



REPUBLIC OF KENYA



KENYA LAW
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**Nekesa & another v Ojiambo & another (Civil Appeal E12 of 2021)
[2022] KEELC 15110 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15110 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
CIVIL APPEAL E12 OF 2021
AA OMOLLO, J
NOVEMBER 17, 2022**

BETWEEN

CAROLYNE NEKESA 1ST APPELLANT

GORDON JECKONIA OMWODO 2ND APPELLANT

AND

AGGREY OYIOMA OJIAMBO 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

*(An appeal against the Judgement and Decree in BUSIA CHIEF
MAGISTRATE COURT ENVIRONMENT AND LAND CASE NO.
128 OF 2018 delivered on 1st September, 2021 by Hon. P.Y Kulecho)*

JUDGMENT

1. This is an appeal against the judgement and decree in Busia Chief Magistrate Court Environment and Land Case No. 128 of 2018 delivered on 1st September, 2021 by Hon. P.Y Kulecho. The appeal is premised on the grounds listed in the Memorandum of Appeal dated 3rd September, 2021 and filed on the 6th of September, 2021:
 1. That the Learned Trial Magistrate erred in law and in fact in failing to find and hold that LR No Samia/Luchululo-Bukhulungu/1471 did not constitute the free property of Abnery Odongo Ojiambo (deceased) as at 20th November, 2014 and that the 1st Respondent's attempt to acquire it by transmission was null and void;
 2. The Learned Trial Magistrate erred in law and in fact failing to declare the 2nd Appellant the sole and lawful and legitimate owner of LR No Samia/Luchululo-Bukhulungu/1471;



3. The Learned Trial Magistrate erred in law and fact in restoring the 1st Respondent registration as the owner of LR No Samia/Luchululo-Bukhulungu/1471 against the weight of the evidence before her;
 4. The Learned Trial Magistrate erred in law and in fact in purporting to adjudicate on a dispute over LR No Samia/Luchululo-Bukhulungu/1469 when no cause of action over it was established and or proved;
 5. The Learned Trial Magistrate erred in law and fact in subjecting the 1st Respondent's claim and the Appellants' counter claim to different standard proof;
 6. The Learned Trial Magistrate erred in fact and in law in raising and determining issues that were never pleaded and or raised before her during trial;
 7. The Learned Trial and Magistrate erred in law and in fact in misapprehending the claims before her and the evidence adduced in support thereof;
 8. The Learned Trial Magistrate erred in law and in fact in arriving at decision that flew in the face of the evidence presented before her;
 9. The Learned Trial Magistrate erred in law and in fact in failing to consider and analyse crucial exhibits adduced by the Appellants in support of their case;
 10. That the Learned Trial Magistrate erred in law and in fact in failing to consider and analyse crucial exhibits adduced by the Appellants in support of their case;
2. The Appellant urged the court to find merit in his appeal and set aside the entire judgement and decree and in its place be substituted with an order dismissing the 1st Respondent's claim and allowing the Appellants' counterclaim with costs.

Submissions

3. The Record of Appeal was filed on the 12th of January, 2022 and a Supplementary Record of Appeal on 24th of February, 2022 and the same were admitted to hearing on the 3rd of November, 2021. The parties agreed to have the appeal dispensed of by way of written submissions.
4. The Appellants filed their submissions on the 24th February, 2022. The supplementary submissions on the 27th of June, 2016. They gave a brief history of the claim and stated that the 1st Respondent instituted a claim vide an amended Plaint filed on the 16th of December, 2019 seeking an order for vacant possession of LR No Samia/Luchululo-Bukhulungu/1469 and 1471 and in default an eviction be issued against the Appellants. That the Respondent also sought a declaration that the Busia County Land Registrar's decision to cancel his name from the register in LR No Samia/Luchululo-Bukhulungu/1471 was unlawful, irregular and illegal and order for restoration thereof, and an order of permanent injunction against the Appellants with respect to the suit land and LR No Samia/Luchululo-Bukhulungu/1469.
5. While submitting on grounds 1, 2, 3, 5,6, 7, 8 and 9 of the grounds of the appeal, the Appellant relied on Nyeri Civil Appeal No. 239 of 2009: *Munyu Maina v Hiram Gitibiba Maina* where the Court of Appeal held that when a registered proprietors' title is under challenge, h must go beyond the title of the document to prove the legality of how he acquired it. They submitted that the real question that should have been posed is who between the Appellants and the 1st Respondent has proved a good foundation for their title. That a party ought to prove that the right procedure was followed in obtaining the titles



and that process was bereft of any flaws. That in Nakuru ELC No. 98 of 2012: [Hubert L. Martin and 2 others v Margaret Kamar and others](#) the Court held that:

“When faced with a case of two or more titles over the same land, it must investigate and discover which of the two titles should be upheld. Such investigation must start at the root and follow all processes and procedures that brought about the titles.”

6. That the Appellant had adduced sufficient evidence to show that the root of their title was procedurally sound and bereft of any flaws and that the 1st Respondent was aware of the sale of the suit land by the deceased to the 2nd Appellant. That despite this knowledge, the 1st Respondent in an act of fraud, went ahead to file a succession cause in respect of the deceased’s estate and included the suit land. That he misled the Court to confirm the grant and give him the same land as a gift necessitating the issuance of the title to the 1st Respondent by the Registrar. That the trial Court held that the Registrar and the 2nd Respondent were fraudsters who falsified the documents yet fraud was never pleaded by the 1st Respondent. While relying on the case of Nairobi Civil Appeal No. 411 of 2018: [Moses Parantai and Another v Stephen Njoroge Macharia](#) the Appellants submitted that fraud cannot be inferred.
7. The Appellants submitted further that before the Trial Court it was them who had on a balance of probabilities demonstrated that they had good title to the suit land as their process was bereft of any flaws while the 1st Respondent knowingly misled the Probate Court and the Registrar to gift him the land.
8. While submitting on ground 4 of the Appeal, the Appellants stated that the Court erred in adjudicating on a purported dispute over LR No Samia/Luchululo-Bukhulungu/1469 when no cause of action over it was established and or proved. That the Plaintiff ought to have pleaded the cause of action for the same to be adjudicated upon. The Appellant faulted the trial court for blaming the 2nd Respondent for the transaction and even attributed the fraud to him. That the Court misapprehended the status of the 2nd Respondent and the evidence before it. The Appellant concluded by submitting that the appeal is merited and that they have proved their counterclaim against the 1st Respondent and that the same should be allowed with costs.
9. The 1st Respondent filed his submissions on the 24th of February, 2022 and submitted that the case law relied on by the Appellant was to the effect that when a court is faced with a case of two or more titles over the same land, it must investigate and discover which of the two titles should be upheld. He sought to distinguish these cases and the case before the trial court where he stated that the case was not of existence of two titles. He reiterated the facts in the trial case and stated that on or about the 29th of September, 2019, the Appellants orchestrated his arrest and detention on charges of cutting down trees contrary to section 334(c) of the [Penal Code](#). That while he was still in custody and remand, the 1st Appellant invaded LR No Samia/Luchululo-Bukhulungu/1469 and 1471, cultivated the same and planted crops thereon. That upon the 1st Respondent being released from remand he served the 1st Appellant with the notice to vacate the suit and it was after he failed to comply that he filed the case which is the subject of this appeal. That it was while that suit was pending that the County Land Registrar Busia cancelled the Title deed issued to the Plaintiff without any notice or court order on the 14th of September, 2018.
10. That the issue for determination before the trial court was whether the cancellation of the Plaintiff’s title deed for LR No Samia/Luchululo-Bukhulungu/1471 on the 14th of September, 2018 by the Land Registrar was lawful. He submitted that the suit was brought under section 79 of the [Land Registration Act](#), 2012 which did not provide for cancellation of title which is a purview of section 80



of the *Land Registration Act*, 2012. That the trial court was therefore never required to prove who had good foundation of their title.

11. The 1st Respondent submits that the issue that was for determination before the Magistrate's Court was whether the removal of the 1st Respondent's name from the register of LR No Samia/Luchululo-Bukhulungu/1471 was lawful. He submitted that the trial magistrate cannot be faulted because she appreciated the law on the power of the Land Registrar to rectify register to land and applied the law correctly. That if the Land Registrar had no jurisdiction to cancel the title, then proper remedy would have been a judicial review application for an order of certiorari to quash the decision.
12. On the issue of whether this Court is versed with jurisdiction to entertain the suit, the 1st Respondent submitted that section 26(3) and (4) of the *Environment and Land Court Act*, 2011 gave certain Magistrates the power to preside over cases involving environment and land matters in any area of the country thus the trial magistrate had jurisdiction to entertain the matter and grant the prayers sought in the Plaintiff.
13. After reading of the Memorandum of Appeal, and a perusal of the record of appeal together with the written submissions of the respective parties, this Court frames the following issues for the determination of this appeal:
 - a. Whether the suit title comprised part of the estate of the deceased Abnery Odongo Ojiambo or the title validly belonged to the Appellants;
 - b. Whether the appeal has merit; and
 - c. Who pays the costs of the appeal?
14. From the record, the present claim was initiated vide the amended Plaintiff dated 16th November, 2019 and filed on even date where the 1st Respondent sought the following reliefs:
 - a. An order directing the Defendants to surrendered with immediate effect vacant possession of LR No Samia/Luchululo-Bukhulungu/1469 and 1471 and in default an eviction order be and is hereby issued against the said Defendants;
 - b. A declaration that the decision by the County Land Registrar, Busia to cancel the Plaintiff's name from the register of LR No Samia/Luchululo-Bukhulungu/1471 is unlawful, irregular and illegal and for an order directing the County Land Registrar, Busia to remove the name of the Defendant and restore the name of the Plaintiff to the register of LR No Samia/Luchululo-Bukhulungu/1471;
 - c. An order of permanent injunction be and is hereby issued restraining the Defendants whether by themselves, their agents, servants and/or employees and or anybody claiming through them from entering, staying occupying, using and or working on LR No Samia/Luchululo-Bukhulungu/1469 and 1471 or a portion thereof and or interfering with the Plaintiff's use and or quiet enjoyment and occupation of LR No Samia/Luchululo-Bukhulungu/1469 and 1471;
 - d. Costs of this suit; and
 - e. Any other and/or further relief that this Honourable Court may deem fit to grant.
15. The Appellants on the other hand filed their Defence and Counterclaimed against the Plaintiff. The Appellants denied the allegation that the 1st Respondent was the registered proprietor of LR Nos Samia/Luchululo-Bukhulungu/1471 or that they (Appellants) had fraudulently acquired the same.



In their Counterclaim, they pleaded fraud and illegality against the Plaintiff and listed the particulars thereof. The Appellant sought judgement to be entered in their favour on the following terms:

- a. The 1st and 2nd defendants' claim against the plaintiff is for a declaration that Samia/Luchululo-Bukhulungu/1471 did not constitute the free property of Abnery Odongo Ojiambo (deceased) as at 20th November, 2014 and the plaintiffs attempt to acquire it through transmission from the deceased was null and void and of no consequence.
 - b. The 1st and 2nd defendants' further claim against the plaintiff is for a declaration that the 2nd defendant is the sole lawful and legitimate registered owner of all that parcel of land known as Samia/Luchululo-Bukhulungu/1471.
 - c. Consequently, the 1st and 2nd defendants claim for an order of Permanent Injunction restraining the plaintiff whether by himself, his agents, servants, employees or any one claiming through him from trespassing into, occupying, claiming, using or in any other way interfering with the 1st and 2nd defendants' use and possession of all that parcel of land known as Samia/Luchululo-Bukhulugu/1471.
16. At the trial the 1st Respondent stated during cross-examination that he obtained his title for parcel number 1471 in the year, 2018 after a succession cause that was filed in 2017. He stated that he was not aware that the 2nd Appellant had gotten a title earlier and neither was he aware that the land was no longer in his deceased's brother's name. He acknowledged the sale agreement between his deceased brother and the 2nd Appellant. The 1st Respondent was shown title deed for land parcel No. 1470 and 1471 which was in the 2nd Appellant's name and was dated 1st November 2011 and 12th October, 2001 respectively. He acknowledges during cross-examination that he received K.Shs. 2,000 from the 2nd Defendant as appreciation for the land they sold to him. He also acknowledged that Abnery died in the year 2014.
 17. During his defence testimony, the 2nd Appellant stated that he bought a portion of comprised in land parcel no. 1462 vide an agreement dated 27/8/2011. That upon subdivision LR Samia/Luchululo-Bukhulungu/1462, it gave rise to numbers 1469, 1471 and 1470. That he bought 1471 and that the Vendor took him to the Funyula Land Control Board where they got the consent to transfer the land. Subsequently, he obtained the title to the land on 12/10/2001 and immediately took possession of the same. The 2nd Appellant avers that the 1st Respondent was fully aware that he had purchased the suit title no 1471.
 18. The 2nd Appellant continued to state in his examination in chief that he bought another parcel of land from the 1st Respondent's deceased brother in 2011 being land parcel number 1470 and processed the title in his name in the same year. That the 1st Respondent brought third parties to invade his land in the year, 2018 who started tilling it. He stated that he owned both parcels of land and that he was not interested in land parcel number 1469. In cross-exam, he was asked about erasers that were visible on the documents he had produced and relied upon and he stated that the erasers were on the ID number.
 19. The Busia County Land Registrar testified as DW2 and confirmed that the register for land parcel number LR No Samia/Luchululo-Bukhulungu/1471 was created on the 27th of September, 2001 in the name of Abner Odongo Odhiambo. Thereafter, on the 4th of October, 2001 a transfer was registered in favour of Gordon Omwodo Jeckonia. He confirmed that all the required documents to effect the transfer were provided before the same was done. That Aggrey Oyioma Ojiambo was one of the witnesses in the transfer form.



20. The Land Registrar testified further that in 2018, Aggrey Oyioma Odhiambo appeared before the then Land Registrar with a transmission documents as an administrator of Abner's estate. That the Land Registrar could not trace the green card at the time and proceeded to open a new register with the 1st Respondent being named as the administrator of Abner's estate. That they received a complaint which made them place a restriction on the register to the suit land. That a report was prepared whose final findings were that the suit property belonged to Gordon Omwodo Jeckonia having obtained the title thereto on 12/10/2001. The Land Registrar stated further that the 1st Respondent, having been a witness to the said transfer misled the Court into believing that the said land was available for transmission.
21. In her judgement, the honourable magistrate observed as follows in paragraph 4 and 5 of page 11 of the judgment:
- “It is not clear how the 2nd Defendant obtained the title deed for LR No Samia/Luchululo-Bukhulungu/1471 expressed as having been issued on the 12th of October, 2001 but what is evident is that the same is not genuine, as it is inconsistent with the Lands Registry contents as at the 27th of February, 2017 when the Land Registrar convened a meeting to hear the two parties. It may well be that the 2nd Defendant undertook all the processes required of him in ensuring that the suit land was registered in his name but the officers at the Lands Office failed to perform their part, which is to update their register accordingly, but whatever the case, that is not the Plaintiff's mistake.”
22. The *Land Registration Act* is keen to protect the titles of registered proprietors of land, a fact which both parties in this case are claiming to be in respect of suit parcel LR No Samia/Luchululo-Bukhulungu/1471. The 1st Respondent does not dispute that the deceased undertook subdivision of the original number Samia/Luchululo-Bukhulungu/1462 which generated three numbers including the suit title. The 2nd Appellant avers that he got title to the suit parcel in the year 2001 and has produced documents to support how he acquired the title. The documents produced include application to the Land Control Board for consent to transfer dated 8th July 2001 and the letter of consent issued on 11th October, 2001. The Appellants also produced a duly executed transfer form for LR 1471 signed by the deceased vendor and the 1st Respondent is recorded to have identified the deceased to the advocate who witnessed his signature The Land Registrar confirmed the transfer was registered and a certificate of titled issued to the 2nd Appellant on 12th October 2001.
23. The 1st Respondent contends that he obtained his title in 2018 after succeeding his brother Abner who is alleged to have sold the land to the 2nd Appellant. The trial court observed that although the 2nd Appellant had documents to show the land, that the failure to register those documents was not to be visited on the plaintiff. This observation/findings contradicted the 1st Respondent's case that was presented before the trial magistrate which claim was challenging the cancellation of the title of the 1st Respondent and restoring back the 2nd Appellant's name. The trial court must have misunderstood the evidence of the Land Registrar who stated that when the original green card was not traced, they opened a new green card hence the confusion that led to the 1st Respondent being registered through transmission. Once the 2nd Appellant produced documents to show that he was duly registered, the only issue before the court was to determine whether the title was acquired through fraud.
24. The case before the magistrate was not a question of double allocation since 2nd Appellant obtained his title 13 years before seller who the 1st Respondent was administering his estate had died. Thus the property was not available to be succeeded but like I have said above, the 1st Respondent could only



challenge that title on the basis of fraud or misrepresentation as provided for under section 26 of the Land Registration Act. The particulars of fraud as against the Appellants were neither pleaded nor proved with regard to purchase and transfer of LR 1471.

25. The 1st Respondent's averments that he thought he was signing the transfer for land parcel number 1470 were never substantiated by any evidence. In the case of Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another (2013) eKLR the Court held that that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. It also stated thus:

“...the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

26. The agreement for sale in respect of the suit parcel was dated 23rd August, 2001 and title obtained afterwards. The 1st Respondent not having contested to signing the transfer cannot claim almost 16 years later that the sale did not happen. At the time of his brother's death, the 1st Appellant was well aware that the suit land did not form part of the brother's estate because not only had title passed to the 2nd Appellant but also the limitations of action had officially lapsed by 2014 after he had been in possession of the suit land for a period of 12 years.

27. Section 26 (1) of the Land Registration Act states as follows:

“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 –

- 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.”

28. In light of the analysis given above I find that this Appeal has merit, the same is allowed and the judgement and decree delivered by the Senior Resident Magistrate on the 1st of September, 2021 is set aside and substituted with an order dismissing the Respondent's suit in the court below. The Appellant's counter-claim is allowed as prayed. The costs of this appeal and in the subordinate court awarded to the Appellants.

DATED, SIGNED & DELIVERED ONLINE AT MILIMANI THIS 17TH DAY OF NOVEMBER, 2022.

A. OMOLLO

JUDGE

Sent to advocates on record via email at BUSIA this 17th Day of November, 2022

Deputy Registrar, ELC

Busia

