



Kioko v Calleb (Civil Appeal E018 of 2021) [2023] KECA 771 (KLR) (23 June 2023) (Judgment)

Neutral citation: [2023] KECA 771 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E018 OF 2021
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JUNE 23, 2023

BETWEEN

MARGARET NDUNGE KIOKO APPELLANT

AND

MANASE ANANDA CALLEB RESPONDENT

(Being an appeal against the judgment and decree of the Environment and Land Court at Mombasa (Omollo, J.) dated 16th September 2020 and delivered electronically via email on 21st September 2020 in ELC Case No. 42 of 2013)

JUDGMENT

1. The appellant, Margaret Ndunge Kioko, has challenged the judgment of the Environment and Land Court at Mombasa (ELC) (A. Omollo, J.) dated September 16, 2020 and delivered on 21st September 2020 dismissing her suit against the respondent, Manase Ananda Calleb.
2. The appellant's case before the ELC instituted on 7th March 2013 was that approximately 25 years earlier, on March 4, 1988, she entered into an agreement with one John M. Mukiri, who had since died, to purchase from him a parcel of land for Kshs. 69,850 which he (John M. Mukiri) had purchased from Kobana Binti Salim Khamis Kombo, also since deceased. That on May 24, 1991, John M. Mukiri transferred his interest in the parcel of land to the appellant having paid to Kobana Binti Salim Khamis Kombo, all monies regarding transfer of the property, and "the transfer was done" in her favour.
3. The appellant further averred in her plaint that she maintained her interest in the property; engaged a caretaker who was running a garage on the property and was surprised that the respondent was constructing a wall fence. She averred that she always paid rates for the property and was at loss why the respondent trespassed on it. She pleaded that the respondent acted in bad faith "and might be intending to obtain" the property fraudulently unless restrained.



4. The particulars of fraud the appellant attributed to the respondent were obtaining title deed without paying land rates, stamp duty and rates clearance certificate or obtaining clearance certificate and using or forging the appellant's Deed Plan No. 222406.
5. The appellant sought judgement against the respondent for a permanent injunction stopping him from interfering with her peaceful occupation of the property; vacant possession and in default eviction orders; and an order directing the Registrar of Titles Mombasa to cancel the title deed issued to the respondent for the parcel of land known as CR 98701 - subdivision number 3665 (original number 607/6) of Section III Mainland North as delineated on Land Survey Plan No. 229406 and replace it with the appellant.
6. In his defence, the respondent termed the appellant's suit as a fraud and averred that the appellant is a fictitious person without any claim or interest over the property. He denied that the appellant ever had possession of the property or that she had in her possession the original Deed Plan in respect of the same. He asserted that he is the sole and lawful custodian of the original Deed Plan and Certificate of Title; that the appellant has no title or registrable interest over the property and that her claim, if any, should be against, John Mukiri, the person who purportedly sold his interest to her.
7. The respondent pleaded further that he lawfully and legally acquired title to the property for valuable consideration and is an innocent purchaser without notice and his rights over the property are indefeasible.
8. During the trial, the appellant testified on her own behalf as PW1 and called two witnesses, namely, Elly Otieno Ouma (PW2) and her mother Mary Kioko Muthukya (PW3). A fourth witness, Swaleh Hassan Waithanje, could not attend court on grounds of ill health and his attendance was dispensed with but his written witness statement was admitted in evidence.
9. In defence, the respondent testified as DW1 and called, Edward Marenye Kiguru (DW2) a land surveyor as his only witness.
10. In her impugned judgment, the learned Judge framed three issues for determination, namely, whether the appellant acquired ownership of the property; whether the respondent's title was acquired through fraud; and whether the appellant proved her case.
11. In concluding that the appellant had not established her case, and in dismissing her claim, the learned Judge expressed that it is not clear what steps the appellant had taken to secure registration of the property in her name; that she failed to demonstrate that the plot sold to her was indeed the suit property, and that the particulars of fraud pleaded were not proved. The Judge found that the appellant "...has not demonstrated that she identified the plot she was buying before paying for it" and that she "failed to create a nexus between the plot she bought and the suit plot" and that she "failed to prove that the [respondent] acquired the suit title through fraud". The Judge also held that the appellant's suit was fatally defective for non-joinder of the Land Surveyor or Director of Surveys in the proceedings.
12. The appellant has challenged that judgment on eight grounds set out in the memorandum of appeal namely, that the Judge erred in: failing to admit the appellant's document into evidence, in particular, the original Deed Plan; finding that the respondent had a valid title, yet the Land Control Board Consent was obtained 7 years after the date of the sale agreement, and yet no grant of letters of administration was produced as the registered owner had already died; relying on photocopies of the respondent's Deed Plan; locking out a crucial witness, namely an officer from the Director of Survey; concluding that the portion of land the appellant was buying was not identified yet the appellant had possession of the same from 1991.



13. In the appellant's written submissions on which learned counsel Mr. Mutugi relied during the hearing of the appeal on February 27, 2023, the afore stated grounds of appeal were condensed into two. First, whether the Judge erred in denying the appellant an opportunity to re-open her case to call the custodian of title deeds to guide the court on which of the two Deed Plans was authentic. Secondly, whether the Judge was right in upholding the respondent's title to the property.
14. On the first ground, counsel submitted that article 159 of *the Constitution* and Section 1A of the *Civil Procedure Act* demand that justice be administered without undue regard to procedural technicalities and that resolution of civil disputes must be just; that in the present case the court used a forged document to sanitize a fraudulent title deed and that the purpose of requesting for the Director of Surveys to appear in court was to shed light regarding which of the two Deed Plans was genuine.
15. It was urged that the trial court wrongly relied on procedure in dismissing the appellant's application to re-open the case for the witness to be called, thereby denying the court the opportunity to clarify the genuineness or otherwise of the Deed Plans. Citing decisions in *Standard Chartered Financial Services Limited & 2 others vs. Manchester Outfitters (Suiting Division) Limited (Now Known as King Wollen Mills Limited & 2 others* [2016] eKLR; *Nguruman Limited vs. Shompole Group Ranch & another* [2014] eKLR and *Re Estate of Late Ishmael Muchiri Nkinyangi (Deceased)* [2021] eKLR counsel submitted that the trial court should have allowed the appellant to re-open the proceedings for purposes of getting the evidence of Director of Surveys on the two Deed Plans.
16. On the second ground, counsel submitted that the appellant produced to the court uncontroverted evidence that she was the bona fide purchaser of the property; that she produced evidence showing how she purchased the property, paid the purchase price, and obtained a transfer from the original owner Kobana Binti Salim Khamisi Kombo Mtwafy. It was submitted that whereas the property originally belonged to the said Kobana Binti Salim Khamisi Kombo Mtwafy, the transfer of the property in favour the respondent was by a stranger, one Rehema Shee Ali, with no explanation how she could transfer property in respect of which she was not the registered proprietor; that the respondent did not produce letters of administration to show that she was the administrator of the estate of the said Kobana Binti Salim Khamisi Kombo Mtwafy and consequently the transfer in favour of the respondent is null and void.
17. Opposing the appeal, learned counsel for the respondent, Mr. Mutubia, also relied entirely on the respondent's written submissions dated September 26, 2022. With regard to the first ground of appeal, counsel submitted that the complaint that the Judge erred in declining the request by the appellant to re-open the case is not a matter for determination in this appeal; that instead of filing submissions in accordance with directions of the trial court after the close of the defence case, the appellant filed an application before the ELC dated February 13, 2019 in which she sought orders for re-opening of her case to enable her adduce additional evidence; that the respondent opposed the application and the ELC delivered a ruling in that regard on February 12, 2020 rejecting the request; and that the appellant did not appeal against that ruling of February 12, 2020.
18. Moreover, counsel submitted, the evidence of the Director of Survey would not have changed the position that the appellant did not have a title to the property as the Deed Plan does not indicate or contain details as to the ownership of the property.
19. Counsel further submitted that the complaint by the appellant that the Judge erred in finding that the respondent had a valid title has no basis; that the evidence before the trial court demonstrated that the respondent was the first registered owner of the property vested with absolute and indefeasible ownership of the property. In that regard, the case of *Mike Maina Kamau vs. Attorney General* [2017] eKLR was cited.



20. It was submitted, reference being made to, among others, the decision of the court in *Vijay Morjaria vs. Nansingh Madhusingh Darbar & another* [2000] eKLR, that the claims or allegations of fraud must not only be distinctly pleaded but must also be distinctly proved, and in this case were not proved; that the respondent, unlike the appellant, was able to demonstrate how he acquired the property and the question of the transferor of the property to the respondent was not pleaded.
21. Regarding possession, it was submitted that the purported lease agreement between the appellant and Elly Otieno Ouma is a forgery as there are discrepancies in the identity card numbers of the appellant and that Elly Otieno Ouma was not in possession of the property. Counsel concluded by urging that the trial Judge correctly determined the matter and rightly dismissed the appellant's suit.
22. We are empowered under rule 31(1)(a) of the *Court of Appeal Rules, 2022* on a first appeal such as this to re- appraise the evidence and draw inferences of fact with a view to reaching our own independent conclusions. See *Selle & Another vs. Associated Motor Boat Co. Ltd & others* [1968] E.A. 123.
23. With those principles in mind, we first address the complaint that the Judge erred in declining the appellant's request to re-open her case after the close of the defence case. The record of proceedings before the trial court shows the appellant's case was closed on 31st July 2017 immediately after the witness statement of Swaleh Hassan Waithanje was admitted into evidence without calling him on account of his ill health. The trial resumed on February 21, 2018, over six months later, when the respondent testified and was cross examined. Thereafter proceedings adjourned and the hearing then resumed on November 19, 2018 when the respondent's witness, DW 2, testified and was cross examined after which the respondent closed the defence case. Directions were then given on the same day by the trial court for the filing of written submissions.
24. A period of over two months lapsed after the close of the defence case before the appellant's counsel moved the trial court by application dated February 13, 2019 for an order to re-open his case "and allow additional and crucial new evidence to be tendered". The new evidence that was sought to be introduced was a letter dated 21st December 2018 addressed to the appellant's advocates in response to those advocates letter dated November 29, 2018 seeking confirmation of the authenticity of copies of Deed Plans to which the Ministry of Land and Physical Planning Survey of Kenya was responding stating that according to its records Deed Plan No. 229406 is the authentic Deed Plan.
25. Having considered that application and the submissions by counsel, the learned Judge delivered a ruling dated 23rd January 2020 dismissing it on grounds that the appellant had the opportunity to summon the proposed witness before close of her case and no reason was given why the inquiry to the Ministry of Land and Physical Planning Survey of Kenya on the authenticity of the Deed Plans could not have been made before the commencement of appellant's case or before close of her case. The Judge concluded in that ruling thus:

"Reacting on the evidence presented by the [respondent] is equivalent to wanting to steal a match. It is my considered view and I so hold that no sufficient cause has been shown why the [appellant] should be allowed to re-open her case where both the impugned document has all along been in possession of the [appellant]/applicant."
26. The appellant did not challenge that decision on appeal. The notice of appeal on which the present appeal is hinged is the appellant's notice of appeal dated September 22, 2020 and relates specifically to the impugned judgment delivered on September 21, 2020. In the circumstances we uphold the submission by counsel for the respondent that not having appeal the ruling of 23rd January 2020, that matter is outside the purview of the present appeal.



27. The next issue for consideration is whether the Judge erred in upholding the respondent's title to the property. What then was the appellant's case before the trial court and what evidence was presented in support? Her case was that she purchased the property in 1988, from one John Mucene Mukiri to whom she paid Kshs.69,850.00 and then obtained a transfer from the registered owner, Kobana Binti Salim Khamisi Kombo Mtwafy. Her main prayer was for an order for the cancellation of the title deed in favour of the respondent. That prayer was based on the grounds that the respondent acquired title to the property fraudulently. We have already alluded to the particulars of fraud that the appellant pleaded, namely that the respondent obtained the title deed without paying land rates; without paying stamp duty; without paying for rates clearance certificate, or indeed without obtaining a clearance certificate; and in forging the appellant's Deep plan.
28. In her testimony, the appellant reiterated that she purchased a property from John Mucene Mukiri for Kshs. 69,850.00 on 24th of May 1991 by an agreement of same date which was witnessed by Swaleh Hassan Waithanje. She produced a copy of the cheque she issued in that regard. She stated that John Mukiri took her to the registered owner, Kobana Binti Salim Khamisi Kombo Mtwafy, to whom she paid Kshs. 100,000.00 in cash and Kobana Salim executed a Transfer in her favour on November 1, 2003. Later she obtained a Deep Plan prepared by a Land Surveyor, Edward Kiguru (DW2) for which she paid Kshs. 18,000.00 and was in the process of securing title. She stated that initially, she allowed a neighbour to breed chicken on the property before allowing Elly Otieno Ouma (PW2), with whom she entered into an agreement, to use it as a garage and to take care of it.
29. She testified further that in February 2013, she got a call while in Germany where she was based, that someone wanted to take her plot and wanted to put building materials on the plot whereupon she advised PW2 to report the matter to the police and later instructed her advocates to commence suit.
30. It was her further testimony, under cross examination, that John Mukiri did not have any title to the property when she paid him Kshs. 69,850.00; that Kobana Binti Salim Khamisi Kombo Mtwafy to whom she paid Kshs. 100,000.00 did not show her the Deed Plan for the property as it was with the surveyor Edward (DW2); that after the death of Kobana Binti Salim Khamisi Kombo Mtwafy, she did not approach the next of kin of her estate to get the land and that she did not know the process of obtaining title after death of the owner.
31. As already mentioned, the witness statement of Swaleh Hassan Waithanje dated March 6, 2013, was admitted into evidence and his attendance dispensed with on grounds that he was ailing. In that statement, he stated that the appellant and John Mukiri were well known to him; that John Mukiri had "earlier on purchased a plot on Number 607/II/MN" and was paid Kshs. 69,800.00 in full and that he witnessed the agreement and the Transfer; that the appellant took possession until February 25, 2013; that he also purchased a parcel of land from the same original parcel from the same family; that he was aware that the appellant went to Kobana Binti Salim Khamisi Kombo Mtwafy who was the vendor and a transfer was done "although for some reason the same was not registered"; that he was surprised when he saw some people had trespassed and were digging terraces on the appellant's parcel and suspected "foul play on the part of the [respondent] and the family members now that Mama Kobana is deceased including Mr. Muchiri (Mukiri)".
32. The appellant's mother, Mary Kioko Muthukya, PW3, stated in her evidence, that when the appellant expressed interest to purchase a plot, she and Swaleh Hassan Waithanje, who identified the property, viewed it and later met the owner and a price of Kshs. 69,850.00 was agreed; that payment for the purchase price was made by a banker's cheque; that an agreement was drawn up and later went to see "the owner of the land" called Kobana who confirmed the sale and a transfer was done and the appellant paid Kshs. 100,000.00. She stated all that took place in 1991 and the appellant has been in possession



- since then though it was leased in 2010 to PW2; that PW2 informed her that he had welcomed the respondent, who had a neighbouring plot, to keep materials on the property.
33. Elly Otieno Ouma (PW2) stated that in 2010, he was running his garage on a plot adjoining the suit property, which was owned by the appellant; that he approached the appellant to allow him to utilize the suit property and he entered into an agreement with the appellant for that purpose; that in 2011, the respondent began construction on his property 3666/III/MN and his caretaker requested access to the property to keep construction material; that on 27th February 2013, the respondent's caretaker, one Douglas Andai, approached him claiming that the property had been sold and requested him to vacate to enable them construct a wall; that on consulting the appellant he established that she had not sold the property; that on February 28, 2018 when digging of foundation on the property began, he, on instructions from the appellant, reported the matter to Mtwapa Police Station. Thereafter he received a demand letter to remove his things from the property.
 34. On his part, the respondent, Manase Ananda Caleb, who stated that he is a practicing advocate in Mombasa, testified that he is the registered and bona fide owner of the property Plot No. 3665/Original Number 607/6) Section III Mainland North and that he lawfully purchased the property for valuable consideration from the previous registered owner; that after purchasing the property a transfer in his favour was duly registered.
 35. The respondent produced the agreement for sale dated 15th March 2005 between Kobana Binti Salim Khamis Kombo, as vendor, and himself as purchaser as well as the Transfer dated November 22, 2012 executed by one Rehema Shee Ali, as transferor to him as purchaser. He also produced a Certificate of Title Number CR. 58932 issued by the Registrar of Titles in his favour and a Certificate of Postal Search as on March 15, 2013 indicating that he is the registered owner of the property; Stamp Duty Declaration, Assessment & Pay in Slip in relation to the Transfer. He stated that the Deed Plan No. 229406 and Receipt No. 366 relied upon by the appellant "are forgeries fabricated by the [appellant] to mislead the court in her quest to unlawfully alienate [his] plot" and produced a copy of a letter by the Surveyor (DW2) to that effect.
 36. He stated that by the time of transfer the property into his name, there was no caveat or restriction or caution registered against the title; that when he bought the property, the seller, rather than the appellant was in possession; that it is not true that PW2 was in possession and operating a garage on the property at the time but could sometimes park his vehicles when his garage was full; that he is the owner of Plot No. 3666 where he has some developments and 3665 which was not developed was his extension; that he constructed a wall in March 2013 after getting title on February 1, 2013. He stated that he paid land rates, stamp duty and application for land control board consent and prayed for the dismissal of the suit.
 37. Under cross examination, the respondent maintained that he entered into the agreement for sale with Kobana Binti Salim Khamisi Kombo Mtwafy, as vendor on March 15, 2005; that land control board consent and transfer was obtained seven years later on 2nd November 2012 and November 22, 2012 respectively; that the person who signed the transfer was Rehema Shee Ali but that he had not produced any document of her capacity in relation to the vendor; that in 2012 the property was not occupied; and that when excavation was going on his manager was taken to the police.
 38. Edward Marenye Kiguru (DW2), a licensed Land Surveyor stated that he had over 30 years' experience as a private land surveyor; that he is the one who, on instructions of the registered owner, undertook the subdivision of Plot No. 607/III/MN into plots one of which is 3665/III/MN; that he obtained Deed Plans for each plot; that he received a letter from the respondent dated 24th May 2013 to confirm if he had issued a Deed Plan and receipt which had been produced by the appellant and stated that



- he had never seen, nor released the same to the appellant and neither did he issue the receipt for Kshs. 18,000 produced by the appellant and denied that the signature thereon was his.
39. Under cross examination, DW2 stated that Kobana Binti Salim Khamisi Kombo Mtwafy is deceased and was the mother of Rehema Shee Ali; that he received instruction on sub-division in the year 2000 but “started the process in 1997”; that the signature on the Deed Plan produced by the appellant was different from the one produced by the respondent and that he was not involved in the processing of the title deeds.
 40. In our view, the evidence shows that one John Mucene Mukiri entered into some form of agreement with Kobana Binti Salim Khamis Kombo, the registered owner of the property Plot Number 607/II/MN to purchase an un-surveyed portion of that property; that by an agreement dated May 24, 1991, the said John Mucene Mukiri agreed to sell the same to the appellant for Kshs. 69,850 which the appellant paid to the said John Mucene Mukiri by a banker’s cheque dated May 24, 1991. According to the appellant, the said John Mukiri then took her to the owner of the land to whom she paid Kshs. 100,000.00 in cash. That appears to have happened twelve years after the agreement with John Mukiri because the un-registered Transfer prepared by Chalalu & Co. Advocates and executed by Kobana Binti Salim Khamis Kombo in favour of the appellant is dated November 1, 2003. It is not clear what was happening in the intervening twelve years.
 41. According to the appellant, on November 1, 2003, she paid DW2 an amount of Kshs. 18,000.00 for a Deed Plan for the property. DW2 however disowned both the Deed Plan relied upon by the appellant as well as the receipt that was purportedly issued to the appellant for the Deed Plan. She stated that she was in the process of securing a title and paid approval fees of Kshs. 2701 on August 22, 1991 for which receipt No. L964420 was issued although, according to DW2, the sub-division process did not start until 1997.
 42. She stated that she took possession of the plot, erected a fence made of iron sheets; initially allowed a neighbour to breed chicken and later entered into an agreement with Elly Otieno Ouma (PW2) who became the caretaker and who remained in possession until February 2013; that at the end of February 2013 she got a call that someone wanted to take her plot when the matter was then reported to the police station and she later commenced suit leading up to the present appeal.
 43. Based on our re-appraisal of the evidence we find as a fact that the appellant did agree to purchase from the said John Mukiri an un-surveyed portion of the property known as Plot Number 607/II/MN which the registered owner Kobana Binti Salim Khamis Kombo would appear to have agreed to sell to John Mukiri. Through what appears to have some form of a novation agreement, John Mukiri then introduced the appellant to Kobana Binti Salim Khamis Kombo who executed a Transfer dated November 1, 2003 in favour of the appellant for a consideration Kshs. 100,000.00 acknowledged as having been received in the Transfer.
 44. It is not clear why that Transfer in favour of the appellant was never registered and by the time the respondent entered into an agreement for sale dated March 15, 2005 with the said Kobana Binti Salim Khamis Kombo for the purchase of Plot No. 3665 (Original No. 607/6 Sec III M. N. CR 33152 for a consideration of Kshs. 400,000.00, the Transfer in favour of the appellant had never been registered. For reasons that were not explained, it took another seven years or so for the property to be transferred to the respondent by an instrument of transfer dated November 22, 2012 executed by Rehema Shee Ali, as transferor described in the instrument as “registered proprietor of an estate in fee simple”. The respondent’s Certificate of Title was then issued on February 1, 2013.
 45. Questions linger as to when Kobana Binti Salim Khamis Kombo died and whether Rehema Shee Ali who executed the transfer in favour of the respondent was the administrator of the estate of Kobana



Binti Salim Khamis Kombo or indeed the source of her mandate. But that was not the basis on which the appellant sought to impeach the respondent's title. The basis on which the appellant sought cancellation of the respondent's title was fraud the particulars of which, at the risk of repetition, were pleaded to be obtaining title deed without paying land rates, stamp duty and rates clearance certificate or obtaining clearance certificate and using or forging the appellant's Deed Plan No. 222406. However, the appellant did not tender any evidence at all to support those claims.

46. Authorities abound that allegations of fraud are serious and require to be proved on a higher standard than the ordinary standard of balance of probabilities. See for instance *Vijay Morjaria vs. Nansingh Madhusingh Darbar & another* (above). No doubt the respondent took advantage of the situation by seemingly offering a more attractive price to the vendor and capitalizing on the absence of any encumbrances against the title to procure his registration as owner but that in our view is not tantamount to fraud.
47. The respondent was able to demonstrate in sufficient detail how he acquired the title to the property and beat the appellant to become registered as proprietor. We conclude therefore, as the learned trial Judge did, that the appellant failed to prove that the respondent acquired title to the property through fraud.
48. Consequently, the appeal fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JUNE 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

