



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Kiguongo v Ngai s/o Ngai alias John Ngai (Environment and Land Appeal E067 of 2022) [2024] KEELC 1771 (KLR) (21 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1771 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E067 OF 2022**

JG KEMEI, J

MARCH 21, 2024

BETWEEN

JOSEPHAT KANG'ETHE KIGUONGO APPELLANT

AND

NGAI S/O NGAI ALIAS JOHN NGAI RESPONDENT

(Being an appeal against the Judgment of Hon G. Omodho PM delivered in MCELC 4 of 2020 at Kiambu on the 29/6/2022)

JUDGMENT

Introduction

1. This appeal emanates from the trial Court Judgment delivered on 29/6/2022 in Kiambu MCELC No. 4 of 2020 (formerly Milimani ELC 126 of 2014) wherein the Appellant raises the following grounds of appeal vide his Memorandum of Appeal dated 29/7/2022 THAT;
 - a. The Learned Magistrate erred in law and fact in dismissing the Plaintiff's case against the weight of evidence.
 - b. The Learned Magistrate erred in law in holding that the suit was res judicata yet the subject matter was the same.
 - c. The Learned Magistrate erred in both law and fact in failing to find appreciate the fact that subject matter in Kiambu civil case No. 35 of 1976 was land title Githunguri/nyaga/398 whereas the subject matter in MCELC 4 of 202 (formerly Milimani ELC Suit no. 126 of 2014) was Land Title Githunguri /nyaga/914.
 - d. The Learned Magistrate erred in law and fact in questioning the authenticity of the Plaintiff's title and interest in Land title No. Githunguri/Nyaga/914 yet the said title resulted after the



then Defendant (now deceased) secretly caused the subdivision of the parent title Githunguri/nyaga/398.

- e. The Learned Magistrate misdirected herself in refusing the Plaintiff to produce the Court's civil register for the year 1976 which PW2 Jane Irungu had been summoned to produce through summons issued by the Court.
 - f. The Learned Magistrate erred in law and in fact in failing to appreciate the fact that the civil Court register would have assisted the Court in determining if Civil Case No. 35 of 1976 existed at all and its conclusion or status.
 - g. The Learned Magistrate erred in law and fact in ordering cancellation of the Plaintiff's title and interest yet no fraud had been proved against the Appellant.
 - h. The Learned Magistrate erred in law and fact in failing to appreciate the standard of proof on the allegations of fraud.
 - i. The Learned Magistrate erred in law and in fact in holding that the transfer of the Appellant was suspect yet it is the Defendant (now deceased) who caused the creation of title to the suit land in the first place, when he caused the subdivision of the parent title.
2. The Appellant prays that the impugned Judgment be set aside, the suit in the trial Court be allowed as prayed and costs of the appeal.
 3. The background of the appeal is that the Appellant, then Plaintiff, lodged his suit in Court through a Plaint dated 14/1/2014 against the Defendant, now Respondent. The Appellant claimed that he and the Respondent were the common owners of L.R Nos Githunguri/nyaga/914 in proportions measuring 0.25 acres and 1.95 acres respectively. That the Plaintiff's demands to the Respondent to have the land title no. Githunguri/nyaga/914 (hereinafter referred to as the suit land) severed so that they own their respective portions were in vain. At para.4 of his Plaint, the Appellant listed particulars of unreasonable refusal against the Defendant and sought an order directing the Kiambu Land Registrar to remove the restriction on the title of the suit land and costs of the suit.
 4. The Appellant at para.7 of his Plaint averred that there is no pending suit between the parties but there was a previous concluded case between the parties being Kiambu CC 35 of 1976 wherein Judgment was delivered in his favor.
 5. The Respondent opposed the Appellant's claim and filed his statement of defence. He later amended the defence and raised a counter claim dated 3/4/2017. He vehemently denied the Plaintiff's averments of co-ownership of the suit land and put him to strict proof. That he did not enter into any sale agreement with the Respondent for the suit land and therefore the Appellant's registration as a co-owner was fraudulent. He stated that the alleged Kiambu CC 35 of 1976 does not exist and instead it is a Succession Cause No. 35 of 1976. That the Appellant's registration as a co-owner ought to be cancelled and the entire suit land be registered solely in the Respondent's name. He urged the Court to dismiss the Appellant's suit and allow his counter claim as drawn.
 6. In response, the Appellant filed his reply to the defence and defence to CC dated 28/4/2017. He maintained that indeed there was Kiambu CC no. 35 of 1976 in which the Court adjudged him as a co-owner in the suit land. Resisting the CC, the Appellant said the Respondent's claim was time barred and ought to be dismissed with costs.
 7. After hearing the case the trial Court pronounced itself as follows;



- a. A declaration that the transfer and registration of the Plaintiff as an owner of a portion of the suit property land parcel number Githunguri/Nyaga/914 measuring 0.25 acres was done fraudulently.
- b. An order cancelling the transfer and registration of the Plaintiff as an owner of portion of the suit parcel number Githunguri/Nyaga/914 measuring 0.25 acres and the same be registered in the Defendant's name.
- c. Costs of suit and counterclaim.

Written Submissions

8. On 12/10/2023, directions were taken and parties agreed to canvass the appeal by way of written submissions.
9. The firm of Ng'ang'a Ngigi & Co. Advocates filed submissions dated 30/12/2023 on behalf of the Appellant. It was submitted that the trial Court erred in its findings inter alia on res judicata and authenticity of his title against the weight of evidence adduced before it. That the refusal to allow PW2 produce the Court register was detrimental and the findings on fraud leveled against the Appellant were not proven to the required standard as appreciated in the case of Gichinga Kibutha Vs. Caroline Nduku [2018] eKLR. That in any event the claim for fraud was time-barred by dint of Section 26 of the *Limitation of Actions Act*. The Court was urged to allow the appeal with costs.
10. The Respondent through the firm of Peter Gachuhi & Co. Advocates and with leave of Court on 19/3/2024, filed submissions dated 12/2/2024. He submitted that the Appellant failed to prove his case in the trial Court and more so the purchase of the suit land. That the alleged Court order in Kiambu CC 35 of 1976 was a forgery and the case never existed and the objection to produce the Court register was properly upheld. He urged the Court to dismiss the appeal with costs.

Analysis & Determination

11. As a first appellate Court, this Court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in *Selle & Another Vs. Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 in the following terms:

“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 Vs. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”

12. Bearing the said principles, the material and evidence before Court, I will address the merits or otherwise of the appeal as follows.



13. It is trite that he who alleges must prove. Sections 107 - 109 of the *Evidence Act* provide as follows;

“Burden of proof

107(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

14. An appeal is essentially a re-hearing and thorough scrutiny of this evidence is necessary to determine whether or not the Appellant discharged the burden of proof. The standard of proof in civil claims as this one is on a balance of probabilities. The Appellant bore the burden to prove his claim on a balance of probabilities.
15. A glean of the Plaintiff in the trial Court was straightforward in seeking severance of title of the suit land and removal of restriction thereat placed on 23/7/1993. Supporting his case he relied on his amended List of Documents dated 28/4/2017 as P.Exh. 1 – 11 namely two letters from the Chief dated 4/3/1996 and 20/3/1996, official search dated 19/4/2012, Assistant Chief’s letter dated 25/10/2013 and demand letter dated 7/11/2013 drawn by Ng’ang’a Ngigi & Co. Advocates, copy of Court order made on 4/10/1977 in Kiambu CC 35 of 1976, transfer instrument dated 22/11/1977, letter of consent to transfer dated 5/12/1977, Application for registration dated 27/2/1978, receipt for transfer dated 27/2/1978 and copy green card for the suit parcel 398 issued and certified on 18/12/1991.
16. The Appellant testified that there was a consent Judgment between the parties in Kiambu Civil Case No. 35 of 1976. He produced P.Exh.6 a copy of Court Order signed by Hon. Okubasu authorizing the Court Executive Officer to execute transfer documents. The Appellant also produced a Letter of Consent dated 5/12/1977 to transfer part of Githunguri/Nyaga/398 on the strength of Court decree in Civil Case No. 35 of 1976.
17. It was the Appellant’s further testimony that he was registered as a co-owner in parcel 398 whose title was subdivided without his knowledge and gave rise to 914. Indeed, P.Exh.11 the copy of extract of the green card produced entry No.11 shows the Appellant’s name made on 18/12/1991 with a share of 25/530 in parcel 398 while Ngai S/O Ngai held share of 250/530. The Appellant’s averments find more credence in P.Exh. 3 - the Certificate of Official Search dated 19/4/2012 for parcel 914 (and the proprietorship shows that the land is registered in the joint names of Ngai s/o Ngai and the Appellant holding 1.95 acres and 0.25 acres respectively). The official search also shows that a temporary injunction was registered on the suit land on 23/7/1993 pending determination of Case No. 529 of 1992. Neither of the parties explained or defended the said restriction to remain in force. Moreover, the stated case number does not disclose the specific Court it emanated from.



18. In addition, the subsequent actions leading to the registration of the Appellant's name as a co-owner of the suit land to wit; transfer of undivided share dated 22/11/1977 was on strength of the Court order made in Kiambu CC No. 35 of 1976, execution of the transfer of undivided share was done by the Executive Officer of Kiambu Court, letter of consent dated 5/12/1977 indicating that the sub division was pursuant to the Court decree in Civil case no. 35/1976; application for registration made on 27/2 1978 for which the Appellant paid fees of Kshs. 125/= . In my view, on a balance of probabilities therefore the Appellant demonstrated that there existed Court order in Kiambu CC 35 of 1976 in his favor.
19. The Appellant called his second witness Jane Irungu, Court Administrator Kiambu Law Courts who testified that the documents for Case No. 35 of 1976 were not available because they were destroyed by termites. Her attempt to produce the original register was opposed and declined for not having disclose such evidence during Pre-trial conference and therefore amounting to an ambush.
20. Resisting the Appellant's case, the Respondent Stephen Kanja Ngaii, having substituted his late father (Ngai s/o Ngai died on 18/8/2017) testified as DW1. He refuted the existence of Civil Case No. 35 of 1976 urging that the Appellant is a stranger and no land was sold to him. That the Appellant's Court order of 35 of 1976 was a forgery. That the Appellant's registration on the suit land was fraudulent. To buttress his defence, he produced copies of Kiambu Succ. Case No. 35 of 1976 between Land Registrar Kiambu and James Bernard Ngeene.
21. In cross, DW1 stated that the suit land - parcel 398 initially belonged to his grandmother and upon her demise and succession proceedings by his aunts and uncles, his father got parcel 914. That they did not have a title for 914 and it is only after conducting a search in 2014 that they learnt of the Appellant's registration. He urged the Court to allow his counter claim.
22. In the counter claim, the Respondent averred that the Appellant's registration if at all was fraudulent. Again, he who alleges must prove. The Respondent did not tender any iota of evidence to demonstrate fraud on the part of the Appellant if at all. The particulars of fraud on the amended statement of defence accused the Appellant for procuring a fake Court order in Kiambu CMCC No 35 of 1976; forging a Court order; allegations of purchase of a portion of the suit land and registering a fake Court order. The Respondent did no more than enumerating the said particulars. Notably D.Exh.2 being the pleadings filed in Court by the Respondent were for Kiambu Succession Cause between Land Registrar Kiambu and James Bernard Ngeene unrelated to the case before the trial Court.
23. In weighing the Respondent's evidence and in light of the Summons that were not heeded by the Respondent, DW1's evidence that the Appellant was a stranger and claim that his father never sold the land cannot hold water. Put on a balance of probabilities I am of the view that the Respondent failed to prove his counter claim.
24. The totality of this Court's appreciation and analysis of the forgoing evidence as adduced and contained in the Court record, leads to an irresistible conclusion that Ground 1 of the memorandum of appeal that the Court erred in dismissing the Appellants suit against the weight of evidence is merited and it succeeds.
25. Ground Nos. 2 and 3 in the Memorandum of Appeal faulted the trial for holding that the Appellant's suit was res judicata- in light of Kiambu CC 35 of 1976. The Supreme Court in the case of Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR rehashed the preconditions for a plea of res judicata to succeed as here are conditions to the application of the doctrine of res judicata: (i) the issue in the first suit must have been decided by a competent Court; (ii) the matter in dispute in the former suit between the parties must be directly or



substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; and (iii) the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title.

26. Similarly, Section 7 of the *Civil Procedure Act* provides;

“

“7. Res judicata

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation. - (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. - (2) For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.

Explanation. - (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. - (4) Any matter which might and ought to have been made

ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. - (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. - (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

27. The Appellant in his Plaintiff stated that Kiambu CC 35 of 1976 was between him and the Respondent. He produced P.Eexh 6 as discussed in para. 25 above. There is no evidence in the Court record to show that the Court order in Kiambu CC 35 of 1976 was appealed against, vacated or set aside. It is correct then to conclude that the two suits involved same parties. However, and of relevance, the cause of action was dissimilar. According to the Appellant, Kiambu CC 35 of 1976 case concerned ownership of the suit land whereas the trial Court case sought severance (partitioning) of title of a portion of the suit land and removal of a restriction thereat.

28. What is the standard of proving fraud? The Court of Appeal in the case of Vijay Morjaria Vs. Nansingh Madhusingh Darbar & Anor (2000) eKLR Civil Appeal No. 106 of 2000 wherein Tunoi J.A (as he then was) stated as follows –

“It is well established that a fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The alleged to be fraudulent acts must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved”.



29. Earlier on the same Court in *Central Bank of Kenya Limited Vs. Trust Bank Limited & 4 Others* (1996) eKLR expressed itself as follows on the issue of proving fraud:-

“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. In this case, to succeed in the claim for fraud, the Appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the Court would make a finding.”

30. Accordingly, fraud is a serious allegation and the party alleging it must plead it, particularize it, and strictly prove it to a standard higher than the usual one in civil cases of proof on a balance of probabilities. It is not enough for a party to simply infer acts of fraud for the Court to decipher as evidence.

31. In this case the Respondent listed particulars of fraud and led no evidence to support the claims of forgery of Court orders. All he did was to produce documents for Kiambu Succ Cause 35 of 1976 as already discussed in the preceding paragraphs above. Consequently Ground Nos. 7 and 8 impugning the trial Court’s finding on fraud yet the Respondent did not adequately prove the allegations to the required standards are also merited.

32. Concerning Ground Nos. 5 and 6, the issue of production of the civil register by PW2, it is the Court’s finding that the trial Court erred in upholding the Respondent’s objection on production of a Court register, the Court register was to show no more than an entry of cases filed in Kiambu Law Courts. It is information which can be accessed by any member of the public at any given time. These Grounds succeed as the Court finds evidence in the provision of The Judiciary’s Records Management Policy Guidelines which is subject to the [Records Disposal Act](#) provides that all records, books and papers rendered illegible or useless by climate, insect, vermin, fire and water be destroyed at once.

33. The law on evidence for entries in public records is found in Section 38 of the [Evidence Act](#);

“

“38. Entries in public records

An entry in any public or other official book, register or record, stating a fact in issue or a relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible.”

34. Ground No. 9 raises a plea of limitation. The Respondent testified that after conducting a search in 2014, they realized that the Appellant had allegedly been registered as co-owner with his father. He however did not place the official search for 2014 to support his averments. From the record, the Court find that the Appellant adduced evidence on his registration by way of copy of green card extract for parcel 398 (P.Exh.11) in 1991. Having been so registered in 1991 and over 27 years later when the Respondent filed his amended defence raising the counter claim, any claim on ownership of land ought to have been lodged within 12 years in light of the provisions of Section 7 of the [Limitation of Actions Act](#) that;

“

“7. Actions to recover land



An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

35. Last but not least, Ground No. 10 is now spent in light of the finding that the cause of action and relief before the trial Court was distinctly for enforcement and not ownership the suit land.
36. Back to the Appellant’s claim, the Appellant enumerated particulars of unreasonable refusal to consent to severance on the part of the Respondent at para. 4 of his Plaint; failure to meet to discuss on the severance; continuously refused the Appellant entry to the land; collusion to register a fictitious restriction on the suit land and refusing to attend land control board. The Appellant went ahead to produce the chief’s letters and summons addressed to the Respondent dating back to 25/10/2013 and later a demand notice dated 7/11/2013. In light of these summons, it is safe to conclude that the Respondent unreasonably withheld consent to pave way for severance and partitioning of title as sought by the Appellant.
37. Part IX of the *Land Registration Act*, 2012 deals with the issues of co-tenancy and partition in land. Section 91 (6) *Land Registration Act* reads;
- “(6) No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.”
38. Section 92 of the *Land Registration Act* provides as follows on the issue of joint tenants’ certificates;
- “92. Certificate of ownership of co- tenants
- (1) Each co-tenant of land shall be entitled to receive a copy of the certificate of title of that land.
- (2) The Registrar, on application by co-tenant in the prescribed form, shall issue a copy of the certificate of ownership to that co-tenant, with an endorsement signed by the Registrar that the copy has been issued to the co-tenant named in the endorsement.
- (3) The Registrar shall note the issue of the copy of the certificate of ownership, in the register, and indicate the date of the issue of the copy and the co-tenant in whose name the copy has been issued.”
39. Further Section 94 *Land Registration Act* provides;
- “
- “94. Partition
- (1) Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate of a land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.



- (2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by—
- (a) any one or more of the tenants in common without the consent of all the tenants in common;
or
- (b) any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.
40. Last but not least the Court appreciates Sections 76 and 78 *Land Registration Act* provides for restrictions as follows;
- “76. Restrictions
- (1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.
- (2) A restriction may be expressed to endure—
- (a) for a particular period;
- (b) until the occurrence of a particular event; or
- (c) until the making a further order is made,
and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register.
- (3) The Registrar shall make a restriction in any case where it appears that the power of the proprietor to deal with the land, lease or charge is restricted.
78. Removal and variation of restrictions
- (1) The Registrar may, at any time and on application by any person interested or at the Registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction.
- (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the Court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.”
41. The restriction has not been explained and more so none of the parties shed light as to why it should continue subsisting. The Court therefore finds no justifiable reason to leave the said restriction subsisting on the title
42. The upshot of the foregoing is that the appeal dated 20/1/2023 meritorious and is allowed.
43. Final Orders;
- a. Trial Court Judgment be set aside and Plaintiff dated 14/1/2014 be allowed as prayed.
- b. The Respondent’s counter claim is dismissed for want of proof.



c. Costs of both the appeal and trial Court be awarded to the Appellant.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 21ST DAY OF MARCH, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muturi HB Ngigi for the Appellants

Gachuhi for the Respondent

Court Assistants – Oliver

