



**Maingi & 3 others v Ndumi & another (Environment and Land Appeal  
60 of 2019) [2022] KEELC 4861 (KLR) (19 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4861 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 60 OF 2019  
CA OCHIENG, J  
SEPTEMBER 19, 2022**

**BETWEEN**

**PATRICK MULWA MAINGI ..... 1<sup>ST</sup> APPELLANT  
MUTHOKA MUYO ..... 2<sup>ND</sup> APPELLANT  
MUTUKU NZUKI ..... 3<sup>RD</sup> APPELLANT  
KYALO NZUKI ..... 4<sup>TH</sup> APPELLANT**

**AND**

**IRENE NDUMI ..... 1<sup>ST</sup> RESPONDENT  
JEFFERSON MUSYOKA PAUL ..... 2<sup>ND</sup> RESPONDENT**

*((Being an Appeal from the Judgment of Machakos Chief Magistrate's Court in Civil  
Case No. 793 of 2013 delivered on 31st October, 2019 by Hon. E.H. Keago -(SPM)))*

**JUDGMENT**

**Introduction**

1. By a Memorandum of Appeal dated the November 22, 2019, and amended on March 2, 2021 the Appellants appealed against the whole Judgment delivered by Hon E H Keago (SPM). The genesis of this Appeal is the Judgment of the Senior Principal Magistrate Hon E H Keago in Machakos CMELC No 793 of 2013 Irene Ndumi & Jefferson Musyoki Paul Vs Paul Mulwa Maingi & 3 Others, delivered on October 31, 2019, where the trial court proceeded to dismiss the Defendants' Counter-claim and entered Judgment for the Plaintiff as per the prayers sought in the Plaint.
2. The Appellants being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated November 22, 2019 which was subsequently amended on March 2, 2021.
3. The Amended Memorandum of Appeal contains the following grounds: -



1. The Learned Trial Magistrate erred in Law and Fact by making a finding that the Respondents are the owners of parcel of land No Mavoko Town Block 3/4412 and that the Appellants occupies the same without any right.
2. The Learned Trial Magistrate erred in Law and Fact by failing to consider that the Respondents herein acquired the Title Deed over Parcel of Land Mavoko Town Block 3/4412 fraudulently through non-disclosure of material facts and without following the due process procedure envisaged in law since there was an Appeal pending for Hearing and Determination before the Commissioner for Co-operative Development. Being appeal No 338 of 1995.
3. The Learned Trial Magistrate erred in Law and Fact by failing to consider that the Respondents herein were not and had not been in occupation and/or possession of the Parcel of land Mavoko Town Block 3/4412 since the year 2008.
4. The Learned Magistrate erred in Law and Fact by failing to consider the evidence on record and documents adduced by the Appellants as Exhibits in support of his case during trial.
5. The Learned Magistrate erred in Law and Fact by failing to consider the submissions by counsel for the Appellant.
6. The Learned Trial Magistrate erred in Law and fact by failing to consider that the Appellants herein is and has been in occupation and/or possession of the Parcel of land No Mavoko Town Block 3/4412 since the year 2008.
7. The Learned Trial Magistrate erred in law and fact by making a finding that the Respondents are the owners of the Parcel of Land No Mavoko Town Block 3/4412 and that the Respondents had made a prima facie case for an Order of Permanent Injunction.
8. The Learned Trial Magistrate erred in law and fact by failing to consider that the Parcel of Land Mavoko Town Block 3/4412 was exercised from plot No 294 within Lukenya Ranching and Farming Co-operative Society Limited and that it was not part of Plot No 295 within the said Society.
9. The Learned Trial Magistrate erred in law and fact by failing to consider the History of the Parcel of Land No Mavoko Town Block 3/4412 before its Ownership by the Appellants and the Respondents.
10. The Learned Trial Magistrate erred in Law and fact by failing to consider that the Appellant was an innocent purchaser for value without Notice of his Portion of Land in the Parcel of Land No Mavoko Town Block 3/4412.
11. The Learned Trial Magistrate erred in law and fact by failing to consider the Statement of the Defence of the Appellants.

**Reasons Wherefore, the Appellants pray that the Appeal be allowed and the Judgment of the Lower Court be set aside and the Court do substitute the same with its own Judgment.**

4. The Appeal was canvassed by way of written submissions.



## Submissions

### Appellants' submissions

5. The Appellants in their submissions provide a history of Land Parcel No Mavoko Town Block 3/4412 which was the fulcrum of the dispute in Machakos CMELC No 793 of 2013 and is subject of this Appeal. They explain that Mavoko Town Block 3/4412 is a resultant sub-division of Plot No 295 Lukenya Ranching and Farming Co-operative Society Ltd. Further, that the said Plot No 295 which was subdivided into three (3) Portions to wit: Mavoko Town Block 4412, 4413 and 3174 respectively was originally registered in the name of Mbula Koti (deceased). They contend that Plot No 295 Lukenya Ranching and Farming Co-operative Society Ltd had been subject to an arbitration wherein John Koti Sanga was directed to split the said Plot No 295 belonging to his wife Mbula Koti (deceased) into two (2) equal parts. Further, he was to retain half the share and transfers the remaining half to Makau Mbili. There was an Appeal lodged against the said Award, in 1995 with the Commissioner for Co-operatives Development which was yet to be determined. The Appellants claim that the Respondents fraudulently caused subdivision of Plot No 295 and processed the Title Deed to Parcel of Land No Mavoko Town Block 3/4412 amongst other Title Deeds. They aver that the Appeal herein has merits and the Court should allow the same and set aside the Judgment of the Lower Court and substitute the same with its own Judgment. They argue that the trial Magistrate did not critically analyze and interrogate the issue of possession by the Appellants' of Plot No 295 Lukenya Ranching & Farming Co-operative Society Ltd since the year 1999 and 2000 and the possession by the family of Mbula Koti (deceased) since the year 1991. Further, that possession is one of the overriding interests recognized by the Land Laws. They reiterate that the Certificate of Title for Mavoko Town Block 3/4412 was obtained fraudulently and through corrupt means by the Respondents as the Appeal had not been concluded in the year 2004 when the said Respondents illegally caused the Register to be opened, subdivided the Plot No 295 and fraudulently processed the Title deed to Parcel of Land No Mavoko Town Block 4412, 4413 and 3174 respectively. Further, that the Trial Magistrate therefore failed to consider that the Respondents did not explain the procedure they adhered to, in acquiring the Title Deed to the parcel of land No Mavoko Town Block 3/4412 whose Mother title Plot No 295 Lukenya Ranching and Farming Co-operative Society Ltd was owned by Mbula Koti (deceased), while the root of the Title Deed was being challenged by the Appellants in their Pleadings, Counter Claim and evidence before the Trial Court. In their further submissions, they stated that the Appeal was filed within time.
6. To support their averments, they relied on the following decisions: *Mayube vs Nyamuro* (1983) KLR 403; *Jason Masai v Masai Kipsamii* [1997] eKLR; *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR; *Benson Mogeni Arita (suing as the personal representative of Stephano Mogeni Arita - Deceased v Abel Karura Tineka & 7 others* [2017] eKLR; *Jennifer Kobilu Kandie Vs James Ondieki* (2019) eKLR; *M'bechi Nkandau & 19 Others Vs Attorney General & 3 Others* (2019) eKLR; *Raphael Kahindi Kawala Vs Mount Elgon Beach Properties Limited* (2018) eKLR; *Patience Abaid Tsuma Vs Asha Said Tuaba* (2022) eKLR; *Eye Company (K) Limited V Erastus Rotich t/a Vision Express* (2021) eKLR; *Jonathan Nzioka Mutiso Vs Nzuki Mwinzi & Another* (2020) eKLR and *June Christine Nyamoita Odhiambo V Jamii Bora Bank Ltd t/a Kingdom Bank Ltd & Another* (2021) eKLR.

### Respondents' Submissions

7. The Respondents in their submissions insist the suit property was transferred into their names legally and the Judgment in the trial court was validly entered. They contend that the Appellants claimed they acquired the suit property through fraud but never pleaded the particulars of fraud. Further,



that the Appellants never tendered any evidence to that effect. It is their contention that the primary complainant in this matter ought to have been the family of John Sanga Koti who purportedly filed an appeal that has never been determined and not the Appellants' who claim as third parties by dint of an alleged purchase from the family of John Sanga Koti. They insist that the arbitration decision where parcel No 297 was divided between the families of Makau Mbili and John Koti Sanga, was never overturned. They reiterate that the Appeal was filed out of time. To buttress their averments, they relied on the following decisions: *Kuria Kiarie & 2 Others V Sammy Magera* (2018) eKLR; *Mellen Mbera Vs James Theuri Wambugu* (2020) eKLR; *Abubaker Mohammed Al – Amin Vs Firdaus Siwa Somo* (2018) eKLR and *Charles Karanja Kiiru Vs Charles Gitthinji Muigwa* (2017) eKLR.

### **Analysis and Determination**

8. Upon consideration of the Amended Memorandum of Appeal, Record of Appeal, Supplementary Record of Appeal and the rivalling submissions, the following are the issues for determination: Whether the Respondents acquired title to land parcel number Mavoko Town Block 3/4412 fraudulently. Whether the Appellants are purchasers for value without notice of the seven (7) acres from land parcel number Mavoko Town Block 3/ 4412. Whether the Appeal is merited.
9. I will deal with these issues jointly but before I proceed to do so, I wish to provide a background on this matter. The Respondents (Plaintiffs) filed a suit against the Appellants (Defendants) being Machakos CM ELC No 793 of 2013 seeking the following orders:
  - a) That the Defendants, their agents, sons and daughters be restrained and/or stopped from trespassing and entering into the Plaintiffs land and further be evicted and give vacant possession to the Plaintiff's land known as Mavoko Town Block 3/4412.
  - b) That costs of this suit and any order this court deems fit to grant.
10. The Appellants (Defendants) filed a Defence dated the 11<sup>th</sup> September, 2013 which was amended on February 3, 2016 to include a Counter-claim where they sought for the following orders:
  - a) A declaration that the Defendants are entitled to a portion of land parcel number Mavoko Town Block 3/4412 forming part of Plot No 295 within Lukenya Farm measuring approximately seven (7) acres.
  - b) An order directed to the County Land Registrar, Machakos County to cancel the Title Deed and all entries over land parcel Mavoko Town Block 3/4412.
  - c) A permanent injunctive order restraining the Plaintiffs by themselves or person claiming under them and or authorized by them from interfering with the Defendants use and occupation of the suit land parcel.
  - d) Costs of the suit.
11. After the testimonies of the Plaintiffs and Defendants in the lower court, the learned trial Magistrate dismissed the Counter-claim and entered Judgment in favour of the Plaintiffs (Respondents), which is the subject of this Appeal. I have perused the many grounds of Appeal and find that there are only two key issues which are whether the Respondents legally acquired their title to the suit land and if the Appellants are purchasers for value without notice.
12. As to whether the Respondents legally acquired their title, I note the Respondents are administrators to the estate of the late Makau Mbili Kyai as evident in the Certificate of Confirmation of Grant dated the March 19, 2007. It emerged in evidence that Makau Mbili was involved in a dispute with John Koti and Lukenya Ranching Cooperative Society vide Arbitration Proceedings conducted on August 15,



1995, in respect to shares No 297 which were in the name of Mbula Koti , the wife of John Koti. After hearing both parties, the Arbitrator entered Judgment on 15<sup>th</sup> September, 1995 as follows:

1. The 2<sup>nd</sup> Defendant John Koti split the farm belonging to Mbula Koti through Share No 297 into two equal parts.
  2. That John Koti retains the half and transfers the other half to the complainant Makau Mbili immediately.
  3. There is no order that each party meet its own costs incurred at this reference.
13. The said John Koti was aggrieved by this decision and filed an Appeal being Minister’s Appeal No 338 of 1995 John Koti & Another Vs Makau Mbili. During the hearing in the lower court, the Appellants stated that the Appeal was pending but failed to provide the current position nor indicate whether there had been a stay granted pending the said Appeal. It further emerged in evidence that DW2 who was an administrator to the estate of Mbula Koti proceeded to sell portions of share No 297 to the Defendants (Appellants) from the year 2000 during the pendency of the Appeal. The Respondents stated in their evidence that as a result of the Judgment from the Arbitrator, they proceeded to process the title in respect to the suit land, after undertaking succession proceedings in respect to the estate of Makau Mbili. The Appellants insist the title was obtained fraudulently as the root of title is challenged since the Respondents failed to explain how they acquired it. However, from perusal of the Pleadings, I find that the Appellants never raised the issue of fraud in their Amended Defence including Counter-claim and it is trite that parties are bound by their pleadings and cannot introduce fresh issues in submissions as the Appellants did. From the evidence in the lower court including the documents produced, it is my finding that the Respondents did not acquire the Certificate of title fraudulently as claimed as this was as a result of the impugned judgment from the Arbitrator dated September 15, 1995 which is yet to be set aside. As relates to the Certificate of Title produced by the Respondents, Section 26(1) of the *Land Registration Act* provides that:

The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

- a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
14. In the case of *Willy Kipsongok Morogo v Albert K. Morogo* (2017) eKLR the Court held as follows:
- The evidence on record shows that the suit parcel of land is registered in the names of the Plaintiff and therefore is entitled to the protection under sections 24, 25 and 26 of the *Land Registration Act*.”
15. In associating myself with this decision as well as the analysis above, I find that since the Respondents were the registered proprietor of the suit land and had a title to that effect, they are indeed entitled to protection of the law as well as orders of injunction to restrain any party from interfering with it.



16. I note the Appellants have emphasized that the Respondents obtained their title illegally during the pendency of the impugned Appeal, yet I note they also purchased their respective portions of the suit land after the demise of Mbula Koti and also during the pendency of the said Appeal. The Appellants nor DW2 never produced any documents of title, admitted that they are on the suit land and insist they are bona fide purchasers for value without notice.
17. In the case of Case of *Artbi Highway Developers Limited V West End Butchery Limited & 6 others* (2015) eKLR the Court of Appeal dealt exhaustively with the issue of bona fide purchaser for value without notice and held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. Further in the Uganda Court of Appeal decision of *Katende V Haridar & Company Ltd*, the Court defined what amounts to a bona fide purchaser for value and stated thus:

...a *bona fide* purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, he must prove the following:

- a. He holds a certificate of Title
- b. He purchased the Property in good faith;
- c. He has no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.

A bona fide purchase of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

18. Further in the case of *Lawrence P Mukiri Mungai, Attorney of Francis Muroki Mwaura Vs Attorney General & 4 others* (2017) eKLR the Court of Appeal held that a party cannot claim a bona fide purchaser for value where the vendor did not have a valid title.
19. In associating myself with the principles set in the three cited decisions, noting that DW2 who was the administrator to the estate of Mbula Koti admitted he did not have a Certificate of Title to the suit land, prior to selling a portion of the land to the Appellants, while Appellants are yet to acquire the title to their respective portions of the suit land since the year 2000, the Appellants cannot hence be deemed to be bona fide purchasers for value without notice.
20. It is against the foregoing that I find that the Learned Trial Magistrate did not err in Law and Fact by making a finding that the Respondents are the owners of land parcel No Mavoko Town Block 3/4412 and that the Appellants had no right to occupy it. I further find that the Learned Trial Magistrate did not err in Law and Fact by holding that the Respondents herein indeed acquired their Title Deed over Parcel of Land Mavoko Town Block 3/4412 legally and not fraudulently through non-disclosure of material facts and without following the due process procedure envisaged in law since there was an Appeal pending for hearing and determination before the Commissioner for Co-operative Development as claimed. I further find that since the issue of the Respondents occupation of the suit land was not in dispute, the Learned Trial Magistrate did not err in Law and Fact by failing to consider that the Respondents herein were not and had not been in occupation and/or possession of the Parcel of land Mavoko Town Block 3/4412 since the year 2008. It is my finding that the Learned



Magistrate indeed considered the Pleadings, evidence on record including the documents adduced by the Appellants as well as the Exhibits and Submissions in support of their case during trial before making his findings. It is hence my finding that the Learned Trial Magistrate was right in making a finding that the Respondents are the owners of the Parcel of Land No Mavoko Town Block 3/4412 and that the Respondents had made a prima facie case for an Order of Permanent Injunction. Further, that the Learned Trial Magistrate did not err in Law and fact by declining to hold that the Appellants were innocent purchasers for value without Notice of their Portions of Land in the Parcel of Land No Mavoko Town Block 3/4412.

21. In the circumstance, I find the Appeal unmerited and will proceed to dismiss it with costs to the Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19<sup>TH</sup> DAY OF SEPTEMBER, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

