



**Karani & another v Kabibi & another (Environment and Land Appeal
14 of 2019) [2022] KEELC 15688 (KLR) (8 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 15688 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL 14 OF 2019**

EC CHERONO, J

JULY 8, 2022

BETWEEN

ESTHER WARUGURU KARANI 1ST APPELLANT

JUDY MUTHONI MWANGI 2ND APPELLANT

AND

DAVID MWAI KABIBI 1ST RESPONDENT

COUNTY LAND REGISTRAR, KIRINYAGA COUNTY 2ND RESPONDENT

*(An appeal from the Decision/Order of Hon. E.O. Wambo – S.R.M
Delivered on 11th October, 2018 in Kerugoya SRMELC No. 118 OF 2018)*

JUDGMENT

1. The appellants were plaintiffs in the lower court case number 118 of 2018 where, vide a plaint dated September 3, 2018, filed contemporaneously with a Notice of Motion of even date were seeking judgment for the following orders;-
 - A. That the honourable court do issue a permanent injunction directed against the defendants and/or their agents from, disposing of alienating, charging, transferring, bequeathing, or dealing with land parcel No. Kiine/Kiangai/2896 and the title therefore be registered in the names of the original owners.
 - B. That the Land Registrar be ordered to place a prohibitory order against title land parcel No. Kiine/Kiangai/2896 and the same to remain in force till further orders of this Court.



- C. That thehonourable court do grant any other orders it may deem fit and just to grant.
 - D. That thedefendants do pay costs of this suit.
2. In the said Notice of Motion application brought under certificate of urgency, the plaintiffs/applicants were seeking the following orders;-
- A. (Spent).
 - B. That thishonourable court be pleased to issue a temporary injunction restraining the Respondents, their agents, and servants from disposing of, alienating, charging, transferring, cutting trees, bequeathing or dealing otherwise with land No. Kiine/Kiangai/2896 pending the hearing and determination of this application.
 - C. That the land Registrar, Kirinyaga County be ordered to register prohibitory orders against the said title land parcel No. Kiine/Kiangai/2896 and the same to remain in force till further directions or further orders of thiscourt.
 - D. That the respondent be restrained from evicting, threatening and/or behaving in a manner likely to cause breach of peace till final disposal of this matter.
 - E. That the costs of this application be provided for.
3. The said application is supported by grounds shown on the face thereof and a joint affidavit sworn by both appellants on even date. According to the applicants, the suit land parcel No. Kiine/Kiangai/2896 was at all material times registered in the names of Esther Waruguru Karani, Judy Muthoni Mwangi and Jane Wanjiku Karani in equal shares.
4. The applicants further deposed that after their mother Jane Wanjiku Karani passed on, they conducted a search at the lands office with a view to filing succession cause in order to inherit her share but to their surprise, they discovered that David Mwai Kabibi, the 1st defendant/respondent had transferred the suit land in his name without their knowledge. They stated that the said David Mwai Karani has even threatened to evict them and is likely to transfer the property to third parties. On those grounds, they sought the injunctive orders in the application dated 3rd September,2018. That application was filed under certificate of urgency. When the same was placed before the duty magistrate, it was certified as urgent and temporary injunction orders were issued pending inter-parte hearing.
5. The 1st respondents/defendant filed a replying affidavit and a Notice of preliminary objection in opposition to the said application dated October 1, 2018. According to the 1st respondent, the Applicants are guilty of concealment of material facts in that the suit land No. Kiine/Kiangai/2896 was the subject-matter of this Court's Civil Case NO. 48 of 2014 where, after hearing and determination, the trial Court held that the defendants, including the applicant's mother Jane Wanjiku Karani had transferred the same to him as a security for a friendly loan advanced to them on the understanding that he would re-convey the same back to them once the friendly loan was fully repaid.
6. The 1st respondent further deposed that the suit was Res-judicata in the sense that it raises the same issues raised in the former suit between the same parties save the inclusion of the Land Registrar which they said, was a calculated move to make it appear to have different parties.
7. The Notice of preliminary objection raises similar issues to the effect that that suit was Res-judicata as it raises the same issues raised in Civil case No. 48 of 2014 which has been heard and determined



and the suit land parcel No. Kiine/Kiangai/2896 ordered to be sold by Public Auction to satisfy the Decree in that case.

8. After the inter-parte hearing of the said application, the trial court dismissed the same for lack of merit with costs on 29/3/2018. The applicants were aggrieved and preferred the present Appeal on the following grounds; -

1. The Learned Senior Resident Magistrate erred in law and in fact in his Ruling dated March 29, 2019 not considering that Civil Suit No. 48 of 2014 the subject matter therein was recovery of a liquidated claim of money which is expressly stated in the judgment of that suit attached to the defendant's affidavit.
2. The Learned Senior Resident Magistrate erred in law and in fact his ruling dated March 29, 2019 in not considering that present suit is for orders to establish if transfer of this subject suit number Kiine/Kiangai/2896 was done through fraud.
3. The Learned Senior Resident Magistrate erred in law and in fact in not considering that the 1st defendant herein, David Mwai Kabibi transferred the suit land parcel No. Kiine/Kiangai/2896 in his name unlawfully in that the date of redemption of the sum advanced to the appellants had not lapsed.
4. The Learned Senior Resident Magistrate erred in law and in fact in not considering that the 1st respondent/defendant conspired with the 2nd respondent/defendant County Land Registrar-Kirinyaga who caused the said land No. Kiine/Kiangai/2896 to be registered in his name immediately by fraudulently alleging that the sum he had advanced to Esther Waruguru Karani, the 1st applicant/plaintiff was at the time amounting to Kshs. 720,000/ which was not true. The learned Magistrate failed to consider the amount reflected in the green card being Ksh. 200,000/= the only money advanced to the 1st appellant as purchase price of the whole piece of land which was in any way undervalued at that time.
5. The Learned Magistrate misdirected himself, erred in law and fact in ignoring or failing to consider the preliminary objection raised by the petitioners/ applicants herein in that the alleged transfer was fraudulent as it offends the provisions of Land Control Board Act.
6. The Learned Senior Resident erred in law and in fact in not considering that 1st Respondent/applicant filed a suit to recover his money owed by the appellants in CMCC 48 of 2014, which was not properly before the court as directed to ill-advice the defendant/decree-holder to sell the property before executing the decree in that suit to recover his money through public Auction. The Learned Magistrate misdirected himself in directing that the Decree holder offers for sale by public Auction the Title Number Kiine/Kiangai/2896 which was in fact in the name of the decree holder as he had already transferred the same fraudulently in his own name before the suit was concluded and determined.
7. The Learned Senior Resident Magistrate erred in law and in fact in not considering whether the Respondent has money lending certificate, or was



licensed money lender or was he a normal cartel to defraud the appellants of their subject parcel of land.

8. The Learned Senior Resident Magistrate erred in law and in fact in not considering that the transfer of the whole parcel of land namely Kiine/Kiangai/2896 before the maturity of the date of payment of debt was fraudulent, not genuine but malicious.
9. The Learned Senior Resident Magistrate erred in law and in fact in not considering whether the defendant hold statutory power of sale before transferring the subject parcel of land to himself or whether the said transfer void and unlawful.
10. The Learned Senior Resident Magistrate erred in law and in fact in not considered that the Appellants were going to suffer prejudice, damages by losing their own parcel of land through dubious and unlawful way of transfer the subject parcel of land to the defendant.
11. The Learned Senior Resident Magistrate erred in law and in fact in not considered whether the subject parcel of land was valued before effecting the unlawful transfer and release of the borrowed amount and was such transfer to the defendant under-valued or was the value over and above the borrowed amount of money.
12. The Learned Senior Resident Magistrate erred in law and in fact in not considered that the unlawful transfer was not normal sale or under the transfer by change in exercise of its power of sale.
13. The Learned Senior Resident Magistrate erred in law and in fact in not considered that the transfer for the subject parcel of land was fraudulent as the defendant transferred the same in the name on July 26, 2012 and was issued with Title Deed on July 31, 2012 and the sum of Ksh. 200,000/= is clearly indicated in the Green Card. That filing of the said suit Number CMCC NO. 48 of 2014 claiming for recovery of the sum owed to him by the Appellants while the security was already in his name was not properly before the Court.
14. The Learned Senior Resident Magistrate erred in law and in fact in not considered that this court does not hold power or jurisdiction to hear matters relating to fraud and the plaintiffs should be given leave to appeal.
15. The Learned Senior Resident Magistrate erred in law and in fact in not considered that whether the consent was void or in conformity of the provisions of the *Land Control Board Act* cap. 302 of the Laws of Kenya.
16. The Learned Senior Resident Magistrate erred in law and in fact in not considered that the 1st defendant/respondent never consulted them or attended any land Board before transferring land parcel No. Kiine/Kiangai/2896 into his name as at the time he was advancing the 1st Appellant the said amount of Ksh. 200,000/= the 1st defendant/respondent requested for two certificates of title deeds from the 1st Appellant/plaintiff, one for land parcel No. Kiine/Kiangai/2896 and Kiine/Kiangai/2897 which to date title deed Kiine/Kiangai/2897 is in custody of the 1st defendant/respondent



while land parcel No. Kiine/Kiangai/2896 is in the name of 1st respondent/defendant unlawfully.

17. The Learned Senior Resident Magistrate erred in law and in fact in not considering that immediately the 1st respondent /defendant transferred the land parcel Kiine/Kiangai/2896 in his names the plaintiffs herein were not able to cultivate and get enough tea proceeds to enable them repay the loan or mesne profits to repay the amount given to the 1st appellant/plaintiff.
18. The Learned Senior Resident Magistrate erred in law and in fact in not considering that the Respondent held another Title Deed Number Kiine/Kiangai/2897 in the name of Esther Waruguru Karani, the 1st appellant/plaintiff which he could have attached to recover his debt (if any) after getting Decree I CMCC 48 of 2014 and is in fact in his possession to date. Under circumstances of the parcel of the land Number Kiine/Kiangai/2896 is fraudulent and done with malice.

Appellants Submissions

9. The appellants through the firm of Wandai Murimi Advocates submitted that from the Memorandum of Appeal filed herein, the issues that comment for determination are threefold; -
 1. Whether the Senior Resident Magistrate erred in law and in fact in his ruling dated March 29, 2019 in misapprehension of the nature of the pleadings in civil suit no. 48 of 2014 vis-à-vis ELC case NO. 188 of 2019 and finding that the suit was res-judicata.
 2. Whether the Senior Resident Magistrate erred in law and in fact in his ruling dated March 29, 2019 in failing to find that the subject matter in Civil Suit NO. 48 of 2014 was recovery of a liquated claim of money whilst in ELC case NO. 188 of 2018, the subject matter is fraudulent transfer of L.R No. Kiine/Kiangai/2896 to the 1st respondent.
 3. Whether the Senior Resident Magistrate erred in law and in fact in his ruling dated 29th March, 2019 in failing to find that there had been conspiracy by the Respondents to defraud the Appellant and strip them of L.R No. Kiinekiangai/2896.
10. The appellants cited the case of *C. K Bett Traders Limited & 2 others v Kennedy Mwangi & another* (2021) e Klr in support of the appeal

The 1st Respondent's Submissions

11. The 1st respondent through the firm of 1.W. Muchiri & Company Advocates submitted that the 1st Respondent had instituted Kerugoya CMCC NO. 48 of 2014 against the Appellants and their late mother, one Jane W. Karani which he had sought to recover a sum of Ksh. 762,000/= with interest in accordance with a written friendly loan agreement. He submitted that the terms and conditions of the said friendly loan agreement was that the Appellants and their deceased mother were to transfer land parcel No. Kiine/Kiangai/2896 to the 1st respondent who was to hold the same as security for the friendly loan and on trust for them until the loan was fully paid when the 1st respondent was obligated to re-transfer the same back to them.



12. The 1st respondent further submitted that the appellants and their late mother failed to repay the loan on the due date. The 1st defendant then sued them for recovery of the loan after which he would re-convey the land back to them and their deceased mother in accordance with the terms and conditions of the loan agreement.
13. After the case was heard, judgment was entered in favour of the 1st respondent. The appellants failed to satisfy the decree and the 1st respondent applied for execution by way of committal to civil jail. When the matter came up for appellants to show cause why they cannot be committed to civil jail, the appellants and the 1st respondent entered a consent settlement whereby the appellants and their late mother agreed to pay the sum of Ksh. 1,042,000/= in full and final settlement of the decree. The Appellants were to pay the agreed sum on or before 15.11/2014.
14. The appellants failed to pay the agreed amount on the due date whereby the 1st respondent made an application for execution by way of sale of parcel Number Kiine/KiangaI/2896 and the court sanctioned the sale by public Auction. The 1st respondent referred to the trial court ruling delivered on September 29, 2016 by Hon. Andayi W.F, Chief Magistrate which has not been appealed against to date. The 1st respondent further submitted that It is against this background that the Appellants filed ELC Case NO. 118 of 2018 with the objective of defeating or frustrating the judgment and orders in CMCC NO. 48 of 2014. He submitted that they raised a preliminary objection to the subsequent suit No. 118 of 2018 where Hon. E.O Wambo made a ruling on 29/3/2019 which is the subject matter of this Appeal.

Analysis and Determination

15. I have looked at the record appeal particularly the impugned order by the learned Magistrate issued on 29/3/2019 which is the subject of this appeal. I have also looked at the Memorandum of Appeal dated June 6, 2019 and Amended on June 7, 2021. The impugned order issued on 29/3/2019 arose from a Notice of Motion dated 3rd September, 2018 where the Appellants who were plaintiffs in the suit had sought a temporary injunction order and a prohibition. The application was opposed by the respondents who filed a replying affidavit and a Notice of preliminary objection. In the notice of preliminary objection dated 1/10/2018, the respondents raised the following two issues :-
 - a. The suit is *res-judicata* as it raises the same issues raised in this Court's Civil Suit NO. 48 of 2014 between me and the plaintiffs which has been concluded and the suit land ordered to be sold by public auction to satisfy the decree in that case.
 - b. This application and the suit upon which it is based are brought in bad faith with the aim of delaying, subverting, defeating or frustrating this court's orders in the said previous case and is therefore a gross abuse of the process of this court.
16. After considering the said application, the trial magistrate rendered himself by dismissing the same on 29/3/2019.
17. From my re-evaluation of the evidence before the trial court which forms part of the record in this appeal, it is clear that before the Appellants instituted the former suit Kerugoya PMCC NO. 118 of 2018 which is the subject of this Appeal, there was another suit which had been instituted by the Respondent against the Appellants and their deceased mother Jane W. Karani in respect of the same subject matter being PMCC NO. 48 of 2014. From the ruling issued by Honourable Andayi W.



Francis (in respect of Kerugoya PMCC NO. 48/2014) on 27/1/2016), it is clear that there is a former suit between the same parties for the recovery of a friendly loan advance which is a civil claim. The judgment in that suit was in favour of the plaintiff who is the respondent in this Appeal. The finding of the court can be seen at page 6 of the ruling where the said Hon. Andayi W. Francis observed as follows;-

“-----The plaintiff herein holds security in form of land parcel No. Kiine/Kiangai/2896 for the money he advanced to the defendants. Although he has not realised his security to recover the money advanced, he has that option. The property is already registered in his name----- I do not think the option of committing the JDs to civil jail would be appropriate at this stage. If he does not wish to pursue that path, he should surrender the land by way of transferring it back to the registered owner and only then can he pursue the alternative of the two JDs to civil jail.

In the end, the JDs may still offer to hand over that land to him to realize his money-----“

18. The subsequent suit commenced by the Appellants in Kerugoya PMCC NO. 118 of 2018 was in relation to land parcel No. Kiine/Kiangai/2896 which was a security for the friendly loan advanced to them by the respondents. The issue of the land parcel No Kiine/Kiangai/2896 was not an issue in the former suit being Kerugoya PMCC No. 48 of 2014.
19. The respondent did not even file defence to the appellants claim in Kerugoya PMCC No. 118 of 2018.
20. From the totality of my re-evaluation of the court record in the two former cases being PMCC No 48/2014 and 118/2018, it becomes clear in my mind that the subsequent suit No. 118 of 2018 is not Res-judicata vis-à-vis PMCC No. 48 of 2014
21. The upshot of my findings is that this Appeal partly succeeds and the following orders are issued;-
 1. The order by Hon. E.O. Wambo issued on 29/3/2019 dismissing the Appellants' Notice of Motion application dated September 3, 2018 is set aside and substituted with an order confirming the interim order issued in the first instance on 3/9/2018 pending hearing and determination of the main suit.
 2. The matter is remitted back to the lower court for hearing and determination.
 3. Mention before the Chief Magistrate, Kerugoya on 26/7/2022 for directions.
 4. Each party to bear their own costs of this Appeal.

JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 8TH JULY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Wandia Murimi for Appellant
2. 1st Respondent/Advocate – absent
3. Kabuta, Court Assistant – present

