

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO.E044 OF 2024

JOSEPH WACHIRA THUMBI
APPELLANT

VERSUS

AGNES WAMBUI MANJERU 1ST

RESPONDENT

DIARIM ENTERPRISES 2ND

RESPONDENT

THE LAND REGISTRAR, RUIRU 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

(Being an appeal arising from the judgment and decree of Hon. C. Mwaniki (Principal Magistrate) delivered in Ruiru Magistrate’s Environment and Land Case No. E036 of 2023 on 17th April 2024)

JUDGMENT

1. This appeal emanates from the judgment of Hon. C. Mwaniki, Principal Magistrate in Ruiru CMELC Case No. E002 of 20213 where the Appellant filed suit against the Respondent claiming that he was the registered proprietor of UNSURVEYED PLOT NO. 12 designated as RUIRU/ MUNICIPALITY/441. It was his case that the 1st Respondent in collusion with the 3rd Respondent had fraudulently obtained a fake certificate of lease in respect of the suit property and sold it to the 2nd Respondent. He sought a declaration that he is the owner of UNSURVEYED PLOT NO. 12

designated as RUIRU/MUNICIPALITY/441, an order that the 2nd Respondent's title be declared null and void and that the same be cancelled, and a permanent injunction restraining the 1st and 2nd Respondents from in any way interfering with the quiet possession, utilization, occupation and ownership of the suit property.

2. The 1st Respondent filed a Statement of Defence dated 1st August 2023 denying the Plaintiff's claims against her and put the Plaintiff to strict proof. She maintained that she was allocated the suit property by the Government of Kenya and she followed the right process in acquiring the title thereto before she transferred it to the 2nd defendant.

The 2nd Respondent also denied the Appellant's claim through its undated Statement of Defence filed on 20th March 2023. It denied colluding with the 3rd Respondent to obtain a fake lease certificate and asserts that the documents used in the transfer were genuine.

3. In their Statement of Defence dated 10th July 2023, the 3rd and 4th Respondents denied the Appellant's claim. They stated that an allotment letter is not a title as envisaged by section 26 of the Land Registration Act. In particular, they denied the particulars of fraud attributed to them and put the Appellant to strict proof thereof. It was their position that any registration carried out by them was exercised diligently in accordance with the documents presented to their officers.

4. After hearing the parties, the trial magistrate delivered his judgment in which he dismissed the Appellant's case and affirmed the 1st Respondent's title stating that it had been validly and procedurally acquired. He further held that the transfer of the suit property to the 2nd Respondent was legitimate and legal.
5. It is the said judgment that triggered this appeal in which the Appellant cited the following 7 Grounds of Appeal:
 - i) *That the learned trial magistrate grossly misdirected himself by treating the Plaintiff's evidence and submissions superficially and consequently arrived at an erroneous decision.*
 - ii) *The learned trial magistrate erred in law and in fact in dismissing the Appellant's suit despite the fact that the Appellant had demonstrated sufficient evidence to the prayers sought in the Plaint;*
 - iii) *The learned trial magistrate erred in law and in fact by failing to appreciate that the 1st Respondent violated the law governing the acquisition of good title to land;*
 - iv) *The learned trial magistrate erred in law and in fact by failing to consider the validity of the allotment letters before making a determination on the issue of a valid transferrable interest to land;*
 - v) *The learned trial magistrate erred in law and in fact by failing to take into consideration the sworn testimony of the Land Registrar discrediting the allotment letter which was prima facie evidence that the same was obtained illegally.*

vi) *The learned trial magistrate erred in law and in fact by failing to take into consideration various factors which he ought to have taken into consideration thus arriving at an erroneous conclusion.*

vii) *The learned trial magistrate erred in law and in fact in failing to have due regard to the authorities cited by the Appellant and as such arrived at an erroneous finding on the issue of the allotment letter.*

6. He thus urged the court to re-assess the evidence before the trial court and set aside the judgment of the trial magistrate.

7. The appeal was canvassed by way of written submissions with brief oral highlights by the parties' counsels.

Appellant's Submissions

8. In his submissions dated 28th February 2025, learned counsel for the Appellant submitted that the Appellant was issued with an allotment letter dated 8th September 1993 for unsurveyed Industrial plot No. 12 -Ruiru. He subsequently paid the requisite charges on 11.6.2020. When he followed up in order to get a title, he was informed that the land had been registered in the name of another person. He wonders how the 1st Respondent was issued with an allotment letter over the same parcel of land a day after his allotment letter was issued. He also wonders why the 1st Respondent's payment was accepted yet he (Appellant) had already paid for the same plot.

9. It was his submission that this shows that the 1st Respondent's title was not obtained lawfully or procedurally and the same ought

not to be allowed to stand. He relied on the case of **Munyu Maina v Hiram Maina (2013) eKLR** for the proposition that when a registered proprietor's root of title is under challenge, it is not enough to dangle the instrument of title as proof of ownership, the owner must go beyond the instrument and prove the legality of how he acquired the title and show that it was acquired legally.

1st Respondent's Submissions

10. On his part, learned counsel for the 1st Respondent submitted that the Appellant did not prove the allegations of fraud against the 1st Respondent. He placed reliance on the case of **Vijay Morjarai v Nansigh Madhusingh Darabar & Another (2000) eKLR** for the proposition that fraud must be pleaded and proved.
11. It was his contention that the 1st Respondent went through all the processes before obtaining her title and therefore her title was lawful and valid. She produced an offer letter issued by Ruiru Town Council, a Letter of allotment dated 9.9.1993, and Part Development Plan. She thereafter made payment after which she was given a letter from the Director of Surveys and the Registry index Map on which her land was reflected. She was then issued with a lease and a Certificate of Lease. She later transferred the suit property to the 2nd Respondent.
12. On the other hand, the Appellant only produced a letter of allotment which does not confer ownership. Counsel placed reliance on the case of **Dr. Joseph Arap Ng'ok v Justice Moijo**

**Ole Keiyua & 4 Others C.A No. 60 of 1997 (Unreported)
Gladys Wanjiru Ngacha v Teresa Chepsaat and 4) Others
(2008) eKLR .**

13. He pointed out that the allotment letter produced by the Appellant was disowned by PW2, Edward Kariuki Muchai who purportedly signed it as he stated that at the time the said letter was written he was based at the coast and during that period all allotment letters were issued at Ardi House in Nairobi.
14. He submitted that the trial court had considered the documents produced by the appellant as against those produced by the Respondents and held that the Respondents documents of title were more superior. He submitted that under Section 26 of the Land Registration Act a title could only be challenged if it was obtained by through fraud or misrepresentation or where it was acquired illegally, unprocedurally or through a corrupt scheme, none of which had been established by the Appellant.

2nd Respondent's Submissions

15. Learned counsel for the 2nd Respondent submitted that the Appellant did not adduce sufficient proof that he was the lawful owner of the suit property. It was his submission that an allotment letter without more is insufficient to confer ownership. He relied on the case of **Wreck Motor Enterprises v Commissioner of Lands & 3 Others (1997) eKLR** where the court held that an allotment letter does not amount to title to land, and a party who

holds only an allotment letter must at the very least, demonstrate that he has fulfilled all conditions attached thereto including payment of the requisite fees and issuance of a title deed.

16. It was his contention that the Appellant had not demonstrated that he had complied with all the conditions in the letter of allotment.
17. He submitted that no fraud had been pleaded or proved against the 2nd Respondent and that the transfer of the suit property from the 1st to the 2nd respondent was lawful. He relied on the case of **Elias Mukonji v Boniface Mungai Gachuchi (2015) eKLR** where the court held that where a registered proprietor lawfully transfers land to another, without notice of fraud or illegality, the transferee obtains a good title.

ANALYSIS AND DETERMINATION

18. This being a first appeal, my primary role as a first appellate court is to reevaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial magistrate are sound or not and give reasons either way. See the case of **Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212**.
19. Similarly, the principle was espoused in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, as follows:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to

this 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..."

20. In essence, the role of this court is not to merely echo the conclusions of the lower court but to reexamine the evidence in its entirety, all the while being ever mindful of the inherent limitations imposed by the reliance on the record alone.

21. Having considered the Memorandum of Appeal, Grounds of Appeal and the entire Record of Appeal the following issues fall for determination:

i) Whether the Appellant proved the allegations of fraud against the Respondents

ii) Whether the Appellant was entitled to the reliefs sought in the Plaint.

iii) Who should bear the costs of the appeal.

22. Section 107 of the Evidence Act Cap 80 of the Laws of Kenya provides that:

"107 Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Additionally, sections 108 and 109 of the same Act provide that:

“108 Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person”

23. Furthermore, as was stated in the case of **Vijay Morjarai v Nansigh Madhusingh Darabar & Another (2000) eKLR** allegations of fraud must be pleaded and proved.
24. At paragraph 8 of the Plaintiff, the Appellant alleged that the 1st Respondent in collusion with the 3rd Respondent fraudulently obtained a fake leasehold title in respect of the suit property and sold the same to the 2nd Respondent who is currently in occupation and possession. The particulars of fraud were itemized as follows:

“Particulars of fraud by the Defendants

- a. Forging ownership documents and particularly the allotment letter in respect of the suit property;*

- b. Forging transfer documents in respect of the suit property;*
 - c. Making illegal entries against the suit land;*
 - d. Illegal acquisition of the title deed to the suit property;*
 - e. Colluding jointly with the sole intention of defrauding the Plaintiff;*
 - f. Illegal occupation of the suit property by the 2nd Defendant;*
25. From the evidence on record, the 1st Respondent produced a letter of allotment dated 9.9.93 and a copy of the Part Development Plan he was issued with after making the necessary payment. He also produced a copy of the Certificate of lease and demonstrated that he was in occupation of the suit property.
26. The Appellant did not produce any evidence to show that the 1st Respondents documents were forged or that the entries in the register were forged. If any anything, it is the Appellant's letter of allotment that was said to be doubtful as it was disowned by the person who is alleged to have signed it.
27. Based on the testimonies of the Appellant and the Respondents as well as the documents produced by the parties, the learned trial magistrate held that the Appellant had failed to prove the allegations of fraud against the Respondents and dismissed the Appellant's case. He also held that the suit property was lawfully acquired by the 1st Respondent who transferred it to the 2nd

Respondent. He concluded that the 2nd Respondent had acquired a valid title.

28. Having carefully evaluated the evidence on record, I am unable to fault the trial magistrate for concluding that the Appellant had failed to prove the allegations of fraud against the Respondents.
29. With regard to the reliefs sought by the Appellant in his Plaint. These were contingent upon a valid underlying claim. In support of his case, the Appellant only produced a letter of allotment and receipt for payment made more than 27 years later. The Appellant also failed to demonstrate that he had ever taken possession of the suit property. In the absence of proof of ownership, the court cannot grant the reliefs sought by the Appellant.
30. Flowing from the above analysis, the Appellant failed to prove his case to the required standard. He neither proved fraud against the Respondents nor did he prove that he was the lawful owner of the suit property.
31. Consequently, it is my finding that there is no sufficient justification to interfere with the decision of the trial magistrate. It follows inexorably that the appeal lacks merit and it is hereby dismissed with costs to the Respondents.

Dated, signed and delivered at Thika this 16th day of December 2025.

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J. M ONYANGO
JUDGE

In the presence of:

1. Mr Moriti for Mr Kimani for the Appellant
2. Ms. Kabinu for the 1st Respondent
3. Ms Matengo for the 2nd Respondent

Court Assistant: Hinga

ORIGINAL