



**Ngayo v Ngayo & 4 others (Environment & Land Case 188 of 2016)
[2024] KEELC 6590 (KLR) (9 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE 188 OF 2016**

**JM MUTUNGI, J
OCTOBER 9, 2024**

BETWEEN

ALEX MWANGI NGAYO PLAINTIFF

AND

VICTORIA WAMBEERE NGAYO 1ST DEFENDANT

KEZIAH FAITH NJERI 2ND DEFENDANT

PETER WAWERU MURIUKI 3RD DEFENDANT

JANE WAMBUI MUTUGI 4TH DEFENDANT

MARITINA KAVESU MUTUGI 5TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced the present suit by way of a Complaint dated 17th November 2016 and prayed for orders that:
 1. A declaration that land parcel number Mwerua/Kabiriri/1112 was illegally and fraudulently transferred to the 1st Defendant.
 2. An order for cancellation of the title deeds to L.R Mwerua/Kabiriri/3665, 3666, 3667, 3668, 3669, 3670, 3671, 3672, 3673, 3674, 3675 and 3676 and the land to be reconstituted to the original parcel number Mwerua/Kabiriri/1112 in the name of Erastus Ngayo Ndeeri, deceased.
 3. Costs of the suit and interest.
2. In the complaint the Plaintiff avers that land parcel Mwerua/Kabiriri/1112 was family land by virtue of the fact that it belonged to their late father Ngayo Ndeeri Erastus (now deceased) before it was fraudulently transferred to the 1st Defendant who was their sister. The Plaintiff contended that on or about 13th August 2015, the 1st Defendant fraudulently and unlawfully caused the transfer of land



parcel Mwerua/Kabiriri/1112 in her name. The Plaintiff alleges that the fraudulent transfer took place while he and the 1st Defendant's father, the registered owner of the original suit land, were sick and bedridden. The Plaintiff avers that he lodged a restriction on the original suit property to protect his interests and those of his siblings. Additionally, the Plaintiff averred that the 1st Defendant caused the original suit property to be subdivided into land parcel Mwerua/Kabiriri/3665-3676, which were illegally transferred to the 2nd to 5th Defendants. He stated that neither he nor his siblings were involved in transferring their family land. As a result, he holds that the transfer to the 1st Defendant was illegal and unlawful, and thus, she could not pass a good title to the 2nd to 5th Defendants.

3. The 1st Defendant filed her Statement of Defence on 16th December 2016, where she denied the allegations in the Plaintiff. She claimed that their father was of sound mind and capable of handling affairs of his properties and that all necessary legal requirements were met when the transfer was effected to her name. The 1st Defendant further averred that the Plaintiff's cautions and restrictions were made in bad faith to delay the distribution of the deceased's estate to the lawful owners. The 1st Defendant further asserted that the transfer of the land to her name, as well as subsequent subdivisions and transfers, complied with all legal requirements and were free from any undue influence, coercion, fraud, or trickery. She asserted that all family members were consulted and consented to the transactions.
4. The 2nd and 3rd Defendants filed their Statements of Defence on 16th December, 2016. In their defences, they denied the claims made by the Plaintiff in the plaintiff. They stated that their parcels of land, Mwerua/Kabiriri/3669 & 3670 for the 2nd Defendant and Mwerua/Kabiriri/3666 and 3665 for the 3rd Defendant, were legally transferred to them, following all necessary legal formalities. They asserted that they were not involved in any fraudulent activities, and emphasized that they conducted due diligence before the purchase and that they acquired the properties in question as bona fide purchasers and in good faith. They stated the parcels of land were vacant at the time they made the purchase.
5. The 4th and 5th Defendants jointly filed their Statement of Defence and denied the Plaintiffs' claim in its entirety. They averred the 1st Defendant legally acquired land parcel No. Mwerua/Kabiriri/1112, subdivided it into portions Mwerua/Kabiriri/3665 to 3676, and subsequently transferred land parcel Mwerua/Kabiriri/3671 and 3672 to the 4th and 5th Defendants, respectively. They prayed that the Plaintiff's suit be dismissed with costs.

Evidence of the Parties

6. The Plaintiff testified on 1st February 2022. He adopted his witness statement and relied on the bundle of documents exhibited and filed with the Plaintiff, and the Supplementary documents. He testified that the 1st Defendant was his sister and that his claim against the 2nd, 3rd, 4th, and 5th Defendants was against them as purchasers. He stated that the land in question was previously registered in the name of his father, Erastus Ngayo Ndeeri (deceased) and that it was fraudulently transferred to the 1st Defendant. He claimed that his father did not sign the application to transfer the land to the 1st Defendant because he was hospitalized and admitted on the date the application was supposedly signed. The Plaintiff further stated that his father lacked capacity to execute the transaction as he had suffered a stroke that rendered him to be incapable of comprehending the nature of the transaction as alleged. Additionally, he testified that the 1st Defendant unlawfully removed the caution and restriction placed on the land by him and the District County Commissioner (DCC) to effectuate the unlawful and fraudulent transfers.
7. The 1st Defendant testified on 1st February 2022 and adopted her witness statement dated 3rd April, 2018 while placing reliance on the bundle of documents she had exhibited in support of her case.



8. The 1st Defendant affirmed that the Plaintiff was her sibling and that the suit land was previously registered in the name of their deceased father. According to her, their father during his lifetime willingly signed the application for consent to transfer the original suit land to her name as a gift for taking care of him when he was sick. She stated that her father was of sound mind when he signed the documents. When questioned about the sale agreement between herself and the 3rd Defendant, she confirmed that it was made on 12th August, 2015 just days before their father passed away. Regarding the caution and restriction, she stated that they were removed by the Plaintiff and the Deputy County Commissioner (DCC) respectively.
9. On 1st February, 2022 the 3rd Defendant testified that he is a land surveyor and had entered into a sale agreement with the 1st Defendant on 12th August, 2015. According to his testimony, the 1st Defendant had previously visited his office and informed him that her father wanted to transfer the original suit land to her. They then visited the father at home, where he signed the application for consent to correct his name and application for the transfer of the original suit land to the 1st Defendant's name.
10. During cross-examination, the 3rd Defendant confirmed that despite finding the deceased to be the registered proprietor after a search, he nonetheless proceeded to enter into the agreement with the 1st Defendant. He stated that the subdivision was done while the deceased was still alive and that the transfer documents were presented to the Lands Office on 14th August, 2015 while the deceased was still alive.
11. The 4th Defendant testified on 17th March, 2022 and it was her evidence that she acquired her piece of land on 12th November, 2015 vide an agreement dated 7th November, 2015. She stated that on 12th November, 2016 they attended the Land Control Board though she affirmed that she never verified how the 1st Defendant had acquired the original parcel of land. She however stated she had conducted a search on the land parcel Mwerua/Kabiriri/3672 after she had entered into the sale agreement but before they attended the Land Board.
12. The 5th Defendant testified that she bought her parcel of land from the 1st Defendant vide an agreement dated 7th November, 2015. She stated that she did all due diligence and that the transfer was done in compliance with all the necessary statutory requirements.
13. The 2nd Defendant testified on 10th May, 2023 whereby she adopted her witness statement and relied on the bundle of documents she had filed. She stated that she purchased her parcels of land from the first Defendant in good faith and that she conducted all necessary due diligence. She stated that at the time of purchase, she was unaware of the prior history of the land in question. She affirmed that it was her late husband who signed the sale agreement on her behalf. She stated that she had been leasing out her parcel of land since the purchase.

Submissions, Analysis, Evaluation and Determination

14. The Plaintiff filed his submissions dated 13th June, 2023 on 15th June, 2023, while the 4th and 5th Defendants filed their submissions dated 28th October, 2023 on 21st February 2024. The 1st, 2nd and 3rd Defendants despite being afforded the opportunity to do so did not file any submissions.
15. The Plaintiff in his submissions reiterated that the 1st Defendant had fraudulently caused their late father's land to be transferred to her name. The Plaintiff argued that at the time the transfer was effected, their father was very sick and was bed ridden and could not of his free will and voluntarily have transferred their only family land solely to the 1st Defendant to the exclusion of all the other children. The Plaintiff submitted that the 1st Defendant manipulated their late father to attend the Land Control Board meeting if at all he did, in order to facilitate the unlawful and fraudulent transfer to herself. The



- 1st Defendant admitted in evidence that at the time they attended the Land Board on 13th August 2015, their father was sick and that he was infact hospitalized on the same date and subsequently passed away on 17th August 2015 barely 4 days later.
16. The Plaintiff contended that the 1st Defendant caused a caution that he (the Plaintiff) had registered against the title, and that placed by the Deputy County Commissioner since there was a family dispute over the land to be removed without the Plaintiff's knowledge, even though the 1st Defendant had filed a suit before the Chief Magistrates Court being Kerugoya CMCC No. 307 of 2015 seeking to have the cautions removed which was still pending as at the time of the transaction herein. The Plaintiff submitted that the 1st Defendant was subsequently charged in Kerugoya CM Cr. Case No. 729 of 2016 as per the charge sheet exhibited as "PEX7" and after trial was found guilty of conspiring to have the restrictions removed from the suit land and sentenced to pay a fine of Kshs 50,000/- or in default to serve 2 years imprisonment.
 17. The Plaintiff took the position that considering their father's medical condition at the time, he could not understand what was happening and he had no ability to comprehend and/or give consent to the transaction. The Plaintiff's deceased father had suffered a stroke and had not recovered and that affected his mental capacity and could not be expected to act as a normal person.
 18. As relates to the transfers effected to the 2nd to the 5th Defendants, the Plaintiff submitted that the 1st Defendant having illegally and fraudulently acquired title to land parcel Mwerua/Kabiriri/1112 she never acquired a good title to the same and consequently could not pass a good title to any person who purchased a portion of the same. He submitted the 1st Defendant could not pass a good title to anybody, when she herself never acquired a good title.
 19. The 3rd Defendant a Surveyor by professional is the person who carried out the subdivision of the suit property and also purchased two of the subdivisions namely, Mwerua/Kabiriri/3665 and 3666. The 3rd Defendant entered into a sale agreement with the 1st Defendant to purchase a portion of 0.10 Ha of Mwerua/Kabiriri/1112 which measured 3.075 Ha approximately. The 1st Defendant entered into the agreement as the vendor yet as at this time, the Plaintiff's deceased father was alive and was the registered owner and was not a party to the agreement. The Plaintiff submitted that the 3rd Defendant, as the Surveyor, had details of the suit property and knew or should have known the property that he entered into an agreement to purchase a portion that did not belong to the 1st Defendant but to her deceased father and hence the 1st Defendant lacked capacity to deal with it. In the premises and having regard to the circumstances, the Plaintiff submitted the 3rd Defendant could not have been a bonafide purchaser for value without notice.
 20. Similarly, the Plaintiff argued the 2nd, 4th and 5th Defendants did not demonstrate they were bonafide purchasers for value without any notice. The Plaintiff contended had the Defendants carried out appropriate due diligence, they would have discovered the 1st Defendant did not acquire any good title that she would have passed to them. The Plaintiff argued the Defendants failed to verify the root of the title that the 1st Defendant had and therefore should bear the consequences of their failure.
 21. The 4th and 5th Defendants in their submissions contended the Plaintiff had not led any evidence to prove any fraud or misrepresentation on the part of the Defendants and nor was any evidence adduced to prove the Defendants acquired titles to the suit land illegally. They submitted no evidence was adduced to prove that Erastus Ngayo Ndeeri (Deceased) was suffering from any mental condition that rendered him incapable of carrying on any transactions and neither was any evidence adduced to demonstrate that the acts of the 1st Defendant were illegal or unlawful so as to impair the title that she acquired from her deceased father. The 4th & 5th Defendants cited the Cases of Eunice Grace



- Njambi Kamau & Another v The Attorney General & 5 Others (2013) eKLR, and David Kiptugen v Commissioner of Lands & 4 Others (2015) eKLR to support their submissions and assertions.
22. Mr. Nyaga Gitari Counsel for the 4th and 5th Defendants maintained that no evidence of fraud or misrepresentation existed to warrant the Defendants titles to be impugned under the provisions of Section 26(1) of the *Land Registration Act*, 2012. It was his position that the 1st Defendant's title was obtained procedurally and that being the case the resultant titles cannot be impeached. He argued that the 4th and 5th Defendants were innocent purchaser's and that their titles deserve the protection of the law. He cited the Case of *Lawrence Mukiri v Attorney General & 4 Others* (2013) eKLR to illustrate what requires to be satisfied for one to be an innocent purchaser. The Court in the case cited the Case of *Katende v Haridar and Company Ltd* (2008) 2 EA 173 –where the Court of Appeal in Uganda held a bonafide purchaser to rely on the doctrine must prove:-
1. He holds a certificate of title.
 2. He purchased the property in good faith.
 3. He had no knowledge of the fraud.
 4. The vendors had apparent good title.
 5. He purchased without notice of any fraud.
 6. He was not party to any fraud.
23. The 4th & 5th Defendants submitted that they procedurally acquired the titles from the 1st Defendant indicating that they entered a formal sale agreement, paid the purchase price in full and obtained the requisite Land Control Board consent for the transaction. They urged that the Plaintiff's suit be dismissed with costs.
24. After review and consideration of the evidence and the submissions of the parties, the following are the issues that arise for determination.
- i. Whether the 1st Defendant acquired title to land parcel Number Mwerua/Kabiriri/1112 illegally and/or fraudulently?
 - ii. Whether the 2nd, 3rd, 4th and 5th Defendants were bona fide purchasers for value without notice and if so, whether they acquired good titles of the subtitles they purchased?
 - iii. Whether the resultant titles from land parcel Mwerua/Kabiriri/1112 should be cancelled?
 - iv. Who bears the costs of the suit?
25. Whereas the Law acknowledges sanctity of title and guarantees protection of title, the law at the same time provides that a title procured illegally and unprocedurally and/or fraudulently maybe challenged on that account. Section 26(1) (a) & (b) of the *Land Registration Act*, 2012 provides as follows:-
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.

Article 40(6) of the *Constitution* equally removes protection of a title that is found to have been unlawfully acquired. Article 40(6) provides that:-

40 (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

26. The Plaintiff has contended that the 1st Defendant acquired title to land parcel Mwerua/Kabiriri/1112 from their deceased father fraudulently. This is the land that the 1st Defendant subdivided and sold portions to the 2nd to the 5th Defendants. If the allegation that the 1st Defendant acquired title to the original suit land fraudulently is upheld, it would mean that she never acquired any valid title to the land. The question then would arise whether the 2nd to the 5th Defendants themselves acquired good titles to the parcels of land that they each purchased from the 1st Defendant.

Whether the 1st Defendant acquired a valid title.

27. It is not disputed that the Plaintiff and the 1st Defendant are siblings and that land parcel Mwerua/Kabiriri/1112 was owned by their deceased father, Erastus Ngayo Ndeeri. The land was family land. The 1st Defendant affirmed that they were in total 10 siblings and that she was the last born in their family. She stated the Plaintiff and one of her other brothers had constructed houses on the suit land. The Plaintiff and the 1st Defendant affirmed that their father had suffered a stroke in 2014 from which he had not recovered. Indeed the 1st Defendant in Cross examination stated as follows:-

“My father was 72 years when he died. He was sick. He had a stroke. He fell down in the morning. We took him to hospital. The stroke affected him in August 2014. The sale took place in 2015. He was still suffering from the stroke and he was walking using a stick. He was still sick when we attended the Land Board, he fell sick and he was taken to hospital where he was admitted. He fell down due to stroke.”

28. The 1st Defendant in her evidence stated she was given the land as a gift ostensibly because she was taking care of the father, which she was to share with her siblings. Though the 1st Defendant in her evidence stated she discussed with her siblings before she sold the land, she admitted she never involved any of the siblings in any of the sale transactions. There was also no record of any meeting they may have had between themselves as siblings or with other persons.
29. The Plaintiff for his part maintained the land was family land and that the 1st Defendant took advantage of their sickly father to get the Land Control Board to issue consent for transfer without the involvement of the other siblings. The Plaintiff upon discovering the 1st Defendant had caused the transfer to her name lodged a caution on 3rd December 2015 to protect his interest as a beneficiary but the caution was somehow removed without his involvement by the 1st Defendant even though the 1st Defendant had filed a suit before the Chief Magistrate’s Court seeking for an order for removal of the caution, where the Plaintiff had filed his defence. That suit CM CC No. 307 of 2015 was still pending on 31st October 2016 when the 1st Defendant allegedly caused the removal of the caution registered by the Plaintiff.
30. The Plaintiff upon discovering the 1st Defendant had caused removal of the caution, complained to the police and the 1st Defendant was arrested and charged in Kerugoya CM CR. Case No. 729 of 2016 with conspiracy to commit a felony by forging the Plaintiff’s signature on the application to withdraw caution. The Plaintiff denied ever signing such an application. The 1st Defendant in her evidence stated



that they held several family meetings involving even elders and at one such meeting the Plaintiff agreed to have the caution removed. Considering that the 1st Defendant had already filed a suit in Court seeking to have the Plaintiff remove the caution he had registered, it would have been expected that if there was such an agreement, they would have recorded a consent in the suit. Besides, the Plaintiff apart from making a report to the Police that the 1st Defendant had unlawfully and fraudulently caused the removal of the caution that he had placed, the Plaintiff also instituted the present suit where he also pleaded the 1st Defendant had fraudulently caused the removal of the caution he had registered against the title of the suit property. The Plaintiff's conduct is not of a person who had voluntarily agreed to have the caution removed as alleged by the 1st Defendant. It is instructive that the 1st Defendant was indeed tried and convicted of conspiracy in having the restrictions registered against land parcel Mwerua/Kabiriri/1112 removed.

31. The 1st Defendant through the institution of the suit by the Plaintiff was put on notice that the root of the title she held before causing the subdivisions was under challenge and the burden was on her to prove that she acquired the title validly and lawfully. It was not enough for her to waive the title and/or registration thereof as proof of ownership as it was that title and/or registration that was under challenge. The 1st Defendant had alleged there were meetings at which ownership of the subject land was discussed by members of the family in the presence of elders. No minutes of any such meetings were availed nor was any of the participants at any such meeting called to testify. I do not find the defence of the 1st Defendant credible and/or believable given the circumstances of this matter. We have a situation where we have a sickly father, who had suffered a stroke; was bedridden; attended the Land Control Board on 13th August, 2015, collapsed on the same day and was hospitalised and passed away 3 or 4 days later on 17th August, 2015. I am persuaded the deceased in the condition he was in, was prone to being manipulated, and the 1st Defendant must have taken advantage of his condition. It beats logic that the deceased would have voluntarily gifted the only parcel of land he had to the 1st Defendant to the exclusion of all his other 9 children some of whom were residing on the land and had their homes thereon.
32. The Court of Appeal in the Case of *Munyu Maina v Hiram Gathia Maina* (2013) eKLR had the following to say in instances where the root of title is under challenge;

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from encumbrances including any and all interests which need not be noted on the register---”
33. On the basis of my evaluation of the evidence I am satisfied that the 1st Defendant did not acquire land parcel Mwerua/Kabiriri/1112 legally. The acquisition was fraudulent and consequently the 1st Defendant never acquired any valid title to the suit property. As the 1st Defendant never acquired any good title to the suit property it follows that she could not pass any good title to any third party.
34. The 2nd, 3rd, 4th and 5th Defendants have argued that they were bonafide purchasers for value without any notice from the 1st Defendant. It is true that the 2nd to 5th Defendants purchased their respective parcels of land from the 1st Defendant but were they really bona fide purchasers? The 3rd Defendant who played a key role in the transactions was a Surveyor, knew the deceased and carried out the Survey and facilitated the processing of the titles. As a professional he knew and/or must have known the 1st Defendant had siblings and that infact the Plaintiff and the rest of the family members through the



DCC had placed a restriction against the suit property. If he had carried out a proper and thorough due diligence he would have known, the Plaintiff had not voluntarily and freely removed the caution he had placed. The evidence irresistibly points to the 3rd Defendant having been complicit to the fraudulent actions of the 1st Defendant. The 3rd Defendant could not therefore have been an innocent and bona fide purchaser for value without notice.

35. The evidence points to the 2nd, 4th and 5th Defendants having been bona fide purchasers for value without notice. However, even in their case, a detailed and thorough due diligence could have disclosed the parcels of land they were purchasing may have had issues. For instance if they sought to deduce the root of the titles they were purchasing they would have discovered they formed part of land parcel Mwerua/Kabiriri/1112 which was family land owned by the deceased (1st Defendant's father) and that the Plaintiff and the DCC had lodged restrictions. Inquiries would have revealed the land was under dispute. However, be it as it may be, the 1st Defendant as I have held never acquired any good title to the land and she could therefore not sell land she did not have. The 2nd, 3rd, 4th and 5th Defendants never acquired any valid titles since the 1st Defendant did not have any title which she could transfer to them and pass good titles. The titles the Defendants hold are void and liable to be cancelled. The 2nd to 5th Defendants have a separate action for recovery of any money and/or damages they may have suffered against the 1st Defendant as the seller. They should perhaps consider pursuing that option.
36. On the basis of my analysis and evaluation of the evidence, it is clear that the transfer of land parcel Mwerua/Kabiriri/1112 to the 1st Defendant was null and void and all the resultant subdivisions therefrom were therefore a nullity. The titles from the subdivisions were null and void and should be cancelled.
37. The final result is that I find the Plaintiff has proved his case on a balance of probabilities. I enter Judgment in favour of the Plaintiff as prayed in prayers (a) and (b) of the Plaint. I award the Plaintiff the costs of the suit as against the 1st Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 9TH DAY OF OCTOBER 2024.

J. M. MUTUNGI

ELC - JUDGE

