



Mwangi v Waiganjo (Suing as the legal representative of Mutahi Waiganjo - Deceased) & another (Environment and Land Appeal 87 of 2021) [2024] KEELC 1002 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1002 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 87 OF 2021
JG KEMEL, J
FEBRUARY 22, 2024**

BETWEEN

DAVID MAINA MWANGI APPELLANT

AND

WANYEKI MUTAHI WAIGANJO (SUING AS THE LEGAL REPRESENTATIVE OF MUTAHI WAIGANJO - DECEASED) 1ST RESPONDENT

MWIHOKO HOUSING COMPANY 2ND RESPONDENT

(Appeal from the Judgment of Hon C K Kisiangani (SRM) in CMELC No 52 of 2020-Ruiru delivered on the 23/9/2020)

JUDGMENT

1. Aggrieved by the Judgment and the decision of the Court in CMELC No 52 of 2020 at Ruiru, the Appellant, who was the 2nd Defendant in the trial Court moved this Court by way of an appeal *vide* the Memorandum of Appeal dated the 22/10/2021 on the following grounds;
 - a. That the learned trial Magistrate erred in law and in failing to set out issues raised in the pleadings and analyze each of them in her Judgment in relation to the documentary evidence tendered.
 - b. That the Learned Magistrate failed to appreciate the evidence, law and submissions made on behalf of the Appellant thus reaching a conclusion that was contrary to the law.
 - c. That the Learned Magistrate erred in law and fact by ignoring the admissions made by the Plaintiffs that attributed the sale and transfer of the suit property to the brother and failing to remedy the mischief.



- d. That the Learned Magistrate erred in fact and law by shifting the burden of proof to the Appellant.
 - e. That the Learned Magistrate erred in law and fact by ignoring the Appellant's written submissions and all the pertinent issues raised therein.
 - f. That the Learned Magistrate erred in law and fact by focusing on the legal regime of succession against the principles of Land Law.
 - g. That the Learned Magistrate failed to appreciate that the 2nd Defendant was an innocent purchaser of value and exercise the maxim that "equity will not suffer a wrong without a remedy."
 - h. That the Learned Magistrate erred in law and in fact in disregarding the admissions, discrepancies and contradictions in the evidence of the Respondent and in so doing reached a wrong decision.
 - i. That the Learned Magistrate failed to consider the evidence in its totality hence reaching a wrong conclusion of both facts and law.
2. The Appellant sought the orders as follows;
 - a. That the appeal be allowed and the Judgement of the lower Court be set aside and/or quashed.
 - b. Costs of this appeal be awarded to the Appellant.
 3. On the 6/6/22 parties elected to file written submissions. All the parties complied with the directions save for the 2nd Respondent.
 4. On behalf of the Appellant it was submitted that the subject property was and is held by way of Certificate of Ownership from the 2nd Respondent in the name of the Appellant. That the 1st Respondent's brother namely Waiganjo Mutahi used the original share certificate to secure a loan from a third party and handed over the original certificate in return. Upon default in payment of the loan, the said original certificate of ownership was used to sell the land to the Appellant who paid valuable consideration. That upon surrender of the original certificate the 2nd Respondent cancelled the same and issued a new certificate in the name of the Appellant. That the original certificate included an original Identity Card in the name of Mutahi Waiganjo.
 5. The Appellant faulted the evidence of the 1st Respondent as follows; there was no proof that the plot belonged to the 1st Respondent's deceased father bearing the same name Mutahi Waiganjo like his son; no certificate of death, consent or family authority to institute the claim on behalf of Waiganjo; no disclosure was made in the pleadings with respect of the action of his brother in disposing the land; evidence to support fraud collusion and misrepresentation against the Appellant were not proven; no theft or forgery of original Share Certificate or Identity Card was alleged; the 1st Respondent admitted that the share certificate is a forgery therefore the Court erred in relying on it; no evidence was placed before the Court to support the unavailability of his brother or documents of identity to ascertain the role he played in the sale and surrender of documents in exchange of a loan; delay in filing suit was also challenged as inordinate.
 6. In addition, the Appellant submitted that the trial Court disregarded evidence, the submissions and authorities tendered and in particular failed to apply equity and justice by upholding the claim based on unsubstantiated evidence and falsehoods. The trial Court was faulted for basing its decision on the law of succession by imputing that the property belonged to the deceased yet no death certificate



was adduced. That the 1st Respondent admitted that the plot was sold by his brother and therefore the Appellant ought not lose his valuable consideration on account of the admission. That the Court ought to have applied the principles of equity that demands that equity will not suffer a wrong without a remedy.

7. The 1st Respondent submitted that the burden of proof was placed on the Appellant in line with Section 109 of the *Evidence Act* to establish how he acquired the property from the deceased person and as such the learned trial Court did not err in shifting the burden of proof to the Appellant.
8. As to whether a sale was conducted by the deceased, the 1st Respondent stated that it is impossible as the deceased was long dead in 1996 and could not have transacted on the suit land in 2010. That the Appellant was categorical that he purchased the land from an old man whom he later learnt was called Gatara and that he also paid the said Gatara monies thereby establishing that the land was not sold by the deceased but rather a stranger who was intermeddling with the deceased's estate.
9. The 1st Respondent submitted that arising from the forgoing it is clear that the registration of the land in the name of the Appellant is unlawful null and void. The Court was urged to disallow the appeal.
10. Having considered the appeal, the written submissions, the trial Court record and all the material placed before this Court the following two issues fall for determination;
 - a. Whether the burden of proof was applied correctly by the trial Court.
 - b. Whether there was a valid transfer of the land to the Appellant
 - c. Whether the Appellant was a bonafide purchaser for value without notice.
 - d. Whether the Court disregarded the submissions of the Appellant
 - e. Who meets the cost of the appeal?
11. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated as thus:

“.... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect....”

12. It is not in dispute that the suit land was acquired by Mutahi Waiganjo in 1990 from the 2nd Respondent Company going by the share certificate dated the 30/5/1990.
13. The Appellant has alluded that there is no evidence that the said Mutahi Waiganjo ever passed away. The record shows that Mutahi Waiganjo died on the 20/2/1996 as shown by the grant of letters of administration dated the 1/11/1990. This evidence was not challenged by the Appellant.
14. The 1st Respondent's case was that his father namely Mutahi Waiganjo acquired the suit land plot No 213 from the 2nd Respondent in 1990 and took possession of the same until his demise in 1990. That his family continues being in possession whereupon he constructed a house and fenced which the Appellant demolished. That in 2013 he sought to process the title from the Company and was informed by the Company that the land was transferred to the Appellant. The 2nd Respondent was



- adamant to explain the circumstances in which the land changed hands only stating that the share certificate in the possession of the 1st Respondent was not genuine. It is the 1st Respondents averment that the manner in which the land was transferred to the Appellant was unclear, replete with collusion and other illegalities.
15. The Appellant on the other hand informed the trial Court that he acquired the land from Mutahi Waiganjo who held an Identity Card and a Certificate of plot ownership from the Company. That he paid valuable consideration for the land wherein the Company cancelled the certificate and issued him with a new one denoting ownership of the land which land has been in his possession for the last 11 years.
 16. It is trite that he who alleges must prove. The standard of proof in Civil cases is on a balance of probabilities. See the Court of Appeal decision in *Palace Investments Limited Vs. Geoffrey Kariuki Mwenda & Another* [2015]eKLR.
 17. It is trite that he who alleges must prove. This is the import of Section 107 of the *Evidence Act*. The standard of proof in Civil cases is on a balance of probabilities. See the Court of Appeal decision in *Palace Investments Limited v Geoffrey Kariuki Mwenda & Another* [2015]eKLR. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Sections 109 and 112 of *the Act*.
 18. The Court of Appeal in the case *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR discussed the burden and evidential of proof and stated thus:

(16)

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”
 19. The *Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case ..”
 20. The above position was reiterated by the Supreme court in the case of *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] KESC 42 (KLR) that;

“132. Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant throughout a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”
 21. The Court finds that the trial Court was right in the way it interpreted the law with respect to the evidential burden. The Appellant’s case was that he purchased the land from Mutahi Waiganjo and he therefore bore the burden of proving that the said acquisition was lawful.
 22. The Court answers the 1st issue in the positive.



23. On the second issue, the Court's attention has been drawn to the agreement of sale dated the 2/9/2010 between Mutahi Waiganjo of ID No 341455/66 and the Appellant over plot No 213 for the sum of Kshs 300,000/-. The Appellant informed the Court in his pleadings that he bought the land from Mutahi Waiganjo ID No 341455/66. Evidence was led that the senior Waiganjo had a son going by the same names who is alleged to have used the certificate of ownership as security against some loan from a man called Gatara. The question is who did the Appellant purchase the land from? He led evidence as follows;

“My name is David Maina Mwangi. I live in Mwihoko. I have a hardware. Plot 213 Mwihoko is known to me. It belongs to me. I have the original share certificate from Mwihoko Housing of 2nd September, 2010. Mwihoko Housing gave it to me after I bought the land in August 2010 and old man came to my hardware and said that he had a plot that he intended to sell. He left me his phone no to call him once I get a customer. He left me a copy of his share certificate. I visited the plot and developed interest. I called him after 1 week and told him. We agreed to meet at Mwihoko Housing Company. He showed me his original share certificate and ID. The Company confirmed he was the owner of the plot. They then transferred the plot to me.”

24. In cross the Appellant said:-

“I have the original share certificate. I can verify since it is the one given to me from Mwihoko Housing Company. It has a company seal. The one that you are showing me has a seal. The company is the one to say which one is fake and which one is the original. The CID and Mwihoko confirmed that mine was original. I have not brought a witness to verify that mine is original. I do not know about a loan that was taken. I knew of it at CID. They are the ones who said that. At CID I showed Gatara as the one who sold me the plot. The plot was sold to me by 3 people. I gave money to Gatara. They were 3 men at Mwihoko Housing Company. Gatara is the one who had the ID and certificate. When selling the plot Gatara did not tell me his name. He had all the documents for the plot. They had original ID and original certificate. The company identified them as the sellers. I could not tell their names. I could only identify Gatara at CID. He is the one who signed the agreement and I gave him the money. The people that they had the documents said they were Mutahi Waiganjo. The men that had the documents and I gave the money were said to be Mutahi Waiganjo. I could not tell if Mutahi Waiganjo was there or not. They had all the documents for the plot.

The person I gave the money to said was Mutahi Waiganjo. I identified him at CID. I was told that his name was Gatara. Gatara is the one who had all the plot documents who signed the agreement and I gave him the money. I was not given a receipt for the purchase price.”

25. From the said evidence the Appellant states that he was offered land by an old man who came by his hardware shop. He does not disclose the name of the seller. However, that they met again at the Company's office where an agreement was reached. That the agreement was drafted by the Company. After a week he was warned by PW2 that the person who sold him the land was not the owner. It would appear that he ignored this warning to his detriment. It was too late because by then he had paid Gatara in a sale he confesses was by 3 nameless men/people. It gets more hilarious when the Appellant states that while buying the plot (including paying him), the said Gatara never told him his name. The Court cannot help but ask how careless and callous the Appellant could have been seeing that the sum of Kshs 300,000/- is not little money to be given away casually in the manner in which the Appellant dealt with the transaction. It reminds me of the case of *Arthi Highway Developers Limited v West End*



Butchery Limited & 6 Others [2015] eKLR where the Court equated the buyers action with one buying potatoes in Wakulima market when it stated:-

“It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new *Constitution* 2010 and the *Land Registration Act*, 2012 will have a positive impact for land investors in future. We have said and it beats repeating that the gusto and dispatch with which the 2nd appellant went about this transaction points to an amalgam of adventurism, greed, and recklessness. For these reasons, all the grounds proffered in the 2nd appellant’s appeal.”

26. The crux of the evidence of the Appellant is tested when he says he could not tell whether Mutahi Waiganjo was there or not when he paid the monies. This is a direct contradiction with his pleading that he purchased the land from Mutahi Waiganjo.
27. For starters the plot certificate dated 30/5/90 is in the name of Waiganjo ID No 3461455/66. If Waiganjo died in 1996 at the age of 86 it then follows that he was born in 1920. He cannot be the same Waiganjo born in 1960. The Court finds that the Waiganjo who purported to have sold the land was not the owner of the suit land. Even if it is true that he was the son of the real Waiganjo, no evidence was led by the Appellant to show that he (“Waiganjo”) had the interest and the capacity to sell the land. The Learned Magistrate was correct in the manner that she interpreted the Section 45 of the *Law of Succession Act* which states as follows;

“45. No intermeddling with property of deceased person:-

- (1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- (2) Any person who contravenes the provisions of this section shall —
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
 - (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

28. If indeed “Waiganjo” sold land to the Appellant he received no interest given that Waiganjo held none and passed none to him. In the Court of Appeal case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR it was settled that a person who holds a bad title cannot pass a good title to a purchaser.
29. Was the Appellant a bonafide purchaser for value without notice? The *Black’s Law Dictionary* 9th Edition defines a bona fide purchaser as: “One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or



infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims." The concept of a bona fide purchaser was aptly discussed in the Uganda Court of Appeal case of *Katende v Haridar & Company Limited* [2008] 2 E.A.173 where it was held that a bona fide purchaser may successfully rely on the bona fide doctrine if he proves that:

- “(a) he holds a certificate of title;
- (b) he purchased the property in good faith;
- (c) he had no knowledge of the fraud;
- (d) he purchased for valuable consideration;
- (e) the vendors had apparent valid title;
- (f) he purchased without notice of any fraud;
- (g) he was not party to any fraud.”

30. The Court has already found that the Appellant alleged to have purchased land from a person who held no interest in the land. The seller equally had no capacity to sell the land given that the owner had passed on 4 years before. The Appellant cannot qualify to be a bonafides because had he carried out due diligence he would have discovered that the alleged Gatara or Waiganjo or whomever the three men were had no title interest and ownership in the property.
31. The Court finds that the Appellant purchased land from Gatara and as such his remedy lies with the said three nameless men including Gatara. The Court finds that the sale, cancellation of plot ownership certificate by the Company was null and void.
32. On the 4th issue, the Court has perused the record and does not agree with the Appellant that his submissions and pleadings were not considered by the trial Court. I find no ground to fault the trial Court in this regard.
33. In the end the appeal has no merit. The Judgment of the trial Court is upheld.
34. The Appeal is dismissed with costs in favour of the 1st Respondent.
35. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of

Mbichire for Appellant

Onchiri for the 1st Respondent

2nd Respondent – Absent

Court Assistants – Phyllis/Oliver

