



**Kigea & another v Mailanyi (Environment and Land Appeal  
26 of 2023) [2024] KEELC 1263 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1263 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL 26 OF 2023**

**CK NZILI, J**

**MARCH 6, 2024**

**BETWEEN**

**GERVASIO MURIIRA KIGEA ..... 1<sup>ST</sup> APPELLANT**

**JUSTER NCUURUBI MBIRITHIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**NAHASHON MWETERI MAILANYI ..... RESPONDENT**

*(Being an appeal from the judgment of the Principal Magistrate's Court at Tigania  
(Hon. P.M Wechuli – SRM) delivered on 4.8.2022 in Tigania Civil Case No. 21 of 2016)*

**JUDGMENT**

1. The appellants had filed a claim at the lower court as plaintiffs, claiming that the respondent as the defendant had fraudulently transferred and recorded Parcel No. 6964 Antuamburi Adjudication Section measuring approximately 0.20 acres as his, despite opposition to the sale by the 2<sup>nd</sup> appellant, the wife, to the 1<sup>st</sup> appellant. They sought the cancellation of the transfer, a permanent injunction and, in default, the transfer of the District Land and Settlement Officer (DLASO) Tigania East District to effect it. The suit was accompanied by a consent to sue dated 9.3.2016 issued by the DLASO Tigania East District.
2. The respondent opposed the claim through a written statement of defence dated 3.3.2016. He averred that he lawfully bought the suit land from the appellants through a sale agreement that was duly executed at the lands office by the 1<sup>st</sup> appellant with no objection from the 2<sup>nd</sup> appellant. He denied any alleged fraud in the transaction since it was above board. Further, the respondent averred that the 2<sup>nd</sup> appellant had no role to play in the transaction since she was not the owner or the seller of the land. Additionally, the respondent denied the existence of any order by the Deputy County Commissioner directing him to retransfer the land to the appellant.



3. By a reply to the defence dated 10.5.2016, the appellants averred that the 2<sup>nd</sup> appellant had objected to the sale and that it was fraudulent to transfer and register the respondent as the owner using forged signatures.
4. At the trial, the appellants testified as PW 1 & PW 2 and adopted as evidence in chief, their witness statements filed on 14.3.2016. PW 1 told the court that as the recorded owner of Parcel No. 6964 Antuamburi Adjudication Section, he entered into a sale agreement dated 18.1.2006, with the respondent of the suit land for Kshs.400,000/= but the sale was aborted after the 2<sup>nd</sup> appellant objected to it by writing a letter. PW 1 testified that the respondent was notified of the same through the area chief, and the offer for a refund was made at the chief's office. He said the respondent failed to accept the refund, only for him to establish in February 2016 that he unilaterally went ahead and recorded the land as his. PW 1 said that he reported the matter to the DCC Tigania Central, who summoned the respondent. In a meeting held on 2.3.2016, PW1 said the respondent agreed he irregularly transferred the land and was ordered to retransfer it to him. He told the court that he made a report to the DLASO Tigania East District, who issued him with consent to institute the suit after the respondent declined to hand back the land.
5. PW 1 said he was a destitute person with five children and had no other land. He produced the sale agreement dated 18.1.2006, letter dated 8.5.2015 summons dated 24.2.2016 and a consent to sue as P. Exh No's. (1), (2), (3) and (4), respectively. The 1<sup>st</sup> appellant denied that the transfer had preceded the sale agreement made before his lawyers and was paid the entire purchase price. He said he was yet to refund the money to the respondent, a proprietor of Mwema Junior Academy and fellow teacher and employee of PW 2. PW 1 said he was ready to refund Kshs.80,000/= to the respondent at the DCC's office but declined the same.
6. PW 2 associated his evidence with that of PW 2, save to add that she was the author of P. Exh No. (2) that was duly received and stamped by the DLASO office. Further, PW 2 said she was not privy to the sale by her husband until the respondents disclosed that the land was being sold. She denied that her objection came too late, long after the transfer of the land into the respondent's name. PW 2 denied that she was present during the execution of the sale agreement. She said she knew that her husband had been paid Kshs.40,000/= as the purchase price. The 2<sup>nd</sup> appellant blamed the 1<sup>st</sup> appellant and the respondent for the aborted sale.
7. Eric Omondi Fremba testified as PW 3 from the DLASO Tigania East office. He said that as per the certified copy of records of existing rights, Parcel No. 6964 belonged to the respondent, though the first owner was indicated as the 1<sup>st</sup> appellant. He could not tell when the records were reportedly crossed and by whom. Similarly, PW 3 could not tell if an objection on transfer necessitated the entries.
8. Additionally, he said the 1<sup>st</sup> appellant had registered a caution on the land. Further, PW 3 said cancellation would occur during the committee, arbitration and objection stages, but no reasons were recorded for the same. He said he was unable to confirm the status through the adjudication records since his office did not have them. He termed the cancellation as a transfer.
9. DW 1 was Nahashon Mweteri Malianga. He told the court, as per his witness statement dated 6.5.2016, that he entered into a sale agreement dated 18.1.2006 with the 1<sup>st</sup> appellant, who sold to him Parcel No.6964 Antuamburi Adjudication Section for Kshs.40,000/=. He said that after he cleared the purchase price, both parties attended the land adjudication office, and a transfer of the land was made in favor of Mwema Junior School, a private school in which he was the sole proprietor, as per the confirmation letter he availed as an exhibit.



10. Moreso, DW 1 said he fenced the land with kei apple and planted macadamia, banana trees and nappier grass.
11. DW 1 said he had been peacefully occupying the land until 2013, when the appellants attempted to chase away his workers. He denied any alleged meeting at the chiefs' office for a refund or at the DCC's offices, where he was allegedly ordered to retransfer the land to the 1<sup>st</sup> appellant. DW 1 produced a copy of the sale agreement, passbook and confirmation letter as D. Exh No. 1, 2 & 3. He said that the 2<sup>nd</sup> appellant, an employee at his school, was privy to the sale, for she was present during the sale agreement execution.
12. In addition, DW 1 said it was the 1<sup>st</sup> appellant who took himself to the land office to effect the transfer by writing a transfer letter. DW 1 said the land was recorded under Mwema Junior Academy. He denied knowledge of any caution registered against the land by the appellants.
13. John Kobia Anampiu testified as DW 2. after adopting his witness statement dated 12.6.2019 as his evidence in chief. He confirmed that the sale agreement was made after the transfer had been effected at the land offices. DW2 said that the 1<sup>st</sup> appellant was the one who expressed his interest in selling the land for his wife the 2<sup>nd</sup> appellant was expecting a baby, and therefore, they needed maternity fees. He said he had consulted his wife, the 2<sup>nd</sup> appellant, and his fellow worker at Mwema Junior Academy, who confirmed knowledge of the intended sale. DW 2 told the court that all the parties later on told him they had effected the transfer.
14. After hearing the suit, the trial court dismissed the suit. With leave of court, the 1<sup>st</sup> appellant filed the memorandum of appeal dated 12.4.2023. He complains that the trial court did not apply the correct or appreciate the law and the principle governing the sale of land; appreciate that no transfer had occurred or if it occurred; it was illegal and unprocedural, it was capricious, judicious, unfair, and unjust in dismissing the suit; failed to establish the evidence was unchallenged and overwhelming for being biased and taking into account personal opinions extraneous and irrelevant matters for negating the principle of unjust enrichment and for not taking into account the appellants written submissions.
15. The parties canvassed this appeal by way of written submissions dated 1.1.2024 and 17.1.2024, respectively.
16. The appellants termed the sale and transfer of the suit land as unprocedural and fraudulent, given the objection by the 2<sup>nd</sup> appellant. They also submitted that the occupation was illegal. It is submitted that courts do not rewrite agreements as held in *Margaret Njeri Muiruri vs Bank of Baroda (K) Ltd* (2014) eKLR. Therefore, in the instant case, since there was an objection letter, the transfer was without their consent and intention, and therefore, the court has the power to cancel or nullify such a title. Reliance was placed on *Republic vs Minister for Transport and Communication & others exparte Waa Ship Garbage collector & others* (2006) KLR 563 and *Alberta Mae Gacie vs Attorney General & others* (2006) eKLR.
17. Additionally, the appellants submitted that the respondent failed to tender evidence on the circumstances under which he obtained the title; hence, it should be deemed as fraudulent. Reliance was placed on *Sai Office Supplies Ltd vs Rosemary Alivista Luseno & another* (2014) eKLR. Further, the appellants submitted that the trial court should not have taken into account extraneous matters since the parties were bound by their pleadings. Reliance was placed on *David Sironga Ole Tunkai vs Francis Arap Muge & others* C.A No. 76 of 2014.
18. The respondents on the other hand, isolated three issues for determination. Regarding the appeal being time-barred it was submitted, the leave granted on 15.3.2023 was to file the appeal within 14 days but



only filed after 34 days, contrary to the ruling. Reliance was placed on *B vs AG* (2004) 1 KLR 431 cited with approval in *Republic vs County Government of Kitui Exparte Fair Plan Systems Ltd* (2022) eKLR, to say that equity aids the vigilant and the appellants should not benefit from their own mistakes. The respondents submitted that the trial court considered the law and facts, hence arriving at the proper judgment.

19. It was submitted that the sale agreement dated 18.1.2006 was not disputed on account of duress, mistake, or illiteracy. Therefore, since the contract was binding on the parties who made it, this court could not redraw it as held in *Pius Kimaiyo Langat vs Cooperative Bank of Kenya Ltd* (2017) eKLR. Additionally, it was submitted that PW 2, in cross-examination admitted knowledge of the payments of the purchase price to her husband. On fraud it was submitted that the same has to not only be pleaded but also proved and cannot be inferred from the facts.
20. In this instance, the appellants failed to produce any documents to support the alleged fraud. Going by clause 8 of the sale agreement, the respondent submitted that the 1<sup>st</sup> appellant had acknowledged the transfer; he admitted in cross-examination that the lawyer who drew and witnessed the sale agreement explained to them the contents; otherwise, the appellants cannot deny knowledge of the transfer.
21. The respondent submitted that the appellant's DW 3 was clear that the cancellation of the names on the Registry Existing Rights amounted to a transfer. Further, the respondent submitted that his evidence at the trial remained unshaken; hence, the suit by the appellants was an afterthought. The respondent also submitted that a caution made on 8.5.2015 was inconsequential since it came nine years after the transfer was effected in 2006. In the absence of an explanation for the inordinate delay that the 1<sup>st</sup> appellant knew of the role, the respondent submitted, the appeal lacks merits, for the appellants had not substantiated all the allegations in their suit at the lower court.
22. The issues falling for my determination are:
  - i. If the appeal was filed outside the timelines.
  - ii. If the appellants pleaded and proved fraud, illegality and forgery of the sale and transfer of the suit land.
  - iii. If the appeal has merits.
23. The appellant's cause of action was captured in paragraphs 3, 4, 5 & 6 of the plaint and 2 & 3 of the reply to the defense. The appellants averred that they discovered the fraud in February, 2016 when they visited the lands office. In the statement of defense dated 3.3.2016, the respondent never raised the defense of a statute-barred suit. The respondent termed the transaction above the board. He, however, did not address the issue of whether the transfer was fraudulent or if the signatures used were forged. Further, the respondent did not address himself to the caution or objection by the 2<sup>nd</sup> appellant as regards spousal consent other than saying that he did not understand her role since she was neither the seller nor the owner.
24. Again, the respondent did not plead to any taking over of vacant possession and erection of developments on the suit land. Additionally, the respondent did not plead that the 2<sup>nd</sup> appellant was privy to, aware of and acquiesced to the sale and transfer hence was estopped from denying its existence.
25. On the other hand, the appellants relied on P. Exh No. 1-3. P. Exh No. (1) was the sale agreement dated 18.1.2006. The respondent did not state when the total purchase price was cleared and acknowledged receipt by the 1<sup>st</sup> appellant for him to take vacant possession. The respondent produced no acknowledgment receipt to show that he cleared the balance on or before 30.9.2006.



26. Evidence of a transfer before the sale agreement dated 18.1.2006 was not substantiated by the respondent other than pleading that the 1<sup>st</sup> appellant knew of it. Evidence of when the transfer occurred was material to the respondent's defense to show that his title was regularly and procedurally obtained.
27. It is trite law that when a title deed is under attack, all the formal and legal processes towards its acquisition must be shown. It is he who risks trussing if certain facts are not pleaded and proved who has the burden of proof. See *Raila Odinga & others vs IEBC & others* (2017) eKLR and *Munyu Maina Gathiba vs Hiram Maina* (2013) eKLR, it was upon the respondent to prove how a transfer could occur before even he had cleared the consideration. The alterations on the sale agreement were not clarified by calling the maker or witness to it. How the buyer and the transferor moved from the Maiteria Mailanyi to Mwema Junior Academy as per the copy of the register of existing rights was not explained by the respondent.
28. If D. Exh No. 1 read the names of the respondent as of 15.10.2015, while the passbook D. Exh No. (2) read Mwema Junior Academy, one is left to wonder how it was possible for the variance in the documents held by the respondent to sustain his defense that the sale and transfer were above board lawful and procedural.
29. Parties are bound by their pleadings, and issues flow from them. See *IEBC & another vs. Mutinda Mule & 3 other* (2014) eKLR. The appellant had filed a case summary and list of issues dated. The issues of the execution of a transfer letter or the instrument in favor of the respondent, whether the appellants were aware of it, and if the said transfer letter or instrument was duly executed by the appellant were not pleaded by the respondents.
30. The appellants testified on their part and called PW 3. The respondents did not ask questions to PW 3 to confirm the existence of the transfer letter or instruments or production of the same. The respondent did not cross-examine PW 3 to confirm if all the procedural aspects of the transfer were adhered to. It was not enough to say that a cancellation of the name in the register of existing rights was equivalent to a transfer letter or instrument. The name of the 1<sup>st</sup> appellant and his signature in approving or authorizing the cancellation did not appear on the said register. The letter and or instrument duly signed and approved by the two parties to the sale and transfer was critical as part of the respondent's evidence. In the absence of the said evidence or documentation, the respondent's title to the land, which had come under challenge, was impeachable.
31. The onus was not on the appellants to avail the documents. It was the respondent who had alleged regularity, procedural and legality of his title or instruments used to acquire the land. The variance in the respondent's documents of ownership and lack of tangible evidence to link them with the 1<sup>st</sup> appellant left no doubt that the transaction was not above board. The appellants were not denying the existence of the sale agreement but were against the manner the transfer and registration occurred after the 2<sup>nd</sup> appellant had objected to the sale. As a spouse to the 1<sup>st</sup> appellant, it is trite law that she had interests in the land. She cannot be termed as a stranger to the transaction to be ignored by the respondent, who knew of the marital status but chose not to involve her.
32. Again, DW 2 was of no assistance in confirming the regularity and legality of the transfer process, for he was not privy to the happenings at the office. If at all he was involved, he would have stated the date of the visit to the lands office, to effect the transfer and whether the 1<sup>st</sup> appellant indeed duly signed any transfer letter or instruments of transfer duly authorized or approved by the spouse.
33. As to the appeal being filed out of time, the respondent did not avail the order which restricted the filing of the memorandum of appeal within 14 days.



34. The trial court isolated two issues for determining whether the sale was stopped and if the transfer was fraudulent. The A/R record was not availed before the court to show how the respondent acquired his title. The fact that the A/R was not before the court on some documents in possession by the respondent to show the legality of the process left doubts as to whether the respondent followed due process in acquiring the land.
35. As indicated above, there was no dispute as to entry into a sale agreement. A contract of sale and a transfer form or instrument of transfer are two different things. The trial court seemed to equate the two as one and or the non-existence of a transfer document as cured by the cancellation in the record of existing rights.
36. Given the preceding, it is apparent that the trial court considered extraneous issues or matters and failed to determine whether or not the transfer and the recording of the land in the name of Mwema Junior Academy was regular or not. The upshot is that I find the appeal with merits. The same is allowed. The lower court decree is overturned and replaced with an order allowing the plaint dated 14.3.2016. costs of the appeal and in the lower court to the appellants.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6<sup>TH</sup> DAY OF MARCH, 2024**

**HON. CK NZILI**

**JUDGE**

In presence of

C.A Kananu

Respondent

Appellant

Miss Kaimenyi for Atheru for the Respondent

