

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELCLA NO. E009 OF 2023

JANE MOKOMBA GISORE (Suing as Legal Representative of the Estate of DAVID
NYAMWEYA) APPELLANT

VERSUS

MICHAEL NYAMWAYA NYAMWEYA RESPONDENT

JUDGMENT

*(Being an appeal against the judgment of Hon. C.A Ocharo, Senior Principal Magistrate,
delivered on 22 August 2023 in the suit Kisii MCELC No.140 of 2019)*

1. This has been a very long running land dispute. The parties first tussled before the Nyamira Principal Magistrates' court in the case Nyamira SPMCC No. 42 of 2010 wherein David Nyamweya (now deceased) sued his brother Michael Nyamwaya Nyamweya (the respondent herein). David Nyamweya claimed to own the parcel West Mugirango/Bosamaro/689 which he alleged to have purchased. He averred that he had invited his younger brother to the land and expected him to move to the ancestral land once he grew up. This ancestral land was said to be West Mugirango/Bosamaro 686 and 1624. It was said that the ancestral lands were subdivided by their mother among six sons and therefore the respondent needed to be evicted from his land. He commenced suit against the respondent because the respondent wished to bury his deceased daughter, Kemunto Michael, on this land and he wanted him stopped from doing so. The respondent's case was that the land was owned by their mother Kemunto Nyamweya and that somehow David had gotten himself registered without undergoing the process of succession. He claimed to have an equitable right on the land. The case was heard before the Magistrate in Nyamira and the suit was dismissed.
2. I see that the respondent proceeded to bury his daughter on the land as David failed to get an order of injunction. Aggrieved, David appealed to this court vide Kisii ELCA No. 4 of 2011. The appeal was heard by Okong'o J who delivered judgment on 26 June 2015. His view was that the trial court failed to determine the issues and directed that a new trial be conducted. At the time of delivery of the judgment, it was only the superior ELC that had

jurisdiction and he directed that the case be heard de novo in the ELC. The ELC (Onyango J) subsequently transferred the matter to the Magistrates' Court on 1 October 2019 for hearing as jurisdiction of Magistrates' Courts was settled.

3. In the lower court, the original plaintiff amended his plaint and he sought the following orders :
 - (i) An order of eviction to be issued against the defendant to move from land parcel West Mugirango/Bosamaro West/689 and take up his portion of land on the parcel West Mugirango/Bosamaro West/686.
 - (ii) Costs of the suit be granted.
 - (iii) Any other further relief as the court may deem fit to grant.
4. The respondent's defence remained that the original plaintiff's registration, obtained on 20 December 1989, was through fraud, as he got registration without filing succession in respect of the estate of Kemunto Nyamweya (their grandmother) who was the previous registered owner and who died in 1988. He denied that the original plaintiff had purchased the land. He admitted though that there was the parcel No. 686 still registered in name of Kemunto Nyamweya.
5. The original plaintiff (David Nyamweya) died in 2021 before the case could be heard and he was substituted by his wife, Jane Mokomba Gisore, the appellant herein. She testified on 17 August 2022. Her evidence was that the suit land was given to her husband by his grandmother though she also said shortly thereafter that her late husband bought the land from his late grandmother (Kemunto). She testified that the respondent ought to move to the land parcel No. 686 registered in name of their grandmother. Cross-examined, she testified that she got married into the home in 1981. She repeated that her late husband bought the land but she did not know when. She claimed that there was an agreement. She refuted that her husband got registered after the death of their grandmother. She acknowledged that as at 1989 both brothers occupied the land parcel No. 689. She elaborated that there were six sons, being her husband, the respondent, Bosire, Mayienga, Momanyi, and Mongare. The suit land was occupied by her husband and the respondent while the parcel No. 686 was occupied by her husband and the respondent, and Mongare. There was a third parcel occupied by Bosire, Mayienga and Momanyi. All these parcels were registered in name of Kemunto. She claimed that succession was done in Nyamira. She could not recall when the respondent came to be in possession of the suit land but she

said that it was before Kemunto died. She claimed that Kemunto gave her late husband a transfer before she died.

6. With that evidence the appellant closed her case.
7. The respondent testified that Elizabeth Kemunto Nyamweya was their grandmother. She died on 16 March 1988 while registered as owner of the suit land. He produced the burial permit to prove this. He testified that she had given to him and the original plaintiff the suit land. Cross-examined, he testified that he was born in 1971. He lived together with the original plaintiff since birth. He stated that their mother, Mellen Motika, is deceased. She was daughter of Kemunto. Regarding the parcel No. 686 he stated that he has not built a home there but they cultivate it. There is the other land, parcel No. 1634 occupied by his other three brothers. He however did not have anything tangible to show that their grandmother gave him the land.
8. DW-2 was Florence Kwamboka sister to the disputants. She testified that Kemunto had three pieces of land which she gave to the six brothers. She lived in the suit land with her grandmother. She acknowledged that the deceased original plaintiff is the one who mostly cared for their grandmother. Their mother, Mellen, lived in Kericho and they mostly took care of themselves. They lived in their grandmother's house. She found the house there and did not know if it was built by the original plaintiff. She stated that Kemunto married her mother (woman to woman marriage). She stated that her grandmother gave the original plaintiff and the respondent the land but she did not put this down in writing.
9. With that evidence, the respondent closed his case.
10. The judgment is rather long and winded. I see in the judgment some excerpts of evidence and recommendations made in mediation proceedings before the Assistant County Commissioner. Also in the judgment, the trial Magistrate formed the opinion that the appellant had not proved sale of the land. She indeed wondered how the late Kemunto, who died in 1988, could have resurrected in order to transfer the land to the appellant's husband. She castigated the Land Registrar, for failing to appear and give evidence at the hearing despite being summoned. She found that on a balance of probabilities the respondent must have been allocated a portion of the suit property but due to his tender age, the property was held in trust for him by the appellant. The trial court found that the appellant had failed to prove her case that her husband's title to the suit land was acquired lawfully. The court however did not order its cancellation. The trial Magistrate also declined to issue the order of eviction sought. She dismissed the appellant's case and ordered each party to bear their own costs.

11. Aggrieved, the appellant has preferred this appeal on the following grounds :

- (i) The learned trial magistrate erred in law and in fact by failing to recognise the sanctity of the said land held by the appellant as provided for under Section 25 (1) of the Land Registration Act.
- (ii) The learned trial magistrate deviated from the evidence adduced and imported evidence from the arbitration (sic) proceedings over the suit property before the Assistant County Commissioner Nyamira which had not been adopted by the Court contrary to the law.
- (iii) The learned trial magistrate erred in law in constructing a trust between the plaintiff and defendant over the suit land without a claim and supporting pleadings of trust over the suit land.
- (iv) The learned trial magistrate erred in law and in fact in impeaching the title held by the plaintiff on the basis of fraud without credible evidence of fraud being adduced as required in law.
- (v) The learned trial magistrate erred in law and in fact in delving into the legality or otherwise of the title held by the plaintiff over the suit property without pleadings and/or proper evidence thereby proceeding to blame the Land Registrar for failing to defend the title without the proper pleadings impeaching the title held by the plaintiff and contrary to the law.

The appellant proposes that the judgment of the trial court be set aside, that the title be protected and for an order of eviction against the respondent.

12. Both Mr. Begi, learned counsel for the appellant, and Mr. Soire, learned counsel for the respondent, filed their submissions to argue the appeal. I have taken the same into consideration.

13. In his submissions, Mr. Begi inter alia extracted part of the judgment to support the appeal, where the trial court stated as follows :

"It is not contested by any party or by the witness who testified that indeed the plaintiff was allocated the suit property by his grandmother. The only contestation is by the defendant who claims to co-own the suit land with the plaintiff on the allegations that their late grandmother gifted it to both. On this premise alone this Honourable court makes a finding that the plaintiff has proprietary rights over the piece of land, west Mugirango/Bosamaro/689."

14. He submitted that on the basis of her own finding, the court found that the appellant had proprietary rights over the piece of land West Mugirango/Bosamaro/689, but yet held that the title is impeachable on the basis of fraud. He also pulled out extracts from the mediation proceedings where a 'verdict' was reached to have the respondent cede 0.2 Ha of his land in West Mugirango/Bosamaro/686 so that he can get 0.2 Ha in the suit land which he occupied, and castigated the trial Magistrate from proceeding to make a separate finding.
15. Now, I already said that I found the trial Magistrates' judgment to be long and winded. In that unnecessary length, the trial court got convoluted. In that muddle, the trial court went to issues that were completely irrelevant and ought not to have been considered, including reference to the mediation proceedings. It is true that the matter had been referred to mediation (not arbitration) by Mutungi J, when the case was still in the superior court, but the proposals made within that mediation were not acceptable to the parties. That was the end of that process and indeed Mutungi J directed that the matter will now be determined by the court. It was erroneous to refer to evidence given in such process, as that is a voluntary closed process, where parties can in fact cede a lot of ground to settle the case. That process was abandoned when the proposed result was rejected and that was the end of it. It was erroneous for the trial court to pick excerpts from evidence tendered in that process and import them into the judgment.
16. Apart from this, the issue about the land being held in trust by the appellant's late husband was also erroneous. A finding of trust could only be made if there was a finding that the land was properly registered in name of the appellant's late husband. The court could not on one hand hold that the title was fraudulently procured and then also go on to say that it is held in trust.
17. The court was certainly wrong on those issues.
18. My own view of the case is that there is compelling doubt as to the veracity of the title in the name of the deceased husband to the appellant. He had of course pleaded that he purchased the land but no sale agreement was produced. It was also not clear how he obtained transfer to his name as the transfer instruments were never exhibited. We cannot run away from the fact that Elizabeth Kemunto died in the year 1988 and the appellant's husband obtained registration in the year 1989. Bar a very good explanation on how he got title, the only conclusion one can reach is that the title was procured fraudulently. No explanation was offered on the receipt of title after the death of Elizabeth Kemunto and the result I arrive at is that it was not a properly procured title. The correct path that ought

to have been taken after the demise of Elizabeth Kemunto was for the beneficiaries of her estate to file a succession cause so that her estate can be properly distributed. Even the arguments of how much land each is supposed to get in the three parcels that were left by Elizabeth Kemunto is a domain for the succession court.

19. The trial court in its verdict held that the appellant could not have obtained good title to the suit land. The next thing that the court ought to have done was to order the cancellation of that title so that it reverts back to the name of Elizabeth Kemunto, and be subjected to succession in the normal way. The court of course did not do so but I will proceed to cancel that title, which I hereby do, because it is clear that it is not a properly obtained title. I order the Land Registrar Nyamira or Kisii, depending on where the title is domiciled, to proceed and cancel the title of the appellant's late husband and have the title revert back to the name that was there before he obtained registration in his name.
20. The prayer of eviction that is sought by the appellant can of course not stand given that the title is nullified. The shares of the parties need first to be ascertained within a succession cause.
21. The long and short of it is that there was no merit in the case of the appellant before the trial court. This appeal also has no merit. It is hereby dismissed.
22. The last issue is costs. The appellant and respondent are indeed family. However, it is clear to me that the appellant's late husband was trying to steal a march on the respondent. The appellant, who is succeeding the estate of her late husband ought to have seen that there was really no good title obtained by her late husband. I will not disturb the trial court's order for each party to bear their costs, but for this appeal, it is dismissed with costs to the respondent.
23. Judgment accordingly.

DATED AND DELIVERED THIS 6 DAY OF NOVEMBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Begi for the appellant

Mr. Soire for the respondent

Court Assistant – Michael Oyuko