



REPUBLIC OF KENYA



**Bitok & 2 others v Yator (Environment and Land Appeal E003 of 2021)
[2024] KEELC 481 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 481 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND APPEAL E003 OF 2021**

**MN MWANYALE, J
JANUARY 30, 2024**

BETWEEN

**FLORA CHEPSOO BITOK 1ST APPELLANT
JANET AKINYI OUKO 2ND APPELLANT
BICHOLAS KIPNYANGO TUBEI 3RD APPELLANT**

AND

FLORAH JELIMO YATOR RESPONDENT

JUDGMENT

1. Vide their Memorandum of Appeal dated 28th October, 2021, the Appellants Florah Chepsoo Bitok and Janet Akinyi Ouko seek orders that;
 - a) the judgment of the Lower Court be set aside in its entirety and the Appeal be allowed.
 - b) that the Honourable be pleased to access reevaluate the Appellants case on evidence on record and arrive on its own independent conclusion and enter judgment against the Respondents as prayed for.
 - c) that in the alternative, and strictly without prejudice to the above prayer and those in the defence and counterclaim, the suit property back be ordered and directed to revert to the deceased to await succession.
 - d) that the Honourable Court be pleased to award costs of this Appeal and in the lower Courts to the Appellants.
2. The above orders are sought as the Appellants were dissatisfied with the finding's decision and judgment of Hon. Jacinta A. Orwa SPM in Kapsabet Magistrates Environment and Land Court case No. 23 of 2018 and have penned 8 grounds of Appeal as here follows;



- i) That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellants case after and without failing to evaluate the entire evidence on record and the exhibits and make a finding that the Appellants had an arguable case, a prima facie case against the Respondent and had proved their case on a balance of probabilities.
 - ii) That the Learned Trial Magistrate erred in law and in fact in failing to established that the Plaintiff/Respondent had not proved her case on balance of probability when the Respondent led no evidence on how she became the co-proprietor of the suit land Nandi/Kapsengere/1400 thereby arriving on a wrong finding and decision.
 - iii) That the Learned Trial Magistrate erred in law and in fact in disregarding the evidence and submissions of the Defendants and the law on a title deed to which the person is proved to be a party; or where it is procured fraudulently illegally, unprocedurally or through corrupt scheme is liable to be impeached.
 - iv) That the Learned Trial Magistrate erred in law and in fact in disregarding the evidence and submissions of the 3rd Defendant and co-proprietor that the Respondent was not the absolute proprietor of the suit land vis a vis the relationship of the 1st Appellant and the said Respondent.
 - v) That the Learned Trial Magistrate erred in law and in fact in disregarding the evidence and submissions of the Appellants, that the Respondent was not the absolute proprietor of the suit land
 - vi) That the Learned Trial Magistrate erred in law and in fact in disregarding the evidence of the 3rd Defendant and Company Registered proprietor on the relationship of the 1st Appellant and the Respondent
 - vii) That the Trial Court arrived at wrong findings on issues before Court.
 - viii) That the judgment of the Learned Trial Magistrate is contrary to the evidence on record and consequently manifestly unsafe and unjust and deserves being vacated in its entirety through failure to interrogate the pleadings and evidence by parties and witnesses.
3. On the basis of the grounds set out in paragraph 2 above the Appellants sought the orders set out at paragraph 1 of this judgment.
 4. Upon admission of the Appeal, parties were directed to file their written submissions on the Appeal.

Appellants Submissions: -

5. The Appellant submits that the Respondents title was under challenge as the suit property was matrimonial property and that as a co-wife the Appellant was entitled to a share of the Estate of her husband which share she had sold to the 2nd Appellant, and in support of this 1st Appellant stated that the Respondent's title was acquired fraudulently and had no good title.
6. The Appellant places reliance on the decision in *Munyu Maina vs Hiram Gathiha Maina (2013) eKLR* as well as *Kenya National Highway Authroithy vs Shalien Masood Mughal and 5 Others*, and the decision in *Hubert L. Martin & 2 others vs Margaret J. Kamau and 5 others*.
7. The Appellant submits that no succession cause was initiated and that the Respondent did not indicate how he had acquired the title. On the basis of the above submissions the Appellant urged the Court to allow the Appeal.



Respondent's Submission: -

8. Through Mr. Tallam Learned Counsel the Respondent submits that Succession proceedings were undertaken in respect of Kibitok Arap Koech the then registered owner of Nandi/Kapsengere 147 which was subdivided to Nandi/Kapsengere 1400 (suit property), Nandi/Kapsengere 1401 and Nandi/Kapsengere 1402, hence there was no fraud in acquisition of the property on the part of the Respondent and that the Respondent' title.
9. The Respondent further submits that the 1st Appellant had no title and therefore could not enter a valid agreement for sale to sale her portion of land to the 2nd Respondent vide the Agreement of Sale dated 22nd October 20-18. The Respondent placed reliance on the decision in Diamond Trust bank Ltd vs Said Hamad Shamisi & 2 others. The Respondent urge the Court to confirm the judgment of the lower Court.

Issues for Determination: -

10. From the pleadings in the Record of Appeal the proceedings, submission of the parties, the Court frames the following as issues for determination;
 - i) whether the acquisition of Nandi/Kapsengere/1400 by the Respondent was irregular, unprocedural and unlawful was pleaded in the defence and counterclaim.
 - ii) whether the Appeal is merited
 - iii) Who bears the cost of the Appeal?

Analysis and Determination: -

11. Being a first appeal, this Court has powers to access, re-evaluate the Appellant's case on evidence on record.

From the testimony of DW3, the suit property Nandi/Kapsengere 1400 is a subdivision of Nandi/Kapsengere 147 which had belonged to Alfred Tunei the father in law of the 1st Appellant and Respondent as the father of a Mr. Evans Koech deceased.

12. This said parcel was subdivided into 3 portions, with the Respondent taking Nandi/Kapsengere/1400 which was jointly registered in the 1st Appellants name as well as Nicholas Kinyango Tubei (DW3). The 1st Appellant and the Respondent were co-wives both having been married by the late Evans Koech who is deceased, but his share in the Estate of Alfred Tubei, seem to have devolved to the Respondent, without succession been undertaken in respect of the Estate of Evans Koech Bitok.
13. It follows that the Respondent and Mr. Nicholas Tabui were thus registered as co-proprietors of Nandi/Kapsengere/1400 but as trustees pending succession of the Estate of Evans Bitok pursuant to a subdivision made in the succession cause of Alfred Tubei and since Evans Koech was deceased, that subdivision ought to have been registered in the name of Administrators of the Estate of Evans Koech pending succession in respect of the Estate of Evans Koech so as to transmit the property legally and procedurally to the dependants of the Estate OF Evans Koech. This was the evidence of the 3rd Defendant which the Court overlooked.
14. Having challenged the acquisition of the title by the Respondent, it was incumbent upon the Respondent to demonstrate proper acquisition but her reliance on the instrument of title only



could not give her a better ownership as was held by the Court of Appeal in *Munyu Maina vs Hiram Githiha Maina* (20130 eKLR).

“we have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.....”

15. In light of the above and the testimony of the 3rd Defendant the Court answers issues number 1 in the affirmative, that the registration and acquisition of the Respondent as an absolute co-proprietor of Nandi/Kapsangere/1400 was irregular, unprocedurally and unlawful, as that registration and acquisition ought to have been as a Trustee of the estate of Evans Koech Bitok and as per Section 25 (2) of the *Land Registration Act*, the said registration of the Respondent did not relieve her of any obligation to which she as subject to as a Trustee.
16. Having answered issue number 1 in the affirmative, the Court now turns to issue number 2, as to whether the appeal is merited. Grounds 2,3,4 and 5 of the Memorandum of Appeal were based on the acquisition and registration of the Respondent as a co-proprietor of Nandi/Kapsengere/1400.
17. Having found that the registration as an absolute proprietor was unlawful and it ought to have been as a Trustee, it follows that the said grounds of Appeal have merits.
18. In respect of the finding by the Learned Magistrate that the Agreement for Sale had no legal basis the said finding is upheld.

Disposition: -

19. Having found merits in grounds 2, 3, 4, and 5 of the Memorandum of Appeal, the inevitable conclusion is that the Appeal is merited and the same is allowed in terms that;
 1. There be a rectification of the Register of Nandi/Kapsengere/1400 to reflect the Respondent Florah Jelimo Yator and Nicholas Kipyango Tubei as Trustees on behalf of Estate of Evans Bitok
 2. That Nandi/Kapsengere/1400 being a subdivision of Nandi/Kapsengere/47 and being registered to the Trustees of the Estate of Evans Koech, all the beneficiaries of the said Estate to undertake succession proceedings with a view to having Nandi/Kapsengere 1400 to be distributed to them.
 3. Costs of this Appeal and in the lower Court are awarded to the appellants.

Judgement, Delivered and Dated at Kapsabet this 30th day of January 2024.

HON. M. N. MWANYALE,

.....

JUDGE

I certify that this is a true copy of the original

Signed



DEPUTY REGISTRAR

In the presence of;

1. Mr. Tallam for Respondent
2. Mr. Korir holding brief for Mr. Choge for Appellant.

