REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CIVIL APPEAL NO. 17 OF 2019

WW...APPELLANT

VERSUS

SEVERIN KINYANJUI NJOROGE...............................1ST RESPONDENT

JANE WAMBUI KIBARU..2ND RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate Court of Kenya at Thika (Mr. M.W Wanjala delivered on 8th February 2019 in Thika Civil case No. 708 of 2011)

BETWEEN

SEVERIN KINYANJUI NJOROGE..PLAINTIFF

VERSUS

JANE WAMBUI KIBARU..1ST DEFENDANT

WW...2ND DEFENDANT

JUDGMENT

The Appellant was the 2nd Defendant and the 2nd Respondent was the 1st Defendant wherein the 1st Respondent had filed **Civil Case No. 708 of 2011** at the **Chief Magistrates Court Thika,** against Defendants. The Claim sought for;

> ***a) That the Land Registrar Thika be ordered to lift any caution (restriction on Ruiru/Ruiru East Block [...], and [...]) and register the Plaintiff and cancel the names of 2nd Defendant from the register (Green card) and dispense with production of old title deeds in respect of Parcel number Ruiru/Ruiru East Block [...] and Ruiru /Ruiru East Block [...].***
>
> ***b) That the Defendants, agent, servant or anybody claiming under the Defendants be restrained by way of injunction from interfering with the said land AND the Plaintiff be allowed to deposit balance in Court of Kshs. 120,000/=.***
>
> ***c) That the Executive Officer to sign all transfer documents to facilitate transfer of the said land on behalf of the Defendants.***
>
> ***d) Costs of the suit be borne by the Defendants and any other order Court deem fit to grant.***

In his statement of Claim, the Plaintiff (1st Respondent) averred that on **4th October 2007**, he entered into an agreement with the 1st Defendant (2nd Respondent) for the sale of the suit properties **for Kshs. 320,000/=.** That on **4th October 2007**, he paid **Kshs. 100,000/=** and on **12th October 2007,** he paid another **Kshs.100,000/=** and a balance was to be paid upon attending the **Land Control Board** for **Consent.** He contended that the 1st Defendant (2nd Respondent) refused to attend the Board.

Further that on **2nd June 2009,** he visited the lands office with the original title deeds and he was informed they are genuine only to be told that the green cards reflect the name of the 2nd Defendant (Appellant). Further, that the 1st Defendant (2nd Respondent) informed him that there was a case filed in **Nairobi HCCC 2809/93,** by the 2nd Defendant , and the 2nd Defendant lost the case as per the Decree dated **29th December 2009.** That the Land Registrar ordered the 2nd Defendant (Appellant) to surrender the title deed for cancellation as per the letter dated **15th February 2010,** but he has refused to comply.

The suit was contested and the 2nd Defendant filed a Defence dated **20th February 2013,** and denied that she is of sound mind and averred that one **WKW,** the guardian and the manager of her Estate would represent her. It was denied that the Plaintiff (1st Respondent) was in possession of the of the suit property. The Court was urged to cancel the title dated **22nd July 2012,** registered in the name of the Plaintiff as the suit properties legally belong to the 2nd Defendant(Appellant).

From the proceedings of the Lower Court, the 1st Defendant's (2nd Respondent's) Defence was struck out from the records.

After Close of Pleadings, the matter proceeded by way of Viva Voce evidence wherein the Plaintiff (1st Respondent) called one witness and the Defendant(Appellant)called one witness

PLAINTIFF'S CASE (1ST RESPONDENT'S)

PW1 Severin Kinyanjui Njoroge, adopted his witness statement dated **17th October 2011,** and Replying Affidavit dated **3rd May 2011**. He produced the share Certificate **No. 3267** and **3268** as Exhibit 1 and testified that the same were issued by **Nyakinyua** and he got land as a result. That he bought land from the 1st Defendant and she gave him a Certificate and Clearance Certificate which are for parcels No. **3082** and **3079** That the two Clearance Certificates were issued on **28th September 2009** and were produced as Exhibit 2. Receipts from Nyakinyua as Exhibit 3. That they entered into a Sale Agreement with the 1st Defendant dated **4th October 2007,** and **13th May 2009,** which he produced as exhibit 4. He further produced titles for the two parcels issued on **2nd October 1992,** as Exhibit 5.

It was his testimony that he got his title through a Court Order, which was issued on **22nd June 2012**. He produced the Decree as exhibit 7. That there were two titles issued to **WW** on **26th August 1988,** and the Land Registrar ordered their recall and cancellation. Letter dated **15th February 2010,** was produced as Exhibit 8. That there were other cases in which the 2nd Defendant was suing the 1st Defendant and 2 others in **1993,** and that she was not of unsound mind in **1993.** That the Decree was never reviewed.

He further testified that the earlier Judgment as against the 2nd Defendant was set aside in his absence. That **Mr. W** had appeared without authority, but eventually got order to act on behalf of **W.** That he is not a shareholder of **Nyakinyua**, but only bought the land. That the titles issued to the 1st Defendant were issued in **1988,** and the one issued to the 1st Defendant was issued in **1992** and his in **2012.** That the 1st Defendant told him that there was case that had been dismissed and the High Court held that the land should remain in the name of the 1st Defendant. That the Share Certificates do not indicate parcel Nos and the register of **Nyakinyua Shareholders** did not indicate the two parcels numbers. That the 2nd Defendant averred in her affidavit that she did not have a title and cannot later claim that she had a title in **1988.** That the 1st Defendant's Defence was struck out.

DEFENCE CASE (APPELLANT)

DW1 WKW, testified that **WW** is her sister and she is of unsound mind. He adopted his witness statement dated **20th February 2013.** He produced his list of documents as Exhibit 1 to 9. That the parcels number have not been indicated in the register. It was his testimony that for one to get a title, a person was required to have a clearance certificate and he did not have the clearance letters, but he had a share certificate. That he filed the suit with a Power of Attorney and his sister has been of unsound mind from **1979**. That his sister was not represented in the High Court Case and she indicate in a Replying Affidavit that the title to the land had already been given to someone else. That they used to till the land, but they have never lived on it until they learnt the Plaintiff had taken it. That he did not participate in the High Court case.

After the *viva voce* evidence, the parties filed their written submission the and trial Court entered Judgment in favour of the Plaintiff (1st Respondent herein) and stated;

> "***The Court had occasion to look at the two title documents that were allegedly issued to WW on the 26th June 10988 (for parcel 3082) and on 28th June 1988(for parcel number 3079). Both Titles indicate at the left bottom corner on the 3rd and 4th pages that they were printed in 1990. Two hundred million copies were printed that year. The 2nd Defendant did not render an explanation to Court how the titles were issued before they were printed.***
>
> ***The above observations lead to a conclusion that unlike the plaintiffs case, it is probable that the defendant is not telling the truth as regards ownership of the two parcels of land herein. I am convinced that the Plaintiff's case has been proven to the required standards. I do hereby enter Judgment for the Plaintiff as per the prayers in the Plaint. The Plaintiff shall recover costs from both Defendants jointly and severally together with interest thereon at Court rates from the dates hereof***.

The Appellant was aggrieved by the above determination of the Court and Decree thereon and he has sought to challenge the said Judgment through the **Memorandum of Appeal** filed on **20th February 2019.**

The grounds upon which the Appellant sought for the Appeal to be allowed are;

> ***1. That the learned Magistrate erred in Law and in fact in holding that the Appellant had not proved on a balance of probability that she is the owner of the suit parcel of land despite the overwhelming evidence and uncontested documents tendered before him which sufficiently proved her case on a balance of probability that she is the registered owner of the suit property.***

2. That the Learned Magistrate erred in Law and in fact by not taking into consideration that the Appellants title to the suit property was a first registration issued in the year 1988 while the Plaintiff's title was issued in 2012.

3. That the earned Magistrate erred in Law and un fact in failing to consider that the 1st Respondent title as issued based on a Decree which was later set aside by the Honourable Court and thus the said title should be cancelled.

4. That the Learned Magistrate erred in law and in fact by holding that the Appellant's title was a forgery without subjecting the said Title for authentication yet an Original Title was tendered in Court.

5. That the Learned Magistrate erred in Law and in fact by relying on a Ruling of case Number CMCC Case No. 2809 of 1993 yet the same was not decided on merits but dismissed for want for prosecution yet the Appellant had satisfactorily explained to the Court the reasons why the matter was not prosecuted on time.

6. That the Learned Magistrate erred in Law and in fact by conclusively relying on the clearance certificate issued to the 1st Respondent as the only document to prove ownership disregarding the facts that there were two rival groups of Directors in Nyakinyua Company and the same could have been issued by either of them to try and defeat justice being done.

7. That the Learned Magistrate erred in Law and in fact by failing to consider the principle of first in time in that the Appellant had purchased the property known as Land reference Number Ruiru/Ruiru East Block [...] and [...] in 1988 whereas the 1st Respondent claim of the land is of the year 2009.

8. That the Learned Magistrate erred in Law and in fact by failing to consider the Appellants submissions and exhibited actual bias against the Appellant.

9. That the Learned Magistrate erred in Law and in fact by shifting the burden of proof to the Appellant herein.

10. That the Learned Magistrate orders have occasioned grave injustice

The Appeal was canvassed with by way of written submissions and the Appellant filed his written submissions through the **Law Firm of Bwogo Manoti & Associates Advocates** and submitted that the fraud alleged by the 1st Respondent was never proved and neither were the Appellant's documents found to be inauthentic or fraudulently acquired. That a letter to the Appellant purported to cancel the Appellant's documents is void as the Land Registrar has no power to cancel and or revoke title. That the Court ought not to have cancelled the Appellant's title for failure to produce a Clearance letter.

It was further submitted that the High Court already made a decision that the Appellant was of unsound mind and it was unjust for the trial Court to visit on the Appellant's mental incapacity as that was not within her mandate and thereby laying an unnecessary burden of proof regarding the Appellant's mental soundness. The Appellant relied on the case of ***Raila Amolo Odinga & Another….Vs…. IEBC & 2 Others (2017) eKLR*** and submitted that by failing to adduce evidence to show fraud and or forgery of the Appellant's documents, there was no basis for cancelling the title.

It was the appellant's submission that the trial Court erred in giving a lot of prominence to a Clearance letter/ Certificate that was issued in **2009** to the 2nd Respondent way after both parties had processed title deeds in their names. That the said Clearance Certificate did not serve any evidential purpose as the Court had been called upon to determine ownership and the Registrar never considered these documents when issuing titles. The Appellant urged the Court to find that she holds the indefeasible title to the suit property whose root had not been challenged..

It was further submitted that the Learned Magistrate applied the wrong principle of the evidential burden of proof by shifting it to her to demonstrate how she acquired her title when it was the 1st Respondent's duty to show that it was not genuine. That the trial Court erred in failing to appreciate the fact that the Appellant's title was issued back in **1988,** and no evidence adduced to warrant its cancellation. That the trial Court ignored the Principle of ***Stare decisis*** as set out in the case of ***Gitwany Investment Limited….Vs….Tajmal Limited & 3 others s(2006) eklr*** where the Court held that;

> ***"Like equity keeps teaching us, the first in time prevails so that in the event such as this one where , by a mistake that is admitted, the Commissioner of lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. it must prevail because without cancellation of the Original Title it retains its sanctity ."***

It was therefore the Appellant's submissions that she holds an indefeasible title to the suit property and no evidence has been adduced to warrant its invalidation.

The 1st Respondent through the **Law Firm of Ishmael & Co Advocates** filed his written submissions dated **1st April 2021,** and submitted that the submissions as filed are fatally defective having been filed by a stranger not on record.

It was submitted that the Appeal is unmerited and engaging the Court in a circus without any terminate position. It was further submitted that although the suit properties were intertwined, **L.R Ruiru/Ruiru East Block [...],** was not for consideration by the subordinate Court as the Court in **HCCC 2809 of 1993,** issued a Decree on **29th December 2009,** dismissing the Appellant and affirming that **Jane Wambui Kibaru** to remain as the registered owner. That the 1st Respondent sued the Appellant and the 2nd Respondent for transfer of the two properties and the 2nd Respondent upon whom **L.R [...],** was affirmed in her favour did not contest the title and thus its ownership should

not be reopened.

That the Appellant did not produced any document showing the trail of how she acquired the titles to the suit properties as the register produced in evidence was merely a piece of paper with people's names. Further that the witness in his evidence confirmed that the share certificate and ballot cards produced in evidence did not indicate the suit properties. The Court was urged to find that the Appellant failed to demonstrate the root of her title. That the Appellant's witness indicated that the document he was holding was printed by the Government Printers in **1990,** while the title was issued in **1988**. That the green cards produced show different dates in which each one was opened leading to the conclusion that the same were not authentic.

Further the 1st Respondent's submitted that the issue was not of titles issued earlier in time than others, but whether one holds a forgery as title. That the Appellant did not discharge her evidential burden of proof to demonstrate the title as was held in the case of ***Ahmed Mohammed Noor ...Vs… Abdi Aziz Osman*** where the Court held that;

> ***"…..on the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegation and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of eh election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof***.

The Court was further urged to take Judicial Notice of the fact that the Appellant has in other suits utilized share certificates numbers **[...] & [...]** and ballot **card No. [...]** purportedly from **Nyakinyua Investment Group,** to acquire other parcels of land, and it is impossible that the two Certificates can have one acquire four parcels of land and counting . The Court was therefore urged to dismiss the Appeal with costs.

The Court has also carefully considered the findings of the trial court, the submissions by the Counsels and finds as follows;-

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **Selle v Associated Motor Boat Co. [1968] EA 123 where the Court held that;**

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan(1955), 22 E. A. C. A. 270).***

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of ***Mbogo vs Shah (1968) EA at Page 93*** where the Court held that:-

> ***"I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

The Court will also take cognizance of the fact that it neither saw nor heard the witnesses and must give allowance to that.

It is not in doubt that both the Appellant and the 1st Respondent are laying claim to the suit property. It is further not in doubt that both parties have a title deed to the suit property. While the Appellant clams to have been allotted the suit property by **Nyakinyua Company Limited** and as per the title deeds produced in evidence, she was registered as the owner in **1988**. The 1st Respondent also produced in evidence a title deed that he bought the suit property from the 2nd Respondent, who was issued with a title deed dated **2nd October 1992**.

In the case of ***Hubert L. Martin & 2 Others …Vs… Margaret J. Kamar & 5 Others[2016] eKLR*****, the Court held that;**

> ***"A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder."***

From the above decided case, it follows that for this Court to make a decision on whether the trial Court erred in its Judgment and either dismiss or uphold the said Judgment, it must determine which party was able to show that it had a good foundation for the root of their title.

It is evident that both the Appellant and the 1st Respondent produced in evidence their share Certificates. That the Appellant produced in evidence two share certificates, a ballot card and a copy of the register of **Nyakinyua Investments Company** showing that she is a member, copies of a green card and title deeds. The 1st Respondent who testified that he bought the suit property from the 2nd Respondent also produced in evidence share certificates. Sale agreement showing he bought the suit property and a clearance letter dated 28th **September 2005,** in which the said **Nyakinyua Company Limited** indicated that after scrutinizing the documents, it has found that the suit properties were issued to the 2nd Respondent.

From the above, it is clear that while both parties have produced documents to show the root of their title, none of them called any official from the said **Nyakinyua Company** to shed more light on the situation. However, the 1st Respondent produced in evidence the Clearance Certificate wherein the Company was categorical that the 2nd Respondent was the person who was allotted the suit property. The Court having dealt with various cases that involves land buying Company is cognizant of the fact that a Clearance Certificate is necessary for the registration of a person as a proprietor. And the fact that the Company confirmed that the 2nd Respondent is the bonafide owner of the suit property it would only mean that the 1st Respondent was able to show the root of her title.

Further the Court considers that in showing the root of her title, a party ought to show the right procedure was followed and that the process did not have any flaws. The Court concurs with the observation of the trial Court that while the Appellant claims to have acquired title over the suit property in **1988,** in **1994** she was swearing an Affidavit stating that she found that the 2nd Respondent had already been registered as the proprietor, when she sought to have the suit properties registered to her. How could that be, while the 2nd Respondent was registered as a proprietor in **1992** and she claims to have been registered in **1994.** Further the trial Court which Court was the one that had the evidence and had the benefit at looking at all the original documents further notes that the Appellant's title deeds were printed in **1990,** while she was issued with the same before they were printed. In her submissions, the Appellant has not controverted these observations by the trial Court and therefore this Court has no reason to interfere with the trial Court's findings.

In her submissions, the Appellant rightfully submitted that if there are two competing title deeds, the first in time will prevail. It is not in doubt that the Appellant has produced in evidence title deeds issued in **1988.** However, the Appellant had the onus of proving the root of her title. She had the burden of proving that her title was acquired procedurally and without any fraud, which in the Court's considered view, she failed to prove. It follows that the same then seizes to be a case of competing title as one was not properly issued.

The registration of person as a proprietor vests in them the absolute rights and privileges .However this registration is not absolute as a person must prove that the said registration was one that was in accordance with the law and the laid down procedures. **Section 26(1)** of the **Land Registration Act** provides;

> ***"the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –***
>
> > ***(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or***
> >
> > ***(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.***

The law protects title to land, but there are two instances wherein such title can be challenged. The first is where the title is obtained by **fraud** or **misrepresentation**, to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The Court of Appeal in the case of **Munyu Maina…Vs.. Hiram Gathiha Maina [2013] eKLR,** held as follows:

> ***"We state 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. It is this instrument of title that is in challenge and 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, formal and free from any encumbrances including any and all interests which need not be noted on the register."***

Having found that the Respondents properly acquired the title to the suit property, and the Appellant having failed to satisfactorily explain the root of her title, the Court finds that the title held by the Appellant ought to be impugned as it was acquired **unprocedurally** having failed to satisfactorily show the root of her title, and the trial court did not err in finding for the 1st Respondent. It is apparent the documentations for allocation of the suit land to the Appellant are suspect.

Having now carefully **re-evaluated** and **re-assessed** the available evidence before the trial court and the **Memorandum of Appeal** together with the **written submissions,** the Court finds that the trial Magistrate arrived at a proper determination and this Court finds no reason to upset the said determination.

The upshot of the foregoing is that the Appellant's Appeal is not merited and consequently the instant Appeal is **disallowed** entirely and the Judgment and Decree of the trial Court is thus upheld.

On the issue of costs of this Appeal, it is trite that **costs** usually follow the event and the 1st Respondent being the successful party, the Court awards costs of the Appeal to him.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 3RD DAY OF JUNE 2021.

L. GACHERU

JUDGE

3/6/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Njuguna holding brief for M/s Chepngeno for the Appellant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

L. GACHERU

JUDGE

3/6/2021