



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kahanya & another v Gathogo (Civil Appeal 175 of 2018)  
[2023] KECA 1064 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1064 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 175 OF 2018  
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA  
SEPTEMBER 22, 2023**

**BETWEEN**

**DUNCAN GITUTHE KAHANYA ..... 1<sup>ST</sup> APPELLANT**

**ISAAC MWAI GITUTHE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FRANCIS MWANGI GATHOGO ..... RESPONDENT**

*(Being an Appeal from the decree and Judgment of the Environment and Land Court of Kenya at Nyeri, (L.N. Waitthaka, J.) dated 5th March 2018 In ELC Case No. 316 of 2014)*

**JUDGMENT**

1. The background to this appeal is that the respondent, Francis Mwangi Gathogo, vide a plaint dated 14<sup>th</sup> October 2012 sued the appellants, Duncan Gituthe Kahanya (1<sup>st</sup> appellant) and Isaac Mwai Gituthe (2<sup>nd</sup> appellant), over all that property known as L.R No. Nyeri/Watuka/2046 (“the suit property”). The respondent claimed that he had bought the suit property from Joyce Wanjiku Kahanya at a consideration of KShs.600,000 following a sale agreement dated 19<sup>th</sup> October 2011. The consent of the Land Control Board had been obtained and the property transferred to him on 31<sup>st</sup> January 2012. The appellants resisted his attempt to take up vacant possession of the suit property and erected a house thereon and also begun cultivating on the suit property. The respondent brought the suit in the Environment and Land Court (“ELC”) at Nyeri seeking a declaration that he was entitled to exclusive use, possession and occupation of the suit property. He asked for general damages for trespass, and costs of the suit and interest.
2. The claim was opposed by the appellants who filed a defence and counterclaim. Their case was that the suit property was originally registered in the joint names of the 1<sup>st</sup> appellant, his wife Jedidah Wanjiru Gituthe and his mother Joyce Wanjiku Kahanya. Subsequently, and without the 1<sup>st</sup> appellant’s knowledge, the suit property was illegally transferred into the sole name of Joyce Wanjiku Kahanya who



had purportedly sold and transferred the same to the respondent. They stated that the suit property was family land on which they were living, and that the respondent had had the 1<sup>st</sup> appellant charged in Nyeri Criminal Case No. 97 of 2012 with forcible detainer of the suit property but that he had been acquitted. The appellants sought the dismissal of the suit and, in their counterclaim, sought a declaration that the registration of the suit property in the name of the respondent was void ab initio, and asked that the same be ordered to revert into the joint registration.

3. The matter was heard by the ELC (L.N. Waithaka, J.) who found for the respondent by deciding that his claim to the suit property was valid because when he bought it from Joyce Wanjiku Kahanya she was the sole registered proprietor; that the claims that the transfer to him was illegal or fraudulent had not been proved; that there was no proof that the respondent was party to any such fraud or illegality; that, therefore, the respondent had a good title; and that, the actions by the appellants amounted to trespass for which they were ordered to pay general damages in the sum of Kshs.150,000, then costs of the suit. The counterclaim was dismissed.
4. These are the findings that aggrieved the appellants and which led them to appeal to this Court. In their Memorandum of Appeal, the following were their grounds:-

- “ 1. The learned Judge erred in Law in not finding and holding that in so far as the cancellation of the 1<sup>st</sup> defendant and his wife as co-owner together with that of the 1<sup>st</sup> interested party as the registered owners of L.R No. Nyeri/ Watuka/2046 was done without following the due process and without any court order, the 1<sup>st</sup> interested party had no good title to transfer to the defendant. A miscarriage of justice was thereby occasioned.
2. The learned Judge erred in Law in holding that it was necessary to make the land registrar a party to the suit for the court to make a finding that the 1<sup>st</sup> interested party has no good title to transfer to the plaintiff. A miscarriage of justice was thereby occasioned.
3. The learned Judge erred in Law in not finding and holding that the transfer of the suit land to the plaintiff was unlawful, null, and void ab initio and not making an order of rectification. A miscarriage of justice was thereby occasioned.
4. In so far as there was no Land Control Board consent for the transfer of the land from the 1<sup>st</sup> defendant and the interested parties to Jedida Wanjiru Gituthe or any transfer by the three to the said Jedida Wanjiru Gituthe, the learned judge erred in law in not allowing the defendant’s counter-claim. A miscarriage of justice was thereby occasioned.
5. The learned Judge erred in law in not holding that the plaintiff had knowledge of the defendant’s interest, possession, and occupation of the suit land simply because she had found that the plaintiff was not a party to the irregularity in the transfer. A miscarriage of justice was thereby occasioned.
6. In so far as the interested party was a party to the suit land, the learned judge erred in simply holding that “issues a bound concerning the transfer of the suit property to the interested party” without finding and holding that those “issues” made the interested party not to have good title transfer to the plaintiff. A miscarriage of justice was thereby occasioned.



7. In so far as the interested party had no good title to transfer to the plaintiff, the learned judge erred in law in allowing the plaintiff's claim and not dismissing the same. A miscarriage of justice was thereby occasioned."
5. As the first appellate Court, our remit is to reconsider the evidence that was tendered before the ELC, evaluate it and draw our own conclusions thereon, while bearing in mind that the ELC had the advantage of seeing and hearing the witnesses as they gave evidence before it. We do not have that advantage (*Selle –v- Associated Motor Boat Company Limited* [1968] EA 123; *Williamson Diamonds Ltd –v- Brown* [1979]EA 1). Nevertheless, we are entitled to interfere with the findings of the trial court if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see *Ephantus Mwangi –v- Duncan Mwangi Wambugu*.
6. In our considered view, the substantive question for our determination is whether the respondent was proved to have an indefeasible title to the suit property.
7. There was no dispute that the respondent entered into an agreement to buy the suit property from Joyce Wanjiku Kahanya (the 1<sup>st</sup> interested party in the ELC) who was paid Kshs.600,000 as the purchase price. Joyce was then the registered proprietor of the suit property. The parties went to the Land Control Board, obtained consent and the suit property was transferred to the respondent who then filed the suit subject of the appeal. His claim was that the appellants had illegally entered and remained in the suit property and were, therefore, interfering with his right to quiet possession and enjoyment. It was common ground that Joyce was the mother of the 1<sup>st</sup> appellant. She was 105 years old. Infact, during the criminal proceedings in which the 1<sup>st</sup> appellant had been charged, Joyce was not able to testify on account of her age. According to the 1<sup>st</sup> appellant's testimony in the ELC, she did not understand anything. The other piece of undisputed evidence was that, before the suit property was registered in the name of Joyce, it had been registered in her name jointly with her son (1<sup>st</sup> appellant) and his wife Jane Jedidah Wanjiru (2<sup>nd</sup> interested party). The title deed in the joint names was issued on 8<sup>th</sup> March 2007.
8. On 6<sup>th</sup> October 2011 the suit property became registered in the sole name of Joyce. The evidence of the 1<sup>st</sup> appellant and that of Jedidah was that they were not party to the registration, and had not sanctioned it. It was evident before the ELC that the ID Card and the PIN used in the transfer of the suit property, and which documents were attributed to Jedidah, were a forgery. They did not belong to Jedidah. The evidence of the 1<sup>st</sup> appellant was that his documents had been illegally used in the transfer, and that the signature attributed to him was not his. It was the evidence before the ELC that before the Land Registrar could sanction the transfer to Joyce, he wrote to the 1<sup>st</sup> appellant and Jedidah to produce the original title deed. The 1<sup>st</sup> appellant was the one who was in possession of the original title deed. The two did not go to see the Land Registrar and neither was the original title deed surrendered. The 1<sup>st</sup> appellant got an entity called Social Watch to write a protest letter to the Land Registrar. The next thing was that the Land Registrar advertised in the Gazette Notice that the title deed was lost, which then became the basis of the issuance of a new title deed to Joyce. Of course, the original title deed had not been lost. The 1<sup>st</sup> appellant had it at the time he gave evidence. This evidence, together with the forgeries of the documents of Jedidah and the signature of the 1<sup>st</sup> appellant, indicated clearly that the title to Joyce was unprocedurally and illegally obtained. There was no evidence that the 1<sup>st</sup> appellant and Jedidah signed any agreement to transfer their interest in the suit property to Joyce, and neither was any consideration provided.
9. On 19<sup>th</sup> October 2011, about 13 days following the registration of the suit property in the name of Joyce, the respondent signed the agreement to purchase the suit property. The respondent's evidence



was that before the sale agreement was signed he conducted a search which revealed that Joyce was the registered owner. According to him, he checked the suit property and confirmed that it was vacant. According to the 1<sup>st</sup> appellant, he conducted a search on 17<sup>th</sup> October 2011 and found that the suit property was in the name of Festus Muriithi Wanjohi who was a stranger. He produced the search certificate. The respondent similarly produced his certificate of search.

10. It was evident that the 1<sup>st</sup> appellant was the son of Joyce and husband of Jedidah. The evidence of the 1<sup>st</sup> appellant was that this was family land on which they were living. He stated:-

“I have continuously refused the plaintiff to enter the suit land and until the court determines this matter, will still not allow him access.”

11. The trial court did not resolve the question whether the suit property was vacant or that the 1<sup>st</sup> appellant had settled thereon. This is how the court dealt with the issue:-

“55. Whereas the defendant/interested party claim that the plaintiff ought to have known about their interest in the suit property because they were in possession and occupation of the suit property, having determined no evidence has been adduced to show that the plaintiff was party to the alleged irregularity in the transfer of the suit property to the interested party or that he knew of the alleged defect in the title held by the interested party, I find and hold that the plaintiff was not under any legal obligation to ascertain whether the title held by the interested party was subject of any unregistered interest in favour of them. If anything, it is doubtful whether the defendant/interested party can successfully urge a case in the alleged illegal, unlawful, unprocedural registration of the suit property to the 1<sup>st</sup> interested party in the absence of the Land Registrar. Besides, an allegation of fraud, illegality requires to be particularly pleaded and proved by way of evidence. The burden of proof of the alleged irregularity or unlawfulness in the registration of the suit property either in the name of the interested party or the plaintiff lay with the defendant/interested parties. In the circumstances of this case the defendants have not proved that the transfer of the suit property to the plaintiff was tainted with fraud or illegality. The issues relied on in support of their case relate to the transfer of the suit property to the interested party. Whereas issues abound concerning the transfer of the suit property to the interested party, there being no evidence that the plaintiff was an actor in that transfer, I am of the considered view that the plaintiff who bought the suit property from the 1<sup>st</sup> interested party at a time when it was not encumbered cannot be blamed for any defect, if any, in the transfer of the suit property to the interested party.”

12. We are of the considered view that the trial court ought to have considered the available evidence and determined whether or not the appellants were in possession at the time of the sale of the land by the 1<sup>st</sup> interested party to the respondent. This was because, if the respondent was buying land in which the appellants were residing, he needed to have inquired from the seller who the appellants were in relation to the property. He ought to have inquired from the appellants what claim, if at all, they had in the property. We have considered the rival evidence on the question of occupation. The 1<sup>st</sup> appellant's evidence was that this was family property in which he lived. It was clear that he was the son of Joyce. Jedidah is his wife. Against the respondent's evidence that he bought a vacant land on which the appellants settled later, we find that it was probable that he bought the suit property while the



appellants were occupying it. It follows that this occupation should have signalled to them that there was a possible claim to the land by the appellants. There was, therefore, no due diligence conducted on that property.

13. Among the documents that Joyce gave to the respondent during the transaction was the letter that the Land Registrar had written to the 1<sup>st</sup> appellant asking him to return the original title deed to the suit property. He told the court that he was not conversant with the letter and did not know what it was all about. In our view, this letter should have put him on notice. Why was a third party the one having the original title deed to the land he was buying? Why did the seller, the 1<sup>st</sup> interested party, not have this original title deed? Further, the 1<sup>st</sup> interested party gave to him the transfer document that had not been dated, and it had only one signature. He did not question the 1<sup>st</sup> interested party about this peculiar transfer to her. We are mindful that the respondent was dealing with an old lady, in excess of 100 years, and who, according to her relatives, did not know what was happening. All these facts taken together, and considering that the transaction was happening soon after the illegal transfer of the suit property to the 1<sup>st</sup> respondent, lead us to the irresistible conclusion that the respondent was party to the fraud and illegality that led to the transfer of the suit property from the joint registration to the 1<sup>st</sup> interested party. We do not agree with the trial court that the respondent, in dealing with the 1<sup>st</sup> interested party, was a bonafide purchaser as all along he intended to acquire the suit property wrongly. Considering the decision in *Katende –v- Haridar & Company Limited* [2008]2 EA 173, we are unable to find, or agree with the trial court, that the respondent was acting in good faith. He knew or ought to have known that the 1<sup>st</sup> interested party did not have a good title that she could pass to him. He knew that the 1<sup>st</sup> interested party had a tainted title to the suit property.
14. The respondent’s learned counsel referred us to the decision in *Smith –v- Jones* (1954) 2 All E.R. 823 in which it was held that a purchaser shall not be prejudicially affected by notice of any matter, fact or thing unless it is within his knowledge, or would have come to his knowledge if such inquiries or inspections had been made as ought reasonably to have been made to him. We agree with the holding, and find that, in the particular circumstances of this case, the respondent was all along aware that the suit property that he was buying had a tainted history. He was not acting in good faith in the transaction.
15. In concluding this appeal, we wish to reiterate that if the respondent was claiming to be a bonafide purchaser as a basis for his asserting his entitlement to the suit property against the claims by the appellants, he needed to show that he bought the suit property without actual or constructive notice of any defects in or infirmities, claims or equities against the 1<sup>st</sup> interested party’s title (*Weston Gitonga & 10 Others –v- Peter Rugu Gikanga & Another* [2017]eKLR). He did not prove this, we find. Indeed, the trial court acknowledged that:-

“issues abound concerning the transfer of the suit property to the interested party”

but went on to hold that the respondent was not privy or party to these issues. We have found that he was privy to the issues. The respondent did, as it were, wave his title to the trial court, and emphasised its sanctity. However, this Court cannot countenance an illegally obtained title.

16. The result is that the appeal succeeds. The orders by the ELC are hereby set aside, and in their place there shall be –
  - a. an order dismissing with costs the respondent’s claim before the ELC;
  - b. an order allowing the appellants’ counterclaim with costs; and



- c. an order rectifying the register in respect of LR No. Nyeri/Watuka/2046 by cancelling the title issued to the respondent and reverting the title into the joint names of Joyce Wanjiku Kahanya, the 1<sup>st</sup> appellant Duncan Gituthe Kahanya and Jedidah Wanjiru Gituthe.

17. Costs of the appeal shall be borne by the respondent.

**DATED AND DELIVERED AT NYERI THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**A.O. MUCHELULE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

