



**JNC & another (Minor Suing Through the Next of Friend
SWM) v Kamau & 2 others (Environment and Land Appeal
E017 of 2021) [2024] KEELC 5063 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5063 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E017 OF 2021**

JM MUTUNGI, J

JULY 4, 2024

BETWEEN

JNC 1ST APPELLANT

GKN 2ND APPELLANT

MINOR SUING THROUGH THE NEXT OF FRIEND SWM

AND

CECILY NJOKI KAMAU 1ST RESPONDENT

LYDIA WAWIRA JANE 2ND RESPONDENT

COUNTY GOVERNMENT OF KIRINYAGA 3RD RESPONDENT

(An Appeal arising from the Judgment of the Honourable A. Lorot-CM delivered on 22nd July 2022 in Civil Suit ELC No. 1 of 2017 in the Chief Magistrate’s Court at Wang’uru)

JUDGMENT

1. The subject of this appeal is Plot No. 121 Wang’uru Township (hereinafter referred to as “the suit property”), which was initially owned by Geoffrey Kamau Gichuhi (now deceased). According to the records from the Lower Court, ownership of the suit property was transferred to the 1st Respondent who subsequently sold it to the 2nd Respondent vide a sale agreement dated 17.08.2016.
2. Through a Plaint dated 9.01.2017, the appellants sought several declarations and orders. They prayed for a declaration that the 1st Respondent held the suit property in trust for the Appellants a declaration that the sale agreement between the 1st and 2nd Respondents and sanctioned by the 3rd Respondent was illegal, unlawful, marked by irregularities, and therefore null and void; revocation and cancellation of the registration of the transfer in favour of 2nd Respondent; and a permanent injunction against the



- Respondents restraining them from in any manner interfering with the Appellants quiet possession of the suit property.
3. The Appellants contended that following a family meeting, the deceased transferred the ownership of the disputed property to the 1st Respondent, to hold in trust on behalf of the Appellants, who were minors at the time. They further contended that, although the property had been transferred to the 1st Respondent, it was Mary Nyambura, the deceased's wife who also later passed away during the pendency of the suit, who was responsible for collecting rent from the property. The collected rent was then utilised to cover the educational expenses of the Appellants. The Appellants further claimed that the 1st Respondent secretly and fraudulently sold the suit property to the 2nd Respondent for a sum of KES. 2,000,000/-, without the Appellants consent. They contended the sale transaction was unlawful and void as the 1st Respondent lacked the legal authority to transfer a clean title to the 2nd Respondent.
 4. In her Statement of Defence dated 12/01/2017, the 1st Respondent confirmed that the disputed land was originally owned by her late father, who had passed it on to her with the understanding that she would hold it in trust for the Appellants. She recounted meeting the 2nd Respondent in 2016 through mutual acquaintances, leading to an agreement where the 2nd Respondent lent her a friendly loan of KES 2,000,000/-, with the disputed property as collateral. The 1st Respondent stated that they consulted a lawyer to prepare a loan agreement but stated she was surprised when in October 2016, she discovered that one of her tenants had received a demand notice from the 2nd Respondent for payment of rent. She stated the 2nd Respondent claim ownership of the suit property and notice wrongfully claimed ownership of the disputed land and instructed that rent payments be directed to her (2nd Respondent). The 1st Respondent claimed that she did not sell or legally transfer the property to the 2nd Respondent, and asserted that the land was intended for her children. The 1st Respondent nonetheless affirmed her willingness to repay the borrowed sum of KES 2,000,000/- to the 2nd Respondent.
 5. The 2nd Respondent in her Statement of Defence denied the contents of the plaint and averred that she lawfully purchased the suit property vide a sale agreement dated 17.08.2016 for the consideration of Kes. 2,000,000/-. She maintained that the suit property was lawfully transferred through minute No. L/H/UD/17/2016 where the transfer was approved during the meetings held on 26th, 27th and 28th August 2016. She averred that she conducted due diligence before the purchase which revealed, the 1st Respondent was the registered owner of the plot and it had no encumbrances. She averred that she was a bona fide purchaser for value without notice of any defect in the title. The 3rd Respondent in its defence denied the allegations made against it in the Plaint.
 6. The Appellants in their amended plaint prayed for vacant possession of plot No. 121 Wang'uru Township in the possession and occupation of the 2nd Respondent and further prayed for mense profits from the date of filing of the suit.
 7. The 2nd Respondent amended her statement of defence and included a Counterclaim. By her Counterclaim, the 2nd Respondent sought a declaration affirming her as the rightful owner of the disputed plot and further prayed for a permanent injunction restraining the Appellants from interfering with the said plot. She also prayed for mesne profits at the rate of KES 35,000/- per month from the date the lawsuit was initiated, together with the costs of the suit.
 8. In its Judgment dated 22nd July 2022, the trial court dismissed the Appellants, suit and ordered them to pay the 2nd and 3rd Respondents costs. The Trial Court allowed the 2nd Respondents Counterclaim and granted the 2nd Respondent vacant possession of the property and issued a permanent injunction restraining the Appellants from in any manner interfering with the 2nd Respondent's peaceful enjoyment of the property.



9. Aggrieved and dissatisfied with the court's decision, the Appellant appealed to this Court and filed a Memorandum and Record of Appeal dated 18.08.2022 and 12.03.2023, respectively.
10. The Appellant's Memorandum of Appeal set out 10 grounds of appeal. The grounds are as follows: -
 1. That the Learned Magistrate erred in law and fact by holding that the 1st Respondent Cecily Njoki Kamau did not hold Plot No. 121 Wang'uru Township of the Kirinyaga County in trust for the Appellants and which finding was contrary to the weight of evidence adduced before the court pointing the existent of a trust including customary trust hence made a wrong finding not supported by evidence and the law.
 2. The Learned Magistrate erred in law and fact by holding that, the creation of trust over Plot No 121 Wang'uru Township Kirinyaga County registered in the names of the 1st Respondent should have been noted in the registration documents in favor of the Appellants capable to be identified upon performing a search and which holding is wrong and contrary to the evidence and law established governing the issue of trust under the circumstance of this case.
 3. The Learned Magistrate erred in law and fact by holding that the 2nd Respondent was a bona fide purchaser for value capable of extinguishing the trust issue over Plot No 121 Wang'uru Township and which finding was contrary to the weight of evidence adduced in court pointing to the Respondents conspiracy and fraudulent acts in the acquisition of suit plot and which fraudulent acts the Respondents were guilty of and hence no clean title capable to be protected under the legal doctrine of an innocent purchaser for valuable consideration.
 4. The Learned Magistrate erred in law and fact by holding that the 1st Respondent held a clean title capable of being passed to the 2nd Respondent as a bona fide purchaser for value and which finding was contrary to the weight of evidence in view of the particulars of fraud duly proved against the Respondents by the Appellants.
 5. The Learned trial Magistrate erred in law and fact by holding that the transfer of Plot No 121 Wang'uru Township from 1st Respondent to 2nd Respondent as sanctioned by the 3rd Respondent was legally and procedurally above board and which finding was contrary to the weight of the evidence adduced by the Appellants as the process of transfer was opaque, fraudulent and irregular in terms of lack of notification and forgery of instruments of transfer which documents were never adduced in court by the 3rd Respondent.
 6. The learned Trial Magistrate erred in law and fact by failing to make a finding that the 3rd Respondent's evidence on transfer was based on L/H/UD/5/2016 minutes dated 20.5.2016 whereas the 2nd Respondent relied upon minutes of 26th, 27th, and 28th August 2016 and which evidence was contradictory and a pointed to fraudulent transfer and hence failed to make any appropriate finding for cancellation of the 2nd Respondent's registration over the suit land.
 7. The learned Trial Magistrate erred in law and fact by dismissing the Appellants' case whereas there was sufficient and admissible evidence to uphold the suit against the Respondents and hence made a finding not supported by law and evidence.
 8. The Learned Trial Magistrate erred in law and fact by upholding the 2nd Respondent's defence and counter-claim whereas the 2nd Respondent's evidence was not sufficient to enable granting of orders sought.
 9. The Learned Trial Magistrate erred in law and fact by not fully considering the Appellants' case and submissions thereto and proceeded to dismiss the suit without sufficient reasons.



10. The Learned Trial Magistrate erred in law and fact by not finding that the Respondents were guilty of all particulars of fraud as per the evidence adduced and hence the 2nd Respondent holds no clean title over Plot No 121 Wang'uru Township and which registration should be canceled in favour of the Appellants.
11. The Appellants prayed that the appeal be allowed and the Judgment in Wang'uru CM'S ELC Case No. 1 of 2017 be set aside and be substituted with an order entering Judgment in favour of the Appellants and dismissing the 2nd Respondents Counter claim with costs.
12. The appeal was canvassed by way of written submissions. The Appellants in their submissions argued that the Trial Magistrate made a legal and factual error in determining that the appellants did not successfully prove trust. The Appellants contended that the 1st Respondent had acknowledged that the transfer of the suit property into her name was indeed intended for her to hold the same in trust for her children, a claim that remained unchallenged. The Appellants emphasized that the trust was demonstrated by the fact that, even after the transfer of the property ownership to the 1st Respondent, her mother remained in charge of collecting the rent. The rent collected was utilized to fund the educational needs of the minor children. The appellants argued that the 2nd Respondent exploited the 1st Respondent, who had sought a soft loan from her. They pointed out that the 2nd Respondent could not provide any signed transfer documents as proof that the 1st Respondent was indeed a party to the transaction, which they noted occurred prior to the alleged sale agreement. The Appellants, contended that the 2nd Respondent could not be considered a bona fide purchaser for value owing to her involvement in what was essentially a corrupt scheme aimed at defrauding, alienating, and registering the property in her name, despite being aware that the actual landlord/lady was not the 1st Respondent. By choosing to enter into an agreement with the 1st Respondent under these circumstances, the Appellants contended the 2nd Respondent engaged in a fraudulent dealing and hence could not acquire a valid title to the suit property.
13. The 2nd Respondent in her submissions stated that although the Appellants contended the 1st Respondent was registered to hold the suit property in trust, they did not adduce any evidence to prove there was such a trust. The 2nd Respondent further submitted that the Appellants had not adduced any evidence to demonstrate or prove that the agreement she entered into for the sale of the suit property was fraudulent. The 2nd Respondent reiterated she was a bonafide purchaser of the suit property as found by the trial Court.
14. I have considered the record of the appeal and the submissions of the parties, and the issues that arise for determination in the appeal can be summed up as follows:-
 1. Whether the 1st Respondent held Plot No. 121 Wang'uru Township in trust for the Appellants and whether the Appellants had proved the existence of such trust?
 2. Whether the transfer of Plot No. 121 Wang'uru from the 1st Respondent to the 2nd Respondent was fraudulently procured?
 3. Whether the 2nd Respondent was a bonafide purchaser of the suit property?
15. This being an appeal of first instance, the Court is duty bound to appraise and re-evaluate the evidence in keeping with the principle enunciated in the Court of Appeal Case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
16. In their Memorandum of Appeal, the Appellants raised 10 grounds of Appeal but in their submissions they basically dealt with three issues, firstly, whether they successfully proved or established a trust



- between themselves and the 1st Respondent; secondly, whether the sale and transfer of the property in question was conducted in a legal and procedural manner; and finally,, whether the 2nd Respondent qualified as a bonafide purchaser of the property for value without notice of any defect in the title.
17. Regarding the primary contention, the Appellants argued that the testimony of the 1st Appellant reinforced their claim that Geoffrey Kamau Gichuhi had conveyed the disputed property to the 1st Respondent with the intention of holding it in trust for the Appellants' benefit. Furthermore, they contended that although the title of the property had been transferred, the management of the income derived from its rental remained under the control of the 2nd Appellant's mother who utilized proceeds to cover the educational expenses of the Appellants. According to the Appellants, the deceased's intention in bequeathing the suit property to his daughter the 1st Respondent, was clearly aimed at benefiting the Appellants, indicating that the property was intended to be held in trust for them.
 18. In addressing the second issue, the Appellants argued that the 1st Respondent was not engaged in the transfer process. It was their contention that the 2nd Respondent failed to present evidence demonstrating the 1st Respondent's involvement in the transfer process. The Appellants further claimed that the 3rd Respondent's approval of the transfer was granted months prior to the execution of the sale agreement which suggested impropriety in the process.
 19. Regarding the third issue, the Appellants contested the assertion that the 2nd Respondent was a bona fide purchaser for value. They argued that she actually defrauded them by knowingly entering into a sale agreement for the property with the 1st Respondent despite being aware that the 1st Respondent was not in charge of the suit property and that she was holding the property as a trustee.
 20. In the Judgment subject of this Appeal, the Trial Magistrate concluded that there was no evidence presented to prove that the 1st Respondent held the suit property in trust for the Appellants. The Court noted that although it was alleged that the 2nd Respondent had acquired the suit property through fraudulent means, the actions of the 1st Respondent were not consistent with those of a person who was a victim of fraud. Specifically, the 1st Respondent did not report the alleged fraud to the police but rather acknowledged receiving Kes. 2,000,000/- from the 2nd Respondent. Though she claimed the money was a loan facility, she made no effort to repay it. The Court took note of the fact that the 1st Respondent never explained how her documents, which were necessary for the transfer of the suit property to the 2nd Respondent, came into the possession of the 3rd Respondent. The Trial Court determined the most plausible explanation was that the 1st Respondent may indeed have borrowed the money and received money from the 2nd Respondent, and decided to sell the suit property to the 2nd Respondent after her inability to repay the money. The Trial Court concluded that the conduct of the 2nd Respondent depicted her as a bona fide purchaser for value and the title she obtained from the 1st Respondent was valid and indefeasible.

Whether there was a trust

21. Trust, including customary trust, must be proved by way of evidence though what constitutes trust would depend on the facts and circumstances of each particular case. In the Case of Juletabi African Adventure Ltd & Another –vs- Christopher Michael Lockley (2017) eKLR stated as follows:-

“It is settled law that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because the law never implies, the court never presumes a trust, but only in case of absolute necessity. The Court will not imply a trust save in order to give



effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied”

22. Further the Court of Appeal in the Case of *Kazungu Fondo Ahutu & Another –vs- Japhet Noticharo & Another* (2021) eKLR restated what they had held in the *Juletabi* case (Supra) when in their Judgment at paragraph 31 they stated thus:-

31. As earlier stated, the existence of a trust is a question of evidence. In the *Juletabi* Case (supra) the Court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. This is because;

“The law never implies, the Court never presumes a trust, but (only) in case of absolute necessity. The Court will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”

23. There is no general principle that parents hold the property that they acquire in trust for their children. Thus as proprietors of property, unless there is an express stipulation that they are registered to hold any property as trustees for their children, parents have unfettered rights as proprietors to deal with any property registered in their names in the manner they please without necessarily consulting with their children. *Munyao, J* in the Case of *Jemutai Tanui –vs- Juliana Jeptepkeny & 5 Others* (2013) eKLR had occasion to address the issue where he stated as follows:-

“The rights of any proprietor of land whether such proprietor has children or not, is the same. The rights of proprietorship are not affected because such proprietor has children. There is no law that says that where a parent hold land, then he holds the same as trustee for any children that he/she has.”

24. Turning to the first issue whether or not the 1st Respondent held the suit property in trust for the Appellants, the Court takes cognisance that the burden to prove that there was a trust lay on the Appellants. Did they discharge this burden? The Appellants were asserting that the 1st Respondent held the suit property in trust for them and hence were under an obligation to prove that a trust did exist in their favour.

25. Section 107, 108 and 109 of the *Evidence Act* Cap 80 Laws of Kenya elaborately provides who bears the burden of proof and in what circumstances as relates to Court proceedings and set out hereunder are these provisions for their tenor and effect:-

107. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.



The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

26. The suit property in the instant matter having not been clan land and/or property that was held under customary law, the guidance given by the Supreme Court in the Case of Isaack M'inanga Kiebia –vs- Isaaya Theuri M'inanga & Another (2018) regarding customary law claims would have no application in the present case.
27. The Appellants in the present matter had to adduce evidence to support and prove their claim before the Trial Court that the 1st Respondent held the suit property as a trustee for them. Judicial decisions have been consistent that the existence or otherwise of a trust is a matter of fact and has to be proved by evidence by the party that alleges the existence of a trust.
28. In the Court of Appeal Case of Juletabi African Adventure Ltd & Another –vs- Christopher Michael Lockley (2017) eKLR the Court stated:-

“It is settled law that the onus lies on a party relying on the existence of a trust to prove it through evidence”.
29. In the present matter though the Appellants claimed the 1st Respondent held the suit land in trust for their benefit no evidence was adduced to prove there was a trust. If there was an intention that the 1st Respondent was to hold the plot in trust, it was not expressed in the 3rd Respondent's register. There is no basis for the Court to hold there was either an implied and/or a resulting trust. The Learned Trial Magistrate on the basis of the evidence, rightly held that there was no proof that the 1st Respondent held the suit plot in trust for the Appellants.
30. The 1st Respondent was duly registered as the owner of the suit plot in the records of the 3rd Respondent and was lawfully entitled to deal with the property in any manner she pleased. There were no encumbrances noted on the register of the suit property and the 2nd Respondent quite properly dealt with the 1st Respondent as the owner of the property. The 2nd Respondent dealt with the 1st Respondent at arms length and there was no evidence adduced to prove that she engaged in any fraudulent dealing with the 1st Respondent. The 2nd Respondent paid to the 1st Respondent a sum of Kshs 2,000,000/- which the 1st Respondent acknowledged, though she claims it was advanced to her as a soft loan. The claim that the sum of Kshs 2,000,000/- was a loan is not borne out by the facts. The 1st Respondent did not exhibit any loan agreement if there was one. In contrast the 2nd Respondent exhibited a sale agreement dated 17th August 2016 which was duly executed by the 1st Respondent and the 2nd Respondent and was attested by one Mwangi Kinyua Advocate and witnessed by three(3) independent witnesses.
31. What however appears troubling and the record equally shows the trial Magistrate grappled with the same, is the apparent inconsistency as to the date when the County Government approved the transfer of the suit plot from the 1st Respondent to the 2nd Respondent. There is on the one hand, an extract of a minute which indicated the County Government gave its approval for the transfer on 20th May 2016 yet another extract of the Minutes for meetings held by the relevant committee of the County Government on 26th, 27th and 28th August 2016 indicated the suit plot was amongst several others



whose approval for transfer was given at this meeting held at Sports View Hotel, Kasarani. The trial Magistrate in dealing with this aspect of the evidence stated as follows in his Judgment:-

“I have seen the Plaintiffs have clung onto the discrepancy of the minutes approving the transfer. The County has explained its processes.

In all processes, unless fraud is alleged, then mistakes and errors are expected. There is no indication that the minutes date stamped 23rd February, 2017 held in August 2016 are forgeries. These minutes reflect many properties, the plot included.

There is nothing untoward for a Committee of the County having its sittings outside of the County.

32. I have considered the evidence adduced both by the 1st Respondent and the 2nd Respondent before the trial Court and I am persuaded that indeed the 1st Respondent and the 2nd Respondent initially had a mutual loan arrangement whose terms were not in writing. It is when the 1st Respondent experienced difficulties to repay the loan that she must have decided to sell the plot which she had pledged as security for the loan to the 2nd Respondent. The explanation by the 2nd Respondent regarding the agreement dated 17th August 2016 was not believable. That agreement apart from being signed by both the 1st and 2nd Respondent was signed by 3 independent witnesses and attested by an Advocate. The 1st Respondent did not protest the agreement even after receiving a Demand Letter from the 2nd Respondent’s Advocate dated 21/10/2016. If she had not signed the agreement one would have expected her to report the matter to the police for investigation and appropriate action. There was no evidence that the 1st Respondent made such a report to the police. I view the 1st Respondents conduct of renegeing from the contract she had entered into with 2nd Respondent as an effort to pacify the Appellants who are her immediate family members.
33. Having carefully evaluated the evidence adduced before the Lower Court, I find no basis upon which I can fault the Learned Trial Magistrate on the decision that he reached. The appeal lacks merit and I dismiss the same with costs to the 2nd Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 4TH DAY OF JULY 2024.

J. M. MUTUNGI

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ELC - JUDGE

I certify that this is a true copy of the originally

Signed

DEPUTY REGISTRAR

