



**Kanana & another v Kwiriga & another (Environment and Land Appeal
42 of 2020) [2022] KEELC 13290 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 42 OF 2020
CK NZILI, J
OCTOBER 5, 2022**

BETWEEN

EUNICE KANANA 1ST APPELLANT

JOSEPH NTEERE 2ND APPELLANT

AND

ROSEMARY MUGITO KWIRIGA 1ST RESPONDENT

GRACE KARIMI KWIRIGA 2ND RESPONDENT

*(Being an appeal from the judgment of Hon. J. Irura In Nkubu
ELC CMCC case No.110 of 2018 delivered on 20.1.2020)*

JUDGMENT

A. The Appeal

1. The appellants who were the plaintiffs at the lower court have lodged this appeal complaining that the trial court erred in facts and in law in dismissing their suit. The grounds of the appeal are that:- the evidence produced over the purchase of the suit land was not properly evaluated; fraud was not proved; *prima facie* evidence was not considered since extraneous factors took center stage; the court failed to find the appellant's evidence unchallenged by the respondent; it failed to consider the pending facts, evidence, law and the circumstances of the case and hence arriving at a wrong decision.
2. This being a first appeal this court guided by *Peters v Sunday Post* (1958) EA 424 has the mandate to rehearse, re-hear, re-evaluate and re-appraise itself on the lower court record and come up with independent findings as to facts and the law while at the same time bearing in mind that the trial court had the advantage of seeing and hearing the witnesses first hand.



B. Pleadings of the Lower Court

3. The appellants through a plaint dated July 13, 2017 claimed they were as joint registered owners of LR Abogeta/L-Kiungone/493 (herein the suitland) which they had bought from one Caxton Mutwamwari. They sued the respondents for trespass into the suitland and for illegal constructions therein without any colour of right, consent or authority.
4. The prayers sought were for eviction and permanent order of injunction against further trespass to the suit land. The suit was supported by a copy of title deed issued on January 8, 1999 and a demand letter dated August 5, 2015 together with witness statements.
5. In a defence dated September 27, 2017, the respondents stated that the alleged land belonged to their late father Kwiriga Magiri and which was fraudulently transferred to the appellants by an alleged seller who lacked capacity to sell and or transfer it; who purported to acquire a confirmation of grant without the family members consent or knowledge and therefore he had no good title to pass and was engaged in criminal activities. The respondents denied being trespassers to the land, and further averred that the suit was filed in a court without jurisdiction and without a demand letter being served.
6. The appellants filed a reply to defence, stating that they bought the land from one Caxton Mutwamwari who had bought from Stephen Kithinji Kwiriga, at the time possessed of letters of grant to the estate with the knowledge of the respondents, which grant had not been objected to. hence denied any alleged fraud.

C. Testimony

7. The appellants through PW 1 adopted the witness statements and told the court they bought the land in 1990's from PW 2, took vacant possession, fenced it off with barbed wire and later on sold it to a third party one Simon Gitonga who took vacant possession to date and has put up a house therein.
8. PW 1 said one Rosemary Mugito sued Samuel Gitonga in 2016 claiming the land. He said when he bought the land it was pointed out on the ground but was later on shown as parcel No 493 which was occupied by Grace Karimi Kwiriga. PW 1 produced a title deed jointly owned with his wife Eunice Kanana as P Exh (1) and a demand letter dated August 5, 2015 as P Exh (2) a copy of the grant and the gazettement as P Exh No (3) & (4) respectively.
9. PW 1 confirmed that he was not aware of a probate cause No 113/92 filed by Peter Gikunda Kwiriga and Stephen Githinji Kwiriga prior to buying the land.
10. Further PW 1 urged the court to grant the prayers sought so that the person he had sold the land to, could take vacant possession while the respondents should take up vacant possession of LR No 485.
11. In cross examination PW1 told the court he never notified the 1st respondent and John Peter Gikunda about the purchase since the title deed did not indicate their names. According to him, the letters of grant did not include LR No's 493 and 485 as part of the estate of the registered owner and the witness. PW 1 was not a relative of the respondents. PW 1 said PW 2 did not show him any sale agreement between him and the administrators of the estate of the deceased. Further, PW 1 admitted he did not produce the sale agreement between him and PW 2 as an exhibit. He confirmed it was the respondents who were occupying the land though he had not sought for eviction order against them.
12. PW 1 witness confirmed that the respondents were not listed as beneficiaries in the grant supplied to the court. As regards the suit filed by the respondents against Simon Gitonga, PW 1 said the court had



- ordered the said Gitonga to vacate parcel No 485 but his case herein was for the respondents to vacate parcel No 493 which he had bought from PW 2 so that Simon Gitonga can take vacant possession.
13. PW 2 adopted his witness statement dated July 13, 2001 and told the court he sold land parcel No 493 to PW 1 in 1997 after he had bought the said land from Simon Kithinji & John Gikunda, the registered owners as per the search certificate. He said the land was transferred to him which he later on sold to the appellants. He confirmed that had not been in occupation of the land between 2000 and the date of the sale.
 14. PW 2 said what was shown to him on the ground at the time of the sale was land parcel No 485 and not parcel No 493. In cross examination PW 2 denied that he was a close relative of the respondents. He stated that he lost the original sale agreement he made with the sellers Stephen Kithinji & John Gikunda which was witnessed by a lawyer. Similarly, PW 2 stated that he did not produce the said agreement to the appellants notwithstanding the fact that parcel No's 493 & 485 were not included in the succession documents produced by the appellants.
 15. Further PW 2 said that he did not conduct a search at the time of the sale though he came to learn that the grant was erroneous. PW 2 acknowledged that the 1st respondent had a house on LR No 493 even though her residence was at Kanyakine market where she operated a shop. PW 2 denied that the land allegedly sold to him was under the name of a deceased person to the appellants, since the sellers had a title deed and he viewed the land on the ground.
 16. DW 1 adopted her witness statement dated September 24, 2019 and told the court that her father together with the 2nd respondent was the late Kwiriga Magiri who had several parcels of land including LR Nos Abogeta/L-Kiungone/485 & 493 which were not included in the grant produced by the appellants. She produced a death certificate as D exhibit (1), limited grant as D Exh (2), chiefs' letter as D Exh No (3), copy of the register for LR No Abogeta/L-Kiungone/493 as D Exh No (4). DW 1 denied knowing how Caxton Mbae and the appellants got to purchase her late father's land. She admitted that she never lived on LR No 493.
 17. DW1 admitted that one of her brothers was Stephen Kithinji now deceased and the other was John Gikunda who was still alive. She admitted that her land was currently under the appellants names. Further, DW 1 denied knowledge of any subdivisions to her deceased father's parcels of land or whether parcel No 493 was as a result of a subdivision. DW 1 confirmed that she was married and did not know if her late brother had filed a succession cause No 114/1992 prior to her cause. She could not therefore have protested to the said cause without such knowledge.
 18. As regards the case against Simon Gitonga DW 1 said she sued Simon Gitonga regarding LR No 485. She however confirmed that LR No 493 was under her late father's name for the green card had no indication of a subdivision and which parcel was not included in the grant held by her brother. She could not tell therefore how the land was allegedly transferred to the appellants before a grant was sought and obtained for the said parcel of land.

D. Written Submissions

19. The appellants have submitted that under order 2 rule 2 and order 7 rules 3, 7 and 8 *Civil Procedure Rules* parties are bound by their pleadings which is a cardinal principle of law so that each party puts the other on notice the issues so that they may respond to.
20. The appellants also submitted that the respondents defence lacked a counter claim hence the trial court acted ultra vires to pronounce on a claim not made by the respondents. Reliance was placed on



Hillarione Kabuteni & another v George Kiruki Mwamba (2019) eKLR, Dakianga Distributors (K) Ltd v Kenya Seed Co Ltd (2015) eKLR, Caltex Oil (K) Ltd v Rono Ltd (2016) eKLR.

21. It was submitted that the respondents admitted there was no protest to the letters of administration over the deceased estate; that the green card indicated the land was duly transmitted to the seller who eventually transferred it to the appellants which transfer was valid under section 93 of the Law of Succession Act.
22. As regards fraud, the appellants submitted that since the respondents did not challenge the succession cause, the title remained legitimate and the process of its procurement was above board hence the trial court erred in law to hold otherwise.
23. Further, the appellants submitted that the trial court formulated a different cause of action, determined the matter against persons who were never parties to the suit and proceeded to issue damning orders against them which orders, were never sought by the parties.
24. The appellants submitted that the trial and or were therefore court misdirected itself in considering the lack of the sale agreement and or land transfers which issues were never part of the trial and were therefore contrary to section 107 of the Evidence Act given that the duty to prove fraud was on the respondents who were alleging it and not the appellants.
25. Concerning the grant, the appellants submitted that the trial court was incapacitated in law to deal with the issue of grant. This court is urged to exercise its discretion under order 42 rule 27 (b) of the Civil Procedure Rules to call for the succession cause No 113 of 1992 in order to consider the issued therein conclusively, more so when the Kenya gazette was not challenged. Therefore, the trial court should not have doubted the authenticity of the grant which in any event was a matter to be dealt with by the High Court.
26. In sum, the appellants urged the court to find the trial court misdirected itself on the facts, evidence, the law and arrived at an erroneous judgment.
27. The respondents submitted that the appellants, prior to the suit being transferred from Githongo Law Courts to Nkubu Law Courts had filed a supplementary list of exhibits dated January 18, 2018 in which he included a grant in Meru HC succession case No 113 of 1004, which grant did not include LR No Abogeta/L-Kiungone/493.
28. The question then is on what basis the land was acquired by the appellants when the title number was not included on the grant held by the seller at the time. Therefore, it was submitted that the appellants had failed to prove that fact before the trial court by the production of sale agreements, consents and the transfer forms.
29. The respondents submitted that the issue of the manner of the acquisition of the land was part of the trial court hence the court did not err at all.
30. As regards bias on the part of the trial court, the respondents submitted this was a new ground of appeal coming at submissions stage and should be disregarded.
31. Concerning fraud and trust, the respondents submitted that a land court and not a probate court had powers to determine the issue going by the caselaw of M'Inoti Thai v Naomi Karenga M'Imanyara Nyeri Court of Appeal No 154 of 2011, and Priscilla v Ndubi & Zipporah Mutiga Gerishon Gatobu Mbui Meru succession cause No 720 of 2013.
32. On the issue of order 42 rule 27 (b) Civil Procedure Rules the respondents urged the court to find the same as res judicata due to the previous ruling.



33. As to property illegally obtained the respondents urged the court not to countenance such property guided by the case law of *Naipanoi Pasha v Stephen K. Wangombe & 2 others*, *Peter Njenga Nganga v Kenya Re-Insurance Corp Ltd (statutory Manager for United Insurance)* Case No ELC 204 of 2017 and *Zelima Atieno Ogada v Findel Ltd & AG* ELC No Mombasa 450 of 2017.

E. Issues for Determination

34. The issues falling for courts determination are:
- i. What were the issues flowing from the pleadings at the lower court?
 - ii. If the trial court travelled outside the issues flowing from the pleadings and considered extraneous factors and circumstances to the detriment and prejudice of the parties.
 - iii. If the parties proved their respective claims.
 - iv. If the trial court granted prayers not sought for by the parties.
 - v. If the appeal has merits.

F. Determination

35. It is trite law that parties are bound by their pleadings and issues flow from pleadings. Emphasizing on this point the Supreme Court of Kenya in *Raila Odinga & another v IEBC & 2 others* (2017) eKLR, said that in absence of pleadings, evidence if any, produced by the parties cannot be considered.
36. The court went on to say that no party should be permitted to travel beyond its pleadings since they ensure that each party is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before court for its consideration.
37. The court held that issues only arise when a material proposition of fact or law is affirmed by one party and denied by the other party. The court went on to state that it was neither desirable nor permissible for a court to frame an issue not arising from the pleadings.
38. Applying the above principles, the primary pleadings herein are the plaint dated July 13, 2017 and its statements and list of documents, the defence dated September 27, 2017 and its list of witness statements, documents and the reply to defence dated January 18, 2018.
39. The appellants had pleaded that they held a good title to the suit land whereas the respondents sought to impeach the title under sections 24, 25 & 26 of the *Land Registration act* 2012 on account of fraud, illegality, improperly procedural irregularities and illegalities. The appellants specifically pleaded that the land was in the name of their deceased father.
40. Further the parties herein complied with order 11 *Civil Procedure Rules* by filing case summary, pre-trial questionnaires and issues for determination appearing at page 108-111 and 80-83 respectively of the record of appeal.
41. The appellants had claimed that they bought the land registration No 1493 from Caxtom Mutwamwari which land the respondents illegally entered into in 2000 without any justification or right hence sought for vacant possession and a permanent injunction against any further trespass.
42. The respondents opposed the claim, alleged the suit land belonged to their late father which had been fraudulently, illegally and wrongly transferred to the appellants by a person lacking capacity to deal with it, out of a secret succession cause unknown to them and transferred by someone without a good title.



43. The respondents denied being trespassers on the suit land. They also raised the issue of the court's jurisdiction. In reply, the appellants pleaded the process of acquisition through Caxton Mbae Mutwamwari who allegedly was transferred the land by Stephen Kithinji Kwiriga out of a succession cause as the administrator of the estate of the respondent's father, was fraudulent, unprocedural and illegal.
44. Before the hearing could commence, the appellants drew out nine issues for the court's determination at page 111 of the record of appeal among them; who was the registered owner of LR No 493, the possessor thereof; if the land was legally transferred; whether whoever sold the land had capacity to do so, whether there was mischief in not identifying the correct parcel on the ground and lastly if there was misrepresentation by the original seller.
45. The respondents also filed a list of issues at page 83 of the record of appeal among them; if the suit land belonged to the deceased father; if it was fraudulently transferred; if the appellants were privy to the alleged fraud and lastly if the respondents were trespassers on the land.
46. An order for witness summons was to issued to the Deputy Registrar, High Court Division to produce the original file succession cause No 113/1992 at the request of the appellants. The appellants did not make a follow up to have their exhibits duly certified as true copies of the originals. Similarly, one of the people said to have sold the land as an administrator to the estate and a brother of the respondents was alive at the time the suit proceeded but the appellants did not find him a necessary witness to their case.
47. PW 2 was also unable to confirm if at the point he bought the suit land it was in the name of the alleged legal administrator of the deceased's estate. PW 2 said he had lost the sale agreement and the transfer documents. He also said the sale and transfer was witnessed by a lawyer but did not call him as a witness.
48. The appellants in their testimony also failed to state the consideration they had paid for the suit land. In his evidence PW 1 testified that after the sale and the transfer, he fenced off the suit land and took vacant possession but later on whatever found out land was pointed out to him had turned up being different from the one in the sale agreement and shown to him later as the right one was occupied by the 2nd respondents with a permanent house therein.
49. PW 1 also confirmed that the names of the respondents were not listed as beneficiaries to the estate of the deceased. It was the appellants who brought all these exhibits.
50. The duty was upon them to prove the genuineness, authenticity and the probative value of those exhibits and produce R.L No's 19, 7, P.A 41 & P.A 54. See *Morris Mwiti Mburugu v Dennis Mburugu* (2016) eKLR. See *Peter Nganga v Kenya RE* (supra).
51. Times without number, courts have held that when a title to land is under dispute every step or trail of the paper work towards its acquisition becomes material and that it is not enough for a title holder to wave a copy of title deed without proving that it was procured procedurally, lawfully and regularly. See *Munya Maina v Hiram Gathiba Maina* (2013) eKLR, *Samuel Kamwere v Land Registrar Kajiando* (2015) eKLR.
52. In this suit, the appellants had the onus to prove that material facts and their claim on how, when, and from whom they acquired the suit land. The respondents put them on notice that the persons who sold them the land lacked capacity to transact; that the land belonged to their late father; that they were beneficiaries to the estate thereof and that they were lawfully in occupation and not trespassers on their own land.



53. In a rejoinder to the issues pleaded the appellants stated that they bought the land as third parties from Caxton Mbae who had obtained the land from the legal administrator of the estate of the respondent's deceased father.
54. In cross examination, it was pointed out to the appellants through the confirmed grant that the grant did not include, the suit property that they were alleging to have formed part of the estate of the deceased.
55. The appellants did not call evidence to back their claim that they were genuine owners of the title to the land. In their written statements, issues for determination and the case summary, the appellants had stated they were shown a different site, in fact LR No Abogeta/L Kiungone/494", that they sold the said parcel of land believing it to be LR No 493 and that all along they had been under the mistaken impression that the said land was land parcel No 413 till they were sued by a person who allegedly brought parcel No 493.
56. The appellants aforesaid issues for determination No's 7&8 related to the mischief for not being correctly shown the land on the ground out of misrepresentations by the original owner.
57. All these were issues raised by the appellants in their pleadings and which they were required to prove before the trial court by calling evidence from whoever sold the land to PW1 and the alleged legal administrator of the estate of the deceased father a brother to the respondents.
58. Additionally, PW 1 & PW 2 never produced the sale agreements, the transfer forms and the letters of consent duly signed by the alleged legal administrator to the estate of the respondent's deceased father.
59. The said crucial evidence was within the knowledge and or custody of the appellants. The failure to produce the said left the trial court to make an inference against them that the documents if availed would have been prejudicial to the appellants.
60. The confirmed grant did not contain the title to the land in issue. It was not a question of doubting the order by the High Court. The authenticity, genuineness and the legality of the said documents was under attack by the respondents.
61. The appellants have complained that the trial court went out of its way to consider extraneous issues, circumstances and factors which did not form part of the pleadings, facts, evidence and injunction prayers based on a title deed obtained through a land initially belonging to the respondents, deceased father.
62. The respondents pleaded fraud, illegality and improper procedure on the part of the appellants in obtaining the registration. The appellants submitted the trial court should not have proceeded to grant the orders or prayers not sought by the respondents without a counter claim and where no evidence of fraud was produced. In *Mutsonga v Nyati* (1984) eKLR the court held that the legal burden was on the plaintiff to prove and show how he acquired the title.
63. There is no requirement in law that there must be a counterclaim for a court to invalidate a title deed under sections 80 of the *Land Registration Act*.
64. The only requirement under order 2 rule 4 of the *Civil Procedure Rules* is to specifically plead fraud and or illegality for an action for the recovery of land.
65. Once the respondents pleaded this and called evidence to point out the irregularities, the court was left with no option but to establish the facts, assess the evidence and apply the law.



66. With respect, it was the appellants who filed the suit alongside their list of documents and witnesses' statements and mentioned the persons who allegedly sold subsequently transferred the land based on a grant and a valid sale agreement, consents to transfer and the eventual transfer forms. There was evidence tendered that the respondents had sued Samuel Gitonga for vacant possession and succeeded. PW 1 was categorical that they had brought the suit herein so that the respondents could be evicted for the said Samuel Gitonga to take vacant possession based on the said decree.
67. Strangely the appellants did not call the said person as their witness or produce the decree in their possession.
68. A party coming to court must play by the rules and produce all the relevant evidence to prove the facts as pleaded and counter the facts as pleaded by the opposite party.
69. In the trial court the appellants were seeking for both eviction and permanent injunction based on a title deed, challenged by the respondents on account of fraud, illegality and improper procedure in its sale, transfer and registration.
70. Once the respondents called evidence to specifically point out the gaps on the pleaded three issues the court had to apply the law, as it is its duty to the facts and the evidence to rectify the situation through the cancellation of the title. The evidence was consistent, credible and pointing at the fact that the sale, transfer and registration was tainted with irregularities and was a product of an illegality. Consequently, the suit property had to revert to the rightful owner(s). See *Njoroge Nganga v Kenya Re (supra), Zelima Ogada v Fintel Ltd & another (supra)*.
71. In *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & another* (2013) eKLR Munyao J held it was not necessary under section 26 (1) of the *Land Registration Act* for the title holder to be a party to the vitiating factors noted thereon. This according to the court, meant that the title of an innocent person was impeachable so long as the same was obtained unprocedurally or through a corrupt scheme. See *Odbiambo* (civil appeal 52 of 2018) 2022 KECA 1025 (KLR) (23 September 2022) (Judgement).
72. In *Katende v Haridar Co Ltd* (2008) 2 E.A 173 the court held that an innocent purchaser was a person who honestly intended to purchase the property but did not intend to acquire it wrongly.
73. In this matter, the duty was on the appellants to prove that they purchased the property in good faith, did not know if there was fraud or illegalities; bought it for valuable consideration; that the vendor had a valid title; bought the land without notice of any fraud and were not party to any of the alleged fraud or illegality.
74. Further in this appeal the appellants held the title deed but were not put into possession after acquiring the title to the land. They claimed that what they initially thought to be the subject land was and remains occupied by the respondents.
75. In the appellants own pleadings, they stated that they suspected a mischief and or misrepresentation on the part of the initial seller(s). The appellant did not call the said seller(s) to testify. They have not produced any paper trail since 1997 after the purchase and or transfer made to show they undertook due diligence. This would have included a visit to the ground with a land surveyor at the time of the sale.
76. There was no evidence tendered that the appellants undertook due diligence prior to the sale. The exhibits produced for the confirmation of grant were not authenticated. The alleged legal administrator who was said to be alive at the hearing was not been called to testify.
77. In absence of all these necessary documents and evidence, the appellants could not be said to be innocent purchasers for value as held in *Moses Parantai & Peris Wanjiku Mukuru suing as the legal*



representative of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia (2020)
eKLR.

78. On the issue of the further evidence and the alleged bias, the two did not form part of the grounds of the appeal. The court has already pronounced itself on the additional evidence application and sees no reasons to divert from its previous findings.

79. In the premises I find the appeal lacks merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 5TH DAY OF OCTOBER, 2022

In presence of:

C/A: Kananu

Thangicia for appellant

Mukaburu for respondent

HON. C.K. NZILI

ELC JUDGE

