



**Malamu v Gakuru & another (Civil Appeal 31 of 2018)
[2024] KECA 1867 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1867 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 31 OF 2018
W KARANJA, J MOHAMMED & LK KIMARU, JJA
DECEMBER 20, 2024**

BETWEEN

DAVID MULWA MALAMU APPELLANT

AND

JOHN WAWERU GAKURU 1ST RESPONDENT

PETER MURAGE KAMANJA 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court of Kenya in Nyeri (L.N. Waithaka, J.) dated 30th June 2015 with final orders on 19th December 2017 in ELC Case No. 73 OF 2014)

JUDGMENT

1. This is a second appeal arising from the judgment of the Environment & Land Court (ELC) sitting at Nyeri (L.N. Waithaka, J.) delivered on 30th June 2015 with final orders delivered on 19th December 2017.
2. The appellant filed a suit before the Senior Principal Magistrate's Court at Nanyuki against John Waweru Gakui, Peter Murage Kamanja, the respondents herein, and Municipal Council of Nanyuki in respect of plot number L.R. No. Nanyuki/Municipality Block 8/909 (the suit property). The appellant sought, inter alia, a declaration that he is the legal owner of all that parcel of land known as L.R. No. Nanyuki/Municipality Block 8/909 and an order for the permanent injunction restraining the respondents, their agents, workers or servants or anybody under them from trespassing, occupying and/or constructing structures or in any way whatsoever interfering with possession and ownership of the suit property.
3. The 1st and 2nd respondents entered appearance and in their amended joint statement of defence and counterclaim dated 19th October 2010 denied the appellant's claim and in the counterclaim prayed



for a declaration that they are the legal owners of L.R. NO. UNS Commercial Plot No. 63 Nanyuki Municipality and for an order rectifying the register for L.R. No. Nanyuki/Municipality/Block 8/909 by cancelling the registration of the appellant as its owner and for the respondents to be registered as the owners, and for a permanent injunction restraining the appellant by himself, the members of his family, his servants, agents, employees or any other person claiming through or under him from interfering with L.R. No. UNS Commercial Plot No. 63 Nanyuki Municipality.

4. It was the appellant's case that on or about 30th July 2009 he purchased the suit property from Samuel Muiruri Kariuki and was immediately put in possession and that he has been in quiet and peaceful possession of the suit property ever since. It was his further case that on or about 8th October 2009 the respondents with the authority of the Municipal Council of Nanyuki and or its servants trespassed into the suit property and started to fence it off without any colour of right.
5. In reply and in opposition of the suit, the respondents denied the allegations against them and in their counter-claim alleged that the appellant obtained title to the suit property which they claimed was originally L.R. No. UNS Commercial Plot No. 63 Nanyuki Municipality unlawfully, unprocedurally and illegally and urged the court to dismiss the suit against them and to enter judgment as prayed in their counter-claim.
6. Upon hearing both parties, the trial magistrate granted orders as sought by the appellant and dismissed the counterclaim.
7. Aggrieved by the judgment, the respondents lodged an appeal before the Environment and Land Court (ELC) sitting in Nyeri citing thirteen grounds of appeal. Upon hearing the appeal the ELC (L.N. Waithaka, J.) held that:-

“47. In view of the foregoing I find that neither the respondent nor the appellant proved their claim to the suit property to the required standard of proof; 48. The suit herein being in respect of grant of disposition of public land I direct that the question concerning the disposition of the suit property be referred to the National Land Commission for further review of the grant by the Deputy Registrar of this court. The National Land Commission shall upon review of the grant make a report to this court for further orders. In the meantime, status quo pertaining the suit property to be maintained; 49. Cost of the appeal to abide the further orders to be issued upon receipt of the report of the National Land Commission.”

8. Subsequently, upon receipt of the report by the National Land Commission dated 16th May 2017, the learned Judge issued her final orders on 19th December 2017 as follows;

“13. As the report of the Commission fell short of that expectation and instead recommended that the suit property be issued to the appellants yet the appellants had not made up a case for issuance of any orders in their favor I disregard the report and instead reiterate my finding that neither the respondent nor the appellants has proved that they are entitled to the suit property;

14. Having found that the title issued to the respondent to have been unprocedurally issued in exercise of the powers conferred in this court under Section 80 of the *Land Registration Act* 2012, I cancel the certificate of title issued to the respondent but decline to issue any orders in favour of the appellants for the reasons stated herein above; 15. For avoidance of doubt the



effect of this judgment is to revert the suit property to the status which obtained before the suit property was unprocedurally transferred to the respondent;16.Any person with interest in the suit property may pursue its interests with the right government identities and in accordance with the applicable laws and regulations; 17.As none of the parties had succeeded in the appeal I order that parties bear their costs of the appeal and those of the case preferred before the lower court.”

9. Aggrieved by the judgment the appellant lodged the instant appeal citing five grounds set out in his memorandum of appeal dated 20th February 2018 to wit that the learned Judge erred in law; in failing to find that the appellant had acquired an indefeasible right and interest over the suit property by dint of provisions of the Registered Land Act; on her interpretation of the law as regards the rights and interest acquired by an innocent purchaser for value; on her interpretation of the effect of non-compliance with the provisions of section 5 and 19 of Stamp Duty Act (Cap 480) Law of Kenya; by invoking provisions of Article 40(6) and 67(1)(e) of the Constitution which were not in force when the cause of action in the suit before trial court arose; and by making final orders which were self-contradictory.
10. All parties filed written submissions in support of the positions advanced. The parties through their respective counsel highlighted their submissions orally before us. Dr. Kamau Kuria SC, appeared for the appellant while Mr. Ngatia, SC appeared for the respondents. The parties reiterated their arguments as had been made before the ELC and as contained in their written submissions both before the ELC and before this Court.
11. We start by observing and appreciating that there were very lengthy submissions filed in this matter by both parties in support of their opposing positions in the matter. What we must not lose sight of is the fact that the appeal before us is a second appeal and our mandate is clearly circumscribed and limited to points of law only. We must, therefore, treat with caution any invitation to us to delve into matters of fact, which unfortunately form the bulk of some of the submissions before us. Even though we have read and considered the submissions as filed, we do not find it necessary to paraphrase the entire contents of the submissions and will only highlight the germane points.
12. Dr. Kamau Kuria (SC) urged that the Judge erred by not recognizing the appellant's indefeasible right and interest in the suit property under the Registered Land Act. He emphasized that the appellant was undisputedly the registered owner of the suit property as of 4th August 2009; the respondents had no sale agreement or documents to show any proprietary interest in the suit property, nor were they legal representatives of the Estate of late John Lebo, who was said to have been the original allottee. Reference was made to Elizabeth Wairimu Githinji & others -vs Kenya Urban Roads Authority & others [2019]eKLR case on the indefeasibility of title.
13. It was submitted that the appellant bought the property from Mr. Samuel Muiruri; he verified ownership with the Land Registrar, and paid the full purchase price and the lease in Muiruri's name was issued on 4th August 2009. In the circumstances, that the appellant's title can only be disputed by proving fraud or misrepresentation involving him. We were referred to legal precedents that affirm this principle.
14. On whether the appellant was an innocent purchaser, counsel contended that the appellant is an innocent purchaser for value without notice, as he bought the suit property in good faith, unaware of any fraud, and had paid Kshs.2.1 million for it. On the components required for a purchaser to successfully rely on the bona fide purchaser doctrine, the appellant placed reliance on the Ugandan



Court of Appeal case of Katende -vs- Haridar & Co Ltd cited with approval in Weston Gitonga & 10 others -vs- Peter Rugu Gikanga & Anor. [2017]eKLR.

15. In regard to whether the learned Judge erred in law on her interpretation of the law as regards the rights and interests acquired by an innocent purchaser for value, reliance was placed on the case of Francis Muroki Mwaura -vs- Attorney General & 4 others [2017]eKLR, for the definition of a bona fide purchaser for value without notice.
16. On the issue as to whether the appellant had complied with the provisions of the *Stamp Duty Act*, it was submitted that the appellant's Certificate of Lease was properly issued with necessary payments, including stamp duty, verified by relevant officials. There was no evidence of cancellation or inauthenticity of the lease.

Further, that the correct procedure was followed in obtaining the lease, Certificate of Lease, and necessary documentation, including the payment of stamp duty.
17. It was submitted further, that the appellant's title could only be rebutted by proof of fraud or misrepresentation which showed him to have been involved. Reliance was placed on Peter Owade Ogwang -vs- Jared Obiero Ouya [2014] eKLR, and Joseph N. K. Arap Ng'ok -vs- Moiyo Ole Keiuwa & 4 Others [1997] eKLR.
18. On the Judge's referral of the matter to the National Land Commission (NLC), the ELC directed that the disposition of the suit property be referred to the NLC for review, with a report to be made to the court. This action was faulted as the cause of action predated the 2010 Constitution. Citing Elizabeth Wambui Githinji,(supra) it is urged that Article 40(6) of *the Constitution* does not protect properties unlawfully acquired, and was not applicable in this matter as the cause of action preceded the enactment of *the Constitution*.
19. On the jurisdictional issue arising from the said referral, the ELC's action was seen as relinquishing its jurisdiction to the NLC, causing parallel proceedings to those in the Chief Magistrate's Court. It was submitted that the ELC has exclusive jurisdiction over private land and title issues as per *the Constitution* and relevant statutes, but the ELC misunderstood the nature of the appeal and ignored the evidence. It was urged that the report by NLC dated 16th May 2017 contained a mini-trial's findings and determinations. It was submitted that the National Land Commission is a creation of the 2010 Constitution and did not have effect on property rights acquired before it came into force and that all the proceedings touching on the reference of some issues of the appeal to the National Land Commission are nullities.
20. On the final orders given by the learned Judge, counsel urged that the learned Judge made contradictory final orders by calling for a National Land Commission (NLC) report but then disregarding it, and ruling that no party was entitled to the suit property. It was urged that the property should revert to its status before the appellant's unprocedural acquisition, with interested parties to pursue their claims legally. Counsel cited the Satrya Investments Limited -vs- J. K. Mbugua [2013] eKLR case, highlighting that disregarding the appellant's title was an error, similar to ignoring section 23 of the Registration of Titles Act. We were urged to allow the appeal.
21. Opposing the appeal and in reply to the above submissions Mr. Ngatia (SC) urged that this being a second appeal, the issues should strictly be confined to matters of law, as per section 72(1) of the *Civil Procedure Act*. He cited the case of John Mbuta -vs- Bosky Industries [2019] eKLR to support this. He contended that the appellant was inviting the Court to reconsider factual issues already settled by the Environment and Land Court, which is contrary to the legal requirements for second appeals.



22. On the jurisdiction of the Court, it was submitted that the Court lacks jurisdiction to entertain the appeal from the judgment of 30th June 2015 because the appeal was filed more than two years later, violating rule 75 of the Court of Appeal Rules, 2010; that the appeal was filed late without the necessary leave, thus the Court should dismiss grounds 3 and 4 of the appellant's submissions due to lack of jurisdiction. The case of Patrick Kiruja Kithinji -vs Victor Mugira Marete [2015] eKLR was cited in support of the said proposition. Reliance was placed in the case of Patrick Kiruja Kithinji -vs- Victor Mugira Marete [2015] eKLR for the proposition that an appeal filed out of time goes to the jurisdiction of this Court.
23. Counsel submitted that the Court should only consider the final orders issued on 19th December 2017, as there is no proper appeal against the 30th June 2015 judgment.
24. On indefeasibility of title, it was argued that the learned Judge correctly found that the appellant had no indefeasible rights over the suit property. The learned Judge based this on section 26 of the [Land Registration Act](#), concluding that the title was fraudulently and irregularly acquired, and hence not protected by law.
25. It was submitted that the appeal was filed more than two years from the date of delivery of the judgment on 30th June 2015 and in the absence of leave to institute the appeal outside the prescribed timelines and that this Court is divested of the jurisdiction to entertain any appeal emanating from the impugned judgment.
26. On whether the court erred in interpreting and applying the law on indefeasibility of title, it was submitted that the learned Judge correctly interpreted and applied the law to find that the appellant does not have any indefeasible right and interest over the suit property. Reliance was placed on section 26 of the [Land Registration Act](#). It was submitted, therefore, that the Environment and Land Court correctly analyzed the evidence before it to arrive at a conclusion that the title held by the appellant was fraudulently and irregularly acquired, as such, the appellant could not benefit from the protection of the law.
27. On the issuance of title, it was submitted that various procedures were not followed before issuing the title. The transfer occurred without clearance certificates or proof of stamp duty payment. The former Commissioner of Lands, Mr. Mabea, disowned the signatures on the documents, and the appellant could not prove the lease's authenticity.
28. Further, that the trial magistrate failed to address the authenticity of the lease and the Environment and Land Court (ELC) Judge reconsidered the evidence as mandated by the law under Rule 29(1) of the Court of Appeal Rules as espoused in many decisions of this Court. The ELC found that the trial magistrate erred in declaring the appellant as the legal owner without addressing the lease's authenticity. Reliance was placed in Mohammed Eltaff & 3 others -vs- Dream Camp Kenya Ltd [2005]eKLR.
29. On the question of fraud, the learned Judge concluded the title was void and fraudulently acquired and the appellant could not claim ownership under the bona fide doctrine due to the vendor's lack of valid title as there was no evidence that the vendor was ever registered as the proprietor. Available records showed the property was initially allotted to John K. Lebo, who informally transferred it to the respondents.
30. On the issue of consistency of the final orders, learned counsel urged that the Judge's final orders were consistent with earlier findings that no party proved their claim to the property, and the status should revert to its status before the unprocedural transfer to the appellant. We were urged to find the appeal devoid of merit and dismiss it with costs to the respondents.



31. Our mandate on second appeal is as has been enunciated in a long line of cases decided by the Court. See *Maina -vs- Mugiria* [1983] KLR 78, and *Stanley N. Muriithi & Another -vs- Bernard Munene Ithiga* [2016] eKLR, for the holdings, inter alia, that on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.
32. Having carefully considered the record in the light of the rival submissions set out above, the issues that fall for our determination are as follows:
 1. Whether we have jurisdiction to determine this appeal, it having been said to have been filed out of time and without leave of the court.
 2. Whether the Learned Judge erred in law cancelling the title of the appellant who had purchased the land from Samuel Muiruri Kariuki.
 3. Whether the appellant was able to prove that he acquired a valid and legal title upon transfer.
33. On the first issue, we hold the view that it was raised as an afterthought. If the respondent was convinced that the appeal was filed out of time, that was an issue that should have been raised in limine through an application for striking out the appeal. That notwithstanding, our view of the matter is that the earlier judgment was not complete until the final orders were given, which could not be done before the report of the NLC was received by the ELC as ordered in the judgment. Time started running after delivery of the “Final Orders” by the learned Judge after consideration of the reports filed by the NLC. The notice of appeal was in our view filed within the timelines provided by the Court of Appeal Rules and this Court is seized of the requisite jurisdiction to hear and determine this appeal.
34. On the second issue, the main contention by the respondents as noted by the learned Judge is that it is not in dispute or controverted that various procedures and processes involved in the issuance of title were not complied with before the title was issued, for instance that the transfer was effected before the requisite clearance certificates were obtained, that there is no evidence that stamp duty in respect of the transfer was paid and there is serious doubt as to the authenticity of the documents used to effect the transfer in favor of the appellant. The officers at the Lands Registry who allegedly authored them disowned the documents. Expert opinion tendered in court in respect thereof was to the effect that the documents were not authentic. Records held at the Lands Registry concerning the suit property indicated that the bona fide owner thereof is still Colonel John Lebo (deceased) and that although there were attempts to transfer the suit property to the respondents those attempts did not materialize.
35. On second appeal, it is not within our remit to re-analyse the documents produced before the trial court and authenticated by the ELC. From the evidence adduced before the trial court, and upheld by the ELC, the suit property lawfully belonged to the deceased Col John K. Lebo. Samuel Muiruri Kariuki was neither the registered owner nor a beneficiary to the estate of the deceased, and as held by the two courts below, he had no good title to pass to anybody.
36. Was the appellant’s title indefeasible? Section 26 of the *Land Registration Act*, 2012 provides as follows:

“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.”

37. As it may be observed, the law is extremely protective of title but the protection can be removed and title impeached, on two instances. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. More importantly, it is worth noting that the appellant cannot seek refuge under Article 40 of *the Constitution* as his claim falls under Article 40(6).
38. Like the learned Judge we find that the appellant’s title having been obtained illegally, unprocedurally and/or through a corrupt scheme, the same is liable to be cancelled as was done by the learned Judge. See also *Munyu Maina -vs- Hiram Gathina Maina* [2013] eKLR and *Funzi Development Ltd & Others -vs- County Council of Kwale*, [2014] eKLR.
39. Finally, as to whether the final orders issued by the learned Judge on 19th December 2017 were contradictory to the judgment delivered on 30th June 2015 and as to whether the suit property was public land. We note that one of the issues framed for determination by the trial court was which of the 2 parties was the rightful owner of the suit property. In exercise of her mandate as a first appellate court to re-analyse the evidence afresh, the learned Judge in determining that issue concluded that none of the parties had proved ownership. The land could not be left “ownerless” as it were. It was on that basis that the learned Judge decided that the land was Public land. The learned Judge, though not expressly stating so must have had in mind Article 62(d) of *the Constitution*, and it was in that context that she referred the matter to the NLC to determine who the rightful owner of the suit property was. It is apposite to point out that the NLC report was not binding on the court and the final determination still reposed on the ELC.
40. The NLC sent its report to the ELC but the learned Judge did not adopt its findings. However, she made orders that the ownership reverted to the status it was in “before it was unprocedurally transferred to the respondent”. That position is that the suit property was and remained as at the time of the delivery of the impugned judgment that the suit property was in the name of the deceased Colonel John Lebo, but there was an informal transfer of the plot to the respondents, which had not been completed. This was definitely a departure from the earlier finding that the land was Public land. Our finding, however, is that as the 2015 judgment was not the final judgment, the learned Judge still had room to adjust her final orders after receiving the report from the NLC.
41. In view of the contradicting reports from the NLC, and based on our earlier analysis of the matter, we are persuaded that the learned Judge arrived at the right conclusion by reverting the ownership of the suit property to the position before the illegal transfer to the appellant herein.
42. We also find that the late John Lebo had done an informal transfer of the suit property to the respondents several years before he died. It was on that basis that they had taken possession of the suit property as they waited for the other formalities to be concluded. They cannot therefore, be said to have been intermeddlers in the deceased’s estate as opined by the learned Judge. The suit property had already been transferred to the respondents and it was not part of the deceased’s free estate. In view of that and the time this matter has taken in the courts, in the interest of justice and fairness, we invoke the principle of Equity that provides that “Equity regards as done that which ought to have been done.”



- 43. There was already an informal transfer of the suit property by the deceased several years before his demise. There was no evidence of him ever changing his mind. The completion of the transfer lay in the hands of the Land Registrar and it is not clear why the process was not completed. In the circumstances, we order the Land Registrar to facilitate the completion of the transfer of the suit property to the respondents herein pursuant to this judgment.
- 44. Save for the above orders the appeal is, otherwise, dismissed with orders that each party bears its own costs both here and in the court below as ordered by the learned Judge.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER 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

