



Ndarwa v Methi & Swani Farmers Co-operative Society Limited & another (Civil Appeal 139 of 2019) [2024] KECA 1303 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KECA 1303 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 139 OF 2019
W KARANJA, J MOHAMMED & LK KIMARU, JJA
SEPTEMBER 27, 2024**

BETWEEN

KENNEDY KIMANI NDARWA APPELLANT

AND

**METHI & SWANI FARMERS CO-OPERATIVE SOCIETY
LIMITED 1ST RESPONDENT**

PETER IRUNGU KAMAU 2ND RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court at Murang'a (Kemei, J.) dated 11th April, 2019 in ELC Case No. 20 of 2018)

JUDGMENT

1. The appellant instituted Civil Case No. 73 of 2012 against the respondents before the High Court of Kenya at Nyeri. By a plaint dated 27th March 2012, the appellant alleged that he became a member of the 1st respondent co-operative society in 1992, after purchasing shares from one Philip Maina Wachira, and was issued a share certificate number 3872. He contended that by virtue of his shares, he was allocated a parcel of land No. Mitubiri/Wempa/14 (hereinafter 'suit land'), and that he immediately took possession of the same, as he awaited to be issued with the title deed.
2. The appellant averred that to his surprise, he discovered that the suit land was registered in the 2nd respondent's name, and that a title deed had been issued to him, despite the fact that the appellant was in possession of the suit land. The appellant prayed for orders directing the 1st respondent to cancel all entries in their records purporting to give the 2nd respondent ownership of the suit land; and that the District Land Registrar, Murang'a, be ordered to cancel the registration of the 2nd respondent as the owner of the suit land, and that a title deed be issued to the appellant as the rightful owner of the suit land.



3. The 1st respondent filed a statement of defence dated 16th April 2012, where it denied the assertion that the appellant was a member of the society. The 1st respondent averred that it was not party to the alleged contract alluded to by the appellant, pursuant to which the appellant alleged to have become its member, and that all bona fide shareholders and members had been issued with title deeds. The 1st respondent denied putting the appellant in possession of the suit land and averred that prior to the allotment, people were at liberty to till any part of the farm.
4. The 2nd respondent entered appearance but did not file a defence statement.
5. By consent of the parties, the matter was transferred to Murang'a Environment and Land Court for hearing and determination. The case was heard by way of viva voce evidence. The appellant asked the Court to adopt his written statement as his evidence in chief. In his statement, the appellant averred one Philip Maina Wachira sold him shares he held at the 1st respondent co-operative society on 29th November 1992. The said Mr. Wachira had bought some of the shares in his son's name, Peter Karanja Maina. The appellant averred that on 15th November 2005, Philip Wachira transferred to him share certificate number 3872, with respect to plot number 14.
6. On 17th November 2005, Peter Karanja Maina, who had now become an adult, transferred share certificate number 4079, with respect to Parcel Number 2983 (17). The appellant averred that in 2011, he was informed that the 1st respondent was issuing title deeds to its members. He stated when he visited the 1st respondent's offices, he discovered that his title deed had been issued to the 2nd respondent. It was his testimony that the 1st respondent's officials were reluctant to assist him, and he was forced to register cautions against the parcels Nos. Mitibiri/Wempa/Blk 2/14 and 17, and institute the suit before the superior court. The appellant availed the transfer of shares documents and payment receipts in evidence. He averred that he was still in occupation of the suit land.
7. PW2, Gerald Kuria Samuel, told the court that the appellant introduced him to Philip Maina Wachira, who was looking to sell his shares held at the 1st respondent co-operative society. He stated that after he bought the said shares, Mr. Wachira surrendered to him ownership documents. Mr. Wachira told PW2 that he wished to sell more shares, and PW2 informed the appellant. PW2 stated that he was present when the appellant met Mr. Wachira, who informed the appellant that the shares he wished to transfer to the appellant belonged to him and his son.
8. PW2 stated that he witnessed the agreement between Mr. Wachira and the appellant, and that Mr. Wachira surrendered ownership documents to the appellant, who took immediate possession of the suit land. He averred that in 2011, he learnt that the 1st respondent was issuing its members with title deeds. He went to the offices accompanied by the appellant, where they discovered that the titles to the appellant's plots had been issued to third parties.
9. PW3, Veronica Wanja, who is the appellant's wife, corroborated the appellant's testimony that he bought shares with respect to two plots from Peter Maina Wachira, but that the 1st respondent issued the titles to the two plots to third parties. PW3 stated that they are in possession of the plots which they have been cultivating since the appellant purchased them from Mr. Wachira.
10. The 1st and 2nd respondents did not file any witness statements, and neither did they call any witnesses.
11. After hearing the parties, the learned Judge, in a judgment delivered on 11th April, 2019, found that the appellant had not presented sufficient evidence to warrant cancellation of the 2nd respondent's title with respect to the suit land. The appellant's claim was dismissed.



12. The appellant, aggrieved by this decision, lodged an appeal before us. He averred that the learned trial Judge erred in law and fact in concluding that the appellant did not avail the requisite transfer documents, which he produced as plaintiff exhibit number 4, and payment receipt, which was produced as exhibit number 5. He faulted the learned Judge for finding that there was no nexus between the share certificate and the suit land, yet the transfer form dated 15th November 2005, reflected Plot Number 14, alongside share certificate number 3872.
13. He was aggrieved that the learned Judge faulted him for failing to avail the vendor, who was deceased, or officials of the 1st respondent, who he could not force to come to court and testify. He averred that the learned Judge failed to take judicial notice of the fact that when shares are transferred from one member to another, the 1st respondent was only required to cancel the particulars of the outgoing member, and not issue new share certificates to new members. The appellant faulted the learned Judge for failing to acknowledge that there may have been a corrupt scheme that warranted the cancellation of the 2nd respondent's title. He pointed out the fact that his evidence remained unchallenged by the respondents, who chose not to testify before the trial court.
14. The appeal was heard by way of written submissions. The appellant's counsel averred that the appellant availed the share certificate and transfer forms which were executed in his favour, and that his evidence was corroborated by that of his two witnesses. It was his submission that the transfer was executed by the parties in the 1st respondent's offices, and that the 1st respondent, after cancelling the seller's name with respect to the share certificates, replaced it with the appellant's name. He faulted the learned Judge for finding that the transfer of shares was improper for reason that new receipts or share certificates were not issued to the appellant, as this was not the practice with the 1st respondent.
15. The appellant's counsel asserted that the appellant availed transfer forms executed by the appellant, the vendor and the 1st respondent officials, which reflected share certificate number 3872, with respect to Plot Number 14 (suit land). He contended that the receipts were issued to Philip Maina Wachira in 1989, and transferred to the appellant in 1992, upon his purchase of the shares. Counsel urged that Mr. Wachira had already obtained possession of the suit land by year 2005, contrary to the learned Judge's finding. He faulted the learned Judge for finding that the appellant ought to have availed officials of the 1st respondent as his witnesses, or availed a list of 1st respondent's members, which information was not in the appellant's possession. He noted the fact that the respondents failed to give evidence before the superior court pointed to the fact that the respondents conspired to deprive the appellant of his land. In the premises, the appellant's counsel urged us to allow the appeal as prayed.
16. The respondent did not file any written submissions.
17. We are alive to our mandate as a first appellate court to re- evaluate, re-analyze, and re-consider the evidence availed by the parties, and render our own independent determination, bearing in mind that we did not see the witnesses testifying, and, therefore, give due allowance for that. This duty was aptly stated by this Court in the case of *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR as follows:

“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 allowances in this respect.”



18. In this appeal, we are called upon to determine whether the appellant availed sufficient evidence to prove that he is the rightful owner of the suit land.
19. The appellant's case was that he joined the 1st respondent co- operative society and became a shareholder by purchasing shares from an existing shareholder, one Philip Maina Wachira, for Kshs.35,000, which payment he obtained a receipt and a share certificate for Plot Number 14 (suit land). It was his evidence that he took immediate possession of the suit land, and is still in possession of the same to date. The appellant's evidence was corroborated by that of his witness, PW2, who was present when Mr. Wachira and the appellant entered into an agreement for transfer of the said shares.
20. The appellant produced documents to back up his acquisition of the suit land, being the share certificate no. 3872, a transfer of shares document and payment receipts. The transfer of shares document dated 29th November 1992, indicated that Mr. Wachira transferred shares with respect to share certificate number 3872, held at Methi & Swani Farmers' Co-operative Society Limited, to the appellant for Kshs.35,000. The appellant further availed a transfer form from the 1st respondent co- operative society, detailing that Philip Maina Wachira, Owner of Plot No. 14, vide share certificate number 3872, had transferred the same to the appellant. The transfer form was executed on 15th November 2005, by Mr. Wachira, the appellant, and the officials of the 1st respondent, being the chairman, secretary and treasurer.
21. The respondents did not give evidence before the superior court, and neither did they avail evidence to controvert the appellant's case. The documents produced by the appellant were not challenged by the 1st respondent. It is our considered view that when the root of a title is under challenge, it is incumbent upon the holder of the title to go beyond the said title and prove its legality by explaining how he or she obtained the same.
22. In the case of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR this Court held thus:

“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. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony.”
23. The learned Judge found that the title held by the 2nd respondent is absolute and indefeasible as the appellant failed to prove that the same was acquired by fraud or misrepresentation. The learned Judge failed to acknowledge that a title can also be impeached if it shown that it was acquired illegally, unprocedurally or through a corrupt scheme.
24. Section 26 of the *Land Registration Act* provides as follows:
 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.”

25. In this case, the respondents did not adduce any evidence detailing how the 2nd respondent acquired title to the suit land, and if he held a share certificate or ballot for the said land. Further, the 1st respondent did not challenge the documents availed by the appellant showing that he held the share certificate with respect to the suit land. Even after the appellant wrote to the 1st respondent, through the District Co-operative Officer, Murang’a South District, seeking clarification as to why he was not issued with a title to the suit land, yet he held the respective share certificate, the 1st respondent did not respond to the correspondence, or offer any explanation to the appellant.
26. The 2nd respondent, by failing to participate in the proceedings, failed to go the extra mile that was required of him to prove the authenticity root of his title. He failed to establish the legality of how he acquired the title and show that the said acquisition was beyond reproach and free from any irregularities. No evidence was led to rebut the appellant’s testimony, and that of his witnesses.
27. It is our finding that the appellant’s evidence, which remained unchallenged, and uncontroverted established that the 2nd respondent acquired title to the suit land unprocedurally. The learned Judge erred in placing blame on the appellant for lack of participation of the respondents in the proceedings. Further, the appellant explained that Mr. Wachira, who sold him the shares, was deceased, and he could not, therefore, avail him as his witness.
28. The totality of our re-evaluation of the evidence on record is that the ownership documents produced by the appellant showed a nexus between his share certificate and the suit land, and that the appellant sufficiently proved that he is the rightful owner of the suit land in that regard.
29. The upshot of the above is that the appeal is allowed. The judgment of the trial court dated 11th April, 2019, is hereby set aside. We substitute in its place, judgment to be entered in favour of the appellant against the respondents, as prayed for in the plaint dated 27th March 2012.
30. The respondents shall bear costs of this appeal.

DATED AND DELIVERED AT NAKURU THIS 27TH DAY OF SEPTEMBER, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

