



**Kihanya v Ndirangu (Environment and Land Appeal E004 of 2022)  
[2024] KEELC 3583 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3583 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

**JG KEMEI, J**

**APRIL 9, 2024**

**BETWEEN**

**WILSON MWAURA KIHANYA ..... APPELLANT**

**AND**

**STEPHEN GITAU NDIRANGU ..... RESPONDENT**

*(Appeal from the Judgment of Hon G Onsarigo (SPM) in  
CMELC No 121 of 2022 Kikuyu delivered on the 20/1/2022)*

**JUDGMENT**

1. Aggrieved by the Judgment aforesaid the Appellant (Defendant in the trial Court) proffered this appeal on the following grounds;
  - a. That a decision of the Subordinate Court is contrary to the overriding objectives of *Civil Procedure Act* and Article 159(2) of the *Constitution* of Kenya, further the impugned decision is injudicious and inconsistent. It is contrary to the pleadings, submissions, evidence and precedent and it is inexplicable on the law/practice.
  - b. The trial Magistrates erred in law and fact by failing or refusing to be guided by High Court and Court of Appeal decision regarding the same subject matter of this appeal despite that the High Court and Court of Appeal decision were binding on him.
  - c. The trial Magistrates erred in law and fact by holding that the Defendant was the one who engaged the services of an Advocate for drawing the agreement between him and the Respondent despite the evidence of the Defendant stating otherwise.
  - d. The learned trial Magistrate erred in fact and in not appreciating sufficiently or at all that the Appellant facts and/or allegations of fraud against the Respondent were sufficiently proved were not rebutted and therefore they remained unchallenged.



- e. The learned trial Magistrate erred in law and fact by misdirecting himself that the Appellant did not prove fraud against the Respondent despite persuading, convincing and biding evidence of prove of fraud on the part of the Respondent.
  - f. That the learned trial Magistrate erred in law and fact by relying on the believing in each and every allegation stated by the Respondents against the Appellants yet the said allegations were not proved to the required standard by the Respondents.
  - g. The learned Magistrate erred in law and fact by wishing away a statutory requirement of spousal consent in land transactions.
  - h. The Learned Magistrate erred in law and fact in failing to appreciate that the Appellant's suit as contained in the counterclaim was based on fraud he believes was executed by the Respondents and by proceeding to ignore these weighty pleadings of fraud whose particulars are set out in the Appellant's counter claim.
  - i. That the totality of the Learned Magistrate decision indicates that he had taken a predisposed position that was favourable to the Respondent and unfavourable to the Appellant.
  - j. That the trial Magistrate erred in law and fact in making conclusions of fact that were not supported by the evidence adduced in Court.
  - k. The learned trial Magistrate erred both in fact and in law in failing to consider the evidence on record in totality which failure occasioned a miscarriage of justice.
2. The Appellant sought the following orders on appeal;
    - a. The Appeal be allowed.
    - b. The Judgment and Orders made on 20<sup>th</sup> January 2022 by the Hon. Onsarigo Principal Magistrate be set aside and in lieu thereof an order be made dismissing the Respondent's case and allowing the Appellant's counterclaim with cost to the Appellant.
    - c. The Respondent be ordered to bear the cost of this appeal.
    - d. This Honourable Court be pleased to make such other orders that it may deem necessary.
  3. On the 1/11/23 the Court directed the parties to file written submission within 60 days however none of the parties have complied. The Court shall proceed to determine the Appeal based on the material before it.
  4. The key issue for determination therefore is whether the appeal is merited.
  5. A background of the case in the trial Court is necessary. It was the case of the Plaintiff (Respondent) that he is the proprietor of the suit land having acquired the same from the Defendant (Appellant) vide a purchase and sale agreement dated the 2/5/2014 whereupon he was issued with a title thereafter. That despite the conclusion of the payment of the purchase price the Defendant has failed to grant him vacant possession. Consequently, he sought the following orders;
    - a. A permanent injunction be issued against the Defendant restraining him and/or his servants/agents from entering, being upon, utilizing, or in any other way interfering with the land parcel LR No Muguga/Gitaru/2701.
    - b. That this Honourable Court be pleased to order the eviction of the Defendant herein from parcel of land known as LR No Muguga/Gitaru/2701 forthwith.



- c. That the OCS Kikuyu Police Station to ensure compliance of the orders.
  - d. Costs of the suit.
6. In response, the Defendant denied the Plaintiff's case and filed a counterclaim dated 3/3/2021 where he insisted that he is the registered proprietor of the land claimed by the Plaintiff. That in 2014 he required some cash for an undisclosed business and through a mutual friend managed to secure a loan from the Plaintiff in the sum of Kshs 1.2 Million against the title of the suit land. That however unknown to him, the Plaintiff almost immediately illegally transferred the title to his name on the allegations that he purchased the land. Particulars of fraud on the part of the Plaintiff were pleaded under para 17 of the Counterclaim. Consequently, the Defendant sought the following orders in the counterclaim;
- a. Dismissal of the Plaintiffs' suit with costs and interest thereon.
  - b. A declaration that the Defendant is the legitimate and rightful beneficiary of this property of LR Muguga/Gitaru2701 to the exclusion of all others.
  - c. An order direction of Land Registrar Kiambu to forthwith revoke and cancel title document issued to the Plaintiff in respect of parcel No Muguga/Gitaru2701 and issue one to the Defendants.
  - d. Permanent injunction against the Plaintiff his agents, servants, officers, employees and any other person action at their behest or under directions or instructions by the Plaintiff restraining them from alienating or in any way interfering with the Defendant's quiet possession of Muguga/Gitaru/2701.
7. Upon hearing and determining the suit, the trial Court dismissed the Defendant's counterclaim and entered Judgement in favour of the Plaintiff. This is the decision that has provoked this appeal.
8. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123, this principle was enunciated as thus:
- “.... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court .... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect....”
9. With this in mind I shall analyze the evidence that was placed before the Court in line with the grounds of appeal as expressed in the memorandum of appeal.
10. The starting point is whether the Appellant proved fraud on the part of the Respondent in the trial Court. The Appellant led evidence and adopted his statement of defense and counterclaim together with the witness statement dated the 2/3/21 and the documents produced on trial. He denied selling the land and instead informed the Court that they entered into a loan agreement with the Plaintiff where he was advanced the sum of Kshs 1.2 Million repayable within 30 days and in default the sum of Kshs 2.4 Million would be payable to the Respondent. That later he realized he had signed a sale agreement and proceeded to place a caution on the title. It is notable that the Appellant failed to show evidence of a loan agreement between the parties or the terms and conditions of such a loan. Clearly,



he has failed to show evidence of a caution that he lodged on the title, the time of lodging the caution and the reasons for the caution.

11. It was the Plaintiff's case that he entered in to an agreement of sale with the Appellant and paid the sum of Kshs 2.4 million as consideration for the land. He produced a sale agreement. An official search dated the 2/12/2014, a title in his name, and a spousal consent. These are the documents that the Appellant averred in the trial Court that he signed on the belief that they were loan agreements. The fact of signing an agreement was therefore not denied only that for the Appellant, it was a loan agreement and for the Respondent, a sale agreement. Having considered the agreement for sale dated the 2/5/2014, the Court confirms that it is a valid agreement which is contemplated under section 3(3) of the Contract of Law Act which states as follows;

- “(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
- i. is in writing;
  - ii. is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party: Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

12. The Court's attention has been drawn to para 11, 12 and 13 of the Appellant's witness statement where he stated as follows;

“The Plaintiff on his part was in the company of his Advocate who presented to me a copy of the loan agreement which was read to me since I am not very conversant with the English language and thereafter I signed on the last page of the agreement after confirmation of the terms of the agreement.

Further to secure the loan I was requested to provide my original title of the land the subject matter herein as a security for the payment of the loan amount. I also executed other documents for transfer and surrendered them to them in case there was a default on my part to repay the loan amount. The documents were to be retained by the Advocate for safe custody and were never intended to further any transaction. They were only to be acted upon in case of default in repaying the loan amount.

I did not suspect anything wrong in the transaction since the persons who introduced me to the Plaintiff was a close friend and also it did not occur to me that the Plaintiff and his people had other ulterior motives and ideas.”

13. From the above averments the Court finds that the Appellant admitted signing the agreement and in the absence of any evidence of a loan agreement, the Court takes that the agreement that was signed by the Appellant is the agreement of sale dated the 2/5/2014. Further that he handed over the original title of the land to the Respondent and executed documents for transfer and surrendered them to the Respondent in case of default, to repay the monies on his part. In the absence of a disclosed list of



documents that the Appellant averred to have executed, the Court takes the view that these must have been the documents listed in para 4 of the agreement of sale which included the following documents;

- a. Original Title Document for LR No Muguga/Gitaru/2701
- b. Land Control Board Consent to transfer the property.
- c. Duly executed Transfer Form.
- d. Copies of the Vendors PIN Certificate & National Identity Card.
- e. 3 Coloured Passport Size Photographs of the Vendor.
- f. Spousal Consent/Affidavit.

14. Although he says the documents were to be retained and acted upon in case of default, the averments serve to show the Appellant's admission that there is indeed default of the payment of the monies. The Court notes that completion was pegged on the full payment of the purchase price. It was an open-ended agreement and therefore it could have been the next day or some other time. The Appellant annexed bank documents which showed that he received the monies into his account. It is presumed that if full payment was done as he stated by the 3/5/2014, then there was nothing to stop the Respondent from transferring the land to himself as per the agreement. The time taken to register the title in the name of the Respondent on its own is no testament of fraud. The Appellant needed to do more.

15. On the question of Land Control Board consent, both the Appellant and his witness DW2 informed the Court that they attended the land board at the District officer's office in Kikuyu. On spousal consent, it is the averment of the Appellant that DW2 was not his wife and therefore the spousal consent executed by her is not legal. DW2 admitted executing the consent but for a different purpose that is to say a loan agreement. She also denied being a spouse of the Appellant but a friend of over 25 years and that the Appellant invited her to witness the documents. If indeed the Appellant presented DW2 as his wife, how was the Respondent supposed to know that DW2 was not a spouse for purposes of compliance with the provisions of the sale agreement? The Court finds that this was an afterthought and DW2 executed the documents as a spouse and the Appellant cannot feign ignorance too late in the day.

16. With respect to default of payment of the alleged loan, the Court finds that indeed if the evidence of the Appellant was to be taken that he loaned monies from the Respondent, then the admission of default would mean unjust enrichment as the Appellant despite being in default is seeking title of the land in addition. The Appellant has not led evidence of any undertaking to repay the monies at all. This Court being a Court of equity and a Court of law cannot countenance a position of unjust enrichment on a party.

17. The provisions of Section 26 of the [Land Registration Act](#) 2012 states as follows;

“26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) 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, restrictions 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, unprocedurally or through a corrupt scheme.”

18. Having analyzed the evidence above, the Court finds that the Appellant did not proof fraud on the part of the Respondent. He failed to impeach the title of the Respondent and the Court concurs with the decision of the trial Court entirely.
19. The Appellant has alleged bias on the part of the trial Court. However, no evidence was led to show that the learned trial Magistrate displayed a disposition of bias and the Court takes this as unproven allegation. I say no more.
20. In the end the appeal is devoid of merit. It is dismissed with costs in favour of the Respondent.
21. Orders accordingly.

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 9<sup>TH</sup> DAY OF APRIL, 2024.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Gakaria for the Appellant

Ms. Kamotho HB Mrs. Kihika for Respondent

Court Assistants – Phyllis/Oliver

