



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELCA NO 32 OF 2020

LUCIA WAMBUI KARIUKI 1ST APPELLANT

KARIUKI KANINA..... 2ND APPELLANT

VS

GRACE WANJIRU.....1ST RESPONDENT

ROBERT MUNGAI KAMAU2ND RESPONDENT

(both suing as the legal Attorney to ANTHONY MUNGAI GICHURA)

(Being an appeal from the judgement in RUIRU MCLE No 42 of 2019 delivered by Hon C K Kisiangani,

Senior Resident Magistrate delivered on the 13/8/2019)

JUDGMENT

1. This appeal arises from the judgement of Hon C K Kisiangani in **MCLE No 42 of 2019** delivered on the 13/8/2019 in which the Court issued orders as follows;

a. That a declaration is hereby given that the Plaintiff is the bona fide owner of all that property denoted by ballot number 1342 Share Certificate Number 5416 Githunguri Constituency Ranching Company Ltd now Parcel Number Ruiru/Kiu Block 2/Githunguri/3279.

b. That the Ruiru Land Registrar is hereby ordered to cancel or annul the 1st Defendant's title deed to Land Parcel Number Ruiru/Kiu Block 2 (Githunguri)/3279 and transfer the same in the name of Antony Mungai Gichura.

c. Each party to bear its own cost of the suit.

2. Dissatisfied with the above judgement the Appellants filed this appeal and proffered 9 grounds set out as thus;

a. **THAT** the Honourable trial Court erred in law and in fact when it conducted trial and entered a Judgment against the Appellants notwithstanding that there was a pending application for stay of proceedings and a Criminal Case No. 42 of 2019 against the 2nd Appellant while she knew very well that it was against the legal doctrine subjudice rule otherwise leading to a mistrial.

b. **THAT** the learned trial Magistrate erred in law and in fact in admitting hearsy evidence by the Respondent and PW3 without warning herself against dangers of so doing otherwise leading to miscarriage of justice.

c. **THAT** learned Trial Court erred in law and in fact when it misguided itself on exercise of judicial discretion wrongful and irregularly by failing to admit Appellant's documentary evidence.

d. **THAT** Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Respondent's case was based on documents generated after the Appellants had processed their title to Land Parcel No. RUIRU KIU BLOCK 2 (GITHUNGURI) 3279.

e. **THAT** Learned Trial Court misguided itself when it held that it was the Appellants burden of proof to produce transfer

documents yet on a first registration such transfer forms were not requisite for such registration unless the PW3 was to avail a ground which was not in tandem with procedure that the Appellant land adopted that was irregular.

f. **THAT** Learned Trial Court erred in law and in fact when it absorbed the Respondent from mistake of having his share certificate cancelled yet PW3 was not validly on authority of acts done by predecessors without a clear and filed company resolution.

g. **THAT** Learned Magistrate erred in fact and in law when it applied wrong principles of law that the Appellants had wrongfully gotten themselves registered yet there was no proof of any act of irregularity and/or fraud against the Appellants in obtaining title to land parcel No. RUIRU KIU BLOCK 2 (GITHUNGURI) 3279.

h. **THAT** Learned Court erred in fact and in law when it adjudged the case in full ignorance of Statutes of Limitation of Actions Act knowing that the Respondents interest or otherwise cause of action land long been extinguished.

i. **THAT** the Honourable Court misguided itself on the application of company law for want of written resolution by Githunguri Constituency Ranching Company Limited declaring that the Appellants vestment of Title No. RUIRU KIU BLOCK 2 (GITHUNGURI)/3279 and ballot No. 1342 were irregularly issued.

3. The brief background of the suit in the trial Court is set out as thus; vide a plaint filed on the 4/6/2019 the Plaintiffs acting under their respective power of Attorneys in favour of Anthony Mungai Gichura, duly registered, sued the Defendants for the fraudulent and illegal acquisition of the property known as RUIRU/KIU/BLOCK2 (GITHUNGURI) 3279. It is their case that the suit land belongs to Anthony Mungai Gichura and not the 1st Defendant. The particulars of fraud against the Defendants are pleaded at para 10 of the said Plaint. On those grounds they sought a declaration of title as well as the cancellation of the title in the name of the 1st Defendant and the same be registered in the name of the said Anthony Mungai Gichura.

4. The 1st & 2nd Defendants denied the Plaintiffs claim and in particular the particulars of fraud vide their statement of defence dated the 15/8/2019 and stated that the 1st Defendant is validly registered as the proprietor of the suit land and urged the Court to dismiss the suit.

5. The 3rd & 4th Defendants denied the particulars of fraud as pleaded by the Plaintiffs and sought to put them under strict proof. That the title issued by their office was done procedurally based on the documents presented before the 3rd Defendant by the 1st and 2nd Defendants. In their opinion the Plaintiffs are not entitled to the prayers in the plaint and urged the Court to dismiss it.

6. At the trial the 1st Plaintiff led evidence and informed the Court that the suit land was acquired from Githunguri Constituency Ranching Co. Limited by their father the late James Mwangi Mungai who paid the requisite fees and balloted on behalf of his son, Anthony Mungai Gichura who lives and works in the United Kingdom (UK). That it was after the demise of their father in 2013 that she stumbled on the documents in 2014 to wit; share certificate No. 5416, ballot No. 1342, receipts dated the 14/6/85 and 13/3/86 in the name of Anthony Mungai Gichura. She then alerted Anthony in the United Kingdom who asked her to keep the documents awaiting his return to the country which he did in 2018.

7. The 2nd Plaintiff testified in support of PW1 and informed the Court that he accompanied Anthony to Githunguri Ranching Co Limited with the documents. That Anthony paid Kshs 3000/- for purposes of being shown the plot and a further 14,000/- for the clearance certificate. That the Chairman of the Company informed them that the suit land was already registered in the 1st Defendants name. That the company confirmed the documents to be genuine and summoned the 1st Defendant for a meeting to verify the true owner of the land but the 1st Defendant ignored the summons and did not attend the meeting.

8. The Chairman of the Company, one Mr John Maina Mburu took the stand as PW3. He informed the Court that the documents held by Anthony are genuine. That according to the register the 2nd Defendant is indicated as the owner of the land but the title reads the 2nd Defendant. That there was no evidence of transfer of the suit land to the 1st Defendant who happens to be the wife of the 2nd Defendant. That a full member of the Company had to be a paid up member (membership fee) with a share certificate and a ballot. That each paid up member had 100 shares comprising of a residential plot of $\frac{1}{8}$ acre, $\frac{1}{4}$ shamba and $\frac{1}{4}$ acre plot.

9. On behalf of the 3rd and 4th Defendants, the Land Registrar, one Mr Mugendi testified and informed the Court that for his office to register land, they rely on the clearance certificate, transfer, copy of ID, share certificate, approximate acreage of the land. He informed the Court that there were no transfer, clearance certificate on record for the 1st Defendant despite the said 1st Defendant being registered as the proprietor of the suit land. All in all, he concluded that where there is an ambiguity, his office has to rely on the company to confirm the rightful owner of the lands.

10. Lucia Wambui Kariuki testified and informed the Court that she is the registered owner of the land in question. That her husband caused the title to be registered in her name because then he worked in Rift Valley. She produced receipts in his name dated the 2/6/68, 16/6/68 and 30/7/96 and a clearance certificate dated the 22/1/92 together with a title in her name of even date. That it is the 2nd Defendant that balloted for the plot. She admitted that she was one of the committee members of the Company tasked with beaconing the company lands. That she also has another land next to the suit land which she purchased. She informed the Court that there were no share certificates issued to members then only receipts. Interalia she also informed the Court that the share certificate for the suit land got lost and a police report was filed. She produced a police abstract issued to her in 2003. With respect with the clearance certificate she confirmed that it is the clerk that signed the clearance certificate.

11. Joseph Kariuki Karina testified and informed the Court that he became a member of the company in 1968. That he was issued with a share certificate which got lost. That he talked to the management to issue his wife, the 1st Defendant, with the title for the suit land as he

worked in Uasin-Gishu District then and could not collect it himself. He explained that his 11/4 plot is No 969 while the 1/8 plot was sold leaving the suit land plot No 3279 registered in the name of his wife.

12. Upon the conclusion of the hearing the Court returned a verdict as set out in para 1 above, which decision is now the subject of this appeal.

13. Through the law firm of **Prof Kiama Wangai & Company Advocates**, the Appellant submitted and faulted the evidence of PW3 on the grounds that Peter Kamunge, the Secretary of the company was not called as a witness, neither was Boniface Njuguna, the clerk who is alleged to have signed the clearance certificate in favour of the 1st Defendant and also that no handwriting expert was called to testify on the veracity of the said handwriting. Inter alia that the Court erred in holding that the 1st Defendant should have produced the transfer. In his opinion the said transfer cannot be with the 1st Defendant as they were presented to the Land Registrar for registration and that if the same was not in the parcel file, it cannot be the mistake of the 1st Defendant.

14. Further, that the Court misdirected itself in spite of PW3 having confirmed to the Court that the Plaintiffs name did not appear in the company's register and that the 1st Defendants documents were genuine. They faulted the Court for attempting to shift the burden of proof to the Defendants when the burden of proof laid with Plaintiffs to prove fraud. That the Plaintiffs failed to prove fraud. Finally, that the 2nd Defendant was absolved of any culpability in the criminal case.

15. The 3rd and 4th Respondents did not file any written submissions.

16. As to who is the owner of the suit land, the Respondents argued that the answer rests on the documentary evidence. That the Appellants failed to adduce a ballot for the suit land; no share certificate was produced; no evidence of how she acquired the land despite the receipts being in the name of the 2nd Appellant; the clearance certificate lacked critical details and was signed by an unauthorized person in the name of Boniface Njuguna, a clerk in the company. In addition the Respondents posited that the fact of the 2nd Defendants name being on the register is not sufficient to found a good title in favour of the 1st Defendant.

17. Through the law firm of **Kanyi Kiruchi & Company Advocates**, the Respondents submitted that it is the 1st Appellant who took advantage of her being a member of the committee of the company to insert the name of her husband to the space for the suit land. That it was common where details of a member were unavailable for the register to be left blank awaiting the member to visit and tender the details. That the Appellant's title was found to be vitiated under Section 26 of the Land Registration Act leading to its cancellation. They urged the Court to dismiss the appeal.

Analysis and determination

18. Having read and considered the record of appeal, the lower Court file, the written submissions of the parties and all the material placed before me the issues for determination are;

- a. Whether the proceedings in this case were subjudice given the presence of ongoing criminal case No 42 of 2019;**
- b. Whether the evidence of PW3 fell short of admission on account of hearsay;**
- c. Is the 1st Appellant the registered owner of the suit land;**
- d. Is the appeal merited;**
- e. Who meets the costs of the appeal?**

19. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

"...this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

20. Accordingly, to enable me determine the appeal, I will re-evaluate the evidence that was presented before the lower Court in arriving at the decision of this Court.

21. In re-evaluating the decision of the lower Court, I have heeded to the principles set out in the case of **Mbogo & Another vs Shah [1968] EA** where the Court held as follows;

"An appellate Court will not interfere with the exercise of the trial Courts discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice."

22. I shall deal with issue No. C as I believe this is the key to the appeal. It is not in dispute that the suit land originated from Githunguri Constituency Ranching Company Limited, a cooperative Company owned through membership. It incorporated Kenyans of all walks of life in the quest to acquire land and so it was basically a land buying company which acquired large chunks of land at the advent of Independence from the white settlers who were folding up their agricultural activities to return to their native countries. The members pay a membership fee to join and acquire shares in the company. The shareholding was critical as it was the basis of allocation of land. One would then be issued with a share certificate and various receipts for all manner of payments that was demanded for by the company. At the right time, the land would be surveyed by the land buying company and subdivided into smaller portions according to the number of its members and to cater for common utilities as and when desired by the membership. Membership was therefore denoted by the share certificate. The company would maintain a register of members indicating their details, the share certificate number, plot number and such other details as may be peculiar to the membership.

23. Allocation of land would be through balloting. Members would then be issued with a ballot denoting the plot number balloted for. The instruments required to process the title therefore would be the share certificate, the ballot, the payment receipts and the clearance certificate by the company informing the Land Registrar that the holder of these documents is the rightful proprietor of the land. The ballot number must agree or correspond with the land reference number as shown on the Registry Index map, which denotes the land on the ground.

24. It is not in dispute that the contestants in this appeal trace the root of their claims to Githunguri Ranching Co Limited. It is the case of the Appellants that the suit land belongs to the 1st Appellant. That the 2nd Appellant was a member of the land buying company and a holder of a share certificate and a ballot No 1342. That the 2nd Appellant balloted and got ballot No 1342 and later caused the title of the suit land to be registered in the name of his wife the 1st Appellant.

25. Proof of proprietorship in a case such as this is by documentary evidence. To prove ownership to the suit land the Appellants produced the following documents; receipt dated the 2/6/68 in the name of the 2nd Appellant being for Kshs 5/- for entrance fees; receipt in the name of the 1st Appellant dated the 16/6/1968 for Kshs 140/- for shares; receipt in the name of the Appellant dated the 30/7/1990? For the sum of Kshs 1000/- for title collection for 1¹/₄ acre. I have examined these receipts and none of them indicate the plot reference. The effect therefore is to create doubt in the mind of the Court whether these documents refer to the suit land.

26. The Appellants informed the Court that they lost documents in respect to the suit land such as the share certificate, ballot and some receipts and produced a police abstract dated the 6/10/2003. On scrutiny this abstract is with respect to Plot No 1012 and not the suit land. They are therefore irrelevant to the case at hand in my view.

27. Next document that was produced by the Appellants was the clearance certificate dated the 22/1/1992. It is addressed to the Land Registrar Kiambu and certifies that the 1st Appellant is the registered owner of the suit land parcel 3279 for ballot No 1342. The block and the share certificate number is blank. The clearance directed the Land Registrar to issue the title to the 1st Appellant. The 1st Appellant confirmed to the Court that it is the document she submitted to get a title. The Land Registrar informed the Court that the parcel file had no clearance certificate nor a transfer to the 1st Appellant. He was at pains to explain how the title was registered in the name of the 1st Appellant in the absence of the requisite documents which he enumerated as the share certificate, the ballot, the receipts and the clearance certificate from the land buying company. He informed the Court that without these documents the title cannot be registered and that in the event of any ambiguity in respect to the documentation, deference would be made to the company. The question that remains unanswered is how the title in the face of the disclosed deficit in documentation was registered in the name of the 1st Appellant.

28. The 1st Appellant in her testimony was categorical that there was no share certificate issued in her name nor that of the 2nd Appellant. That there were no share certificates at that time. If this was the case then it buttresses the holding of the Court that there was no share certificate with respect to this plot and also confirms my finding that the police abstract could not be for the suit land but for Plot No 1012.

29. PW3, the Chairman of the company led evidence and impugned the clearance certificate on several fronts; firstly, that the same was signed by an unauthorized person in the name of Boniface Njuguna who was a clerk and not the Secretary of the company namely Peter Kamunge. The Appellants submitted that this evidence should not be given weight on the grounds that no handwriting expert was called to verify the signatures, the said individuals were not called to testify and that the PW3 evidence should not be believed. I agree with Respondent's submissions that the Appellants have not placed any evidence before the Court to challenge the knowledge of the Chairman who has been in office since 2009 and had personal knowledge of the Secretary's signature. I rely on Section 50 of the Evidence Act which states as follows;

a. When the court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is admissible.

b. For the purposes of subsection (1) of this section, and without prejudice to any other means of determining the question, a person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business documents purporting to be written by that person have been habitually submitted to him."

30. The 1st Appellant admitted that she was one of the committee members of the company and she has not explained why her clearance would be executed by an unauthorized clerk while she had access to the official Secretary of the company. The only assumption, which assumption in my view is correct is that the clearance certificate was corruptly obtained or a forgery which cannot support a genuine clearance certificate. Given that other critical information such as the share certificate number is missing, the authenticity of the document is in question. It is to be noted that this is the document that was relied on to register the title according to the 1st Appellant which document could not be found in the Land Registry records. Had the Land Registrar exercised caution, he would have realized that the clearance, if indeed it was produced at all, was not complete.

31. I will now examine the company's register. The Appellant's case is anchored on this register and their strongest argument is that the name of the 2nd Appellant is on the register. The Chairman of the company while testifying stated that though the 2nd Appellants name appears on the register he has never seen a share certificate and ballot in his name. When he was summoned to the meeting at the company offices to table the documents, he did not attend. The Appellants have not produced these documents and the clear assumption is that they do not have. This means that neither the 1st nor the 2nd Appellant was a member of the company in the absence of a membership certificate. Having not been a member, none of the Appellants balloted for the suit land in the absence of a ballot number. It is instructive to note that the register is blank with respect to identification number as well as the signature of the 2nd Appellant despite his name appearing on it. The presence of the name of the 2nd Appellant in the absence of a share certificate and a ballot in my view is not sufficient to found an interest or title in the suit land.

32. In the case of **Teresia Wangari Mbugua Vs Jane Njeri Nduati & Anor (2020)eKLR** the Court held that when the root of title is under challenge, it is not sufficient for the holder of the title to dangle the impugned title as proof of ownership. He must go beyond the said title and proof its legality of how he acquired the same and show that the acquisition was legal formal and free from any encumbrances. Going by the analysis above it is the finding of the Court that the Appellants have not explained the root of the title they are purporting to hold nor that they acquired it free from any taint.

33. On the other hand, the Respondents have clearly produced documents to back up their acquisition of the land being the share certificate no 5416 for ballot No 1342 for 100 shares issued on the 6/6/1985 in the name of the Respondent, the receipts in the name of the Plaintiff, ballot No 1342. The receipts of the Plaintiffs bear the relevant details of the land in both the share certificate and the ballot number.

34. Section 26 of the Land Registration Act states as follows;

“Certificate of title to be held as conclusive evidence of proprietorship.

(1) The certificate of title issued by the 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, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

35. In this case the Respondents have satisfied the Court that the Appellants acquired title without being members of the company nor holding a ballot for the land. The acquisition was therefore illegal for want of the share certificate and the ballot for the land. Further the clearance certificate used to register the title was falsified as attested by the evidence of PW3.

36. I am therefore satisfied that the Respondents have proved fraud and illegality and going by Section 80 of the Land Registration Act, the Court was right in its decision to cancel the title.

37. The first issue is therefore answered in the negative.

38. As to whether the suit in the trial Court was subjudice, given that the criminal case has been heard and determined, I decline to determine this matter as in my view it is moot.

39. The issue of whether or not the evidence of PW3 was hearsay has been answered in the negative. I did not find any evidence to support hearsay. The witness was right to lead evidence from his personal knowledge having worked with the Secretary for a long time thus knew the signature of the official. In any event the same was not challenged by the Appellants.

40. Having now considered the pleadings, the record of appeal, the submissions and all the materials placed before me I find that the appeal has no merit. It is disallowed wholly.

41. The costs shall be in favour of the Respondent.

42. Orders accordingly.

DELIVERED, SIGNED & DATED ON THE 8TH DAY OF FEBRUARY 2022 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

1st Appellant – absent

Prof. Wangai for 2nd Appellant

Mr. Kanyi for the Respondent

Ms. Phyllis Mwangi – Court Assistant