



Marete (Suing as the legal representative of the Estate of M'Muketha M'Mwongo - Deceased) v William (Sued as the legal representative of the Estate of William Kaburu M'Inoti - Deceased) & another (Environment and Land Appeal E007 of 2023) [2024] KEELC 745 (KLR) (14 February 2024) (Judgment)

Neutral citation: [2024] KEELC 745 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

CK NZILI, J

FEBRUARY 14, 2024

BETWEEN

KENNETH MARETE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'MUKETHA M'MWONGO) DECEASED APPELLANT

AND

**NGUCHINE WILLIAM (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WILLIAM KABURU M'INOTI - DECEASED) 1ST RESPONDENT
THE LAND REGISTRAR MERU 2ND RESPONDENT**

(Being an appeal from the judgment of the Chief Magistrate Court at Meru delivered on 10.1.2023 in CM ELC E033 of 2021 by Hon. L.N Juma – S.R.M.)

JUDGMENT

1. The appellant faults the lower court judgment on eight grounds summarized as follows:
 - i. For not appreciating her pleading, issues raised, evidence, and written submissions.
 - ii. For misrepresenting the facts and misinterpreting the law on the subject matter and computation of time.
 - iii. For ignoring her evidence on illegality, fraud, and collusion.
 - iv. For arriving at an erroneous judgment.
2. As an appellant court, the duty is to re-hear, rehearse, and re-appraise the lower court findings on facts and law while giving due allowance to the trial court which saw and heard the witnesses firsthand. See *Peters v Sunday Post* (1958) E.A 424 *Gitobu Imanyara & others vs. A.G. & others* (2015) eKLR and



3. In the lower court, the appellant, as the plaintiff, commenced her suit with an amended plaint dated October 21, 2021. She sued the 2nd and 3rd defendants for irregularly, unprocedurally, and illegally transferring L.R No. Abogeta/Lower-Chure/145 to the 1st respondent, without following the laid down procedures of the law and the knowledge or authority of the deceased and his family. She sought the cancellation of the title deed issued on 13.6.2019 and the reversal of the same into the name of the deceased.
4. Similarly, the 1st respondent denied the claim by a statement of defense dated March 31, 2021. It was averred that the appellant was aware, just like the rest of her siblings, of the sale and transfer of the suit land by the late M'Muketha M'Mwenda to the 1st respondent's late husband, William Kamuru M'Inoti.
5. The 1st respondent averred that the initial owner owed the appellant no duty over his property as he sold and transferred it for valuable consideration that was fully paid to him, and the transfer effected free of any encumbrances, lawfully and procedurally.
6. The 1st respondent further averred that the suit disclosed no cause of action was time-barred, vexatious, frivolous and bad in law. Additionally, the 1st respondent averred upon purchase of the suit land, exclusive vacant possession was handed over to them and they embarked on possession use and development for close to 30 years in an open, exclusive, notorious manner and without any interruption from the appellant.
7. The 2nd and 3rd respondents filed a statement of defense dated February 2, 2022. They termed the certificate of title held by the 1st respondent as *prima facie* evidence of the proprietorship of the land in an absolute and indefeasible manner, subject to any overriding rights or interests as contained or endorsed in the certificate.
8. In addition, the 2nd and 3rd respondents denied any alleged illegalities or fraud by the appellant. They averred that the process of registration of the suit land was carried out lawfully and procedurally as the 2nd respondent executed its statutory duties after receiving and recording all applications for land registration presented to it under the *Land Registration Act*. The 2nd and 3rd respondents averred a cancellation of a title happens where the registration was obtained, made, or omitted by fraud, or mistake and therefore put the appellant to strict proof of the allegations.
9. At the trial, Kenneth Marete testified as PW 1. He termed the late M'Muketha M'Mwongo as his late uncle. He adopted his witness statement dated March 3, 2021 as his evidence in chief. He told the court that the late M'Muketha was the elder brother to his late father and the registered owner of L.R No. Abogeta/L-Chure/145, who died without any heirs. PW 1 told the court the deceased, a farm worker, had initially leased out his land to the late William Kaburu, the husband to the 1st respondent.
10. PW 1 told the court that after their father passed on, they approached the late William Kaburu for help in subdividing their land on condition that they would sell to him the land owned by M'Muketha M'Mwongo to clear an outstanding debt owed to him by his late uncle.
11. Similarly, PW 1 told the court the said William Kaburu collected copies of the identity card from his brother and the late uncle, to facilitate the subdivisions, but unfortunately, his uncle died three months before the subdivision was completed. Afterward, PW 1 said they embarked on preparing to file a succession cause for the estate of their late uncle, only to discover after an official search that the land had been transferred to the 1st respondent's husband.



12. PW 1 also said efforts to summon the 1st respondent to the area chief were futile as she was unable to come up with any documentation on how the sale and transfer took place. He produced copies of an official search for L.R No. Abogeta/L-Chure/145, copy of a chief's letter dated 29.10.2020, copy of a limited grant ad litem, and a death certificate as P. Exh No's. 1-4, respectively.
13. As to the sale agreement by the 1st respondent, PW 1 told the court he could not sell what he did not own. He said he was after his uncle's land since he had already sold a portion of his father's share. He said he did not report the alleged fraud to the police or file a succession cause for the estate of his late uncle. In cross-examination by the 2nd and 3rd respondents, PW 1 told the court his late uncle passed on in 1993 and was not aware if his claim, if any, based on fraud was time-barred. PW 1 admitted that part of his uncle's land was under the use of the 1st respondent, who unfortunately fenced the whole of it in 2019, hence denying them access to it.
14. Mbobua Kithinji testified as PW 2. He admitted that he was a signatory to the sale agreement involving the deceased and the 1st respondent's late husband. He said the 1st respondent was all along using the land by force. Cross-examined by the 2nd and 3rd respondents, PW 2 told the court his late uncle died in 1993, but was not aware the 1st respondent's late husband acquired the land in 1992. He said he was chased away from the land by the 1st respondent.
15. Cyrus Kithinji testified as PW 3 and adopted his witness statement dated March 3, 2021 as his evidence in chief. He confirmed that he was a signatory to the sale agreement with the 1st respondent, alongside some of his brothers. Besides, PW 3 said he voluntarily signed the sale agreement in 1992 in the presence of his uncle.
16. Jeniffer Ncugune testified as DW 1 and adopted his witness statement as his evidence in chief. She told the court that her late husband bought the suit land for Kshs.25,000/= by a sale agreement dated 25.7.1992 from the late M'Muketha M'Mwongo, who signed it received full consideration and handed over vacant possession to them, and they embarked on developing the land. DW1 said the nephews of the deceased, among them Mwobi M'Ithinji and John Mbaabu, witnessed the sale agreement. She said that after the sale, they fenced off the land and continued planting maize, beans, and nappier grass. Moreso, DW 1 said that after her late husband passed on, she sought and obtained letters of confirmation of grant and transferred the land to her name. DW1 termed the appellant's claim ill-advised and statute barred. D.W. 1 produced a copy of the sale agreement and its translation copy of the green card and title deed as D. Exh No's. 1-3, respectively.
17. With this evidence, the trial court dismissed the appellant's suit. The appellant relied on written submissions dated 18.12.2023 where he has isolated the following issues for the court's determination in this appeal. On whether the suit was time-barred, the appellant submitted a claim based on fraud or illegality, time starts to run under section 2 (b) of the *Limitation of Actions Act* upon discovery of the fraud.
18. In this appeal, the appellant submitted that he discovered the illegal entries or fraud on 22.10.2020 when the 1st respondent produced the sale agreement at the chief's office, so he had three years to file his suit and hence was not caught by the time limit under section 26 of the *Limitation of Actions Act*.
19. The appellant submitted that a court of law was a court of equity and justice and should not sanction illegalities since any void action was a nullity ab initio. To this end, the appellant submitted that the 1st respondent admitted that she bought the land from strangers who were not the registered owners with no signature from the actual owner, yet he was still alive and that one could not pass a title he did not have in the first instance. Reliance was placed on *Onesmus Sintole Saidimu vs Sane Ole Saidimu Nkikoora & others* (2021) eKLR.



20. The appellant submitted under sections 26 (1) (b) of the *Land Registration Act* that a title illegally acquired was impeachable, and in view of the irregularities pointed out, the court should not sanction the title deed held by the 1st respondent. Reliance was placed on *Board of Trustees National Social Security Fund vs. Michael Mwalo* (2015) eKLR citing with approval *Mukula International Ltd vs His Eminence Cardinal Nsubuga & another* (1982) H.CB. 11.
21. The 1st respondent relied on written submissions dated December 13, 2023. It was submitted that the lower court suit was time-barred since the land was brought from the original owner on 25.7.1992 and later transferred to the late Wiliam Kaburu on September 4, 1992, going to the green card produced as D. Exh No. (2) and the sale agreement D. Exh No. (1). The 1st respondent submitted that she took vacant possession and has been on the land for over 30 years. Therefore, for a suit on recovery of land under section 7 of the *Limitation of Actions Act*, 12 years after the transfer expired a long time ago. Reliance was placed on *Edward Moonge Lengusuranga vs James Lenaiyura and another* (2019) eKLR, *Mehta vs Shab* (1965) E.A 321, *Gathoni vs K.C.C Ltd* (1982) KLR 104 and *Iga vs Makerere University* (1972) E.A.
22. On jurisdiction to entertain the appeal, the 1st respondent submitted that since the sale agreement was dated July 25, 1992, 12 years lapsed on July 25, 2014, so a suit filed on 20.10.2021 over a contract of land under Section 4 of Cap 22 was filed 26 years later without leave hence the trial court had no jurisdiction to entertain the suit. Reliance was placed on *Anadet Kalia Musau vs A.G. & others* (2020) eKLR, *Iga vs Makerere (supra)*, and *Nicholas Kiptoo Arap Korir Salat vs I.E.B.C. & others* (2013) eKLR.
23. The issues calling for my determination are:
- i. If the appellant's suit was statute-barred.
 - ii. If the trial court had jurisdiction to hear and determine the suit.
 - iii. If the appellant pleaded and proved irregularity and illegality against the respondents.
 - iv. If the appeal has merits.
24. The cause of action, as pleaded by the appellant, was captured in paragraphs 5, 7, 8, 9, and 10 of the amended plaint dated 21.10.2021. It was averred that the appellant discovered the irregularity or illegality after he conducted an official search over the suit property. He averred the initial owner passed on on 3.4.1993, after which the 1st respondent was irregularly and unprocedurally issued with a title deed on 13.6.2019.
25. In support of his claim, the appellant produced an official search dated 28.9.2020, a chief's letter, a limited grant for the estate of the late M'Muketha M'Mwongo dated 18.1.2021 and a death certificate dated 14.12.2020 as his exhibits. From the copy of the records, the late William Kaburu became the registered owner on 4.9.1992 and was issued with a title deed on 26.2.1993. This was almost two months after the deceased M'Muketha M'Mwongo passed on. On the other hand, the 1st respondent produced a sale agreement dated 25.7.1992.
26. The appellant averred that he became aware of the alleged irregularity or illegality at a meeting before the chief's office and after he obtained an official search in 2020. The appellant was not a party to the sale agreement. No evidence was tendered that the appellant was aware of the sale and the transfer in 1992 or 1993 and or during the filing and determination of the succession cause, filed by the 1st respondent. The 1st respondent, in paragraphs 3, 4, 6, and 7 of the statement of defense, failed to plead and specify when the appellant became aware of or was deemed to have been aware of the alleged fraud or illegality.



27. In *Alba Petroleum Ltd vs Total Marketing (K) Ltd* (2019) eKLR, the court cited *Gathoni vs K.C.C. Ltd* (*supra*), that the law of limitation of actions was intended to protect the defendant against an unreasonable delay, and for a plaintiff to exercise reasonable diligence in taking reasonable steps in his interests. The court further cited with approval *Iga vs Makerere University* (*supra*) that a limitation clause does not extinguish a claim but bars the claim or remedy sought.
28. Regarding the knowledge of fraud, the appellant, in paragraphs 8 and 9 of the amended plaint, set out the particulars of illegalities and not fraud. Fraud refers to concealment or misrepresentation of facts to the detriment of another. Illegality or illegal practices, on the other hand, refer to what is forbidden by law or offends the mandatory provisions of the law or its procedure. See *Black's Law Dictionary* Deluxe 9th edition.
29. In *Mapis Investment (K) Ltd vs Kenya Railway* (2006), the court cited with approval *Scott vs Brown Doering Menab & Co.* (1982) 2 QB 724, that no court should enforce an illegal contract or allow itself to be made an instrument of enforcing obligations arising out of an illegal contract or where a defendant was implicated in illegality.
30. In *Titus Laisa Waliumba vs Calistus Barasa Khisa & others* (2018) eKLR, the court cited *Jane Gachoki Gacheba vs Priscilla Nyawira Gitonga & another* (2008) eKLR, that a thief accrues no right or interest which may be transferable in stolen property and that such a transaction would be void ab initio. The court also cited *Standard Chartered Bank vs Intercom Services Ltd* (2004) eKLR, where the court held a land sale agreement entered into while the buyer knew the registered owner was deceased was an illegal transaction.
31. In *Elijah Makera Nyagwara vs Stephen Mungai Njuguna and another* (2013) eKLR, Munyao Sila J held that under sections 26 (1) (b) of the *Land Registration Act*, a title deed of an innocent person was impeachable so long as it was obtained illegally, unprocedurally or through a corrupt scheme. In the case of *Iqbal Singh Rai vs Mark Lechini & Registrar of Titles* CC. No. 1054 of 2001, the court held that the failure to deal with the registered owner to obtain the transfer could not confer protection to the purchaser. Further in *Diamond Trust Bank (K) Ltd vs Said Hamad Shamisi & others* (2015) eKLR, the court said no one could give a better title than what he possessed.
32. The appellant in this appeal had pleaded that the 1st respondent transferred the suit land without the knowledge or authority of the deceased and his family, in collusion with the 2nd respondent and without following the laid down legal procedures. He termed the transaction irregular and illegal ab initio.
33. There is no dispute that the initial owner left no heirs to his estate. The sale agreement by the 1st respondent did not indicate whether the balance of the purchase price was paid. The 1st respondent did not plead or testify that the amount indicated as a consideration in the sale agreement was cleared and acknowledged receipt of by the deceased. Evidence for an application and receipt of a land control board consent was never tendered. Land transfer forms duly signed by the deceased payment of stamp duty and transfer fees were not availed by the 1st respondent. In *Munyu Maina vs Hiram Gathiba Maina* (2013) eKLR, the court observed that when a title deed is under challenge, it is not enough to dangle the instrument of ownership without showing that it was obtained lawfully, legally, and procedurally.
34. The acknowledgment note relied upon by the 1st respondent was not signed by the initial owner but by someone else. The 1st respondent did not produce an independent witness who had participated in and witnessed the transaction. The land registrar was not called to testify or produce the land control board consent and the transfer documents that the 1st respondent had lodged to acquire the title deed. Whereas the 2nd and 3rd respondents pleaded that it was their statutory duty of the 2nd respondent to



register instruments of transfer, the documents for registration must be duly signed, executed, and witnessed as per the law.

35. The procedural steps of transferring and registering the title deed together with the accompanying documents must have been in the custody of the 1st and 2nd respondents. The regularity and legality of the process had been brought into question. The nephews of the vendor who witnessed the sale agreement and the handover of vacant possession were not called to testify. The copy of records showed that the suit land was initially registered in the name of Linus Mworira Festus Kirimi on 26.2.1993 before the deceased passed on.
36. Evidence that the 1st respondent acquired the land in 2019 through transmission was not produced. The confirmation of the grant in the name of the 1st respondent for her to obtain the land as part of the estate of the late William Kaburu was never tendered before the trial court. All these issues were the legal processes of land transfer, which the appellant had questioned in his pleadings and tendered evidence on. The respondent had poked holes in the processes and hence proved there were glaring irregularities and illegalities in the manner the suit property came under the name of the 1st respondent.
37. The upshot is that I find the appeal with merits. The same is allowed and a dismissal order is substituted with an order allowing the suit. Costs of this appeal and in the lower court to the appellant.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 14TH DAY OF FEBRUARY 2024

In presence of

C.A Kananu

Miss Mukamburu for Karanja for Appellant

Anampiu for 1st respondent

Miss Maina for 2nd respondent

HON. CK NZILI

JUDGE

