



Gachuhi v Njoroge (Suing as the administrator of the Estate of the Late Njoroge Thiaru) & 2 others (Civil Appeal E087 of 2021) [2023] KECA 317 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 317 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E087 OF 2021
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
MARCH 17, 2023**

BETWEEN

JOSEPH MURAYA GACHUHI APPELLANT

AND

JAMES MUKURIA NJOROGE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE NJOROGE THIARU) 1ST RESPONDENT

JORETH LIMITED 2ND RESPONDENT

THE COMMISSIONER OF LANDS 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Nairobi (K. Bor, J.) delivered on 5th May 2020 in ELC Case No. 462 of 2012)

JUDGMENT

1. The dispute the subject of this appeal relates to a parcel of land known as LR No 13330/592 (“the suit property”) situated in Nairobi.
2. By way of background, the 1st respondent filed a suit by way of a plaint against the appellant and the 2nd and 3rd respondents in the Environment and Land Court (the ELC), Nairobi. The 1st respondent averred that his late father, Njoroge Thiaru, was allotted plot number 173 as a shareholder in Thome Farmers No. 5 Limited. The 1st respondent further stated: that upon subdivision, the parcel number changed to Land Reference Number 13330/592; that upon his father’s demise, he was appointed administrator of his estate, and that the suit property was given to him after the distribution of the assets of the estate of his late father; that he paid all dues to facilitate the issuance of a title in his name; that the 2nd respondent, Joreth Limited, illegally transferred the suit property to the appellant through fraud, forgery and misrepresentation; that the transfer could not have been signed by the 2nd respondent’s director, Mr. Njenga Karume, on 12/4/2012 because he was already dead by then;



- and that he had been deprived of his land by the appellant through a fraudulent transaction. The 1st respondent sought an order for cancellation of the appellant's title, and an order of injunction restraining the appellant from disposing of, trespassing or in any way dealing with the suit property.
3. On the part of the appellant, his position was that the suit property was initially registered in the 2nd respondent's name until he bought it on 26th July 2011 for valuable consideration after conducting due diligence. He maintained that the suit property had never been registered in the name of Thome Farmers Number 5 Limited, or of the 1st respondents' father, and argued that the registration of the transfer in his name was lawful and valid.
 4. In the trial, the appellant testified that he became aware that the suit property was available for purchase through a newspaper advertisement placed in January 2011; that he looked for the offices of the 2nd respondent, who had advertised the property, and found them at Hughes building in Nairobi and made an offer; that he signed a sale agreement and paid 35% of the purchase price as deposit; and that, upon payment of the balance, he was given all the completion documents and subsequently obtained a title deed for the property; and that he saw Njenga Karume sign the sale agreement and transfer form in the offices of the 2nd respondent at Hughes building.
 5. On the allegation that Njenga Karume could not have signed the transfer since he was dead as at the date that is indicated in the transfer, he testified that he was present when the said Njenga Karume signed the transfer, and that the date was inserted later at the time of registration. It was his further testimony that he paid Kshs. 10 Million for the suit property; that, upon valuation for purpose of stamp duty, the government valuer assessed a sum of Kshs. 1,800,000/- for stamp duty purposes; that his advocate undertook the registration and got him the title, but did not give him the receipt for the stamp duty; that he later charged the property for Kshs 30 Million; that the value of the land in that area rose dramatically after the construction of Thika road; and that he took possession of the land and had fenced it.
 6. The 1st respondent's position at the trial was that there was no sale agreement between Thome Farmers and the 2nd respondent; that his late father was the bona - fide owner of the parcel of land which he paid and was allotted after balloting; that, upon his death and obtaining the letters of administration, he went to the offices of the advocates who were dealing with the transaction, M/s. Kimani Kahiro Advocate, and delivered the share certificate, identity card and certificate of confirmation of grant; that he was asked to pay additional money for the parcel of land, though they had already paid the full purchase price; that the appellant would at times go to the property and harass workers on the land and demolish their house; that he made a report to Kasarani police station on the harassment and demolition; and that the transfer of the land to the appellant was fraudulent as the land had already been allotted to his father and, therefore, not available for sale.
 7. The 2nd respondent's site manager testified that there was no sale agreement between the 1st and 2nd respondent, or with the 1st respondent's father; that he was present when the 2nd respondent signed the sale agreement with the appellant, and that he saw Njenga Karume sign the transfer; that, in as much as Njenga Karume was sick in the year 2011, he signed the transfer documents before going to hospital; that the 2nd respondent gave the appellant possession of the suit land after the purchase; that, at the time of sale to the appellant, there was no one on the suit property; that Thome Farmers No. 5 could not have sold the parcel of land to the 1st respondent as it was not the owner of the land; and that the appellant's ownership of the property was valid and lawful.



8. Upon hearing the parties, the trial court (K. Bor, J.) held as follows:

- “ 39. The evidence of Robertson Nderitu Mwihi was not credible. The 1st Defendant testified that he was shown the plots available by the 2nd Defendant’s General Manager, Mr. Robertson Nderitu. As the 2nd Defendant’s Site Manager tasked with the role of showing people where to pay for the plots, he would have known that the Plaintiff was in occupation of the land and that there was a garage on the land in 2011 when the 1st Defendant offered to purchase the Suit Property from the 2nd Defendant. The 1st Defendant should have noticed that the land was occupied when he offered to purchase it from the 2nd Defendant. The court believes the Plaintiff’s evidence that he was in possession of the suit land at the time the 2nd Defendant sold it to the 1st Defendant due to financial constraints.
40. The 1st Defendant claimed he purchased the Suit Property for Kshs. 10,000,000/= in July 2011 but the transfer registered in May 2012 indicated the consideration as Kshs. 1,800,000/=. He did not adduce evidence of the stamp duty he paid for the transfer and produced an illegible application for the registration of the transfer to his name. There is a probability that the sum of Kshs. 10,000,000/= which the 1st Defendant paid was for the three plots that he purchased from the 2nd Defendant. He charged the suit land to secure a loan of Kshs. 30,000,000/= in January 2015 while this suit was pending in court. The court notes that the Registrar placed a caveat against the suit land on 26/2/2015 under section 65(1)(f) of the repealed Registration of Titles Act prohibiting a transfer of the suit land.
41. The Defendants did not call a witness from Kagwe Kamau and Karanja Advocates to verify when Mr. Karume executed the transfer of the Suit Property to the 1st Defendant and when it was dated. Catherine N. Karanja Advocate who according to the transfer witnessed all the signatures including that of Mr. Karume was not called by the defence to confirm that she saw Mr. Karume execute the impugned transfer and the date it was executed. Mrs. Margaret Magugu, the other director of the 2nd Defendant could have been called to give evidence as to when the 2nd Defendant executed the transfer in favour of the 1st Defendant.
42. The burden of proving that Mr. Njenga Karume executed the transfer in favour of the 1st Defendant lay on the Defendants. They did not discharge this burden. The evidence of the Defendants’ witnesses was inconsistent as to when Mr. Njenga executed the transfer and where it was executed. It is highly unlikely that Mr. Karume could have signed the transfer in 2011 while he was in hospital. He could not have signed it in April 2012. The 1st Defendant’s evidence was also shaky as to who registered the transfer and what completion documents were given to him. The sale agreement does not mention who the purchaser’s advocates in the transaction were.”



9. In the end, the learned judge allowed the 1st respondent's plaint in the following terms:
- “43. The Plaintiff has proved his claim on a balance of probabilities. The court grants prayers (a) and (b) of the plaint dated 31/7/2012. The Plaintiff is awarded the costs of the suit to be borne by the 2nd Defendant.”
10. Aggrieved by the judgment of the High Court, the appellant lodged this appeal seeking orders to set aside the judgment of the Environment & Land Court. The memorandum of appeal lists 8 grounds of appeal which can be compressed into the following: that the learned Judge erred: in finding that Njenga Karume did not execute the transfer document for the suit property; in finding that it is the appellant, the 2nd and 3rd respondents who should have called witnesses to prove fraud and forgery; in cancelling the appellant's title for the suit property; in framing issues that were not captured in the plaint as filed by the 1st respondent; in finding for the 1st respondent, and yet there was no sale agreement or contract of sale as between the 1st and 2nd respondent; and by disregarding the evidence of the appellant's witnesses.
11. The appellant has filed written submissions dated 2nd August, 2021 which may be summarized as follows: that it was proved that Njenga Karume did sign the transfer form sometime in November 2011 together with Margaret Wairimu Magugu; that the 1st respondent did not adduce evidence to prove that Njenga Karume's signature was forged; that the 1st respondent did not prove the allegations of fraud, and that the learned Judge shifted the burden of proof to the appellant and the 2nd respondent; that the learned Judge ignored the appellant's evidence on why the transfer document was dated 23rd April 2012, but signed earlier; and that the court erred in framing the issue – who between the appellant and the 1st respondent had a superior title, and yet the 1st respondent had not claimed title to the suit property.
12. The 1st respondent filed submissions dated 18th August, 2021 which may be summarized as follows: that the sale agreement and the transfer could not have been signed by Njenga Karume; that the burden of proof lay squarely with the appellant to prove that Njenga Karume signed the sale agreement and transfer documents because they were dated 23rd April, 2012 while he died on 24th February, 2012; that the learned Judge did not disregard the evidence and testimony of Robert Nderitu Mwihi, and that the Court correctly found him to be an incredible witness; and that the issue for determination was framed correctly as there was no other issue for determination.
13. The 2nd respondent filed submissions dated 16th August, 2021 which may be summarized as follows: that the learned Judge ignored clear explanations and unrebutted evidence adduced by the appellant and the 2nd respondent explaining why the transfer document was dated 23rd April, 2012 though signed earlier; that both the appellant and the 2nd respondent discharged their statutory burden as provided by section 112 of the *Evidence Act*; and that the date of the transfer does not invalidate the signatures on the transfer document.
14. The 3rd respondent did not file any submissions.
15. At the hearing of the appeal, learned counsel for the appellant, Mr. Gachuhi, sought to rely on their submissions, which he highlighted as follows: that the core issue was whether Njenga Karume signed the transfer document; that the court erred in finding that one of the directors did not sign; that the burden of proof lay with the 1st respondent; that the 1st respondent did not prove fraud on the part of the appellant; and that it was wrong for the court to cancel the appellant's title.
16. He further submitted that, whereas the advocate who witnessed Njenga Karume's execution of the transfer documents was not called as a witness, the site manager, who was present and witnessed the



- signing, testified on this issue; that the purchase price of the suit property was not an issue before the trial court; and that, on whether the 1st respondent made payments to the firm of Kimani Kahiro, it was submitted that there was no contract between the 1st and 2nd respondents.
17. Mr. Kimathi, advocate for the 1st respondent, also highlighted his written submissions and stated: that the trial court's judgment was based on the evidence and the relevant law; that the 1st respondent proved the case to the required standard and, therefore, the judgment was legally sound; that the burden of proof shifted to the appellant to prove that Njenga Karume signed the transfer document; that the other directors who are alive were not called as witnesses; that Duncan Ndegwa, the other co-director, only signed an affidavit, but did not attend court to testify; and that the suit property lawfully belonged to the 1st respondent's father for over 30 years, that is, from the year 1975 when the payment for the shares was made, and the share certificate issued, and which was adduced in court.
 18. The 2nd and 3rd respondents were not represented.
 19. This being a first appeal, it is our duty, in addition to considering submissions by the appellants and the respondents, to analyze and re-assess the evidence on record and reach our own independent conclusions in the matter. This approach was adopted in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR where the Court cited the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 and held 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 allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
 20. Upon a careful perusal of the record of appeal, the rival submissions of the parties, and the cited authorities, the issues arising for determination may be discerned to be: Whether the title by the appellant is valid and legitimate; and whether the learned Judge ignored cogent documentary evidence adduced by the appellant.
 21. Upon analysis of the record, the evidence tabled by the appellant was rather scanty as it did not fill the gaps that are apparent in his case. For instance, it was the appellant's case that it purchased the suit property from the 2nd respondent at Kshs. 10 million shillings, and yet the government valued the property at Kshs. 1,800,000/- as shown in the transfer document. We note that the application form for registration that was produced by the appellant was not legible. This begs the question: How could one buy a property for Kshs 10 million and pay stamp duty of Kshs 1.8 million? Certainly, such a transaction raises eyebrows, but that is not the only worrying matter.
 22. The other crucial issue, and which was ably dealt by the trial court, is the question as to when the transfer document was signed, and whether the signatory, Njenga Karume, was alive or dead at the time. The appellant makes heavy weather of the assertion that Njenga Karume signed the transfer document and the sale agreement, and that the learned Judge ignored his evidence through his witnesses. The appellant testified that he was present when Njenga Karume and his co-director signed the sale agreement and the transfer document. The questions that beg for answers include: were his lawyers present together with him? On which date did Njenga Karume sign the transfer document? who else



was present? Were they called as witnesses? We note that the appellant did not dispute the fact that Njenga Karume was not alive on the date indicated on the transfer. The date of signing of a document is a factual issue, and the date on a transfer is deemed to be the date of signing unless the party can demonstrate why that is not the case. A mere assertion by a party without any evidence holds no water and will be treated by the court as of no probative value.

23. There was paucity of evidence when the answers to the above questions were not forthcoming. On this issue, the learned Judge held:

“ 17. He claimed that he was given the completion documents by Kagwe Kamau and Karanja Advocates who were to process the title over the suit land. He testified that he saw Mr. Njenga Karume sign the sale agreement and transfer in the offices of Joreth Limited in Hughes Building. He explained that the Government valued the Suit Property at Kshs. 1,800,000/= after Mr. Njenga Karume had signed the transfer in April 2012. When he was informed by the Plaintiff’s advocates that Mr. Njenga Karume died on 24/2/2012, he changed his evidence and stated that Mr. Njenga Karume must have signed the transfer before that date. He stated that he was neither given Mr. Njenga Karume’s copy of identity card and PIN or those of Margaret Magugu, nor was he given the 2nd Defendant’s certificate of incorporation.”

24. Further evidence of the appellant as captured in the ruling is:

“ 18. He confirmed that he charged the Suit Property to a bank. He explained that the value of the suit land went up after the construction of Thika Super Highway. He did not have a copy of the receipt issued on payment of the stamp duty and explained that his lawyers carried out the transaction. He did not have a legible copy of the application for registration of the transfer. “

25. The appellant’s case was that being the registered owner of the suit property, it was unorthodox for the court to order cancellation of his title, and that the learned Judge went against known law in issuing such orders. It is trite law that the registration of a person and certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. However, the holding of such title is not absolute as the same may be impeached under certain circumstances. section 26(1) (a) and (b) of the *Land Registration Act*, which provides that a title can be cancelled on the ground of fraud or misrepresentation to which the person is proved to be a party or (where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

26. We cite with approval the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 others* [2016] eKLR where Munyao, J. held as follows:

“ A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no



advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

27. The same position was held by this Court in the case of *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR where the Court stated that:

“when a registered proprietor’s root of title is in the challenge, it is not sufficient to dangle the instrument of title as ownership. It is this instrument that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired 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.”

28. Needless to say, in such a case where two parties purport to be the legitimate owners of the same property, investigation to the root of title would be apt. This is the approach that was adopted by the trial court.

29. The appellant posited that the learned Judge erred in framing the issue for determination to be, namely, who as between the appellant and the 1st respondent had a superior claim to the suit property, whereas both parties had not agreed this to be an issue in their pleadings.

30. On the question regarding the framing of issues, we note that under order 15 rule 1 of the *Civil Procedure Rules*, an issue arises when one party makes a material proposition of fact or law which is denied by the other party. Order 15 Rule 2, which deals with the framing of issues provides as follows:

- “2) The court may frame the issues from all or any of any of the following materials:
 - a) Allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;
 - b) Allegations made in the pleadings or in answer to interrogatories delivered in the suit;
 - c) The contents of documents produced by either party.”

31. From the foregoing, it is clear that the trial court has the right to exercise its discretion as provided under order 15 rule 2 of the *Civil Procedure Rules* to frame its own issues as derived from the contents of the documents produced by either party as was the case here.

32. In her judgment, the learned judge correctly identified the main issue for determination to be: who as between the appellant and the 1st respondent held a valid title? In other words, who as between the appellant and the 1st respondent was entitled to the suit property. The trial court was well within its ambit in opining that to be the issue for determination, and it was not bound by what the parties thought or agreed on what the issues should be.

33. We note that, in both its written and oral submissions, the appellant made heavy weather of the allegation that the learned Judge erred in shifting the burden of proof from the 1st respondent to the appellant. According to the appellant, the 1st respondent had the burden of proving fraud and forgery. The learned Judge found that the burden lay squarely with the appellant, and we could not agree more. In the judgment, the Court held:

- “36. The 2nd Defendant did not produce the record of payments made for its plots that it received from Kimani Kahiro Advocates following the consent recorded



in court in *HCCC No. 6206 of 1992*. The burden of disproving that the Plaintiff did not make payments to Kimani Kahiro Advocate lay on the 2nd Defendant under section 112 of the *Evidence Act*. The 2nd Defendant's witness confirmed that the 2nd Defendant had these records in its office. Based on the evidence adduced in court, the court believes the Plaintiff's evidence that he paid more than Kshs. 200,000/= to the 2nd Defendant's agents, Kimani Kahiro Advocates for the Suit Property."

34. Sections 109 and 112 of the *Evidence Act* provides that:

"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

....

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

35. The learned Judge found the evidence adduced by the appellant to be insufficient.

This does not mean that she did not consider the evidence as posited in the grounds of appeal and submissions.

36. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

37. It is therefore old hat that evidential burden initially rests on the party with the legal burden, but as the weight of evidence given by either party during the trial varies, so also will the evidential burden shift to the party who would fail without further evidence such that, when prima facie evidence is adduced by the respondent as was in the instant case, then evidential burden was created on the shoulders of the appellant who was called upon to prove the contrary, but it chose not to.

38. From the record, the 1st respondent was able to discharge his burden of proof during the trial by producing documentary evidence to support his case that the parcel of land was bought by his late father, and that they had taken possession of the suit land and leased it as a garage to third parties. He also produced a copy of the notice dated 22nd July 2005 by which Joreth Limited, the 2nd respondent, invited individuals to take advantage of a consent recorded in HCCC No. 6206 of 1992 – *Joreth Limited v Lewis Kibue and others*. According to the notice, payments were to be made to Kimani Kahiro Advocates. He produced receipts issued by Kimani Kahiro Advocates, which were indicated to be on account of payment for plot number 173 LR No 13330/592. He also produced a schedule of monies remitted to the 2nd respondent.



- 39. Despite the appellant being the defendant in the trial court, hence having a chance to rebut the 1st respondent’s evidence, he did not rise up to the occasion and, hence, did not discharge the evidentiary burden that rested upon him on the question of fraud.
- 40. The appellant did not offer any explanation regarding the facts and allegations made against him by the 1st respondent, especially on prior possession of the parcel of land by the 1st respondent, the payments made to Kimani Kahiyo Advocates and, more specifically, the issue of whether Njenga Karume executed the transfer document and the sale agreement.
- 41. The learned Judge found that the burden of proving that Mr. Njenga Karume executed the transfer in favour of the appellant lay on the appellant, but that he did not discharge this burden. The court found the evidence of the appellants’ witnesses to be inconsistent as to when Mr. Njenga executed the transfer, and where it was executed.
- 42. The learned Judge therefore did not misdirect herself by failing to find that the appellant had proved his case on a balance of probabilities, and in believing the evidence of the 1st respondent since failure by the appellant to adduce evidence to rebut the 1st respondent’s evidence meant that the evidence of the 1st respondent remained uncontroverted.
- 43. In view of the foregoing, and after a careful re - analysis and re - evaluation of the evidence, it is our finding that the appellant has failed to demonstrate that the learned judge erred in law and in fact in coming up with the determination in the impugned judgment. The appellant’s suit was properly dismissed by the trial Judge in a balanced and well analyzed judgment, and we can do no more than to uphold the same. Accordingly, we hold that this appeal has no merit, and it is hereby dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2023.

D. K. MUSINGA (P).

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

