



**Muchungo v Gitau (Environment and Land Appeal 48 of 2020)
[2022] KEELC 13663 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13663 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 48 OF 2020**

JG KEMEI, J

OCTOBER 13, 2022

BETWEEN

NGENDO WAINAINA MUCHUNGO APPELLANT

AND

JAMES TENDU GITAU RESPONDENT

*(Being an appeal from the Judgment and Orders of the Hon M W
Wanjala, SRM delivered on 29/10/2020 in Thika CMCC No 77 of 2014)*

JUDGMENT

1. The background of the appeal arises from the suit filed by the Plaintiff on September 4, 2014 in CMCC No 217 of 2014, Thika. The Plaintiff is now the Appellant and the Defendant is the Respondent in this appeal. In the said suit the Plaintiff averred that he is the registered owner of parcel Ruiru/Kiu / Block 2 Githunguri 3997 (suit land) which he acquired through allocation as a member of Githunguri Constituency Ranching Company Limited (GCRCL) vide membership No 277 Ballot No 1146. That upon allotment GCRCL issued him with a Clearance Certificate paving way for the issuance of title by the Land Registrar, Thika. That it was not until 2010 when she conducted a land search on the suit land and discovered that the same had been fraudulently registered in the name of the Defendant. She was categorical that prior to this period she had not conveyed the suit land to the Defendant through any sale or other forms of disposal howsoever. Resultantly she pleaded fraud on the part of the Defendant in paragraph 7 of the Plaint. She averred that the Defendant has trespassed onto the land; subdivided it into 4 portions and despite lodging a complaint at the Director of Criminal Investigations (DCI), no help was forthcoming forcing her to file suit.
2. The Plaintiff sought the following orders-



- a. A permanent injunction to restrain the Defendant by himself, his servant or assigns from trespassing into or interfering in any manner with the suit premises Title No Ruiru/Kiu/Block 2 Githunguri 3997.
 - b. A declaration that the suit premises Title No. Ruiru/Kiu/Block 2 Githunguri 3997 belongs to the Plaintiff.
 - c. A decree to compel the Registrar of Lands, Thika District to cancel the Defendant's title over Ruiru/Kiu/Block 2 Githunguri 3997 and issue title to the suit property to the Plaintiff.
 - d. General damages.
 - e. Costs.
3. The Defendant denied the Plaintiff's claim and in particular assertions of fraud. He contended that he was a bonafide purchaser without notice having purchased the land on July 4, 2007 from one John Kanja Githiri who held all the ownership documents issued to him by GCRCL. That upon purchase he subdivided the land and denies the claim of trespass. He conceded that the Plaintiff first raised the complaint in 2008 with the area Chief who referred the dispute to GCRCL who heard the dispute on June 27, 2008 and resolved that GCRCL would allocate the Plaintiff another shamba. That thereafter the Plaintiff filed a complaint with the DCI who upon investigations concluded that there was no evidence of fraud or forcible detainer.
 4. Upon hearing the matter the Hon Learned Magistrate delivered Judgment on October 29, 2020 dismissing the suit on grounds that: the Plaintiff failed to proof fraud; original land has been subdivided into 3 plots and some disposed to 3rd parties; the original title is therefore non-existent rendering the Plaintiff's claim overtaken by events; trespass was not proven as with the cancellation of original title on subdivision the claim of trespass was overtaken by events; the resultant subplots are now in occupation by other people who are not parties to the suit.
 5. Aggrieved by the said Judgment the Plaintiff filed this appeal on the grounds set out below-
 - a. That the learned Magistrate erred in law and in fact in dismissing and disallowing the Appellant amended Plaint dated September 13, 2019 against the Respondent.
 - b. That the learned Magistrate erred in law and in fact in making a finding that the Appellant had not proven her case to the required standard.
 - c. That the learned Magistrate erred in law and in fact when he disregarded the evidence raised by the Appellant in her suit, her oral testimony and that of her witnesses despite the same raising very serious issues.
 - d. That the learned Magistrate erred in law and in fact by not finding that the Respondent had forcefully encroached/trespassed on the Appellants land in light of all the exhibits produced by the Appellant.
 - e. That the learned Magistrate erred in law and in fact by failing to hold that the Appellant had proven that the Respondent had acquired land parcel No Ruiru/Kiu/Block 2 Githunguri/3997 through fraud and all subdivision of the said land being illegal.
 - f. That the learned Magistrate erred in law and in fact by failing to find that the Respondent had initially acquired land parcel No Ruiru/Kiu/Block 2 Githunguri/3997 unconstitutionally, unlawfully, unprocedurally and illegally from Githunguri Constituency Ranching Limited Company.



- g. That the learned Magistrate erred in law and in fact in awarding Judgment to the Respondent against the Appellant when the Respondent did not prove his case on a balance of probability.
 - h. That the learned Magistrate Order has occasioned grave injustice to the Appellant and she stands to suffer irreparable loss.
 - i. That the whole Judgment of the Senior Resident Magistrate is against the Pleading, submissions and the law.
6. Consequently, the Plaintiff sought the following orders:-
- a. An Order setting aside the Judgment delivered on October 29, 2020 by Hon M W Wanjala.
 - b. An Order allowing this Appeal.
 - c. Cost of the Appeal.
 - d. Such other and/or further orders as this Court may deem just and expedient.
7. On the April 2, 2022 the parties elected to canvass the appeal by way of written submissions. Thereafter the Court directed the parties to file and exchange written submissions within 30 days.
8. The law firm of Bryan Khaemba Kamau Kamau & Co Advocates filed written submissions on behalf of the Appellant while that of Milimo Muthomi & Co Advocates filed on behalf of the Respondent.
9. In her written submissions the Appellant summarized the 9 grounds of appeal into two issues as: who is the legitimate owner of the suit land and whether all subdivisions of the said land were illegal.
10. On who is the legitimate owner of the suit property, the Appellant submitted that her title was never declared a forgery by the DPP, the Chief, Police and or CID. It was her submission that the PW3, the Chairman of GCRCL confirmed that the Appellant was a member of the Company from 1970 as seen in the members' Register produced in evidence. Further PW3 led evidence to show that John Kanja the alleged transferor of the suit land to the Respondent was never a shareholder of the Company.
11. The Appellant submitted that it was unclear from the evidence adduced at the hearing how John Kanja acquired title to the suit property. It was submitted that the original parcel No 3996 on the Green Card was altered to read 3997: ballot card had been altered from $\frac{1}{8}$ acre residential to $\frac{1}{4}$ acre shamba similarly and that Share Certificate did not disclose the number of shares allotted.
12. The Appellant submitted that the Learned Hon. Magistrate having made a finding that there are 2 competing titles against the suit property, she argued that her title was issued on 9/8/1993 while that of the Respondent was issued on July 31, 2008 pursuant to a transfer from John Kanja who became registered owner of the title on April 8, 2003, 10 years after she got a title. On that account, the Appellant submitted that where there are two competing titles the first in time prevail. She relied on the case of *Wreck Motors Enterprises –Vs- the Commissioner of Lands & Others* (1997) eKLR where the Court held that where there are two competing titles the one registered earlier is the one that takes priority.
13. That the Learned Magistrate having found that no fraud was proved by the Appellant to warrant cancellation of title held by the Defendant, she submitted that the Court had a duty to make a finding that the title of the Appellant having been acquired in 1993 was first in time and ought to have prevailed



over that of the Respondent. She relied on the decision of the Court in *Gitwany Investment Ltd –Vs- Tajmal Ltd and 3 Others* (2006)eKLR where the Court held:-

“... the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail.”

14. As to whether the subdivisions were illegal, the Appellant submitted that the Respondent having admitted that the property has been subdivided into several plots, thus the original has been extinguished and any claim premised on the original title 3997 is now overtaken by events. That the Appellant having held a superior claim over the suit land then the subsequent subdivisions having not been sanctioned by the Appellant were void ab initio calling for their cancellation. That John Kanja acquired no interest in the suit land capable of being conveyed to the Respondent and other third parties, going by the equitable maxim of *nemo dat quod non habet*.
15. The Respondent on the other hand submitted on two issues as follows:-
 - a. Whether the Appeal is meritorious / whether the trial Court erred in dismissing the Appellant’s claim.
 - b. Who is to bear the costs of the Appeal?
16. It was submitted that prior to purchasing the land from John Kanja, the Respondent conducted a search in 2007 which confirmed that he was the registered owner and that he had all the necessary ownership documents issued by GCRCL to include; Clearance Certificate dated December 13, 2002, Share Certificate dated March 16, 2001 and Ballot No 1146. Upon conclusion of the purchase the Respondent has been in possession of the suit land since 2007, it was submitted.
17. That despite her claim, the Respondent submitted that the Appellant failed to enjoin the Land Registrar to explain why there was no land register opened for the title held by the Appellant and urged the Court to find that the Appellant’s title was not backed by a register or Green Card in the Lands Registry.
18. Relying on the decision of the Court in *Peter Kiruri Karanga –Vs- Daniel Mbuti Wanyoike* (2019) eKLR the Respondent submitted that in order to determine the owner of the said land it was necessary to look at the root of the title. In that respect it was submitted that the Respondent produced documents which supported the purchase of the property from John Kanja Githiri who was a member of GCRL. That the company resolved to allocate the Plaintiff another shamba pursuant to the letter dated June 27, 2008 on account that the Company acknowledged that there was double allocation of the suit land to both the Appellant and the Respondent. It was further submitted that John Maina Mburu’s evidence confirming the Appellant as the owner of the land contradicted the evidence of the Company as contained in the letter dated June 27, 2008. That the said Mburu was not a Director of the Company then. He became the Chairman of the Company in 2009.
19. Further the Respondent subdivided the said parcel of land in 2010 before the filing of this suit; which subdivision the Appellant was fully aware of. Land parcel 3997 is therefore nonexistent and the prayer sought in the Plaint cannot be granted. The Appellant was further faulted for not enjoining John Kanja Githiri who was the previous registered owner of the suit land.
20. In conclusion the Respondent submitted that the doctrine of first in time prevails is not applicable to this case in view of the fact that GCLR acknowledged its mistake and resolved to allocate the Appellant



another parcel of land. Moreso, the Respondent submitted that the Appellant's title was not registered at the Registry, given that there is no record in support of registration.

Analysis and Determination

21. This being a first appeal, the duty of the Court is to re-evaluate, reassess and re-analyse the case and reach its own conclusions.
22. In bearing that in mind I shall therefore re-analyse the case as follows:
23. At the hearing PW1, the Appellant testified that she is the registered owner of Parcel 3997 having been registered as such in 1993. That she is a shareholder of GCRCL from the 1970's vide share membership No 272. She paid for shares, survey vide several receipts and balloted in 1983 – although she cannot remember the ballot number and thereafter took possession of the land. That all was well until 2009 when she noticed strangers visiting the land and upon conducting a land search discovered that the land had been transferred to the Defendant without her consent and knowledge. She then sought help from the area Chief who referred the dispute to the Company who told her to vacate the suit land, so that she could be given another land, a decision which she disagreed with majorly because she had balloted for the land and had a title. Dissatisfied and aggrieved with the decision of the Company, she reported the matter to the CID who advised her to file a Civil Suit. She stated that no one has condemned her title as not being genuine. She clarified that she was not given an alternative land by the Company.
24. PW2 – Samuel Kamau Kagendo testified and stated that he is the son of the Appellant. He reiterated the evidence of the Appellant almost word for word. That he unsuccessfully conducted a search on the land on July 30, 2010 as he was told that the documents he was seeking were private and confidential and therefore unavailable. However he obtained a copy of the Green Card from Investigating Officers handling the complaint lodged by his mother. He informed the Court that the land is currently vacant. He admitted that according to the Green Card on record the land has been subdivided into parcels Nos. 6212 - 6214 but he does not know who are the registered owners of the resultant subdivisions. On the Green Card, he stated that the said land reference was altered from Parcel 3996 to 3997. He stated that at no time has his mother's title, Parcel 3997 been determined as a forgery.
25. PW3 – John Mburu Maina informed the Court that he is the Chairman of GCLR. He stated that according to the Company's records the Appellant is the registered owner of the land, having balloted and was issued with ballot No 1146, membership No 277 and title No 3997, measuring 1¹/₄ acres in 1993. He produced a copy of the members' register in support of his evidence. He further informed the Court that John Kanja Githiri was not a member of the Company. He confirmed that he authored the Certificate of Clearance dated August 31, 2010 in which he confirmed the Appellant as the rightful owner of the suit land according to the records in possession of the Company. With respect to whether a meeting was held to discuss the dispute, the witness informed the Court that he did not find any documents evidencing the same. He stated that though a letter was written that the Appellant would be given another land, none had been given. He denied the letter emanated from the offices of GCRL and blamed Mr Karianja, the author of the letter whom he termed as having the habit of writing letters unilaterally and without the Company's authorization. Shown the register he clarified that though Parcel 1148 has remained blank, the same has already been balloted awaiting the holder of the ballot to come to the office and register and give his particulars. That all the plots have been balloted for and there is no land available for allocation to members including the Appellant.
26. Next to take the stand was James Tendu Gitau who testified and informed the Court that he purchased the land from John Kanja in 2007. Prior to that he conducted a search which showed that Kanja was the registered owner. Further that he obtained all the documents held by Kanja which were issued to



him by GCLRL, where he was a shareholder. That thereafter he subdivided the land and registered in his name save for one parcel which he has sold to a third party. He stated that the Company decided that he should keep the land and the Appellant would be given another land on account that at that time he held a title and had developed the land by fencing and cultivation while the Appellant had no title. That the Appellant was not satisfied and she escalated the dispute to the CID who carried out investigations. That the DPP recommended that the proposal to give the Appellant another land would carry the day. The Defendant added that the Plaintiff only produced a title at the CID offices which title was confirmed to be authentic. The witness stated that he subdivided the land in 2009 when GCRC had resolved the dispute by agreeing to give the Plaintiff another land. When shown the Green Card the witness confirmed that the original LR No was 3996 but altered to 3997. He produced an original ballot given to him by Mr Kanja. He informed the Court that the acreage on the ballot had been altered to record 1¹/₄ shamba from 1¹/₈ acre residential. That the alteration was countersigned by a Mr Karianja. On the Share Certificate No B the witness confirmed that the number of shares was omitted. With respect to the letter dated June 27, 2008 the witness admitted that the said letter addressed to the Chief did not bear a file number, file reference nor a Company seal. He stated that he too obtained a copy of the Green Card from the CID.

27. Having laid down the background of the case I shall now draw the issues for determination as follows:
 - a. Whether the Appellant proved fraud.
 - b. Who is the legitimate owner of the suit land?
 - c. Whether the Appeal is meritorious.
 - d. Who bears the costs of the Appeal?
28. It is not in dispute that both the Appellant and the Respondent hold title over the same parcel of land.
29. It is not in dispute that the land traces its roots to GCRCL.
30. From the facts of the case it is clear that there are two (2) competing titles over the same land. It is therefore imperative to look at how each of the contestants acquired the land.
31. As I discuss the point, I shall also analyse the evidence to see whether the Plaintiff/Appellant proved fraud against the Defendant / Respondent noting that her case was premised on fraud.
32. Fraud is defined as:-

“A knowing misrepresentation or know concealment of a material fact made to induce another to act to his or her detriment.”
33. It is trite that fraud must be pleaded and proved to the standard higher than:- Civil cases but lower than in Criminal cases. This question leads me to the root of the titles in contestation.
34. The Appellant led evidence that she became a member of GCRCL in 1970's. That she holds a membership Certificate No 277 dated October 19, 1972 at page 19 of the Record of Appeal. It is for 10 shares and is cleared for shamba allocation.
35. PW3 led unchallenged evidence and tabled a members' register which shows the Appellant was registered against ballot No 1146 land Parcel 3997 of Box 25 Githunguri and identified by ID No 3096085 which ID agrees with the one on the title. The Share Certificate is endorsed with ballot No 1146. The Appellant informed the Court that she duly paid entrance fees on June 9, 1968; membership fees on May 14, 1970; shares on May 14, 1970; survey fees on May 14, 1970 and July 14, 1973;



- completion of share on April 25, 2003; survey fees on October 4, 1984; water project on October 8, 1984; survey on August 18, 1989 and November 21, 1989; title deed on May 19, 1989; survey for 1¹/₄ shamba ballot 1146 Parcel 3997 on May 18, 2010. All these receipts have not been challenged either by the Company or the Respondent as not being authentic.
36. At page 80 of the Record of Appeal the Appellant produced a ballot dated October 8, 1984 and countersigned by the Land Adjudication Officer on October 10, 1984. The No 1146 is embossed on the ballot and signed.
 37. Further the Appellant produced two (2) Clearance Certificates from the Company dated August 3, 2005 signed by a Mr Karianja confirming that the title belongs to the Appellant and another dated August 31, 2010 signed by Mr John Maina Mburu confirming the said ownership.
 38. According to unchallenged evidence on record the title of the Appellant was registered on August 9, 1983.
 39. On the other hand the Respondent led evidence that he purchased the property in 2008 from one John Kanja Githiri. That he conducted a search at the Lands Office which confirmed that the land was registered in the name of Kanja on August 4, 2003. That he obtained all the documents of ownership held by Kanja from the Company.
 40. He produced the Share Certificate dated 2001 issued to Kanja. He led evidence that the Share Certificate was B483 however the Share Certificate on record is indicated as No B. The number of Shares is omitted. In my view this is an incomplete document that in law is incapable of conveying any shares or interest left of all to the Respondent.
 41. The ballot produced by the Respondent is indicated as No 1146. As admitted by the Respondent the acreage has been altered from ¹/₈ residential to 1¹/₄ acres shamba. The Respondent did not offer a satisfactory explanation as to why the alteration was done. The ballot is not dated. Its credibility is therefore called to question.
 42. The only payment receipt produced by the Respondent is dated April 11, 2008 of Kshs 500/- for undisclosed purpose. The Respondent failed to table any evidence to show payment of shares, survey etc with respect to the land. No explanation was offered by the Respondent as to how Kanja acquired shares and land without any payment. The GCRL did not give any evidence that the same was a gift either. The only inference is that Kanja did not pay for the shares / land.
 43. In the absence of the complete and valid Share Certificate, payment of shares, survey etc, membership entry in the register, the Court is unable to find that Kanja obtained a good title from GCRL with respect to the land.
 44. Consequently the Respondent did not receive a good title from the said Kanja.
 45. I rely on the case of *Munyu Maina -Vs- Hiram Gathiba Maina* (2013)eKLR where the Court held that:-

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”



I find that the Respondent's title having been under challenge, he had the onus to go beyond the Green Card and the title he held and prove the legality of how he acquired the title and show that the acquisition was beyond reproach formal and free from any taint. He did not.

46. The provisions of Section 26 (1) (b) of the Land Act are clear. It states as follows:-

- “1. The Certificate of Title issued by the Registrar upon registration ... 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... and the title of that proprietor shall not be subject to challenge except –
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

47. I am satisfied that the Respondent does not hold a valid and legitimate title.

48. I shall now address the Respondents submission that the Company settled the dispute but the Appellant was uncooperative.

49. I have perused the letter allegedly authored by the Company dated June 27, 2008. It read as follows:

“June 28, 2008

The Chief

Ruiru Location

Dear Sir,

Re: Dispute of Ruiru/kiublock 2/Githunguri/3997 Ballot No 1146

We the Directors of Githunguri Ranching Company Limited do confirm to your office that we have listened to the dispute of the above shamba between James Thendu Gitau ID No 4307365 and Ngendo Wainaina ID No 3096086.

Through our records and their documents, we have established that both parties are out shareholders and there was an error of double allocation.

After consultation, we decided that since James Thendu Gitau had already been cleared and issued with a title deed for the same the Company will re-allocate Ngendo Wainaina another shamba.

This was the decision of the Company.

Yours faithfully,

For the Board of Directors.”

50. The Company resolved that the dispute was one of double allocation. Having made the finding as I have above the Court faults this position on ground that: the Appellant's title was issued in 1993. It is therefore untrue that she did not hold a title in 2008. Indeed she held a first title. The basis of clearing the Respondent as registered owner of the land was baseless in fact and in law given the analysis of the documents held by the Respondent above. The Respondent and Kanja were not shareholders of the Company. The Company either erred in arriving at this decision or it was a deliberate action to dispossess the Appellant of her rightful ownership of the land. PW3 has disowned the letter and I think it serves no further purpose to go into it, save to state that the decision of the Company in 2010 was



totally inconsequential and could not wrestle the title from the Appellant, it having been issued in 1993. This title as alluded before is backed by the documents in the custody of the Company.

51. Even if I was to be wrong on my finding that the Appellant has proved fraud, it is clear that the title of the Appellant was the first to be issued in 1993. That of the Appellant is a later title having been issued in 2003.
52. The principle of first in time prevails is applicable where two equities are equal, the first in time prevails. The circumstances applicable to this maxim are: absence of fraud; two equities are equal – mistake is admitted; titles are both apparent and are issued regularly and procedurally without fraud save for mistake then the first in time prevails.
53. In this case I have held that the title of the Respondent was issued irregularly and fraudulently and unprocedurally and therefore the principle of first in time does not apply. However, absence of fraud, the title of the Appellant would still prevail under the equitable maxim.
54. On the issue of subdivisions, there was no evidence that the resultant titles have been transferred / registered in the name of third parties. Even if they are the Respondent having not acquired a good title from Kanja, cannot pass a good title to anybody else let alone to third parties.
55. In conclusion I have reached the decision that the appeal has merit. It is allowed entirely.
56. Costs in this Appeal and the lower Court shall be in favour of the Appellant.

DELIVERED, DATED AND SIGNED AT THIKA THIS 13TH DAY OF OCTOBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Wafula HB Khaemba for Appellant

Ms. Muritu HB Muthomi for Respondent

Court Assistant – Phyllis Mwangi

