



REPUBLIC OF KENYA



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**Irungu v Wambua t/a Mbukoni Holding Limited & another (Environment and Land Appeal 8 of 2021) [2024] KEELC 156 (KLR) (24 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 156 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 8 OF 2021**

**A NYUKURI, J  
JANUARY 24, 2024**

**BETWEEN**

**CATHERINE NJUGUINI IRUNGU ..... APPELLANT**

**AND**

**THOMAS WAMBUA T/A MBUKONI HOLDING LIMITED .. 1<sup>ST</sup> RESPONDENT**

**DAVID NJENGA KURIA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the judgment of Hon. A. G. Kibiru CM delivered on the 29th day of May 2019 at Machakos Chief Magistrates Court in Machakos CMC ELC Case No. 88 of 2018)*

**JUDGMENT**

**Introduction**

1. This appeal is against the judgment of Honourable A. G. Kibiru, Chief Magistrate, delivered on 29<sup>th</sup> May 2019 in Machakos CMC ELC Case No. 88 of 2018. In the impugned judgment, the learned trial magistrate declined to grant orders for specific performance but granted the alternative prayer and entered judgment in favour of the appellant for refund of Kshs. 160,000/- plus interest against the 1<sup>st</sup> respondent and damages in the sum of Kshs. 18,000/- plus interest against the 2<sup>nd</sup> respondent. The court also condemned the 1<sup>st</sup> respondent to pay costs of the suit to both the appellant and 2<sup>nd</sup> respondent.

**Background**

2. By a plaint dated 19<sup>th</sup> October 2017, the plaintiff (now appellant) averred that she was in possession of and the lawful owner of Plot No. 140 formerly part of LR No. Mavoko Town Block 12/53 and now registered as LR Mavoko Town Block 12/7689 and currently registered in the name of the 2<sup>nd</sup> defendant (2<sup>nd</sup> respondent). She stated that she purchased the suit property from the 1<sup>st</sup> defendant (1<sup>st</sup>



respondent herein) on 5<sup>th</sup> May 2011 at a consideration of Kshs. 140,000/- and paid a further Kshs. 20,000/- to cover the cost of processing title.

3. She stated that in May 2017, the 2<sup>nd</sup> defendant trespassed on the suit property, claiming ownership and maliciously damaged a pit latrine, barbed wire fence and wooden fence; all worth a cumulative sum of Kshs. 18,000/-. She therefore sought the following orders;
  - a. A declaration that the plaintiff is the lawful owner of parcel of land known as LR No. Mavoko Town Block 12/7689.
  - b. The title deed issued to the 2<sup>nd</sup> defendant in respect of parcel of land known as LR No. Mavoko Town Block 12/7689 be canceled and/or nullified and the said title deed be registered in the name of the plaintiff.
  - c. A permanent injunction against the defendants, their agents, employees, servants and or anybody claiming under them restraining them from trespassing, constructing, developing, alienating, transferring and/or dealing in any way whatsoever with parcel of land known as LR No. Mavoko Town Block 12/7689.
  - d. In the alternative to prayers (i), (ii) and (iii) above, the 1<sup>st</sup> defendant does refund to the plaintiff the sum of Kshs. 160,000/- being the purchase price plus the changes for processing the title deed and further pay the plaintiff damages for breach of the sale agreement.
  - e. The 2<sup>nd</sup> defendant does pay the plaintiff a sum of Kshs. 18,000/- being damages for the malicious destruction of the plaintiff's property.
  - f. Costs and interest of the suit.
  - g. Any other relief the court deems fit to grant.
4. In response, the 1<sup>st</sup> defendant filed defence dated 7<sup>th</sup> February 2018. He denied the plaintiff's claim in its entirety and put the plaintiff to strict proof thereof.
5. By a defence and counterclaim dated 6<sup>th</sup> December 2017, the 2<sup>nd</sup> defendant denied the plaintiff's claim and averred that he purchased the suit property from the 1<sup>st</sup> defendant and was subsequently registered as proprietor thereof. He therefore sought for the dismissal of the plaintiff's claim and judgment against the plaintiff for an order of permanent injunction to restrain the plaintiff from encroaching or interfering with the parcel of land known as Mavoko Block No. 12/7689 (suit property). He also sought for costs of the suit and the counterclaim.
6. At the hearing, only the plaintiff testified as the defendants did not attend court despite service. Upon hearing the plaintiff and considering the pleadings, evidence and submissions, the trial court found that there was no evidence to show that at the time the 2<sup>nd</sup> defendant purchased the suit property from the 1<sup>st</sup> defendant, he had been aware that the suit property had already been sold to the plaintiff, and that therefore the 2<sup>nd</sup> defendant was an innocent purchaser for value. The trial court further found that granting an order for specific performance would be in vain as the suit property had already been transferred to the 2<sup>nd</sup> defendant. Therefore the trial court allowed the plaintiff's alternative prayer and ordered refund of Kshs. 160,000/- paid to the 1<sup>st</sup> defendant. The court also awarded the plaintiff damages of Kshs. 18,000/- against the 2<sup>nd</sup> defendant together with interest from the date of filing suit and costs to the plaintiff and 2<sup>nd</sup> defendant to be borne by the 1<sup>st</sup> defendant.



7. Aggrieved by this decision, the appellant filed a Memorandum of Appeal on 7<sup>th</sup> June 2019, which was amended on 15<sup>th</sup> November 2022. In the amended Memorandum of Appeal, the appellant listed the grounds of appeal as follows;
- a. That the learned magistrate erred in law and fact in failing to appreciate the that 1<sup>st</sup> respondent had no legal title to transfer the property known as Mavoko Town Block 12/7689 to the 2<sup>nd</sup> respondent.
  - b. That the learned magistrate erred in law and fact in failing to appreciate the appellant's evidence and his witnesses and thereby arriving at the wrong decision.
  - c. That the learned magistrate erred in law and in fact in failing to attach the due weight to the appellant's evidence and submissions on the primary suit.
  - d. That the learned magistrate erred in fact and law in failing to appreciate the fact that the appellant is a bona fide purchaser for value of the subject properly known as Mavoko Town Block 12/7689 and the legal proprietor of the same.
  - e. That the learned magistrate erred in fact and law in failing to award the appellant the current market value of the property known as Mavoko Town Block 12/7689.
8. Consequently, the appellant sought the following orders;
- a. A declaration that the appellant is the lawful proprietor of the whole parcel of land known as Mavoko Town Block 12/7689.
  - b. The title deed obtained by the 2<sup>nd</sup> respondent be canceled and/or nullified and the title deed be registered in the names of the appellant herein.
  - c. A permanent injunction issued against the respondents and/or their servants and/or anybody claiming under them restraining them from accessing, trespassing, constructing, developing, alienating, transferring and/or in any way dealing whatsoever with the parcel of land known as Mavoko Town Block 12/7689.
  - d. That the costs of the appeal be awarded to the appellant.
9. By directions made by this court on 23<sup>rd</sup> November 2022, the court ordered that this appeal shall be disposed by way of written submissions. On record are the appellants submissions filed on 10<sup>th</sup> March 2023. None of the respondents filed submissions, despite service.

### **Submissions**

10. Counsel for the appellant submitted that the role of this court as a first appellate court is to reconsider, re-evaluate and re-analyse the record and determine whether the conclusions made by the trial court were justified. On the first ground of appeal, counsel submitted that the trial court failed to appreciate that the 1<sup>st</sup> respondent had no legal title to transfer the suit property to the 2<sup>nd</sup> respondent as the 1<sup>st</sup> respondent in an agreement with the appellant acknowledged that the suit property was transferred to the 2<sup>nd</sup> respondent in unclear circumstances. Counsel argued that, that being the case, the proper relief for the appellant would have been cancellation of the 2<sup>nd</sup> respondent's registration and that the property be transferred to the appellant.
11. It was submitted for the appellant that it is only when a contract is frustrated that the parties are released from their obligations. They argued that the contract between the appellant and the 1<sup>st</sup> respondent had not been frustrated and that therefore the 2<sup>nd</sup> respondent did not obtain good title.



12. On the 2<sup>nd</sup> and 3<sup>rd</sup> grounds of appeal, counsel submitted that the trial court failed to appreciate the appellant's evidence. Counsel contended that since it was only the appellant who tendered her evidence in court, the court should not have declined the prayer for specific performance. Counsel placed reliance on the case of *Hubert L. Martin & 2 Others v. Margaret J. Kamar & 5 Others* [2016] eKLR for the proposition that the title that ought to be upheld is the one that conformed to procedure with a proper trace of its root. Counsel also relied on Section 80 of the *Land Registration Act* to argue that this court has jurisdiction to cancel title registered in the 2<sup>nd</sup> respondent's name.
13. Regarding the fourth ground of appeal, counsel contended that the court failed to appreciate the fact that the appellant is the bona fide purchaser for value. Counsel submitted that it was not in dispute that the appellant purchased the suit property from the 1<sup>st</sup> respondent, a fact admitted by the 1<sup>st</sup> respondent vide its letter dated 16<sup>th</sup> August 2017. Counsel relied on the case of *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others* [2017] eKLR for the proposition that a title issued earlier in time ought to be upheld against subsequent titles. Counsel argued that the appellant was the first purchaser of the suit property and therefore her ownership thereof ought to have been upheld.

### **Analysis and determination**

14. This court has carefully considered the appeal, submissions and the entire trial court record. The duty of this court as the first appellate court is to reassess, reconsider and re-analyse the evidence before the trial court and make its own independent findings bearing in mind that it had no opportunity of hearing and seeing witnesses and give due allowance for that (See *Selle v. Associated Motor Boat Company Limited & Others* [1968] EA 123).
15. In the instant appeal, the crux of the appellants grievance with the findings made by the trial court is that the appellant was the first in time to purchase the suit property and that therefore the 1<sup>st</sup> respondent had no good title to sell and pass or transfer the same to the 2<sup>nd</sup> respondent and that therefore the trial court should have cancelled the 2<sup>nd</sup> respondent's title and ordered the same to be registered in the appellant's name instead of allowing the alternative prayers for refund.
16. I have considered the pleadings and evidence and it is clear that the appellant pleaded that he purchased the suit property on 5<sup>th</sup> May 2011, from the 1<sup>st</sup> respondent, a fact acknowledged by the 1<sup>st</sup> respondent. There is no sale agreement for that date but she produced beacon certificate and certificate of ownership both dated 5<sup>th</sup> May 2011. The appellant and the 1<sup>st</sup> respondent later entered into an agreement dated 16<sup>th</sup> August 2017 in which the latter agreed to either ensure the title in the 2<sup>nd</sup> respondent's name is cancelled in three months or the appellant is compensated the value of the suit property at the market value. The parties did not however disclose what amounted to market value then. The 1<sup>st</sup> respondent failed to comply with the agreement. The certificate of search produced by the plaintiff indicate that the suit property was registered in the name of David Njenga Kuria the 2<sup>nd</sup> respondent, on 10<sup>th</sup> May 2017. In the agreement of 16<sup>th</sup> August 2017, the 1<sup>st</sup> respondent confirmed selling the suit property to the appellant and stated that the same was transferred to the 2<sup>nd</sup> respondent in unclear circumstances. From the affidavit filed by the 2<sup>nd</sup> respondent and sworn by him on 6<sup>th</sup> December 2017, he deponed that he purchased the suit property in the year 2016.
17. In addition, in his defence and counterclaim dated even date, the 2<sup>nd</sup> respondent stated that he purchased the suit property and holds title thereto. Among the documents filed by the 2<sup>nd</sup> respondent, are a search certificate to show that the suit property was registered in the names of the 1<sup>st</sup> respondent on 18<sup>th</sup> August 2014, payments for processing of title paid to Wangira Okoba & Company Advocates,



a title deed and photographs. I note that while the 2<sup>nd</sup> respondent did not file any document demonstrating purchase of the suit property from the 1<sup>st</sup> respondent, he did not give any testimony in court to show how he acquired the suit property from the 1<sup>st</sup> respondent who was the registered owner as at the time of the alleged purchase.

18. Article 40 (1) and (6) of the [Constitution of Kenya](#) 2010, protects property that is lawfully acquired and owned and provides as follows;

40.

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-
  - a. of any description; and
  - b. in any part of Kenya.
6. The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

19. Section 26 of the [Land Registration Act](#) No. 3 of 2012 provides for impeachment of title of unlawfully acquired title as follows;

26.

- (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.
2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

20. Therefore it is not enough for a party to have title to property whose manner of acquisition they cannot explain. A title without proof of basis of its root cannot stand in law. In the case of [Albert Mae Gacie v. Attorney General & 4 Others](#) [2006] eKLR, cited with approval in the case of [Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others](#) [2015] eKLR, the court held as follows;

Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come."



21. In the instant case, the 2<sup>nd</sup> respondent only claimed ownership of the suit property on the basis of a rootless title deed issued to him on 10<sup>th</sup> May 2017. No evidence was presented by the 2<sup>nd</sup> respondent to show the basis of that registration or how he acquired title thereto. The scope of protection of proprietary rights under Article 40 of the Constitution only extends to property whose acquisition is lawful and can be explained and the root of title can be traced. As there is no explanation given by the 2<sup>nd</sup> respondent herein of how he acquired the suit property, and there being evidence that the 1<sup>st</sup> respondent stated that registration of the suit property in the name of the 2<sup>nd</sup> respondent was in unclear circumstances whereas the 1<sup>st</sup> respondent acknowledged having lawfully sold the suit property to the appellant, I find and hold that trial court erred in concluding that the 2<sup>nd</sup> respondent was an innocent purchaser for value; as there was no proof of purchase, leave alone proof of innocence.
22. Therefore it is not enough that the suit property is registered in the name of the 2<sup>nd</sup> respondent, without any valid support of the 2<sup>nd</sup> respondent's title, the same is devoid of legal protection. Hence weighing the appellant's rights vis a vis those of the 2<sup>nd</sup> respondent, it is clear that the registration of title in the name of the 2<sup>nd</sup> respondent was unlawful as it lacked any evidence of lawful acquisition.
23. Under Section 80 of the Land Registration Act, the court has power to order rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. In the absence of evidence by the 2<sup>nd</sup> respondent for the basis of his registration of the suit property, and there being cogent evidence that the appellant lawfully purchased the suit property from the 1<sup>st</sup> respondent, I am satisfied that the appellant is entitled to orders of cancellation of the 2<sup>nd</sup> respondent's title and in his place, to be registered as proprietor thereof.
24. In the premises, I am satisfied that the trial court erred in arriving at the conclusion that the 2<sup>nd</sup> respondent was an innocent purchaser for value and that therefore the order for cancellation of title and registration of the same in the appellant's name was not available. For the above reasons, I find and hold that the appeal herein is merited. I therefore allow the appeal and make the following orders;
  - a. A declaration be and is hereby issued that the appellant is the lawful proprietor of the whole parcel of land known as Mavoko Town Block 12/7689.
  - b. The registration of the property known as Mavoko Town Block 12/7689 in the name of David Njenga Kuria be and is hereby cancelled, and in its place, the title thereof be registered in the name of the appellant Catherine Njuguini Irungu.
  - c. A permanent injunction be and is hereby issued against the respondents, and/or their servants and/or anybody claiming under them, restraining them from accessing, trespassing, constructing, developing, alienating, transferring, and or any way dealing whatsoever with the parcel of land known as Mavoko Town Block 12/7689.
  - d. The costs of the appeal are awarded to the appellant, to be borne by the 2<sup>nd</sup> respondent.
25. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24<sup>TH</sup> DAY OF JANUARY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**A. NYUKURI**

**JUDGE**

In the presence of:-

1. Mr. Musya for Appellant



2. No appearance for Respondent

Josephine - Court Assistant

