



**Wambu v Gituto & another (Civil Appeal 143 of 2018)
[2024] KECA 1034 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 1034 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 143 OF 2018
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
APRIL 12, 2024**

BETWEEN

DAVID NJAGI WAMBU APPELLANT

AND

GRACE MUTHONI GITUTO 1ST RESPONDENT

THE LAND REGISTRAR KIRINYAGA 2ND RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Kerugoya (Olao, J.) dated 7th May, 2018 in E.L. C. No. 440 of 2013)

JUDGMENT

1. David Njagi Wambu, the appellant herein, instituted a suit against the respondents, before the Environment and Land Court (ELC) at Kerugoya. By an amended plaint dated 7th March, 2011, the appellant alleged that he was the registered owner of parcel L.R. No. Inoi/Kariko/2452 (hereinafter “suit property”), having purchased the same from his brother, Symon Ndegwa Wambu, and that a title deed was issued to him to that effect on 16th March, 2004. It was the appellant’s case that sometime in the year 2005, the 1st respondent invaded the suit property and started picking the tea bushes planted therein. The appellant averred that he reported the matter to the police, and when the 1st respondent was summoned, she produced a title deed with respect to the suit property, allegedly issued on 24th December, 2004. The appellant alleged that the 1st respondent acquired the said title fraudulently, with the assistance of the 2nd respondent.
2. The appellant sought the following orders from the ELC: declaration that he was the legitimate owner of the suit property; directing the 2nd respondent to rectify the register by cancelling the names of the 1st respondent as a registered owner of the suit property; ordering the eviction of the 1st respondent from the suit property, and payment by the 1st respondent of mesne profits thereof; as well as costs of the suit.



3. The 1st respondent, vide a statement of defence dated 9th January, 2007, denied the allegations of fraud levelled by the appellant. She stated that the appellant fraudulently effected registration of the suit property to himself, from his brother, who was the registered owner at the time, and that the matter was referred to the police at Kirinyaga CID office. She asserted that upon investigations by the police, the appellant's name was cancelled from the register with respect to the suit property, and the suit property reverted back his brother, Symon Ndegwa Wambu. It was the respondent's case that she is the lawful registered owner of the suit property, having purchased the same from the said Symon Ndegwa Wambu. The 2nd respondent did not participate in the proceedings before the ELC.
4. The case was heard by way of viva voce evidence. The appellant, who testified as PW1, told the court that the suit property was part of a larger parcel of land, which originally belonged to his father, Samson Wambu Ndegwa. The parcel of land was later sub-divided into four portions, and the suit property, which was one of the resultant portions, was transferred to his brother, Symon Ndegwa. The appellant testified that he purchased the suit property from his brother, on 26th November, 2003. He produced a sale agreement to that effect (Pexh 1). He stated that he was issued with a title document in respect of the suit property on 16th March, 2004. He immediately took possession of the same. The appellant admitted that his brother, Symon Ndegwa, instituted a criminal case against him, alleging that he had fraudulently acquired registration of the suit property. He told the court that he managed to come into an agreement with his brother, and the case was subsequently withdrawn. The appellant alleged that the 1st respondent invaded the suit property in 2005, and that he reported the matter to the police, upon which the police advised him to lodge the dispute before a court of law for resolution. The appellant maintained that his title deed is valid, and that he has never sold the suit property to the 1st respondent. He stated that the 1st respondent was in current use of the suit property.
5. Upon cross-examination, the appellant reiterated that he was not aware that his brother had sold the suit property to the 1st respondent. He was shown a green card, with respect to the suit property, where an entry dated 16th March, 2004, showed that the appellant's name had been struck off, as the registered owner of the suit property, and that as a result, the property reverted back to Symon Ndegwa. On re-examination, the appellant stated that he was not informed of any cancellation of his title to the suit property.
6. The appellant's brother, Symon Ndegwa, testified as PW2. It was his testimony that he sold the suit property to the appellant.

Upon cross-examination, PW2 denied selling the suit property to the 1st respondent. He told the court that he was drunk when he executed the sale agreement between him and the 1st respondent, relating to sale of the suit property. He admitted receiving payment of Kshs. 800,000/-, for purchase of the suit property from the 1st respondent, but stated that he refunded the same to his cousin Peter, who was present when he entered the sale agreement with the 1st respondent. PW2 stated that he was under duress when he instituted criminal proceedings against the appellant, and that he misled the police when he made the report to the police.
7. The 1st respondent gave evidence as DW1. It was her evidence that she purchased the suit property from Symon Ndegwa, vide a sale agreement dated 1st November, 2004. She produced into evidence the sale agreement, as well as deposit slips, indicating that Kshs. 800,000/- was paid to Symon Ndegwa through his account held at Kirinyaga District Farmers Sacco. The 1st respondent stated that there was no caution registered against the title at the time, and that the suit property was transferred to her after the Land Control Board granted the requisite consent. She produced into evidence the title deed as



well as the proceedings in Criminal Case No. 1538 of 2004. The 1st respondent stated that she has been in possession of the suit property since 2004.

8. DW2, Peter Mubari Kabugi, testified that he was present when the 1st respondent and Symon Ndegwa entered into an agreement for the sale of the suit property for a consideration of Kshs. 800,000/-. He witnessed the said agreement. The 1st respondent availed Munene Nyaga, (DW3), who was the investigating officer in the criminal case that was lodged against the appellant. DW3 stated that in that case, the appellant was accused of procuring a document by false pretences and obtaining land registration by false pretences. He stated that the complainant was the appellant's brother, Symon Ndegwa, who at the time alleged that the appellant had transferred the suit property to himself, without his consent. He stated that Symon later withdrew his complaint against the appellant, after the appellant agreed to revert the suit property back to him.
9. After hearing the parties, the ELC (Olaogun, J.), in a judgment dated 7th May, 2018, dismissed the appellant's suit, and found that the 1st respondent was the rightful owner of the suit property. The learned Judge further ordered the 2nd respondent to cancel the title held by the appellant with respect to the suit property.
10. The appellant, dissatisfied with the judgment of the learned Judge, preferred an appeal before this Court. In his eight grounds of appeal, the appellant faulted the learned Judge for finding that he defrauded his brother, contrary to the evidence on record, and for basing his decision on a criminal case which was withdrawn. He contended that the learned Judge was misdirected in finding that the appellant and his brother agreed to cancel the appellant's name, as the owner of the suit property, without any evidence in support of such finding. He was aggrieved that the learned Judge approached the dispute as if it was one between the appellant and his brother, instead of addressing himself on whose title, between the appellant and the 1st respondent was valid. The appellant took issue with the fact that the learned Judge determined that he was not entitled to mesne profits. Finally, the appellant was aggrieved that the entire decision of the learned Judge was against the weight of the evidence adduced during the trial before the ELC. In the premises, the appellant urged us to allow his appeal and grant the prayers that he had sought in his amended plaint.
11. The appeal was canvassed by way of written submissions. The firm of Maina Kagio and Company Advocates was on record for the appellant. Counsel for the appellant reiterated the facts of the case as summarized earlier in this judgment. It was urged on behalf of the appellants that the learned Judge erred in finding that the appellant and his brother appeared before the Land Registrar and had the registration in the name of the appellant cancelled for having been entered in error, yet no such evidence was adduced by the 2nd respondent. Counsel for the appellant submitted that going by the evidence of the investigating officer, the appellant was the registered owner of the suit property as at 11th January, 2005, when the charge sheet was amended. Counsel was of the view that in the absence of any evidence that there was a court order directing cancellation of the appellant's name as the registered owner of the suit property, then the cancellation effected on the green card on 16th March, 2004, was illegal.
12. The appellant's counsel further asserted that the appellant was the registered owner of the suit property when the 1st respondent purchased the same from Symon Ndegwa, on 1st November, 2004. Counsel submitted that Symon Ndegwa had no claim against the appellant in this case, and that the mere fact that the appellant was charged in the criminal case did not automatically equate to his guilt, in relation to the allegations of fraud that were made against him. Counsel reiterated that the documents alleged to have been forensically examined in the proceeding in the criminal case, according to the investigating officer, were not availed before the ELC for the court to determine that the transfer documents were fraudulent. It was his submission that no evidence was tabled before the ELC to show that the appellant



fraudulently obtained ownership documents to the suit property. He explained that Symon Ndegwa admitted to having executed the sale agreement between himself and the appellant. Counsel asserted that ground seven, relating to mesne profits was abandoned. In the circumstances, the appellant's counsel invited us to allow the appeal.

13. The respondents did not file any written submissions despite being requested to do so by the Court.
14. This is a first appeal. We are alive to our mandate as a first appellate court which is to re-evaluate, re-assess and re-analyze the evidence on record, and to draw our own conclusions as to whether the determinations of the trial court were sound or not, keeping in mind that we neither saw nor heard the witnesses, and therefore should make due allowance in this regard. (See *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2E.A. 212).
15. Guided by the foregoing principles, the grounds of appeal, the record, as well as the written submissions by the appellant, we are called upon to determine whether the learned Judge erred in determining that the 1st respondent was the rightful owner of the suit property.
16. From the evidence on record, it is apparent that both the appellant and the 1st respondent had legitimate claim over the suit property, as they both held respective titles to the property. By virtue of Section 26 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.”
17. The learned Judge delved into the root of both titles to determine who was the valid registered owner of the suit property. The appellant's case was that he bought the suit property from his brother, Symon Ndegwa, vide a sale agreement dated 26th November, 2003. The suit property was subsequently transferred to him on 16th March, 2004. The said Symon Ndegwa (PW2) told the court that he indeed sold the suit property to the appellant for a consideration of Kshs.450,000/-. Although the sale agreement was produced in court, no proof of payment of purchase price was ever availed by the appellant to establish that he paid such purchase consideration.
18. The 1st respondent, on the other hand, testified that she purchased the suit property from Symon Ndegwa vide an agreement dated 1st November 2004, for a consideration of Kshs.800,000/-. The suit property was subsequently transferred to her on 24th December, 2004. She produced the sale agreement as well as a deposit slip number 154913 which indicated that she deposited the sum of Kshs. 800,000/- to an account held by Symon Ndegwa at Kirinyaga District Farmers Sacco Society Limited.
19. What is interesting though is that the appellant's sale agreement dated 26th November, 2003, and subsequent registration of the appellant as the owner of the suit property on 16th March, 2004, was a subject of contention that caused Symon Ndegwa to institute criminal proceedings against the appellant. The OB extract of the report made to the police produced by the 1st respondent indicated



- that the appellant was arrested in November, 2004. It is clear, from the copy of the criminal proceedings on record, with respect to Kerugoya Senior Resident Magistrate's Court Criminal Case Number 1538 of 2004, that the appellant was arraigned before the said court on 12th November, 2004.
20. The appellant was charged, in the first and second counts, with the offence of procuring execution of documents by false pretences contrary to Section 355 of the Penal Code. The particulars in the first count alleged that the appellant procured the execution of a Land Control Board consent, with respect to the sale of the suit property, by fraudulent representation, on 18th June, 2003. The appellant was accused in the second count of fraudulently representing a transfer of land document, with respect to the suit property, by alleging that it was signed by Symon Ndegwa, and thereby procuring execution of the same by an advocate.
 21. In the third count, the appellant was charged with obtaining land registration by false pretences contrary to Section 320 of the Penal Code. It was alleged that on 16th March, 2004, the appellant willfully procured the registration of the suit property in his name, by falsely pretending that the same had been sold to him by Symon Ndegwa, who was the registered owner of the said property.
 22. The case however did not proceed to trial. From the proceedings, Symon Ndegwa withdrew the charges against the appellant. He informed the Court that they had settled the matter out of court with the appellant. DW3, who was the investigating officer in that case, told the ELC that Symon withdrew the case after the appellant agreed to revert the suit property back to him. The copy of the green card relating to the suit property indeed shows that the entry dated 16th March, 2004, which indicated the appellant as the owner of the suit property, was cancelled as having been registered in error. This entry could not have been made without the consent of the appellant. He cannot feign ignorance that such transaction indeed took place to enable the charges that he was facing to be withdrawn. The suit property was then transferred to the 1st respondent after she paid valuable consideration on 24th December, 2004.
 23. Further to this, another interesting element was the evidence of Symon Ndegwa (PW2). At first, Symon denied selling the land to the 1st respondent. Upon cross-examination, however, Symon admitted that he had accompanied the 1st respondent and DW2 to see an advocate known as Karani where the parties executed the sale agreement produced by the 1st respondent. The 1st respondent availed receipts of payment of legal fees to Wachira Karani Advocates made by both herself and the 1st respondent, and dated the same day as the sale agreement.
 24. Symon Ndegwa also admitted to receiving Kshs. 800,000/- from the 1st respondent, being the agreed purchase price of the suit property. He admitted that the account indicated in the deposit slip produced by the 1st respondent and held at Kirinyaga District Farmers Sacco Society Limited was indeed his. He however told the ELC that he did not keep the funds, and that he refunded the same to DW2. We note that there is no proof that Symon refunded the money to DW2. Secondly, if indeed Symon reneged on the sale agreement, why not refund the money back to the 1st respondent?
 25. We agree with the assessment by the learned Judge that Symon's contention that he was drunk when he signed the sale agreement between himself and the 1st respondent was incredible, as was his contention that he refunded the purchase consideration back to the 1st respondent. Peter Kibugi, (DW2) witnessed the execution of the sale agreement between Symon Ndegwa and the 1st respondent. He did not speak to the allegations made by Symon that the purchase consideration was refunded.
 26. Symon Ndegwa further admitted in his testimony, that he instituted criminal charges against the appellant, so that he could get back the suit property, after he accused the appellant of fraudulently transferring the suit parcel of land to himself. He however went ahead to contradict himself by stating



that he did not know what was happening at the time, and that he gave false information to the police, with respect to the criminal complaint and the subsequent charges.

27. It is our considered view that the fact that Symon Ndegwa instituted criminal charges against the appellant, in which he accused the appellant of fraudulently obtaining registration of the suit property on 16th March, 2004. The fact that the entry on the green card showed that the appellant's registration as the owner of the suit property entered on 16th March, 2004 was cancelled, as having been entered in error, after which the criminal charges were withdrawn, irrefutably points to the fact that Symon Ndegwa did not sell the suit property to the appellant as alleged by the appellant. Symon Ndegwa admitted to having filed the complaint with police so that he could get back the suit property from the appellant. The Land Registrar having cancelled the appellant's registration (apparently by his own consent), the ownership of the suit property reverted back to Symon Ndegwa and was subsequently legally transferred to the 1st respondent upon purchase of the same.
28. The appellant's counsel submitted that the appellant was still the registered owner of the suit property as at 11th January, 2005, when the charges in the criminal proceedings were amended. He made submissions to the effect that the appellant was the registered owner when the suit property was transferred to the 1st respondent. These assertions were however not supported by the evidence of the green card entries which showed that the 1st respondent was the registered owner of the suit property as from 24th December, 2004, and that the appellant's registration prior to that had been cancelled. The green card traced the root of the title to the suit property. Further, the copy of the official search undertaken at the Land Registry on 20th May, 2005, produced by the 1st respondent, clearly shows that she was the registered proprietor of the suit property as of that date.
29. The appellant further submitted that the fact that he was charged in the criminal case did not automatically imply that he was guilty of the fraudulent acts that were alleged against him. We agree with the appellant to the extent that no conviction against him was pronounced in the criminal proceedings. However, looking at the evidence before the ELC as a whole, it is our holding that the appellant did not hold a valid title to the suit property, and that the same was not sold to him by Symon Ndegwa. The original owner, Symon Ndegwa, admitted to instituting the criminal charges against the appellant with the goal of getting back his land from the appellant. He succeeded in this endeavour. The appellant voluntarily went to the Lands Office and had his name deleted as the owner of the suit property so that he could secure the withdrawal of the criminal charges that had been laid against him by Symon. The appellant's name was struck off the green card. The suit property reverted back to Symon.
30. We find no material in this appeal to warrant our interference with the decision of the learned trial Judge. We find that the learned Judge came to the correct conclusion when he found in favour of the 1st respondent. The appeal is devoid of merit. We accordingly dismiss it with no orders as to costs, as the respondents did not participate in this appeal.

DATED AND DELIVERED AT NYERI THIS 12TH DAY OF APRIL, 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL



A. O. MUCHELULE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

