



REPUBLIC OF KENYA



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**Mwangi & another v Muthike (Environment and Land Appeal
E032 of 2022) [2025] KEELC 935 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 935 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E032 OF 2022
JM MUTUNGI, J
FEBRUARY 27, 2025**

BETWEEN

NAHASHON KARIMI MWANGI 1ST APPELLANT

JANE WAMBURA KIIHO 2ND APPELLANT

AND

ZACHARIAH MUNENE MUTHIKE RESPONDENT

*(Being an appeal from the Judgement of Hon. A.K Ithuku Chief Magistrate Kerugoya
delivered on 17th November 2022 in Kerugoya CMC ELC Case No. 119 of 2017)*

RULING

1. The Respondent instituted the suit against the Appellants in the Lower Court vide a Complaint dated 18th July 2019, seeking the following order:
 - a. A declaration that the transfer of title number Inoi/Ndimi/1288 on 16th February 2012 and the subsequent subdivision and transfer/s are fraudulent and therefore were null and void.
 - b. Cancellation of the 1st and 2nd Defendants' names as the proprietor of title numbers Inoi/Ndimi/3501 and 3502, consolidation of the same into former title number Inoi/Ndimi/1288 and subsequent registration of the same to the Plaintiff as the proprietor.
 - c. Costs of this suit with interest.
 - d. Any other relief which the Court may deem fit to grant.
2. The Respondent in the suit averred that in 1996, Jackan Githinji Gicheru gifted him land parcel No. Inoi/Ndimi/1288. The Respondent pleaded that on 13th May 1996, Jackan Githinji Gicheru obtained the necessary consent from the Ndia Land Control Board and completed the transfer forms for the suit land on 17th October 2007. The Respondent asserted that he discovered the fraudulent actions of



the second Appellant only when he presented the documents at the Kerugoya Land Registry in March 2019 and found that, on 16th February 2012, the second Appellant had unlawfully transferred the suit land to herself and subsequently subdivided it into titles numbered 3501 and 3502.

3. Further, the Respondent averred that the 2nd Appellant transferred title number Inoi/Ndimi/3501 to herself and title number Inoi/Ndimi/3502 to the 1st Appellant. Upon making discovery of these fraudulent activities, the Respondent placed a caution against the title of the suit land. The Respondent further asserted that he had continuously been in possession of the land and contended the Appellants' actions were unlawful, null, and void and prayed that the suit property be reverted to his name.
4. In response to the Respondent's claim, the 2nd Appellant filed her Statement of Defence on 18th September 2019 which she subsequently amended and filed her amended defence and counterclaim on 16th January 2020. She denied the averments made in the Plaint and asserted that the suit land had been bequeathed to her by her late husband, Jackan Githinji Gicheru and hence prayed for the dismissal of the Respondent's suit.
5. In her Counterclaim, she averred that her late husband gifted her the suit land on 16th February 2012 and that the land remained registered under her name until 11th February 2019, when she subdivided it into two parcels: Inoi/Ndimi/3501 and Inoi/Ndimi/3502. She stated she subsequently sold parcel Inoi/Ndimi/3501 on 18th March 2019 to the 2nd Appellant for Kshs. 1,200,000. In her Counterclaim, she sought the following orders:
 1. That an order of forceful eviction do issue against the Plaintiff, his relatives, servants or anybody else claiming through him from the land parcel number Inoi/Ndimi/3501.
 2. Costs of the suit.
6. The 1st Appellant equally filed his defence on 18th September 2019 and later also amended the same on 16th January 2020. He denied the allegations in the plaint, asserting that he was an innocent purchaser for value who had no knowledge of the Respondent's alleged claim. In his Counterclaim, he averred that the land was sold to him by the 1st Appellant on 18th March 2019. He emphasized that he conducted thorough due diligence, which affirmed that the title was free from any encumbrances. The 1st Appellant averred that all relevant statutory procedures were followed, and the title to land parcel Inoi/Ndimi/3502 was duly transferred to him. He contended that as the legitimate owner of the land, any occupation by the Respondent was illegal, categorizing the Respondent as a trespasser who should be forcefully evicted.
7. On 17th November 2022, the Trial Court issued a judgment in favor of the Respondent and against the Appellants. As a consequence, the Appellants' Counterclaims were dismissed.
8. The Appellants, dissatisfied with the Judgment, filled a Memorandum of Appeal dated 24th November 2022, setting out the following grounds for their appeal:
 - a. The Learned Magistrate erred in fact and in Law in holding that the Respondent had acquired a perfect gift against the weight of evidence.
 - b. The Learned Magistrate erred in fact and in Law in ordering the cancellation of the Appellants as owners of Land Parcel Inoi/Ndimi/3501 and 3502 when they had acquired the land procedurally and the Land Registrar testified that the transfer process was above board.
 - c. The Learned Magistrate erred in fact and in law in failing to protect the 1st Appellant's interest as an innocent purchaser for value without notice.



- d. The Learned Magistrate erred in fact and in law in holding that the 1st Appellant acquired Land Parcel No. Inoi/Ndimi/1244 fraudulently against the weight of evidence.
 - e. The Learned Magistrate erred in fact and in law in failing to note that the 2nd Appellant acquired the land during her husband's lifetime and with his consent and the proof of wrongdoing on the part of the 1st Appellant.
 - f. The Learned Magistrate erred in fact and in law in holding that the Respondent's grandfather gave a perfect gift to the Respondent when he could not hold land in his name as he was a minor and he presented the PIN of his grandfather issued 11 years after his death.
 - g. The Learned Magistrate erred in fact and in law in failing to hold that the 1st Appellant was an innocent recipient of land and not the Administrator of the estate of Jackan Githinji and the evidence showed that the conduct of Jackan Githinji never intended to gift the Respondent with the land as he did not give him the original title deed.
 - h. The Learned Magistrate erred in fact and in law in failing to hold that once the transferor died, the transfer form could not hold water without following the succession process.
 - i. The Learned Magistrate erred in fact and in law in allowing the Respondent's claim against the weight of evidence and dismissing the Appellants' Counterclaim.
 - j. The Learned Magistrate erred in fact and in law in making the orders of 17/11/22.
9. The Appellants sought the following orders;
- a. That the appeal be allowed and the Judgement of the Learned Chief Magistrate delivered on 17/11/22 be set aside and substituted with an order allowing the Appellants' Counterclaim.
 - b. Costs of the appeal be awarded to the Appellants.
- The appeal was canvassed by way of written submissions.
10. The Appellants filed their written submissions dated 14th June 2024, contending that despite the Respondent outlining specific allegations of fraud in his Complaint, there was no evidence to substantiate claims that the transfer documents were forgeries or that the 2nd Appellant engaged in any wrongdoing. The 2nd Appellant in the submissions contended that the land in question was a gift from her husband, who voluntarily transferred it to her during his lifetime. Moreover, the 2nd Appellant was not being sued in her capacity as the Administrator of her late husband's estate but rather as a recipient of the gift.
 11. The Appellants further argued that the Respondent's assertion that his grandfather gifted him the suit land in 1996 is implausible, given that he was only 14 years old at that time and legally ineligible to hold land in his own name. They pointed out that the PIN certificate for the deceased, provided as evidence by the Respondent, was issued on 17th October 2007, which was 11 years after the alleged transfer of ownership.
 12. Additionally, the Appellants claimed that the gift inter vivos from the deceased to the Respondent was incomplete, as the original title deed was never presented to him, making registration impossible without this essential document.
 13. Regarding the issue of innocent purchaser, the Appellants contended that the 1st Appellant relied on documentation obtained from the Lands Office. The 1st Appellant submitted that he conducted an official search, which confirmed that the land he intended to purchase, Inoi/Ndimi/3501, was



- free of encumbrances. The 1st Appellant reiterated that he was an innocent purchaser for value, and maintained that the Trial Court made a mistake in ordering the cancellation of his title.
14. The Appellants argued that the Respondent made no attempt to register the transfer form during the deceased lifetime and only did so in 2019 notwithstanding his grandfather, the original registered proprietor, passed away in 2015. They submitted that this raised questions as to why the Respondent would wait several years to register the transfer. The Appellants contended that the transfer form lacked validity and that a succession cause should have been initiated instead.
 15. The Appellants asserted that the Trial Court erred in ordering the cancellation and consolidation of their titles, actions that contravened Section 26 of the Land Registration Act. The Appellants submitted that the Trial Court should have upheld their Counterclaims as the evidence sufficiently proved that they had validly acquired their titles.
 16. In support of their submissions the Appellants placed reliance on the following cases: *Vijay Morjaria v Nansighn Madhusingh Darbar & Another* (2000)eKLR, *Kinyanjui Kamau v George Kamau* (2015)eKLR, *Micheni Aphazard Nyaga & Others v Robert Njue & 2 Others* (2021)eKLR, *Registered Trustees Anglican Church of Kenya Mbeere Diocese v Rev David Waweru Njoroge* (2007)eKLR, *Elizabeth Wambui Githinji & 29 Others v Kenya Urban Roads Authority & 4 Others* (2019)eKLR, *Shimoni Resort v Registrar of Titles & 5 Others* (2016)eKLR, *Lawrence P. Mukiri Mungai, Attorney Francis M. Mwaura v A.G & 4 Others*, and *In the Environment and Land Court at Kerugoya ELC Case No. 414 of 2013 Simon Njagi Njoka v James Gatimu Muriithi & Others*.
 17. The Respondent filed written submissions dated 25th July 2024 and in regard to the Land Registrar's joinder, argued that she was constructively a party to the proceedings. He noted that the Land Registrar participated in the case, complied with the Court's summons, and provided the necessary documents as indicated in the notice to produce dated 26th November 2020.
 18. The Respondent further asserted that he received a gift of approximately 0.31 hectares of land from his grandfather, Jackan Githinji Gicheru, following the passing of his father, James Muthike, in 1989. He highlighted that the Ndia Land Control Board granted the relevant consent on 13th May 1996 and that his grandfather executed the transfer and completion forms in favor of the Respondent on 17th October 2007. This action rendered the gift irrevocable after the signing of the transfer documents.
 19. The Respondent stated that he did not initiate the processing of the transfer until March 2019 owing to what he stated was financial difficulties. Upon visiting the Land Registry, he stated he discovered that the land was registered under the Appellants' names. Consequently, he lodged a caution on 15th March 2019 to safeguard his interest in the disputed land.
 20. Regarding the Appellants' claim that the Respondent was a minor at the time the consent letter was issued on 13th May 1996, he contended that this argument was raised too late, as it was not included in their pleadings during the trial and therefore should not be considered as part of their evidence.
 21. On the issue of the gift being incomplete, the Respondent maintained that the donor's execution of the transfer and completion documents on 17th October 2007 sufficed for the gift to be valid. He argued that the gift would not fail simply because the original title deed had not been delivered to him, nor would it fail due to any remaining actions required by the donee or a third party.
 22. In conclusion, regarding the matter of fraud, the Respondent asserted that he presented direct evidence demonstrating that the 2nd Appellant fraudulently obtained title number Inoi/Ndimi/1288, subsequently subdivided the same, and transferred an unclean title to the 1st Appellant.



23. The Respondent relied on the following cases; Margaret Wambuci Mbutu v Minaxi Kiritkumar Patel ELC Case No. 797 of 2013 Kerugoya, Republic v Chairman Manyatta Divisional Land Control Board (1999)eKLR, Micheni Aphazard Nyaga & Others v Robert Njue & 2 Others (2021)eKLR, Registered Trustees Anglican Church of Kenya Mbeere Diocese v Rev David Waweru Njoroge (2007)eKLR, Alice Njeri Kamau & 2 Others v Attorney General & 2 Others (2020)eKLR, Munyu Maina v Hiram Gathiha Maina Civil (2013) eKLR , Daudi Kiptugen v Commissioner of Lands & 4 Others (2015)eKLR, Zacharia Wambugu Gathimu & Another v John Ndungu Maina (2019)eKLR, and Jasbir Singh Rai & Others v Tarlochan Rai & Others (2014)eKLR.

Analysis And Determination

24. This being a first Appeal to this Court, the Court must evaluate and reconsider the evidence and draw its own conclusions regarding the facts. It is important, however, for the Court to be cautious as it did not have the advantage of hearing the witnesses directly or observing their demeanor as the Trial Court did.
25. This duty was well articulated by the Court of Appeal in the Case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 where the Court stated:-

“I accept counsel for the respondent’s proposition that this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily to follow the Trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”

26. Having reviewed the Memorandum and Record of Appeal and the submissions of the Parties, the issues that stand out for determination in this Appeal are as follows:-
1. Whether the Respondent was gifted land parcel Inoi/Ndimi/1288 by his grandfather Jackan Githinji (deceased) during his lifetime and if so whether the gift was perfected?
 2. Whether the 2nd Appellant fraudulently acquired title to land parcel Inoi/Ndimi/1288?
 3. Whether the 1st Appellant was a bonafide purchaser and whether he acquired a good title in regard to land parcel Inoi/Ndimi/3502 a subdivision from land parcel Inoi/Ndimi/1288 transferred to him by the 2nd Appellant?
 4. Whether the Learned Trial Magistrate erred in ordering the cancellation of land titles Inoi/Ndimi/3501 and 3502 and consequently dismissing the Appellants Counterclaim?
 5. Who bears the costs of the Appeal?
27. On the evidence both the Respondent and the 2nd Appellant claim to have been gifted land parcel Inoi/Ndimi/1288 by Jackan Githinji Gicheru (now deceased) during his lifetime. The Respondent is a grandson to the deceased while the 2nd Appellant was one of the deceased wives. The grandson’s evidence was that the grandfather gifted him the land in 1996 and in support, the Respondent



- exhibited a copy of an application for consent of the Land Control Board (undated), copy of consent of the Land Control Board dated 13th September 1996 and copy of Transfer of land dated 17th October, 2007 duly executed by the deceased. It was the Respondent's position that the gift was completed by execution of the transfer by the deceased in his favour considering that the Ndia Land Control Board had already given its consent for the transfer.
28. The 2nd Respondent for her part tendered evidence that the land parcel Inoi/Ndimi/1288 was registered in her late husband's name and that he gifted the land to her in the year 2012. She tendered evidence by way of copy of application for consent to the Land Control Board dated 26th October 2011, copy of Letter of Consent dated 27th October 2011 and a duly executed and registered copy of transfer dated 5th January 2012. An abstract of title (green Card) for land parcel produced in evidence by the Respondent indicates the register for land parcel Inoi/Ndimi/1288 was opened on 28/4/1997 when Jackan Githinji Gicheru was registered as the 1st registered owner. The land was registered in the name Jane Wambura Kibicho (2nd Appellant) on 16th February 2012 for the consideration of gift. The title of the land was closed on subdivision on 11th February 2018 on subdivision and two new titles 3501 and 3502 were created.
29. The Respondent's claim that the land was gifted to him in May 1996 and that the Land Control Board issued its consent for transfer on 13th May 1996 raises issues. As per the abstract of title (green card) for land parcel Inoi/Ndimi/1288 the parcel of land was not registered until 28th April 1997 when Jackan Githinji was registered as the first proprietor. Before that date there was no such land. It was therefore not possible for an application for consent for a non-existent land to have been made in May 1996 and for Consent to be issued nearly one(1) year before the land was registered.
30. Though I have had no advantage/opportunity to see the original application for consent and the original consent issued on 13th May 1996 a close scrutiny of the copies exhibited points to a possible alteration of the parcel Number 1288 with the last number 8 appearing to have been embossed on an already existing number. The Respondent also did not explain why from the time the gift was allegedly given it took over 11 years for the donor of the gift to execute the transfer. Even after the alleged transfer was executed in 2007, it took the Respondent another over 11 years to initiate the transfer process in early 2019. The explanation that he had not presented the transfer for registration because he had financial challenges does not appear plausible.
31. On the evidence presented before the Trial Magistrate there was no credible evidence for the Learned Trial Magistrate to find and hold that the Respondent was a beneficiary of a gift inter vivos that had taken effect. The deceased grandfather as I have observed could not give a gift of land that he was not the owner of at the time the gift is said to have been given. The deceased was first registered as owner of land parcel Inoi/Ndimi/1288 on 28th April, 1997 as per the abstract of title. How is it then possible that he could have gifted the Respondent the land in May 1996 before he was registered?
32. The 2nd Appellant adduced evidence to prove that she in fact received a gift of the suit land from her husband during his lifetime. The evidence from the 2nd Appellant clearly established that she procedurally acquired title to the suit property and upon registration as the proprietor she acquired ownership rights in terms of Section 24, 25 and 26 of the Land Registration Act, 2012 and she could in the premises sell the portion of land that she sold to the 1st Appellant.
33. I am conscious that the parties referred to various authorities in support of their arguments in this Appeal but with respect I do not consider they were directly relevant to the issue that I have had to determine and which determines the Appeal. I have determined that the Respondent, never proved there was ever a gift made to him by his deceased Grandfather and with that determination the Appeal



dissipated. The Learned Trial Magistrate on the evidence should have found there was no gift made in favour of the Respondent and hence his claim was not proved and hence dismissed. The Appellants Counterclaims were proved and should have been allowed.

34. In consequence therefore I find merit in the Appeal. I allow the Appeal and set aside the Judgment delivered by the Learned Chief Magistrate on 17th November 2022 and in place thereof substitute an order dismissing the Respondent's suit in the Lower Court and allowing the Counterclaims by the Appellants against the Respondent. The 2nd Appellant and the Respondent are closely related family members and on account of that and in exercise of my discretion I order that each party bears their own costs of the Appeal.
35. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 27TH DAY OF FEBRUARY 2025.

J. M. MUTUNGI

ELC - JUDGE

