



**Kagendo v Thuita (Environment and Land Appeal 12 of 2021)
[2022] KEELC 15597 (KLR) (6 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 15597 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 12 OF 2021**

AK BOR, J

JULY 6, 2022

BETWEEN

ROSEMARY KAGENDO APPELLANT

AND

CHRISTOPER THUITA RESPONDENT

JUDGMENT

1. The Appellant who was the defendant in Nanyuki CMCC No. 57 of 2013, lodged this appeal against the judgment of the Learned Magistrate delivered on March 25, 2019 in which he found that the Respondent had proved his case against the Appellant on a balance of probabilities. The dispute relates to the ownership of the parcel of land known as Nanyuki Municipality/Block 2/559 (Kilimo) (“the Suit Property”). The Appellant claims that she purchased the Suit Property from its owner Eva Wanjiru Thuita, on May 02, 2007.
2. The Respondent claimed in the Amended Plaintiff that his sister, Eva Wanjiru Thuita, who lives in the United States of America (USA) was the registered proprietor of the Suit Property measuring approximately 0.0774 hectares. That by a general Power of Attorney registered on 3/05/2013 as Power of Attorney (P A) No 42/5/13, his sister gave him the authority to take possession of her properties including the Suit Property and to sue and defend any action affecting her properties.
3. He averred that when he went to inspect the Suit Property on June 20, 2017, he discovered that the Appellant had fenced the land and started construction of a structure even though the matter was pending before the court. He averred that the Appellant lodged a caution against the Suit Property on February 18, 2013 forbidding dealings with the land. He sought to have the Appellant compelled to withdraw the caution and an order directing the Appellant or her agents to demolish the structure which she had erected to the Suit Property and to the fence around the land. He also sought to have the Appellant restrained through a permanent injunction from interfering with his possession of the Suit Property.



4. The Appellant denied the claim in the Amended Defence and Counterclaim filed in court on November 2, 2017. She averred that she was a bona fide purchaser for value having purchased the Suit Property from the owner of the ballot who was allocated the land. She averred that the Respondent lacked legal capacity to sue her and averred that she perfected her title and was issued a title over the Suit Property by the Land Registrar on May 2, 2007. She denied fencing the suit land or erecting any structures on the land since the commencement of the suit. She counterclaimed costs from the Respondent for the suit, damages and loss on investments. In addition, she sought damages from the plaintiff for depreciation, wear and tear of the Suit Property.
5. The Learned Magistrate heard the case and, in his judgment, dismissed the counterclaim while granting the reliefs sought by the Respondent for injunction and the removal of the caution placed against the suit land by the District Land Registrar.
6. Being aggrieved by that decision, the Appellant filed a memorandum of appeal setting out nine grounds of appeal against the decision of the Learned Magistrate. The Appellant faulted the Learned Magistrate for failing to take note of the fact that the Respondent did not have the legal mandate to file the suit in his name or that of Eva Wanjiru Thuita.
7. She contended that the Learned Magistrate failed to appreciate that Eva Wanjiru Thuita had willingly sold the Suit Property to her for a consideration. She contended that the Learned Magistrate ignored the fact that the Land Registrar, Nanyuki had no legal mandate to cancel her title without due process and further, that the Appellant's title could not be cancelled through a gazette notice.
8. She faulted the Learned Magistrate for failing to take cognizance of the fact that there was no caution registered against the Suit Property because Eva Wanjiru Thuita and Kilimo Welfare had already transferred the Suit Property to the Appellant without adhering to due process. The other grounds of appeal were that the Learned Magistrate erred by failing to appreciate that the Respondent failed to prove his claim and that his evidence was inconsistent unlike the Appellant who claimed that she tendered evidence which established that the Respondent had no legal claim to the Suit Property. Further, that the Learned Magistrate failed to appreciate that the Appellant's title and ownership of the Suit Property could not be defeated without adhering to due process.
9. The Appellant prayed for the setting aside of the judgment delivered on March 29, 2019 and for the Respondent's title to be cancelled as well as any entries on the green card for the Suit Property except the entry supporting her claim. Secondly, she sought a declaration that the Respondent's title is a nullity in law and for judgment to be entered in her favour.
10. The appeal was heard through written submissions. The Appellant summarised five issues for determination in this appeal. These are whether the cancellation of the title without due process was merited; whether a general Power of Attorney can transfer an interest in land; whether the donor of the power of attorney was in Kenya at the time when it is alleged that she donated the power to the Respondent; whether the Respondent can be allowed to introduce new evidence after the case is closed; whether the Appellant has a title to the Suit Property and if she is a bona fide purchaser for value.
11. The Appellant submitted that her rights over the Suit Property were guaranteed and protected under Article 40 of the *Constitution* and Section 25 of the *Land Registration Act*. That according to Section 80 of the *Land Registration Act*, it was only the Environment and Land Court which had powers to invalidate, revoke and cancel title deeds. She submitted that the Land Registrar did not have power to cancel her title over the Suit Property and relied on the decision in *Republic v Chief Land Registrar & Another Ex-parte Yosabia Kerubo Manyura* [2018] eKLR.



12. Further, she submitted that the gazette notice was an illegality because it stated that the title was cancelled at the instance of Eva Wanjiru Thuita who was out of the country at the time and that the Respondent had no power to act on her behalf. The Appellant mentioned in the submissions that the Respondent had earlier filed another suit without the Power of Attorney but later purported to withdraw that suit and to manufacture the Power of Attorney which the Appellant contended was not registered and did not allow him to deal with the Suit Property.
13. Regarding the issue as to whether a general Power of Attorney can transfer an interest in land, the Appellant relied on Section 48 of the *Land Registration Act* which refers to execution and verification of the Power of Attorney in accordance with Section 55 of that Act. The Appellant maintained that the Respondent did not have authority to transfer the interest in the suit land. Further, that because there is no evidence to show that Eva Wanjiru was in the country during the period when it is alleged that she caused the cancellation of the Appellant's title and when she donated her powers over the land to the Respondent, the Power of Attorney which the Respondent relied on is diminished and lacks evidential value.
14. The Appellant maintained that she was a bona fide purchaser for value of the Suit Property from Eva and relied on the evidence which she tendered before the trial court to show that Eva transferred to her the share she held with Kilimo before being issued with the title in her name. The Appellant submitted that she called the lawyer who drew the sale agreement as her witness in the case. She urged that her evidence in support of the sale agreement and the process of acquiring title over the suit land were not rebutted or denied by the Respondent. She submitted that a bona fide purchaser for value who is entered in the register as the first registered owner cannot have their title challenged in the absence of fraud.
15. The Appellant relied on the decision of *Katende v Haridar & Company Limited* [2008] 2 E A 173 which has been cited with approval by the Kenyan Courts. The Appellant urged that her title was valid because it was first in time and relied on the decision in *Gitwany Investment Limited v Tajmal Limited & Others* [2006] eKLR. The Appellant concluded that she had proved that the actions of the Respondent amounted to illegalities and the Learned Magistrate therefore erred by making a finding in his favour of the Respondent. She beseeched the court to find that the appeal is merited and allow it in its entirety.
16. On his part, the Respondent submitted that the Learned Magistrate did not err in making a finding that Eva Wanjiru Thuita did not dispose of her land for any consideration to the Appellant. According to the Respondent, from all the documentary evidence which he adduced during the trial it was clear that he was the brother of Eva Wanjiru Thuita who was in the U S A at the time when the Appellant purports to have purchased the suit land from her.
17. The Respondent maintained that the Power of Attorney which Eva Wanjiru Thuita donated to him was duly registered on May 03, 2013 at the Laikipia Lands Registry and that it gave him vast powers including taking possession of the Suit Property. He relied on the evidence which he adduced before the court that his sister Eva purchased the Suit Property from Kilimo Welfare and was given ballot number 4559 before she left for the U S A He pointed out that Eva's name had been entered as entry number 2 on the green card which the Appellant tendered in evidence. He stated that the Appellant was summoned to the Lands Office vide the letter dated August 28, 2010 but she failed to appear following which her title was cancelled by the Land Registrar through gazette notice no 285 of January 14, 2011.
18. The Respondent submitted that the Land Registrar had power to cancel the title held by the Appellant and issue one in Eva's name. He emphasised that the trial court found as a fact that the Suit Property



was originally allocated to Eva Wanjiru Thuita by Kilimo Welfare Group. Further, that the court found that the Appellant had lodged a caution against the Suit Property and that this position was confirmed through the official search dated February 18, 2013.

19. The Respondent maintained that the Appellant stated before the court that she went to Kilimo Welfare Group and identified the land which she wanted to buy and the officials of Kilimo promised to call the owner before they finally took her to the Lands Registry where it was confirmed that the land belonged to Eva Wanjiru Thuita; whom it is claimed gave out her documents and the Appellant was later issued a title deed. The Respondent emphasised that according to the green card, the identity number for Eva Wanjiru Thuita was xxxx and not xxxxx which had been cancelled. He pointed out that the Appellant's list of witnesses had Eva Wanjiru Thuita in it even though the Appellant denounced her. This in the Respondent's view confirmed that Eva was the owner of the suit land.
20. The Respondent submitted that during cross examination, the Appellant confirmed that she bought one acre of land which was to be excised from the Suit Property yet it measures approximately 0.0774 acres. The Respondent added that on re-examination, the Appellant stated that she did not know Eva Wanjiru Thuita but that it was the officials of Kilimo Welfare who introduced her to the Appellant. The Respondent faulted the Appellant for her failure to call the Kilimo officials as her witnesses.
21. He relied on the evidence of the Land Registrar who informed the court that a title could be cancelled through the Kenya Gazette or through a court order. Further, that the Land Registrar confirmed that a caution had been lodged against the Suit Property on May 12, 2011 while clarifying that a person holding a Power of Attorney can do anything outlined in the Power of Attorney and that the Power of Attorney in this case was registered on May 3, 2013. He added that the Land Registrar confirmed that a caution was lodged and noted on the register with a pencil and that that had not been removed.
22. Further, the Respondent contended that if the Appellant was aggrieved by the Land Registrar's decision of cancelling her title through a gazette notice, she ought to have filed an application for judicial review to quash the Land Registrar's decision since it was an administrative decision and is amenable to challenge through appropriate court proceedings. The Respondent pointed out that the Appellant neither joined the Land Registrar to these proceedings nor did she seek cancellation of the title held by his sister which was issued on March 4, 2011. He pointed out that the Appellant did not plead fraud on the Respondent's part and the grounds relating to this must fail.
23. The Respondent submitted that parties are bound by their pleadings and emphasised that the prayers the Appellant sought in her Counterclaim dated October 20, 2013 did not correspond with the orders she now seeks in this appeal. In the Counterclaim, the Appellant sought costs of the suit, damages and loss on investment, damages for depreciation, wear and tear of the plaintiff's property yet in this appeal she seeks cancellation of the Respondent's title and the entries made in the register against the Suit Property. He submitted that since the prayers sought in the counter claim and those sought in this appeal are at variance, this court cannot grant those orders at the appeal stage. He added that the Appellant was introducing extraneous prayers which were not litigated upon during the trial.
24. The Respondent submitted that his sister Eva Wanjiru Thuita gave him the Power of Attorney to take possession of all freehold and leasehold properties including the Suit Property to manage, sell, lease, sue or bring or defend any action or other proceedings in respect of her property. That based on that Power of Attorney, he filed the case on behalf of his sister. He submitted that the Power of Attorney was duly signed by the donor and witnessed by a Commissioner for Oaths. Further, he contended that there is no evidence to show that it was executed in a foreign country while pointing out that this issue was never challenged during the trial.



25. The Respondent submitted that the Power of Attorney was duly stamped upon payment of stamp duty and that it complies with Section 44 of the [Land Registration Act](#). The Respondent maintained that he had the legal mandate and capacity to institute these proceedings and referred to Section 91 regarding execution of the Power of Attorney.
26. The Respondent submitted that as matters stand his sister Eva Wanjiru Thuita is the registered proprietor of the Suit Property and that her title was issued on March 4, 2011 after the Appellant's title had been cancelled. He relied on Sections 25 and 26 of the [Land Registration Act](#) on the protection registration affords to a proprietor of land. The Respondent relied on Section 35 of the [Land Registration Act](#) whose effect and tenor is that documents signed by a Registrar are to be presumed to have been so signed and that entries or notes in the register, cadastral map or file or plan are to be received in proceedings as conclusive evidence of the matter or the transaction recorded.
27. The Respondent contended that the issue as to whether the Land Registrar exceeded his mandate in cancelling the Appellant's title or whether due process was followed before her title was cancelled should have been litigated in a different forum and were not issues dealt with before the trial court. Consequently, they cannot be raised on appeal. He pointed out that the trial court did not cancel any title, but only granted the prayers which the Respondent sought in the amended plaint since the Land Registrar was not made a party to the suit.
28. The Respondent contended that this court cannot grant adverse orders against a party without giving them a chance to defend themselves. He added that the issue as to whether or not the general Power of Attorney can transfer an interest in land was also not in issue before the trial court. The Respondent submitted that there was no evidence that the donor was outside the country when she donated her Power of Attorney.
29. Regarding the introduction of new evidence, the Respondent submitted that he sought and obtained leave to amend his plaint and the Appellant was equally granted leave to amend her defence which she did and filed a counterclaim. The Respondent maintained that the Appellant had no title to the Suit Property when this matter was filed since her title had been cancelled by the Land Registrar. The Respondent maintained that the trial court only dealt with matters that were before it. He denied that the Appellant was the first registered owner of the Suit Property and pointed out that in the authorities cited by the Appellant, the Chief Land Registrar and the Commissioner of Lands were made parties to the suits because their decision of canceling title deeds was in dispute which is not the case in these proceedings.
30. He pointed out that the Appellant has never sued Eva Wanjiru Thuita for cancellation or revocation of her title. The Respondent urged that the appeal was incompetent and should be dismissed because the Appellant failed to extract and file the decree from the magistrate's court in this appeal. He relied on Order 42 Rule 13 (4) of the [Civil Procedure Rules](#) which requires that a copy of the Judgment, order or decree appealed from is to be filed and added that that omission violated Section 79 G of the [Civil Procedure Act](#) which is couched in mandatory terms.
31. The court has looked at the appeal together with the submissions and the authorities which the parties relied on. Looking at the judgment, the Learned Magistrate took note of the fact that the land was registered in the name of Eva Wanjiru Thuita and then transferred to the Appellant on the same day and a title was issued to the Appellant the same day raises many questions.
32. The main issue for determination is whether the court should grant the orders sought in the appeal. The Appellant seeks the setting aside of the judgment delivered on March 29, 2019 and for the Respondent's title over the suit land to be cancelled as well as any entries on the green card except the



entry supporting her claim. She also seeks a declaration that the Respondent's title is a nullity in law and for judgment to be entered in her favour.

33. It is not in dispute that the suit land was originally owned by Eva Wanjiru Thuita and that she bought the land from Kilimo Welfare Group through a ballot and that she had not been issued a title deed until May 2, 2007 when the abstract of title shows that a title deed was issued to her and the land was transferred to the Appellant on the same day. That is the same day when the Appellant claims to have entered into a sale agreement with Eva Wanjiru Thuita for the sale of the land. It is the possibility of all these transactions taking place on the same day that the Learned Magistrate found questionable. This court agrees with the reservations of the trial court because such transactions would in the ordinary course of business take days if not weeks to complete and to effect registration.
34. Looking at the abstract of title which the Appellant produced in evidence before the trial court, entry no 1 dated April 24, 1995 shows that the Government of Kenya was the proprietor of the Suit Property. Entry no 2 of May 2, 2007 shows that Eva Wanjiru Thuita was the proprietor and her identity number xxxx is indicated against the column reading shares. Entries numbers 3 and 4 show that Rosemary Kagendo was registered on May 2, 2007 as the proprietor of the Suit Property following a transfer. Her identity number is indicated as xxxx.
35. Through entry no 5 dated March 4, 2011, entries numbers 2, 3 and 4 were cancelled vide gazette notice number 285 of 14/1/2011. Entry no 6 of March 4, 2011 shows that Eva Wanjiru Thuita was registered as the proprietor of the suit land. The identity number xxxx was crossed out and the number xxxx written over it. This is the identity number that tallies with the copy produced before the trial court as Eva's identity card. Eva would have been expected to provide her identity card when she entered into the transaction with the Appellant or to the advocate who drew the sale agreement.
36. The sale agreement dated May 2, 2007 is between Eva Wanjiru Thuita of identity number xxxx and Rosemary Kagendo Nguura of identity number xxxx. The agreement states that the vendor desires to sell an acre which is to be hived from plot number Nanyuki Municipality Block 2/559 (Kilimo). Clause 2 indicated that the purchase price for the land was Kshs 125,000/= in cash which had been paid to the vendor on execution. Clause 3 stated that the purchaser confirmed that she had already seen the plot to be hived from the land in question on the ground and was satisfied with it. That's why the agreement was being drawn.
37. Clause 5 stated that purchaser would have the transfer forms processed with the assistance of the vendor after the signing of the agreement and the vendor was to surrender all the documents pertaining to the land on execution of the agreement. One of the conditions indicated on the agreement was that the advocate was only restricted to the drafting of the agreement and on the instructions of the parties.
38. The agreement which drawn by Kiget & Company Advocates. When Mr Kiget testified, he confirmed what was stated in the agreement that his role was only limited to drawing the sale agreement. The explanation given by Mr Kiget regarding the insertion in the sale agreement of the clause on excision of one acre from plot number Nanyuki Municipal Block 2/559 is not persuasive in light of the fact that Suit Property measures 0.0774 hectares which translates to 0.191 acre. In any event, the excision if at all it were to be carried out would have taken some time.
39. No evidence was tendered of how the Appellant came to be registered as the owner of the suit land on May 2, 2007. The Appellant did not call any witnesses from Kilimo Welfare Group to support her claim that she purchased the Suit Property from Eva Wanjiru Thuita and that they introduced her to Eva. This was critical in light of the denial by Eva Wanjiru Thuita that she never sold the Suit Property and that she was not in Kenya on May 2, 2007 when the Appellant claims to have purchased the land from her.



40. The Appellant only challenged the aspect of Eva not having been in the country when the power of attorney was signed but did not address the issue of her not having been in Kenya when she alleges she entered into the sale transaction with her on May 2, 2007. There is no evidence to confirm that the Appellant paid the purchase price indicated in the sale agreement which would make her a purchaser for value as she contended.
41. The Appellant submitted that having the Respondent tender evidence after he had closed his case was an injustice and prejudiced her. It is not clear what new evidence the Appellant introduced after he had closed his case. The proceedings on record do not show that the Respondent tendered more evidence after closing his case. The court notes that both parties amended their pleadings and relied on these at the hearing. In the court's view, the Appellant ought to have raised this objection during the trial.
42. The court agrees with the Respondent that this appeal is not the proper forum for the Appellant to seek cancellation of the title held by Eva Wanjiru Thuita. After the Land Registrar cancelled her title over the Suit Property and issued a title to Eva, the Appellant should have commenced proceedings to challenge the cancellation of her title by the Land Registrar. No doubt, the Land Registrar needed to be made a party and to participate in any proceedings challenging the Registrar's actions of cancelling the Appellant's title.
43. The Appellant challenged the Power of Attorney which the Respondent relied on as giving him the authority to institute proceedings on behalf of Eva. The [Land Registration Act](#) envisages that agents can transact on land using the power of attorney route (see Sections 7 and 48) and goes on to stipulate the manner of execution and registration of the power of attorney. A power of attorney authorises one to act on behalf of a person, to sue and generally represent the person for purposes of the [Land Registration Act](#). Even if the power of attorney had not been executed properly as the Appellant contends, it would still not have conferred a good title on the Appellant. The Appellant failed to demonstrate before the trial court that she had a good claim to the suit land.
44. The Appellant sought costs from the Respondent for the suit, damages and loss on investments in the Counterclaim. She also sought damages for depreciation, for wear and tear of the Respondent's property. Looking at the totality of the evidence that was tendered before the Learned Magistrate, this court cannot fault the Learned Magistrate for arriving at the decision they did.
45. The appeal is dismissed with costs to the Respondent.

DELIVERED VIRTUALLY AT NANYUKI THIS 6TH DAY OF JULY 2022.

K BOR

JUDGE

In the presence of: -

Mr Andrew Kariu for the Appellant

Mr William Bwonwongá for the Respondent

Ms Stella Gakii- Court Assistant

