



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC APPEAL CASE NO. 22 OF 2019**

**KENNEDY OTIENO OPIYO.....APPELLANT**

**VERSUS**

**ROSEMARY KASUKU.....DEFENDANT**

**(Being an appeal arising from the judgment of Hon. M.M. Wachira in the SRM's Court ELC No. 107 of 2018, delivered in the Chief's Magistrate's Court at Migori on the 10<sup>th</sup> day of September 2019)**

**JUDGMENT**

1. The present appeal is from the Judgment and decree of Honourable M.M. Wachira, SRM (as he then was) in Migori Chief Magistrate's Court Civil case number 107 of 2018 between the appellant, Kennedy Otiemo Opiyo and the respondent Rosemary Kasuku herein. The Judgment was rendered on 10<sup>th</sup> September 2019 in favour of the respondent's counterclaim dated 31<sup>st</sup> January 2019 while the plaintiff's suit originated by way of plaint dated 17<sup>th</sup> December 2018, was dismissed with costs.

2. The appellant is represented by the firm of Messrs Abisai and Company Advocates. The respondent is represented by the firm of Messrs Odondi Awino and Company Advocates.

3. Briefly, the facts of the suit before the trial court are that by the plaint, the lamentation of the appellant is that he is registered proprietor of suit land, **LR NO. Migori/Kachieng/876**. That in the year 2017, the respondent illegally encroached and trespassed into the suit land. Thus, he sought the following reliefs:-

a) A permanent injunction to issue restraining defendant from trespassing and occupying part of the plaintiff's LR NO. Migori/Kichieng/876.

b) Costs

c) Interest on (b) above

4. The respondent filed a statement of defence and the counterclaim, in the suit whereby she stated that her late father in law, Patrice Njumwa (deceased 1) in his life time gave the suit land to her husband, Cornel Kasuku Njuma (Deceased 2) and herself. That the appellant who is her nephew, unlawfully and fraudulently caused the suit land to be registered in his name. In the result, she counterclaimed against the appellant for the relief infra :-

***i. THAT the register be rectified and the title held by Kennedy Otiemo Opiyo be deleted and cancelled from the register and instead the name of Rosemary Kasuku be inserted in the registry.***

5. The suit proceeded to hearing before the trial court on 6<sup>th</sup> June 2019. In support of his testimony, the appellant (PW1) relied on title deed (PEXhibit 1) and a certificate of official search (PEXhibit 2), in respect of the suit land.

6. The respondent (DW1) testified on 23<sup>rd</sup> July 2019 to the effect that her late husband was deceased 2 while her co-wife was Millicent Adhiambo Njuma (DW3). That she could not tell how the appellant obtained title to the suit land on which she built in the year 2015. That the appellant's acquisition of title thereto was fraudulent.

7. To reinforce her case, DW1 called her brother-in-law one Simon Ojala Njuma (DW2) and (DW3) who testified that the suit land belonged to deceased 2. That the appellant acquired its title deed illegally.

8. By the Judgment, the trial court found in favour of the respondent as per in the counterclaim as the appellant's suit was dismissed with costs. The appellant was dissatisfied with the said Judgment and hence originated this appeal.

9. The appellant listed thirteen (13) grounds of appeal in the memorandum of appeal dated 3<sup>rd</sup> October 2019. However, the gravamen of the appeal is contained in grounds 1,3,4 and 13 namely;-

1) THAT the learned trial Magistrate erred in law and fact by failing to appreciate the principle of indefeasibility of title by failing to take into account the fact that the plaintiff (the appellant) is the registered proprietor of LR No. Migori/Kachieng/876.

2) THAT the learned trial magistrate erred in law and fact by failing to appreciate that the respondent did not have the requisite locus standi to mount a counterclaim.

3) THAT the learned trial magistrate erred in law and fact in his holding that the respondent had proved her case notwithstanding that the standard of proof on fraud is higher than a balance of probability in law.

4) THAT as result of the forgoing the learned trial magistrate erred in law in finding that the appellant's claim was not worthy of the prayers sought in the plaint dated 17<sup>th</sup> December 2018.

10. On that score, he is seeking orders infra:-

a) The appeal herein be allowed.

b) The order dismissing the appellant's case be set aside.

c) Judgment be entered for the appellant

d) Costs both in the lower court and the high court

e) Interest of (d) at court rates.

f) The court to issue any other orders it deems just and equitable in the circumstances.

11. During the hearing of the appeal by way of written submissions, learned counsel for the appellant gave brief facts of the case, referred to the evidence adduced at the trial, condensed and argued the grounds into three (3) categories ; 1,3,6,7 and 3.9, and 4,5,8,11,13. To fortify the submissions, counsel cited section 82 (a) of the Law of Succession Act Chapter 160 laws of Kenya, the case of **Alfred Njau and another =vs= City Council of Nairobi (1982-88) 1KAR 229, Section 24 of the Land Registration Act, 2016 (2012) (the LRA), section 107 of the Evidence Act Chapter 80 Laws of Kenya**, the case of **Beatrice Wambui Kiarie and 2 others =vs= Tabitha Wanjiku Nganga and 9 others (2018) eKLR** and **Gitunga Kibutua =vs= Carole Nduku (2018) eKLR**.

12. In response, learned counsel for the respondent addressed this court on the issues of jurisdiction and or locus standi as it forms grounds 3 and 9 of the appeal and argued that the respondent being a widow, can not be derived of her right to defend herself or maintain the counterclaim. Counsel relied on Mombasa Civil Appeal No. 48 of 2018; **Peter Kim Baker=vs= Sidi Katana Bongo and another** thereof. Counsel further relied on Land Adjudication Act Chapter 284 Laws of Kenya, the case of **Kipkobei Arap Misoi =vs= Priscila Chepkorir (2016) eKLR, Macfoy=vs= United Africa Company Ltd (1961) TALLER 1169, Henry Muthee Kathurima =vs= Commissioner of Land and another (2015) eKLR, Section 80 (1) of the LRA and Alice Chemutai Too=vs=Nickson Kipkurui Korir and 2 others (2015) eKLR** on the sanctity of title in favour of the respondent.

13. This being a first appeal from the trial court, indeed, this court has the jurisdiction to reconsider the evidence on record afresh to determine whether the conclusion originally reached upon that evidence should stand. However, this is a jurisdiction which should be exercised with caution as noted by Sir Kenneth O’connor, President in **Peterson =vs= Sunday Post (1958) EA 424 at 429.**

14. It is therefore, the duty of the appellate court not interfere with the trial court’s decision unless the same is founded on wrong principles of fact and or law, remembering that it has not heard or seen witnesses of the case; see **Nkube =vs= Nyamiro (1983) KLR 403 and Kenya Ports Authority =vs= Kuston (K) Ltd (2009) 2 EA 212.**

15. On the issue of proprietorship of the suit land as framed in paragraph 9 hereinabove, PW1 contended that he was the first registered owner of the suit land as revealed in PExhibits 1 and 2. That DW1 trespassed into the suit land as per the particulars at paragraph 4 of the plaint. PEXhibit 2 shows that PW1 was registered as it’s proprietor on 24<sup>th</sup> August 2015. Accordingly, title deed (PExhibit 1) was issued to him under **section 108 of the LRA (supra)** on 29<sup>th</sup> February 2016.

16. This court is aware of sections 2,24,25,26 and 30 of the LRA on proprietorship of registered land. More fundamentally, Article 40 (1) of the Constitution of Kenya,2010 anchors the right to property.

17. Notably, the registration of the suit land in the name of the Appellant (PW1) was somewhat not in dispute. However, such registration can be challenged on the grounds of fraud as noted in **Tayebali Adamji alibhai =vs= Abdul Hussein Adamji Alibhai (1938) 5 EACA 1** applied in the case of **Kimani Ruchine and another=vs= Swift Rutherford company Ltd and another (1976-80) 1 KLR 1500 alongside Kuria Kiarie and Morjaria cases (supra).**

18. On that strength, the respondent (DW1) asserted that the appellant (PW1) obtained PEXhibit 1 by fraudulent means. Under section 26 (1) of the LRA, fraud is a ground of impeaching a certificate of title to land as noted in **Misoi and Too cases (supra).**

19. In the case of **Kuria Kiarie and 2 others =vs= Samwel Magera (2018) 4 KLR**, the Court of Appeal opined that fraud and misrepresentation as grounds of impeaching a certificate of title, be distinctly pleaded and proved; see also **Vijay Morjaria =vs= Nansingh Madhusingh Darbar and another (2000) eKLR.**

20. As regards proof of fraud, I take into account **Gichinga and Alice Too cases (supra).** Similarly, in **Kinyanjui Kamau =vs= George Kamau (2015) eKLR**, the Court of Appeal held that :-

*“It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged. It is not enough to inter from the facts.”*

21. The testimony of DW1 was that the suit land was fraudulently registered in the name of PW1 and that the same be removed from the register and it be registered in the name of DW1 as per the counterclaim. That position was affirmed by DW2 and DW3 who stated that PW1 acquired the suit land illegally.

22. The learned trial magistrate’s finding was that PW1 did not avail documents to prove that he was the 1<sup>st</sup> registered owner of the suit land. At pages 4 and 5 of the Judgment, he reasoned, inter alia,

*“..... He never proved that he bought the land.....on the 3<sup>rd</sup> issue, having found that the registration by the plaintiff was fraudulent.....obtained registration of the land illegally.....”*

23. This court subscribes to the Court of Appeal decision in the case of **Munyi Maina =vs= Hiram Githiha Maina (2013) e KLR** where it was held thus :-

***“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..... 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.”** (Emphasis added)*

24. It is discernable from paragraph 5 of the counterclaim and as stated at paragraph 4 hereinabove as well as the evidence of DW1, DW2 and DW3 that deceased 1, on his own free will gave the suit land to deceased 2 and the respondent during his lifetime; see also **Marigi =vs= Muriuki (2008) 1 KLR (G&F) 1013 at 1077/78.**

25. The respondent pleaded particulars of fraud on the part of the appellant in paragraph 6 of the counterclaim and sought rectification of the register and deletion of title to the suit land held by the appellant. Fraud therefore, as alleged in the plaint, was proved by way of her cogent evidence fortified by the steadfast testimonies of DW2 and DW3 as held in longline of authorities, among them, **Kiarie, Vijay, Kamau and Alibhai cases (supra).**

26. In respect of the issue of locus standi, this court is guided by the Court of Appeal reasoning in **Trouistik Union in International and another =vs= Jane Mbeyu and another (1993) eKLR and Rajesh Pranjivan Chudasama =vs= Sailesh Pranjivan Chudasama (2014) eKLR**, among others, that the estate of the deceased person is vested in the legal representative. This court is also mindful of sections 3,45 and 87 (a) (supra) of the Law of Succession Act Chapter 160 Laws of Kenya and all the cited authorities including **Baker, Alfred Njau, Wambui, Kiarie and Misoi cases (supra)** in regard to locus standi.

27. It was the assertion of DW1 as discerned in paragraph 4 of the counterclaim and supported by DW2 and DW3, that the suit land was given to her and deceased 2 by deceased 1, during his life time as noted in Marigi case (supra). I note that Section 31 of the Law of Succession Act (Cap 160) concerns characteristics of gift in contemplation of death while sections 49 and 51 of the Land Act 2016 (2012) relate to the transmission on death of joint proprietor. The suit land vested in both deceased 2 and DW1 and none held it in exclusion of the other as noted in **Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 39 paragraph 29.**

28. DW1 also asserted that the suit land belonged to deceased 1, who gave the same to deceased 2 and DW1. That it is family or ancestral land. So, customary trust come into picture thereby as envisaged in **Isaack M’inanga Kiebia =vs= Isaaya Theuri M’lintari and another (2018) eKLR and sections 25 (b) and 28 (b) of the LRA.**

29. The appellant contended that the respondent did not possess the requisite capacity to mount the suit before the trial court. However, the respondent contended otherwise and argued inter alia, that she can not be discriminated against as envisioned under **United Nations Convention on the elimination of all forms of discrimination against woman (CEDAW)**. Furthermore, under Article 1 of the Universal Declaration of Human Rights people are born free and equal in dignity and rights. More importantly, the respondent and the appellant have rights in regard to the suit and this appeal as envisaged under **Articles 22, 25 ( c), 27,28,48 and 50 (1) of the Constitution (supra).**

30. In the obtaining scenario, the decision of the learned trial magistrate was informed by the correct application of principles of the constitution and the law. I find the same sound and faultless.

31. A fortiori, the instant appeal lacks merit. I proceed to dismiss the same. The appellant to bear the

costs of the appeal and the court below.

**DELIVERED, SIGNED and DATED in Open Court at MIGORI this 26<sup>th</sup> day of JANUARY 2021**

**G. M. A. ONGONDO**

**JUDGE**

**In the presence of :-**

**Mr. Ondondi Awino learned counsel for the respondent**

**Mr. Singei learned counsel for the appellant**

**Tom Maurice – Court Assistant**