



REPUBLIC OF KENYA



**Muvia v Nyaga (Environment and Land Appeal E014 of 2021)  
[2024] KEELC 4846 (KLR) (12 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 4846 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E014 OF 2021  
A KANIARU, J  
MARCH 12, 2024**

**BETWEEN**

**JOSEPH MWANIKI MUVIA ..... APPELLANT**

**AND**

**LUCY WANDIA NYAGA ..... RESPONDENT**

*(Being an appeal from the judgement of the Senior Principal Magistrate Hon. J.W Gichimu at Runyenjes on the 17th August 2021 in E.L.C case No. E001 of 2020)*

**JUDGMENT**

1. This appeal arose from the judgement of the lower court at Runyenjes (Hon. J. W Gichimu) delivered on 17.8.2021. The Respondent – Lucy Wandia Nyaga – had sued the Appellant – Joseph Mwaniki Muvia- in the lower court seeking for her eviction from land parcel Kagaari/kanja/5616 of which she is the registered proprietor. In the said case, the Respondent was complaining that the Appellant had unlawfully entered into the said land and started occupying it without any justification or authorization from her. She termed the appellants presence and occupation of the suit land as trespass and on this basis, she was asking the court for an order of his eviction.
2. The Appellant had filed a defence in the lower court case in which he denied the Respondents allegations. He urged the court to dismiss the respondents suit and find that the registration of parcel no. 5616 was wrongly registered in favor of the respondent as the correct parcel of land that was to be in her name was parcel 5617.
3. The Appellant and the Respondent in this case are brother and sister. Their dispute revolves around land parcel Kagaari/kanja/5616 which land is registered in favour of the Respondent. The Appellant maintains that the suit land was erroneously registered in favour of the Respondent. He says that the land was a resultant subdivision of land parcel Kagaari/kanja/1385 which originally belonged to their father. That the original parcel of land was subdivided into various portions among them Kagaari/



kanja/5616 & 5617. That his father sold parcel 5617 and remained with 5616. That the respondent purchased the land his father sold which is parcel 5617 and therefore there was an error of registration of the title deed which shows that the respondent is the registered proprietor of parcel 5616. He also said that his wife, his parents, his brother and his brother's wife were buried on parcel 5616 and that is where the matrimonial home of his parents is. He wanted the register to be rectified to show that the respondent was the proprietor of parcel no. 5617, not 5616.

4. The lower court at Runyenjes (Hon. S.W Gichimu SPM) heard the matter and in a judgement delivered on 17.08.2021 held that the defendant had no legal basis to ask that the register be rectified. That the plaintiff is the registered owner of the suit land and as such she enjoys the rights and privileges provided for under Section 24 of the Land Registration Act. The court therefore found that the plaintiff had proved her case on a balance of probabilities and ordered for the eviction of the appellant. He was however given a grace period of 60 days to voluntarily vacate the suit property failure to which he would be evicted.
5. The outcome of the lower court case is what triggered the appeal now before me. The memorandum of appeal came with nine (9) grounds as follows:
  1. The learned trial magistrate erred in law and fact when he failed to find that the intention of the appellant's father was to sell land parcel Kagaari/kanja/5617 which he lived with his family the appellant included.
  2. The learned trial magistrate erred in law and in fact when he refused to interchange land parcels no. Kagaari/kanja/5616 and 5617 so that the appellant's father remains with land parcel Kagaari/kanja/5616 and the respondent remains with no. Kagaari/kanja/5617 as the respondent does not have any developments on land parcel no. Kagaari/kanja/5616.
  3. The learned trial magistrate erred in both law and in fact by finding that the appellant did not prove that he lives on land parcel no. Kagaari/kanja/5617 and not 5616 which was an erroneous finding in that the appellant resides on land parcel no. Kagaari/kanja/5616 registered under the names of the respondent and that is why the respondent had filed a case for eviction against the appellant.
  4. The learned trial magistrate erred in law and in fact by failing to find that the appellant had an overriding interest against land parcel Kagaari/kanja/5616.
  5. The learned trial magistrate erred both in law and in fact by finding that the respondent had proved her case on a balance of probabilities whereas she had bought land when the appellant and his family were already in occupation and had their home on this land parcel and therefore we cannot term her sale to have been free from encumbrances.
  6. The learned magistrate erred both in law and in fact when he failed to amicably sort out the dispute between the two parties who are brother and sister bearing in mind the matrimonial home of the parents of the parties is on land parcel Kagaari/kanja/5616.
6. The court was urged to set aside the trial courts judgment, allow this appeal, and that the costs of the appeal and those of the lower court be awarded to the appellant.
7. The appeal was disposed of by way of submissions. The Respondent submitted orally whereas the appellant filed written submissions.
8. The appellant submitted that his testimony was that his father sold land parcel 5617 and built his home on parcel 5616 which testimony was corroborated by his sister DW2. That his parents, his brother, and wife are buried on parcel 5616, which statement is uncontroverted by the respondent. That having



- owned two parcels of land, their father would not have sold the parcel of land where he lived but sold the parcel he was not occupying being parcel No 5617. That the respondent had failed to prove her case and that she admitted in her testimony that by the time she bought the suit land, the appellant was living therein, which to him means the land was encumbered.
9. It was submitted further that the respondent did not tender any evidence nor call any witnesses to prove which parcel of land on the ground she had bought. The case of *Seferio Ogola Nandwa v Chairman Board of Management Committee, Nambale Urban Secondary School & Anor* (2022) eKLR was cited. That the respondent has no developments on parcel No 5616 and that the appellant and his deceased parents had developed parcel 5616. That it was the appellant's proposal that the respondent be registered as the owner of parcel No 5617 and their father remain as owner of parcel 5616. That if the appellant is evicted it will occasion him great injustice as he lives on the suit land where he was put in occupation by his father. That the respondent will not suffer any prejudice as she has no developments on parcel 5616.
  10. The Respondent on the other hand submitted that she won the case in the lower court. That she showed all the documents to that court to prove that the land in dispute is hers whereas the appellant did not produce any document. That she purchased the suit land. She did not inherit it. That she took a loan in order to raise money to buy the land, which she purchased from John Namu Andrew. That when the appellant got to know that she had bought the land, he started causing trouble and allowed his children to be insulting her.
  11. That she got annoyed. They were on her land and when she realized they had no respect for her, she ordered them to leave her land so that she could start using it. They refused to leave and that is why she sued them in the lower court in Runyenjes. That the lower court saw her document of ownership. That she produced evidence whereas the appellant had no evidence. That she even had more evidence to give but the lower court was satisfied with the evidence she had already given. That she asks the court to decide the case so that she gets her land as the appellant is bothering her and she is tired of him.
  12. She submitted further that when she plants anything on the land, the appellant uproots it, which is painful as she had bought the land. That there was a time the appellants son uprooted all the napier grass she had planted and the appellant never asked him to stop. She asked the court to fairly decide the case and asked for costs.
  13. I have considered the appeal filed as well as the submissions of the parties and their arguments. My duty as the first appellate court is to re-evaluate and re-assess the evidence that was before the lower court and make my own conclusions while bearing in mind that the lower court had the advantage of handling the evidence first hand. The decided cases of *Selle v Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo v Shah* [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower court unless I am completely convinced that the lower court was wholly wrong in its appreciation of the evidence before it.
  14. From the material before me, I find that the issue for determination is whether the appellant is the rightful owner of land parcel Kagaari/kanja/5616 or 5617.
  15. The appellant contends that the trial court should not have made the determination it did for the reason that the intention of their father was to sell parcel no. 5617 and not 5616. He says that the respondent therefore purchased parcel no. 5617 and not 5616 and therefore the register should be rectified to reflect the same. At the hearing, only he testified together with his sister DW2, Cecilia Warue Juliano, who made a similar accusation. She testified that their father showed her the land he had sold and that he later told them there was an error with the title deed and that they should have it corrected.



16. The respondent on the other hand was the only one who testified at the hearing. It was her testimony that she was the registered owner of parcel no 5616 having bought the same from Andrew Namu who had purchased it from their father. That the purchaser then started having issues with the appellant and therefore she decided to buy the land so that they could iron it out with the appellant. That at the time she purchased the land the appellant was living therein. The appellant produced in evidence the title deed to the suit land as PExh1. She also had in evidence a sale agreement for land parcel 5616 between herself as the purchaser and John Namu as the seller.
17. The Law under section 26 of the *Land Registration Act* provides that title to land is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It also provides very specific circumstances under which the said title can come under challenge. It 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
18. The respondent therefore being the registered proprietor of land parcel 5616 has an indefeasible title to the land. The same can only be challenged if it is proved that she acquired it fraudulently or through misrepresentation, illegally, un procedurally or through a corrupt scheme. This was not proved. If the appellant wished the court to believe that their father’s intention was to sell parcel 5617 and not 5616, he had the duty and the burden to prove the same. He did not produce any evidence to prove his allegations. The law under section 107 of the *Evidence Act* is very clear that he who alleges must prove. The Act provides as follows;

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

19. Also, the respondent being the registered owner of the suit land enjoys all the rights and privileges pertaining to that land as provided for under Section 24 of the *Land Registration Act*. Section 24 provides;
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
  - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.



20. I agree with the trial magistrate that there is no legal basis nor justification to alter the respondent's title. The appellant did not produce any or any sufficient evidence to support his case. He merely made accusations which a court of law cannot use to revoke someone's title to land. In the absence of any evidence to the contrary, the respondent is a bonafide purchaser for value of the land that is registered in her name, being land parcel No 5616 and not No 5617 as has been suggested by the appellant. She therefore enjoys protection by the law as registered proprietor of the land she acquired as well as all the privileges that come with it. The appellant's presence in the suit land therefore without authorization from the respondent amounts to trespass.
21. In essence, this court finds no reason to interfere with the trial courts findings. The court finds that the appeal lacks merit and hereby dismisses it.
22. Given that the parties are siblings, I will equally not award costs of the appeal. Each party shall bear their own costs.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 12<sup>TH</sup> MARCH, 2024.**

**A. KANIARU**

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**JUDGE – ELC, EMBU**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

**In the presence of**

Respondent (present in person).

Court Assistant - Leadys

