Wandaka & 2 others v Mwangi (Civil Appeal 36 of 2019)
[2025] KECA 83 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 83 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 36 OF 2019

MA WARSAME, PM GACHOKA & JM MATIVO, JJA

JANUARY 24, 2025

BETWEEN

RAPHAEL KINORU WANDAKA & 2 OTHERS ..... APPELLANT

AND

ELIZABETH WAMBUI MWANGI ..... RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court at Nairobi (Munyao Sila, J.) delivered on 7th March 2019 in ELC No. 263 of 2013)

JUDGMENT

1. Land-buying companies assumed prominence soon after Kenya gained independence. Groups of people would come together and buy huge chunks of land from the departing settlers. Thereafter, the land would be subdivided and the members would then ballot for the plots arising from that subdivision. For all practical purposes, the receipt for payment of the parcel of land and the ballot paper authenticated ownership pending commencement of the formal registration process for the issuance of title deeds.

   Without greed, fraud and corruption, this appeared to be a seamless process. However, that is easier said than done. Court registries have been marred with a replete with disputes arising from this would-be-good-looking arrangement. Disputes of this nature shed light on the importance of documentary evidence, proper drafting, and presentation of a case theme and theory; a trilogy necessitated towards urging a trial court to find in a party's favour.

2. Central to the issue before us is the question of ownership over all that parcel of land, namely L.R. No. Gilgil/Karunga Block 5/369 situated in Mukinye (the suit land). The appellants on the one part and the respondent on the other part each claimed that they were the rightful proprietors of the suit land. It was therefore requisite on the parties to establish that on a balance of probabilities, who was

the lawful proprietor of that piece of land. In analyzing the evidence placed before it, the court was commissioned to ascertain the rightful and lawful proprietor of the suit land.

3. To contextualize the appeal, we shall give a background to the dispute, albeit in summary. By plaint dated 25th March 2013, the appellants contended that the 1st appellant is the lawful owner of the suit land. They claimed that one Muturi Munene (now deceased) was the owner of ballot paper No. 36 obtained from Mukinye Farmers Land buying Company Limited (the land buying company). The said Muturi Munene is the 2nd appellant's father and the husband to the 3rd appellant. It was averred before the trial court that in his life time, the said Muturi Munene was a member of the land buying company, paid for two shares and balloted for plots number 36 and 37. It was pleaded that he transferred the two shares to the 2nd and 3rd appellants, who later sold the parcels of land to the 1st appellant. The 1st appellant then successfully transferred the land for ballot paper 37 to himself but he hit a snag with respect of ballot paper No 36 as he discovered that the parcel of land was registered in the name of the respondent. This triggered the filing of the suit in the trial court. The appellants accused the respondent of obtaining the title deed fraudulently. On her part, the respondent filed a counterclaim seeking orders of injunction to restrain the appellants from interfering or trespassing on the suit land. She further sought a declaratory order that she was the lawful owner of the suit land.

4. The parties adduced evidence to support their claim to the suit.

   Upon analyzing the evidence, the learned Judge emphatically found that the appellants' evidence failed to establish that on a balance of probabilities, that the suit land belonged to the 1st appellant. In arriving at that conclusion, the Judge held in part:

> "21. Both plaintiffs and defendant availed two ballots to the suit land. The plaintiffs' ballot has a printed serial No. 37 but is handwritten Plot No. 37 and 36. On the other hand, the defendant's ballot is printed with the serial No. 36 and is handwritten Plot No. 036. The question that arises is which of the two ballots should be considered to be genuine?
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> 22. PW-3 in his evidence stated that both ballots were issued by the Society. He however believed that the plaintiffs' ballot is the correct ballot, his general explanation being that if someone had two plots, he was given the other plot next to what was noted in the ballot and this other plot was handwritten into the ballot that he picked. I am personally not swayed by this evidence of PW-3. First, he was not present when the balloting exercise was being conducted and I do not see how he can thus state with finality what transpired during the balloting. This is in contrast to the evidence of DW-1 who was present when the balloting was done and who testified that it is Erastus who picked the ballot to the plot No. 36. In fact, I did not find the explanation of the two plots being indicated in the same ballot as convincing. If it is to be believed that where one had two plots, and he balloted for one, then the next was given to him, why not simply also issue him with the ballot for the other plot so that he can have two ballots for the avoidance of doubt? If the process is as outlined by PW-3, if this second ballot was not given as I have pointed out above, where then would this other ballot go? The ballot to the second plot would have been printed in advance and thus available. His explanation on what would happen to this ballot was certainly not convincing.
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> 23. I have also not forgotten the discrepancy between the evidence of PW-2 and PW-3. PW-3 stated that PW-2 was never a member of the Society, yet PW-2

contended that he is the one who owned the plot No. 37. If he indeed owned the plot No. 37, where is his ballot for this plot? Apart from the receipts bearing his name, and which do not refer to the Plot No. 37, or even plot No. 36, there was nothing else to show that PW-2 owned the plot No. 37 as he alleged. Moreover, if indeed he was entitled to the plot No. 37 as he claims, how come it was his father who was entered in the register and not himself? Why didn't he complain about the fact that his name is nowhere in the register? When cross- examined on why his name did not appear in the register, PW-2 stated that the register was probably altered. PW-2 is the second plaintiff, and now, if one of the plaintiffs himself states that it is probable that the register was altered, I find it curious that the same plaintiffs wish to also rely on the same register that they believe was altered.

24. My own assessment of the evidence is that the ballot No. 36 was indeed picked by Erastus Kimanga and not either PW-2 or their deceased father. The printed ballot No. 36 bears his name and there is no suggestion that he forged this ballot.

25. Mr. Kariuki made heavy weather of the fact that the name of Erastus Kimanga does not appear in the register which was produced by PW-3. As I have just mentioned, the plaintiffs themselves also seem to have a concern with the register, and given that position, it is probable that there is a serious problem with the said register. Without other evidence, one cannot simply rely on this register, for as I have pointed out, even the plaintiffs do not believe it. In fact, DW-1, a long standing official, whose evidence must be given considerable substance, did state that what was availed was not the genuine register, and given that position, I am unable to give much weight to the register that was produced by PW-3.

26. Neither am I persuaded that the non-production of receipts by the defendants negated the ballot that they rely on. The evidence was clear that no one could ballot without having been fully paid up. The fact that Erastus Kimanga picked a ballot would infer that indeed he was fully paid and eligible to ballot. His status was confirmed by DW-1. I really see no issue at all with the ballot that he picked.

27. My holding on the first issue therefore is that the ballot to the Plot No. 36 was picked by Erastus Kimanga and that is the genuine ballot for the suit land.

28. That being the case, I see no problem with Erastus Kimanga having taken out title in the year 1990 and I see no problem with the subsequent transfers leading to the title of the defendant.

29. But even if I am wrong on the above, I still do not see how the plaintiffs can succeed. Firstly, it is their case that the ballot to the plot No. 36 was owned by the late father to the 2nd and 3rd defendants. If that is the case, the 2nd and 3rd defendants had no capacity to sell the said plot to the 1st plaintiff before first conducting a succession case and the property being distributed. They also cannot say that they have capacity to present this case as they have not presented this case for the benefit of the estate of their late father, if their position is that the said plot was owned by their father. That alone would lead

to the plaintiffs' suit being defeated for lack of capacity. There was a pleading that Muturi Munene had transferred his interest to the 2nd and 3rd plaintiffs before his demise, but no such evidence was led.

30. I also note that the title to the suit land was first taken on 22 August 1990 by Erastus Kimanga. The plaintiffs, if indeed they thought that the title was not a good title, had 12 years from this time to challenge the title of Mr. Erastus, as their cause of action accrued immediately title was issued to Mr. Erastus. This is brought out by the provisions of section 7 of the *Limitation of Actions Act*, which provides as follows:-

> " 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."

31. I do not for one moment think that the plaintiffs can escape this 12 year rule. They themselves did state that they had acquired title to land parcel No. 37.

    They probably would have persuaded me that they only got wind of the title of Erastus in the year 2013 if they had revealed to me when exactly they got title to their land parcel No. 37. But they never brought forth this evidence, and I am not persuaded that they never knew of the title of Erastus from the time it was issued in the year 1989 or shortly thereafter. They have in fact not told me why they have never followed up on the issuance of the title to the suit land for all those years, if they had fully paid up for it, balloted for it, and their name was in the register, and they believed that they owned it. My own view of the matter therefore is that the case of the plaintiffs is time barred pursuant to Section 7 of the Limitations of Actions Act.

32. I see no problem with the title of the defendant. For all intents and purposes, the defendant was an innocent purchaser for value who conducted proper due diligence before purchasing the suit land. It cannot be said that she procured her title fraudulently or through misrepresentation. Neither have I seen any fraud in the manner in which her predecessors in title obtained title to the suit land. I am thus unable to impeach her title. As the owner of the suit land, the defendant is entitled to all rights of ownership as provided for in Section 25 of the *Land Registration Act*, 2012 and the plaintiffs must therefore keep of this land..."

5. The appellants aggrieved by those findings filed a notice of appeal dated 8th March 2019. The appellants also filed a memorandum of appeal dated 7th June 2019 that raised 4 grounds impugning the findings of the learned Judge. In summation, the appellants are disgruntled: that the learned Judge disregarded the evidence of Gabriel Gatheru Mbugua (PW3), the chairman of the Land Buying Company, regarding the register that was kept by the company; that the register disclosed that the late Muturi Munene was the genuine owner of ballot no. 36 and 37; therefore, the procurement of the land title namely L.R. No. GigilKarunga/Block 5/36 was fraudulent; the respondent did not produce any alternate register to prove that he bought the suit land from a genuine member; that the respondent did not

produce payment receipts or call any witnesses to demonstrate that he was a genuine member of the land buying company; and that the trial Judge extraneously framed his own issues namely that the 2nd and 3rd appellants had no legal capacity to sue or institute suit and that the suit was time barred under section 7 of the Limitations of Actions Act.

6. In the premised circumstances, the appellants prayed that the appeal be allowed by setting aside the judgment of the trial court. He also urged this Court to allow their claim as prayed and further prayed for costs at trial and in this appeal.

7. When this appeal was heard virtually on 11th November 2024, learned counsel Mr. Wambugu Muriuki appeared for the appellants but the respondent failed to attend, though duly served with the hearing notice. Mr. Muriuki relied on the appellants' written submissions and bundle of authorities dated 16th October 2024 that were orally highlighted.

8. Mr. Wambugu argued grounds 1, 2 and 3 together. The gravamen of the grounds revolved around who was the rightful owner of ballot No. 36 morphing into L.R. No Gilgil/Karunga/Block 5 /369 registered in the name of the respondent. The appellant made heavy weather of the fact that they called the Chairman of the land buying company as their witness and his evidence was that ballot papers No. 36 and 37 were collected and belonged to Muturi Munene. He submitted that the said witness produced the certified register of the land buying company and that evidence was not controverted by the respondent. According to the appellants, the independent witness that was called by the respondent, one Joseph Kariuki Kibicho, the treasurer at that material time, attempted to produce a handwritten register that was rejected by the trial Judge. The appellants argued that having rejected the register produced by the respondent, then there was no basis for upholding his title.

9. The appellants wondered why the alleged owner of the land, one Erastus Kimanga, who was alive and later sold the land to the respondent, was not called as a witness. In other words, the appellants argued that their evidence sufficiently established before the trial court that they sequentially acquired the suit land, unlike the respondent, who did not produce any documentary evidence to support how he obtained title. We were urged to reevaluate the evidence and find in favour of the appellants.

10. The 4th ground raised separate legal issues concerning the legal capacity to sue and the question of limitation of time as extrinsic and irregular for they were raised by the trial Judge and not by the parties. It was argued that during the lifetime of Munene Muturi, he transferred ballot papers No. 36 and 37 to the 2nd and 3rd appellants. It was thus inconsequential to apply for letters of administration before selling the suit land to the 1st appellant. On the issue of limitation, the appellants argued they learnt of the fraud on 21st January 2013 and that the suit was filed 2 months later. It was also argued that in any event, the respondent had obtained title on 20th April 2011 and therefore only 3 years had lapsed before filing suit. Citing Fredrick Kiura Nyaga Waweru & 2 others vs. Justino Njue M'Mbuchi & 24 others [2013] eKLR), the appellants argued that a claim for recovery of land based on fraud has no time limit.

11. We have considered the appellants' submissions, examined the record of appeal and analyzed the law. As a first appellate court, an appeal is by way of a 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 and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and thus should make due allowances in this respect. [See Gitobu Imanyara & 2 others vs. Attorney General [2016] eKLR].

12. We have already set out in detail the background and the evidence that was adduced in the trial Court. In our view, three issues arise for determination namely:

a. Considering the evidence and the documents that were produced, who was the lawful owner of the suit land? Put differently, did the appellants prove their case on a balance of probabilities?

b. Did the 2nd and 3rd appellants have the legal capacity to sell the suit land to the 1st appellant?

c. Was the suit time-barred under the Limitations of Actions Act?

13. The elephant in room is who the lawful and rightful owner of the suit land is. It is common ground that in a land buying company, the process of obtaining title is as follows: one joins a land buying company by buying a share(s); one is issued with a receipt for payment; one's name is included in the members' register; and is issued with a share certificate. Finally, upon subdivision, balloting is done and the ballot(s) is then used to process the title.

14. The trial Judge, upon hearing the parties, disclosed that he was not impressed with the evidence adduced by the appellants. We have reevaluated the evidence afresh and we are equally of the same view. We find that the appellants' evidence falls short of the required standard. It is important to remember that the respondent holds a third-generation title. The first title to the suit land was issued in 1990. The original owner sold it to the person that eventually sold it to the respondent. The appellants' main prayer was a cancellation of the title held by the respondent and a declaration that the 1st appellant is the rightful owner of the suit land. As stated in the beginning of this judgement, every case stands or falls on the evidence that is adduced in the trial court. Such evidence is used to support the cause of action that is pleaded. This means that at the end of the day, even the best submissions that are not supported by evidence will amount to an academic exercise.

15. A scrutiny of the evidence shows that both parties produced ballot papers in respect to the suit land. The appellants produced a ballot paper that is printed number 37 but number 36 is handwritten. The respondent produced a ballot paper with a printed number 36 but handwritten plot no. 036. We note that the appellants' contention was that if one had two plots, he picked one ballot paper and the next plot was handwritten. The witness who adduced this evidence was PW3 claiming that he was the chairman of the company. That witness was not an official of the company at the material time and did not adduce any evidence or plausible explanation for that assertion. Even on face value such evidence does not seem plausible. If balloting was done for the plots, each plot must have been identified with a ballot number and that was the essence of balloting. Just like the trial Judge, we agree with the evidence of the respondent's independent witness, the treasurer at the material time, that the title that was issued in 1990 to Erastus Kimanga, the genuine owner as he was the holder of the ballot paper No. 36. The chairman of the company, PW3, stated that he was not a member of the land buying company. Who is to be believed?

16. We also agree with the trial Judge that the appellants' evidence had gaping holes which no amount of submissions could cure. The 2nd appellant claimed that he was the owner of plot no. 37 yet his name does not appear on the register. Even if he was the owner of the ballot paper for plot no. 37, how would that entitle him to plot no. 36? The appellants spent a considerable amount of time attacking the process that led to issuance of the ballot paper no. 36 to the original owner, Erastus Kimanga without laying any credible basis for their claim to the suit land. In his witness statement, also relied on by the 3rd appellant, the 2nd appellant states as follows: "...plot no 36 & 37 were in Mukinye Gatundu Co-operative society Ltd. The land was in my father's name but title had not been issued by the time of my father's death on or about 20.4.2001." This begs the question: can such a hollow statement be the basis for canceling a title on the basis of fraud? Certainly not especially when one considers that there is no iota of evidence that was adduced by the appellants that can support the claim that the title to the suit land was issued fraudulently. We also note that the documents relied on convoluted their position

further. For instance, the appellants produced receipts in the name of Muturi Munene in the names of Mukinye Farmers' Co-operative Society Ltd and Gatundu Farmers' Co-Operative Society Ltd. Their evidence was that the two refer to the same company. The receipt for Gatundu Farmers' Co – Operative Society Ltd states it is for one share and another one for 4 shares. There is a receipt for Mukinye Farmers' Co-Operative Society Ltd dated 29.3.1982 and it only states that it is for a 'share'. It does not give any parcel number. The other piece of evidence is a handwritten letter dated 17th January 2013 by one Alexander Nganga, the Chairman of Mukinye Framers' Co-Operative Society Ltd. It states in part: "...Munene's Father who had 2 shares plot no. 36 and 37 voted and picked plot no. 37 as directed. Card no.36 was to be picked later at Cooperative office-Gilgil. When Munene turned for ballot card it was picked by Kariuki Kibicho the treasurer who then sold plot to Erastus Kimanga fraudulently, who then sold the same to a Geofrey Karrithi Gachathi -who then sold the same to Elizabeth Wambui who holds the title deed at present."

17. We should now stop there as further analysis of the evidence adduced by the appellants only demonstrates how weak their case was and that it is beyond resuscitation.

18. We now turn to ground number 4, which has two limbs: Firstly, the appellants argue that the learned Judge erred in holding that the 2nd and 3rd appellants had no legal capacity to sue or enter into any transactions relating to the suit land owned by Muturi Munene as they did not antecedently obtain the letters of administration. It was argued that this was not an issue for determination as it was neither pleaded nor raised by the parties. We note that it is pleaded as follows in the plaint: "...it is during the said lifetime of Muturi Munene he transferred the shareholding of ballot plot no. 36 to the 2nd and 3rd plaintiffs who later sold it to the 1st plaintiff."

19. It is significant to note that witness statement dated 25th March 2013 by the 2nd appellant on his behalf and that of the 3rd appellant states as follows: "...the land was in my father's name but title had not been issued at the time of my father's death on or about 20th April 2001."

20. In the witness statement the 2nd appellant does not speak to the transfer. Extrapolating from this, the question remains if and when the transfer was done. We note that in his evidence, the 2nd appellant stated that the two plots no. 36 and 37 belonged to his father and himself respectively. The record shows that when a question was put to him in cross-examination as to which plot belonged to him and which belonged to his father, the trial Judge recorded that the 2nd appellant refused to answer. Another significant question that was asked during cross-examination was whether the 2nd and 3rd appellants had applied for letters of administration. The record shows that the 2nd appellant responded as follows: "...We did not file a succession case over the estate of my father. I did not know that it was necessary before selling the land...we have not sued the defendant in our capacity as the administrators of the estate of my late father."

21. The 2nd and 3rd appellants gave contradictory statements on the ownership of the suit land. If the suit land was indeed transferred by Muturi Munene in his lifetime, nothing would have been easier than for the parties to furnish evidence to that effect. The 2nd appellant in his witness statement was categorical that the suit land belonged to his father, Muturi Munene. It is trite that for one to sell the property of a deceased person, the legal authority to do so can only be obtained from a grant of the letters of administration or probate. The 2nd and 3rd appellants admitted that they did not apply for them.

22. The appellants argued that this question of law was introduced by the trial Judge. In fact, the appellants with temerity called it a stray issue. It is the appellants who, in their pleadings and evidence introduced the issue of ownership of the suit land by the late Muturi Munene. The issue of the legal capacity of the 2nd and 3rd appellants to sell the suit land arose in cross- examination and in any event, on any a

question of law, there is no way the appellants can run away from this issue. We quickly hasten to add that if a party fails to take out a grant of probate or letters of administration before filing suit, they lack the locus standi to bring the suit on behalf of the deceased's estate.

23. This issue has been a subject of discussion before this Court.

Constituted differently, this Court in Rajesh Pranjivan Chudasama vs. Sailesh Pranjivan Chudasama [2014] eKLR held as follows:

> " As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased's estate. That may well be the case, but in our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In Otieno v Ougo (supra) this Court differently constituted rendered itself thus:
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> > " ... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."
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> It therefore matters not that the respondent had a cause of action. Indeed the issue was not whether he had a cause of action or not but that he lacked the requisite locus standi to seek relief from the Court without first obtaining letters of administration. In any case being aware that there was a purported Will alleged to be in existence, he ought to have moved the court to have the appellant propound the Will or renounce the executorship and if need be then proceed to challenge the Will."

24. The second limb of that ground was that the learned Judge erred in holding that the suit was time-barred by dint of the provisions set out in the *Limitation of Actions Act*. This was on account of the fact that the suit, being for recovery of land, was not filed within the stipulated period of 12 years. It is important to note that the appellants instituted the suit in 2013 after they learnt that the title to the suit land was transferred to the respondent in the year 2011. We note that the trial Judge was wrong on the issue that the suit was time-barred. The first title was indeed issued in 1990, but when a party pleads fraud, time starts running from the time the fraud is discovered. The relevant part of section 26 of the *Limitation of Actions Act* provides as follows:

> " Where, in the case of an action for which a period of limitation is prescribed, either:
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> the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
>
> SUBPARA a.
>
> b. the right of action is concealed by the fraud of any such person as aforesaid; or
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> c. the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it..."

25. Whereas the learned Judge was wrong on this question, nothing turns on this point in view of what we have already held regarding the other grounds.

26. In light of the above findings, we find that the appeal fails and it is hereby dismissed. We uphold all the orders issued by the learned Judge. As regards to costs, we note that the respondent did not file submissions or participate in the hearing. Accordingly, we order that each party shall bear their own costs of the appeal.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF JANUARY 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR