



Babu (Suing as an Administrator of the Estate Of The Late Babu Muriuki – Deceased) v Gikou & another (Environment and Land Appeal 24 of 2020) [2023] KEELC 21436 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 24 OF 2020
JO OLOLA, J
NOVEMBER 10, 2023**

BETWEEN

**STEPHEN MAINA BABU APPELLANT
SUING AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE BABU
MURIUKI – DECEASED**

AND

**CATHERINE WANGU GIKOU 1ST RESPONDENT
LAND REGISTRAR, NYERI 2ND RESPONDENT**

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable A. Mwangi, Principal Magistrate delivered on 30th June, 2020 in Karatina PMELC Case No 9 of 2019.
2. By a Plaint dated and filed in the Lower Court on 21st March 2019, the Appellant herein had sought Judgement against the two Respondents herein for:
 - (a) An order directing the 1st Defendant, her agents and assigns to surrender the title deed for the suit properties LR Konyu/Baricho/337 held by the Defendant herein to the Nyeri Land Registrar for purposes of cancellation and reversion to the original owner and in default the said Land Registrar be authorised to cancel the said title deed and reissue the same in the name of the Plaintiff or his nominee;
 - (b) An order of a permanent injunction prohibiting the (1st) Defendant by herself, her servants and agents from taking possession, selling, transferring, alienating, charging, wasting, stepping on or howsoever interfering in any way with the suit property LR Konyu/Baricho/337 held by the (1st) Defendant;



- (c) Costs of the suit and interest thereon; and
- (d) Any other relief that the Honourable Court may deem fit and just to grant.
3. Those prayers arose from the Appellant's contention that his deceased father Babu Muriuki was the registered proprietor of the suit property after land consolidation and demarcation in 1958. The Appellant further contended that the 1st Respondent entered the suit property as a licensee in or about 1998 but after the death of his parents, the Appellant conducted a search on 11th September, 2018 only to discover that the suit property had been secretly and fraudulently transferred to the 1st Respondent.
4. But in her Statement of Defence dated and filed on 12th June 2019, the 1st Respondent denies that she entered the land as a licensee. On the contrary, the 1st Respondent asserts that she took possession of the suit property in 1998 as the absolute registered owner thereof. She denied the allegations of fraud made by the Appellant and invited the Appellant to strict proof.
5. It was the 1st Respondent's case that by a Sale Agreement dated 5th November 1998, the 1st Respondent purchased the suit property from the Appellant's mother one Grace Wamuyu. The 1st Respondent contended that the sale was duly and lawfully completed by registration of the title in her name on 9th November, 1998 and delivery of vacant possession of the suit land.
6. Having heard the dispute and in her Judgment delivered electronically on 30th June, 2020 aforesaid, the Learned Trial Magistrate was not persuaded that the Appellant had proved his case on a balance of probabilities. The Learned Trial Magistrate accordingly dismissed the Appellant's suit with costs to the Respondent.
7. Aggrieved by the said determination, the Appellant lodged the Memorandum of Appeal herein dated 27th July, 2020 urging this Court to set aside the Judgement of the Learned Trial Magistrate on the grounds:
1. That the Learned Magistrate erred in law and in fact in failing to make a finding that the Plaintiff had proved his case on a balance of probabilities;
 2. That the learned Magistrate erred in law and in fact in failing to make a finding that the Defendant did not prove that she had lawfully acquired the title to the suit land;
 3. That the Learned Magistrate erred in law and in fact in failing to find that the Defendant had obtained title to the suit land through fraud;
 4. That the Learned Magistrate erred in law and in fact in failing to make a finding that the Defendant did not obtain title to the suit land regularly;
 5. That the Learned Magistrate erred in law and in fact in failing to make a finding that the Plaintiff was entitled to the prayers sought; and
 6. That the Learned Magistrate erred in law and in fact in awarding the costs of the suit to the Defendant.
8. As a first Appellate Court, this Court is duty bound to reconsider the evidence adduced before the trial Court and re-evaluate it in order to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the Learned Trial Magistrate were consistent with the evidence placed before her during the trial. [See *Selle & another v Associated Motor Boat Company Limited & others* (1968) EA 123].



9. Accordingly, I have carefully perused and considered the Record of Appeal as filed herein together with the impugned Judgment as delivered on 30th June, 2020. I have similarly perused and considered the submissions and authorities placed before this Court by the Learned Advocates representing the Parties.
10. By his Memorandum of Appeal filed herein, the Appellant had faulted the Learned Magistrate on some six (6) grounds as enumerated at paragraph 7 hereinabove. By his submissions filed herein dated 16th December 2022, the Appellant reduced the grounds of his Appeal to three (3) namely;
 1. Whether or not the Trial Court erred in law and fact in failing to find that the Plaintiff had proved his case on a balance of probabilities;
 2. Whether the Learned Magistrate erred in law and fact in failing to make a finding that the suit property was acquired fraudulently; and
 3. Whether or not the Appellant is entitled to the orders as prayed.
11. Whichever way one looks at the said grounds, it was apparent that the only issue for determination by this Court was whether or not the Learned Trial Magistrate was right in her finding and conclusion that the Appellant herein had failed to prove his case against the Respondents.
12. By his suit filed in the Lower Court, the Appellant had sought an order directing the 1st Respondent to surrender the title deed for the property known as Konyu/Baricho/337 to the 2nd Respondent for cancellation and that the same be reverted to the name of the original owner one Babu Muriuki (deceased). In default of such surrender, the Appellant urged the Court to authorize the 2nd Respondent to cancel the title in the name of the 1st Respondent and to re-issue the same in the name of the Appellant or his nominees. Ultimately, the Appellant sought an order of permanent injunction restraining the 1st Respondent from dealing in any manner whatsoever with the suit properties.
13. Those prayers arose from the Appellant's contention that the suit property was in the year 1958 registered in the name of his father the late Babu Muriuki who passed away on 3rd May, 1983. It was his case that the 1st Respondent first entered the suit land as a licensee in the year 1998 and that following the death of his mother in the year 2018, the Appellant had conducted an Official Search on the suit property only to discover that the 1st Respondent had colluded with the 2nd Respondent and fraudulently caused herself to be registered as the proprietor of the property.
14. The particulars of the alleged fraud were listed at Paragraph 6 of the Appellant's Plaint as follows:
 - (a) Causing original land parcel number Konyu/Baricho/337 to be transferred without the Plaintiff's deceased father's and/or legal representative's/Plaintiff's consent;
 - (b) Causing the resultant transfer of land parcel Konyu/Baricho/337 to be transferred to the Defendant without the Plaintiff's deceased's father's (sic) and/or legal representative's/Plaintiff's consent;
 - (c) Leading the Nyeri Land Registrar into believing the suit property belonged to the Defendant;
 - (d) Inducing the Nyeri Land Registrar to issue Title Deed without the Plaintiff's deceased's father's and/or legal representative's/Plaintiff's consent;
 - (e) Causing the Land Registrar to issue the Title Deed without first obtaining the relevant Land Control Board consent and/or confirmation of Grant;
 - (f) Misrepresenting herself to the Lands Office as the owner of the suit property.



15. In support of that position, the Appellant relied fully in his Witness Statement dated and filed in Court on 21st March, 2019 as his evidence-in-chief. At the relevant Paragraphs 1 to 4 of the Statement which was adopted as his evidence-in-chief, the Appellant states as follows:

- “ 1. I am the Plaintiff herein, an adult of sound mind, working and residing at Nakuru;
2. That my deceased father was the registered owner of land parcel Konyu/Baricho/337 after land consolidation and demarcation in 1958;
3. That my late father died on 3rd May, 1993 and my late mother died on 2nd January, 2018 and it is only in 11th September, 2018 when I conducted official search when I discovered that land number Konyu/Baricho/337 had been secretly and fraudulently transferred to one Catherine Wangu Gikou; and
4. That the Defendant entered into the suit land in or about 1998 as a licensee.”

16. A perusal of Page 69 of the Record of Appeal reveals that after the Appellant’s Statement was so-adopted as his evidence, the Appellant who was the sole witness in his case testified as follows in cross-examination by Counsel for the 1st Respondent:

“My mother died in 2018. The land was transferred on 9th November 1998. My mother was alive at the time. I do not know if mother was the one who transferred the land. I do not know how the land was transferred. The 1st Defendant is using the land. I do not know if they went to the Land Control Board. I do not know how the land was transferred. I used to use the land when I was in school with grandmother. I have not used the land since 1998. I stay in Nakuru.”

16. That then was the testimony of the Appellant in the Lower Court for which the Learned Trial Magistrate is being faulted for failing to find that the Appellant had proved his claim for fraud against the Respondents on a balance of probabilities. With respect, I was unable to find anything in the Appellant’s adopted evidence-in-chief and testimony during cross-examination which could be used to justify the accusations of fraud.

17. As the Court of Appeal asserted in *Virjay Morjaria v Nansingh Madhusing Darbar & another* (2000) eKLR:

“It is well established that fraud must be specifically pleaded and the particulars of fraud must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

18. As provided under Section 109 of the *Evidence Act*, Cap. 80 of the Laws of Kenya, 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.

19. In the matter herein, it was clear that all the Appellant did was to accuse the Respondents of collusion and fraud. No attempts was made whatsoever to support the accusation and it was left for the Court to make an inference that the registration was the result of fraud.



20. It was apparent that in the Appellant’s argument, since his father was initially the registered proprietor of the suit property, the registration of the 1st Respondent could only be the result of authorization of his father who passed away back in 1983 or that of the Appellant himself who obtained a limited grant for the estate in 2019.
21. Either way, it was apparent that the Appellant was being very economical with the truth. While it is true his father passed away in the year 1983, it was apparent from the documentation presented by himself and the 1st Respondent that the Appellant’s mother Grace Wamuyu Wangai survived his father by about 35 years.
22. While the Appellant purported during his cross-examination that he did not know if his mother the said Grace Wamuyu Wangai sold the land to the 1st Respondent, it was telling that the Appellant did not question the documents of transfer produced by the 1st Respondent (Pages 35 to 52 of the Record) which clearly show that it was the Appellant’s mother who transferred the land to the 1st Respondent by way of sale and at consideration on 6th November, 1998.
23. While the Appellant purported that the 1st Respondent first entered the suit premises as a licensee in 1998, it is telling that he did not bother to explain the nature of the licence upon which the 1st Respondent entered the land. Those documents at Pages 35 to 52 of the Record referred to hereinabove clearly corroborate the 1st Respondent’s position that she entered the suit property and took possession thereof in November, 1998 as a purchaser thereof and that the Appellant’s mother upon selling the land then moved to Nakuru.
24. It also explains the Appellant’s concession at the trial that since 1998, he has never occupied or utilized the land in any way. From his own Certificate of Birth that he produced at the trial, the Appellant was born in 1966. That would make him a mature 32 year old as at the date his mother is said to have sold the land to the 1st Respondent and he cannot therefore feign ignorance of the same.
25. Indeed while the Appellant only emphasized the ownership of the land by his father, it was apparent from a perusal of a copy of the Green Card for the said parcel of land produced by the 1st Respondent (page 36 of the Record) that the title was transferred from the name of his father Babu s/o Muriuki to his mother and that his mother – Grace Wamuyu Wangai was on 17th February, 1997 issued with a title deed for the same property in her own name more than a year before she would transfer the same to the 1st Respondent.
26. As properly stated by the Learned Trial Magistrate, Section 26 of the [Land Registration Act](#) enjoins the Courts to consider persons named as proprietors of land in any certificate of title issued by the Registrar upon registration as the absolute and indefeasible owner of the said parcel of land and such title 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.”
27. In the matter herein, there was undisputed evidence that the Appellant’s mother caused herself to be registered as proprietor of the suit property in February, 1997 before transferring the same in November, 1998 to the 1st Respondent. The Appellant has not in any way faulted the mother for transferring the land to herself and/or proceeding to enter into the transaction that they entered into with the 1st Respondent.



28. It was apparent as stated by the 1st Respondent that upon selling the land, the Appellant moved to Nakuru together with her children. From the material placed before the Court by the Appellant, she passed away some 20 years after the sale at the Nakuru Provincial General Hospital on 2nd January, 2018.
29. It was clear that following her death, the Appellant herein got an idea that he could claim all that his parents owned including what they had properly disposed of. While the Appellant accused the Respondents of fraud, it was apparent to me that if there was any fraud herein, it was the one being orchestrated by the Appellant through the institution of the matter in the Lower Court and the Appeal herein.
30. It follows that I was not persuaded that the Learned Trial Magistrate had misdirected herself in her finding and conclusion that the Appellant herein had failed to prove his case at the trial.
31. In the premises I find no reason to disturb the Judgment delivered on 30th June, 2020. This Appeal is dismissed with costs to the 1st Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 10TH NOVEMBER, 2023.

In the presence of:

Ms Maina holding brief for Warutere for the Appellant

Mr. C. M. King'ori for 1st Respondent

Mr. Simitu holding brief for Ms Chege for the 2nd Respondent

Court assistant - Kendi

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J. O. OLOLA

JUDGE

