



Nzuki (Suing as the Legal Representative of the Estate of Naomi Syomiti Muia) v Kiarie & another (Environment and Land Appeal E026 of 2021) [2024] KEELC 1120 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E026 OF 2021
CA OCHIENG, J
FEBRUARY 29, 2024**

BETWEEN

SARAH NTHENYA NZUKI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NAOMI SYOMITI MUIA) APPELLANT

AND

JOHN MUGO KIARIE 1ST RESPONDENT

MACHAKOS LAND REGISTRAR 2ND RESPONDENT

(Being an Appeal from the Judgment of Kangundo Snr. Principal Magistrate's Court in ELC No. 109 of 2019 delivered on 9th June, 2021 by Hon. M. Opanga (SRM))

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the 30th June, 2021, the Appellant appealed against the Judgment delivered by Hon. M. Opanga (Senior Resident Magistrate) on 9th June, 2021 in Kangundo SPM ELC No. 109 of 2019 between Sarah Nthenya Nzuki v John Mugo Kiarie & Machakos Land Registrar. The trial court had made a determination that the Appellant had not proved her case on a balance of probability and consequently dismissed it.

The Appellant, being dissatisfied with the whole of the said Judgment, filed a Memorandum of Appeal dated the 30th June, 2021 based on the following grounds:-

1. That the learned Senior Resident Magistrate erred in law and fact in failing to find that the Appellant had proved her case to the required standards in matters fraudulent registration of an interest in land.



2. That the learned Senior Resident Magistrate erred in law and in fact by failing to analyze, appreciate and take into consideration the evidence adduced by the Appellant and thus made a wrong decision dismissing the Plaintiff's suit.
3. That the learned Senior Resident Magistrate erred in law and in fact in dismissing the plaintiff's suit on the ground that some other facts, documents were required to prove the case to the required standards, thereby made the wrong decision.
4. That the learned Senior Resident Magistrate erred in law and in fact in dismissing the Appellant's suit whereas the same was not opposed and/or controverted and therefore made the wrong decision.

Whereby the Appellant prays that the Judgment dated 9th day of June 2021 be set aside and the Appeal herein be entered in her favour.

The Appeal was canvassed by way of written submissions. The Appellant filed her submissions, the 1st Respondent despite being duly served failed to file submissions but the 2nd Respondent opted not to participate in the Appeal.

Appellant's Submissions

2. The Appellant in her submissions contended that the Appeal was merited and should be allowed for various reasons. She explained that she had purchased the suit land and produced several documents in support of her case, at trial level. The said documents included a Sale Agreement, a Search Certificate, a Green card on the suit land and executed Transfer instruments. She further submitted that the suit was uncontroverted since the Respondents' in the lower court were personally served but failed to enter appearance nor file any defence to counter her claims. She averred that the 1st Respondent had not offered any explanation as to how he had acquired the suit property. She reiterated that Section 26 (a) and (b) of the [Land Registration Act](#) would apply to defeat his title. To support her averments, she relied on the following decisions: Billiah Matiangi v Kisii Bottlers Limited & Another [2021] eKLR; Alberta Mae Gacci v Attorney General and 4 Others [2006] eKLR; Alice Chemutai Too v Nickson Kipkurui Korir & 2 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina, Civil Appeal No. 239 of 2009; Erastus Kiguta Karanja & Another v Benson Ndere Mbaria & 4 Others [2021] eKLR and Peter Nyamondio Anchinga v Florence M.Ogero [2019] eKLR.

Analysis and Determination

3. Upon consideration of the Memorandum of Appeal, Record of Appeal and the submissions by the Appellant, the following are the issues for determination:
 - a. Whether the Appellant legally acquired the suit land from the deceased Naomi S. Muia.
 - b. Whether the 1st Respondent's title to the suit land is valid.
 - c. Whether Judgment delivered on 9th June 2021 should be set aside.
 - d. Whether the Appeal is merited.
4. The background of this Appeal emanates from Kangundo SPMC ELC No.109 of 2019: Sarah Nthenya Nzuki v John Mugo Kiarie & Machakos Land Registrar. In the said suit, the Appellant herein who sued as a representative of the estate of the late Naomi Miti Muia vide a Plaint dated the 17th April, 2019 sought for the following Orders:-



1. A declaration that the land known as Donyo Sabuk/Koma Rock Block1/ 18617 belongs to the deceased Naomi Miti Muia.
 2. An order evicting the 1st Defendant from the land known as Donyo Sabuk/Koma Rock Block 1/ 18617.
 3. An order directing the 2nd Defendant to cancel and/or revoke the title made in favour of the 1st Defendant and issuing the Plaintiff with a Certificate of title in favour of the deceased Naomi Miti Muia.
 4. Costs of the suit.
 5. Any other this Honourable Court deems fit to grant.
5. The Defendants therein though duly served failed to enter appearance nor defend the said suit. The Appellant contends that she purchased land parcel number Donyo Sabuk/Koma Rock Block1/18617, hereinafter referred to as the *'suit land'*, from the late Naomi Miti Muia. She claimed to have taken possession thereof for over 18 years and that although the transfer was not completed since she was out of the country, all the transfer instruments had been duly executed. She insisted that the 1st Respondent fraudulently misrepresented to the 2nd Respondent for his name to be entered as the legal owner of the suit land since no explanation had been given as to how he acquired it.
6. The learned trial Magistrate in her Judgment noted that the allegations by the Appellant were only on paper since a certified copy of the Green card on the subject land revealed a number of dealings, several caveats by the registered owner and finally a transfer to one Phillip Musembi in 2010, to Njororo Muriithi, on 22nd September 2010 and finally to the 1st Respondent on 22nd February 2012. The learned Magistrate concluded by holding that the Appellant, by failing to call the Land Registrar or a qualified officer from Machakos Lands Registry to shed light as to how the land changed from the original owner to the name of the 1st Respondent, had failed to prove her case to the required standards.
7. In an Appeal, the role of the Appellate Court was emphasized in the case of Abok James Odera t/aA.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR as follows:-
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way...”
8. From the proceedings as well as exhibits produced in the Lower Court, I note the Appellant tendered copies of the Sale Agreement, Transfer Form, Consent of the Land Control Board as well as the Green Card. She explained that she had not effected transfer in her name since she had been abroad. Further, despite her argument that she has been in possession of the suit land since 2004 and constructed thereon, the trial Magistrate found that the evidence tendered was insufficient and dismissed her suit.
9. From perusal of the copy of the Green Card, I note it was opened on 28th November, 2007 and Naomi Miti was registered as the first proprietor of the suit land. Further, on 11th February, 2010, she entered a restriction which she allegedly removed on 9th March, 2010. I note entry No. 5 dated the 8th July, 2010 indicated a General Power of Attorney to one Philip Musembi and soon thereafter on 22nd September, 2010 transfer was effected to Cosmas Njororo Murithi after which entry No. 8 dated the 22nd February, 2012 shows transfer to John Mugo Kiarie for a consideration of Ksh.1,600,000.00. It is worth noting that the deceased executed Transfer Documents on 31st May, 2011 and she was identified



by one Phillip Musembi who is recorded as the one who had a Power of Attorney. Further, I note in the Sale Agreement dated the 15th August, 2004, the vendor sold five (5) acres of her land in Komarock Farm and the said Agreement was witnessed by various parties.

10. In my view, the Appellant demonstrated that she entered into a valid Sale Agreement with the deceased, paid the full purchase price, obtained consent of the Land Control Board as well as duly executed Transfer Form and deceased put her in possession of the suit land. The key question we need to ponder is whether once the deceased had duly executed Transfer Forms and Obtained Consent of the Land Control Board, could the 1st Respondent legally acquire a proper title to the suit land.
11. Section 6 of the [Land Control Act](#) provides that a contract for sale of land is void of all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act. From the lower court proceedings, despite the 1st Respondent having been duly served, he failed enter appearance nor file a Defence hence the Appellant's claim remained uncontroverted. I note no party controverted the fact that the Appellant was in possession of the suit land. Further, by the 21st September, 2006 when the Vendor obtained Consent from the Land Control Board to transfer the suit land to the Appellant as well as on the 31st May, 2011 when the deceased Vendor signed the Transfer Form, the 1st Respondent had not been registered as proprietor of the suit land. It is trite that as per the repealed Registered [Land Act](#) and [Land Registration Act](#), a duly executed Transfer Form is a contract for disposition of land and is registrable. To my mind, I opine that this created proprietary interest on land on behalf of the Appellant.

Section 26 of the [Land Registration Act](#) of 2012 provides 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.”

12. From the documents presented before the trial court which were not challenged, I find that the Appellant was able to prove she legally acquired the suit land. Further, from the speed with which the entries in the Green Card were being made, noting that the Vendor had already obtained Consent of Land Control Board and signed Transfer Forms before her demise, I find that this was a pointer enough for the Learned Magistrate to decipher elements of fraud.
13. In the case of Karugu (Suing as the Personal Representative of Peter Karugu Guandai - Deceased) v Kiburu & 3 others (Environment & Land Case 1375 of 2014) [2023] KEELC 18137 (KLR) (15 June 2023) (Judgment), the Learned Judge observed that:-

“At this juncture, it is pertinent to interrogate the legal frame work which governs the execution of documents in order to determine the validity of the transfer document dated 14.9.2009. The provisions of Section 108 of the Registered [Land Act](#) Cap 300 (Repealed)



stipulated that; “Every disposition of land, a lease or a charge shall be effected by an instrument in the prescribed form...”

80. While Section 109 thereof provided that;(1) Every instrument evidencing a disposition shall be executed by all persons shown by the register to be proprietors of the interest affected and by all other parties to the instrument. (2)Subject to section 124 (2), an instrument shall be deemed to have been executed only –a.by a natural person, if signed by him;.....”
 81. The verification of the execution was provided for under Section 110 of the aforementioned statute in the following terms;“(1) Subject to subsection (3), a person executing an instrument shall appear before the Registrar or such public officer or other person as is prescribed and, unless he is known to the Registrar or the public officer or other person, shall be accompanied by a credible witness for the purpose of establishing his identity.”
 82. The above provisions of law are echoed in the current legal regime to be found under Sections 43- 46 of the *Land Registration Act*. In particular, Section 44 thereof provides that;(1)Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.(2)The execution of any instrument referred to in subsection (1), by a person shall consist of appending a person’s signature on it or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument”, Emphasize added.
 83. From the foregoing provisions of law, (both old and new law), it is apparent that the transfer document had been duly signed and had therefore met the requisite criteria set out under the applicable law.
 84. It is noted that the 4th defendant has given a plausible explanation that the instrument of conveyance of the suit property from Karugu to the 1st defendant had been executed way back in February 2009, and she only inserted the date of 14.9.2009 at the time of registration. That evidence is corroborated by Dw1 who testified that at the point of signing the conveyancing document, the said instrument did not have a date. She went on to state that; “I got the conveyance with Mr. Karugu’s signature soon after I had signed. When I got it back, it had a stamp but it was still undated.”
 85. I find that in absence of any challenge to the signature of Karugu both in the sale agreement of 10.8.2007 and the conveyancing document of 14.9.2009, it follows that the latter document had been duly executed paving way for it to become a registrable instrument.”
14. While in the case of *Alberta Mae Gacci v Attorney General & 4 Others* 2006 (eKLR), the Court held that:-
- “Cursed should be the day when any crooks in the street 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 day when such a crook would have a 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....”



15. Yet in the case of *Munyu Maina v Hiram Gathiha Maina*, Civil Appeal No. 239 of 2009, the Court held that:-

“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.”

16. Based on the facts before Court, while relying on the legal provisions I have cited including the decisions quoted, I find that since the deceased Vendor had duly executed the Transfer Form, she had already disposed of her land to the Appellant. Further, this land was hence not available for disposal to a third party. I find that the Appellant hence legally acquired the suit land from the deceased vendor and the 1st Respondent’s title to the said land cannot be deemed to be valid since he did not acquire a clean title as the root of the said title is challenged. I opine that even if the transfer had not been registered, this could not defeat the transaction. In the circumstances, I will rely on Section 80 of the [Land Registration Act](#) and find that the 1st Respondent’s title stands revoked.

17. In the foregoing, I find that the Learned Senior Resident Magistrate erred in law and fact in failing to find that the Appellant had proved her case to the required standards in matters fraudulent registration of an interest in land. Further, I find that she erred in law and in fact by failing to analyze, appreciate and take into consideration the evidence adduced by the Appellant and thus made a wrong decision dismissing her suit. I also find that the Learned Senior Resident Magistrate erred in law and in fact in dismissing the Appellant’s suit on the ground that some other facts, documents were required to prove the case to the required standards.

18. I hence find the Appeal merited and will proceed to set aside the Judgment dated the 9th day of June 2021 and allow the Appeal in favour of the Appellant as per the Orders sought in the Complaint filed in the lower court.

Costs of the Appeal are awarded to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF FEBRUARY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Kilonzi holding brief for Appellant

No appearance for 1st Respondent

No appearance for 2nd Respondent

Court Assistant – Ashley

