



**Ariithi v Munyua & 3 others (Environment and Land Appeal  
E120 of 2021) [2022] KEELC 13779 (KLR) (26 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13779 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E120 OF 2021  
CK NZILI, J  
OCTOBER 26, 2022**

**BETWEEN**

**VICTORIA KINYUA ARIITHI ..... APPELLANT**

**AND**

**FRANCIS MUNYUA ..... 1<sup>ST</sup> RESPONDENT**

**ERASTUS KIMATHI M'RARIA ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR MERU CENTRAL ..... 3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment of Honourable J. Irura –  
Nkubu PMCC Civil Suit No. 86 of 2010 delivered on 27.3.2019)*

**JUDGMENT**

1. The appellant who was the 1<sup>st</sup> defendant alongside the 2<sup>nd</sup> – 4<sup>th</sup> respondents at the lower court while the 1<sup>st</sup> respondent herein was the plaintiff has appealed over the judgments of the primary court on the basis that; it disregarded the sale agreement and failed to determine its legality; failed to find the suit against her time barred and disclosing no cause of action; based its judgment on unled matters regarding the land control board; it disregarded the contents of the sale agreement and instead relied on extraneous matters; it failed to find that no fraud had been proved against her and lastly, it disregarded her evidence and the list of authorities hence arriving at a wrong decision.
2. This being a first appeal this court under Section 78 of the *Civil Procedures Act* as read together with Order 42 *Rules* 24-26, and 32 is mandated to rehearse, rehear, re-evaluate and reassess the lower court record, come up with independent findings as to fact and law while mindful that the trial court had occasion to see and hear the witnesses first hand. See *Abok James Odera t/a A.J Odera & Association Vs Kenya Posts and Telecommunications Corporation* (HCCC No. 518 of 1996).



3. In the trial court the 1<sup>st</sup> respondent by an amended plaint dated 5.4.2016, as the registered owner of LR No. Nkuene/Kithunguri/1070, sued the appellant alongside the 2<sup>nd</sup>-4<sup>th</sup> respondents alleging that they, secretly fraudulently and illegally subdivided his land into 3 portions namely Parcel L.R No's. 1020, 1021, and 1090 and thereafter transferred and registered LR No.1020 to the appellant on 4.5.1999.
4. The appellant averred that he only came to learn of the fraud or illegality in January 2010. He prayed for the invalidation of the subdivisions, transfers and registration of the said portions, retransfer and consolidation into one Parcel L.R No. 680, rectification of the record; permanent injunction; eviction of the appellant from his land, mesne profits and general damages.
5. The amended plaint was accompanied by a witness statement, copies of the green card, chief's letter, police abstract for loss of the title deed and a demand letter dated July 7, 2010.
6. The appellant filed a further amended defence dated March 12, 2018 denying the alleged fraudulent subdivisions, transfer and registration. Instead, she averred the same was lawful, procedural and done with the consent of the 1<sup>st</sup> respondent's son Erastus Kimathi M'Raria, the 2<sup>nd</sup> respondent. She averred the suit disclosed no cause of action against her, was incompetent, defective, lacked vital particulars, offended the Government Proceedings Act and the Limitations of Actions Act, and was an abuse of the court process.
7. The appellant also took out a notice of claim against the 2<sup>nd</sup> respondent upon leave dated July 17, 2014, in which he pleaded that the 2<sup>nd</sup> respondent received the consideration and participated in the transfer. He sought the court to determine whether L.R No. 1020 and 1070 belonged to the 1<sup>st</sup> & 2<sup>nd</sup> respondents; if she lawfully acquired the land; if she paid a consideration to the 1<sup>st</sup> respondent through the 2<sup>nd</sup> respondent and if the 1<sup>st</sup> respondent had a claim against her.
8. The defense was accompanied by witness statement dated June 3, 2014, copy of a sale agreement dated March 13, 2001, mutation form for L.R No. 1022, receipt dated June 27, 1999, title deeds for LR No. 1020 and 1070 and a copy of register for L.R No.1020.
9. The 2<sup>nd</sup> respondent entered appearance on May 18, 2015 by a memorandum of appearance dated April 30, 2015 and filed a replying affidavit sworn on the even date. In the defense he confirmed the 1<sup>st</sup> respondent was the registered owner of LR No. Nkuene/Kithunguri/1070. He denied being a registered or beneficial owner thereto or to have sold the land to the appellant. He denied that the signature appearing on the sale agreement as his. Additionally, he said he was never given or received any monies from the appellant.
10. The trial court on August 27, 2019 visited the *locus in quo*, made observations and as a consequence parties on 6.9.2013 recorded a consent for the maintenance of the status quo until the matter was heard and determined.
11. The 1<sup>st</sup> respondent adopted his witness statement dated 31.12.2013 and produced a copy of the green card, chief's letter, police abstract and a demand letter as P. Exh's 1-4 respectively. He said the appellant was unknown to him and that he did not know how she acquired his land as she was a trespasser therein. He denied ever subdividing his parcel L.R No.680 into the three portions since he was still in possession of the land. He said after he lost his original title deed he reported to the police and the area chief. He said that he learned of the illegal subdivisions, transfer and registration in 1999. He said that he did not enter into any sale agreement with the appellant.
12. The appellant adopted her witness statement dated 3.6.2014 and produced a copy of the sale agreement, mutation form, receipt and copies of title deed and green card as D. exh's 1-5 respectively. She admitted that she paid Kshs.110,000/= for the land to the lawyer, and paid for the transfer. She



- did not however avail the copies before court. According to her, the 2<sup>nd</sup> respondent had been given the land by his father, the 1<sup>st</sup> respondent herein. She said the search showed that he was the owner of the land and his wife gave him the consent to transfer the land. She denied any alleged conspiracy to defraud the 1<sup>st</sup> respondent of his land.
13. Further, the appellant testified that the 1<sup>st</sup> respondent had some money belonging to one Lawrence Mungiria hence the reason she paid directly for the debt so that the transfer could be affected, since the 2<sup>nd</sup> respondent had been given a plot by the said Lawrence Mungiria in exchange of the suitland.
  14. The appellant said she acquired the two titles to land separately and that she had brought the 2<sup>nd</sup> respondent on board so that he could explain the transaction herein, since her title deeds were lawful.
  15. DW 2 adopted their witness statement dated June 3, 2014, confirming that he took money to Lawrence Mungiria in 1998. DW3 associated his evidence with that of DW2.
  16. The record of appeal indicates that after the appellant closed her defense, counsel acting for the appellant told the trial court that the 2<sup>nd</sup> respondent had entered an appearance and filed a replying affidavit sworn on 30.4.2015. The trial court proceeded to *suo moto* adopt the replying affidavit as his defense and closed the 2<sup>nd</sup> respondents defense on account of the age of the file.
  17. There is no indication of what directions the court gave as regards the 3<sup>rd</sup> and 4<sup>th</sup> respondents who the 1<sup>st</sup> respondent had brought on board as third parties. There is no affidavit of service as to whether the said parties were ever served with summons to enter appearance and or hearing notices before and after the main hearing commenced on November 24, 2018
  18. By a judgment dated March 27, 2019, the trial court allowed the claim against the respondents herein together with the appellant in favor of the 1<sup>st</sup> respondent.
  19. The appellant submitted that the sale agreement produced conformed with Section 3 (3) of the [Law of Contract](#) on salient features and execution on 13.3.2001 hence it should not have been disregarded by the trial court.
  20. On fraud, the appellant submitted the date of its discovery in January 2010 was not in dispute. That since the suit was on filed in 2016, the claim was time barred guided by Sections 4 and 26 of the [Limitation of Action Act](#) as held in [Mwangi Kanyinga vs Francis Kariuki Kanyinga & another](#) (2008) eKLR and [Javel Abdul Rabman & another vs Bernard Alfred Samba & another](#).
  21. As to the burden of proof on fraud, the appellant submitted that 1<sup>st</sup> respondent failed to meet the threshold as required under Section 26 (1) of the [Land Registration Act](#), by calling the land registrar and demonstrating that his signature was forged. Reliance was placed on [Jeremiah Njoroge Njuguna vs Clement Ndichu Kimani & 4 others](#) (2018) eKLR on the standard of proof.
  22. On the land control board consent, the appellant submitted that it was never pleaded by the 1<sup>st</sup> respondent hence the trial court was wrong to frame the issue and determine it without giving parties an opportunity to ventilate the issue hence the court went beyond the pleading's contrary to the holding in [IEBC vs Stephen Mutinda Mule](#) (2014) eKLR.
  23. The 1<sup>st</sup> respondent submitted that the trial court was right in finding the sale agreement did not conform to Section 3 (3) of the [Law of Contract Act](#) due to the discrepancies in the acreage, particulars of the parcel of land affected, the mutation form which was incomplete, signatures which were not attested and for lack of proof of registration.



24. As to the suit being time barred, the 1<sup>st</sup> respondent submitted the suit was filed in 2010 and amended in 2016 hence was not time barred.
25. Regarding Section 36 of the Land Registration Act on fraud, the 1<sup>st</sup> respondent submitted that P. Exhs 1-5 proved that he did not enter into the sale agreement and any transfer thereof was illegal and fraudulent.
26. The 1<sup>st</sup> respondent submitted the appellant adopted her witness statement and those of her witnesses which statements were self-incriminating. Reliance was placed on Sections 109 & 112 of the Evidence Act, Easters Produce (K) Ltd vs James Kipketer Ngetich (2008) eKLR, Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others (2015) eKLR, Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & another (2013) eKLR, Aritbi Highway Developers Ltd vs West End Butchery Ltd & 6 others (2015) eKLR.
27. The issues calling for court's determination are whether: -
  1. The trial court went beyond the pleadings and issues flowing from the pleadings and the evidences tendered by parties.
  2. If the failure to give third party directions between the appellant and the 2<sup>nd</sup> respondent occasioned miscarriage of justice.
  3. If the 1<sup>st</sup> respondent pleaded and proved fraud or illegality against the respondents and appellant.
  4. If failure to give directions on the attendance of and service upon the 2<sup>nd</sup>-4<sup>th</sup> respondent occasioned miscarriage of justice.
  5. If the trial court was in order to adopt the evidence of the 2<sup>nd</sup> respondent and close his case.
  6. If the appeal has merits.
28. The primary pleadings before the trial court was the amended plaint dated April 5, 2016, the further amended statement of defense dated March 26, 2018, the 2<sup>nd</sup> respondent memo of appearance dated May 18, 2015 and a replying affidavit dated April 30, 2015, and the appellant's notice of claim against the 2<sup>nd</sup> respondent dated July 17, 2014 which is referred to at paragraph 4 (b) of the further amended statement defense, and the reply to the amended defence dated December 9, 2014.
29. In the amended plaint, the 1<sup>st</sup> respondent raised the issues of unlawful, illegal, irregular and unprocedural manner in which the subdivisions and transfers were affected by the appellant and the 2<sup>nd</sup> respondent with collusion and connivance of the 3<sup>rd</sup> respondent on the suitland without his consent or approval. The 1<sup>st</sup> respondent averred that he became aware of and established the said irregularities or illegalities in 2010.
30. In the initial plaint dated January 28, 2010, the 1<sup>st</sup> respondent at paragraph 3 pleaded that the alleged irregularity or illegality occurred on June 26, 2010 when the transfers were made to the appellant.
31. Therefore, as at the time the suit was filed, the cause of action was still valid. All what happened in 2016 was to amend the plaint and clarify the facts and not to replace the existing suit with a different cause of action. The changes also brought on board the 3<sup>rd</sup> and 4<sup>th</sup> respondent.
32. The issues raised in the amendments were the manner in which the sale, the subdivisions and the transfers were affected without the consent or approval of the 1<sup>st</sup> respondent. The said issues formed part of the list of issues and case summary filed by the 1<sup>st</sup> respondent on June 17, 2015.



33. The 1<sup>st</sup> respondent raised the issue of the consent or approval of the subdivisions and the transfer from the onset. He was throughout categorical that he never participated in any of the stages leading to the subdivisions, transfers and registrations in favor of the appellants.
34. The appellant in her amended defense pleaded that the process leading to the registration was lawful, procedural and with the consent of the 1<sup>st</sup> respondent. He also said the 1<sup>st</sup> respondent's claim should be determined alongside her claim against the 2<sup>nd</sup> respondents, presumably as per the notice dated September 17, 2014.
35. In the said notice, the appellant raised five issues to be determined by the court as between her and the 2<sup>nd</sup> respondent inter alia; if she lawfully acquired the land and paid the consideration; if the 1<sup>st</sup> respondent had a cause of action against her and if the land belonged to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
36. In my view therefore, it cannot be true as submitted by the appellant that the trial court went beyond the pleadings and issues as arising from the pleadings herein as held in *IEBC vs Stephen Mule Mutinda* (supra) and in line with Order 15 Rule 2 of the *Civil Procedure Rules*.
37. It is not in dispute that leave was granted on August 30, 2017 to amend the plaint and join the 3<sup>rd</sup> and 4<sup>th</sup> respondents to the suit following which an amended plaint dated November 13, 2017 was filed. The appellant filed an amended plaint on March 12, 2018.
38. There is no indication if the 3<sup>rd</sup> and 4<sup>th</sup> respondents were served with fresh summons to enter appearance. The court has also not seen any fresh summons to enter appearance filed and signed by the executive officer to be served upon the added parties pursuant to the leave granted. Similarly, if at all some summons were extracted and served upon the 3<sup>rd</sup> and 4<sup>th</sup> respondents, there is no return of service filed in court.
39. Additionally, from August 30, 2017 to November 21, 2018 when the hearing commenced, there is no indication of service of hearing notices or directions given on the manner of proceeding with the matter notwithstanding the default by the 2<sup>nd</sup> – 4<sup>th</sup> respondents to file any amended pleadings in line with the leave granted on August 30, 2017.
40. The appellant had also raised a claim against her co-defendants. There is no indication also if the appellant served the amended defence upon the 2<sup>nd</sup> respondent and took out any directions.
41. Order 10 Rule 2 of the *Civil Procedure Rules* provides that when any defendant has failed to appear and the plaintiff wishes to proceed against such defendant, he shall file an affidavit of service of the summons unless the same has been served by a process server appointed by the court. Order 10 Rule 3 Order 1 Rule 8 *Civil Procedure Rules* provides no default judgment can issue against the government without leave of court. In this suit, there is no indication or record if the 1<sup>st</sup> respondent sought for leave to enter default judgment against the 2<sup>nd</sup> & 4<sup>th</sup> respondents after failing to enter appearance and or file a defence.
42. As regards the notice issued by the appellant to the 2<sup>nd</sup> respondent, Order 1 Rules 24 and 25 of the *Civil Procedure Rules* govern the procedure where there is a claim against a co-defendant. Order 1 Rule 24 (2) of the *Civil Procedure Rules* requires the questions or issues raised be adopted for the determination of such a claim as if such other person is third party under this order.
43. Order 1 Rule 22 of the *Civil Procedure Rules* requires that directions be given in the manner the question may be tried.



44. In this matter, it appears the appellant did not move the court and or seek to have the court give directions on the issues or questions as framed in the notice of claim alluded above. The trial court after the issue was brought to its attention and in absence of the two parties proceeded without notice, to adopt the replying affidavit of the 2<sup>nd</sup> respondent as his evidence without giving him an opportunity to present his evidence and for the other parties to cross examine him.
45. In my considered view, though irregular, the adoption of that evidence corroborated the 1<sup>st</sup> respondent evidence as to the issue of irregularity and illegality in the manner the land was sold, subdivided, transferred and registered in the name of the appellant.
46. The appellant did not object to the adoption of the replying affidavit which in essence clearly said that the 2<sup>nd</sup> respondent never participated in the sale, subdivision, transfers and registration in favour of the appellant.
47. To my mind, if the person the appellant alleged that he was sold and transferred the land by the owner whose replying affidavit says the opposite, obviously the evidence by the appellant remained hollow and with no substratum to stand on.
48. With such evidence and given the appellant's pleadings was that the sale, subdivisions, transfer and registration were lawful, regular, procedural and valid, the onus was then on the appellant to demonstrate that he had valid sale agreement, land control board consents, transfer forms and registration documents contrary to what had been disowned by the true owner of the land in his sworn affidavit produced without objection by the appellant.
49. The courts have held that once a title deed is under impeachment it is not enough for a title holder to wave the certificate. Every paper trail to the manner of acquisition becomes necessary to show the unbroken chain of acquisition.
50. In this case, it behooved the appellant to avail the necessary documentation to back her pleadings that she lawfully, regularly and procedurally acquired the suitland.
51. On the issue of the legality of the sale agreement, the same is dated March 13, 2001. At the time it was executed the law of contract as it is today was different following the amendments in 2003. At the time the only requirement was an acknowledgement note by an authorized representative and proof of vacant possession.
52. The 1<sup>st</sup> respondent had denied the sale as well as the 2<sup>nd</sup> respondent. The onus was on the appellant to prove that she acquired vacant possession as soon as the transactions occurred, that an authorized agent of the seller took the consideration and or approved the sale.
53. In view of the lack of paper trail to link the 1<sup>st</sup> respondent with the sale, subdivision, transfer and registration, the trial court was right in finding the sale, transfer and registration in favour of the appellant invalid.
54. In the premises I find the trial court did not err in law or fact. Thus the appeal lacks merit and is hereby dismissed with costs

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 26<sup>TH</sup> DAY OF OCTOBER, 2022**

**In presence of:**

C/A: Kananu



Miss Mukaburu for appellant

Miss Kinyanjui for Mbaabu Inoti for respondents

**HON. C.K. NZILI**

**ELC JUDGE**

