



**Kibanga v Chege & 5 others (Environment and Land Appeal .
E076 of 2021) [2023] KEELC 15845 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15845 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL . E076 OF 2021**

BM EBOSO, J

FEBRUARY 9, 2023

BETWEEN

DANIEL GICHUKI KIBANGA APPELLANT

AND

STEPHEN MAINA CHEGE 1ST RESPONDENT

JOHNSON WACHIRA 2ND RESPONDENT

DISTRICT LAND REGISTRAR, THIKA 3RD RESPONDENT

COMMISSIONER OF LANDS 4TH RESPONDENT

ATTORNEY GENERAL 5TH RESPONDENT

KENYA COMMERCIAL BANK LTD 6TH RESPONDENT

*(Being an Appeal against the Judgment of Hon. J. N Nangea (CM) delivered in
Thika Chief Magistrate Court on 30/9/2021 in Thika MCL & E Case No 67 of 2012)*

JUDGMENT

Background

1. This appeal challenges the Judgment rendered on 30/9/2021 in Thika CMC Civil Case No 192 of 2018 by Hon J M Nang'ea, Chief Magistrate. The said suit was initially instituted in the Civil Division of the High Court at Milimani (Nairobi) as Nairobi High Court Civil Case Number 67 of 2012. Upon establishment of the Environment and Land Court, the suit was transferred to the Nairobi (Milimani) Registry of the new court where it was registered as Nairobi (Milimani) ELC Case No 67 of 2012. Subsequent to that, the suit was, in 2018, transferred to Thika Chief Magistrate Court. It is observed from the record of appeal and from the original record that part of the sworn oral evidence on record was taken at the interlocutory stage before Kimondo J on 9/7/2012, pursuant to a consent order which



the appellant and the 1st respondent recorded before the Judge on 20/3/2012. The testimony was tendered by one Christopher Maina Gichuki, the Land Registrar who issued the parallel titles at the centre of the dispute in this appeal. I will briefly outline the background to the appeal before delving into the issues that fall for determination in the appeal.

2. At the centre of the dispute in the appeal is land parcel number Ruiru East Block 1/3145. Both the appellant and the 1st respondent are waving parallel titles relating to the land. It is common ground that the land was a subdivision out of land parcel number Ruiru East Block 1/260. The parcel register relating to Ruiru East Block 1/260 was opened on 18/10/1995. On the same day, it was registered in the name of Francis Munene Waruhiu. On 21/1/2000, the land was registered in the joint names of Rose Nyambura Waruhiu and Francis Munene Waruhiu. On 30/3/2007, the land was transferred to Frank Wainaina Waruhiu and Nancy Wangari Kefa. On the same day, it was transferred to Francis Munene Waruhiu and Nancy Wangari Kefa. On 17/7/2007, a subdivision mutation plan relating to subdivision parcels surveyed out of the land, namely, parcel numbers 3144 to 3148, was registered on the parcel register. Consequently, the register was closed on that day.
3. The parcel register relating to one of the subdivisions which is the subject of this appeal, Ruiru East Block 1/3145, was opened on 17/7/2007 in the joint names of Francis Munene Waruhiu and Nancy Wangari Kefa. On 23/11/2009, the said subdivision, land parcel number Ruiru East Block 1/3145 (hereinafter referred to as “the suit property”), was registered in the name of Stephen Maina Chege [the 1st respondent in this appeal]. A title deed was issued to him on 25/11/2009. Subsequently, on 6/10/2010, the suit property was registered in the name of Johnson Wachira [the 2nd respondent in this appeal] of ID No xxxx.
4. The 1st respondent contended during trial that he neither sold nor transferred the suit property to Johnson Wachira. He added that at all material times, he had his original title with him. It was his case that the registration divesting the suit property from him to Johnson Wachira was fraudulent.
5. It was contended by the appellant that vide an agreement dated 15/7/2011, Johnson Wachira [the 2nd respondent] sold the suit property to the appellant at Kshs 2,150,000. To finance the purchase, the appellant who worked with Kenya Commercial Bank borrowed Kshs 3,547,558 from the Bank using the title relating to the suit property as security. The encumbrances section of the parcel register shows that a charge was registered against the title in favour of the Bank.
6. Through a plaint dated 8/2/2012, the 1st respondent sued the appellant, terming him a trespasser on the suit property. He sought, against the appellant, a permanent injunction restraining the appellant against constructing on the suit property. In addition, he sought a declaration that he was the bonafide owner of the suit property.
7. The 1st respondent’s case was that he purchased the suit property from Francis Munene through an agreement dated 10/1/2006. At the time of purchase, the suit property was still part of Ruiru East Block 1/260. Upon completion of the subdivision survey exercise, the suit property was registered and transferred to him in 2009 by Francis Munene. In 2012, while in the United Arab Emirates, he was alerted by a neighbour that a stranger was developing his the suit property. He travelled back into the country and established that the appellant was the person developing the suit property. The appellant informed him that he had purchased the suit property from one Johnson Wachira. He lodged a complaint with the Police and subsequently initiated a suit in the High Court.
8. The appellant responded to the suit through a defence dated 18/12/2012. He subsequently filed an amended defence and counterclaim dated 2/7/2013. Through the amended defence and counterclaim, the appellant brought on board Johnson Wachira [as 2nd defendant]; District Land Registrar – Thika



[as 3rd defendant]; Commissioner of Land [as 4th defendant] and the Attorney General [as 5th defendant].

9. It was the appellant's case that he purchased the suit property from Johnson Wachira through an agreement dated 15/7/2011. He contended that at the time of purchase, Johnson Wachira was the registered proprietor of the suit property. He added that prior to purchasing the suit property, he obtained an official search from the Land Registry. The official search confirmed that the suit property was registered in the name of Johnson Wachira and that the Land Registry had issued a title to Johnson Wachira. By way of counterclaim against: the plaintiff; Johnson Wachira; the Land Registrar; and the Commissioner of Lands, the appellant sought, among other reliefs, a declaration that he was the lawful registered proprietor of the suit property. As an alternative relief, he sought an award of damages "for the monies expended over the purchase of the said land and the developments thereon."
10. The Land Registrar, the Commissioner of Lands, and the Attorney General filed a defence to the counterclaim, dated 29/8/2013, in which they contested the counterclaim. They averred that the Land Registrar's decision to disown the title held by the appellant was informed by the records held in the Land Registry. They contested the appellant's contention that he stood to suffer loss and damages, adding that if loss and damages were suffered, the same were attributable to the appellant's own negligence. They urged the court to dismiss the counterclaim.
11. Although no formal claim had been made against the Bank, the Bank filed what it described as the "interested party's Statement of Defence" in which it contended that it was an innocent party in the transaction and its interest having been registered over the suit property, it "ranked in priority".
12. The 1st respondent contested the appellant's counterclaim through a defence to counterclaim dated 1/7/2013. He contended that Johnson Wachira could not pass a good title to the appellant because the title he purported to pass to the appellant had been obtained fraudulently.
13. Upon conclusion of trial, and upon receiving submissions, the trial court rendered the impugned Judgment. The trial magistrate identified four issues upon which he made the following findings: (i) Johnson Wachira did not pass a good title to the appellant, and that there was a probability that he acquired his title fraudulently through collusion with "the Land Registry"; (ii) on a balance of probability, the 1st respondent was the lawful owner of the suit property, hence he was entitled to the reliefs sought in the plaint; (iii) In light of the above findings, the appellant's counterclaim failed; (iv) the Bank's contention that its charge enjoyed priority stood rejected because no good interest was created in the suit property in favour of the Bank; (v) Johnson Wachira and the Land Registrar having been found at fault, they were to bear the 1st respondent's costs of the primary suit while the Commissioner of Land and the Attorney General were to bear their own costs of the primary suit; and (vi) each party to the counterclaim was to bear their own costs of the counterclaim.

Appeal

14. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following 8 grounds of appeal:
 1. The learned magistrate erred in fact and in law by finding that the 1st respondent was the lawful owner of the suit property known as Ruiru East/Block 1/3145 despite the evidence of the Land Registrar confirming the authenticity of the Appellant's title.
 2. The learned magistrate erred in fact and in law in holding that the 2nd respondent did not pass a good title to the appellant despite the totality of the evidence led by the appellant and the land registrar at trial confirming the acquisition of the appellant's title to the suit property.



3. The learned magistrate erred in fact and in law by making an erroneous assumption without any proof being tabled before court that the 2nd respondent must have acquired the title to the suit property fraudulently with possible collusion with the land registry by virtue of his failure to defend the suit and testify in court.
 4. The learned magistrate erred in fact and in law in disregarding the evidence of the land registrar who confirmed on oath that there was no element of fraud or collusion with respect to the transfer and registration of the title to the suit property issued to the appellant.
 5. The learned magistrate erred in fact and in law by finding that the appellant had no good title to pass to the 6th respondent herein yet the land registrar had testified on oath as to the authenticity of the title held by the appellant and the subsequent legal charge in favor of the 6th respondent as entered in the land register.
 6. The learned magistrate erred in law by totally disregarding the clear provisions of Section 26(1) of the [Land Registration Act](#) 2012.
 7. The learned magistrate erred in fact and in law by holding that the 2nd respondent's title must have been acquired fraudulently and through collusion without any evidence or at all on proof of fraud being led by the plaintiff on the required threshold.
 8. The learned magistrate erred in fact and in law by failing the 1st defendant's counterclaim despite the totality of evidence tendered before court by the 1st defendant in support of the same.
15. The appellant urged the court to set aside the Judgment and Orders of the Chief Magistrate Court and substitute them with an order allowing the appellant's counterclaim. Further, the appellant prayed for an order condemning the respondents to bear costs of the appeal.

Submissions

16. The appeal was canvassed through written submissions dated 10/6/2022, filed by M/s Kale Maina & Bundotich Advocates. Counsel for the appellant identified the following as the three issues that fall for determination in this appeal: (i) Whether the trial court erred in fact and in law by finding the 1st respondent as the lawful owner of the suit property; (ii) Whether the trial court erred in law by disregarding the clear provisions of sections 26(1) of the [Land Registration Act](#), 2012, and (iii) Whether the trial court erred in fact and law in failing to consider the appellant's counterclaim. Counsel contended that there was no evidence of fraud on part of the appellant in relation to the title held by him. Counsel argued that the finding of the trial court was based on an assumption that the 2nd respondent must have acquired his title fraudulently in collusion with the Land Registry. Counsel contended that the trial court wrongly formulated its own facts relating to the acquisition of the appellant's title. Counsel added that the trial court similarly unilaterally framed new issues that had neither been pleaded nor proved by the parties. Counsel submitted that the trial court's finding to the effect that the 2nd respondent did not pass a good title to the appellant was based on mere speculations of fraud and collusion that was neither pleaded nor proved.
17. On whether the trial court erred in law by disregarding the clear provisions of Section 26(1) of the [Land Registration Act](#) 2012, counsel for the appellant argued that the trial court erred in failing to take into consideration the appellant's submissions on the indefeasibility of his title. Counsel argued that in the absence of fraud on part of the appellant, his title was protected by Section 26(1) of the [Land Registration Act](#). Counsel added that the appellant was an innocent purchaser for value and without



- notice of any defect in the title that was passed to him, hence his title should have been upheld by the trial court.
18. On whether the trial court erred by failing to consider the appellant's counterclaim, counsel submitted that besides pleading a counterclaim, the appellant led evidence in support of the counterclaim. Counsel contended that the trial court ignored the appellant's evidence and dismissed the appellant's counterclaim in its entirety. Counsel urged the court to allow the appeal as prayed.
 19. The 1st respondent opposed the appeal through written submission dated 28/6/2022, filed by M/s Muchoki D M & Co Advocates. Counsel submitted that the trial court did not err in finding that the 1st respondent was the lawful owner of the suit property, adding that Kimondo J had already made a finding on the issue and the finding had not been overturned. Counsel added that no good title could be passed to the appellant by the 2nd respondent because the 2nd respondent did not have a good title to pass to the appellant.
 20. On the contention that the trial court disregarded the protection accorded to the appellant's title by Section 26(1) of the *Land Registration Act*, counsel submitted that the 1st respondent's title was the first in time and could not be defeated by the appellant's subsequent title that had been irregularly generated.
 21. The 6th respondent supported the appeal through written submissions dated 4/7/2022, filed by M/s J K Kibicho & Co Advocates. Counsel for the 6th respondent identified the following as the three issues that fall for determination in this appeal: (i) Whether the trial court erred in fact and in law by finding that the 1st respondent was the lawful owner of the suit property; (ii) Whether the trial court erred in fact and in law by basing its judgment on issues not pleaded; and (iii) Whether the trial court erred in law and in fact by disregarding Sections 26(1)(b) and 80(2) of the *Land Registration Act*.
 22. Counsel submitted that prior to purchasing the suit property, the appellant carried out due diligence. Counsel contended that the trial court inferred fraud from the facts contrary to the established principle that fraud must be pleaded and proved. Counsel added that the 1st respondent neither pleaded nor particularized fraud, hence it was wrong for the trial court to delve into the issue of fraud.
 23. On whether the trial court erred by disregarding Sections 26(1) and 80(2) of the *Land Registration Act*, counsel submitted that the appellant demonstrated that he followed due procedure in the acquisition of his title and in the absence of fraud on his part, his title was protected under Section 26 of the *Land Registration Act*. Citing the Court of Appeal decision in *Elizabeth Wambui Gitinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR, counsel submitted that the appellant was an innocent purchaser for value without notice, whose title ought to have been protected. Counsel urged the court to allow the appeal.

Analysis and Determination

24. I have read and considered the original record of the trial court; the record of appeal filed in this appeal; and the parties' respective submissions in the appeal. I have also considered the relevant legal frameworks and jurisprudence on the key issues that fall for determination in the appeal. The appellant itemized 8 grounds of appeal in his memorandum of appeal dated 12/10/2021. His counsel subsequently condensed the 8 grounds of appeal into the following three issues: (i) Whether the trial court erred in fact and in law by finding that the 1st respondent was the lawful owner of the suit property; (ii) Whether the trial court erred in law by disregarding the clear provisions of Section 26(1) of the *Land Registration Act* 2012; and (iii) Whether the trial court erred in fact and in law by failing to consider the appellant's counterclaim.



25. Taking into account the grounds of appeal and the parties' written submissions, the following are, in my view, the three key issues that fall for determination in this appeal: (i) Whether the trial court erred in upholding the 1st respondent's title and in rejecting the appellant's title to the suit property; (ii) Whether the trial court erred in rejecting the appellant's counterclaim in its entirety; and (iii) What order should be made in relation to costs of this appeal and costs of the suit in the trial court. Before I dispose the three issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction
26. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013) eKLR as follows:-
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
27. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
28. The first issue for determination in this appeal is whether the trial court erred in upholding the 1st respondent's title and in rejecting the appellant's title. The 1st respondent holds a title issued to him by the Land Registry on 25/11/2009 pursuant to a transfer registered in his favour on 23/11/2009. The registration of the transfer in favour of the 1st respondent and issuance of a title deed to him are reflected in the parcel register as entry numbers 2 and 3 respectively. On the other hand, the appellant holds a title issued to him by the Land Registrar on 13/9/2011 pursuant to a transfer registered in his favour on 7/9/2011. The transfer and the issuance of the title deed held by the appellant are reflected in the proprietorship section of the land register as entry numbers 6 and 7 respectively. The 1st respondent contested the transfer of the suit property from him to John Wachira and ultimately to the appellant. His case was that he neither sold nor transferred the suit property to Johnson Wachira. He contended that he, all along, had his original title deed with him. He termed the registration of the suit property in the name of Johnson Wachira and subsequently in the name of the appellant as fraudulent because he neither sold nor transferred the suit property. He tendered evidence to the effect that he had his original title with him and that he was not privy to the transfer that vested the suit property in the name of Johnson Wachira.
29. Under Section 107 of the Evident Act, the 1st respondent having demonstrated that he neither sold nor transferred the suit property, the appellant together with the 2nd respondent, were required to tender evidence demonstrating that the 1st respondent conveyed the suit property to Johnson Wachira. Regrettably, the duo did not discharge that obligation. They did not lead evidence to demonstrate how Johnson Wachira acquired the title that he eventually conveyed to the appellant. The appellant joined Johnson Wachira as a defendant in the counterclaim and served him with summons to enter appearance. Johnson Wachira elected not to step forward to defend the title that he purported to pass to the appellant. The result is that the originator of the title that the appellant is waving abandoned the appellant when he was effected to step forward and explain how he got his title. In the end, the appellant



was not able to rebut the 1st respondent's evidence to the effect that he neither sold nor conveyed the suit property to Johnson Wachira and that the registration of the suit property in the name of Johnson Wachira, was fraudulent and that the title purportedly passed to the appellant was a fake.

30. Our superior courts have umpteen times emphasized that when the legitimacy of a title is challenged, it is not enough for the holder of the challenged title to wave it and proclaim its indefeasibility. The holder of the challenged title has an obligation to demonstrate the legitimacy of the title. Not too long, the Court of Appeal emphasized this point in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR in the following words:

“...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.... 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....”

31. Similarly, the Court of Appeal made the following pronouncement on the fate of a title that is a product of fraud in *Arthi Highway Developers Limited v West End Butchery Limited & others* [2015] eKLR:

“66. We have found already, on evaluation of the recorded evidence, that fraud was committed both at the registry of companies as well as the Lands Office. The consequence is that West End did not divest its registered interest in the disputed land which was not an equitable one. It was the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. The trial court held, following previous court decisions, that an innocent holder of legal Title to land cannot be dispossessed of that interest by a fraudster, and that Section 23 protects Title issued to a purchaser upon the transfer or transmission by the proprietor thereof”. Those decisions are the Alberta Mae Gacie case (supra) and the Iqbal Singh Rai case (supra) which emanated from the High Court. With respect, we are persuaded by the reasoning in those cases as it accords with the law.”

32. Based on the evidence that was placed before the trial court, and for the above reasons, the logical conclusion is that what Johnson Wachira purported to pass to the appellant was a fake that did not divest the 1st respondent of his title in the suit property. I do not, in the circumstances, find fault in the trial court's findings upholding the 1st respondent's title and rejecting the appellant's title. Consequently, my finding on the two limbs of the first issue is in the negative.
33. The second issue is whether the trial court erred in rejecting the appellant's counterclaim in its entirety. The appellant's counterclaim was directed against Stephen Maina Chege [the 1st respondent]; Johnson Wachira [the 2nd Respondent]; the District Land Registrar – Thika [the 3rd respondent]; and the Commissioner of Land [the 4th respondent]. There was evidence that Johnson Wachira was served with court summons and elected not to respond to the counterclaim. He is the one who received money from the appellant and purported to convey to him the fraudulent title. The appellant proved that he entered into a sale agreement with Johnson Wachira and paid him the agreed purchase price. Further, the appellant made an alternative plea for damages. In the circumstances, there was no proper reason why the trial court failed to award the appellant damages as against Johnson Wachira. I therefore fault the trial court on its rejection of the appellant's counterclaim in its entirety. The trial court ought to have awarded the appellant judgment on the counterclaim against Johnson Wachira.
34. I would not have hesitated to condemn the Land Registrar to pay damages to the appellant had the appellant pleaded negligence on part of the Land Registrar in the counterclaim. This view is informed by the testimony of the Thika Land Registrar before Kimondo J. However, because negligence on part



of the Land Registrar was neither pleaded nor particularized, I will not make an award against the Land Registrar.

35. What should be the quantum of damages? In paragraph 26 of the counterclaim, the appellant pleaded for an alternative relief in the following terms:

“and/or in the alternative, compensation and damages for the monies expended over the purchase of the said parcel and the developments thereon.”

36. In terms of the ultimate prayers, the appellant prayed for damages but did not specify the category of damages he was seeking. During trial, the appellant did not lead evidence relating to the market value of the suit property. Neither did he tender evidence relating to the value of the developments he had undertaken on the suit property.

37. In the above circumstances, the court cannot pluck a figure from the air. The only figure available to reasonably guide the court in assessing damages is the purchase price which the appellant paid to Johnson Wachira. I will therefore condemn Johnson Wachira to pay to the appellant damages equivalent to the purchase price paid to him together with interest from the date when the counterclaim was filed in the High Court [30/8/2013].

38. On costs, both the suit in the trial court and in this appeal are a direct result of fraudulent activities of Johnson Wachira. In the circumstances, he is to bear costs of this appeal and costs of the suit in the trial court in relation to the innocent parties.

Disposal Orders

39. In the end, this appeal partially succeeds in the following terms:

- a. The trial court’s findings on the counterclaim by Daniel Gichuki Kibanga in the Judgment rendered on 30/9/2021 in Thika Civil Suit No 192 of 2018 is hereby set aside and is substituted with an award on the counterclaim as against Johnson Wachira for damages in the sum of Kshs 2,150,000 together with interest at court rate from 30/8/2013 till the money is paid in full.
- b. The trial court’s orders on costs are similarly set aside and are substituted with an order condemning Johnson Wachira to bear costs of Stephen Maina Chege, Daniel Gichuki Kibanga and Kenya Commercial Bank Ltd in the primary suit.
- c. Johnson Wachira shall, similarly, bear costs of the above parties in this appeal.
- d. The Attorney General and the parties represented by the Attorney General will bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF FEBRUARY 2023

B M EBOSO

JUDGE

Ms Ikonge for the Appellant

Court Assistant: Osodo

