



**Mogaki v Master (Environment and Land Appeal E017 of 2022)
[2024] KEELC 1083 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1083 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E017 OF 2022**

JM KAMAU, J

FEBRUARY 28, 2024

BETWEEN

FESTUS OSUMO MOGAKI APPELLANT

AND

PRISCILLA GESARE MASTER RESPONDENT

JUDGMENT

1. The Appellant, Festus Osumo Mogoki filed Nyamira Chief Magistrate’s Court ELC case No. 25 of 2019 dated 7/5/2019 against one Julius Sitino Master as the 1st Defendant and the Respondent herein as the 2nd Defendant. The last 2 are husband and wife respectively. His claim was that the father of the said Julius Sitino Master, the father in law to the Respondent herein sold a portion of his land viz 0.40 Ha. out of LR. No. North Mugirango /Bonyarurande/247 at an agreed purchase price of Ksh. 135,000/-. There were tea bushes thereon and the Appellant was forthwith given possession of the same. This was in 2006. The same was later sub divided into North Mugirango/ Bonyarurande/2591,2592,2593 and 2594 and North Mugirango/Bonyarurande/2592 was earmarked for the Appellant and transferred to the latter on 15/4/2014 after consent of the land control board was obtained to effect the respective transfer. In 2017 the Respondent herein and the 1st Defendant in the lower suit entered on the portion occupied by the Appellant, herewith a semi permeant house and started plucking tea therefrom without the Appellant’ permission. This in spite of several demands. Consequently, the Appellant sought the following reliefs: -
 - a. An order of eviction of the Defendants, themselves, their agents, servants, family members and or any persons acting for and on their behalf on parcel No. North Mugirango/Bonyarurande/ 2592.
 - b. An order of permanent injunction to restrain the Defendants by themselves, their agents, servants, family members and or any persons acting on their behalf from entering onto, cultivating, tilling, planting of any crops, erecting any structures, harvesting or plucking



tea leaves and or in any manner interfere with land parcel No. **North Mugirango/Bonyarurande/2592**.

- c. Costs of the suit
 - d. Any other relief this Honourable court deems fit to grant.
2. On her part, the Respondent denied the entire claim by the Appellant and averred in the alternative that even if the Appellant bought the 0.40 Hectares out of **NORTH MUGIRANGO/BONYARURANDE/247** he must have bought it from a share of a different member of the family and not from the Respondent's share and that the portion that ended up being **NORTH MUGIRANGO /BONYARURANDE/2592** was meant for her since she did not have any other land and that is where she has put up a homestead and has been farming and rearing chicken. She further claims that nobody else in the family did attend the land control board meeting that gave consent to the transfer of parcel No. L.R. **NORTH MUGIRANGO/ BONYARURANDE/2592** to the Appellant, if at all. She finally avers that the suit land **NORTH MUGIRANGO/BONYARURANDE/2592** was fraudulently and illegally acquired by the Appellant.
 3. Curiously, the 1st Defendant, Julius Sitino Master did not file a Defence and the case proceeded for trial on 25/1/2020 when the **ORTH MUGIRANGO/ BONYARURANDE / 247**. He bought the land when it was a subject of a succession cause in court and upon the successful conclusion of the succession cause in 2014 the same was sub divided and **NORTH MUGIRANGO/BONYARURANDE /2592** was transferred to him on 15/4/2014 after obtaining Land Control Board consent. He has therefore lived on the said parcel of land peacefully and interruptedly until 2017 when the Respondent forcefully entered upon the land, put up a semi-permanent structure and started picking tea. There was executed a sale agreement dated 3/10/2006. The Appellant produced the following documents in support of his case.
 1. Sale of land agreement dated 3rd October 2006.
 2. Mutation form for parcel No. North Mugirango/Bonyarurande/ 247
 3. Letter of consent of transfer of land parcel No. North Mugirango/Bonyarurande/2592 dated 2nd April,2014.
 4. Title Deed for land parcel No. North Mugirango/Bonyarurande/2592
 5. He testified that after being given a Title Deed to the land, the Appellant planted tea and nappier grass on the suit land where he has lived since then.
 6. In answering questions form the Respondent, the Appellant said that he bought the suit land from Thomas Sese Nyatanchi when the latter was still alive on 3/10/2006 and that the 1st Defendant equally participated in the sale contract. And that he would not tell why the Respondent and her husband both of who were living away from the home were not involved by their father in the transaction.
 7. He said that the money was paid to the Respondent's father in law. He also said that the 1st Defendant together with his (1st Defendant's) father handed over the land to him. He was a witness to the transaction.



8. On her part, the Respondent testified that the Appellant bought the land from her brother in law who follows her husband, the 1st Defendant. And the said brother is still alive. She said that the Appellant did plant tea on the portion he bought. She said that she still stays on the suit land that she was given. On cross examination by Mr. Soire for the Appellant, the Respondent said that the 1st Defendant is her husband and that her father in law, the 1st Defendant's father, who was the registered owner of the suit land died in 2014 and that it was true that her late father in law sold the suit land to the Appellant but that she could not tell whether the latter had a Title Deed to the said land. She further said she had carried out an official search to the land which is wrongly registered in the name of the Appellant. She also adduced evidence to the effect that it was her father in law himself who sub divided the land into 6 different portions which the lands office told him it was No. 75 and that she was not told anything about North Mugirango/ Bonyarurande/2592.
9. The only document produced by the Respondent to buff up her case is a copy of her Identity Card.
10. Dismas Abuga, the first witness to the Respondent testified that he was son to the late Thomas Sese Nyatanchi who he said had two wives and he gave each one of them land and that the Appellant bought land, ½ an Acre from his father's 3rd born son, Martin or Mojumbe at a consideration of Kshs.75,000/- but that instead the Appellant went to occupy the land belonging to the 3rd son's land which is the Respondent's land. On cross examination, the witness said that the 1st Defendant was the 4th son in the 2nd house. He said he didn't know whether the Appellant had a Title Deed to the suit land and he was not involved in the processing of the Title Deed since that land did not belong to the Appellant.
11. The land belonged to one Martin but the Appellant was given a Title Deed for the land that he did not purchase. He was shown the sale agreement which he admitted was between Thomas Sese Nyatanchi (his late father) and Festus Osumo (the Appellant). He further admitted that he was present and he is the one who counted the money (purchase price) but that his name as a witness to the sale agreement was omitted. Finally, he said the Respondent is living on her land but that the Appellant bought land from Martin.
12. On re-examination by the Respondent, Mr. Abuga said that the Respondent lives on her parcel of land but that the Appellant bought land from Martin.
13. When the last witness was about to be called to testify, the Appellant withdrew the case against the 1st Defendant. Later, I was able to get the hand written proceedings where I found the evidence of Geoffrey Obwocha Batasi who never recorded a statement and whose evidence has strangely not been included in the typed proceedings. He testified that on 14/6/2022 Osumu, the Appellant herein, did buy land from Martin Kennedy. He equally bought some tea plants and contracted him (the witness) to plant them. He also took care of them until they matured after which he left the land. The Appellant left his land unattended and it grew into a bush. He instead went to cultivate the Respondent's land when the latter was away on employment at Kisumu. When the Respondent came back, she enquired why the Appellant was on her land and that he had left the land he had bought from Kennedy who is still alive. He even asked the court to visit the land.
14. On cross examination by Mr. Soire the witness said that he was present and witnessed the agreement for the sale of the land. He also appended his signature to the apposite agreement.
15. Mr. Batasi said he knew the late Thomas Sese Nyatanchi who was his uncle and neighbour and who he said did not sell the land to the Appellant. He also did not know who signed the mutation forms or Application for the consent. He said that although he did not have a copy of the sale agreement, it is Martin who sold his (Martin's)land to the Appellant and that the Appellant gave money to one he



referred to as Kennedy. Finally, he said that the land was in 3 portions but he would not tell whether the Respondent has a Title Deed.

16. This brought the case to an end and the Judgment was delivered on 1/11/2022 where the trial Magistrate dismissed the Appellant's case on the ground that:

“From the agreement the land referred to is Plot No 75. From the evidence of the Defendant and the witnesses it appears the Plaintiff went and occupied the Defendant's piece of land. Alternatively, the Plaintiff went and took a Title Deed to include the portion occupied by the Defendant. It appears also that succession was not done as there is no evidence when the deceased passed on or when succession case No.....the defence evidence and testimonies look credible and could be the correct process. I do therefore find that Plaintiff have not proved their case against the Defendant(s). On a balance of probability. I do proceed to dismiss the suit with costs.....”

17. Having been dissatisfied with the above Judgment the Appellant appealed against the said Judgment this time naming Priscilla Gesare Master as the sole Respondent since the suit against the 1st Defendant had been withdrawn. He itemized the following as his Grounds of Appeal.

1. The learned Trial Magistrate erred in law in dismissing the Appellant's case who was /is the Registered owner of the suit land under the *Land Registration Act*.
2. The learned Trial Magistrate erred and misdirected himself in law in dismissing the Appellant case whereas the Appellant title of the land is still the registration in the name of the Appellant.
3. The learned Trial Magistrate misapprehended and misdirected him on the facts of the case and thereby arrived at a wrong conclusion.
4. The learned Trial Magistrate erred in law by deciding the case against the weight of evidence on record.
5. The learned Trial Magistrate failed and/or neglected to consider that the Respondent did not adduce any evidence in support of her claim to the suit land.

18. He then asked this court to set aside the Judgment of the lower court and give Judgment to the Appellant as prayed for in the Plaint with costs.

19. Before I proceed to analyze the evidence in this case for purposes of writing Judgment I must say that I am greatly perturbed by some interesting scenario of the disconnect in the way the typed proceedings appear in this case. From the signed and certified proceedings filed by the Appellant and the ones in the lower court file, the case was last in court on 1/3/2022 when the directions of the court were given to the effect that the matter was to proceed from where it had reached. Proceedings were to be typed and the Defence Hearing to be conducted on 14/6/2022. This was after the Trial Magistrate, Honourable M.O. Wambani had heard Dw2 on 22/6/2022 and adjourned the case to 17/8/2022 for further Defence Hearing. On 17/5/2022 the case could not be heard because the Hon. Trial Magistrate Honourable M.O. Wambani told the parties that she was on transfer and that on the said date, she was involved in the swearing of the Nyamira Deputy Governor. She then slated the further Hearing for 26/10/2021 and ordered that a Hearing Notice be issued to the parties. On 26/10/2021 the matter did not take off and was given 1/3/2022 as the next Hearing date. From the aforesaid typed proceedings, the case was given 14/6/2022 as the next Hearing date. After that there is a disconnect and what follows on the next page is the Judgment. In order to do Justice, I decided to look at the draft proceedings in the lower court file which show that the court sat on 14/6/2022 when the 2nd Defendant called a witness



by the name Godfrey Obwocha Batasi who testified and the case was closed. I cannot understand why these proceedings were not typed and why the typed proceedings were indicated to be complete without the evidence of the 3rd Defence witness if at all the court sat on the 14/6/2022. I decided to consider the said evidence since the same is on record. I have recorded it above.

20. I am disappointed that neither the Appellant's Advocate Mr. Soire nor the Respondent brought this to my attention.
21. I have carefully gone through the entire proceedings, the record of appeal, the memorandum of Appeal, the grounds thereof, the impugned judgment, the rival submissions filed in court on behalf of both parties and the law. We discern main issues for determination to be; whether the sale and transfer of the suit land from the deceased to the Appellant, was marred with fraud; and whether the Appellant was a *bona fide* purchaser for value without notice.
22. In the case of *Kamau v Mungai* [2006] 1 KLR 15, the court restated the principle as follows:
"Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that."
23. And this being a first Appeal I will condense the facts. I discern them as herein below: -

There was a sale agreement made on 3/10/2006 which was reduced in writing though hand written between Thomas Nyatanchi and Festus Osumo Mogoki. The said Thomas Sese Nyatanchi and his son Julius Sitino Master, the 1st Defendant in the lower court agreed to sell 0.2 Hectares out of Bonyarurande 75 to one Festus Osino Mogoki, the Appellant herein for Ksh. 135,000/- and the agreement states that the said consideration had already changed hands by the time of the said agreement on 3/10/2006. The purchaser was forthwith given possession of the said land including the tea bushes thereon. Among the people who signed the agreement were the late Thomas Sese Nyatanchi, his wife Hellen, mother to the 1st Defendant and Mother in law to the Respondent, the 1st Defendant who is the husband to the Respondent. Also present were the Appellant as well as his wife Josephine Osimo.
24. I do not understand why the land was described as Bonyarurande 75 but every other description of the subject matter and the terms of the contract tally with the documents produced in court and the testimony of the Appellant. There is then the registered mutation form produced by the Appellant showing that the parcel of land known as Nyamira – North Mugirango/Bonyarurande.247 measuring 1.234 Hectare in registry map No. 1 belonging to Thomas Sese Nyatanchi was subdivided into North Mugirango/Bonyarurande/2591 measuring 0.06 Hectares, North Mugirango / Bonyarurande /2592 measuring 0.04 Hectares, North Mugirango /Bonyarurande /2593 measuring 0.43 Hectares and North Mugirango/Bonyarurande /2594 measuring 0.335 Hectares. The Identity Card of Mr. Nyatanchi indicated in the mutation form dated 19/10/2000 is the same as that in the sale agreement of 3/10/2006 -6937147. The said mutation was received at the land's office for registration on 15/4/2004 on presentation book No. 57/2014 and Kshs. 500/- paid for the same with receipt number 7241581 issued. It was paid for on 30/3/2007. A sketch map was attached to the mutation showing the location of North Mugirango/Bonyarurande/2592. On 2/4/2014 consent in respect to reference No. North Mugirango/Bonyarurande/2592 was granted by Ekerenyo Land Control Board to Thomas Sese Nyatanchi to transfer the same to Festus Osumo Mogoki, the Appellant herein and 13 days later on 15/4//2014 a Title Deed was issued to Mr. Festus Osumo Mogoki Id No. 10020057 of P.O. Box 14, Nyamira. The same is for 0.04 Hectares - North Mugirango/Bonyarurande/2592. It shows that North Mugirango/ Bonyarurande/2592 was a subdivision of plot No.247. It is quite clear that all the necessary pre-requisites were observed and the Respondent has not cited any fraud involved



in the transfer of the suit land to the Appellant. She testified that her father in law sold the suit land to the Appellant when it was a subject of a succession cause in court. What succession cause? By the mutation form dated 19/10/2000 was prepared, the same presented for registration on 15/4/2014, the same registered on 15/4/2014, consent for transfer of North Mugirango/Bonyarurande/2592 obtained on 2/4/2014 Title Deed issued to the Appellant on 15/4/2014, and although no death certificate was produced in Court, the uncontroverted evidence on record is that the Transferor was still alive. I do not understand what other evidence was required to prove the sale.

25. Section 26 (1) of the [Land Registration Act](#), No. 3 of 2012 gives the Proprietor of Title assurance of the sanctity of his proprietorship. To challenge this sanctity, one has to bring very tight evidence as to why he thinks that the Title Deed is not genuine. You cannot wake up one morning and start imagining that one's Title was obtained fraudulently. It is trite law that once a person is registered as a proprietor of land, he is to enjoy all rights and privileges appurtenant thereto. Having established that the Respondent's father in law was the registered owner of the suit property, I find that he was entitled to all the rights and privileges belonging or appurtenant thereto and do all that is legally appurtenant to his rightful ownership including transferring the suit land to the Appellant herein. Section 26 (1) of the [Land Registration Act](#), No. 3 of 2012, provides that:

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 <i>the Title of that proprietor shall not be subject to challenge, except—</i>	
<i>(a)</i>	<i>on the ground of fraud or misrepresentation to which the person is proved to be a party; or</i>
<i>(b) where the certificate Title has been acquired illegally, or through a corrupt scheme.</i>	

26. In the case of [Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others \[2015\] e KLR](#) Justice Sila Munyao held that:

"It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation.

27. Flowing from the foregoing, a registered proprietor enjoys the statutory protection of Title as long as he can show that the Title was acquired procedurally. The circumstances when title can be cancelled or revoked have been enumerated above (26(1) (a) & (b) of the [Land Registration Act](#).
28. Section 80 (1) of the [Land Registration Act](#) No. 3 of 2012 provides as follows:



1. Subject to subsection (2), the court may order the 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.
29. But such allegations must go beyond imaginations. They must be proved. In *RG Patel vs Lalji Makanji* (1957) EA 314_ the court expressed itself as follows:

"Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required"
30. Given the seriousness of the allegations, the onus was on the Respondent to provide evidence to the Court of the alleged fraud which evidence must meet the standard of proof as was underscored by the Court of Appeal in *Central Bank of Kenya Limited v Trust Bank Limited & 4 Others* [1996] eKLR as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the Court rendered itself as follows:

"The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case."
31. In the case of *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another* [1979] eKLR, the Court of Appeal took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. The position that emerges is that evidence of especially high quality and strength is required to prove fraud in land cases. It is a daunting and burdensome task to prove fraud in any civil case. In the instant case, the Respondent needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of the Appellant.
31. Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable doubt, but above balance of probabilities. However, from the evidence tendered in Court, the Appellants did not prove fraud at all. No evidence was tendered to this end by the Respondent at least to verify her allegations. In the absence of evidence, I am therefore unable to impeach the Appellant's Title Deed in respect to L.R. NO. North Mugirango/Bonyarurande/2592 or even find that it was acquired fraudulently and the Respondent then accordingly fails in her claim over the parcel of land L.R. NO. North Mugirango/Bonyarurande/2592.
32. If the Respondent had any recourse then it should have been directed to her father in law who was still alive and in fact did received the purchase price in the presence of her husband who did not support her case. In any case, as long as the 1st Defendant is alive, he should be the beneficiary being the direct link to his father. The late Sese had the capacity to transfer North Mugirango/Bonyarurande/2592 to the Appellant, which he did. Although it is a practice that has emerged there is no requirement in the *Land Control Act* (CAP 302 Laws of Kenya) that members of the family of the proprietor of land is invited to the Land Control Board meeting when consent to transfer or even subdivide is being considered. The Respondent can therefore not claim that since she was not involved in the Application for and the granting of the land control board consent, then there was fraud, illegality or irregularity. On the Respondent's argument that the late Thomas Sese Nyatanchi died the same year the consent to transfer the land was obtained, this is immaterial as long as the consent was procured and transfer effected when



the Vendor was still alive. Even on the day he dies as long as the process takes place when he is still alive. Even 1 minute before the transfer. The evidence on record is that the late Sese Nyatanchi died in 2014 after the transfer. This is from the Respondent herself and she never told the court that he died before 13/4/2014. Her evidence is that “.....

“.....it is true that my father in law sold the suit land to the Plaintiff but I cannot tell whether he had a Title Deed to the said land.....” It was my father in law who sub divided the land into 6 different portions.....

33. The Respondent therefore contradicts herself in her submissions that the Title Deed was issued in the names of the Appellant in 2013 when the deceased had died. As to the agreement of sale and the transaction being voidable, only the parties to the same can apply for the agreement to be unlawfully so declared or anybody who has been disadvantaged by the transaction and certainly the Respondent is not in that class.
34. In the premises, it is my considered Judgment that the Appellant proved his case on a balance of probability and deserved to have been granted his claim in the lower court. In the premises I hereby overturn the Judgment of Honourable W. Chepseba, Chief Magistrate dated 1/11/2022 in Nyamira CMCC ELC No. 25 of 2019 and substitute the same with Judgment for the Appellant in the following terms:
- a. An order of eviction be and is hereby granted against the Respondent either by herself, her agents, servants, family members and or any person(s) acting for and on her behalf from the parcel of land No. North Mugirango/bonyarurandE/ 2592.
 - b. An order of permanent injunction be and is hereby granted restraining the Respondent either by herself, agents, servants, family members and or any person(s) acting on her behalf from entering onto, cultivating, tilling, planting of any crops, erecting any structures, harvesting or plucking tea leaves and or in any other manner interfering with land parcel No. **North Mugirango/ Bonyarurande/2592.**
34. In addition, I will also award costs of this Appeal and those of the lower Court to the Appellant.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF FEBRUARY 2024.

MUGO KAMAU

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the Presence of:-

Court Assistant: - Brenda

Plaintiff in person

Defendant in person

