



Presbeta Investment Limited v Gathura & another (Environment and Land Appeal E046 of 2022) [2024] KEELC 6784 (KLR) (15 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6784 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E046 OF 2022
MN GICHERU, J
OCTOBER 15, 2024**

BETWEEN

PRESBETA INVESTMENT LIMITED APPELLANT

AND

SAMUEL WAIREGI GATHURA 1ST RESPONDENT

LAND REGISTRAR, KAJIADO 2ND RESPONDENT

JUDGMENT

1. This judgment is on the appeal by the appellant dated 18/10/2022 in which it seeks the following orders.
 - a. This appeal be allowed.
 - b. The judgment and decree of the Honourable Trial Court delivered and issued on 28/9/2022 be set aside and the same be substituted with a judgment in favour of the appellant in terms of the plaint dated 8/3/2022.
 - c. The costs of this appeal and costs of the Lower Court suit be awarded to the appellant.
 - d. Any other relief that this court may deem fit to grant.
2. In the judgment dated 28/9/2022, the learned trial Magistrate dismissed the appellant's suit in Kajiado Chief Magistrate ELC Case No. E023 of 2022 with costs on the grounds that the plaintiff had not adduced any evidence to prove that the 1st respondent acquired the suit parcels namely Kajiado/Lorngusua/6599, 6600 and 6601, suit parcels, fraudulently. She added that there was nothing tangible in the form of documentary evidence to prove the allegations apart from copies of green card in the 1st respondent's names and a copy of the mother title deed. Secondly, the learned trial Magistrate found that there was a possibility that there was a resolutions by the appellant that recommended the issuance of several plots to the 1st defendant for his contribution to the company. Thirdly, the court found that



there was no direct evidence linking the 1st defendant to the existence of two mutation forms and sketch plans. Finally, the trial court found that there existed boardroom wrangles which ought to have been resolved through various Alternatives Dispute Resolution Mechanisms.

3. Dissatisfied with the entire judgment and decree the appellant filed a memorandum dated 18/10/2024 containing the following fourteen grounds of appeal. The trial Magistrate erred in law and/or fact by,
 - i. failing to find despite the evidence adduced that the appellant is the rightful and the owner of those properties known as LR Kajiado/Lorngosua/6599, 6600 and 6601, the suit properties, thus arriving at a wrong decision,
 - ii. failing to find that the 1st respondent had a burden of explaining the root of his certificate of title which he failed to discharge on the required standard,
 - iii. Failing to find that the 1st respondent had no proprietary interest over the suit property for want of consideration,
 - iv. failing to find that the 1st respondent had failed to demonstrate through evidence that his alleged acquisition of certificate of title in respect to the suit land was legal, formal and free from any encumbrances,
 - v. by concluding without any facts that the 1st respondents had acquired the suit properties through contributions made to the appellant,
 - vi. by concluding that the appellant had not proved elements of fraud while selectively ignoring the appellant's documentary evidence and existence of other grounds of impeaching the 1st respondent's certificates of title,
 - vii. by failing to conclude that the 1st respondent's certificates of title in respect to the suit property were impeachable on account of having been acquired illegally, unprocedurally and through a corrupt scheme,
 - viii. rendering a decision that was not based on the evidence tendered by the parties, the facts and any known legal principles,
 - ix. by failing to make a finding that the evidence adduced by the 1st respondent's witness lacked both probative and evidential value since the witness could only corroborate the 1st respondent's testimony,
 - x. by failing to arrive at a conclusion that the appellant had discharged the burden of proof to the required standard of a balance of probabilities,
 - xi. by shifting the burden of proof to the appellant on issues pleaded by the 1st respondent,
 - xii. by rendering a decision in favour of the 1st respondent while ignoring the appellant's critical, reliable, cogent evidence and submissions,
 - xiii. by considering extraneous matters and issues not pleaded by the parties thus rendering a contradictory, inconsistent, biased and unfair decision not supported by evidence or any known legal principles and judicial precedents,
 - xiv. by awarding costs of the suit to the 1st respondent.
4. The appellant 's case is that it owned LR Kajiado/Lorngosua/1836 measuring 125 acres which it wished to subdivide in quarter acre plots. The 1st respondent was one of the officials then. He told the members of the appellant that the original land had been subdivided into 442 quarter acre parcels.



This was not the case because the 1st respondent and other officials had concealed to the appellant that there were seven (7) extra plots which they had not declared. The three suit parcels were part of the seven parcels fraudulently created and concealed from the appellant. When the appellant discovered the fraud, it filed the suit in the Lower Court to recover the fraudulently acquired plots. The 1st respondent's case is that he did everything above board and with the authority of the other directors and the chairman. If there was a problem, it was caused by the surveyor who prepared and drew the mutation form.

5. This being a first appeal, this court must do the following.
 - i. Reconsider the evidence of the trial court, evaluate itself and draw its own conclusions,
 - ii. Bear in mind that it did not see or hear the witnesses in the Lower Court and make due allowance in this regard.

See *Selle –versus- Associated Motor Boat Company Limited* (1968) EA 123.

6. I have carefully considered the appeal in its entirety including the record, the orders sought, the grounds of appeal, the written submissions by the learned counsel for the parties, the issues identified for determination and the law cited by both sides. I will treat the fourteen grounds as the issues. I make the following findings on the issues.

On the first issue, I find that the trial Magistrate erred because it is not clear how the suit parcels were transferred from the appellant to the 1st respondent. There is no sale agreement, no application for consent of the Land Control Board, no transfer form duly executed by the buyer and the seller and no evidence of payment of stamps duty. All the above are prerequisites to a lawful and procedural transfer of land from one entity to another. The burden was on the registered owner, in this case the respondent to prove that all the above took place. It was the 1st respondent averring that he had acquired the land in question lawfully. He was the one to fail if he did not prove that the land was lawfully acquired. He was the one with the burden of proof under Section 107(2) of the *Evidence Act* which provides as follows,

“When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

Once the appellant proved that only 442 parcels of land were lawfully created out of LR 1836, the burden shifted to the 1st respondent to prove that the extra 7 parcels were lawfully created. Not only was the 1st respondent unable to produce any document to prove conveyance of the three parcels to himself but he also failed to produce the minutes of the meetings that authorized him to own the suit parcels. Such minutes of the meetings of the appellant would have been the ones used to support the transfer of the land to him by the appellant's officer. This finding covers the second issue.

7. It is my finding on the third issues that the learned trial Magistrate erred because no evidence of payment of consideration was ever adduced by the 1st respondent. As I found in preceding paragraph, there are no minutes of any meeting of the appellant authorizing the 1st respondent to get the three parcels in lieu of payment of the purchase price. Such minutes should have been availed by the 1st respondent. This finding together with the preceding ones covers the 4th and 6th issues. On the fifth issue, I find that the learned trial Magistrate erred by finding that fraud was not proved. This is because there can be no lawful transfer of registered land without the documents mentioned in paragraph 6 of this judgment. In this case none of them was proved by the 1st respondent. I find that failure to prove compliance with the lawful procedure in acquiring the suit parcels amounts to fraud. This finding covers the seventh and eighth grounds.



8. On the ninth ground, I find that the 1st respondent's failure to testify in the trial weakened his case. He shied away from the case and instead chose someone else to testify on his behalf. He did not adduce the best evidence in his defence. The evidence by his proxy is not convincing. A look at the remaining issues shows that they are all well covered by previous findings because they concern the burden of proof which has already been exhaustively covered.
9. For the above stated reasons, I find great merit in the appellant's appeal and I allow it in the following terms.
 - i. The judgment and decree of the trial Court in Chief Magistrate's ELC Case No. E023 of 2022 dated 28/9/2022 is hereby set aside and substituted with a judgment in favour of the appellant in terms of the plaint dated 8/3/2022.
 - ii. The costs of this appeal and those of the Lower Court suit awarded to the appellant.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 15TH DAY OF OCTOBER 2024.

M.N. GICHERU

JUDGE

