



**Talu v Mwananchi Credit Limited & 2 others (Environment and Land Appeal E068 of 2023) [2024] KEELC 13625 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13625 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E068 OF 2023  
LN MBUGUA, J  
DECEMBER 5, 2024**

**BETWEEN**

**PRISCILLA MWARIMBO TALU ..... APPELLANT**

**AND**

**MWANANCHI CREDIT LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF LANDS NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Judgment and Decree of Hon. P. Rotich in the Chief Magistrates Commercial Court at Nairobi delivered on 14th June, 2023 in CIVIL SUIT NO. 2465 OF 2016)*

**JUDGMENT**

1. This appeal was commenced vide the memorandum of appeal dated 15.6.2023. It was triggered by the judgment and decree of Hon. P. Rotich (Senior Principal Magistrate) delivered on 14.6.2023 in Civil Suit No.2465 of 2016 at the Chief Magistrate’s Milimani Commercial court, Nairobi.
2. The appellant was the plaintiff before the magistrate’s court, while the 1<sup>st</sup> respondent was the 1<sup>st</sup> defendant. Other parties who were sued in the Further Re-Amended plaint filed on 17.2.2017 before the trial court were Moran auctioneers and Kindest auctioneers who have not been named as parties in this appeal. Instead, the appellant has brought on board the Registrar of Lands as well as the Hon Attorney General as 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as parties in this appeal.
3. Before the trial court, the case of the appellant was that her house No. 23 in Court No. 5 situated on LR No. Nairobi/Block 140/005/023 which she had acquired through purchase from National Social Security Fund was unlawfully and fraudulently transferred to the 1<sup>st</sup> respondent. On its part, the 1<sup>st</sup> respondent contended that the appellant had voluntarily transferred the suit property to it after



- defaulting to repay a loan of ksh.1.5 million advanced to her by the 1<sup>st</sup> respondent, thus she is a rent paying tenant of the 1<sup>st</sup> respondent.
4. Vide its judgment of 14.6.2023, the court exonerated the respondents of the fraudulent allegations and found that the suit property was lawfully transferred by the appellant and registered in the 1<sup>st</sup> respondent's name.
  5. Dissatisfied with the said judgement, the appellant filed this appeal raising the following grounds in her memorandum of appeal;
    - a. That the learned magistrate erred in law and in fact in failing to find that the appellant did not transfer the suit land Nairobi/Block 140/005/023 to the 1<sup>st</sup> respondent.
    - b. That the learned magistrate erred in law and in fact in failing to appreciate the evidence adduced and the appellant's submissions.
    - c. That the learned magistrate erred in law and in fact in dismissing the appellant's suit.
  6. The appeal was canvassed by way of written submissions of which on 25.7.2024, the court gave directions that the appellant was to file submissions by 23.8.2024, while the respondents were to file submissions by 7.9.2024. The Respondents did not comply with the aforementioned directions.
  7. The appellant filed submissions dated 4.10.2024 where she reiterates her evidence that she did not sign the transfer documents allegedly transferring the suit property to the 1<sup>st</sup> respondent. She submits that her evidence was given impetus by PW1 who upon examining her alleged signature on the transfer document vis a vis her known signature came to the conclusion that the signature appended on the transfer document did not belong to her.
  8. She also reiterates that her title documents to the suit land found their way with the 1<sup>st</sup> respondent since it collected the title deed to the suit property from NSSF on her behalf, adding that her pin, ID and passport photographs were obtained from the transfer documents by NSSF to her, adding that they seem to have been lodged at the same time.
  9. It is also submitted that the 1<sup>st</sup> respondent was not able to provide evidence on how it disbursed the loan of Ksh.1.5 million to NSSF and to her.
  10. In support of her case, the appellant relies on the cases of Elijah Makeri Nyangwa'ra v Stephen Mungai Njuguna & Another [2013] eKLR, Charles Karathe Kiarie & Others v Administrators of Estate of John Wallace Mathare (deceased) & 5 Others [2013] eKLR, Russel & Co. Ltd v Commercial Bank of Africa Ltd [1986] eKLR, David Peterson Kiengo & 2 Others v Kariuki Thuo [2012] eKLR as well as Alice Chemutai Too v Nickson Kipkurui & 2 Other [2015] eKLR where the court upheld sanctity of title.
  11. It is also argued that the plaintiff was able to prove that the 1<sup>st</sup> respondent acquired the suit property fraudulently, illegally and unprocedurally and thus its title should be impeached under Section 26 of the [Land Registration Act](#).

## **Determination**

12. The court has considered the submissions, the record of appeal, and has re-appraised the evidence presented at the trial court. The duty of the 1<sup>st</sup> appellate court as was explained in the case of *Selle and Another Versus Associated Motor Boat Company Ltd & Others* [1968] EA 123, is to reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.



13. It is not disputed that on 1.11.2012, the appellant took a loan of ksh.1.5million from the 1<sup>st</sup> respondent which was to be paid within 4 months in 4 instalments of Ksh.549,038/=. It is also not in dispute that the plaintiff had purchased the suit property from the National Social Security Fund (NSSF) through a tenant scheme.
14. At the trial, the plaintiff who testified as PW2 stated that she had taken the loan for purposes of paying for the house. She denied having been a tenant of the 1<sup>st</sup> defendant. She also denies that she signed the transfer forms for the suit property in favour of the 1<sup>st</sup> defendant.
15. PW1, a document examiner told the court that he compared the signature on the plaintiffs Identity Card and on her driving license as well as her signature which she appended in his presence vis a vis the specimen provided which was the transfer of lease dated 4.11.2017 and he came to the conclusion that the same did not agree.
16. On the other hand, the defence case which was advanced by DW1, Dennis Mwangeli Mombo, the Executive Director of the 1<sup>ST</sup> defendant stated that from the loan disbursed, Ksh.722,000/= was disbursed to NSSF on her behalf, while Ksh.500,000/= was paid to the appellant. According to DW1, the plaintiffs defaulted in repaying the loan, prompting the 1<sup>st</sup> defendant to send a demand notice of Ksh.3,497,797 on 1.10.2013 followed by another demand of 3.4.2014 for Ksh 7.75 million.
17. In light of the above evidence, did the trial court arrive at a just decision in concluding that the suit property was lawfully transferred to the 1<sup>st</sup> respondent? That is now the question falling for determination before this court. In determining the said question, the court will interrogate the issue of accounts as well as the transfer.
18. On accounts, I find that there was no tangible evidence tendered before the trial court as to how a loan of 1.5 catapulted to a whopping sum of Ksh 7,728,855 in a record of one year and 4 months, that is from 1.11.2012, the date of the loan agreement to 3.4.2014 when the demand of Ksh. 7,728,855 was made. There is no evidence of how the loan account of the appellant was maintained by the 1<sup>st</sup> respondent. During cross examination, DW1 was candid in stating that he did not know how the figures were arrived at. I find that the figure of Ksh.7 plus million was sufficient red flag and it requires no rocket science to discern that any transaction anchored on the said figure was an outright fraud!.
19. Further, there is no evidence to indicate that the suit property was valued so as to gauge its value as against the loan.
20. Similar circumstances were captured by the court of appeal in the case of Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR) where the court expressed itself as follows;  

“There is a perennial vexing nightmare for borrowers who take a relatively small loan from a lending institution, but a few years down the line, the institution drops a bombshell of a demand for the immediate payment of a colossal sum, literally bankrupting the borrower, if not confining him/her to a hospital bed due to depression.”
21. On transfer, the same appears to be a classic case of Murphys law, where “anything that can go wrong will go wrong;” where the appellant’s subject property appears to have been rentlessly pursued by the borrower culminating in a transfer of the suit property to the 1<sup>st</sup> respondent. The appellant categorically denied participating in the alleged transfer and even called a document examiner to buttress her averments. In its finding, the trial court stated that; “It is my finding that PW1, a document examiner who was engaged by the Plaintiff is not independent and his evidence that the plaintiff’s



specimen signature did not match her alleged signature in the transfer documents of the suit property is unreliable.”

22. While the opinion of PW1 is not binding on the court, the said evidence of PW1 was uncontroverted. I see no basis upon which the trial court took it that the evidence of PW1 was biased/not independent without giving reasons. In *Kagina v Kagina & 2 Others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment), the Court of Appeal stated as follows;  

“The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so... If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court... Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion.”
23. To this end, I find that the trial court erred in casting aspersions on the evidence of PW1 without giving any basis for his decision.
24. Another point for consideration is that a transfer is ordinarily the tail end of a transaction preceded by such other transaction like an agreement. In the case at hand, the loan agreement cannot be taken to be the one that gave rise to the transfer, seeing that the said transfer states that the appellant acknowledged receiving Ksh.6.3 million!. So at what point did the two parties arrive at this figure resulting in the alleged voluntary transfer of 31.3.2014?.
25. Still on the transfer, the same is dated 31.3.2014 for the sum of Ksh.6,300,000, while the letter to Auckland auctioneers to sell the suit property containing a figure of Ksh.7,728,855 was made 3 days later on 3.4.2014!. The 1<sup>st</sup> respondent never explained where they got the figures of Ksh.6.3 million and Kshs.7,728,855 from within a span of 3 days.
26. The court also notes that the title document to the suit property was issued to the 1<sup>st</sup> respondent on 1.4.2014. However, that letter dated 3.4.2014 addressed to Auckland Agencies Auctioneers by the 1<sup>st</sup> respondent, was instructing the said auctioneers as follows; “...debtor has defaulted in repaying his debts in our records. Kindly proceed to realize the property through public auction.... Outstanding balance is Ksh. 7,728,855/= as at 3.4.2014”.
27. Why was the 1<sup>st</sup> respondent instructing auctioneers to sell the suit property, yet at the same time, the 1<sup>st</sup> respondent was transferring the said property to itself, and already had a title in their name two days prior to the said letter? The logical conclusion to make is that the transfer of the suit property from the appellant to 1<sup>st</sup> respondent was irregular, unlawful and amounts to a fraudulent transaction.
28. The fraudulent and deplorable conduct of the 1<sup>st</sup> respondent did not stop at transferring the suit property to themselves, as they pursued her to the point of levying distress against her whereby in a proclamation dated 24.3.2016, they proclaimed her personal household goods including sofas, TV, DVD Set, Gas cooker fridge, radio, dinning table, water cooler and other items. However, having made a pronouncement that the transfer was irregular, then there was no basis for the 1<sup>st</sup> respondent to levy distress as the suit house did not belong to them. It therefore matters not whether the appellant signed a tenancy agreement with the 1<sup>st</sup> respondent. I therefore find that the tenancy agreement dated 1.9.2014, is an unconscionable transaction entered into with a view to drive the appellant from her own property.



29. In making this finding, the court is persuaded by the holding in Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] KECA 152 (KLR) (Supra), where the court stated that;

“The unwritten terms of lending in relation to the overdraft in this matter which appears to have emboldened the bank to run amok in its interest charges up to 71% p.a, bare the hallmarks of an unconscionable transaction, and we so hold.”

30. Similarly, in the case at hand, I come to the conclusion that the 1<sup>st</sup> respondent ran amok and fraudulently and irregularly transferred the suit property to itself. I am therefore satisfied that the trial court arrived at the wrong conclusion and I therefore enter judgment for the appellant against the 1<sup>st</sup> Respondent in the following terms;

1. The judgment of the trial court delivered on 14.6.2023 in Civil Suit No. 2465 of 2016 at the Chief Magistrate’s Milimani Commercial Court, Nairobi is hereby set aside.
2. The counter claim of the 1<sup>st</sup> respondent is hereby dismissed.
3. The claim of the appellant before the trial court is allowed. For avoidance of doubts, the court finds that the suit property house No. 23 in Court No. 5 situated on LR No. Nairobi/Block 140/005/023 belongs to the Appellant; thus in order to effectuate this judgment, the title issued to the 1<sup>st</sup> respondent is hereby cancelled, to be replaced by the name of the appellant as the registered owner of the suit property.
4. The 1<sup>st</sup> respondent is condemned to pay the costs of the suit both at the appeal and at the trial court.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>th</sup> DAY OF DECEMBER 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:

Kwaba for 1<sup>st</sup> Respondent

A.Kamau for 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

Court Assistant: Vena

