



**Nyakoria v Agwata & another (Environment and Land Appeal  
E001 of 2022) [2022] KEELC 15407 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15407 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA  
ENVIRONMENT AND LAND APPEAL E001 OF 2022**

**JM KAMAU, J**

**DECEMBER 20, 2022**

**BETWEEN**

**KENNEDY MONG'ARE NYAKORIA ..... APPELLANT**

**AND**

**BERNARD NYABERI AGWATA ..... 1<sup>ST</sup> RESPONDENT**

**JAMES ONDIEKI AGWATA ..... 2<sup>ND</sup> RESPONDENT**

*((Being an Appeal against the Judgment of Honourable M.C. Nyigei Principal  
Magistrate, Nyamira dated and delivered on the 15<sup>th</sup> day of December, 2021  
by Hon. M.C. Nyigei - PM in the original Nyamira PMCELC Case No. 45 of 2019))*

**JUDGMENT**

1. This appeal emanated from the judgement of the Honourable Nyigei, principal magistrate, Nyamira dated and delivered on December 15, 2021 in Nyamira CMCC No 45 of 2019. In the said suit *vide* a plaint filed on July 31, 2019, Bernard Nyaberi Agwata and James Ondieki Agwata prayed for the following orders: -
  - a. A declaration against the three defendants that the plaintiff herein is the legal owner of all that piece and parcel of land known as North Mugirango/Bonyarorande/1518 and that the charge in favour of the 2<sup>nd</sup> defendant was based on a bad title and that the same be discharged unconditionally.
  - b. An order for and rectification of the register with regard to property known as title No North Mugirango/Bonyaronde/1518.
  - c. A permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants from entering into, fencing, building, selling, transferring and/or in any way interfering with the plaintiff's lawful use of all that parcel of land known as North Mugirango/Bonyaronde/1518.



- d. Eviction orders to expel the defendants, their employees, agents, assigns and servants from the premises.
  - e. Exemplary damages for trespass and value of land lost due to the defendants' actions.
  - f. Costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit to grant.
2. They based their claim on averments to the effect that in February 1992, one Joyce Kemuma (now deceased) purchased North Mugirango/Bonyaronde/ 1518 situate within North Mugirango - Nyamira County measuring about 0.22 Hectares or thereabout from one Mr William Nyakundi and caused it to be registered in favour of the 2<sup>nd</sup> plaintiff to hold the same in trust for the 1<sup>st</sup> plaintiff as ancestral land. This was on December 28, 1995. The 1<sup>st</sup> defendant subsequently trespassed onto the said property on or about 2017 and fraudulently transferred the said land to himself on May 31, 2017. Particulars of trespass were given as: -
- a. Approached the plaintiffs seeking to be leased the suit property for a term of five (5) years which offer was declined on the premise of ancestral land but he nonetheless decided to trespass onto the property and started planting maize;
  - b. Without regard to the plaintiffs' title and interest to the suit property, the 1<sup>st</sup> defendant allowed his agents, servants, tenants and/or other trespassers to take possession of the suit property.
  - c. Planting trees and other manner of improvements upon the said parcels of land.
3. The 1<sup>st</sup> defendant subsequently used the suit property as a security after allegedly fraudulently charging title to the property with the 2<sup>nd</sup> defendant on June 21, 2007 with the following as the particulars of fraud: -
- a. The 1<sup>st</sup> defendant fraudulently acquired and transferred the suit land to himself without the plaintiff's knowledge and consent.
  - b. Tendering forged documents to the district lands registry at Nyamira with the aim of effecting a transfer.
  - c. Forging signatures and/or other authority of the 2<sup>nd</sup> plaintiff for purposes of persuading the District Land registrar at Nyamira Lands Office to effect a transfer and absolute demise of title upon the 1<sup>st</sup> defendant.
  - d. Acquiring the suit property by fraud; causing the suit land to be transferred to his name.
  - e. Forging the land transfer form alleging it to have been signed by the 2<sup>nd</sup> plaintiff.
  - f. Forging the Land Control Board consent forms for transfer alleging that they had been issued by the Land Control Board.
  - g. Forging the spousal consent on the pretext that it was signed by the 2<sup>nd</sup> plaintiff's spouse.
  - h. Purporting to transfer a parcel of land by one who has got no proprietary interest or rights to the suit land.
  - i. creating a charge over the suit premises for a loan of Kenya shillings five hundred thousand in favour of the 1<sup>st</sup> defendant; and



- j. Issuing a financial facility to the 1<sup>st</sup> defendant in exchange for the suit land without conducting requisitions of title and colluding with imposters to register a charge over the suit property.
4. The 1<sup>st</sup> defendant then defaulted in the repayment of the advanced loan thereby exposing the plaintiffs' proprietary interest over the land due to the exercise of the statutory power of sale.
5. A request for judgement was made on July 5, 2021 after the 1<sup>st</sup> defendant entered appearance but failed to file a defence and the 2<sup>nd</sup> defendant failed to enter appearance at all.
6. I wish to sum up the evidence by the 1<sup>st</sup> plaintiff, Bernard Nyaberi Agwata who said that he one day searched the records at the lands office, Nyamira only to discover that LR North Mugarango/ Bonyarorande/1518 had already been transferred to the appellant herein. He reported the matter to the area chief who was unable to do much because the appellant failed to turn up. He testified that there was nothing in the land registry parcel file to show how the land was transferred to the appellant. He said that the suit land is ancestral where a number of family members have been buried i.e. both parents and 3 brothers. The respondent's mother died in 1994 having bought the land from a neighbour one William Mose Nyakundi in 1983 who later transferred the land to the 2<sup>nd</sup> respondent and a title deed was issued.
7. A sale agreement between the aforesaid Vendor and the respondents' mother dated December 5, 1992 was also produced in court. Then in 2017 the suit land was charged with the 2<sup>nd</sup> respondent who is not a party in this appeal. There was also no consent from the Land Control Board in the parcel file. The land is 2 ½ acres and is an agricultural land. The same is developed, 1 acre had been sold by the respondents herein in order to pay school fees for the 1<sup>st</sup> respondent's children leaving behind 1 ¼ acres. The one (1) acre was sold to One Ocharo Mocheche and an agreement dated December 2, 1991 was produced to that effect. The Land registrar – Nyamira, Mr Charles Mwenda Mutua testified that the tussle over the suit land started in 2017 and that his immediate predecessor had tried to resolve the dispute without any success. He even produced in court summons to the parties to the dispute but was frustrated that the appellant never turned up.
8. Entry No 6 in the title deed bears the name of the appellant as the transferee. Mr Mutua said that there were no transfer forms (which are statutory), copies of ID Cards of the parties to the transaction, KRA Pin Numbers, passports size photos or consent from the Land Control Board. He said that the Land Control Board, Ekerenyo when consulted said that they never received any application nor issued any consent in respect to the said transaction. He concluded his testimony by observing that the transaction was illegal. He recommended the transaction be cancelled. One of the registrars at the time of the transfer, Mr Bosire even made a report to the DCI Nyamira that his signature had been forged in order to effect this transfer and that as at the time of Mr Mutua's testimony in court, Nyamira Land Registry had 56 cases of forged titles with seals. He said that his recommendation to have the title cancelled is further informed by the fact that the Land Control Board said they had no documents relating to this parcel of land, a fact that raised a red flag. Mr Ocharo Mocheche, a neighbour testified how he witnessed the land being purchased between William Mose Nyakundi and the respondents' mother and that he accompanied the parties to the Land Control Board at Ekerenyo for Consent, that the respondents' parents are both buried on the suit land and the respondents used to plant maize and nappier grass on the disputed parcel of land. The 75 year old witness said that the Gusii traditions do not permit one to sell land where one's parents are buried and therefore the respondents herein could not have sold the land to the appellant. He finalized his evidence by testifying that no one lives on the suit land. After the respondents closed their case the court was requested to provide directions so as to whether the appellant could be allowed to file his defence and the court disallowed it on October 27, 2021.



9. These are the facts of the case as I summarize them from the proceedings of the lower court and they do not vary with the trial magistrate who after summing up the case and giving her reasons reached the following verdict: -

1. The 2<sup>nd</sup> plaintiff be and is hereby declared the legal owner of Land Parcel No North Mugirango/Bonyarorande/1518 and the charge registered on June 21, 2017 be and is hereby cancelled and/or revoked.
  2. The register be rectified and ownership be reverted back to the 2<sup>nd</sup> plaintiff.
  3. A permanent injunction do and is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from entering into, fencing, building, selling, transferring and/or in any way interfering with the plaintiff's lawful use of all that land parcel of land known as North Mugirango/Bonyarorande/1518.
  4. Eviction order be and is hereby issued expelling the defendants, their employees, agents, assigns and/or servants from the premises.
  5. Costs of the case and interest at court rates be borne by the 1<sup>st</sup> defendant.
10. The 2<sup>nd</sup> respondent is the registered owner of LR No North Mugirango/Bonyarorande/1518 issued to him on December 28, 1995 which he held in trust for himself and his brother, the 1<sup>st</sup> respondent. The then Land registrar Mr KEM Bosire who is said to have registered the transfer disowned the signature in the green card. He even reported the matter of the forgery of his signature to the police. The appellant was summoned to the Land registrar's Office with a view to sorting out the issue of the Title to the land. He did not turn up. The Land registrar who testified in this case Mr Mutua said that before a transfer is registered there are Statutory forms to be executed by both parties who must produce copies of their ID Cards, KRA Pin certificates, Passport size photos and consent of the Land Control Board. None of these documents was available in the parcel file. The Land Control Board, Ekerenyio also could not trace any minutes, application for or letter of consent in respect to this transaction. Mr Mutua said that the transfer to the appellant on May 31, 2017 was illegal. That notwithstanding, the 1<sup>st</sup> defendant nevertheless used the same title deed to charge the property and immediately defaulted in the repayment of the same. The whole exercise was fraudulent. The marks of fraud are left all over. The appellant did not disprove this fraudulent transaction in his evidence.
11. 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, restriction 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, un procedurally or through a corrupt scheme "



12. In the case of *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others [2015] eKLR* Justice Sila Munyao held that:

It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation.”

13. Section 80 (1) of the *Land Registration Act* No 3 of 2012 provides as follows:

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.”

14. In *Rg Patel v Lalji Makanji (1957) EA 314* the court expressed itself as follows:

Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required”

15. The threshold of proof of fraud and/or participation of the same on the part of the appellant herein was met. The same was proved on the required standard. Transfer of the suit property, an agricultural land, in favour of the appellant without consent of the land control board as is required under the law, transfer without the presentation of the Transfer forms, no Pin certificates, Identity cards and passport size photos of the parties were all fraudulent actions. Even without going further, the trial magistrate was within the law to have dismissed the suit in the lower court on account of fraud and in the absence of the legal process being followed. The transfer must have been punctuated by fraud.

16. On the issue of the charge, although the chargee has not appealed against the decision of the trial Magistrate, I agree with the honourable Mr Justice Sila Munyao with nothing more useful to add in *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others [2015] e KLR* Justice Sila Munyao:

Having considered all arguments, I frankly do not see how the title of the 1st respondent, the star fraudster, can be upheld, and having nothing to charge, I do not see how the charge in favour of the bank can be upheld. It was argued that a decision to cancel the charge would be injurious to the economy. But it is no less, and in fact, it may probably be more injurious, if I am to deny the applicant and the heirs of the estate of the deceased their rightful inheritance, which comprises of the suit property. The charge has to be cancelled and I am afraid that in this instance, the bank will have to pursue the 1st respondent personally to recover its money. I sincerely hope that they will be successful in this mission. As for the applicant, she has succeeded in this case and the title has to revert back to the name of the deceased. On costs, I do not see why the same should not follow the event. The applicants shall have costs jointly and/or severally against the respondents.”

17. Accordingly, I am disinclined to fault the trial magistrate’s judgement and this appeal consequently fails and the same is dismissed with costs. The costs of the lower court are also awarded to the respondents.

**JUDGEMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 20TH DAY OF DECEMBER 2022.**



**MUGO KAMAU**

**JUDGE**

**In the presence of: -**

Court Assistant: Sibota

Appellant: Mr Anyona

Respondents: N/A

