



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NYAHURURU

ELC NO. 17 OF 2017

(Formerly ELC (NAKURU) 131 OF 2014

ANASTASIA KINGORI.....1st APPELLANT

JORAM WAMBUGU.....2nd APPELLANT

VERSUS

STEPHEN MUIKAMBA.....RESPONDENT

(Being an Appeal from the Judgment delivered on the 3rd September, 2014 by Honorable D. K Mikoyan

– the Principal Magistrate Nyahururu Senior Principal Magistrate’s Court Civil case No. 72 of 2011 –

“STEPHEN MUIKAMBA – VS – ANASTACIA KINGORI and JORAM WAMBUGU”

JUDGEMENT

1. This is an Appeal lodged by the 1st & 2nd Appellants vide a Memorandum of Appeal dated 14th January, 2015 and filed on the 15th January, 2015. From the records of Appeal, the Appeal was initially filed before the Environment and Land Court Nakuru being ELC No. 131 of 2014. By that time, it will be noted the Environment and Land Court had not yet been established at Nyahururu and all Appeal cases were being referred to the nearest ELC court by then being at Nakuru.

2. The Appeal emanates from the decision of the Nyahururu Principal Magistrate Court in PMCC No. 72 of 2011 delivered on 3rd September, 2014. The 1st and 2nd Appellants being aggrieved by the decision, instituted the present Appeal before this honorable court hereof.

3. From the records, it appears that the court file for the Principal Magistrate Court which supposedly had been forwarded to Nakuru had gone missing. It could not be traced despite all efforts made. Indeed, it compelled the honorable court to summon the Executive Officer, one M/s. Grace Wangechi of the Chief Magistrate’s court at Nakuru to provide full explanation of the whereabouts of the court file. On 10th November, 2018, the Executive Officer appeared in court and explained that vide a letter dated 26th September, 2016 the original file had been sent back to Nyahururu from Nakuru although the movement book register for year 2016 could not be located. Through a letter dated 16th May, 2017, the Nyahururu law courts acknowledged receipt of the court file from Nakuru and in accordance with the system advised that the matter be allocated a new case number.

4. Arising from this predicament and in the given circumstances that the original court file could not be traced, the parties were left without any appropriate alternatives. Ideally, by consent of all the parties in this matter agreed mutually that the Appeal proceeds on without the original court file and that parties rely on the records of Appeal. Pursuant to this, the Appeal was admitted as being ready for hearing. I felt it needful to recap on these preliminaries in detail for avoidance of any doubt on how the Appeal was managed from the very onset. It is also intended to avoid causing any prejudice to any parties hereof.

5. From the Memorandum of Appeal, the Appellants hereby do challenge the Judgment of the trial court on the following six (6) grounds inter alia:-

i. The Learned trial Magistrate erred in law and fact in finding that the Court did not have jurisdiction to order the cancellation of a title deed.

ii. The Learned trial Magistrate erred in law and fact in failing to find that there was a Sale Agreement between the 2nd Appellant

and the Respondent for the sale of the Suit property.

iii. The Learned trial Magistrate erred in law and fact in failing to find the Respondent's title deed was acquired through fraud as pleaded in the Plaintiff.

iv. The Learned trial Magistrate erred in law and fact in failing to find that the 1st Appellant had an overriding interest over the suit property by virtue of occupation and which had been established.

v. The Learned trial Magistrate erred in law and fact in dismissing the Appellant's Counter Claim despite there being overwhelming evidence both oral and written in support of the same.

vi. The learned trial Magistrate erred in law and fact in making a Judgment which was against the evidence.

6. The Appellants thus sought for;

i. The Appeal to be allowed with costs.

ii. The Judgment delivered by the trial Court Principal Magistrate Civil Case Nyahururu No. 72 of 2014 on the 3rd April, 2014 be set aside.

iii. The Appellant's Counter Claim be allowed with costs to the Appellants.

7. Subsequently parties agreed that the Appeal be disposed of by way of Written Submissions which were to be highlighted upon compliance. The Appellants' Written Submissions dated 9th April, 2019 was filed on the equal date whereas the Respondent's written submissions dated the 10th June, 2019 were filed on the 11th June, 2019.

The 1st and 2nd Appellants Submissions.

8. The 1st and 2nd Appellants' Submissions was that they had been the 1st & 2nd Defendants in the Nyahururu Senior Principal Magistrate's Court No. 72 of 2011 wherein vide a decision of the trial court of 3rd September, 2014 their defence and Counter Claim, by the 2nd Defendant had been dismissed.

9. They submitted that they would rely entirely on their written submissions filed in the lower Court on dated the 12th March, 2014 and filed on the 14th March, 2014 as well as the decisions cited therein and in particular the **Nakuru High Court Civil Appeal No. 50 of 2016 Joram Wambugu -Vs- Duncan Kariuki Kinyanjui** whose facts were almost similar to the facts in the instant case and where the Appeal was allowed, on the Claim for the cancellation of the title deed.

10. Further, to support their case, the 1st & 2nd Appellants held that the Respondent did not exhibit a Sale Agreement duly executed between himself and the 2nd Appellant who was the original and legal registered owner to the suit land. According to the Appellants, a Sale Agreement would prove indeed that the Respondent genuinely and legally bought the land from the 2nd Appellant. Procedurally, the Appellants submitted that by failure to produce a Sale Agreement, the Respondent offended the mandatory Provisions of Section 3 (3) of the Law of Contract Act a fact which was never considered by the trial court while delivering of its Judgment.

11. It was therefore the Appellants submission which was confirmed by the Respondent that he never entered into any Sale Agreement with the 2nd Appellant for the purchase of the suit land.

12. The 1st & 2nd Appellants submitted that although the Respondent was issued with official receipts allegedly by a land selling agent, the correct parcel number was not reflected on it. They held that although Respondent confirmed to having bought Plot No. 40 yet the title deed he held was in reference to Plot No. 42 as per the old numbering system. That indeed the Respondent had confirmed that he never dealt with the 2nd Appellant, whom he describes as a Land Commission, but that he had dealt with other 3rd parties who were never summoned as witnesses to corroborate his evidence.

13. It was the submission of the Appellants that the Respondent never appeared nor obtained a letter of consent for transfer from the Land Control Board nor appeared before an Advocate to witness to duly execute transfer forms for the land. That there was no proof of payment of registration fees or the stamp duty. It was their contention that the District Land Registrar when called to testify failed to produce any relevant documents pertaining to the ostensible land Sale transaction, being the transfer forms, Letter of Consent and receipt to support the transfer of the suit land allegedly from the 2nd Appellant to the Respondent.

14. The 2nd Appellant submitted that he had indeed sold the suit land to the 1st Appellant and a duly executed Sale Agreement which was produced as an exhibit. He also produced a letter of Consent to transfer the land dated 23rd March, 1999. It is their further Submission that the 1st Appellant took possession of the suit land from the year 1997 and she had fully developed it a fact which was confirmed by the Respondent as he was seeking for orders of her eviction from the Land. The Appellants hold that they had pleaded and proved fraud in how the Respondent obtained the title deed to the suit land. Thence, the Appellants submitted that the trial court erred in disallowing the prayer sought for the cancellation of the Certificate of title deed that was irregularly and illegally held by the Respondent. They therefore prayed for their Appeal to be allowed, the Respondent's suit to be dismissed with costs and the 2nd Appellant's Counter Claim to be allowed.

The Submissions by the Respondent

15. The Respondent's submissions dated 10th June, 2019 and filed on the 11th June, 2019 critically responded to all the six (6) grounds of Appeal as framed up by the 1st & 2nd Appellants in their Memorandum of Appeal as follows:-

16. On the 1st ground, the Respondent submitted that the trial Magistrate Court had jurisdiction to cancel a Certificate of title deed to the suit land. To support his case, the Respondent he cited a ruling in the decided case of **Amos Tirop Matui & Ano Vs- Festus K. Kiprono [2018] eKLR**. Interestingly, the Respondent seems to be concurring with the position taken by the Appellants in conceding to this ground of Appeal.

17. As to the 2nd ground, the Respondent submitted that he had produced the original title deed he had acquired upon the purchase of the suit land which title was accompanied by a Certificate of official Search from the Land registry, Nyahururu. To buttress his case, the Respondent cited the provisions of Section 26 (1) of The Land Registration Act to state that he had acquired the Certificate of title deed legally and there was no proof of fraud as pleaded by the Appellant. It was his assertion that failure to produce a Sale Agreement and consent could not be a ground to negate his Certificate of title. That the Land Registrar had testified in court to this regard wherein he had attested that there had not been any irregularity with the Certificate of title deed for the Respondent. The Respondent cited the case of **Peter Njoroge Nganga Vs- Kenya Reinsurance Corporation Ltd (Statutory Manager for United Insurance Co) & Another [2018] eKLR** to support the position on the legal rationale and the purposes of the provisions of Section 26 (1) of The Land Registration Act.

18. On the 3rd ground raised in the memorandum of Appeal, on the allegation of fraud of the Certificate of title deed being held by himself, the Respondent submitted that the 2nd Appellant did not give enough evidence before the trial court. That there was no evidence to warrant the title deed held by him to be assumed have been acquired through fraudulent means. It was his submission that the evidence by the 2nd Appellant was purely circumstantial and based on presumptions. To buttress that view, he cited the case of **Koinange – vs- 12 others –Vs- Koinange (1986) KLR 23, pg. 45** which was based on the rule of evidence to the effect that whoever asserts a fact was under an obligation to prove it in order to succeed. Ideally, he held that he who alleges fraud had the burden to discharge it.

19. In relation to ground number 4 of the Memorandum, the Respondent cited the provisions of Sections 24 (a), 25 & 28 of the Land Registration Act to support and justify the legal efficiency and effect of registration of a proprietor of land. He held that these provisions granted one the absolute proprietorship to the land, hence there was no overriding interest established by the 1st Appellant on the suit land.

20. As to the 5th ground on the Memorandum, the Respondent asserted that the Counter Claim by the 2nd Appellant was statute time barred. He argued that the suit land having had been bought on the 15th May 2012, over 10 years had lapsed since the cause of action accrued to the 2nd Appellant. That a Counter Claim being an action brought by a Defendant after an original claim had been brought by the Plaintiff was subject to the statutory framework on limitation of action. To support this argument he has relied on the provisions of Section 35 of the Limitation of Actions Act. In other words, the Respondent held that an action based on fraud, being a tort, was actionable within three (3) years of accrual of the cause of action by virtue Section 4 (4) of the said Act. He relied on the case of **Gladys Njeri Krugumi –Vs- Langata Development Limited & Another [2018] eKLR**.

21. In conclusion therefore the Respondent contended that the 1st & 2nd Appellants did not prove their case through the evidence adduced and therefore the Appeal ought to be dismissed with costs to the Respondent. He prayed that the judgment delivered by the trial court on 2nd September, 2014 be upheld.

Analysis and determination

22. I have considered the Appeal herein, Counsel's submission and the annexed authorities. Conscious of my duty as the first appellate Court in this matter, it is my duty to re-evaluate and access the evidence adduced on record in the trial court where it becomes necessary. However, I am also reminded that as an appellate court I will normally not interfere with the trial court's finding of facts unless it is based on no evidence or on a misapprehension of evidence or if the trial court is shown demonstrably to have acted on wrong principles in reaching that finding. As properly stated out in the cases of **Selle & Ano Vs- Associated Motor Boat Co. Ltd & others 968/ EA pg 126** where it was held as follows;

“I accept Counsel for the Respondent's proposition that this Court is not bound necessarily to accept the findings of fact by the 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 bounding necessarily to follow the trial court Judge findings of fact of it appears either that he was clearly failed on some point to take account of particular circumstances or probability 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”.

23. In making the final determination in this Appeal, the Court will be guided by the Principles of preponderance of probability, a point which was also upheld in the case of **Joseph Njuguna Mwaura [2013] eKLR**- to the effect that “ *it is common place that the first appellate court is mandated to re- consider and re - evaluate on record*”

24. The defence by the 1st Appellant is dated 16th June, 2011 and filed before the trial Court on the 17th June, 2011. From the filed defence, the Appellant denied that the Respondent had any registrable interest over the suit land or right of possession. She further held that:-

(a) Vide a Sale Agreement dated 23rd September, 1996 she purchased a Plot No. 42 (old number) Land Reference No. Nyandarua/Oljero-Orok/Salient/8794 from its then registered proprietor one Joram Wambugu at a sum of Ksh. 35,000/=, monies which she paid

in full.

(b) That she had been shown the suit land by the 2nd Appellant wherein she took vacant possession of it. She fully developed it by planting trees which were now mature, and had built an eight (8) roomed house on it where she resides with her family.

(c) On 25th March, 1999 the said Joram Wambugu, the 2nd Appellant obtained a consent letter for transfer of the suit land to her.

(d) She was unable to raise the amount required for the transfer of the suit land but she had been in quiet and peaceful occupation of the suit land believing that the same was still registered in the names of the seller, the 2nd Appellant

25. Additionally, the 1st Appellant contended that the Respondent had never at any time taken possession of the suit land nor claimed ownership. Finally, the 1st Appellant pleaded that she was reliably informed by the 2nd Appellant herein that the Respondent had never purchased any land from him and that the Respondent must have acquired the title deed for suit land through fraudulent means. That was the reason as to why the 1st Appellant had felt it needful to enjoin the 2nd Appellant as party to this suit.

26. On the 15th January 2015, the 2nd Appellant who initially had not been party to the suit had filed an application to be enjoined. Subsequently he had prepared a statement of defence and Counterclaim dated 12th April, 2012 and filed on the 15th January, 2015. The Respondent also proceeded on to file an amended Plaintiff and verifying Affidavit dated 21st March, 2012 and filed in court on 23rd March, 2012.

27. From the defence and Counter Claim, the 2nd Appellant submitted that he was the absolute registered proprietor of all that parcel of land known as LR. No. Nyahururu/ Oljoro-Orok/Salient/1757 which he had later caused to be sub-divided into 14 parcels all measuring 0.04 ha for purposes of sale. That he had subsequently sold all the resultant sub-divisions being Land parcels No. Nyahururu/ Oljoro Orok/Salient/ 8783 to 8766, to different persons for a consideration. Parcel No. Nyahururu/ Oljoro Orok/Salient/ 8794 being the suit property which he had sold to the 1st Appellant herein. That the relevant letter of consent for the transfer of the land to the 1st Appellant from the Land Control Board had been obtained on the 25th March 1999 wherein he had allowed the 1st Appellant to take vacant possession and occupy the land.

28. The 2nd Appellant contended that he had never consented to the sale and transfer of land to the Respondent who was unknown to him and that he was never at any given time a land commission agent as claimed by the Respondent. The 2nd Appellant was therefore surprised to learn that the Respondent had become the legally registered proprietor to the suit land on 1st November, 2001. The 2nd Appellant contends that the said registration must have been obtained through fraud as he had never consented to it. He outlines the particulars of fraud ostensibly precipitated by the Respondent in the Defence.

29. In his Counter Claim the 2nd Appellant affirms to have been the legal registered owner to the suit land and having sold it to the 1st Appellant on 23rd September, 1996. He contended that the 1st Appellant paid up in full the purchase price for the said suit property and he obtained a letter of consent to transfer from the Land Control Board on 25th March, 1999. Indeed, the 2nd Appellant asserts that the 1st Appellant was already in occupation of the suit land with his consent.

30. In the final analysis, he prayed for the declaration of the ownership of the land, the cancellation of the title deed fraudulently issued to the Respondent being entries No. 2, 3 & 4 of the register and costs and interests of the suit.

The Respondents Case

31. The Respondent's case on the other hand was that he had instituted this case as a, vide a Plaintiff and a verifying affidavit dated 11th February, 2011 on the 26th April, 2011. From the Pleadings, the Respondent had purported to be the registered proprietor to all that parcel of land known as Land Reference No. Nyahururu/ Oljoro Orok/Salient/8794 measuring 0.044 hectares or thereabouts, herein after called the suit land

32. In his testimony before the trial court he testified that he had been informed of the plots for sale in Nyahururu by one James Maina Kehongi. According to the Respondent he was informed that Mr. Kehongi was the brother to Joram Wambugu, – the 2nd Appellant herein. He was shown the plot which is situated towards Nairobi at site scheme. He came to learn that the plots were being sold by the 2nd Respondent herein. Mr. Kehongi took the Respondent to Mr. Wambugu but there were other people present in the office. He made some payments of Ksh 5,000/= and was issued with a receipt. In total he paid up a sum of Ksh 30,000/= as consideration for the Plot No. 40. That this payment was through his advocate M/S Waithaka Mwangi Advocate wherein he was issued with the receipts by a company trading in the names and style of Nyahururu Outlet Agencies

33. That after making payment of the full consideration, the Respondent had been taken to the site to view the plot by Mr. Kehongi and a lady worker from the aforementioned company. He was shown the Plot No. 40 on the sketch Map. According to the Respondent though he was shown Plot No. 40, he was buying Plot No. 42. He did not take possession. In the course of time the company was closed down and so was his Advocate's offices. Later, they had proceeded with the land transaction with Mr. Kehongi. On 1st November, 2001 he was issued with an original Certificate of title deed to Plot No. 40. On close scrutiny, he realized that the title had an error as the names read Stephen Muikamba instead of his actual names Stephen Muikamba Murage.

34. He had returned it for rectification and on 18th March 2010 wherein he had received the corrected one. During the same year, he proceeded to develop the plot No. 40 but was accosted by someone who informed him that the Plot was the wrong one. He was thus shown where Plot No. 42 was situated, but realized that the 1st Appellant had already taken it up possession of the suit land and built some

structures on it. He called Mr. Wambugu through his cell phone who denied knowledge of such possession. It was thus for that reason that he decided to seek legal redress.

35. It was therefore the contention of the Respondent that the 1st Appellant, on an unknown date had entered into the suit land without the Respondent's consent nor knowledge where she had erected a residential house thereon and continued to remain on the land claiming a Purchaser's Interest against one Joram Wambugu who had posed as a land commission agent during the Sale transaction of the suit land by the Respondent.

36. The Respondent claimed that the 1st Appellant had no registrable interest over the suit land and that he was entitled to an order of vacant possession. He submitted that he was entitled to have the Appellant's forcible eviction as there was no privity of contract between the Appellant and the Respondent.

37. In a nutshell, the Respondent sought the following orders from the trial court:-

a) An Order of delivering a vacant possession of the Land Reference No. No. Nyahururu/ Oljoro Orok/Salient/ 8794 by the Defendant (now the 1st Appellant) or her forceable eviction.

b) Costs and interest of the suit

38. Based on the Memorandum of Appeal, the Submissions by both the Appellants and the Respondent, the numerous authorities cited hereof and the applicable laws, I find that in order to arrive at an informed decision, I must address myself on the following salient issues;

(a) Whether the trial Court has jurisdiction to cause any cancellation of the title deed for the suit property – being Land Reference Number No. Nyahururu/ Oljoro Orok/Salient/ 8794.

(b) Whether the Respondent acquired the suit land in a legally accepted manner from the 2nd Appellant hence became the absolute legal owner to it.

(c) Whether the Certificate of title held by the Respondent was acquired through fraud as pleaded in the Plaint.

(d) Whether the 1st Appellant had an overriding interest over the suit property by virtue of occupation and which had been established.

(e) Whether in dismissing the Appellant Counter Claim despite there being overwhelming evidence both oral and written in support of the same.

(f) Who is entitled to the costs of the Appeal.

39. On the 1st Issue as to whether the trial Court had jurisdiction to hear and determine an issue of cancellation of the title deed. The issue of jurisdiction of a court is now trite law in the celebrated case of "**The Owners of Motor Vessel "Lillian S. –Vs- Caltex Oil Kenya Ltd (1989) KLR 1653 CA"** where Justice Nyarangi held:-

Jurisdiction is everything, without it a Court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it is without jurisdiction".

40. The jurisdiction of the ELC is founded under the Provisions of Article 162 (2) (b) of the Constitution of Kenya which provides that this court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, the provisions of Section 13 of the Environmental and Land Court Act expounds on the jurisdiction of this court as follows:-

(1) *The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

(2) *In exercise of its jurisdiction under Article 162 (2) (b) of the constitution the court shall have power to hear and determine disputes.*

(a) *Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuation, mining, minerals and other natural resources.*

(b) *Relating to compulsory requisition of land.*

(c) *Relating to public, private and community land and contracts closes in action or other instruments granting any enforceable interests in land.*

(d) *Any other dispute relating to environmental and land.*

The Environmental Land Court Act grants jurisdiction to the ELC under Section 13 (7) to do the following, thus:-

“..... to make any order and grant any relief as the Court deems fit and just including:-

- (a) Prerogative orders*
- (b) Award of damages*
- (c) Compensations*
- (d) Specific performance*
- (e) Restriction*
- (f) Declaration or*
- (g) Costs*

41. Under the provisions of Section 26 of the Act the same provides that for the sitting of the Court thus:-

(1) The court shall ensure reasonable and equitable access to its service on all counties.

(2) A sitting of the Court may be held at such places and at such times, as the court may seem necessary for the expedient and proper discharge of its function under this act.

(3) The Chief Justice may by notice in the Gazette, appoint certain Magistrates to preside over cases involving environment and land matters of any area of the county.

(4) Subject to Article 169 (2) of the Constitution the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle:-

(a) Disputes relating to offences defined in any Act of Parliament dealing with environment and land.

(b) Matters of Civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrate's Court Act.

(5) Appeals on matters from the designated Magistrate's Court shall lie with the ELC Section 9 of the Magistrate Court Act deals with claims in employment labour relations, claims, land and environment cases.

42. The said provision of the law is to the effect that A Magistrate Court shall in the exercise of the jurisdiction conferred upon it by Section 26 of the Environment and Land Court Act (Cap 12 A) and subject to the pecuniary limits, have jurisdiction to hear land matters.

43. Under Sections 7 (i) of the Magistrate's Act, the Magistrate can hear and determine claims relating to; environmental, planning and protection climate issues, land use planning, title and tenure, boundaries, rates, rents valuations, mining, minerals and other natural resources. (ii) Compulsory acquisition of land (iii) Land administration and management (iv) Public, private and community land and contracts, closes in actions or other instruments relating any enforceable interests in land and (v) environment and land generally.

44. Section 80 of the Land Registration Act provides for the rectification of the register by Order of Court. The Section provides that subject Sub-section (2) the Court may order the rectification of the register by directing that any registrations be cancelled or amended if it is satisfied that any registration was obtained made or omitted by fraud or mistake and that the register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission fraud or mistake in consequence of which the rectification is sought, or cause and such omission, fraud or mistake or subsequently contributed to it by any act, neglect or default.

45. Section 2 of the ELC Act defines **“the Court”** to mean ELC established by the Act and other Courts having jurisdiction on matters relating to land. This includes the Magistrates Court. Therefore the position taken by the trial court in this matter that it had no jurisdiction to cancel the title deed was erroneous. I do affirm that the law is not silent on the powers of the Magistrate's court in rectification of register. The power of Magistrate's Court in respect to title to land are very wide and extensive. The court has jurisdiction to cancel title and rectify a register in compliance with the provisions of Section 80 of the Land Registration Act is clearly spelt out. So long as the value of the subject matter falls within the pecuniary jurisdiction of the Court.

46. Although no valuation report on the suit land was produced to determine the value of the land, but taking that the purchase price was by then a sum of Ksh 30,000/= in the year 1996, the Pecuniary limit for a Magistrate Court is Ksh 20,000,000/=. From the afore stated, the matters pertaining to the suit land was well within the jurisdiction of the trial court as conceded by the Respondent. Hence that limb of the Appeal which apparently the Respondent seem to be conceding succeeds.

47. On the second issue as to whether the Respondent acquired the suit land in a legally accepted manner from the 2nd Appellant hence became the absolute legal owner to it. I find that this is a very central issue for determination in this proceedings and the Appeal. The

provisions of Section 7 of the Land Act provides several methods upon which acquisitions of title to land is attained. These are through :-

- (a) *Allocations*
- (b) *Land Adjudication process*
- (c) *Compulsory acquisition*
- (d) *Prescription*
- (e) *Settlement program*
- (f) *Transmission*
- (g) *Transfer*
- (h) *Long term leases exceeding twenty one (21) years created out of private land or*
- (i) any other manner prescribed in the Act of Parliament.

48. The effects of Registration as per the provisions of Section 24(a) of the Land Registration Act are that:

“The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

49. It therefore goes without saying that prima facie, the registration of the Respondent herein as proprietor of the suit land gave him absolute proprietorship of the said parcel of land and the said title could only be impeached in one of the two scenarios envisaged under Section 23(1) of the Registration of Titles Act Cap 281 Laws of Kenya (now repealed) and the new Section 26 (1) of the Land Registration Act, No. 3 of 2012 which embody the doctrine of indefeasibility of title as envisaged under the Torrens System of registration which applies to Kenya

50. It was **held in the case of Republic vs Senior Registrar of Titles Ex-parte Brookside Court Limited (2012) eKLR, that the** statutorily, the sanctity of title to land is assured and protected under **Section 24, 25 and 26 of the Land Registration Act 2012** produced as herein under”;

51. Section 24 stipulates as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

52. Section 25 of the act provides:

(1) The rights of a proprietor, whether acquired on 1st registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

53. Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or 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 that 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.

54. Evidently, from the facts of this case the 2nd Appellant was the initial legally registered owner to parcel of land known as Land Reference No. Nyahururu/ Oljoro-Orok/Salient/1757 Measuring 2.20 Ha wherein he had later he caused its sub division into 14 parcels of equal sizes resulting into being parcels No. 8753 – 8794 which he sold off to different people for consideration. On 23rd September, 1996 vide a duly executed sale agreement he disposed of part of the sub-divided parcels, the suit land herein, to the 1st Appellant for a consideration of Ksh 35,000.00. On 25th March, 1999 he obtained a letter of consent for transfer of the land to her from the Land Control Board. Pursuant to that, the 2nd Appellant took up vacant possession of the land.

55. The 2nd Appellant testified that he had never interacted with the Respondent at all and was surprised to learn that the suit land was registered in the Respondent's name which led to the conclusion that the registration must have been obtained by fraudulent means.

56. It's so unfortunate that the 1st Appellant seem to have failed to have completed the land sale transaction between himself and the 1st Appellant by causing it to be registered with the land registry. To that effect, she lacks a proper registrable instrument to the land. But the question here is that does that deny her ownership to the land? The answer is in the negative.

57. On contrary, the Respondent claims to be the legally registered owner to the property. Although he bears a prima facie evidence-certificate of title deed issued to him on 18th March, 2010, the golden question here is what procedure he applied to have attained the title deed to his names without involving the Respondent who was the legally registered proprietor to the suit land. The extract of the Register the Green card indicates that he acquired the land on 1st November, 2001 directly from the 2nd Appellant.

58. This is a very bizarre recurrence taking that the 2nd Appellant clearly states that he had never had any relationship with the Respondent. Paradoxically, the Respondent describes the 2nd Appellant as being a land commission agent to the company. He only seems to trust and hence be dealing with third parties – Mr. Kehonge.

59. From the proceedings before the trial Court, the Respondent held that he had been informed about the sale of the suit land by one James Maina Kahongi, an alleged brother to the 2nd Appellant. He was informed the land was being sold by the 2nd Appellant. He was taken to the offices of a land agent trading in the names and style of **"Nyahururu outlet Agencies"** wherein he had made several payments and was issued with a receipt. In total he had paid up a sum of Ksh 30,000/= which was received on behalf of one Mary Wanjiru Gichuru and he was issued with an official receipt. That he had been shown plot No. 40 but on the ground it was plot No. 42. Eventually he obtained the Certificate of title deed and that in law he claims ownership.

60. He testified that the entry 1 on the green card to the suit land was in the name of the 2nd Appellant while entry No. 2 showed that the land had been transferred to himself on the 1st November, 2001 of the same date.

61. The Land Registrar testified that for the transfer property to have been properly executed, he must have been presented with the letter of consent to transfer obtained from Land Control Board, and a valuation of property to assess appropriate stamp duty should be available. Land Registrar confirmed that although they ought to have these documents in their office, yet they were not available. By this assertion alone this is problematic on how the Respondent acquired a good title deed to the suit property. This Court is therefore left with the conclusion that there was an omission and mistake on how the registration of the suit land was acquired and therefore the certificate of title deed must be rectified and/or Cancelled thereof.

62. On the 3rd issue for determination as to whether the Certificate of title held by the Respondent was acquired through fraud as pleaded in the Plaint. I find that According to the filed Plaint, the 1st Appellant has not pleaded any allegations of fraud of the title deed having taken place. But, the 2nd Appellant in the filed Defence and Counter Claim under Paragraph 6 holds as follows:-

"The 2nd Defendant is now surprised to learn that the Plaintiff (now the Respondent) had himself registered as a proprietor of the suit property on 1st November, 2001 and contends that such registration was obtained though fraud as he did not consent to the same...."

63. The 2nd Appellant proceeds on to provide specific particulars of the alleged fraudulent acts supposedly meted by the Respondent. These are:-

- i. Acquiring the title deed for land being Land reference Numbers Nyandarua/Oljoro Orok Salient/8794 without his consent;
- ii. Presenting forged documents in transferring to the suit land to himself;
- iii. Giving false information to the District Land Registrar while acquiring the title for the suit land;
- iv. Being registered as the proprietor of the suit property without a Sale agreement, letter of consent, transfer instruments and the 2nd Defendant's national identity card.

64. Fraud is a serious matter which must be proved to the required standard. In *R.G Patel vs Lalji Makanji 1957 E.A 314*, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

65. I have no doubt in my mind that the Plaintiffs herein have distinctly pleaded the facts on which fraud is alleged against the Defendants. The next step however was for them to prove those allegations to the required standard. I will therefore interrogate this allegation of fraud as submitted by the Plaintiff.

66. The evidence by the Land Registrar, Nyahuru and Samburu County one Mr. Nathan Gathaya – Pw - 3 is critical. Although he was non-committal on whether there was fraud or not his words on cross examination were that *‘if its forgery we act on it innocently and there are several cases where original title had been issued ...we refer this to the CID and we await (sic) at court decision to act on it...’*

67. Needless to say, he admitted that the prerequisite sale of land documents such as the letter of Consent from the land Control Board; the duly executed transfer documents property executed, the valuation of property to assess appropriate stamp duty in this case were not available. Secondly there was no evidence adduced by the Respondent to confirm that indeed he had purchased the suit land from the 2nd Appellant who was its proprietor, no executed sale agreement by the 2nd Appellant had also been produced in evidence

68. Section 3(3) of the Law of Contract Act provides that no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit is founded is;

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

69. The wording of the above provisions is in mandatory terms. The 2nd Appellant in his evidence denied selling the suit property to the Respondent which in essence means that there was never a sale. In this case the existence of a duly executed Sale agreement by the parties is critical and expected. It is evident that the Respondent and the 2nd Applicant herein never had any such agreement for this transaction. There being no sale agreement between the 2nd Appellant and the Respondent and the sale of the suit land to the Respondent therefore became unattainable.

70. On the 4th issue for determination as to whether the 1st Appellant had an overriding interest over the suit property by virtue of occupation and which had been established, I find that overriding interests on land are the rights which need not be noted though exists but are not registered on the land registry. The occupation and the existence of the 1st Appellant was clearly known issue.

71. Section 28 (1) of the Land Registration Act recognizes the overriding interests as a right. The said provision provide that: -

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register: -

(a) Spousal rights over matrimonial property;

(b) Trusts including customary trusts;

(c) Rights of way, rights of water and profits subsisting at the time of first registration under this Act;

(d) Natural rights of light, air, water and support;

(e) Rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;

(f) Leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;

(g) Charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;

(h) Rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i) Electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law;

(j) And other rights provided under any written law

72. In this case, the 1st Appellant acquired the rights, and interest on the land by entering into a written sale agreement with the 2st Appellant. She paid up the consideration. Immediately, she took vacant possession and even caused development of the land. This is a fact which even the Respondent admits.

73. It is unfortunate that she never caused this land transaction to be registered with the land registration as would have been expected by law. All said and done, by this very act of the 1st and 2nd Appellants an equitable interest in form of an overriding interest was created on the land wherein she is entitled protection of the law.

74. In conclusion, having taken all the evidence, the submissions adduced, the authorities herein by the parties concerned and the applicable law into consideration, I hereby grant the following orders: -

- i. The Appeal is hereby allowed with costs to be borne by the Respondent.
- ii. The Judgment delivered by the trial Court Principal Magistrate Civil Case Nyahururu No. 72 of 2014 on the 3rd April, 2014 is hereby set aside.
- iii. The Appellant's Counter Claim is hereby allowed with costs to be borne by the Respondent.

It is ordered

Dated and delivered at Nyahururu this 10th day of December 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE