



**Karonga v Karimi & 2 others (Environment and Land Appeal  
E026 of 2023) [2024] KEELC 453 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 453 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E026 OF 2023  
CK NZILI, J  
JANUARY 31, 2024**

**BETWEEN**

**GITONGA PAUL KARONGA ..... APPELLANT**

**AND**

**JOSPHAT MUTUGI KARIMI ..... 1<sup>ST</sup> RESPONDENT**

**THE LAND REGISTRAR IMENTI NORTH DISTRICT ..... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the judgment of the principal magistrate's court at  
Nkubu, delivered by Hon. J. Irura – SPM on 28.4.2022 in ELC NO. 112 of 2018)*

**JUDGMENT**

1. The 1<sup>st</sup> respondent sued the appellant before the trial court, together with the Land Registrar Imenti North District and the Hon. Attorney general as the defendants, for illegally and fraudulently subdividing and transferring family land LR No Abogeta/Kithangari/126 (hereinafter the suit land), to the appellant as LR No's Abogeta/Kithangri/1611, 1612 & 1613. He sought the court to declare the suit land as family land, rectify or cancel the titles and have the land revert to him.
2. The appellant, by a defence and counterclaim dated 8.11.2017, denied the claim. He averred that the late Murithi M'Ithiria had subdivided the land into LR No's Abogeta/L-Kithangari/1611, 1612 & 1613 on 13.1.2012 in favour of Murithi M'Ithiria, Fredrick Kirimi Kajau and Rose Kajau Ooko respectively. The appellant averred he bought and was lawfully transferred for value the portions belonging to Fredrick Kirimi Kajau and Rose Kajau Ooko on 11.9.2014; hence, his titles to the parcels of land were validly acquired. Further, he averred that the appellant had no locus standi to represent the estate of his grandfather or late father.



3. By way of a counterclaim, the appellant sued the 1<sup>st</sup> respondent together with the sellers of the two suit parcels of land namely; Elias Kimathi Kiimi and Florence Mwari Kirimi, as the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> defendants. He averred that they had sold and lawfully transferred LR No's.1612 and 1613 to him for value, which he took vacant possession of. The appellant had averred that the 1<sup>st</sup> respondent made a police report with the CID on an alleged forgery of subdivisions of LR No Abogeta/L-Kithangari/126, who investigated the same and found the complaint was false. Further, the appellant averred on 8.1.2015 that the 1<sup>st</sup> respondent, alongside the other defendants, had interfered with the boundary and threatened him, leading to criminal case No. Nkubu PMC No. 55 of 2015. The appellant averred that the 1<sup>st</sup> respondent, alongside the other defendants, refused to vacate or hand over vacant possession to him. The appellant prayed for vacant possession, in default for eviction orders, permanent injunction and mesne profits.
4. By way of reply to the defence and defence to the counterclaim dated 24.11.2017, the 1<sup>st</sup> respondent and the co-defendants denied the contents of the defence and counterclaim. They termed the counterclaim defective in law. The appellant relied on his list of witnesses and documents dated 10.4.2015 and 8.11.2017.
5. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents in this appeal, as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the primary suit, entered an appearance by a memorandum dated 2.2.2020. Through a statement of defence dated 2.2.2020, they averred that LR No Abogeta L-Kithangari/126 belonged to the late M'Murithi M'Ithiria as of 20.12.1972, which he had acquired from one Kiome M'Kirika. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents denied knowledge of the alleged social affinities or overriding interests with the 1<sup>st</sup> respondent since they were not reflected on the register.
6. Further, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents denied any alleged fraud in the subdivisions and the transfer of the suit land. Additionally, they averred that the subdivisions and transfers to the appellant were valid and legal, leaving LR No 1611 still under the deceased's name. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents averred that the 1<sup>st</sup> respondent had no locus standi to file the suit. Further, they termed the suit as disclosing no cause of action, vexatious, frivolous and an abuse of the court process.
7. At the trial, Josephat Mutugi Kirimi testified as PW 1 and adopted his witness statement dated 18.7.2019 as his evidence in chief. Briefly, he told the court that LR No Abogeta/L/ Kithangari/126 belonged to his late grandfather, who had three children: his late father and John Kirimi M'Murithi, who passed on in 1995. He said all his siblings were brought up and occupied the land as their only homestead.
8. PW 1 told the court his grandfather had shown his late father a portion to develop or occupy before he passed on in 2013. He said the estate was yet to be legally distributed, which the appellant was now forcefully trying to evict him from, alleging a purchaser's right. PW 1 termed the sale and transfer process irregular and unprocedural, given that the land control board consent application forms lacked vital details.  
  
PW 1 produced a valuation report as P. Exh No. (1), green card dated 10.1.2012 as P. Exh No. (2), green card dated 19.5.2014 as P. Exh No. (3), letter of consent dated 9.3.2014 as P. Exh No. (4), for application for consent as P. Exh No. (5), green cards for Fredrick as P. Exh No. (6), official search date 27.5.2014 as P. Exh No. (7) and burial permit as P. Exh No. (8).
9. In cross-examination, PW 1 admitted that he lacked letters of administration for his late grandfather's estate. He said M'Murithi and Rose allegedly subdivided the land during his late father's and grandfather's lifetime. He said he was not mentally stable at the time, but his father was still alive.



10. Florence Kirimi testified as PW 2 and adopted her witness statement dated 18.7.2021 as her evidence in chief. She termed PW 1 as her son and herself as the widow of the late John Kirimi M'Murithi. PW 2 reiterated the evidence of PW 1 and confirmed they were living on the suit land.
11. The appellant testified as DW 1. He adopted his witness statement dated 10.10.2017 as his evidence in chief. His testimony was that in July 2014, Rose Kajau Ouko and her son Fredrick Kirimi Kajau sold and transferred to him LR No's. Abothuguchi/L-Kithangari/1613 & 1612, measuring 0.18 ha and 0.30 ha for KShs.1,100,000 and IShs.500,000/=. Respectively DW1 said he visited the land, inspected it, and obtained an official search. Further, DW 1 said he successfully applied for the requisite land control board consent to transfer the land parcels to his name. DW1 denied any alleged fraudulent subdivisions and transfers of the parcels of land since the deceased had subdivided and transferred the land during his lifetime to the daughter and grandson, respectively, on 13.1.2013.
12. DW 1 said the sellers had every right to sell and transfer the two parcels of land to him, which the 1<sup>st</sup> respondent was privy to. DW 1 also said that after the transfer was effected, he went to the land on 1.10.2014, when the 1<sup>st</sup> respondent made a report to the police at Nkubu for alleged land fraud, leading to investigations which turned negative. Further, DW 1 stated that, following the investigations, the 1<sup>st</sup> respondent and PW 2 sought more time to vacate his land only to change thereafter and sue him.
13. Similarly, DW 1 said he visited the land on 7.1.2015 with a land surveyor to erect beacons, which the 1<sup>st</sup> respondent uprooted on 8.1.2015, threatened him and mounted a public demonstration, was arrested and charged in Nkubu law courts criminal case No. 55 of 2015. DW 1, the 1<sup>st</sup> respondent, had refused to vacate his two parcels of land and move to LR No 1611. He produced a copy of the mutation for D. Exh No. (1), sale agreement as D. Exh No. (2) & (3) fund transfer forms as P. Exh No's. (4) & (5), title deed as D. Exh No. (6) & (7), copy of green cards as P. Exh No. (8) & (9), letters from the DCIO Imenti as D. Exh No. (10) and copy of the charge sheet as D. Exh No. (11). DW 1 said he was not a party to the initial subdivision and transfer with the deceased.
14. In cross-examination, DW 1 said he bought the two parcels of land after conducting due diligence, only later for Rose Kajaju to lodge false complaints with the police. DW 1 said the 1<sup>st</sup> respondent had sought time to vacate the land and remove any development therein, only for them to decline, threaten and deny him vacant possession.
15. Rose Kajau Ooko testified as DW 2. She adopted her witness statement dated 10.10.2017 as her evidence in chief. DW2 told the court she was a relative of PW 1 and 2. Further, she said that after her late father passed on, she took charge and buried him on LR No 1611. She said the deceased was the one who had transferred to her and her son LR No's. 1612 & 1613, while he retained LR No 1611.
16. DW2 said that none of her relatives cared for the late father after her mother passed. She said she resigned from her employment in Naivasha to come and take care of him. DW2 said her late father had preserved LR No 1611 in favour of the 1<sup>st</sup> respondent's family. DW 2 also said that after her late father was buried, PW 1 & 2 became hostile to her and her son and started trespassing into LR No's. 1612 and 1613. Further, DW 2 said that due to the hostility, she had to look for land to settle elsewhere in Ntharene.
17. DW 2 said her late father passed on 13.6.2013, around five months after transferring the two parcels of land to her and her son. She denied the alleged fraudulent subdivisions and transfers since her late father had lawfully gifted her the land in front of elders during his lifetime.
18. In cross-examination, DW 2 told the court that the late father had initially directed and sent the 1<sup>st</sup> respondent to sign the land control documents on behalf of the late mother while she was away. DW



- 2 said the land was subdivided into three portions, but she could not register her son as a beneficiary, who was a minor then with no identity card. Further, DW 2 said she had been shown her share of the land during the lifetime of her late father in the presence of witnesses, including the Nkuene chief one Kawira. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents' defence was marked as closed for lack of attendance despite hearing notices being served.
19. With this evidence, the trial court allowed the 1<sup>st</sup> respondent's suit and dismissed the appellant's defence and counterclaim.
  20. Through grounds of appeal dated 26.5.2022, the appellant faults the trial court;-for failure to find that he was a legitimate owner of LR No's.1612 and 1613, for misconstruing Section 80 (2) of the [Land Registration Act](#), for finding there was illegal and fraudulent subdivisions and transfer of the suit parcels of land; for failing to consider and disregarding written submissions and the cited caselaw; for being biased and going against the weight of the evidence, which amounts to a travesty of justice.
  21. Following directions by the court, the parties agreed to canvass the appeal by written submissions dated 2.10.2023 and 30.10.2023. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not participate in the appeal.
  22. The appellant isolated six issues for the court's determination. It was submitted that since the 1<sup>st</sup> respondent was not a legal representative of the deceased M'Murithi M'Itirithia's estate, he lacked locus standi to lodge the suit. Reliance was placed on [Rajesh Pranjivan Chudasama v Sailesh Pranjivan](#) (2014) eKLR, [Millicent Mbatha Mulavu, another v Annah Ndunge Mulavu and others](#) (2013) eKLR.
  23. The appellant submitted that before he bought and transferred the suit parcels of land, they were already in the names of Rose Kajau Ooko and Fredrick Kirimi Kajau. Therefore, if there was any fraud or illegality in the subdivisions and transfers, any liability for it lay with the two. Additionally, the appellant submitted that the two were necessary parties to the suit but were unfortunately condemned unheard contrary to Order 1 Rule 3 of the [Civil Procedure Rules](#).
  24. As to whether fraud was proved against him, the appellant submitted that the trial court found he was not liable for the alleged fraud. Relying on Black Laws Dictionary (No citation) & [Dennis Noel Mukhulo Ochwanda 7 another v Elizabeth Murungari Njoroge & another](#) (2018) eKLR, [Evans Otieno Nyakwana v Cleophas Bwana Ongaro](#) (2015) eKLR and Sections 107 – 108 of the [Evidence Act](#), the appellant submitted the 1<sup>st</sup> respondent could not sue him and then expect him to provide the evidence to prove his case without himself tendering cogent evidence by subjecting the mutation forms, applications for the land control board and all the other transfer instruments to forensic audit to prove that indeed it was not the deceased who undertook the transactions.
  25. In the absence of a forensic report, the appellant submitted the finding by the trial court that the late M'Murithi M'Itirithia did not subdivide and transfer the suit lands to DW 2 and her son was incorrect and misguided since a gift *inter vivos* did not require registration of the transfer instrument immediately, more so after a donor had performed his part. Reliance was placed on [Michael Aphaxard Nyaga and others v Robert Njue and others](#) (2021) eKLR. The appellant submitted that the deceased had done everything he could to transfer the land to DW 2 and her son and that the transfers were registered way before his demise, the only issue remaining being the issuance of the title deeds.
  26. Regarding whether he qualified as an innocent purchaser, the appellant, based on Black's Law Dictionary 8<sup>th</sup> Edition and the case of [Katende v Haridar and Co. Ltd](#) (2008) 2 EA 173 submitted that he bought the two parcels of land in good faith, and since the trial court found he was not a party to any fraud, his lawfully acquired titles should not have been cancelled. Reliance was placed on [Eunice Grace Njambi & another v The attorney General & 5 others](#) Civil Suit No. 976 of 2012 on lack of notice of any defect to the title where the court cited with approval [Fletcher v Peck](#) 10 US 87 (1810).



27. On the merits of the appeal, the appellant submitted that since the 1<sup>st</sup> respondent had no *locus standi*, DW 2 and her son were necessary parties to the suit whose omission was fatal and that since the trial court found he was innocent of any fraud, the suit against him ought to have failed. The appellant urged the court to grant him costs for the appeal.
28. The 1<sup>st</sup> respondent submitted that the mandate of a 1<sup>st</sup> appellate court is to evaluate the evidence on record and come up with independent findings on fact and the law. To this end, the 1<sup>st</sup> respondent submitted his evidence, and that of PW 2, taken together with his exhibits, showed that the title deeds for the suit parcels of land were obtained on 25.4.2014, yet the deceased had died on 13.6.2013. Further, the 1<sup>st</sup> respondent submitted that it was illogical for the two parcels of land to have been gifted to DW 2 and her son, leaving out the other beneficiaries in the land occupation.
29. The 1<sup>st</sup> respondent submitted the land consent letter for subdivisions, as approved on 29.9.2015, out of a meeting allegedly held on 12.8.2014, which was unprocedural, yet the appellant could not clarify the anomalies. Relying on Sections 26 & 80 of the [Land Registration Act](#), the 1<sup>st</sup> respondent submitted the sellers to the suit parcels of land were witnesses before the trial court, and coupled with the fact that he has been in occupation of the land together with PW 2, the titles held by the appellant could not enjoy any legal protection.
30. The 1<sup>st</sup> respondent submitted that under Article 22 of the [Constitution](#), Order 1 Rule 9 of the [Civil Procedure Rules](#), as read together with Article 159 (2) of the [Constitution](#), his suit could not be defeated based on technicalities since he had protectable rights as an occupier of the land, which the appellant never took possession of. Reliance was placed on [DT Dobie Co. \(K\) Ltd v Joseph Muchina & another](#) (1980) eKLR.
31. The mandate of this court is to look through the lower court record with an open mind and a fresh perspective and come up with independent findings on facts and the law while mindful that the trial court had the benefit of hearing and seeing the witnesses first-hand. In [Gitobu Imanyara & others v Attorney General & another](#) (2016) eKLR, the court said an appeal was by way of a retrial by reconsidering the evidence and evaluating it, drawing its conclusions but giving due allowance to the court, which saw and heard the witnesses. The court cited *Peters v Sunday Post Ltd* (1958) EA 424, that if there is evidence to support a particular conclusion, the trial court judgment could stand, but if there were evidence that the trial court failed to appreciate the weight or bearing of the circumstances admitted or proved, an appellate court would not hesitate to decide.
32. The following issues call for my determination;-
  - i. If the appeal is competent.
  - ii. If Rose Kajau Ooko and Fredrick Kirimi Kajau were necessary parties to the suit.
  - iii. If the 1<sup>st</sup> respondent had locus standi.
  - iv. If the 1<sup>st</sup> respondent sued or was sued by the appellant in his own capacity or on behalf of his estate of the late grandfather.
  - v. If the 1<sup>st</sup> respondent required letters of administration to advance a claim based on overriding interests and customary trust.
  - vi. Whether the 1<sup>st</sup> respondent proved his suit.
  - vii. If the appellant pleaded and proved his defence and counterclaim.
  - viii. Whether the appeal has merits.



33. The primary pleadings before the trial court were the plaint dated 15.1.2015, the appellant's defence and counterclaim dated 8.11.2017, a reply to defence and defence to counterclaim by the 1<sup>st</sup> respondent dated 29.1.2018 and 24.11.2017 and the 2<sup>nd</sup> & 3<sup>rd</sup> respondents' defence dated 2.2.2020.
34. The law is that all documents and pleadings before the trial court must form part of a record of appeal unless otherwise directed by the appellate court. In the record of appeal dated 27.9.2023, other than the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' list of witness statements and documents on pages 94 – 125, their statement of defence was omitted. On that account alone, I find the appeal record incompetent and defective.
35. In trite law, parties are bound by their pleadings and issues for determination flow from pleadings. See *Raila Odinga & others v IEBC* (2017) eKLR and *Mutinda Mule and others v IEBC* (2013) eKLR.
36. As captured in paragraphs 5, 6, and 7 of the plaint, the respondent's claim was based on overriding interests. The 1<sup>st</sup> respondent averred the suit parcels of land formed part of ancestral or family land held in trust for other family members by the deceased grandfather. In paragraphs 8 – 9 of the plaint, it was averred that the appellant fraudulently caused the family land to be subdivided and transferred to him as LR No's. 1612 and 1613 without the family members' knowledge, consent or authority. The 1<sup>st</sup> respondent termed the resultant subdivisions and transfers from the initial parcel of land to the appellant as subject to his overriding occupation or possessory rights, illegal, unprocedural and fraudulent. The particulars against the appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents were set out in paragraphs 9 (a), (b), (c), (2) (e), (f) & (g) of the plaint. The 1<sup>st</sup> respondent urged the court to declare the suit parcels as family land, subject to his rights and occupation by his family for a long time and for the rectification and cancellation of the title to revert to its original status.
37. In the statement of defence and counterclaim dated 8.11.2017, the appellant averred that the original title was non-existent, following subdivisions and transfers into three portions on 13.1.2012 by the deceased Murithi M'Itirithia to Kirimi Kajau and Rose Kajau, who lawfully and procedurally sold and transferred to him LR No's. 1612 and 1613 for value without notice. The appellant averred that LR No 1611 was still available for the respondent's mother and siblings as per their grandfather's wishes.
38. From the defence and counterclaim, the appellant did not specifically refute or deny that the initial parcel of land was ancestral family and that the 1<sup>st</sup> respondent had no overriding rights. Additionally, the appellant did not specifically plead ever taking vacant possession in 2014, occupying or displacing the respondent or his family from LR No's. 1612 and 1613, soon after or immediately upon purchasing the land or acquiring titles to it in 2014 save the police report made on 1.10.2014.
39. In the counterclaim, at paragraph 16, the appellant averred that on 1.10.2014 he took vacant possession only for the 1<sup>st</sup> respondent to make a baseless police report against him and the predecessors in the title on account of fraud. Additionally, the appellant averred that on 8.1.2015 the respondent interfered with beacons to the suit land. Further, in paragraph 20, the appellant averred that the 1<sup>st</sup> respondent and the defendants to the counterclaim refused to vacate his parcels of land and stopped him from taking vacant possession. He, therefore, counterclaimed for vacant possession, eviction and permanent injunction. In the counterclaim, the appellant never pleaded that the subdivision transfers to the predecessors in title and subsequently to himself were not subject to any possessory occupation and overriding interests.
40. From the plaintiff's list of issues dated 18.7.2019, issues numbers 1, 2, and 5 were on customary or family rights and occupation of the land by the deceased's family, the witness statements by the respondent dated 18.7.2019 captured the issues of ancestral and family occupation of the suit land.



The appellant was alleged to have colluded with the 2<sup>nd</sup> respondent to effect the transfers to his name, oblivious of the plaintiff's rights.

41. In the defence by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, it was confirmed that LR No 126 as of 20.13.1972 belonged to the deceased upon transfer by one Kiome M'Kirika. In paragraph 8 of the plaint, the 1<sup>st</sup> respondent had averred Kiome Kirika was the father to the late M'Murithi M'Itirithia. The concept of intergenerational equity had, therefore, been pleaded and admitted by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, though it was not reflected in the title register.
42. In paragraphs 7 and 8, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents confirmed transfers from Fredrick Kirimi Kajau to the appellant and from Rose Kajau Ooko to the appellant, while LR No 1611 remained with the deceased.
43. It is a trite law that a title holder must prove all its acquisition processes and procedures when a land title is attacked. See *Munyu Maina v Hiram Gathiba Maina* CA No. 239 of 2009. Further under Article 40 of the *Constitution*, a property illegally or unprocedurally obtained has no sanction under the law, and so is one where there is evidence of fraud, illegality, unprocedurally in acquisition under Section 26 (1) of the *Land Registration Act*.
44. The 1<sup>st</sup> respondent produced P. Exh No's. 2 & 3 showing that LR No 126 was first registered in the name of Kiome Kirika on 6.1.1967; transferred to M'Murithi M'Itirithia on 20.12.1972 and was closed for a subdivision on 10.1.2012. P. Exh No. 4 was issued on 9.3.2011, P. Exh No. (5) has no date, P. Exh No. (7) is dated 27.6.2014 while P. Exh No. 8 shows the deceased passed on 13.6.2013.
45. The District Land Registrar, the 2<sup>nd</sup> defendant in a replying affidavit sworn by H.S.N Musumiah on 30.7.2015, attached a copy of a mutation form dated 13.1.2012. It lacked a sketch map for the proposed partitions. In paragraph 6 of the said affidavit, the 2<sup>nd</sup> respondent averred on oath that on 13.1.2013, the deceased transferred LR No 1612 to Fredrick Kirimi Kajau, who obtained his title on 25.4.2014, after which the appellant obtained his title on 11.9.2014.
46. Further, the 2<sup>nd</sup> respondent swore on oath in paragraph 7 that on 13.1.2015, the deceased transferred LR No 1613 to Rose Kajau Ooko, who obtained a title on 25.4.2014 and eventually transferred the land to the appellant on 11.9.2014.
47. D. Exh No. 1 had no details on when it was registered and approved. The maker was not called to testify. It was unclear if the subdivision was ever affected on the ground during the deceased's lifetime. D. Exh No. 10 was not a forensic report to show that any investigations were done regarding the complaint on forgery, and DW 2 was cleared of any irregularity. D. Exh No's. 2 & 3 did not reflect if the sellers had paid the total purchase price and if an acknowledged receipt was made.
48. There were some alterations on D. Exh No. (8) and (9), which the appellant did not explain. Above all, documents showing the date when the sellers lodged the transfer forms, paid for stamp duty and registration fee were not produced as evidence. Additionally, the appellant failed to produce before the trial court any duly signed, stamped and registered transfer forms submitted to the Land Registrar before the title deeds, namely exhibit no's. 6 and 7, were issued.
49. The legal and evidential burden of establishing facts remains static with the plaintiff as held in *Raila Odinga & others v IEBC* (*supra*) but keeps shifting depending on who would lose if no further evidence were introduced. The 1<sup>st</sup> respondent tendered evidence to show that his late grandfather passed on on 13.6.2013. That fact was admitted on oath by Rose Ooko in her replying affidavit dated 6.2.2015. She said her late father died five months after the transfers.



50. So, if the transfers were genuine, DW 2 should have supplied the transfer forms, which the deceased duly signed, executed and lodged before his death, for the transfer to be effected on the register on 13.1.2013.
51. The gaps between 10.1.2012, when the initial title register was closed for subdivision and entries for the opening of registers for LR No's. 1611, 1612 and 1613 on 10.1.2012, and the issuance of titles to DW 2 and her son on 13.1.2013, remained unexplained. The appellant failed to counter the assertion that the transfers were subject to overriding interests or that the same was unprocedural and was secretly undertaken to defeat the 1<sup>st</sup> respondent's overriding rights.
52. The appellant had pleaded that he was an innocent purchaser for value without notice of any rights belonging to the 1<sup>st</sup> respondent. Due diligence included visiting the locus in quo and ascertaining who occupied the land. In *Torino Enterprises Ltd v Attorney General* Petition 5 (E006 of 2022) (2023) KESC 79 (KLB) (22<sup>nd</sup> September 2023) (Judgment), the court said an innocent purchaser for value also denotes one who was aware of what they were purchasing by inspecting the suit premises such that if occupied would sound a warning of "buyer beware". The court also said documents, even if public, require certification under Sections 68, 79 and 80 of the *Evidence Act*.
53. In this appeal, the appellant sued the 1<sup>st</sup> respondent in the counterclaim for trespassing onto his land. The appellant admitted that the 1<sup>st</sup> respondent occupied LR No's. 1612 and 1613 instead of LR No 1611. He could not, therefore, turn around and claim he had no locus standi to sue or be sued. Additionally, if titles to LR No 126 were extinguished in 2012 after it was closed on a subdivision, on what basis would the appellant demand that the 1<sup>st</sup> respondent should have had letters of administration?
54. The 1<sup>st</sup> respondent based his claim on overriding interests as a grandson of the deceased, who occupied the suit parcels before registration in favour of the appellant. See *Macharia Kibari v Ngigi Kibari* (1994) eKLR. In *Isack M'Inanaga Kiebia v Isaya Theuri M'Lintari & another* (2018) eKLR, the plaintiffs had sued their uncles under customary law as of right. Customary trust rights are encumbered on the land. They are not registrable. See *Justus Maina Muruku v Jane Waitihira Mwangi* (2018) eKLR. They are intergenerational equity as held in *Mukangu v Mbui* CA No. 281 of 2000 can be proved through actual possession of the land.
55. In *Kiebia v M'Lintari* (*supra*), the court observed that the ingredients include evidence of land before registration of family, clan or group land; claimant belonging to the family, clan or group; the relationship of the claimant to the family, clan or group as proximate, the claimant could have been the registered owner save for some intervening circumstances and lastly, claim directed against the registered proprietor who was a member of the family, clan or group.
56. In this appeal, the 1<sup>st</sup> respondent asserted customary rights, not inheritance rights. All he required was to establish trust by leading evidence on the history of the suit property under relevant customary law. See *Muthuita v Muthuita* (1982 – 1988) 1 KAR 42 and *Njenga Chogera v Maria Wanjira Kimani & 2 others* (2005) eKLR. From the pleadings and evidence tendered, the 1<sup>st</sup> respondent asserted the right as a family member based on intergenerational equity. He was not required to join the predecessors in title to advance his claim. DW 2 and her son, the predecessors in the title, were witnesses for the appellant. They were unable to dislodge the evidence of overriding rights and the land being ancestral or family. The 1<sup>st</sup> respondent qualified as a claimant based on customary trust. He was not claiming as a dependant or beneficiary of the estate. See *Re-estate of late Jonathan Kinyua Waititu* (2017) eKLR.
57. As to the evidence of overriding rights, I think the 1<sup>st</sup> respondent led credible evidence on how the land was acquired by his late grandfather and occupied by his late father and mother and that the deceased



intended the land to be shared among his immediate family and children. Evidence was tendered and admitted by DW 2 that the 1<sup>st</sup> respondent and relatives have been on the land as part of family land.

58. Therefore, I find the overriding rights of the 1<sup>st</sup> respondent and PW 2 existed before the parcels of land changed from the deceased to DW 2 and later to the appellant. The rights went with the land and were not defeated due to a registration status to the appellant. I find the 1<sup>st</sup> respondent had tendered enough evidence to establish the rights which the appellant ignored to establish through a site visit before he acquired the land. On the same reasoning, the appellant did not qualify as an innocent purchaser for value without notice had he done due diligence. Good faith as held in *Mukiri Mungai and others v Attorney General* (2008) 2 EA 173 includes not being party to fraud or its knowledge by carrying out due diligence as held in *Samuel Kamere v Land Registrar, (Kajiado)* (2015) eKLR. In *Joseph Gitbinji Gathiba v Charles Kingori Gathiba* (2001) eKLR, the court said that equity always protects the just rights of the oppressed; equity sanctifies the administration of justice. I think DW 2 acquired the titles with her son in a fiduciary capacity. She did not act in good faith and disclose to the appellant the rights of the 1<sup>st</sup> respondent, who had been in occupation of the land as a matter of right. DW 2 took advantage of the 1<sup>st</sup> respondent. I find the appellant cannot escape such overriding rights. His titles to the suit land are subject to those overriding rights.

59. The upshot is I find the appeal not only incompetent but lacking merits. It is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31<sup>ST</sup> DAY OF JANUARY 2024**

**HON. CK NZILI**

**JUDGE**

In presence of

C.A Kananu/Mukami

Miss Kerubo for applicant

