



**Mwangi v Mwangi (Environment and Land Appeal E015 of 2022)
[2023] KEELC 16232 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16232 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E015 OF 2022**

LN GACHERU, J

MARCH 9, 2023

BETWEEN

HUMPHREY IRUNGU MWANGI APPELLANT

AND

STANLEY IRUNGU MWANGI RESPONDENT

(Being an Appeal from the whole of the JUDGMENT delivered on the 22nd July 2021, by the Honorable E.M Nyagah, Senior Principal Magistrate at Murang'a.)

JUDGMENT

1. The Respondent filed a suit against the Appellant for fraudulent transfer of Loc 12/Sub-Loc 3/180, being land alleged to be held in trust for the family. The Respondent averred that the Appellant misrepresented himself at the Land's Registry and caused the suit land to be registered in his name at the exclusion of his siblings. He sought revocation and cancellation of title.
2. The Appellant entered appearance and denied all the contents of the Plaintiff and raised a Counter-claim. He averred that he was allocated the suit land during a demarcation process and which land was subsequently registered in his name.
3. The matter was set down for hearing and the trial Court rendered itself vide a judgment, the subject matter of this appeal, delivered on July 22, 2021. The trial Court entered judgment in favour of the Respondent herein.
4. Being dissatisfied with the said Judgment, the Appellant preferred the instant appeal premised on eleven grounds and sought for Orders that the Appeal be allowed and the Judgment of the trial Court be set aside.
5. The Appeal was admitted for hearing on the September 19, 2022, and the Court directed that the appeal be canvassed by way of written submissions.



6. The Appellant filed his submissions on the January 16, 2023, through the Law Firm of Muthoni GM & Co Advocates, giving a brief background of the facts founding the appeal and raised one issue for determination;- wit whether the appeal should be allowed.
7. The Appellant submitted that the trial Court should have considered the entire process of acquiring the title document. He maintained that he followed the due process in acquiring title having been issued with a demarcation card which he presented at the land's office for title to be issued.
8. It was the Appellant's further submissions that the trial Court did not give reason as to how the Appellant's title was defeasible within the meaning of it in Section 26 of the Land Registration Act. Reliance was placed on the case of Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another (2013)eKLR, where the Court reiterated the circumstances for cancellation of title. He submitted that the fraud was not proved to the standard required in Charles Kimani Kuria vs Director of Surveys & Another {2018} eKLR. The also Appellant submitted that he followed the due process of acquiring title.
9. The Respondent through the Law Firm of LM Kinuthia & Associates Advocates, filed his written submissions dated January 17, 2023, raising three issues for determination by this Court. The Respondent submitted that he has an original certificate of title and thus has absolute and indefeasible title. In the end, he submitted that the Judgment of the trial Court should not be set aside since his proprietary right should be protected being the current occupant of the suit property.
10. The duty of the 1st appellate court was explained in the case of Selle vs Associated Motor Boat Co {1968} EA 123, and is well captured under Section 78 of the Civil Procedure Act, which espouses the role of a first appellate court as to: '... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' This provision was buttressed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR, where it was held that:

We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.
11. Similarly, in the case of Abok James Odera t/a AJ Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, the Court rightly held:-

'This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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.'
12. Therefore, the court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial court, analyse the same, evaluate it and arrive at an independent conclusion. This Court cannot simply interfere with the discretionary powers of the trial Court which powers are donated to this Court by the Constitution and statute.
13. Before this Court can interfere with such discretion, it must be satisfied that the learned Magistrate misdirected himself and as a result arrived at a wrong decision or that he misapprehended the law or failed to take into account some relevant matter. Madan, JA (as he then was) captured the principle



more succinctly in the case of *United India Insurance Co Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898*, where he held as follows:

'The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.'

14. The foregoing was reiterated in the celebrated case of *Mbogo vs Shab (1968) EA* at Page 93, where the Court held that:-

'I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.'

15. Having been well guided above and having now carefully read and considered the Record of Appeal, the Grounds of Appeal, the rival written submissions by the parties, and the Judgment of the trial Court, this Court finds that the issue for determination is whether the Appeal is merited.
16. In determining whether the appeal is merited this Court will seek to answer
- i. Whether the Appellant validly acquired title of the suit property
 - ii. Whether the Respondent proved his case on a balance of probabilities against the Respondent

i. Whether the Appellant validly acquired title of the suit property?

17. It is the Appellant's case that he was allotted the suit land during the demarcation process and an adjudication card was issued in the name of Irungu Mwangi, which was kept in the custody of their mother. He alleged that after the death of his mother he started the process of having a title issued in his name. He told the trial Court that a title could not be issued since he had a problem with his name, but he swore an Affidavit and a letter of consent for correction of names that was issued on November 21, 2006, by the Chairman, Land Control Board Kangema.
18. Evidently, the suit was first registered in the name of Irungu Mwangi on January 21, 1964. Sometime in 2006, the Appellant made an application for correction of name in the register. By a letter of consent dated November 21, 2006, the Chairman Land Control Board, Kangema consented to the change of name as per the application by the Appellant. On September 3, 2012, the land was registered in the name of the Appellant and a title deed issued on January 3, 2017.
19. Interestingly, the Respondent made an application for correction of names sometime in 1977, but there is no evidence that the same was acted on. This Court has only seen a copy of title in the name of the Appellant. Both parties herein are entitled to own and acquire property in Kenya as guaranteed under the Constitution. However, a title deed is prima facie evidence of proprietorship.



20. Section 24 of the [Land Registration Act](#) provides that registration confers ownership. It states as follows;

Subject to this Act—

- (a) The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

21. Further section 26 (1) (b) of the [Land Registration Act](#) provides:

The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”

22. The Appellant has incontrovertible right over the suit property since he has title. By dint of the above provisions, he has the right to have his title protected by this Court. This Court has had the benefit of looking at the copy of the title deed, the same has a seal and signature by a Land Registrar and this Court does not have any reason to doubt the authenticity of the said title deed, unless there is evidence to challenge it, which the Court shall establish progressively.

23. The Respondent submitted that he is the bona fide owner of the suit land, since he has an original Certificate of Title issued by the Registrar. This Court has not seen any such certificate. The Respondent contended that the suit land, was a family property having been registered in his name to hold it in trust for the family. Trust is an overriding interest registerable on land thus it is one of the ways of acquiring land. Section 7 of the [Land Act](#) provides for the ways title may be acquired, it provides

Title to land may be acquired through-

- (a) Allocation;
-
- (d) Prescription
- (g) transfers;
- (i) any other manner prescribed in an Act of Parliament.



24. Trust is one of the overriding interests contemplated under the *Land Registration Act*, which is one of the means of acquiring land. Section 28 provides:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- a.
- b. Trusts including customary trusts;
- c.
.....

25. Trust is thus one of the overriding interests that can take away the indefeasibility. The Appellant's title was challenged and it was his duty to demonstrate to the trial Court that he validly acquired his said title. The Court of Appeal Court in the case of *Munyu Maina Vs Hiram Gathiba Maina, Civil Appeal No 239 of 2009*, held that:-

We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.

26. At the hearing of the suit, before the trial Court, the Respondent maintained that the land was issued in his name as the eldest son during the demarcation process. That he was to hold the land in trust for the family, since his father had long died and his mother was not allowed to own property. He called other persons who confirmed his case. What came out is that the Respondent was living on the suit property and the Appellant has never occupied the said land.
27. The Appellant did not call any witness, save for himself, despite having listed many witnesses. The land registrar told the trial Court that there was a correction of names in favor of the Appellant. She noted that she never had a correction of name request. That the one present was in respect of Loc 12/Sub-loc 3/176.
28. There is no doubt that the land was first registered in the name of Irungu Mwangi. Unfortunately, both the Appellant and the Respondent share in the name of Irungu Mwangi. Interestingly, both parties come from Iyego Location, but they are not related. At the hearing of the suit, the Appellant told the trial Court that the Respondent had been living on the suit property since 1964. It is important therefore to investigate through evidence how the land came to be registered in the name of the Appellant at the exclusion of the persons living on the suit property.
29. The Respondent's witness PW2 told the trial Court that he was a retired Senior Assistant Chief, and that he resolved the issues between the parties herein. He produced a letter to buttress his claim. There are a number of letters addressed to the Land Registrar Murang'a, which seeks to have the land registered in the name of the Respondent whom they stated lived on the suit property.



30. The Appellant produced a chief's letter which letter which confirmed the Appellant's name and added that his land referenced therein be corrected. While the Respondent called the author of his letter, the Appellant opted not to, despite there being two conflicting information. The Respondent's uncle PW3 told the trial Court that the suit land was issued to the Respondent and added that his clan members hail from the same area.
31. The Appellant alleged that he had a demarcation note showing that the land was issued to him. There was no note availed to the trial Court. He confirmed that together with the Respondent they had both visited the Chief's office. It is safe to conclude that his statement corroborated the testimony of PW2. The Appellant's has all the requisite documents necessary for registration of title. However, this Court notes from the application of correction of name and letter of consent that there is a mix up of land references in some parts it reads Loc 12/ Sub-Loc3/180, in some it reflects Loc 12/ Sub-Loc3/176. This is a grievous confusion that needs clarification from the holder of records. The land Registrar, DW2 told the trial Court that she did not have a correction of name request and added that if it is done, then the Land Registrar should have it in their records. She confirmed to the Court that the request contained in the Appellant's documents was in regards to land parcel Loc 12/ Sub-Loc3/176. Her testimony did not in any case liberate the Appellant.
32. There was no convincing evidence that the Appellant was the original allottee of the suit land. While the Appellant was of age as at the time of the demarcation, there was no material evidence placed before the trial Court to show that the land was allocated to him. Conveniently, the Appellant took advantage of the common names between him and the Respondent and caused title to be issued in his name. The issue of title deeds do not matter and what the Appellant was bound to demonstrate to the lower Court was that he was the original allottee of the suit land and was issued with the requisite documents. The Appellant would have at least called a witness to confirm his allegations. The Appellant had his day in Court, and opted not to score his card.
33. The witness statements filed alongside the Appellant defence (at the trial Court) were statements within the meaning of Order 3 Rule 2 of the Civil Procedure Rules. They were supposed to aid the Respondent with knowledge on what they would be confronted with at the trial. The intent of witness statement was elaborated by the Court in *In re Estate of Boniface Munguti Mutiso (Deceased) [2016] eKLR* when it relied on some cases it held:

The primary objective of witness statements is to improve the efficiency and expedite the hearing of civil trials, by ensuring that by the time of trial each party is fully prepared and aware of the full extent of the other party's case. In Halsbury's Laws of England Vol 11, 5th Edition Para 751 the application of witness statements is explained as follows:

'If a party has served a witness statement and he wishes to rely at trial on the evidence of the witness who made the statement, he must call the witness to give oral evidence, unless the Court otherwise. Where a witness is called to give oral evidence under this provision, his witness statement will stand as his evidence in chief unless the Court orders otherwise. A witness giving oral evidence at trial may, with permission of the court, amplify his witness statement and give evidence in relation to new matters which have arisen since the witness statement was served on the other parties. The Court will give such permission only if it considers that there



is a good reason not to confine the evidence of the witness to the contents of his witness statement.'

In addition, Kimondo J held as follows in *Surgipharm Ltd V Kenya Invalid & Pharmacy Supplies Ltd & 2 Others*[2013] e KLR as regards the distinction between witness statements and affidavits:

- '12. Clearly, a witness statement remains a guide for the oral testimony in court. As part of evidence in chief, it is subject to cross-examination. But the witness can deviate from it with leave of the court. It would thus be to turn logic on its head to strike out an action based entirely on the contents of the statements.
 13. I am fortified in that finding by the following. The witness statement is not a deposition or sworn statement. I can draw an analogy: In proceedings commenced by originating summons, parties often choose to rely entirely on their affidavits to determine the matter. In such a scenario, a party may very well argue that the deposition does not disclose a case against it. The court in dealing with such matter would be well guided since all the evidence would be before it...
 15. As a witness statement is a synopsis of intended evidence at the trial, it is not the exclusive basis for evidence to be submitted in support of facts alleged in the claim. The Court can grant leave to deviate from the statement, to amplify the evidence or even to refer to new matters.'
34. The Respondent never had a chance to interrogate the facts contained in the witness statements and there is no way the same was going to be adopted by the trial Court unless parties had agreed which was not the case here. The purpose of the witness statement has been elaborated hereinabove and it cannot be gainsaid.
 35. The Appellant failed to show the root of his title and based on the testimony availed before the trial Court, it is safe to conclude that the Appellant acted fraudulently by concealing the true identity of Irungu Mwangi.
 36. Black's Law Dictionary 10th Edition 2009 defines fraud as:

A knowing misrepresentation or concealment of a material fact made to induce another to act to his or her detriment or a reckless misrepresentation made without justified belief in its truth to induce another person to act.
 37. The Land Registrar told the trial Court that the title deed was authentic and he confirmed the initial name was Irungu Mwangi. What was intriguing is her testimony that she never had the correction of name request which ideally are kept in their records. The Appellant did not attempt to adduce evidence in his aid. To this end, this Court finds and holds that the Appellant did not acquire title validly. Even though his title was authentic, acts of fraud and misrepresentation took away the authenticity.



38. In *Embakasi Properties Limited & Anor v Commissioner of Lands & Anor [2019] eKLR*, the Court held rightly as follows:

'Although it has been held time without end that the certificate of title is: '...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration Act, 2012* though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation, or where it has been acquired 'illegally, unprocedurally or through a corrupt scheme.'

39. The end result of the foregoing is that the Appellant's title was not subject to protection by this Court.

ii. Whether the Respondent proved his case on a balance of Probabilities against the Appellant?

40. The Respondent had the legal burden of leading evidence before the trial Court. The *Evidence Act* makes provisions on the burden of proof

107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

41. The Plaintiff(Respondent) led evidence through testimony that he was allocated the land for his family and he also told the trial Court through the evidence of PW3 that the land is within a clan. There was uncontroverted evidence that the Respondent lives on the suit property, a fact admitted by the Appellant. The Appellant did not inform the trial Court how the Respondent was able to occupy his land and he never complained about it. He did not give testimony terming the Respondent as tenants or persons present on his land illegally. Albeit, the fact that the Respondent did not produce any demarcation card, he did not claim at the hearing that he was issued with one. The Respondent made a case of fraud against the Appellant. The facts were particularized in paragraph 7 of the Plaint.

42. The Court of Appeal in *Mombasa Civil Appeal No 312 of 2012;- Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR* held;

'Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.'



43. It was the sole duty of the Plaintiff(Respondent) to lead evidence that the Appellant fraudulently acquired title. In *Gladys Wanjiru Ngacha V Treresia Chepsaat & 4 Others, [2013] eKLR*, the Court held that:

... Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga vs Nyati (1984) KLR 425*, at pg 439, this Court held: Whether there is any evidence to support an allegation of fraud is a question of fact.

44. The Respondent testified that his entire family occupied the suit land and has never been evicted by the Appellant. That he realized in 2007, that the Appellant had caused the land to be transferred to his name thereby taking away his proprietary rights. As stated above, the parties herein share a common name. It was not difficult for the Registrar to believe the Appellant's allegations that he was the Irungu Mwangi. The Chief's letter which was produced in this Court as evidence was not challenged and it conforms to the testimonies that parties had been to the chief to resolve the issue. The Respondent brought enough testimony to demonstrate that the land belonged to him and not the Appellant.

45. The Appellant save for bringing titles on how the registration was done, did not bring any evidence to confirm the root of his title. While the Appellant wanted the trial Court to take into consideration his letter of November 9, 2006, it should be appreciated that the Appellant had the option to bring the author of the said letter, to confirm that he was the owner of the land. This is so because there was a chief, PW2 who had already testified to the contrary.

46. The issuance of Identity Card has no significant forbearance with the validity of title herein. After all, it was not an issue before trial Court. The Court was simply analysing evidence and there is nowhere in the Judgment that the Court was guided to conclude the way it did based on the identity cards. The Respondent having led evidence through testimony that he was living on the suit land, and continues to by dint of demarcation, the Appellant had the duty to also lead evidence. The fact that he had an authentic title was not enough not to led evidence as to the source of his title. The evidentiary burden shifted to the Respondent to show that he was the valid allottee of the suit land at the exclusion of the Respondent. Amusingly, the Appellant never attempted to evict the Respondent to assert his proprietary rights over the land.

47. In *Mbutbia Macharia v Annah Mutua Ndwiga & another [2017] eKLR* the Court discussed the facets of legal burden of proof and held:

The Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

'The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

(14) The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden



lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.'

- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?

48. A quick look at the particulars of fraud enumerated by the Respondent informs this Court that the Respondent not only particularized the elements of fraud, but proved the same to the required standard. The letter of the chief dated March 5, 2007, is instrumental. The author came to Court and gave testimony that corroborated the testimony of the Appellant herein that parties appeared before him. The Appellant did not dispute his evidence or call a witness to counter it.

49. Therefore, this Court finds and holds that the trial Court was right in concluding that the Respondent had proved his claim on a balance of probability thus entering judgment in his favour. The Appellant's title having been rendered defeasible, the Counter-claim ought to have failed as there was no prima facie case established. Ultimately this Court finds and holds that the appeal herein as stated in the Memorandum of Appeal dated August 5, 2022, lacks merit and the said Appeal be and is hereby dismissed entirely with costs to the Respondent herein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 9TH DAY OF MARCH, 2023.

L. GACHERU

JUDGE

Delivered virtually in the presence of;

Joel Njonjo/Mwende - Court Assistant

M/s Muthoni for the Appellant

Respondent – Absent

L. GACHERU

JUDGE

9/3/2023

