



**Mundia & another v Kinyanjui & 3 others (Environment and Land Appeal  
35 of 2020) [2023] KEELC 18086 (KLR) (5 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18086 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 35 OF 2020**

**BM EBOSO, J**

**JUNE 5, 2023**

**BETWEEN**

**FRANCIS MURIITHI MUNDIA ..... 1<sup>ST</sup> APPELLANT**

**ELIZABETH WAKIURU KABECHEKI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**TABITHA NJOKI KINYANJUI ..... 1<sup>ST</sup> RESPONDENT**

**G. M MUHORO ..... 2<sup>ND</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR, KIAMBU ..... 3<sup>RD</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

*(Being an Appeal against the Judgment of Hon C. A. Otieno-Omondi Senior  
Principal Magistrate, delivered on 31/8/2020 in Ruiru MCLE Case No. 39 of 2019)*

**JUDGMENT**

1. This appeal challenges the Judgment rendered by Hon. C. A Otieno – Omondi, SPM, on 31/8/2020, in Ruiru SPMC MCLE Case No 39 of 2019. The dispute in the trial court revolved around the question of ownership of land parcel number Ruiru/ Ruiru East Block 3/1183. The land was alleged to be a subdivision out of Ruiru/Ruiru East Block 3, which was a subdivision scheme that was owned by M/s Mwalimu Investment Co Ltd. During trial, the appellants, Francis Muriithi Mundia and Elizabeth Wakiuru Kabecheki, waved a title dated 3/2/2016 relating to the suit property. They alleged that the title was conveyed to them by one Paul Karogo Mwai in 2016 after they purchased the suit property in 2008 from one Samuel Muthui Munuhe.
2. On her part, the 1st respondent, Tabitha Njoki Kinyanjui, waved a title she alleged was issued to her in 1997 after M/s Mwalimu Investment Company Ltd conveyed the land to her. She contended that she was a balloting member of the subdivision scheme relating to Ruiru/Ruiru East Block 3, owned



by Mwalimu Investment Company Ltd. Besides the title, she waved various documents indicating that Mwalimu Investment Company Ltd allotted to her the suit property in 1983 and in 1990 the suit property was surveyed as land parcel number Ruiru/ Ruiru East Block 3/1183. Before I delve into the key issues that fall for determination in this appeal, I will briefly outline the background to the appeal.

3. Through a plaint dated, the two appellants sued the respondents, praying for among other reliefs: (i) an order lifting a restriction which had been placed against the reconstructed land register relating to the suit property; (ii) an order restraining the respondents against harassing them; (iii) a declaration that their registration as proprietors of the suit property [which they described in the plaint as Ruiru/ Ruiru Block 3/1183] was “reflective of proper holders of title” to the suit proper; and (iv) a declaration that the title held by the 1st respondent was a nullity.
4. The case of the appellants during trial was that they purchased the suit property from one Samuel Muthui Munuhe vide a sale agreement dated 9/6/2008 and that the suit property was subsequently conveyed to them by one Paul Karogo Mwai in 2016 through a transfer registered in their favour on 3/2/2016. They contended that they were being harassed by the Police over the title which they held, adding that the 3rd respondent (the Land Registrar) had summoned them requiring them to submit their ownership documents to his office; actions which prompted them to file a petition in the High Court to challenge the Police and the 3rd respondent.
5. The 1st respondent filed a statement of defence dated 24/1/2020, in which she contested the appellants’ title and the allegation of harassment. During trial, she testified as DW1. The case of the 1st respondent was that she acquired the suit property from Mwalimu Investment Co Ltd through balloting in 1982 and that the title she held was processed and issued to her by the said land buying company, adding that the company was the proprietor of the subdivision scheme. She urged the trial court to dismiss the appellants’ case.
6. The 2nd respondent filed a statement of defence dated 19/6/2019 and testified as DW2. He denied the appellants’ allegation. His case was that he acted for Mwalimu Investment Company Ltd in processing the subdivision titles and in conveying the subdivision titles to the balloted members of the company. It was his evidence that the suit property was allotted to the 1st respondent by Mwalimu Investment Company Ltd through balloting. He added that the 1st respondent approached him and informed him that she wanted to sell her land but she had learnt that the land register relating to the suit property bore the names of the appellants. It was his further evidence that, on instructions from the 1st respondent, he wrote to the Land Registrar requesting him to place a restriction on the land register.
7. The 3rd and 4th respondents filed a statement of defence dated 14/6/2019. The Ruiru Land Registrar, Mr Robert Mbuba, testified as DW3. The case of the 3rd and 4th respondents was that the Land Registry processed the registration in favour of the appellants in 2016 on the basis of a “skeleton file” because the original records relating to the suit property were missing from the Land Registry. He added that to facilitate opening of the “skeleton file”, the Land Registry asked the appellants to execute a deed of indemnity in favour of the Land Registrar and the Government of Kenya. DW3 added that it took about seven (7) years for the registration to be effected because the original records were missing from the Land Registry. Lastly, DW3 testified that Ruiru/ Ruiru East Block 3 was owned by Mwalimu Investment Company Ltd and that subdivisions out of the block were allotted to the teachers and TSC staff who were investing members of the said company.
8. Upon conclusion of the trial, and upon receiving submissions from the parties, the trial court rendered the impugned Judgment in which it made the following key findings: (i) the appellants had failed to demonstrate the root of the title which they held; (ii) the 1st respondent had demonstrated that the title she held was acquired from Mwalimu Investment Company Ltd who were the owners of the



subdivision scheme, hence she had proved the root of her title; and (iii) the appellants had failed to prove impropriety or illegality in the actions of the 2nd and 3rd respondents. Consequently, the trial court dismissed the appellants' suit with costs.

## Appeal

9. Aggrieved by the findings and disposal orders of the trial court, the appellants brought this appeal through a memorandum of appeal dated 14/9/2020. The memorandum of appeal was amended on 26/11/2020. The appellants advanced the following nine verbatim grounds of appeal:

1. That the learned trial magistrate erred in both law and fact in holding that the appellants' title is not genuine yet no evidence was led to prove it was fraudulently acquired.
2. That the learned trial magistrate erred in both law and fact in holding the 1st respondent's title is genuine while it does not have any supporting records at the Land Registry.
3. That the learned trial magistrate erred in both law and fact in holding that the 1st respondent's title is genuine while the said title does not bear the registrar's stamp.
4. That the learned trial magistrate erred in both law and fact in holding that the records supporting the appellants' title were not genuine yet no evidence was led to prove that they were fraudulently created or that the appellants were aware of any such dealings if at all there were any.
5. That the learned trial magistrate erred in both law and fact in holding that the appellants should have demonstrated how the initial registered proprietor from whom they purchased the suit property had acquired the property yet the certificate of official search is reflection of the title records and a government guarantee of the accuracy of the register.
- 5A) That the learned trial magistrate erred in both law and fact in not finding that the appellants were innocent purchasers for value without notice of any alleged fraud if at all there was any.
6. That the learned trial magistrate erred in both law and fact in holding that the title deeds held by the appellants and the 1st defendant were in respect of the same property while the title deeds indicate the respective properties are on different registry maps sheets.
7. That the learned trial magistrate erred in both law and fact in relying on the evidence of the 2nd respondent who testified that documents produced by the 1st defendant were issued by Mwalimu Investment Company Limited without proof that he was authorized to act on behalf of the company.
8. That the learned trial magistrate misapplied the law and misdirected herself on the facts therefore arriving at the wrong conclusion.
9. That the learned trial magistrate misapplied the law and misdirected in fact by relying on the evidence of the Land Registrar Ruiru who abrogated upon



himself power to cancel the appellants' title whereas the law does not confer him with such power.

### **Appellants' Submissions**

10. The appellants canvassed the appeal through written submissions dated 26/9/2022, filed by M/s Muigai, Kemei & Associates. The appellants' submissions were broken into the following four parts: (i) The background; (ii) The suits in the Lower Court; (iii) The Law and Analysis; and (iv) Conclusion.
11. Counsel cited Section 7 of the *Limitation of Actions Act* and submitted that the 1st respondent having been issued with a title on 2/12 1997, she was "barred" from "seeking to recover" the suit property 21 years later. Counsel contended that neither the Land Registrar nor the trial court could help the 1st respondent to recover the suit property after 21 years "because the law orders them otherwise". Counsel contended that the trial court ought to have allowed the plaintiffs' prayers because the respondent could not change the law through evidence that they acquired the land through "Mwalimu Sacco". Counsel submitted that the respondent never took possession of the suit property.
12. Counsel for the appellants added that the appellants led evidence demonstrating that "they bought the land from a claimant of interest" who, acting in conjunction with the registered proprietor of the land, transferred the land to the appellants. Urging the court to allow the appeal, counsel submitted that the only records availed to the trial court were those "created by the Ministry through efforts of" the appellants. Counsel argued that there was no evidence that the appellants' title was acquired through fraud, adding that the appellants were bonafide purchasers for value. Counsel urged the court to allow the appeal and grant the appellants the prayers that were sought in the plaint.

### **Respondents' Submissions**

13. The 1st respondent filed written submissions dated 30/1/2023, through M/s Kieme & Company Advocates. Counsel for the 1st respondent broke the 1st respondent's written submissions into three parts: (i) Factual Background; (ii) Root of Title; and (iii) Bonafide Purchaser for Value. Counsel submitted that the appellants failed to demonstrate how Samuel Muthui Munuhe acquired the land that he purportedly sold to them. Citing the provisions of Section 26 of the *Land Registration Act*, counsel for the 1st respondent submitted that in the absence of relevant documentary evidence on the root of the appellants' title, the only logical conclusion was that the appellants transferred the land to themselves without any legal authority and through forged documents.
14. Citing the decision in the Ugandan case of *Katende v Harindar & Company Limited*, counsel submitted that the conduct of the appellants was not that of a diligent bonafide purchaser for value, adding that the appellants failed to ascertain the root of the title which they purchased. Counsel urged the court to dismiss the appeal.
15. The court record does not bear submissions by the other respondents.

### **Analysis and Determination**

16. I have read and considered the entire record of the trial court, alongside the record filed in this appeal. I have also read and considered the submissions that were tendered in this appeal. Further, I have considered the legal frameworks and jurisprudence relevant to the key issues in this appeal. The appellants advanced nine grounds of appeal. None of the nine grounds of appeal raised the issue of extinction of title under the *Limitation of Actions Act* or the law on limitation under the *Limitation of Actions Act*. Similarly, this issue was not pleaded in the plaint which formed the basis of the trial in the lower court. Yet a substantial portion of the appellants' submissions in this appeal focus on the issue of



limitation under the *Limitation of Actions Act*. The submissions clearly raise an issue that was neither pleaded in the lower court nor was part of the grounds of appeal.

17. Taking into account the grounds of appeal and the submissions that were tendered, the following are the two key issues that fall for determination in this appeal: (i) Whether the trial court erred in finding that the 1st respondent [Tabitha Njoki Kinyanjui] was the legitimate proprietor of land parcel number Ruiru/ Ruiru East Block 3/1183; and (ii) What order should be made with regard to costs of this appeal. Before I dispose the above two issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
18. 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 Keshar 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.”
19. 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.”
20. The two appellants on one part and the 1st respondent on the other part held parallel titles relating to land parcel number Ruiru/Ruiru East Block 3/1183. They challenged the legitimacy of each other’s title. Not too long ago, the Court of Appeal laid down the following principle in Munyu Maina v Hiram Gathiha Maina [2013] eKLR regarding the obligation of a registered proprietor of land when the root of his title is challenged.

“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 any encumbrances including any and all interest which need not be noted on the register.”
21. The Land Registrar testified as DW3. A key aspect of his testimony was that the appellants’ title was generated in 2016 on the basis of a “skeleton file” because the relevant records relating to the suit property were missing from the Land Registry. He added that the appellants’ transfer documents could not be acted upon for about seven (7) years because the relevant records were missing in the Land Registry. He told the trial court that the appellants executed a deed of indemnity to facilitate opening of what he called “a skeleton file”. There was, however, no evidence of any notice that was published in the Kenya Gazette to facilitate the reconstruction of a land register or a parcel file in terms of Section 33(5) of the *Land Registration Act*.
22. Secondly, the indemnity which formed the basis upon which the Land Registrar opened the alleged “skeleton file” was executed by the appellants. Paul Karogo Mwai who was alleged to be the registered



- proprietor of the suit property at the time the “skeleton file” was opened did not execute any indemnity. The said Paul Karogo Mwai was not called as a witness to give evidence relating to the root of the title that was attributed to him. No one knows whether he exists or not. No one knows the root of the title that he conveyed to the appellants on the platform of the skeleton file.
23. Thirdly, the appellants’ case in the trial court was that they acquired their title through purchase of land from one Samuel Muthui Munuhe in 2008. The said Samuel Muthui Munuhe was not the registered proprietor of the suit property. He was not called as a witness. There was no evidence placed before the trial court to demonstrate that the said Samuel Muthui Munuhe held any interest in the suit property capable of disposal through a sale agreement. There was no evidence of any registered power of attorney vesting in Mr Munuhe authority to dispose the suit property through a sale agreement.
  24. Fourthly, the uncontested evidence before the trial court was that the suit property was a subdivision out of Ruiru/ Ruiru East Block 3 which was a sub-division scheme owned by Mwalimu Investment Company Ltd. No evidence was placed before the trial court to demonstrate that Paul Karogo Mwai who purportedly conveyed the suit property to the appellants was an allottee of the suit property land within the subdivision scheme.
  25. On her part, the 1st respondent tendered evidence demonstrating that she was a balloting member of Mwalimu Investment Company Ltd and that the company allotted the suit property to her through balloting. She also tendered evidence showing that the title which she held was processed by the proprietor of the subdivision scheme, Mwalimu Investment Company Ltd, and issued to her by the said company in 1997.
  26. DW3, G M Muhoro, testified that he was retained by Mwalimu Investment Company Ltd to process subdivision titles relating to Ruiru/Ruiru East Block 3. He stated that he processed conveyances in favour of the balloted members of the scheme. He confirmed that the 1st respondent balloted for and was allotted the suit property. DW3’s evidence corroborated the 1st respondent’s evidence that the title which she held was processed and issued to her by the owner of the subdivision scheme on the basis of money paid towards acquisition of the land and, further based on the balloting that was conducted by the company.
  27. The totality of the foregoing is that, the 1st respondent placed evidence before the trial court tracing the root of the title which she held. The evidence demonstrated that she [the 1st respondent] was the legitimate proprietor of the suit property. On the other hand, the appellants waved their title but were not able to demonstrate the root of the title they were waving.
  28. The appellants’ counsel contended in this appeal that the appellants were innocent purchasers for value and that the title they hold should be protected. The evidence which emerged during trial clearly indicates that the appellants were sold a fake title by people who were not members of the subdivision scheme. They were sold a title that had been faked in relation to land that had been allotted to the 1st respondent and was already registered in the name of the 1st respondent. The 1st respondent never parted with her title.
  29. There abound jurisprudence by our superior courts that fake or irregular titles do not enjoy the protection contemplated under the [Land Registration Act](#) [see *Ardhi Highway Developers v West End Butchery Ltd & 6 Others* [2015] eKLR]
  30. Having evaluated the evidence which was placed before the trial court, I find no basis upon which to fault the trial court. I entirely agree with the finding of the trial court on the question of the legitimacy of the rival titles. Consequently, my finding on the key issue in this appeal is that the trial court did not



err in finding that the 1st respondent [Tabitha Njoki Kinyanjui] was the legitimate proprietor of land parcel number Ruiru/Ruiru East Block 3/1183.

31. On costs, the general principle in Section 27 of the [Civil Procedure Act](#) is that costs follow the event. No special circumstances have been demonstrated to warrant a departure from the above general principle.

32. In the end, this appeal is dismissed for lack of merit. The appellants shall bear costs of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 5TH DAY OF JUNE 2023**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

M/s Njoroge holding brief for Ms Muigai for the Appellants

Mr Kieme for the 1st Respondent

Court Assistant: Hinga

