



**Karamana v Mwari & another (Environment and Land Appeal
E065 of 2021) [2023] KEELC 21373 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21373 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E065 OF 2021
CK YANO, J
NOVEMBER 9, 2023**

BETWEEN

GRACE KARAMANA APPELLANT

AND

FRIDAH MWARI 1ST RESPONDENT

M'KIARA M'MBOGORI 2ND RESPONDENT

JUDGMENT

Introduction

1. Vide the amended plaint dated 10th March 2020, the 1st respondent herein sued the 2nd respondent and the appellant herein whereby she stated that she was the sister of the late Rhodah Gatwiri and had been appointed to act in her place. That the 2nd respondent herein was the son of the late M'Muthamia Stanley Mbogori and the 1st respondent was the daughter to the 2nd respondent who was the initial bona fide owner of land parcel No. ABothuguchi/ Mariene/1231 while the appellant was the wife of the registered owner of the land who was then deceased.
2. The 1st respondent pleaded that after the conclusion of Civil suit No. 20 of 2002, a decree was issued to the effect that the suit land was to be shared amongst the three wives of the 2nd respondent herein. That the 2nd respondent in collaboration with one Edward Kirimi Muthamia conspired to frustrate the said decree of court by having the land belonging to the 2nd respondent altered to reflect the names of Edward Kirimi Muthamia thus rendering the implementation of the said decree futile.
3. The 1st respondent prayed for orders of permanent injunction and an order compelling the 2nd respondent and the appellant to effect transfer of the said parcel of land into the 2nd respondent's name and in default, the executive Officer Githongo Law Court to sign all the necessary documents to effect the transfer to the 2nd respondents father's name.



4. By a statement of defence dated 16th October, 2020, the 2nd respondent and the appellant denied all the averments in the plaint and prayed for the 1st respondent's suit to be dismissed with costs.
5. At the hearing, the 1st respondent testified as the sole witness and closed her case while the 2nd respondent also testified. The record indicates that the appellant was on several occasions given a chance to prosecute her case but she failed to do so and her case was eventually deemed as closed.
6. After considering the matter, the trial court found that the 1st respondent had proved her case on a balance of probabilities and directed as follows-;
 - i. The title held by the Late Edward Kirimi Muthamia and his registration as proprietor of LR No. Abothuguchi/Mariene/1231 is herein cancelled.
 - ii. I further direct that the title deed in respect of L.r No. Abothuguchi/Mariene/1231 reverts back to the deceased Stanley Mbogori Muthamia.
 - iii. A permanent injunction restraining the defendant by himself, agents or any working on the behest from entering, remaining or developing or in any way interfering with parcel No. Abothuguchi/Mariene/1231 whatsoever is herein issued.
 - iv. Costs of the suit to the plaintiff"
7. The appellant was aggrieved by the said judgment and filed the present appeal citing the following grounds-;
 1. The learned trial magistrate erred in law in ordering the locking out of the appellant's evidence at the trial thereby denying the appellant the right to a fair hearing and right to adduce evidence and this occasioned substantial injustice.
 2. The learned trial magistrate erred in law in finding that the appellant's husband Edward Kirimi (deceased) obtained land parcel number Abothuguchi/Mariene/1231 illegally, un-procedurally and/or through corrupt means.
 3. The learned trial magistrate erred in law in finding that the respondents had proved their case against the appellant to the required standards.
 4. The learned trial magistrate erred in fact and law in failing and/or refusing to bound by the decision in Meru High Court Succession Cause NO. 298 OF 2003. In the matter of the estate Edward Kirimi (deceased) which vested ownership of land parcel Number Abothuguchi/Mariene/1231 to the appellant contrary to the stare decisis principle.
8. The appellant prayed for the appeal to be allowed and the judgment of the lower court delivered on 18th May 2021 to be set aside and/or vacated, an order for re-trial of the case before another magistrate other than Hon. Susan Ndegwa (SPM). The appellant also seeks an alternative order to issue declaring her to be the legal and beneficial owner of the suit land as well as costs of the appeal and of the suit in the lower court to be awarded to the appellant.
9. The appeal was canvassed by way of written submissions. The appellant filed her submissions dated 26th July, 2023 through the firm of C.B Mwangela & Company Advocates while the 1st respondent filed her submissions dated 4th October, 2023 through the firm of Otieno C & Co. advocates. The 2nd respondent filed his submissions dated 4th October, 2023 in person.



Appellant's Submissions

10. In their submissions the advocates for the appellant gave a background of the appeal and identified the following issues for determination-;
 - i. Whether the appellant was denied right of fair hearing and right to adduce evidence.
 - ii. Whether the respondents proved their case against the appellant to the required standards.
 - iii. Whether the learned trial magistrate erred in fact and law in finding that the appellant's husband Edward Kirimi (deceased) obtained land parcel Number Abothuguchi/Mariene/1231 illegally un-procedurally and/or through corrupt means.
 - iv. Whether the learned trial magistrate breached the stare decisis principle by failing and/or refusing to be bound by the decision in Meru High court Succession Cause No.298 of 2003, in the matter of the estate of Edward Kirimi (deceased) which vested ownership of land parcel Number Abothuguchi/Mariene/1231 to Edward Kirimi (deceased)
11. Regarding the first issue as to whether the appellant was denied the right to a fair hearing and right to adduce evidence, counsel for the appellant quoted what the learned magistrate stated that "The 2nd defendant was given a chance on several occasions to prosecute her case but she failed to do so and since she cannot hold a court of law at ransom, her case was eventually deemed closed."
12. Learned counsel for the appellant submitted that that finding was in error because the right to fair hearing is a principle of natural justice, and a trial court must be circumspect in limiting or taking away such a crucial right. Further, that Article 25 (c) of *the Constitution* of Kenya 2010 specifically provides that there should never be a derogation to the right of a fair trial and that Article 50 (1) provides for fair hearing with regard to any dispute that has to be resolved in accordance with the law.
13. The appellant argued that one of the elements of a fair trial in Article 50 (2) of *the Constitution* of Kenya is the right to adduce evidence in one's defence which right it was submitted was negated in this case.
14. The appellant's counsel on the case of Pinnacle Projects Limited Vs Presbyterian Church of East Africa, Ngong Parish & another [2018] eKLR, Alice Ayuma Vs Edward Chakava & another, Land Registrar Mbale Office (interested party) [2021]eKLR.
15. While conceding that powers of the trial court in granting adjournment to the parties is discretionary and depend on whether the applicant has demonstrated a sufficient cause warranting orders sought counsel for the appellant relied on the case of Wachira Karani Vs Bildad Wachira [2016] eKLR and BML v WM [2020] eKLR in which the Court of Appeal relied on the definition of sufficient cause given by the Supreme Court of India in Civil appeal 1467 of 2011 Parimal Vs Veena Bharti (2011) as follows

"Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently..."
16. The appellant submitted that in her application dated 11th December, 2020 she gave sufficient cause to be allowed to adduce evidence and maintained that she failed to attend court because she was never served with a hearing notice adding that she was a stranger to the process server and sought the court's leave to cross examine the process server.



17. The appellant contended that she failed to attend court because she was in hospital having fractured her leg and pointed out that the trial court only dismissed the appellant's application on grounds that she failed to pay throw away costs of Kshs. 15,000/- as per the court direction and not because the appellant in her application failed to prove sufficient cause.
18. The appellant's counsel submitted that non-payment of costs should not defeat the ends of justice and does not warrant denial of right to fair hearing. It is submitted that the court, in conducting its proceedings is guided by Article 159 of *the Constitution*, Section 3A of the *Civil Procedure Act* and the Principles of Natural Justice and that since the appellant was never given a chance to state her case and produce her evidence and or address the court generally in the case, it follows that she had been denied her right to fair trial and the court ought to always shy away from condemning a party unheard and to ensure that proceedings are not conducted in a manner which would bespeak injustice, prejudice, dishonesty, and favoritism.
19. With regard to the second issue as to whether the appellant's husband Edward Kirimi (deceased) obtained the suit land illegally, un-procedurally and/or through corrupt means, the appellant's counsel referred to the trial magistrate's finding on the import of section 26 of the *Land Registration Act* and submitted that the trial court misconceived the said provisions.
20. The appellant submitted that 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. The appellant cited Section 107 of the *Evidence Act* and relied on the case of Bungoma High Court Election Petition No. 4 of 2017 Levi Simiyu Makali Vs Koyi John Waluke & 2 others (2018) eKLR. The appellant's counsel also cited Section 109 and 112 of the *Evidence Act* and the Black's law Dictionary (9th edition, 2009) at page 1535 regarding the definition of "the standard of proof" as "the degree or level of proof demanded in a specific case in order for a party to succeed."
21. Learned counsel for the appellant submitted that the standard of proof in Civil cases is proof on the balance of probabilities and argued that the respondents did not prove before the trial court to the required standards elements of illegality, corrupt means, and un-procedurally to warrant a shift of the evidential burden to the appellant.
22. The appellant submitted thus that the learned trial magistrate erred in finding that the title was obtained by fraud when there was no dispute that when the suit property was registered in the name of Edward Kirimi Muthamia (deceased), there was no restriction or injunction whatsoever to restrict the said transfer and that without any injunction or restriction, transfer of property could not be stopped on the basis that there is an on-going case related to the suit property. It is submitted that the respondent's evidence fell short of establishing illegality against the appellant and the appellant faulted the trial court for finding that the appellant acquired the title through fraudulent means.
23. It is the appellant's submission that it is undisputed that the appellant's deceased husband was the registered owner of the suit land and for fraud to be inferred, the appellant's advocate relied on the case of Vijay Marjario Vs Nansingh Madhusingh Darbar & another [2000] eKLR.
24. The appellant's advocate further submitted that Order 2 Rule 10(1) (a) of the Civil Procedure Rules requires a pleading to give particulars of any misrepresentation, fraud breach of trust, willful default, or undue influence on which the party pleading relies on. Learned counsel for the appellant cited paragraph 7 of the amended plaint and submitted that no ground of fraud was pleaded and argued that the learned trial magistrate pronounced herself on matters not pleaded.
25. On the forth issue on the stare decisis Principle, the appellant's counsel relied on the case of Jacinta Nduku Masai Vs Leonida Mutua & 4 others [2018] eKLR and Jasbir Singh Rai & 3 others Vs Tarlochan



Singh & 4 others (2013 eKLR. The appellant contended that in the instant case, the 1st respondent herein was the 3rd objector in Meru HC succession cause No. 298 of 2003 which was determined on 8th November, 2012 and that parties were in court when the high court vested ownership of the suit land to the deceased Edward Kirimi. That instead of appealing against that decision of the High Court, the respondent moved to a lower court to seek redress.

26. The appellant's counsel submitted that based on the principle of stare decisis, by virtue of the High Court being higher in the hierarchy of the Kenyan Court system, its decision is binding on the magistrate's court in so far as similar matters are concerned. It is the appellant's submission that a court must strictly follow the decision handed down by higher courts within the same jurisdiction. The advocate for the appellant submitted that the principles enunciated in the decision would apply to matters that had not been placed before that court and to parties who were not before the court, so long as the latter matters turn on similar facts and points of law.
27. The appellant's counsel contended that the binding nature of the decision of a higher court is based on the requirements of certainty, uniformity, and predictability of judicial decisions. The appellant's counsel relied on the case of National Bank of Kenya Ltd Vs Wilson Ndolo Ayah Civil appeal No. 119 of 2002, [2998] KLR 762 and submitted that the trial court had no discretion on the matter and therefore lacked jurisdiction to pronounce itself in the matter. It is the appellant's submission that the appeal is merited and should be allowed with costs to the appellant.

1st Respondent's Submissions

28. In their submissions, counsel for the 1st respondent gave a synopsis and or facts of the case and submitted that the substantive issues in the appeal are whether the trial court erred in finding that the name of Edward Kirimi Muthamia was fraudulently recorded as the owner of the suit land, and whether the trial court erred in issuing permanent injunction.
29. On the first issue, learned counsel for the 1st respondent submitted that at all material times relevant to the suit, the appellant's husband one Edward Kirimi Muthamia who had been the registered owner of land Parcel No. Abothuguchi/Mariene/1231 having fraudulently erased the name of his father M'Muthamia Stanley Mbogori and placed his own.
30. The 1st respondent submitted that M'Kiara M'Mbogori did not deny that the said land belonged to the 1st respondent and her sister as per the decree in Meru LDT NO. 20 OF 2002 and decreed on 25th April, 2002. The 1st respondent further submitted that the claimant have since then not appealed over the said decree although they had been granted 30 days right of appeal. The 1st respondent contended that the 2nd respondent gave the correct impression of what transpired, pointing out that the 2nd respondent replaced his father as 1st defendant as he was too old and likely suffered from senile amnesia allowing himself to be tossed to and fro by the appellant.
31. Learned counsel for the 1st respondent submitted that under Section 26(1) of the [Land Registration Act](#), the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements restriction and conditions contained or endorsed in the certificate. That such title, however, may be challenged on the ground of fraud or misrepresentation to which the proprietor is proved to be a party and or where the certificate of title has been acquired illegally, un-procedurally, or through a corrupt scheme. The 1st respondent's advocate relied on the case of Elijah Makeri Nyangw'ra Vs Stephen Mungai Njuguna & another (2013) eKLR and submitted that in this case, the title deed of the suit property was acquired illegally, un-procedurally and through a corrupt scheme and that it is therefore fair and just that the same be



- cancelled and be registered in the 1st respondent's name alongside her sisters as per the decree issued on the 14th day of April 2003.
32. Regarding the second issue on whether the trial court erred in issuing a permanent injunction, the 1st respondent submitted that the suit land was registered in the name of the appellant's late husband and occupied by the appellant, but belongs to the 1st respondent herein and her sisters. That having proved that the appellant's husband fraudulently processed and acquired title to the suit property in his name, he did not acquire a good title to the property and consequently no interest to the property could pass to him. Learned counsel for the 1st respondent relied on the case of *Elijah Makere Nyangw'ra Vs Stephen Mungai Njuguna & another* [2013] eKLR where the court held that the title in the hands of an innocent party can be impugned if it is proved that the title was obtained illegally, un-procedurally or through a corrupt scheme. It is the 1st respondent's submission that by virtue of Section 26(1) (b) of the *Land Registration Act*, the title in the name of the appellant's husband was impeachable as the same was obtained illegally, un-procedurally or through a corrupt scheme.
 33. The 1st respondent submitted that the trial court was satisfied that the 1st respondent discharged the burden of proof on a balance of probabilities to be granted a permanent injunction on the ground that the appellant and the 2nd respondent had not demonstrated any right over the suit land and that the 1st respondent is vested with all rights over the said land including the right of ingress, egress, and exclusive use. The 1st respondent argued that the appellant had no right to be on the land without the permission of the 1st respondent and the 1st respondent was otherwise entitled to the order of permanent injunction as prayed for in the plaint.
 34. The 1st respondent cited Section 80(1) of the *Land Registration Act* which provides that no registration is exempted from rectification through cancellation or amendment where the court is satisfied that the same was obtained, made or omitted by the fraud or mistake.
 35. The 1st respondent prayed that the name of Edward Kirimi Muthamia be erased from the register over the suit land and be replaced with the 2nd respondent's name for purposes of effecting transfer to the rightful owners as had been the intent of the decree in Meru LDT No. 20 of 2002. That the appellant's family were trespassers all along and thus the 1st respondent was entitled to compensation in the form of damages for trespass.
 36. On the issue of costs, the 1st respondent cited the provisions of Section 27 of the *Civil Procedure Act* (Cap 21) and submitted that a successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise as held in *Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd* [1967] EA 287.
 37. The 1st respondent urged the Honourable court to find that the trial court considered the evidence of both parties herein, that fair trial was duly administered where parties were given a chance to present their case and urged the court to find that the appeal herein is an afterthought made not in good faith, lacks merit and accordingly dismiss the appeal in its entirety with proper costs to the 1st respondent and allow ageing parties to enjoy the fruits of its judgment.

2nd Respondent's Submissions

38. The 2nd respondent also gave brief facts of the case and his submissions are more or less identical to those of the 1st respondent. The 2nd respondent urged the court to uphold the judgment of the lower court and dismiss the appellant's appeal for lack of merit,



Analysis And Determination

39. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities relied on by the advocates for the parties to buttress their rival positions. This being a first appeal, it is trite law that this court has the duty and obligation to reconsider the evidence, evaluate it and draw its own conclusions, bearing in mind that this court has neither seen nor heard the witnesses and therefore will make due allowance in this respect.
40. The issues that I find call for my consideration are-;
- i. Whether the appellant was not accorded a fair hearing and the right to adduce evidence thereby occasioning him substantial injustice.
 - ii. Whether or not the learned trial magistrate was justified in finding that the appellant's husband, Edward Kirimi (deceased) obtained land parcel No. Abothuguchi/Mariene/1231 illegally, un-procedurally and/or through a corrupt means.
 - iii. Whether the respondents had proved their case against the appellant to the required standard.
 - iv. Whether the trial court failed and/or refused to be bound by the decision of the High Court in succession cause No. 298 of 2003 contrary to the stare decisis principle.
41. With regard to the first issue, the appellant raised the issue that she was locked out from adducing her evidence at the trial thereby denying her the right to a fair hearing and therefore occasioning her substantial injustice. Article 50 (1) of *the Constitution* of Kenya provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body. The twin rules of natural justice that no man shall be a judge in his own cause (Nemo Judex in causa sua) and that no man shall be condemned unheard (audi Alteram Partem) are cardinal principles of law which are fundamental in our justice system. They are basically an embodiment of the duty to act fairly. However, there is no legal definition or standard regarding what constitutes procedural fairness and therefore each case must be decided on its own merits.
42. I have perused the proceedings in the present case. On 2nd October, 2020, all parties were present in court presumably for pre-trial directions. Counsel for the 1st respondent herein who was the plaintiff in the case before the lower court indicated that they had complied with Order 11 of the Civil Procedure Rules. The 2nd Respondent is indicated to have stated that he had filed his written submissions. The appellant, however, prayed for more time and the court granted her 14 days. The appellant was also condemned to pay CAF. When the matter came up for mention on 23rd October, 2020, the record indicates all the parties were present in court. The appellant is shown to have stated that she had not filed her witness statement. The trial court fixed the matter for hearing on 16th November, 2020 and the appellant was directed to file and serve her witness statement before then. However, when the matter came up for hearing on 16th November, 2020, the appellant was the only party who was absent. The other parties were ready to proceed. The trial court noted that the date was taken by consent and directed the matter to proceed in the absence of the appellant and the case proceeded and closed.
43. The record further shows that the appellant filed an application dated 11th December, 2020 through the firm of Kiogora Mugambi & co. Advocates seeking among other enlargement of time for the appellant to adduce her evidence in the matter. The said application was opposed and court directed the same to be canvassed by way of written submissions. However, on 29th January, 2021, the parties compromised the application and allowed the same subject to the applicant paying agreed throw away costs totaling



KShs. 15,000/= . When the matter came up on 11th February, 2021 counsel for the appellant was absent and the appellant had also not paid the agreed costs. The court granted the appellant 7 days within which to pay the said costs failure to which the orders of 29th January, 2021 would automatically lapse and the matter to proceed for judgment. It is apparent that the appellant never complied with the orders given by the trial court, and parties filed submissions and later judgment was delivered. In the judgment dated 18th May 2021 the trial court stated as follows-;

“ The 2nd defendant was given a chance on several occasions to prosecute her case but she failed to do so and since she cannot hold a court of law at ransom, her case was eventually deemed as closed.”

44. Going by the record as shown hereinabove, it is clear that the appellant was granted an opportunity to adduce her evidence and the case adjourned severally, but failed to do so resulting to the court locking her out of the case. In my considered view, that was a mistake of the appellant and her advocate and not the court. In exercising its judicial authority, the court is guided by the Principles outlined under Article 159 (2) (c) of *the Constitution* and Sections 1A, 3A of the *Civil Procedure Act* as well as Section 3 of the *Environment and Land Court Act* to facilitate the expeditious resolution of disputes before it. The parties and their representatives are also required to assist the court to further said overriding objective which among other states that justice shall not be delayed. Therefore, in this case, I am not persuaded by the appellant’s argument that she was denied her right to adduce evidence in the matter. It is clear from the record that the appellant was accorded an opportunity to present her case but she was indolent and could not hold the trial court at ransom indefinitely.
45. With regard to the second issue as to whether Edward Kirimi (deceased) who was the appellant’s husband, obtained title to the suit property illegally, un-procedurally and/or through corrupt means the court has perused the record herein. In the amended plaint dated 10th March, 2020, the 1st respondent’s claim was that her father, the 2nd respondent herein, in collaboration with the appellant’s husband conspired to frustrate the decree of court in Civil Suit No. 20 of 2002 by having the suit land altered to reflect the appellant’s late husband as the registered owner. According to the 1st respondent, the said decree had decreed that the land be shared amongst the three wives of the 2nd respondent herein.
46. The 1st respondent pleaded conspiracy at paragraph 7 of the plaint. It is trite law that fraud must be specifically pleaded and proved. In this case, it is not in dispute that there was a decree in Meru Land Dispute Tribunal case No. 20 of 2002 which determined how the suit property was to be shared. By then, the land disputes Tribunal had the mandate to hear and determine land disputes. By 27th November, 2001 when the late Edward Kirimi got registered as the owner of the suit land, the matter was still before the said tribunal. As rightly found by the trial court, it follows that the registration of the suit land in the name of the late Edward Kirimi was done to frustrate the decision of the tribunal. The evidence on record, and in particular that of the respondents clearly pointed out that the late Edward Kirimi Muthamia was party to the fraud or misrepresentation which led to the suit land being registered in his name ostensibly to frustrate the decree in land Dispute Tribunal case no.20 of 2002.
47. Section 26 of the Land Dispute Registration Act No. 3 of 2012 provides that:
- “ The certificate of title issued by the land registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions, and conditions contained or endorsed in the certificate, 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, un-procedurally or through a corrupt scheme.”

48. As ably found by the learned trial magistrate, the law is extremely protective of title but the protection can be removed and the title impeached on two instances, namely, where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party and where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The purpose of Section 26(1) (b) in my view is to protect the real owners of property from being deprived of their titles by subsequent transactions. In this case, and having looked at the material on record, and in particular the evidence adduced by the respondents, I am satisfied that the conditions provided for impeachment of a title as per the provisions of Section 26(1) (b) have been met and I find no basis for interfering with the learned trial magistrate’s finding.

49. Further, in my view, the trial court was not bound to abide by the decision in succession cause No. 298 of 2003 which clearly distributed property that did not belong to the deceased in that succession cause. In the instant case, the trial court was determining issues of ownership where title was being challenged on the basis of fraud or misrepresentation. Therefore, I do not think that the principle of stare decisis is applicable in the matter at hand. The issue in the succession cause and this case are totally different.

50. Consequently, I find no merit in this appeal and the same is dismissed with costs to the respondents.

51. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF NOVEMBER, 2023.

In the presence of

Court Assistant – V Kiragu/Lena M.

Ms Auguche for appellant

No appearance for respondents

C.K YANO

JUDGE

