



**Gacuri (Suing as the Administratrix of the Estate of Zaituni
Ngima Gacuri) v Hobbs & another (Environment and Land Appeal
E007 of 2023) [2024] KEELC 6987 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6987 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E007 OF 2023
AK BOR, J
OCTOBER 9, 2024**

BETWEEN

**ROSEMARY WANGECHI KAMAU APPELLANT
SUING AS THE ADMINISTRATRIX OF THE ESTATE OF ZAITUNI NGIMA
GACURI**

AND

**TIMOTHY BENEDICT HOBBS 1ST RESPONDENT
MARGARET NJERI DAUDI K INGONGORA 2ND RESPONDENT**

JUDGMENT

1. Being aggrieved and dissatisfied with the judgment of Hon. Kithinji A.R. Chief Magistrate delivered on 16/8/2023 in Nanyuki CMELC NO. 62 of 2 019, the Appellant lodged this appeal. She faulted the trial court for failing to find that plot number 688 which had been registered as Gakawa/Githima/Block2/688 (the suit property) belonged to the late Zaituni Ngima Gacuri who had acquired from Burguret Arimi Company Limited. Further, the Learned Magistrate was faulted for failing to find that the suit property belonged to a deceased person and was not available for sale to the 1st Respondent by the 2nd Respondent before letters of administration to her estate were obtained.
2. The other grounds of appeal were that the trial court erred by relying on the green card and title deed without regard to the history of the suit property and for holding that the Appellant should have called a witness from Burguret Arimi Company Limited or the land Registrar of Laikipia to confirm the position on the ground yet the property did not fall within Laikipia County. The trial court was also faulted for arriving at the decision that the 2nd Respondent was the 1st proprietor of the suit property and that she successfully transferred it to the 1st Respondent through the sale agreement



yet the 2nd Respondent had not obtained letters of administration for the Estate of the late Zaituni Ngima Gacuri, the original owner of the suit property.

3. The Appellant contended that the trial court failed to consider his written submissions and arrived at an erroneous decision and that the court failed to consider the affidavits sworn by the 2nd Respondent confirming that Zaituni Ngima Gacuri was the original owner of the suit property. The trial court was also faulted for failing to hold that by virtue of the affidavit, the 2nd Respondent did not have property that she could transfer or sell to the 1st Respondent. The Appellant contended that the trial court should have found that the 2nd Respondent had irregularly and improperly acquired the suit property and could not therefore have passed a good title to the 1st Respondent.
4. The background to this case according to the plaint filed in the Chief Magistrates Court on 7/8/2019, is that the Appellant claimed that the late Zaituni Ngima Gacuri was the owner of the suit property. Upon her demise, the Appellant went to the land registry in Nyeri and discovered that the 2nd Respondent had transferred the suit property to her name and later sold it to the 2nd Respondent. The Appellant was emphatic that since the 1st Respondent owned several other properties which border the suit property and knew all along that it did not belong to the 2nd Respondent, he could not be said to be an innocent purchaser for value without notice.
5. The Appellant pleaded particulars of fraud on the part of the Respondents while urging that she had never sold or transferred the suit property or any part of it to the Respondents. She sought a declaration that the suit property was fraudulently and deceitfully transferred to the Respondents. She also sought cancellation of the title held by the 1st Respondent and to have the land registered in the names of the deceased Zaituni Ngima Mohammed.
6. It would seem that the 2nd Respondent did not participate in the suit. In his defence filed on 20/9/2019, the 1st Respondent denied the Appellant's claim and averred that he acquired the suit property through a valid and lawful sale from the 2nd Respondent vide the sale agreement dated 7/7/2005.
7. The matter went to trial and in the judgment delivered on 16/4/2023, the Learned Magistrate found that despite the Appellant claiming that the late Zaituni Ngima was the registered owner of the suit property, she did not adduce evidence to support the claim. According to the trial court, the evidence on record confirmed that the 2nd Respondent was the first proprietor of the suit property and she successfully transferred her interest in the land to the 1st Respondent vide the sale agreement dated 7/7/2015 for the consideration of Kshs. 3,000,000/=. The trial court went further to state that if the Appellant felt that the 2nd Respondent committed any wrong by transferring the suit property to the 1st Respondent, she was at liberty to pursue her. The court dismissed the suit with costs to the 1st Respondent.
8. The appeal was canvassed through written submissions. Both parties filed submissions which the court has considered. The Appellant submitted that she clearly told the trial court that the 2nd Respondent was her sister in law while Zaituni Ngima Gacuri who was her mother in law, died on 15/3/1984. She relied on the grant of letters of administration ad litem and certificate of death. When she heard rumors that the 2nd Respondent was selling the suit property, she carried out an official search which confirmed that the suit property was registered in the 1st Respondent's name 21/8/2019. The Appellant faulted the Learned Magistrate for stating that she did not lodge any claim to the suit property until the 2nd Respondent sold it to the 1st Respondent and argued that one can only claim something after learning that a cause of action exists.



9. The Appellant contended that she tendered evidence which confirmed that her late mother in law acquired the suit property from Burguret Arimi Limited. Further, that the 2nd Respondent had confirmed through her sworn affidavit that the late Zaituni Ngima Gacuiru owned the suit land. She contended that in light of this, the trial court should have concluded that the 2nd Respondent did not have land to transfer to herself and then proceed to sell it to the 1st Respondent.
10. The Appellant relied on her witnesses' evidence to the effect that Zaituni died on 14/2/1984 and that she owned plot no. 688 prior to her death based on her membership in Burguret Arimi Company Limited which had allocated her the suit land, which is now registered as Gakawa/Githima Block 2/688. She also relied on the clearance certificate issued by the land buying company as well as the register of members of Burguret Arimi company and their respective plots. She emphasized that the register indicated that Zaituni Gacuiru owned plot not.688.
11. The Appellant referred the 2nd Respondent's affidavit sworn on 13/5/1999 in support of the application for lodging a caution against the suit property. The affidavit expressly mentioned that Zaituni Ngima Gacuiru was the registered proprietor of the suit property. She urged that she tendered overwhelming or a land documentary evidence to confirm that the late Zaituni owned the suit property and challenged the trial court's reliance on the green card and the title deed produced by the 1st Respondent in arriving at its decision.
12. The Appellant went on to argue that there was no need to call the Laikipia Land Registrar to testify as the trial court found because the land was registered at the Nyeri Land registry and not Laikipia. The Appellant contended that the 2nd Respondent had not obtained letters of administration and that the trial court committed unforgivable errors of omissions and commissions
13. The Appellant went on to urge that the late Zaituni acquired the suit property from Burguret Arimi Limited and was given a clearance certificate after making the requisite payments. That she died before processing her title. The Appellant was emphatic that the 2nd Respondent could not have been the first proprietor of the suit property since she had not taken out letters of administration or the estate of her late mother-in-law, Zaituni Gacuiru. The Appellant faulted the Learned Magistrate for finding that she ought to have sought indemnity from the 2nd Respondent without explaining how the suit property would revert to the deceased when it was already registered in the 1st Respondent's name.
14. The Appellant went on to explain that she had sued the right parties being the 1st and 2nd Respondents, because they participated in the intermeddling with the property of a deceased person, which is a criminal offence. The Appellant urged that she cited binding authorities including the one where the court found that if there was a contention that a lease was improperly acquired, the holder must demonstrate through evidence that the lease he held was properly acquired. Further, that the courts have held that a title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. She maintained that she had discharged her burden of proof.
15. The Appellant submitted that having transferred the suit property belonging to a dead person to her own names without letters of administration, it was upon the trial court to arrive at the conclusion that the 2nd Respondent's title over the suit property was improperly acquired and that she could not have passed a good title to the 1st Respondent. She maintained that the 1st Respondent failed to demonstrate at the trial that the title in his hands was properly acquired hence it could be impugned for being obtained illegally, unprocedurally or through a corrupt scheme. She added that it was evident that the Respondents and some corrupt Land Registrars acted in concert and transferred the suit property first



- to the 2nd Respondent and thereafter to the 1st Respondent. She maintained that the 1st Respondent was not an innocent purchaser for value as she contended.
16. The Appellant relied on *Alice Chemutai Too vs Nickson Kipkurui & 2 Others* (2015) eKLR on the point that it was not necessary for the title holder to be a party to the vitiating factors that the title was obtained illegally, unprocedurally or through a corrupt scheme because the effect of Section 26(1)(b) of the *Land Registration Act* was to remove protection from an innocent purchaser.
 17. The Appellant relied on Section 80 of the *Land Registration Act* on the court's powers to order rectification of the register by directing that any registration be cancelled if satisfied that it was obtained or made by fraud or mistake. That since it had been established that the title over the suit property was irregularly or fraudulently registered in the 2nd Respondent's name, and later the 1st Respondent, this court should order rectification of the register and restoration of the title to the Estate of the late Zaituni Ngiua Gacuiru without any condition.
 18. The Appellant contended that Section 45 of the *Law of Succession Act* prohibited intermeddling with the estate of a deceased person and expounded that the 2nd Respondent could not have passed a good title than she had to the 1st Respondent based on the fact that no succession proceedings had been filed in respect of the Estate of the late Zaituni. The Appellant reiterated that it did not need space science to conclude that the 2nd Respondent must have acquired registration of the suit property through fraud. The Appellant relied on several decisions of courts regarding the position of a fraudulent title which should not be allowed to stand.
 19. The 1st Respondent submitted that the Appellant did not produce any document to confirm that the late Zaituni owned the suit property. He pointed out that the receipts issued by Burguret Arimi Limited which the Appellant tendered in evidence together with the clearance certificate did not mention the suit property. Moreover, that the clearance certificate was issued on 1988 yet Zaituni died on 14/2/1984 as shown on the death certificate and that a clearance certificate could not have been issued to a dead person. He added that it was not in dispute that the late Zaituni was never at any given time registered as proprietor of the suit property. The Respondent submitted that the Appellant produced the caution in evidence and that in that caution, she merely stated that the suit property was registered in the 2nd Respondent's name to hold in trust for the family without making any allegations of fraud.
 20. The 1st Respondent contended that the suit property could not have formed part of the estate of the late Zaituni because it was not her free property within the meaning of Section 3 of the *Law of Succession Act*. The 1st Respondent reiterated that the late Zaituni was not registered as the proprietor or owner of the suit property and that the trial magistrate could not be faulted for arriving at his findings.
 21. The 1st Respondent submitted that he demonstrated how he acquired the suit property through the green card which showed that the suit property was registered in the 2nd Respondent's name on 18/2/2015 and transferred to him on 2/10/2015. He relied on the sale agreement and the consent of the Land Control Board (LCB). He also quoted the definition of an innocent purchaser in the Black's Law Dictionary. The 1st Respondent submitted that the Appellant was required to specifically plead and prove fraud. He pointed out that in the plaint, particulars of fraud were alleged as well as misrepresentation and misconception of the registrar yet it was the Appellant who had the onus to either join the Land Registrar as a party to the suit or call him as a witness to prove how the Registrar was deceived or misled to issue a title deed to the 2nd Respondent.
 22. Regarding the list of members of Burguret Company, the 1st Respondent submitted that it was incomplete and was not authenticated or signed by its Directors or Land Registrar. He argued that the Appellant should have called the directors of the company as witnesses to produce the complete



- and authentic members' register. He argued that under Section 107 of the Evidence Act, the burden of proof lay on the Appellant to call crucial witnesses and lead proper evidence in support of her claim.
23. The 1st Respondent contended that his registration as proprietor of the suit property conferred upon him rights and interest which were protected under Sections 24 and 25 of the Land Registration Act. He relied on John Kenneth Njeru (suing as Attorney of Patrick Gitonga Nyaga v Peter Maina Waweru Nanyuki ELC Case No. 9 of 2022 (unreported))
 24. The issue for determination is whether the court should allow the appeal and set aside the decision of the Learned Magistrate and instead enter judgment for the Appellant in terms of her suit. The Appellant's claim is that the 2nd Respondent who is her sister in law unlawfully sold and transferred the suit property which she claimed belonged to her late mother in law without taking out letters of administration. The Appellant relied on the documents from the land buying company. Zaituni died on 14/2/1984. The Appellant obtained letters of grant of administration ad litem in relation to the Estate of the late Zaituni on 19/11/2018, which is 34 years after her death. It is not clear whether the late Zaituni had other assets and whether succession proceedings have been commenced in respect of her entire estate.
 25. What is not in dispute is that the late Zaituni had not been registered as the proprietor of the suit property before her death. It was therefore incumbent upon her beneficiaries, including the Appellant, to take out letters of administration soon after she died so as to protect and preserve her assets for distribution by the court among her dependants. No explanation was given by the Appellant for the failure to pursue registration of the suit property from 1984 when Zaituni died until 2018 after the 2nd Respondent had sold the land to the 1st Respondent in 2015.
 26. The 2nd Respondent transferred the suit property to the 1st Respondent after being registered as proprietor. It is the registration of the land which confers and buttresses rights of ownership on a proprietor, and the protection afforded to the registered owner by the law stems from the fact of registration. This is why part of the due diligence which a prospective buyer undertakes is doing a search at the lands registry to establish the registration details of the land. By not moving with alacrity to have the suit property preserved and dealt with in accordance with the Law of Succession Act so soon after Zaituni died in 1984 while knowing full well that the land had not been registered in her name, the Appellant and other beneficiaries of the estate of the late Zaituni exposed themselves to the risk of the land being sold or transferred by a family member who was shrewd enough to process the title in her name in mysterious circumstances.
 27. Without the 2nd Respondent to shed light on how the suit property came to be registered in her name and without proof of fraud to the standard required, it is difficult to fault the findings of the Learned Magistrate. Nothing turns on the trial court's finding that the Appellant should have called the Laikipia Land Registrar yet the land falls under the Nyeri Land Registry because the Appellant could have called the right Land Registrar to explain how the 2nd Respondent got herself registered as proprietor of the suit property.
 28. The court declines to allow the appeal. Each party will bear its costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 9TH DAY OF OCTOBER 2024.

K. BOR

JUDGE

In the presence of:-

Mr. Bwonwonga William for the Appellant



Mr. Muchiri Mwangi for the 1st Respondent

Diana Kemboi- Court Assistant

No appearance for the 2nd Respondent

