



**Nahason v Kinyua & 2 others (Environment and Land Appeal  
E010 of 2020) [2024] KEELC 3249 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 3249 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E010 OF 2020  
CK YANO, J  
JANUARY 25, 2024**

**BETWEEN**

**NKOROI NAHASON ..... APPELLANT**

**AND**

**MWARANIA TOMAS KINYUA ..... 1<sup>ST</sup> RESPONDENT**

**ZAKARIA MUGAMBI MWARANI ..... 2<sup>ND</sup> RESPONDENT**

**MWARANIA MATIRI ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The appellant in this appeal moved the trial court vide a plaint dated 1<sup>st</sup> February, 2017 seeking an order for transfer of 0.56 acres out of LR. NO. Abogeta/U-Kiungone/1647 registered in the name of the 1<sup>st</sup> respondent herein. The appellant pleaded that on 14<sup>th</sup> January, 2013 he entered into a Sale Agreement with the 1<sup>st</sup> and 2<sup>nd</sup> respondents, wherein he purchased the said 0.56 acres at a consideration of Ksh. 351,000/= which he paid in full and was put into possession of the said land. That the 1<sup>st</sup> and 2<sup>nd</sup> respondent reneged on the understanding to transfer the said land to the appellant.
2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a joint statement of defence dated 27<sup>th</sup> February, 2017 wherein they denied all the allegations in the plaint and without prejudice, the 1<sup>st</sup> respondent averred that sometime in February, 2012, at the appellants request, he agreed to lease to the appellant about 1000 tea bushes at consideration of Ksh.90,000/= for a period of 3 years. That it was during that period that the appellant brought to the 1<sup>st</sup> respondent a document at his home to sign, purporting that it was the lease agreement for the said 1000 tea bushes, and being illiterate, the 1<sup>st</sup> respondent duly signed the document believing the same to be the said lease agreement.



3. It was further pleaded that in the same period, the 2<sup>nd</sup> respondent agreed to lease to the appellant 1500 tea bushes for Ksh. 135,000/= for a period of 3 years, but since he was also illiterate, he signed a document given to him by the appellant believing the same to be a lease agreement.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondent denied that the appellant was entitled to the prayers sought and stated that the appellant's claim was based inter alia on fraud and misrepresentation, particulars of which were listed.
5. The 3<sup>rd</sup> respondent who is father to the 1<sup>st</sup> and 2<sup>nd</sup> respondents was later joined in the case as an interested party.
6. Upon considering the matter, the trial court found and held that the appellant had failed to prove his case on a balance of probabilities and dismissed the same with costs to the respondents.
7. The appellant was aggrieved by that Judgment and filed this appeal on the following grounds:-
  1. The Honourable Magistrate erred in law and in facts in failing to find that the sale agreements dated 2<sup>nd</sup> February, 2012 and 14/1/2013 were properly prepared by an advocate and executed by all the parties. As a result of that failure she arrived on the wrong finding.
  2. The Learned magistrate erred in law and in facts in believing the respondents evidence that the plaintiff defrauded them when there was no iota truth in their evidence.
  3. The learned magistrate erred in law and in facts in failing to find that the respondents had put the appellant into possession of the suit land for a record 8 years and such a constructive trust had been created.
  4. The learned magistrate erred in law and in facts in not making a finding on the issue of the consideration price, the appellant had paid to the respondents.
  5. The learned magistrate erred in law and in facts in deciding the whole suit in biased manner in unjudicial manner and against the weight of evidence.
8. The appellant prays for the appeal to be allowed with costs. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 18<sup>th</sup> September, 2023 through the firm of Muchomba Law Advocates while the respondents filed theirs dated 13<sup>th</sup> December 2023 through the firm of John Muthomi & Company Advocates.

### **Appellant's Submissions**

9. Learned counsel for the appellant gave a background of the matter and submitted that the learned trial magistrate overlooked some issues on the validity of the agreements for sale such as the indication of the land which was being sold, the consideration, the instalments of the payments when the appellant was to take possession, whether he was taking it free from encumbrances, the advocate who prepared it and the default clause. It is the appellant's submissions that all those components of the agreements are there.
10. It is further submitted that the appellant through his advocates submitted that a constructive trust had been created by the respondents by virtue of putting the appellant in possession of the subject parcels of land after the execution of the agreements. That he further relied on Court of Appeal finding in *Macharia Mwangi Maina & 87 Others Versus Davidson Mwangi Kagiri* [2014]eKLR wherein the



court found that constructive trust was an overriding interest and as such lack of Land Control Board consent could not affect it as it was an equitable relief. That the trial court did not consider the authorities or distinguish them from the instant case hence erring in law.

11. The appellant's counsel submitted that in view of the evidence adduced by the appellant and the Respondents, it is clear that all the parties herein signed the agreements for sale in their respective capacities and hence cannot feign ignorance of the fact that there was meeting of minds and that they intended to sell the subject property to the appellant with the 3<sup>rd</sup> respondent being the registered owner and the 1<sup>st</sup> and 2<sup>nd</sup> respondents being the beneficial owners by virtue of property being family property, and thereafter put the appellant in possession. It is the submission of the appellant's counsel that the doctrine of proprietary estoppel should protect the interests of the appellant against the respondents renegeing on the contract for sale of the suit land. He relied on the Court of Appeal decision in *Willy Kimutai Kitilit Versus Michael Kibet [2018]eKLR* wherein the court applied the equity doctrine of constructive trust and proprietary estoppel in protecting the rights of a purchaser and urged the court to be persuaded and apply the same in the circumstances.
12. Learned counsel for the appellant further submitted that the respondents' only explanation of how the appellant got into possession of the suit property is that they had leased tea bushes therein to him, but did not avail any proof of the lease. That the learned trial magistrate took their word to be the truth against the overwhelming documentary evidence of the agreements for Sale of the suit land. The appellant's counsel cited Section 107(1) of the *Evidence Act* and submitted that it follows that the learned trial magistrate erred in both law and fact devoid of such proof of lease and fraud as alleged by the respondents. That in addition, it is trite law that fraud must be specifically pleaded and strictly proven which he said was not done in this case. The appellant's counsel agreed that the agreements for sale were not objected at production level and therefore the trial magistrate considered extraneous factors by holding that the advocate/makers who drew them should have been called to testify against the rules of evidence.
13. In conclusion, the appellant's counsel submitted that in view of the foregoing the appellant proved his case on a balance of probabilities at the lower court and urged the court to allow the appeal.

### **Respondents Submissions**

14. Learned counsel for the respondents also gave a brief introduction and background of the case and submitted that at the hearing of the suit in the lower court, the appellant bore the legal burden of proof that he purchased the suit land from the proprietor and registered owner, the 3<sup>rd</sup> respondent herein. The respondents' counsel submitted that the question of which party bears the evidentiary burden in civil proceedings is well settled under the law and cited Section 107 and 108 of the *Evidence Act*.
15. It was submitted that the appellant anchored his suit on the alleged Sale Agreement dated 14<sup>th</sup> January, 2013 allegedly entered into between the 1<sup>st</sup> and 2<sup>nd</sup> respondents and the appellant to purchase the suit land, but his testimony in court over the alleged purchase was full of contradictions and inconsistencies. That whereas in paragraph 3 of the plaint, the appellant alleged that "at all material times the 1<sup>st</sup> defendant was the registered proprietor of LR. No. Abogeta/u-kiungone/1647, during cross-examination, the appellant contradicted himself and states that the suit land was in the name of Mwarania Matiri, the 3<sup>rd</sup> respondent herein, the father of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. That whereas in paragraph 4 of the plaint the appellant alleged that he entered into a Sale Agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for sale of 0.56 acres out of LR. NO. ABOGETA/U-KIUNGONE/1647 and paid the consideration in full and was put into possession, during cross-examination, the appellant contradicted himself and stated inter alia that the said agreement did not indicate the size he was purchasing.



16. The respondents counsel further submitted that a cursory look at the alleged sale agreement dated 14<sup>th</sup> January, 2013 reveals some contradictions and inconsistencies such as the same having been made between 3 parties, namely the appellant, the 1<sup>st</sup> respondent and one John Magaju Mwarania who was not sued by the appellant. That the 2<sup>nd</sup> respondent who was not a party to the said agreement was wrongfully sued. That according to the alleged Sale Agreement, the appellant was allegedly buying 18 points from the 1<sup>st</sup> respondents and not 54 points as per his oral evidence and/or 56 points as pleaded in the plaint.
17. It was further submitted that the appellant's evidence having failed to prove that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had the legal capacity to sell the suit land to him or at all, the alleged sale agreement is null and void ab initio. It was submitted that it is trite that no one can give that which one does not have which is expressed in the Legal maxim "Nemo dat quod non Habet". Consequently, learned counsel for the respondents submitted that the appellant's evidence having failed to prove that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were the registered proprietors of the suit land, his claim was dead on arrival. The court was urged not to fault but uphold the Judgment of the lower court which correctly analyzed the facts and law and dismissed the appellants suit, and dismiss the appeal with costs to the respondents.

### **Analysis And Determination**

18. I have perused the record of appeal and the grounds of appeal. I have also considered the submissions made, the authorities relied on and the law. This being a first appeal, I am obliged to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This was settled in the case of *Selle & Another Versus Associated Motor Boat Company Limited (1968)EA 123*.
19. The issues I find for determination are:-
  1. Whether there was a valid agreement for sale of a portion of land Parcel LR. No. Abogeta/u-kiungone/1647 between the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents?
  2. Whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents had capacity to enter into agreements for sale of the suit property which was registered in the 3<sup>rd</sup> respondent's name?
  3. Whether the decision of the trial court was against the weight of the evidence adduced.
  4. Whether the appeal is merited or not.
20. I will condense the issues and discuss and analyse them together, but I will try to illustrate how each of the issues have been resolved.
21. It is clear that the appellant's case was predicated on the agreement for sale made on 14<sup>th</sup> January, 2013 between the appellant and the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The content of one of the said agreements in part was as follows:-

AGREEMENT FOR SALE OF LAND

VENDOS(SIC): MWARANIA TOMAS KINYUA

ID. NO. xxxx

BOX 58



KIONYO

JOHN MAGAJU MWARANIA

ID. NO. xxxx

BOX 58

KIONYO

PROPERTY: 18 POINTS TO BE EXERCISED FROM THE MAIN LAND OF ABOGETA/U-KIUNGONE/1647 FREE FROM ALL ENCUMBRANCES REGISTERED IN THE NAME OF THE VENDORS FATHER ONE MWARANIA MATERI

CONSIDERATION: KENYA SHILLINGS NINETY THOUSAND (KSH. 90,000/=) ONLY.

WHEREAS THE VENDORS (which term shall include all assigns and successors in title) are the sons of one M'Mwarania Materi the registered proprietor of Land Parcel Abogeta/u-kiungone/1647 and are desirous of excising and selling 18 points from the main land being part of their share of interest in the said title and WHEREAS THE PURCHASER (which term shall include his assigns and successors in title) is desirous of buying the same under the terms and conditions appearing hereinafter.

NOW THIS MEMORANDUM OF AGREEMENT WITNESSETH:

1. Save as hereabove detailed the vendors sell the property and the purchaser buys the same free from all encumbrances.
2. The vendors shall execute the necessary documents to ensure sub-division and transfer of the property to the purchaser.
3. ....
4. ....
5. ....
6. ....
- 7.....
- 8.....
- 9.....
22. There is another agreement dated 2<sup>nd</sup> February, 2012 allegedly signed between the 3<sup>rd</sup> respondent herein, the appellant and the 2<sup>nd</sup> respondent wherein it is alleged that the 3<sup>rd</sup> respondent had decided to give his son (the 2<sup>nd</sup> respondent) a portion measuring 38 points from the said mainland and that the 2<sup>nd</sup> respondent sold it to the appellant.
23. It is evident that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not the registered owners of the suit land that they purported to enter into an agreement to sell a portion thereof to the appellant. It follows therefore that the 1<sup>st</sup> and 2<sup>nd</sup> respondents could not enter into a valid agreement that could be enforced against them in regard to the subject Land. The only person who could subdivide and transfer a portion of the said land was the 3<sup>rd</sup> respondent herein who incidentally was not a party in the original suit. He only came in at a later stage as an interested party. In the plaint, the appellant only sued the 1<sup>st</sup> and 2<sup>nd</sup> respondent herein.



24. It is my considered view that the only circumstances under which the 1<sup>st</sup> and 2<sup>nd</sup> respondents could deal with the land, if they were not the registered owners, was if they had a lawful and valid power of attorney from the registered owner, in this case the 3rd respondent herein. It is therefore my finding and I so hold that the 1<sup>st</sup> and 2<sup>nd</sup> respondents could not enter into a valid agreement for the sale of a portion of the suit property that was binding. In my humble view therefore, the purported agreement was null and void ab initio and the prayer sought by the appellant which was a transfer of 0.56 acres out of LR. NO. Abogeta/u-kiungone/1647 could not issue as rightly found by the trial court. The court could not order the enforcement<sup>of</sup> a contract by issuing a transfer where the registered owner of the property was not a party to the agreement and the suit. The appellant's claim if any, lay in seeking for compensation from the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
25. Considering the totality of the material availed in this case, and applying the principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision she made. The finding and holding of the learned trial magistrate were well founded and, I find no basis to interfere with it.
26. In the result, I find that the appellant's appeal has no merit and the same is dismissed with costs to the respondents.
27. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 25<sup>TH</sup> DAY OF JANUARY, 2024**

**HON. C. YANO**

**ELC – JUDGE**

In the presence of:

Court Assistant: Kiragu

Mr. Miriti for Appellant

John Muthomi for the Respondents

