



**Mureithi v Karaba & 3 others (Environment and Land Appeal
3 of 2016) [2023] KEELC 18494 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18494 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 3 OF 2016**

JO OLOLA, J

JULY 6, 2023

BETWEEN

DEDAN GITONGA MUREITHI APPELLANT

AND

RICHARD NDERITU KARABA 1ST RESPONDENT

JOHN GITHIRA GITEI 2ND RESPONDENT

WATSON WACHIRA MURIITHI 3RD RESPONDENT

BEATRICE WANGUI WARUTERE 4TH RESPONDENT

JUDGMENT

Background

1. This is an Appeal arising from the Ruling of the Honourable C. Mburu, Resident Magistrate issued in Nyeri CMCC No. 9 of 2013 on March 3, 2016.
2. By a Plaint filed in the lower Court on January 16, 2013, Richard Nderitu Karaba and John Githira Gitei sought orders against Watson Wachira Muriithi (the 3rd respondent) and Wachira Gitonga (the 4th Respondent herein) for:
 - (a) A perpetual injunction restraining the Defendants, their agents and/or servants from entering into or in any other way interfering with the (Plaintiffs) possession and use of L.R No. Mugunda/Nairutia/605;
 - (b) Damages for trespass; and
 - (c) Costs and interest.



3. Those prayers arose from the Plaintiffs' contention that the 1st Plaintiff was the registered absolute proprietor of the said parcel of land while the 2nd Plaintiff was said to be his tenant therein having actual possession and use of the suit property. The two Plaintiffs accused the two Defendants of trespassing onto the suit land on October 7, 2013 whereupon they destroyed the crops thereon and proceeded to plough the land for the Defendant's own use.
4. In their Joint Statement of Defence filed in the Lower Court on February 6, 2013, the 3rd and 4th respondents herein denied that the suit land existed and/or that the 1st Plaintiff was the absolute proprietor thereof. The respondents further denied that they had trespassed upon the land and committed the acts complained of by the two plaintiffs.
5. That suit was heard before the Honourable P. Mutua, Principal Magistrate and in a Judgment delivered on May 29, 2014, the Learned Magistrate entered Judgment for the Plaintiffs against the 3rd and 4th Respondents herein as sought in the Plaint. The Court further awarded the Plaintiffs general damages of Kshs.200,000/- for trespass as well as the costs of the suit.
6. Subsequently and while the matter was at the execution stage, the Appellant herein – Dedan Gitonga Muriithi instituted a Notice of Motion in the proceedings dated January 26, 2016 seeking orders that:
 - (b) The Court be pleased to enjoin the Applicant/Interested party as a necessary Party to the suit;
 - (c) The Court be pleased to set aside the sale of land by Public Auction done on February 20, 2015 and the Certificate of Sale issued in respect of this matter be revoked and annulled and the 1st Defendant (the 3rd Respondent herein) be ordered to refund any moneys that was paid by the Purchaser to her;
 - (d) An order issues to the Land Registrar Nyeri to reinstate the registration ante the sale or alternatively the Interested Party be registered as the owner thereof; and
 - (f) The costs of the application be provided for.
7. The application was premised on the grounds that:
 - (i) The Interested Party was not a Party to the suit and that any decree issued in the matter was not issued against him;
 - (ii) The land against which the decree was issued did not belong to the Judgment debtor at the time of sale;
 - (iii) The Interested Party is legally and beneficially entitled to the parcel of land known as Mugunda/Nairutia/604 pursuant to a transfer executed on or about September 29, 1994;
 - (iv) The Interested Party has been in actual possession of the land since 1963 and there are more than 8 households currently living on the said piece of land;
 - (v) The said parcel of land was transferred by the 1st Defendant Judgment debtor and hence all along he knew of the existence of those facts as he had no interest in the subject parcel;
 - (vi) The said sale was by collusion, connivance and or fraud of the 1st Defendant who even when served with the application for sale never disclosed the position or was oblivious or the ensuing circumstances; and
 - (vii) It is only just and mete and in the interest of justice to so order that the sale be set aside and the Purchaser receives the amount she has paid for the parcel of land.



8. That application was placed before the Honourable C. Mburu, Resident Magistrate who having heard the Parties and in a Ruling delivered on March 3, 2016, dismissed the same with costs.
9. Aggrieved by the said Ruling, the Appellant moved to this Court vide his Memorandum of Appeal dated March 14, 2016 urging the Court to review and set aside the orders of the Lower Court on the grounds that:
 1. The Learned Magistrate erred in fact and in law in failing to appreciate the principles for setting aside a sale (by) public auction;
 2. The Learned Magistrate erred in fact and in law in failing to find as a fact that the parcel of land that had been sold in the auction did not belong to the Judgment debtor who had no saleable interest in the parcel of land advertised and that the sale was therefore tainted with fraud and irregularities to be allowed to stand;
 3. The Learned Magistrate erred in fact and in law in failing to consider that the interested party having not been a party to the original suit was not served with the processes leading to the auction hence had been condemned unheard contrary to the rules of natural justice;
 4. The Learned Magistrate erred in disallowing the Appellant's application when there was fundamentally no challenge to the issue of ownership as proved by the affidavit evidence of the Applicant; and
 5. The Learned Magistrate erred in disallowing the setting aside of the sale by public auction even after making a finding that there were clear and material irregularities attached to the said sale.

Analysis And Determination

10. By directions given herein, the Appeal was disposed of by way of written submissions. I have accordingly carefully perused and considered the Record as well as the submissions and authorities placed before me by the Learned Counsels acting for the parties – Mr. Nderi for the Appellant and Mr. King'ori for the Respondent.
11. As the first Appellate Court, this Court is mandated to re-evaluate the evidence before the trial Court as well as the decision appealed and to arrive at its own independent Judgment on whether or not to allow the Appeal.
12. By his application dated January 26, 2016, the Appellant sought to be enjoined as a necessary Party to the suit. In the main, he sought an order that the Court be pleased to set aside the sale of L.R No. Mugunda/Nairutia/604 (the suit property) that had been done by way of public auction a year earlier on February 20, 2015 and that the Certificate of Sale issued in respect of the same be revoked and annulled. In addition, the Appellant sought an order to issue directing the Land Registrar Nyeri to reinstate the original registration of the 3rd Respondent as the proprietor of the land and that in the alternative, the Appellant be registered as the proprietor thereof.
13. The basis for the said application were elaborately stated in the Appellant's Affidavit sworn in support of the application. It was the Appellant's case that he was not a Party to the suit and that he had only come to learn of the material proceedings some time in December, 2015 when the Area Location Chief showed him a letter dated 27th November, 2015 demanding that he vacates the land.
14. The Appellant told the Court that the sale was pursuant to the execution of a decree issued in the said proceedings against the 3rd and 4th Respondents and that the public auction conducted on 19th March, 2015 was pursuant to Court orders served upon the 3rd Respondent. It was the Appellant's case that



the 3rd Respondent herein is his elder step brother who had at all material times been the trustee of their father's parcel of land known as Mugunda/Nairutia/199 and that it was the said parcel of land which had been sub-divided to yield L.R No. Mugunda/Nairutia/604 to 608 among other titles.

15. The Appellant averred that as such trustee, the 3rd Respondent had taken steps to transfer parcel No. 604 to himself and that on 29th September 1994, they had obtained the consent of the Kieni West Land Control Board for the transfer of the same. As a result, the Appellant told the Court the 3rd Respondent had no saleable interest on the land. The Appellant accused the 3rd Respondent of failing to warn him of the impending sale of the land and accused him of colluding and conniving with the Judgment creditors (the 1st and 2nd Respondents herein) to have the land sold to Beatrice Wangui Warutere (the 5th Respondent).
16. That application was opposed by the 1st and 2nd Respondents who on 9th February 2016 filed Grounds of Opposition thereto essentially on the basis that the auction had long been completed and that the application had hence been overtaken by events.
17. In response to the same application, the 4th Respondent herein swore a Replying Affidavit on 5th February 2016 supporting the same. The contents of this Affidavit were rather interesting. At Paragraphs 4 to 10 of the Affidavit, the 4th Respondent deposes as follows:
 - “ 4. That I support the application in its entirety;
 5. That the land parcel number Mugunda/Nairutia/604 belonged to the Interested party since I was a small child and the Interested Party plus his family including myself have lived on the land since;
 6. That the Interested party who is my father and my siblings have built on the land in issue;
 7. That I have ever cultivated and utilized the land without any bar;
 8. That during the hearing of the main suit herein, I informed the Court as much that the suit land belongs to my father/Interested Party;
 9. That the land was illegally sold as the Interested Party's claim to the land cannot be overlooked; and
 10. That I am aware that consent to transfer the land to the name of the Interested Party was obtained and transfer executed in his favour only that he did not pay the requisite stamp duty to effect transfer”
18. Arising from the grounds advanced in the application, it was the Appellant's case that even though the subject matter of the auction was registered in the 3rd Respondent's name, the same did not belong to him. On the flipside, the Appellant told the Court that even though the transfer in his favour had not been registered, it was a fact of common knowledge and notoriety that the Appellant and his family had been in possession of the land since the year 1963.
19. It was however interesting that while the Appellant accused his step brother (the 3rd Respondent) of colluding and conniving with the 5th Respondent to have the land sold, a member of his own family, his son, who is the 4th Respondent herein had been sued as the 2nd Defendant in those same proceedings.
20. While he wants the Court to believe that the 3rd Respondent kept the information about the suit and the resultant execution from himself, the Appellant does not say whether or not the 4th Respondent disclosed to him about the suit and the subsequent sale by public auction. While he asserts that the



sale was pursuant to an order served only upon the 3rd Respondent, the 4th Respondent does not deny in the affidavit filed in support of the application his knowledge of the proceedings and the sale by public auction.

21. Indeed as we have seen at Paragraph 8 of that Affidavit, he acknowledges having participated in the hearing and that he told the Court the land belongs to his father the Appellant. Contrary to what he asserted in the said Replying Affidavit, this is what the Record captures him to have told the trial Court at Page 133 thereof:

“My name is Justus Wachira Gitonga. I am the second Defendant. I come from Nairutia. I sell Petrol and diesel. I live in Watson Wachira (1st Defendant’s) land. The land is Mugunda/ Nairutia/199. I have been there since birth. I was born on the land. The 1st Defendant is my uncle. I herd cattle on that land. I know the (the Plaintiffs) by seeing them. I used to see them use the land but now they don’t. They used to cultivate saying it was theirs but currently they don’t. I was given the land by my uncle.”

22. Arising from the foregoing, I was unable to see how the 4th Respondent who was not only a party to the suit but also was laying claim to a portion thereof was not aware of the impending sale by public auction. It was further inconceivable that his father whom he now purports to be the proprietor of the land and with whom he resides on the same land was unaware of the sale until about one year later. Looking at the circumstances herein, one could not but agree with the Learned Trial Magistrate that this application was nothing but an attempt to re-open the Judgment delivered on May 29, 2014 which Judgment had neither been set aside nor appealed by any of the Parties.
23. At any rate I was unable to see how in the absence of the Appellant’s registration as proprietor of the subject property, the 1st and 2nd Respondents who caused the land to be auctioned and/or the 5th Respondent transferee could be construed to have had any notice, actual or constructive, of the Appellant’s interests on the land. If indeed he had any interest in the land separate and distinct from those of the 3rd Respondent, the Appellant ought to have brought that to the attention of any person wishing to deal with the suit property by registering his interest on the title. I did not think it was sufficient for the Appellant to merely assert without any proof that it was a fact of common knowledge and notoriety that he and his family were in possession of the land.
24. Granted that the 3rd Respondent was the registered proprietor of the land, I was just like the Learned Trial Magistrate not persuaded that there was any basis on which one could argue lawfully that the 3rd Respondent had no saleable interest on the land as at the time the public auction was conducted.
25. As it were, once a sale by public auction was concluded without any irregularity, fraud or misconduct, the only recourse left to the Appellant was a claim for damages. In the matter before me there was no fraud or material irregularity that was disclosed to warrant the setting aside of the sale.
26. It follows that I was not persuaded that there was any merit in the Appeal. The same is dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 6TH DAY OF JULY, 2023.

In the presence of:

Ms Nanjala holding brief for Mr. Nderi for the Appellant

Mr. C. M. King’ori for the Respondents

Court assistant - Kendi



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J. O. Olola

JUDGE

