



REPUBLIC OF KENYA



**Njonjo v Nyambura & 2 others (Environment & Land Case E078 of 2021)  
[2022] KEELC 12614 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12614 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E078 OF 2021**

**JG KEMEI, J**

**SEPTEMBER 22, 2022**

**BETWEEN**

**FRANCIS MAINA NJONJO ..... APPELLANT**

**AND**

**NANCY LYDIA NYAMBURA ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH KIBE NGUGI ..... 2<sup>ND</sup> RESPONDENT**

**RUIRU LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the Judgement of the Learned Hon. J. A.  
Agonda (PM) dated 1/10/2021, in Ruiru MC ELC No. 132 of 2019)*

**JUDGMENT**

**The case of the parties in the trial Court**

1. The appeal arises from the Judgement and orders of Hon PM J A Agonda in MELC 132 of 2019 – Ruiru.
2. In the trial Court the Plaintiff who is now the Appellant averred that he is the registered owner of the parcel of land namely Ruiru West Block 1/789 ( suit land) having acquired it from the late Stephen Mwangi Maina who in turn acquired it from Githunguri Constituency Ranching Company Limited pursuant to his membership in the said company.
3. The Appellant has averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents have trespassed onto the suit land without his consent and permission and in violation of his proprietorship rights.
4. Further that the Respondents through fraud processed a duplicate title in 2015 in the name of the 2<sup>nd</sup> Defendant while knowing that the suit property was already registered in the name of Stephen Mwangi Maina. Interalia that two parallel titles were maintained in an attempt to conceal the true original owner



of the land using duplicated and illegally obtained records to process the lease in the name of the 2<sup>nd</sup> Respondent. Consequently, the Appellant sought the following orders;

- a. A declaration that Property Number Ruiru West Block 1/789 belongs to the Plaintiff.
  - b. Permanent injunction against the 1st and 2nd Defendants in any way interfering with Property Number Ruiru West Block 1/789.
  - c. Mandatory injunction against the 1st and 2nd Defendants to remove illegal fence blocking access to property Number Ruiru West Block 1/789.
  - d. General damages for illegal occupation and illegal fencing off of Ruiru West Block 1/789.
  - e. Costs of this suit.
  - f. Any other or further relief as this Court may deem just.
5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent denied the Plaintiff's claim and contended that if the Appellant held any title then the same was fraudulent unlawful and irregular as set out in the particulars of fraud at para 3 of the defence. They stated that the 2<sup>nd</sup> Respondent is the registered proprietor of the suit land having acquired the same by way of sale for valuable consideration. The Court was urged to dismiss the Appellant's case.
6. The 3<sup>rd</sup> Respondent denied the particulars of fraud and sought to put the Appellant in strict proof.
7. The trial Court heard the matter and delivered its Judgement on the 1/10/2021.
8. It is this Judgement that has provoked this appeal. The Appellant is aggrieved and has proffered 15 grounds of appeal as follows;
- a. The Learned Magistrate erred in law and in fact in and acted out of her jurisdiction in allowing a non-existent counterclaim of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as the said counterclaim had not been pleaded or at all as the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had no counterclaim before Court.
  - b. The Learned Magistrate erred in law and in fact when she failed to consider that the pleadings of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were for property number Ruiru/Kiu Block 1/789, which are at variance with the oral evidence tendered which was Ruiru West Block 1/789. These two are different properties in both the title and location.
  - c. The Learned Magistrate erred in law and in fact in holding that the deceased one Stephen Mwangi Maina had no shares of Githunguri Ranching Constituency Limited when oral and documentary evidence was tendered to show otherwise.
  - d. The Learned Magistrate erred in law and in fact in failing to consider crucial documentary evidence filed by the Appellant more so the Transfer Forms, Letters of administration among others all to the detriment of the Appellant, when the said documents were tendered in evidence by the Appellant and the 3<sup>rd</sup> Respondent.
  - e. The Learned Magistrate erred in law and in fact in considering issues not pleaded from the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and relying on the same to cancel and to revoke title of the Appellant and to award Respondents prayers not sought in the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pleadings when the law is clear that parties are bound by their pleadings.
  - f. The Learned Magistrate erred in law and in fact when she found that the Appellant did not prove that he was a bona fide purchaser for value without notice of Title No. Ruiru West Block



1/789 and further that the suit land is now registered as Ruiru /Kiu Block 1/789 when there was no evidence at all.

- g. The Learned Magistrate erred in law and in fact in finding that the Respondents proved fraud and irregularities against one Stephen Mwangi Maina while none was pleaded as against the plaintiff as the defence pleaded particulars of fraud against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and none was proven or at all against the Appellant and further failed to consider evidence by the Appellant that clearly proved fraud and irregularities against the Respondents.
  - h. The Learned Magistrate erred in law and in fact when she made a finding that the Appellant failed to establish the root of the title which was issued in 2003 to Stephen Mwangi Maina when the Appellants evidence proved to the contrary and further the Court placed too much reliance on the register extract without seeing the register itself and without caution that this was a private document only in the hands of DW3 and not found anywhere else and the said private documents can easily be changed in favour of the Respondents.
  - i. The Learned Magistrate erred in law and in fact in failing to find that the evidence of the 1<sup>st</sup> Respondent was at variance with the evidence of DW3 which evidence was very crucial in establishing the root of the title of the 1<sup>st</sup> Respondent.
  - j. The Learned Magistrate erred in law and in fact by failing to find that on the basis of the oral and documentary evidence placed before the Court, the Appellant is the only lawful and duly registered proprietor of Title No. Ruiru West Block 1/789.
  - k. The Learned Magistrate erred in law and in fact in reaching the draconian decision to cancel the Appellant's title deed on the uncorroborated testimony of the Respondents and more so by holding that the 2<sup>nd</sup> Respondent was the rightful owner of the suit land.
  - l. The Learned Magistrate erred in law and in fact in holding that the 1<sup>st</sup> Respondent was the original shareholder of the suit land which measures 1/8 acre while in fact the person she allegedly got it from and who wasn't proved to be shareholder of Githunguri Ranching Constituency Ltd or at all wasn't in the register by the name Gichuru Gathu had balloted for land measuring ¼ acre (double the size of the suit land) and which the 1<sup>st</sup> Respondent allegedly took over.
  - m. The Learned Magistrate erred in law and in fact in holding that the suit land Ruiru West Block 1/789 was available for allocation and issuance of lease to the 1<sup>st</sup> Respondent in 2015 when there existed a free-hold title issued in 2003.
  - n. The Learned Magistrate erred in law and in fact in holding that the 1<sup>st</sup> Respondent legally and procedurally transferred the suit land to the 2<sup>nd</sup> Respondent when there was no consent from the Head lessor and when evidence was clear that the Respondent acted in collusion all aimed at denying the Appellant the suit land.
  - o. The Learned Magistrate erred in law and in fact in holding when she reached a finding to the extent that Stephen Mwangi Maina abused his influential position as a director of Githunguri Ranching Constituency Ltd by allocating himself the property of the first Defendant when there was absolutely no evidence at all to support the allegations and it was clear Stephen followed all processed and procedures in acquisition of his title.
9. The Appellant sought the following orders;
- a. The appeal be allowed



- b. The Judgement and consequential orders made by the trial Magistrate be set aside.
  - c. That the suit ELC No 132 of 2019 be fully allowed for the plaintiff therein.
  - d. Costs of the appeal be provided for in favour of the Appellant.
10. The appeal was canvassed by way of written submissions which I have read and considered. The firm of Njonjo Okello & Associates filed written submissions on behalf of the Appellant while the Respondents did not file any. That notwithstanding the Court will determine the appeal based the material before it.
  11. The Appellant recounted the genesis of the suit and summary of the evidence adduced in the trial Court. He itemized ten issues for determination and highlighted various issues as contained in the pleadings and the impugned Trial Court's finding on them. The Appellant reiterated that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' statement of defence did not contain any counterclaim and their reference to title no Ruiru Kiu Block 1/789 is distinct from the Appellant's parcel of land known as Ruiru West Block 1/789 (hereinafter referred to as the suit land) as pleaded in his plaint dated 24/9/2019. Further the Appellant faulted the trial Court's decision to cancel his title when there was no such prayer before it by way of pleadings and evidence.
  12. The Appellant submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' pleas on fraud were particularized against the Respondents and in any event, they were not proven to the required standard. He maintained that he lawfully acquired the suit land from the late Stephen Mwangi Maina a former member and chairman of Githunguri Ranching Constituency Ltd. The Appellant invited this Court to examine the evidence of DW3 that confirms that the Appellant did not have a share certificate in his name having bought the suit land from Stephen and a title issued thereof. On the issue of lack of transfer forms for the suit property, the Appellant referred this Court to page 142 of the Record of Appeal containing the application by the Stephen's personal representative to be registered as the owner of the suit land and the subsequent transfer thereof.
  13. Additionally, the Appellant submitted that he was a bona fide purchaser for value without notice having bought the suit land from Stephen vide a sale agreement dated 17/7/2009 for consideration of Kshs. 650K but unfortunately Stephen died in November 2009 before effecting transfer to the Appellant. That the transfer would later be completed by Stephen's widow who was appointed as administrator of Stephen's estate after a variation agreement was signed between the Appellant and the administrator. The said transfer resulted in the issuance of title on 6/6/2016 in the Appellant's name. The Appellant concluded that his appeal is merited and urged the Court to allow his appeal as prayed.

#### **The duty of the first Appellate Court**

14. It is the duty of the Court being the first appeal to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
15. In the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions



though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”

16. Powers of appellate Court are set out in Section 78 of the *Civil Procedure Act* as follows;

“Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power:

  - a) to determine a case finally;
  - b) to remand a case;
  - c) to frame issues and refer them for trial;
  - d) to take additional evidence or to require the evidence to be taken;
  - e) to order a new trial.”
17. Under the above duty I have perused the proceedings of the trial Court and the record of appeal and the claim of the Appellant as I understand is twofold; trespass by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and secondly the alleged fraud against all the Defendants in the manner the title currently in the name of the 2<sup>nd</sup> Defendant was registered.
18. In the circumstances the issues arising therefrom and that fall for determination are set out below;
  - a. Did the Appellant prove trespass on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants?
  - b. Did the Appellant prove fraud on the part of the Defendants?
  - c. What orders should the appellate Court issue?
  - d. Costs of the appeal.
19. It is not in dispute that the suit land’s origin is from Githunguri Constituency Ranching Company Limited (Githunguri). It is not in dispute that the Appellant and the 2<sup>nd</sup> Respondent hold titles for the same parcel of land but under two different land tenures. The Appellant has a freehold title while the 2<sup>nd</sup> Respondent holds a leasehold title.
20. It is the Appellants claim that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have trespassed onto the land without his consent and permission and fenced off the same. It is clear from the evidence that though the Appellant claims to have purchased the land in 2009, he has not practically managed to take possession of the same. In his own pleadings he stated that he obtained title in 2016 and thereafter attempted to construct a temporary house for his worker when he was stopped by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
21. Trespass is defined simply as the unauthorised entry into another’s land. In order for the Appellant to prove trespass he must prove the following;
  - a. The Appellant has a legal interest/owner or tenant or occupier of the land
  - b. There was entry to the Appellants land
  - c. The entry was without the Appellants consent
22. Section 3 of the *Trespass Act* provides as follows;

“(1) Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on,



private land without the consent of the occupier thereof shall be guilty of an offence.

- (2) Where any person is charged with an offence under subsection (1) of this Section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”

23. For the Appellant to assert the claim of trespass he must demonstrate that he is the owner and or occupier of the suit land. The Appellant led evidence that he purchased the suit land in 2009 from one Stephen Mwangi Maina (Stephen) and produced an agreement of sale dated the 17/7/2009 at the consideration of Kshs 650,000/-. That the delay in completing the transaction was occasioned by the demise of the said Stephen the same year necessitating the commencement of the succession his estate. He finally became registered as owner of the suit land in 2016. It was his evidence that Stephen was a member and official of Githunguri and balloted for the land by virtue of his shareholding and membership in the Company and got ballot No 789. He produced documents in support such as; title in the name of Stephen dated the 19/11/2003; green card for parcel No 789 receipts showing that Stephen became registered as such on the 9/10/2003; survey fee receipt dated the 9/9/91; transfer fees dated the 21/5/2003; clearance certificate dated 11/6/2003; share certificate No 038 issued on the 15/8/2002 clearance certificate dated the 7/11/2003 ; certificate of search dated the 11/8/2015 in favour of Stephen.
24. The 1<sup>st</sup> and 2<sup>nd</sup> Defendant contended that the suit land is registered in the name of the 2<sup>nd</sup> Defendant and that if the Plaintiff has any title the same was obtained in a fraudulent manner.
25. For the Appellant to assert title to the land he must lead evidence to show that he is either an owner or an occupier of the land. Section 107 of the *Evidence Act* states that whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
26. Evidence led by the Land Registrar clearly shows that there are two registers over the same suit land; the Appellant holds a free hold title while the 2<sup>nd</sup> Defendant holds a leasehold title. It is trite that in Kenya only one piece of land must have one title. Double allocation of registration numbers is prohibited in law.
27. Back to the acquisition of land from a land buying company, it is now trite that the process is as follows; one buys shares in the land buying company; makes payment and obtains receipts for the shares; pays for survey and other ancillary activities; is issued with a share certificate; name is entered in the register of members; once the subdivision of the land is completed paid up members are invited to ballot; balloting takes place; and a member picks the ballot which is the plot No. according to the subdivision on the ground; is shown the plot; occupies and or carries on with the activities on the land as they await the processing of titles.
28. For the Land Registrar to issue a title to a land owner the following must be produced; transfer duly executed; land control board consent; clearance certificate from the land buying company; members register *interalia*.
29. In this case it is noted that the Appellant failed to produce before the Court a members’ register showing that the said Stephen was a member of the Company and in addition the ballot. It must be stated that the ballot is a fundamental document of ownership as it bears the plot number that the member balloted and in most cases it is the land reference number given that by the time balloting is being done the registration of the plots are complete. It also shows that the survey of the land has been



done and the plot number which is required for titling. Where a member sells the plot before titling, the original ballot forms the key documents that are handed over to the new holder of the land.

30. There is therefore no evidence that the said Stephen held a ballot for the suit land. Neither do the receipts on record for the various payment make any reference to the suit land. There is no evidence to show that Stephen was a member of the company. The Appellant having failed to support that Stephen sold him a good title he cannot be heard to say that he obtained a good title. Needless to state that the Appellant has not shown the steps he took to investigate the title of Stephen at the land buying company, a step that was very critical in ensuring that he secures his title.
31. The Appellant having proved title to the land and or occupation to the same, the Court answers the issue in the negative.

**Did the Appellant proof fraud on the part of the Respondents in the manner that the title in the name of the 2<sup>nd</sup> Respondent was registered?**

32. The Appellant has averred that the Respondents registered a title in 2016 while knowing that there existed a title in the name of Stephen issued in 2003; Further that the title issued in 2016 created a parallel register. The Land Registrar did confirm that indeed there two titles and urged the Court to determine which of the two is authentic.
33. The 1<sup>st</sup> Respondent explained that ballot No 789 belonged to her father Gichuru Gathu having balloted in 1983 and became a member of Githunguri (share certificate No 2474). She produced an assortment of payment receipts made by the said Gathu for various purposes ranging from survey fees, title deed preparation interalia from 1983 – 1994. She also produced the ballot No 789. She stated that her father gave her the land upon which they visited the offices of Githunguri to effect the changes from her father to her name in the register. This evidence was supported by DW3, the Chairman of Githunguri who attested that he knew that ballot No 789 belonged to Gichuru Gathu who died in the year 2000. A member's register of the company showing the 1<sup>st</sup> Respondent registered against the ballot No 789 was produced by the DW3. This evidence was not rebutted by the Appellant.
34. The 1<sup>st</sup> Respondent produced a lease in her name and a title as seen in the green card for the suit land. The Land Registrar informed the Court that between 2000 – 2009 the plots in Ruiru West were held in freehold tenure but thereafter the policy changed and on direction from the Ministry of Lands Head office they begun issuing leasehold titles in consideration for the surrender of freehold to the County Government of Kiambu. This explanation is believable given that the title held by the 1<sup>st</sup> Respondent was issued in consideration of subdivision and surrender of freehold title.
35. Evidence was led by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant that the land was transferred to the 2<sup>nd</sup> Respondent on the 10/9/2015 and a title issued on even date.
36. It is the finding of the Court that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have clearly explained how the title was registered and there is no cogent evidence led by the Appellant to suggest the contrary. It is the finding of the Court that the root of the 2<sup>nd</sup> Defendant's title has been established right from the issuance of the ballot in 1983 to the current title and for that reason the Court answers the second issue in the negative.
37. Having established that the title of the Appellant was obtained in an irregular manner what should the Court do? Section 26 of the *Land Registration Act* provides how a title may be impeached that is on ground of fraud or misrepresentation to which the person is proved to be a party; where the Certificate of Title has been acquired illegally unprocedurally or through a corrupt scheme.



38. In this case the title of the Appellant is not anchored in law, its root having not been explained the same is a good candidate for cancellation under Section 80 of the Land Registration Act which provides as follows;

“ 80

- (1) Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

39. With respect to whether or not the Respondents raised a counterclaim in the lower Court the answer is no however the Respondents challenged the validity of the Appellants title in their statement of defence as having been obtained irregularly, illegally and or through a fraudulent means. The Court has agreed with the Respondents that to the extent that the Appellant has failed to explain the root of its title in his possession, that the said title cannot be allowed to stand. In the interest of justice the title together with the register be and is hereby declared cancelled as the same cannot serve any legitimate purpose.

40. In the end I make orders as follows;

- a. The appeal has no merit. It is dismissed.
- b. The suit in the lower Court is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
- c. The title in the name of the Appellant be and is hereby cancelled.
- d. I make no order as to costs in favour of the Respondents for having failed to comply with orders to file written submissions.

41. Orders accordingly

**DELIVERED, DATED AND SIGNED AT THIKA THIS 22ND DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Njonjo for Appellant

Ms. Swaka HB Njenga for 1st and 2nd Respondents

3rd Respondent - Absent

Court Assistant – Phyllis Mwangi

ELCA E078.2021-THIKA 5Jof 5

