndulele/1150 to plaintiff
 - iii. The Registrar to rectify the title to reflect the original proprietor Sarah Ngeny Saina.
12. The matter went for trial and by a judgement dated June 30, 2021, the learned magistrate found in favour of the defendants and upheld the counterclaim. It is that decision that had provoked the appeal before this honorable court.
13. Parties were directed to file written submissions in respect of the appeal. The respondent equally pointed out that the record of appeal was incomplete as it had left out their submissions. The court granted leave to the appellant to file a supplementary record of appeal.
14. The appellants submit that the judgment was entered without the respondents complying with order 21 rule 6, by producing a certified copy of the register.
15. The appellant further submits that the suit property belonged to Hellen Jeptoo who had transferred it, to him and not the original proprietor Sarah Ngeny Saina and also known as Sarah Job Saina.
16. The appellant further submits that the trial court failed to uphold the provisions of section 80 (2) of the [Land Registration Act](#); since the defendant had not tendered evidence of fraud.
17. It is the appellant's further submissions that by dint of section 112 and 116 of the [Evidence Act](#), that the appellant was a purchaser for value of the suit land from the late Sarah Job Saina.
18. The appellant equally faulted the court for upholding the application of the [Land Control Act](#). It is their submission this that the [Land Control Act](#) was inconsistent with the spirit of section 7 (1) of the transitional and consequential provision in the 6th schedule to the [Constitution of Kenya](#) and that it



would be unjust enrichment to the respondents who would retain the appellant's purchase price and also deprive him of the interest in the suit land.

19. The appellant further submits that the learned magistrate erred in issuing an injunctive order which was not sought for and the same amounts to an eviction against the appellant; contrary to section 41 of the Land Act.

Respondents Submission:-

20. At time of writing the judgment the respondents submission were not on record despite clear directions issued on June 23, 2022, that submissions were to be filed by July 14, 2022 and judgement reserved for September 22, 2022.

Analysis and Determination: -

21. I have considered the grounds of appeal and the submission in support of the appeal, perused the record of appeal as well as the supplementary record.
22. Whereas the appellant contends that no extract of the register was filed by the respondents before judgment, as required under order 21 rule 6 of the Civil Procedure Rules, however, it is the appellant's who filed the certified extract of register on June 22, 2021, while judgment was delivered on June 30, 2021 and appears as at page 152 and 153 of the record of appeal.
23. The extract does not bear a court stamp, and it is doubtful as to why it was filed late and whether it was in fact considered. In evidence noting that judgment was delivered a week after.
24. The court finds no merit on ground 1 of the appeal and the same must fail.
25. With regard to the grounds of appeal 3, 4, 5 and 6 there is equally no merits in them, save on the strength of the submissions that it would be unjust enrichment to let the respondents have both the suit property as well as the purchase price.
26. Vide paragraphs 14 and 15 of the counterclaim the respondents had admitted a purchase by the appellant but that the same never materialized and no refunds were made.
27. A look at the certified copy of the extract equally suggests that the property belonged to Hellen Jeptoo, and as to the same having been filed only a week before judgment was delivered, the probability that it was not considered in the judgment is overwhelmingly ground 2 of the appeal thus succeeds.
28. In view of the foregoing, I set aside the judgment and decree of Kapsabet SPMCC No 25 of 2017 under the provisions of order 42 rule 26 and order that the suit be conducted a fresh before the Chief Magistrate's Court Kapsabet.

DATED AT KAPSABET THIS 22ND SEPTEMBER 2022.

HON MN MWANYALE,

JUDGE

Delivered in the presence of;

Mr Mogambi for the appellant.

Ms Wahome for the respondent.

