



**Njuguna & another v Gikera (Environment and Land Appeal
93 of 2015) [2022] KEELC 2566 (KLR) (12 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2566 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 93 OF 2015
SO OKONG'O, J
JULY 12, 2022**

BETWEEN

MOSES NJUGUNA 1ST APPELLANT

FREDRICK MUIGAI 2ND APPELLANT

AND

PETER GICHIE GIKERA RESPONDENT

*(An appeal from the judgement and orders made by Hon. J.W.
Onchuru(Mr) PM on 21st October 2015 in Thika CMCC No.27 of 2013)*

JUDGMENT

1. This is an appeal against the decision of Hon. J.W Onchuru PM made on October 21, 2015 in Thika CMCC No. 27 of 2013(hereinafter referred to as “the lower court/lower court suit”) in relation to all that parcel of land known as Title No. Kiambu/gatunyaga/1319(hereinafter referred to as “the suit property”).
2. In the lower court, the Respondent had sought the following reliefs; a permanent injunction restraining the Appellants from entering, occupying, transferring or constructing on the suit property; an order directing the 2nd Appellant to surrender the title for the suit property to the Respondent; an order directing cancellation of the title deed issued to the 2nd Appellant in respect of the suit property and for the proprietorship section of the register for the suit property to be rectified to read the name of the Respondent, Peter Gichia Gikera; in the event that the 2nd Appellant fails to execute the transfer documents, the same be executed by the executive officer of the court, and the cost of the suit.
3. The Respondent claimed that he had purchased the suit property from an entity known as Regekia Investment Company (hereinafter referred to only as “Regekia”) under Ballot No. 041 and that the property was subsequently registered as Title No. Kiambu/ Gatunyaga/1319.



4. The Respondent contended that without any colour of right, the 1st Appellant acquired ownership of the suit property and fraudulently sold the same to the 2nd Appellant who entered therein and commenced construction. The Respondent averred that the actions of the Appellants were illegal and fraudulent since the 1st Appellant was not the owner of Rigeria that had sold the suit property to the Respondent.
5. The Appellants denied the Respondent's claim in the lower court in its entirety. The 1st Appellant averred that it was at all material times the registered owner of the suit property and that he lawfully transferred the same to the 2nd Appellant. The Appellants denied that they acquired the suit property fraudulently from Rigeikia.
6. The Appellants denied that the Respondent was at any time the owner of the suit property. They termed the Respondent's claim scandalous, vexatious and untenable and urged the court to dismiss the same.
7. At the trial, the Respondent and the 1st Appellant gave evidence while the 2nd Appellant is said to have adopted the evidence of the 1st Appellant. In its judgment dated October 23, 2015, the lower court held that the Respondent had proved his case against the Appellants on a balance of probabilities and entered judgment in his favour against the Appellants as prayed.
8. The lower court found that both the Respondent and the 1st Appellant were members of Rigeikia. The lower court found that the 1st Appellant did not explain how the suit property moved from Regekia to Kihoto Self Help Group (hereinafter referred to as "Kihoto") whose chairman was the 1st Appellant. The lower court wondered how the 1st Appellant acquired the land that belonged to Rigeikia from Kihoto. The court held that the manner in which the 1st Appellant acquired the suit property was suspicious and that fraud could not be ruled out. The court held that although the 1st Appellant transferred the suit property to the 2nd Appellant for value, the title that he transferred was obtained fraudulently.
9. The Appellants were dissatisfied with the said decision of the lower court and filed the present appeal. In their Memorandum of Appeal dated November 19, 2015, the Appellants challenged the lower court judgment on the following grounds;
 - a) That the Learned Magistrate erred in law by determining a matter relating to the ownership of property known as L.R No. Kiambu /Gatuanyaga/1319 (the suit property) without Jurisdiction.
 - b) That the Learned Magistrate erred in law and in fact in failing to find that the Plaintiff had failed to discharge the burden of proof and had not proved its case of fraud against Appellants on a balance of probabilities or at all;
 - c) That the Learned Magistrate misdirected himself on the facts by finding that the 1st Appellant had not proved how he had acquired the suit property notwithstanding the overwhelming evidence on record to the contrary;
 - d) That the Learned Magistrate erred in law and in fact in failing to appreciate that the Respondent had totally failed to prove any case of fraud on the part of the Appellants to warrant the cancellation of the 2nd Appellant's title as he did.
 - e) That the Learned Magistrate erred in law by ordering the cancellation of the title while no legal /or factual basis had been established to warrant the cancellation of the 2nd Appellant's title;



- f) That the Learned Magistrate erred in fact and in law in misdirecting himself on the law and facts and as a result he arrived at a wrong decision. That the learned Magistrate particularly misdirected himself on the facts by finding that the Respondent was the legitimate owner of the suit property;
 - g) That the Learned Magistrate erred in law in failing to consider the Appellants' defence on record;
 - h) That the Learned Magistrate erred in fact and in law in not upholding the Appellants' defence on record;
 - i) That the Learned Magistrate misdirected himself on the facts and the law and based his findings on wrong and irrelevant considerations;
 - j) That in all the circumstances of the case, the findings of the learned Magistrate were totally unsupported in law;
 - k) That the Learned Magistrate erred in law and in fact in placing reliance on extraneous evidence and matters in arriving at his decision;
 - l) That the Learned Magistrate was openly biased in favour of the Respondent;
 - m) That in all the circumstances of the case, the Learned Magistrate failed to do justice to the Appellants.
10. The Appellants urged the court to allow the appeal with costs to the Appellants, set aside the judgment of the lower court and substitute it with an order dismissing the Respondent's case in the lower court.
 11. The appeal was heard by way of written submissions. The Appellants and the Respondent filed submissions dated May 13, 2020 and May 18, 2020 respectively.
 12. On ground 1 of their appeal, the Appellants submitted that the lower court had no jurisdiction to determine the Respondent's claim since the value of the suit property exceeded Kshs. 500,000/-. The Appellants submitted that under direction 6 of the Chief Justice's Practice Directions dated November 9, 2012 which were made following the enactment of the *Environment and Land Court Act* 2011, the Magistrate's Courts could only hear disputes over land registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed) where the value did not exceed Kshs. 500,000/-.
 13. In support of this submission, the Appellants cited The owners of *Motor Vessel "Lilian S" v Caltex Kenya Ltd.* [1989] KLR 1 and *Kibwana Ali Karisa v Said Hamisi Mohammed*, Petition 7 of 2014. The Appellants submitted that since the lower court presided over the lower court suit without jurisdiction, its judgment delivered on October 21, 2015 was null and void.
 14. On grounds 2 and 3 of appeal, the Appellants submitted that although the Respondent had contended that the 1st Appellant had acquired the suit property fraudulently, no evidence of fraud was presented against them before the lower court. The Appellants submitted that the evidence before the lower court showed that the 1st Appellant was a member of Rigeikia and that he was allocated two plots by Rigeikia including the suit property. The Appellants submitted that after paying the full purchase price for the two plots, the 1st Appellant was issued with Share Certificates No. 39 and No. 40 that entitled him to Plot No. 39 and Plot No. 40.
 15. The Appellants submitted that after Kihoto took over the land that was owned by Rigeikia, Kihoto issued the 1st Appellant with new Share Certificates No. 41 and 42 in place of his earlier Share Certificates No. 39 and No. 40. The Appellants submitted that upon subdivision of the hitherto larger



parcel of land owned by Rigeikia and subsequently Kihoto, the 1st Appellant's two parcels of land were given Title No.1319(the suit property) and Title No. 1320. The Appellants submitted that the Respondent did not prove that the suit property was the plot that was sold to him by Rigeikia or that the 1st Appellant defrauded him of the suit property.

16. The Appellants submitted that fraud is a serious accusation and that the same must be pleaded and proved on a standard which is above a balance of probabilities but not beyond a reasonable doubt. The Appellants cited several authorities in support of this submission. The Appellants submitted that in order to defeat the title held by the 1st Appellant over the suit property, the Respondent had a duty to prove that the title was acquired fraudulently. The Appellants submitted that since no such evidence was presented to court, the decision by the lower court was contrary to the evidence that was presented before it.
17. On grounds 3, 5 and 7 of appeal, the Appellants submitted that the 1st Appellant as the registered owner of the suit property lawfully sold and transferred the suit property to the 2nd Appellant. The Appellants submitted that there was no basis for the lower court's decision to cancel the 2nd Appellant's title as neither fraud nor illegality was established against the Appellants in the acquisition of the suit property. The Appellants cited sections 25(1) and 26 (1) of the *Land Registration Act, 2012* and *Arthi Highway Developers Limited v West End Butchery Limited & Others*, Civil Appeal No. 246 of 2013 and submitted that the registration of the 2nd Appellant as the proprietor of the suit property conferred upon him absolute and indefeasible rights that could only be challenged on the grounds of fraud, misrepresentation or illegality to which he was proved to be a party. The Appellants submitted that none of these grounds were proved.
18. The Appellants submitted further that the 2nd Appellant was an innocent purchaser of the suit property for value without any knowledge of the Respondent's interest in the same. The Appellants submitted further that the lower court suit was filed after inordinate delay which raised doubts on whether the same was brought in good faith. The Appellants submitted that the Respondent who was all along aware that the 1st Appellant had purchased the suit property did not take any action until 19 years later when he filed the lower court suit.
19. In his submissions in reply, Respondent contended that the lower court had the jurisdiction to determine the claim that was before it. The Respondent submitted that the Appellants did not present any evidence showing that the value of the suit property exceeded Kshs. 500,000/-. The Respondent submitted that the evidence before the court had put the value of the suit property at Kshs.300,000/-.
20. On the Appellants' contention that he had not proved fraud, the Respondent submitted that he had proved fraud against the Appellants. The Respondent submitted that he proved that the 1st Appellant had fraudulently transferred the suit property from Rigeikia to Kihoto where he was the chairman. The Respondent submitted that the 1st Appellant did not place before the lower court any documentation on the transaction. The Respondent submitted that the 1st Appellant did not also show how he got new Share Certificates No. 41 and No. 42 for Plot No. 41 and Plot No. 42 after Rigeikia's property was transferred to Kihoto Self Help Group, having previously held Share Certificates No.39 and No. 40 for Plot No. 39 and Plot No. 40.

Analysis and determination.

21. I have considered the proceedings before the lower court, the judgment of the court and the grounds of appeal against the said judgment. I have also considered the submissions by the counsels for both parties. The only issues arising for determination in this appeal are whether the lower court had



- jurisdiction to determine the claim that was lodged before it by the Respondent and whether the Respondent proved his claim against the Appellants to the required standard.
22. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions although it has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified in the lower court. See, the case of [Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd](#) [2004] 2 KLR 269 on the duty of the first appellate court.
 23. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial court unless they were not based on evidence at all, or were based on misapprehension of the evidence or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, [Peter v Sunday Post Ltd](#). [1958] E.A 424 and [Makube v Nyamuro](#) [1983] KLR 403.
 24. I find no merit in the Appellants' contention that the lower court had no jurisdiction to determine the suit that was brought before it by the Respondent. In their defence, the Appellants admitted the jurisdiction of the court. Throughout the proceedings, the Appellants did not challenge the jurisdiction of the lower court. Jurisdiction was not in issue at the trial before the lower court and the court did not make any finding in respect thereof.
 25. The issue of jurisdiction has been raised for the first time in this appeal. I am aware that the issue of jurisdiction can be raised at any time in the proceedings even on appeal. In this case however, I am of the view that the Appellants are on a wild goose chase with this jurisdiction argument. The issue whether the Magistrate's Courts had jurisdiction to handle environment and land disputes upon the establishment of the Environment and Land Court was settled in [Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others](#) [2017] eKLR, in which the Court of Appeal held that there was nothing unconstitutional or unlawful in the Magistrate's Courts continuing to handle environment and land disputes falling within their pecuniary jurisdiction.
 26. The suit property was registered under the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed). As was correctly submitted by the Appellants, even before the establishment of the Environment and Land Court, the Magistrate's Courts used to handle disputes over land registered under the said Act where the value of the land did not exceed Kshs. 500,000/-. The Appellants argument was that the value of the suit property exceeded Kshs. 500,000/- and as such the lower court had no jurisdiction to hand a dispute over the same.
 27. The burden was on the Appellants to prove that the value of the suit property exceeded Kshs. 500,000/-. I am in agreement with the Respondent that they failed to discharge this burden. The evidence tendered by the Appellants showed that the suit property was valued at Kshs. 300,000/-. For the foregoing reasons, I find no merit in the ground of appeal challenging the decision of the lower court on the basis of jurisdiction.
 28. On whether the Respondent proved his case to the required standard, I am in agreement with the submissions by the Appellants and the authorities cited on the standard of proof of fraud. The Respondent's case was based on fraud. The Respondent had a duty to prove that he was the owner of the suit property and that the 1st Appellant acquired the property fraudulently and further that the 2nd Appellant to whom the property was sold by the 1st Appellant was either a party to the fraud or was aware of the same.
 29. From the evidence that was placed before the lower court, there was no dispute that both the Respondent and the 1st Appellant were members of Rigeikia and that both bought and were allocated different parcels of land through balloting. From that evidence, the Respondent balloted for Plot No. 41 while the 1st Appellant balloted for Plot No. 39 and Plot No. 40. The Share Certificates that were



issued to the 1st Appellant by Rigeikia shows that the 1st Appellant was allocated Plot No. 39 and Plot No. 40. At page 59 of the record of Appeal is a ballot paper that was issued to the 1st Appellant by Rigeikia for Plot No. 40. At page 20 of the record of appeal is a ballot paper that was issued by Regikia to the Respondent for Plot No. 41. There is no dispute from the foregoing that the parcels of land that were purchased by the Respondent and the 1st Appellant from Rigeikia were separate and distinct.

30. The Respondent led evidence that after balloting, they were shown the various plots on the ground and as such he was all along aware of the location of his Plot No. 41 on the ground. The Respondent testified that it was this Plot No. 41 that upon survey by Kihoto was given Title No. Kiambu/Gatwanyaga/1319(the suit property). On his part, the 1st Appellant claimed that the parcel of land that was owned by Rigeikia was taken over by Kihoto and that in respect of his two plots, Kihoto issued him with new Share Certificates No. 41 and No. 42 representing Plot No. 41 and Plot No. 42 which after survey were given Title Nos. Kiambu/Gatwanyaga/1319 and 1320.
31. A close scrutiny of the share certificates that were issued by Kihoto to the 1st Appellant shows that they were for Plot No. 39 and Plot No. 40. See the Certificates at pages 68 and 69 of the record of Appeal. The 1st Appellant's claim that he was allocated Plot No. 40 and Plot No. 41 by Kihoto does not find support anywhere in the evidence that was before the lower court.
32. From what I have set out above, there is no doubt that Plot No. 41 is what upon survey of the larger parcel of land owned by Rigeikia was given Title No. Kiambu/Gatwanyaga/1319. The evidence that was before the lower court showed that this parcel of land was purchased by the Respondent from Rigeikia. The Respondent having proved that the said parcel of land was owned by him having purchased the same from Rigeikia, the burden shifted to the 1st Appellant to prove that he acquired the same lawfully.
33. The Respondent from the evidence on record did not deal with Kihoto whose chairman was the 1st Respondent. How Kihoto came into being and how it acquired land that belonged to Rigeikia were facts that could only be within the knowledge of the 1st Appellant. In *George Mbiti Kiebia & Another v Isaya Theuri M'lintari & Another* [2014] eKLR the Court of Appeal stated that:

“Under Section 112 of the *Evidence Act*, 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. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late M’Kiebia.”
34. The 1st Appellant told the lower court that he was the chairman of Kihoto when the suit property was registered in his name. The 1st Appellant had a duty to tell the court how Kihoto acquired the suit property that was initially owned by Rigeikia and how Kihoto allocated to him land that had been allocated by Rigeikia to the Respondent. The 1st Appellant told the court nothing about the transaction between Kihoto and Rigeikia and why the parcel of land that had been purchased by the Respondent was allocated to him by Kihoto in the new arrangement.
35. In *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR, the Court of Appeal stated that:

“...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.... the registered proprietor must go beyond the



instrument and prove the legality of how he acquired the title and show that the acquisition was legal....”

36. The same reasoning was adopted in *Daudi Kiptugen v Commissioner of Lands & 4 others* [2015] eKLR where the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

37. The only document that was produced by the 1st Appellant in proof of his ownership of the suit property was a copy of his title deed. In the absence of any evidence of how the suit property left Rigeikia and came to be owned by Kihoto and how the same was subsequently allocated and transferred allegedly by Kihoto to the 1st Respondent, I am unable to fault the finding by the lower court that fraud was involved in the transaction. It is therefore my finding that the Respondent established that the 1st Appellant acquired the suit property fraudulently.

38. The 2nd Appellant had argued that he was an innocent purchaser of the suit property without notice of any defect in its title and that he was not a party to the fraud alleged against the 1st Appellant. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others*, Nairobi Civil Appeal No. 146 of 2014 the court cited with approval the case of *Katende v Haridar & Company Ltd* [2008] 2 EA 173, where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.

For a purchaser to successfully rely on the bona fide doctrine.... he must prove that:

- a. he holds a certificate of title;
 - b. he purchased the property in good faith;
 - c. he had no knowledge of the fraud;
 - d. he purchased for valuable consideration;
 - e. the vendors had apparent valid title;
 - f. he purchased without notice of any fraud;
 - g. he was not party to any fraud.”
39. The burden was on the 2nd Appellant to satisfy the lower court that he was a bona fide purchaser of the suit property for value without notice. As I mentioned earlier in the judgment, the 2nd Appellant did not give evidence before the lower court. The advocates who appeared for the Appellants in the lower court told the court that the 2nd Appellant was out of the country and that he would adopt the evidence of the 1st Appellant. It is not clear as to when that evidence was adopted. From the evidence on record, no evidence was adduced as to how the 2nd Appellant acquired the suit property from the 1st Appellant. The agreement for sale, the transfer and the 2nd Appellants title were not produced in



evidence. There was completely no basis upon which the lower court could have made a determination that the 2nd Appellant was an innocent purchaser of the suit property. I therefore find no merit in this bona fide purchaser argument.

40. The lower court having found and rightly so that the 1st Appellant acquired the suit property fraudulently and there being no evidence that the 2nd Appellant was a bona fide purchaser of the suit property for value without notice, the lower court cannot be faulted for cancelling the 2nd Appellant's title that was tainted with fraud and ordering that the suit property be registered in the name of the Respondent.
41. In the final analysis and for the foregoing reasons, the Appellants' appeal fails wholly. The same is dismissed with costs to the Respondent.

DELIVERED AND DATED AT NAIROBI THIS 12TH DAY OF JULY 2022

S. OKONG'O

JUDGE

Judgment read through Microsoft Teams Video Conferencing platform in the presence of;

N/A for the Appellants

N/A for the Respondents

Ms. C. Nyokabi-Court Assistant

