



Mugambi & 10 others v Mkandau & 3 others (Suing on Behalf of the 14 Persons Whose List of Names is Attached to the Complaint) & 3 others (Civil Appeal 284 of 2019) [2024] KECA 1072 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 1072 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 284 OF 2019
W KARANJA, J MOHAMMED & LK KIMARU, JJA
APRIL 26, 2024**

BETWEEN

MUTWIRI TARSICIOUS MUGAMBI & 10 OTHERS & 10 OTHERS & 10 OTHERS & 10 OTHERS APPELLANT

AND

**M’BECHI MKANDAU, M’MURITHI M’BWIRIA, JOSEPH MWIKUMI
M’NJOGU, M’ITONGA MUTUNGA, FRANCIS KAMAU NGUGI AND JOSEPH
MBUTU M’IMANYARA (SUIING ON BEHALF OF THE 14 PERSONS WHOSE
LIST OF NAMES IS ATTACHED TO THE PLAINT) 1ST RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT
DIRECTOR, LAND ADJUDICATION AND SETTLEMENT . 3RD RESPONDENT
LAND REGISTRAR, MERU 4TH RESPONDENT**

(Being an appeal from the judgment of the Environment and Land Court at Meru (Mbugua, J.) dated 22nd May, 2019 in HCCC No. 122 of 2007 Formerly Meru HCCC No. 122 of 2007)

JUDGMENT

1. The dispute herein relates to the ownership of fourteen parcels of land within Kiamuri Sub-Location namely Kiamuri “A”/283, 284, 286, 287, 291, 293, 294, 295, 448, 468, 1018, 1130, 1132, 1217 (hereinafter ‘the suit properties’). The land dispute, which dates back to the 1970s, is between two clans: the 1st respondents belong to the Kagwanja Clan; while the appellants subscribe to the Omo Clan.
2. By their plaint dated 27th September 2007, the 1st respondents alleged that while they are the original owners of the suit properties, the appellants unlawfully hold titles to the suit properties. The 1st



respondents' case was that vide Appeal No. 137 of 1991, lodged before the Minister, they were declared the rightful owners of the suit properties. That the Minister decided in favour of the Kagwanja Clan, vide his letter to the Director of Land Adjudication and Settlement, dated 10th March 1994. That the 3rd respondent misinterpreted the Minister's decision, and allocated the suit properties to the appellants. The appellants subsequently filed Civil Suit No. 83 of 1997, before the Chief Magistrate's Court at Meru, seeking eviction orders against the 1st respondents, which suit was transferred to the High Court at Meru, as HCCC No. 78 of 2002. While the said suit was pending, the 1st respondents, instituted the instant civil suit against the appellants, and the 2nd to 4th respondents, before the High Court of Kenya at Meru. It was the 1st respondents' case that the action by the 3rd respondent amounted to wrongful exercise of authority, and deprived the 1st respondents of their ownership rights over the suit properties, which was unlawfully allocated to the appellants.

3. The 1st respondents sought declaratory orders that the purported implementation letter signed by J.B. Musembi on behalf of the 3rd respondent is null and void; an order directing the Land Registrar, Meru, to cancel all the entries in the land register, with respect to the aforementioned parcels, and re- enter the names of the 1st respondents in their respective parcels, as the lawful owners; in the alternative, the 2nd and 3rd respondents, be ordered to compensate the plaintiffs for the loss of value of their respective parcels at current market price, together with valuation costs thereto; as well as costs of the suit.
4. The appellants, vide a statement of defence dated 9th January 2008, averred that the respondents lacked locus standi to sue them, and that the suit was improperly before the High Court. They contended that the respondents' suit was time and statute barred, by virtue of the provisions of the *Limitation of Actions Act*. They urged that there was a pending suit, being Meru HCCC No. 78 of 2002, which relates to the same subject matter. They were of the view that the respondents were not entitled to the reliefs sought, and the suit was bad in law, and raised no cause of action.
5. The 2nd, 3rd and 4th respondents, in their statement of defence dated 10th October, 2011, denied the allegations set out in the plaint.
6. The two suits, HCCC No. 78 of 2002 and HCCC No. 122 of 2007 were consolidated and heard together. The case was heard by way of viva voce evidence. Francis Kamau Ngugi (PW1) testified on behalf of the 1st respondents. It was his testimony that the suit properties formed part of thirty-one parcels of land that had been subject of land adjudication disputes between the Kagwanja and Omo clans for many years. He stated that the Kagwanja Clan was represented by Juliano Ntuara, who had been registered as the owner of the thirty-one parcels of land. The Omo clan was represented by one Murira. PW1 stated that one of such land dispute was Objection Case No. 78/107, which was decided in favour of Omo clan, where they were declared the rightful owners of the suit properties. He testified that the Kagwanja clan, aggrieved by this decision, lodged an appeal before the Minister vide Appeal No. 137/1991 Juliano Ntwara vs Murira Kirigicha. PW1 stated that their appeal was allowed, and the Minister ordered that the suit properties revert back to the original owners, being the Kagwanja clan. That vide an implementation letter dated 25th July 1994, the Minister's decision was wrongly implemented, as the letter had termed the 1st respondents' appeal before the Minister dismissed, yet the appeal had been allowed. That the 1st respondents caused the District land adjudication officer in Meru to write to the director of adjudication in Nairobi (plaintiff exhibit no. 5), seeking clarification of the Minister's order. PW1 stated that although the titles to the suit properties are registered in the appellants' names, the 1st respondents are still in occupation of the suit properties.
7. The appellants on their part called six witnesses. From the summary of the evidence in the judgment of the ELC, DW1, Mutwiri Tarcisious Mugambi, told the court that he acquired L.R. Kiamuri 'A'/1018 in the 1990s, and that after the decision of the Minister in Appeal 137/1991, he was registered as the



- proprietor of the said parcel. He stated that he sub-divided the parcel into three portions and sold to third parties. DW2, Julius Kirimi Magiri, testified that he is the registered owner of Parcel Numbers 468, 290, 292, 1017 and 1147 which he bought from Martin Kathurima, Fabiane M'Ikiara, Murira Karigicha, Joshua Mathonga & Daniel M'Irambu, and M'Arithaa Ndereba M'Mbui & Mucheke M'Mbui, respectively. He testified that he has extensively developed the said parcels of land. DW2 admitted that he was aware about the objection case filed against the 1st respondents, but that he was not aware of the subsequent appeal lodged before the Minister.
8. DW3, Joseph Mbaabu, stated that he is the registered owner of Parcel Number 283, which he inherited from his father, Daniel Mugambi M'Aburi, jointly with his two brothers. He testified that his father was party to the appeal before the Minister, after which he was registered as the owner of Parcel Number 283. DW4, Jamlick Mwongera M'Nkanata, asserted that he was the proprietor of Parcel Number 286, which he has extensively developed with semi-permanent houses, livestock, piped water, borehole and crops. He stated that he also owns Parcel Number 291 which he purchased from Julius Kinyua Jason M'Mungania. He testified that he was an innocent purchaser for value without notice.
 9. DW5, Stephen Muringi M'Tuaruchu, told the Court that Daniel Mugambi (deceased) transferred Parcel Number 217 to him in 1992, and that he took possession of the same. That he sold the said parcel to Japhet Kinoti in 2012, and that Japhet is in occupation of the land to date. DW6, Clifford Mwiti Mugambi, testified that he inherited Parcel Number 284 from his father, Daniel Mugambi M'Aburi, together with his three brothers. He stated that his father was a party in the appeal before the Minister, and that he won the said case.
 10. The 2nd to 4th respondents did not adduce any evidence before the superior court.
 11. After hearing the parties, the Environment and Land Court (ELC) (L.N. Mbugua, J.), in a judgment dated 22nd May 2019, decided in favour of the 1st respondents. The learned Judge dismissed Meru HCCC No. 78 of 2002, and allowed Meru HCCC No. 122 of 2007. She found that the letter drafted by the Director of Land Adjudication and Settlement, J.B. Musembi, on 25th July 1994, with respect to the Minister's decision in Appeal No. 137 of 1991 was null and void. She ordered the titles, with respect to the suit properties, issued to the appellants, be cancelled, and new titles issue in the names of the respective original owners.
 12. The appellants, dissatisfied with the judgment of the learned Judge, preferred an appeal before this Court. In their eight grounds of appeal, the appellants faulted the learned Judge for failing to find that the 1st respondents' suit was time and statute barred. They were aggrieved that the dispute being a representative suit, the 1st respondents failed to seek leave of court, and failed to serve a notice on all parties affected by the suit. They took issue with the fact that the learned Judge failed to acknowledge that the 1st respondents did not obtain a written document giving them authority to sue on behalf of the alleged respondents. They were aggrieved that the learned Judge failed to acknowledge that most of the respondents were deceased, and had not been substituted. They faulted the decision of the learned Judge, stating that the 1st respondents' case was not based on allegations of fraud, and that fraud had not been proved. They contended that the learned Judge ordered that the titles revert back to estates of the deceased owners, yet no such prayer had been pleaded by the 1st respondents. They were aggrieved that the learned Judge awarded costs of the suit to the 1st respondents, without considering that some of the appellants were innocent purchasers for value without notice. Finally, the appellants faulted the learned Judge for failing to consider their written submissions, in making her determination. In the end, the appellants urged us to allow the appeal, and set aside the decision of the ELC.
 13. The appeal was canvassed by way of written submissions. The firm of Kiogora Ariithi and Associates was on record for the appellants. The appellants seemed to have abandoned the first ground of appeal,



and only submitted on grounds two to seven. Counsel for the appellants submitted that PW1 did not avail any written authority, giving him the mandate to institute the suit before the ELC, on behalf of the other 1st respondents, in contravention with the provisions of Order 1 Rules 8 and 13 of the Civil Procedure Rules. Counsel urged that the 1st respondents' suit was a nullity from inception, as the 1st respondents failed to avail grant of letters of administration giving them authority to institute suit on behalf of the deceased respondents. Counsel asserted that the appellants adduced evidence of title with respect to the suit properties, and that they sufficiently explained how they acquired the suit parcels of land. He submitted that no evidence was led to prove fraudulent acts on the part of the appellants, with respect to how they acquired their titles, and that a certificate of title was bona fide proof of ownership. Counsel stated that since some of the appellants inherited the suit properties from the fathers, while the others were innocent purchasers for value without notice, the ELC ought to have exercised its discretion when she made the decision on costs, and direct each party to bear its own costs. In the circumstances, the appellants' counsel invited us to allow the appeal.

14. The respondents did not file any written submissions. Counsel for the 1st respondents, Mr. Kahumbi, informed this Court that the 1st respondents wished to rely on their written submissions filed before the ELC.
15. This is a first appeal. We are alive to our mandate as a first appellate court to re-evaluate, re-assess and re-analyze the evidence on record, and to draw our own conclusions as to whether the determination by the trial court were sound or not, keeping in mind that we neither saw nor heard the witnesses as they testified, and should make due allowance in this regard. (See *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2E.A. 212).
16. Guided by the foregoing principles, the grounds of appeal, the record, as well as the written submissions by the appellants, we find that the issues for determination are:
 - a. Whether the 1st respondents had authority to sue on behalf of the other respondents;
 - b. whether the 1st respondents had legal authority to sue on behalf of the dead respondents;
 - c. whether the learned Judge erred in impeaching the appellants' respective titles with respect to the suit properties; and
 - d. whether the learned Judge erred in awarding costs of the suit to the 1st respondents.
17. Starting with the first issue, it was the appellants' contention that the 1st respondents did not avail any written authority, allowing them to institute the suit before the ELC on behalf of the other respondents, contrary to the provisions of Order 1 Rule 13 of the Civil Procedure Rules. In their pleadings before the ELC, the 1st respondents stated that they instituted the suit on their behalf, and on behalf of all the persons who were the original appellants in Minister's Land Appeal Case No. 137 of 1991. From a perusal of the record, on page 12 and 13, it is evident that the 1st respondents attached a list of the said plaintiffs, as well as the respective land parcels they were each claiming, and the registered owners of the said land parcels. It was duly signed by the plaintiffs. Our re-evaluation of the evidence adduced in that regard leads us to finding that indeed the 1st respondents substantially complied with this requirement of the rules of procedure. This ground of appeal therefore fails.
18. In regard to the second issue, the appellants contended that the 1st respondents did not have legal authority to sue on behalf of some of the respondents who were deceased at the time of filing the suit. The appellants in their written submissions, stated that PW1 during cross examination stated that some of the plaintiffs were deceased. We note that the appellants did not state when the alleged plaintiffs died, or provide any proof of death, so that this Court can determine whether the said plaintiffs died



before the suit was filed, or during the pendency of the suit, and if it is the latter, whether the suit had abated by the time judgment was delivered by the ELC. It is incumbent upon the person alleging a fact to tender sufficient evidence before a court to prove said fact. In this appeal, the appellants tendered no evidence to substantiate who among the 1st respondents were deceased at the time the suit was being heard and were not therefore entitled to benefit from the judgment. Even if this Court were to agree with the appellants, the fact that a party claiming land in a suit dies does not imply that his claim dies with him. On the contrary, the claim survives him and can be taken up by his legal representatives.

19. The next issue for determination is whether the learned Judge was justified in impeaching the appellants' titles, with respect to the suit properties. The appellants are the registered proprietors of the suit properties. According to Section 26 (1) of the *Land Registration Act*, a certificate of title in regard to land is conclusive evidence of ownership of the land. The section provides thus:

- “ 1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor, shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except:
- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

20. The aforesaid provision is similar to Section 23 (1) of the Registration of Titles Act, which preceded the *Land Registration Act*. It provided thus:

“The certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

21. There is no doubt in our minds that the appellants acquired titles to the suit properties unprocedurally, through the mischief of the 3rd respondent, in interpreting the Minister's decision in Land Appeal No. 137 of 1991. The Minister's decision in the said appeal, produced as plaintiff exhibit no. 3, and reproduced by the learned Judge in her decision, was categorical that his orders were that “the persons originally entered as the parcel owners of part of 1185, 295, 1217, 448, 294, 293, 292, 291, 286, 132, 130, 468, 290, 285, 284, 283, 1019, 1020, 1017, 1147, 981, 982, and 1018 be registered as the rightful owners”.

22. Section 29 of the *Land Adjudication Act* gives the Minister the mandate to determine appeals emanating from Objection under Section 26 (1) and (2) of the Act, and further stipulates that the decision of the Minister in such an appeal shall be final.

23. The persons originally entered as the proprietors of the suit properties were the 1st respondents. After the decision in Objection Case No. 78/107, the 1st respondents' names were cancelled, and the suit



properties were registered in the names of the appellants. It follows that the appellants were the current registered proprietors when the appeal was filed before the Minister, while the 1st respondents were the original owners. The Minister's decision was that the suit properties revert back to the original owners. This decision was forwarded to the Director of Land Adjudication and Settlement vide a letter dated 10th March 1994. The Director then forwarded the Minister's decision to the Chief Land Registrar, which implementation letter dated 25th July 1994. In the said communication, the Director noted that the Minister had dismissed the 1st respondents' appeal, and that the suit properties were to remain as currently registered. This was a total misinterpretation of the Minister's decision which was in favour of the 1st respondents.

24. We agree with the finding of the learned Judge that the communication by the Director of Land Adjudication and Settlement to the Chief Registrar was done in utter mischief, and was geared at denying the 1st respondents their right to ownership of the suit properties. The decision of the Minister was categorical that the suit properties were to revert back to the original owners. The Director, contrary to the Minister's order, directed that the suit properties remain as currently registered as the appeal had been dismissed, which was not the case.

25. The effect of this is that the appellants remained as the registered proprietors of the suit properties, in flagrant disregard of the Minister's decision. This Court in *Wambui v. Mwangi & 3 Others* [2021] KECA 144 (KLR) observed thus:

“...no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme.”

26. Further, this Court in *Munyu Maina v. Hiram Gathiha Maina* [2013] eKLR, held as follows:

“We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

27. It is our considered view that the learned Judge's reasoning as to why the appellants' titles to the suit properties were impeached was well founded both in law and fact. The appellants did not challenge the fact that they were registered as the proprietors of the suit properties, pursuant to the decision of the Minister in Appeal No. 137 of 1991. DW1 testified that he was issued with a title deed to Parcel Number 1018 after he was successful in the appeal filed before the Minister. DW3, DW5 and DW6 stated that Parcels Number 283 and 284 were transferred to their father, Daniel Mugambi M'Aburi, after he won in the appeal to the Minister, and that they inherited the parcels from him. DW2 contended that he was an innocent purchaser for value without notice. However, from his cross-examination he admitted that he was aware that a case had been filed against the sons of Ntuara, who sold him the properties.

28. It is, therefore, our finding that the 3rd respondent had no authority to go against the decision of the Minister, and order that the appellants be registered as the rightful owners of the suit properties. The supposed vendors could therefore not pass good title to the said appellants who claimed to be innocent purchasers for value without notice. The root of their title was as a result of a corrupt scheme. Their titles therefore stand impeached.



- 29. Having found as such, we hold that the 1st respondents proved their case before the ELC to the required standard of proof on a balance of probabilities, and the learned Judge did not err in finding in their favour and in awarding them costs of the suit. The appellants have failed to show that the trial Judge failed to properly evaluate the evidence or that she reached the wrong verdict. We uphold the decision of the trial court.
- 30. We find no merit in this appeal. We accordingly dismiss it with costs to the 1st respondents.
- 31. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF APRIL, 2024.

W. KARANJA

.....

**JUDGE OF APPEAL
JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL
L. KIMARU**

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

