



Ibiiri & 3 others v Sikunyi & 2 others (Environment and Land Appeal E017 of 2023) [2024] KEELC 6854 (KLR) (9 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6854 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E017 OF 2023**

AK BOR, J

OCTOBER 9, 2024

BETWEEN

**GLADYS MUTHONI IBIIRI 1ST APPELLANT
GKS 2ND APPELLANT
ABIGAELE MWANDWA MWALA 3RD APPELLANT
EMM 4TH APPELLANT**

AND

**HENRY MWELA SIKUNYI 1ST RESPONDENT
JIMMY KARIUKI BUSIENEI 2ND RESPONDENT
THE HON. ATTORNEY GENERAL 3RD RESPONDENT**

JUDGMENT

1. The 1st Appellant who is the mother of the 2nd to 4th Appellants filed suit claiming that she got married to the 1st Respondent customarily since the early 1980's, and that they had been cohabiting as husband and wife for more than two decades. Further, that during that period they were blessed with three issues, who are the 2nd to 4th Appellants. She claimed that on 20/5/1991, she and the 1st Respondent mutually agreed to purchase a parcel of land where their family could settle. Consequently, the 1st Respondent entered into a sale agreement with Francis Kiogora M'Ikabu to purchase the land known as Laikipia/Kalulu/52 measuring approximately 5 acres (suit property) at the consideration of Kshs. 140,000/=. The land was still under the Settlement Fund Trustees (SFT). The 1st Appellant claimed that at the time she was employed as a civil servant in the Office of the President and used her salary to contribute towards the purchase of the suit property following which the 1st Respondent was registered as owner in trust for the whole family.



2. She claimed that she was retrenched in 2000 and that on or about 2001, the 1st Respondent abandoned the Appellants without any notice and relocated to Western Province where he hailed from. That he did not offer any support or provide any basic needs despite the 2nd to 4th Appellants being minors at the time, who were in educational institutions. She claimed that she single handedly struggled to feed, clothe, house and educate the 2nd to 4th Appellants using the outputs from the suit property.
3. Sometime in 2006, the 1st Appellant received information that the 1st Respondent was intending to dispose of the suit property which she claimed to have been occupying since 1991. She averred that the 1st Respondent did not consult or inform her of his intentions to sell the family land. The 1st Appellant claimed that she sought the assistance of the Chief of Kalalu Location to warn the 2nd Respondent against buying the suit property and subsequently lodged a caveat with SFT against any dealings on the land without her knowledge. The 1st Appellant learnt with shock in 2010 that the 1st Respondent had transferred the suit property to the 2nd Respondent. She contended that the SFT disregarded the caution registered against the suit property and cleared the 1st Respondent to be issued a title deed.
4. The Appellant contended that the land registrar actuated by corrupt dealings between himself and the Respondents, aided a fraudulent transaction in order to defeat her interest by registering a discharge from the SFT and issuing a title to the 1st Respondent and transfer to the 2nd Respondent which were done on the same day. The 1st Appellant contended that the 2nd Respondent knew that the suit property was wholly and exclusively occupied and utilized by the 1st Appellant to the exclusion of the 1st Respondent since 2001. The Appellant pleaded particulars of corruption and fraud on the part of the Respondents.
5. In the amended plaint filed on 25/4/2014 in Meru HCCC No. 158 of 2010, the Appellants sought a declaration that the 1st Appellant had contributed to the acquisition of the suit property and as such, the 1st Respondent held the land in trust for himself and the Appellants. Secondly, they sought a declaration that the SFT trustees erred by clearing the 1st Respondent to be issued with a title deed over the suit property while there was a subsisting caution lodged by the 1st Appellant. They also sought a declaration that the transfer of the suit property by the 1st Respondent to the 2nd Respondent was unlawful and irregular because there was no valid consent from the land control board. They sought an order directing the Land Registrar to cancel the title deed over the suit land registered in the 2nd Respondent's name and register it in the 1st Appellant's name to hold in trust for the 2nd to 4th Appellants.
6. In his amended defence and counterclaim, the 2nd Respondent averred that he solely purchased the suit property and that the 1st Appellant did not make any contribution towards its purchase. He went on to aver that the 1st Respondent was married to Cecilia Naspwondi Mwela and they had 10 children and that the 1st Appellant could not plead to be the 1st Respondent's wife. He averred that after the suit was filed he communicated with the 1st Respondent who denied vehemently that he had any relations with the 1st Appellant or issues.
7. He denied that the 1st Respondent and the Appellants had ever settled on the suit property. He stated that he purchased the suit property when it was still under adjudication and settlement and that he assisted the 1st Respondent to discharge and transfer the land. When he purchased the land, it had no encumbrances. He maintained that the sale transaction was done above board and that they entered into a valid contract of sale for the suit property. He denied the particulars of corruption and fraud set out in the suit.



8. The 2nd Respondent counterclaimed that on or about 29/11/2012, the Appellants invaded the suit property and destroyed the fence and perimeter wall. He asserted that the Appellants had forcefully continued to occupy the suit property without any colour of right therefore interfering with his quiet enjoyment of the land. He maintained that they should be evicted and sought a declaration that he was the rightful owner of the land. He indicated that the 2nd Respondent died on 25/1/2015 and that the continued occupation of the suit property by the Appellants was illegal.
9. He sought general damages for trespass and a permanent injunction to restrain the Appellants from entering the suit property or interfering with his quiet enjoyment of the land. He also sought an eviction order and cancellation or removal of the caution placed against the suit property. He sought to have the Appellant pay mesne profits, to be calculated from 29/11/2012 until the Appellants moved out of the land.
10. The matter went to trial and parties tendered evidence in support of their claims. The Learned Magistrate delivered the judgment in which he found that the 1st Appellant had failed to prove her marriage to the 1st Respondent including the conditions to be met under Meru Customary Law before a man and a woman could be considered to have become husband and wife. The trial court found that the Appellants had failed to prove fraud and that the 1st Appellant failed to adduce evidence to show her interest over the suit property for the court to infer that the 2nd Respondent acquired registration fraudulently. The court found that the 2nd Respondent adduced evidence which showed that he was the registered owner of the suit property after it was successfully transferred to him by the 1st Respondent. The court took into account the fact that the 1st Appellant had been in occupation of the suit land for a long period of time and awarded general damages of Kshs. 200,000/=. The court declined to award mesne profits. It dismissed the Appellants' case and allowed the counterclaim.
11. The court gave directions for the appeal to be canvassed through written submissions. Parties filed their written submissions which the court has read and considered. It was submitted that although the 1st Appellant had registered a caution against the suit property, that was disregarded by the SFT who discharged the title to the 1st Respondent without registering her overriding interest. She maintained that the discharge of the charge over the suit property and registration of the suit land in the 1st Respondent's name, as well as the subsequent transfer to the 2nd Respondent on the same day was marred with fraud and actuated by corrupt dealings. The Appellant maintained that no consent from the land control board was obtained and there was no evidence that the requisite stamp duty had been paid.
12. The Appellants relied on the evidence of the 1st and 2nd Appellants and that of Francis Kiogora. They also relied on the birth certificates for the 2nd to 4th Appellants showing they were the 1st Respondents children. The Appellants pointed out that the only evidence of payment of levies was the receipt dated 6/5/2010 for Kshs. 2000/= and that there was no evidence of payment of stamp duty which rendered the transaction a nullity. The Appellants submitted that the inconsistencies on the date the transfer is indicated to have been registered was another indicator that there were corrupt dealings. They also pointed out that the land control board consent was issued 50 days after the transfer had been effected and a title issued to the 2nd Respondent. The other issue taken up by the Appellants was that the discharge of charge was dated 13/10/2006 but was registered on 6/5/2012. They maintained that the entries were made on the same day to defeat their interest.
13. The Appellants relied on the decision in *Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others* [2015] eKLR on the point that it was not necessary to demonstrate that the title holder was guilty of immoral conduct where a person challenged a title on the ground that it was acquired illegally,



unprocedurally or through a corrupt scheme. The Appellants also relied on the *Land Control Act* and the *Land Registration Act* while urging the court to allow the appeal.

14. The 2nd Respondent submitted that the record of appeal was fatally defective for failure to attach the decree. The 2nd Respondent submitted that the Appellants withdrew the suit against the 1st Respondent after he died on 25/1/2015. He maintained that the dispute should have been taken before the family court to make a determination as to whether or not the 1st Appellant was the wife of the 1st Respondent. The 2nd Respondent went further to urge that the issue of contribution towards the purchase of the suit property cannot be determined by this court and that it should have been determined by the High Court. He added that the discontinuance of the suit against the 1st Respondent placed him at a disadvantage.
15. The 2nd Respondent submitted that there was no existing overriding interest against the suit land while maintaining that the Appellants moved into the land in 2012. The 2nd Respondent submitted that the Appellants had introduced fresh prayers in the appeal in relation to the land control board which were not pleaded before the trial court. He pointed out that the birth certificates for the 2nd to 4th Appellants were taken out when they were already adults after this suit had been filed. He reiterated that this not being a family court, it could not delve into the issues of paternity which should have been litigated before a family court.
16. Further, he reiterated that the 1st Appellant had failed to prove contribution. The 2nd Respondent was emphatic that the sale transaction was done above board and conducted within the ambit of the law. Additionally, that the transfer was effected by the true owner of the suit land and the Appellants lacked the requisite capacity to question the transaction. He added that the issue of stamp duty was never raised before the trial court and could not therefore be introduced at this stage while pointing out that parties are bound by their pleadings. He emphasised that the Appellants withdrew the suit against the 1st Respondent who would have been the one to answer those allegations.
17. He maintained that the Appellants failed to prove that he participated in any fraud or acquired the title illegally. He was emphatic that he was a bona fide purchaser for value and was entitled to the protection of the law as the registered proprietor of the suit land. He urged the court to dismiss the appeal with costs.
18. The issue for determination is whether the court should allow the appeal and set aside the findings of the trial court. The Appellants claim to the suit land is anchored on the assertion that the 1st Respondent purchased the suit property while he was married to the 1st Appellant with the intention of settling the family there. The corollary claim is that the 2nd to 4th Appellants are children of the 1st Respondent, who is said to have died in 2015.
19. The 1st Appellant claimed that she contributed funds towards the purchase of the suit property even though the land was solely registered in the 1st Respondent's name. The issues as to whether or not the 1st Appellant was married to the 1st Respondent; whether the 1st Appellant contributed to the purchase of the suit property and whether it was matrimonial property fall outside the jurisdiction of this court. This court would also be ill placed to address issues of paternity of the 2nd to 4th Appellants. Those issues fall within the jurisdiction of the Family Court or the High Court.
20. Appeal is dismissed with costs to the 2nd Respondent.

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

K. BOR



JUDGE

In the presence of: -

Mr. Kaumbi Kioga for the Appellants

Mr. Ramadhan Abubakar for the 2nd Respondent

Diana Kemboi- Court Assistant

No appearance for the 1st and 3rd Respondents

