



**Chege v Twiga Lodge Limited & 2 others (Civil Appeal
77 of 2019) [2022] KECA 429 (KLR) (4 March 2022) (Judgment)**

Neutral citation: [2022] KECA 429 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 77 OF 2019
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA
MARCH 4, 2022**

BETWEEN

EVANS MUTHEMBA CHEGE APPELLANT

AND

TWIGA LODGE LIMITED 1ST RESPONDENT

GRACE GACHEKE MWAI 2ND RESPONDENT

ISAIAH MWANGI MATHENGE 3RD RESPONDENT

(Being an Appeal arising from the judgment of the Environment and Land Court at Mombasa (Omollo, J.) delivered in Mombasa on 22nd November 2018 in ELC Case No. 607 of 2011)

JUDGMENT

1. Evans Muthemba Chege, the Appellant herein, filed a suit in the Environment and Land Court (ELC) against Twiga Lodge Limited, the 1st Respondent herein, and Grace Gacheke Mwai and Catherine Wangui Ngenji Muigai, the 2nd and 3rd Respondents herein, who are Administrators of the estate of Isaiah Mwangi Mathenge. His claim as stated in his Complaint dated 23rd November 2011, was that he was the registered owner of land title No. Mombasa/ M. S. /Tiwi Beach/ 62 (hereinafter “the suit property”), while the Respondents were the owners of the adjacent plot, namely Mombasa/ M. S. / Tiwi Beach 63 and ran a hotel business thereon. Further, that the Respondents without any colour of right trespassed onto his land and commenced construction of a campsite thereon. The Appellant accordingly sought an order of permanent injunction to restrain the Respondents from trespassing on the suit property.
2. The Respondents in response filed an Amended Defence and Counterclaim dated 19th September 2012, in which they denied being trespassers on the suit property, and claimed that the late Isaiah Mwai Mathenge (hereinafter referred to as “the Deceased”) was registered as the proprietor of the said



property and had been in possession thereof since 1976, and that the Appellant colluded with land officials at Kwale Lands Registry to fraudulently acquire a certificate of lease in respect of the property. They particularised the fraud and illegality on the part of the Appellant, and sought declarations that the Deceased was the lawful owner of the suit property, and that the Appellant fraudulently and/or illegally obtained Certificate of Lease dated 22nd August 2006 and hence it is null and void. The Respondents sought further orders directing the Land Registrar, Kwale District to cancel and/or revoke the Certificate of Lease dated 22nd August, 2006 and any memorial or entry in the register in the name of the Appellant.

3. The ELC (A. Omollo, J.) delivered a judgment wherein it was found that the Appellant's title was not regularly acquired, and as a result ordered for the cancellation of the said title and that the suit property revert back to the name of the Deceased, with costs being awarded to the Respondents. The Appellant is aggrieved by the said decision, and lodged a Memorandum of Appeal in this Court dated 3rd June 2019, in which he raised six grounds of appeal challenging the findings made by the trial court on two fronts. The first was that the evidence adduced did not support the findings by the ELC that the title of the Appellant was not genuine and not lawfully acquired. Second, that the evidence by the Respondents was contrived and introduced very late during the trial.
4. The appeal was heard on 2nd November 2021, and Ms. Ngigi, learned counsel appearing for the Respondents, was in attendance. The counsel for the Appellant was not present, although served with the hearing notice. Written submissions dated 6th February 2021 had however been filed by the Appellant's counsel, and we directed that the hearing proceeds and the appeal would be determined on the basis of the said submissions. Ms Ngigi indicated that she would wholly rely on written submissions dated 6th May 2021 that were filed on behalf of the Respondents.
5. As this is a first appeal, our duty as stated by Rule 29(1) of this Court's Rules is to re-evaluate, re-analyze and re-consider the evidence adduced before the trial court, and draw out our own conclusions thereon. This Court's role in this regard was expressed in *Selle & Another vs Associated Motor Boat Co. Ltd. & others (1968) EA 123* 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 demeanour of a witness is inconsistent with the evidence in the case generally”

6. In arriving at our own conclusions of fact and law, we will only depart from the findings by the ELC if they are not based on the evidence on record, or where the said court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja [1986] KLR 661*.
7. The main contest in this appeal is the ownership of the suit property. The Appellant asserted that he held a title to the suit property. He produced a sale agreement dated 13th October 2005 and transfer of lease dated 10th November 2005 purportedly executed by the Deceased in relation to the suit property, and a certificate of lease issued to him on 22nd August 2006 with respect to the suit property. He also produced the registration details of the suit property (the white and green cards), which documents also showed that the Deceased was previously registered as proprietor of the suit property. The main



issue for determination in this appeal therefore, is whether the transfer and registration of the suit property to the Appellant was lawful.

8. In this respect, and as correctly observed by the ELC, section 26 of the *Land Registration Act* provides that a title deed is taken as conclusive evidence of ownership unless the title is proved to have been acquired by fraud or misrepresentation to which the registered owner is proved to be a party. Section 26 also requires the process of obtaining the title to be lawful. The Appellant in this respect presented evidence during the trial on the processes of his registration, and testified as PW1. His testimony was that he bought the suit property from the Deceased for Kshs. 15 million, and paid 10% which was equivalent to Kshs 1.5 Million in cash on 13th October 2005 and the rest was paid in two instalments namely, Kshs. 6 million on 29th October 2005 and Kshs. 7.5 million on 10th November 2005, also in cash.
9. Two witnesses testified as the transaction. Nancy Njoki Ngui, who testified as PW2, and who worked as a house help for the Appellant, testified that she accompanied the Appellant to Red Brick Hotel on 10th November 2005; that the Appellant was carrying some luggage which she knew was money, based on a conversation she overheard between the Appellant and his wife, but that she did not see the money exchange hands. PW3 was Ambrose Mgenyi Mwaluma, a good friend to the Appellant, who also testified to accompanying the Appellant to Red Brick Hotel on 13th October 2005 and saw the Appellant paying the Kshs. 1.5 Million, and was also present on 29th October 2005, and 10th November 2005 when the balances of Kshs. 6 million and Kshs. 7.5 million respectively were paid. He confirmed seeing the money being counted but did not see the ID card of Isaiah Mathenge to confirm the identity of the person who was paid. He also testified that no family member of the Deceased was present.
10. PW 4, Emmanuel Kenga, a retired Police officer and document examiner, gave evidence that he received documents from Kenzi advocate for examination without the Deceased's known signatures, and was informed that the known signatures were with CIP Alex Mwongera, who later told him he lost the documents. He was thus unable to conduct the examination.
11. The Appellant's counsel submitted that the sale agreement dated 13th October 2005 signed between the Appellant and the seller duly complied with Section 3 (3) of the *Contract Act* and Section 38 (1) of the *Land Act*, No 6 of 2012 which had similar wording. He maintained that the Appellant produced a duly registered transfer of lease and extract of green cards from the records at Kwale land registry which proved he was a bona fide purchase for value of the suit parcel, and he called two witnesses who confirmed the same. He drew this Court's attention to Section 24 and 25 of the *Land Registration Act* and the case of *Mbothu & others vs Waitimu & 11 others (1986) KLR 171* in this regard. Further, that no evidence was tendered to show that the Appellant's title was not obtained lawfully, and that the fact of the transfer being submitted six months after the deceased died was not intermeddling as the Deceased had already signed the transfers before his death. In addition, that the Appellant led evidence that he was running a hardware shop at the busy Mwembe Tayari part of Mombasa on his capacity to raise Kshs. 15 million, and that the sale agreement and transfer were authenticated by a forensic examiner.
12. The Respondents on their part submitted that they proved that the Deceased did not sign the disputed sale agreement which transferred his legal interest in the suit property. Therefore, the Appellant obtained the suit property fraudulently, irregularly and/or illegally. They also noted that the burden of proof shifted to the Appellant who sought to rely on the sale agreement and transfer documents, and placed reliance on the decision in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR* for the proposition that section 107 and 109 of the *Evidence Act* placed the evidential burden upon the Appellant to prove that the signature on these forms belong to the Respondent. The



- Respondent averred that it was also incumbent on the Appellant to prove that he paid the purchase price which he did not, as the testimony of PW 2 shows she did not know the nature of the alleged transaction, while PW 3 did not sign anything to prove the purchase price was paid to the deceased.
13. The ELC in this respect made several findings on the legality of the process of obtaining title. First that the evidence of PW2 and PW4 was of little value, which finding we also agree with, as the two witnesses did not provide any evidence of probative value on any material process during the said transaction. Second, that the burden remained on the Appellant to demonstrate that he indeed paid the balance of the purchase to the deceased, and he did not produce evidence of acknowledgement of these monies by the deceased, and in the absence of such acknowledgment the evidence of PW 3 was not credible. Third and last, that the terms of the subject sale agreement at clause (8) also provided that the completion was to take place at the offices of Katana Kalama advocate, and the Appellant did not clear the air why payments were being made at Red Brick hotel instead of Katana's office, and did not provide any copies of the completion documents stated under clause 8.
 14. We have re-evaluated the evidence on the sale and transfer processes undertaken by the Appellant, and also hold the view that the Appellant, PW2 and PW3 were not credible witnesses, for reasons of contradictions and inconsistencies in their evidence particularly as regards payment of the purchase price and transfer of the suit property. The Appellant's testimony as regards payment was as follows "On 29th October 2005 I paid Kshs 6 million. On 10th November 2005 I paid Kshs 7.5 million in cash at his (the Deceased's) office situated along Jomo Kenyatta Avenue". It is notable he makes no mention of PW2 and PW3 being present when the said payments were made, and stated on cross examination that his advocate Katana Kalama, since deceased, was the one who was present. He also makes no mention of a Red Bricks Hotel.
 15. PW2 on her part stated that they went to Red Bricks Hotel on 29th October 2005, and found two people, one of whom "looked familiar as I had seen his face on TV". She did not indicate who the people were. She also suggested that the item she was carrying on that day to the hotel was money, but testified that she did not see any money being paid. That on 10th November 2005, she carried similar luggage which she did not identify, and went "to the hotel again". Likewise PW3 states that he was introduced to a Mr. Mathenge, and he was present when the Appellant paid the Mr. Mathenge in cash at Red Bricks Hotel on 13th October 2005 and 29th October 2005. That on 10th November 2005, in the evening, "they went again to Mr. Mathenge and paid Kshs 7.5 million". PW3 stated he saw PW2 on 29th October 2005, and on 10th November 2005. However, PW2's testimony was that on 10th November 2005 she "did not go up to the office but remained in the car".
 16. Quite apart from the inconsistencies and contradictions in the evidence by the Appellant's witnesses, the Respondents in this regard produced hospital documents to show that the same Mr. Mathenge who was alleged to have been paid in his offices and in the hotel, was admitted at Mombasa Hospital from 16th October 2005 until 23rd October 2005, when he was transferred to Nairobi Hospital and hospitalised until his death in January 2006. They produced invoices from the Mombasa Hospital dated 23rd October 2005 showing that the Deceased was admitted at the said hospital from 16th to 23rd October 2005, and receipts of payments made at Nairobi Hospital on 12th and 16th November 2005 and 1st December 2005 as evidence in this regard. This clearly controverted the Appellant's evidence that during this period, the Deceased not only received payment for the suit property, but also signed the transfer of lease. It is thus our finding that the Appellant's evidence was not truthful and reliable, and he did not discharge the burden of proving that the subject transactions were lawful as required by section 26 of the *Land Registration Act*.



17. In addition, the Respondents in our view did produce sufficient evidence of fraud on the Appellant's part that was not controverted. The requirements in proving fraud was explained by this Court in the case of *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (Deceased) vs Stephen Njoroge Macharia* [2020] eKLR. These requirements are firstly, that fraud should not only be specifically pleaded and particularized, but that its basis should also be laid by way of credible evidence upon which the Court can make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land. Secondly that fraud, being a quasi-criminal charge must also be proved on a standard which though below beyond reasonable double doubt, is above a balance of probabilities.
18. The Respondents in this respect relied on the evidence of two witnesses during the trial in the ELC. The first witness was James Mwai Mathenge, (DW1), a director of the 1st Respondent and son of the Deceased. He testified that his father bought the suit property in 1975 and based on a search conducted on 11th October 2011, the suit property was in his father's name but because they could not trace the title and reported the loss to the police and were issued with an abstract. He testified that on 16th October 2005 his father was taken ill, and his condition deteriorated, and on 23rd October 2005 he was transferred from Mombasa Hospital to Nairobi Hospital where he died on 12th January 2006. He therefore could not transact business. He further testified that he engaged a forensic expert who examined the signatures on the transfer forms and the sale agreement and found that they did not belong to his father.
19. DW2 was CIP Alex Mwongera, a document examiner at the Directorate of Criminal Investigations at Nairobi. He examined the documents of the sale and transfer of the suit property and prepared a report dated 15th July 2014, where he found that the Deceased's known signatures in the Deceased's company documents marked B1 to B3 were by the same person, and different from the Deceased's signatures in Transfer for Lease dated 10th November 2005 and sale agreement dated 13th October 2005, which were marked A1 and A2 respectively.
20. The Respondents' counsel in addition submitted that they had provided evidence of the Deceased illness by way of hospital bills, and as a consequence proved fraud on the part of the Appellant. Further, that they proved by way of expert evidence that the Deceased did not sign the sale agreement and transfer in dispute. They also noted that the transfer and registration of the Appellant's title was done in the face of a prohibitory order registered on 17th September 1981, and placed reliance on Section 31 of the Registered *Land Act* for the position that this was in itself evidence of illegality.
21. The Appellant on the other hand submitted that the fact on sickness was never pleaded and it was brought very late in the day and was contrived. Further, that the Land Registrar, Kwale never participated in the proceedings though he was a crucial part in clarifying whether the Appellant's title was genuine or not. He also noted that the loss of title was reported when the suit was pending. Reference was made to *Gitwany Investment Limited vs Tajmal Ltd & Another* (2006) 2 EA 76 which placed the burden of proving fraud on the person who raised it. Therefore, there was no evidence to find that the Appellant's title was not lawful.
22. The ELC findings on the proof of fraud were as follows:
 - “26. The issue of forgery/fraud raised by defendants has been aptly explained in the forensic examiner's report. DW 2 said the known signatures provided did not match those in the questioned documents. The plaintiff did not in his evidence state that he requested for provision of the known signatures and the same were denied. The submission that the fraud could only be proved by the evidence of



the Land Registrar Kwale is without a foundation as a Land Registrar is not a handwriting expert to investigate signatures. There was also an order registered on the title prohibiting any transfer. There is no evidence the same had been lifted at the time of registration of the title into the plaintiff's name. Once it was raised, the plaintiff had the obligation of rebutting it by producing a certificate of search he did before entering into the agreement to purchase the land.”

23. We have already found that the Respondents demonstrated by verifiable evidence that at the time the Deceased was alleged to have received the balance of the purchase price and signing the transfer, he was ill and hospitalised. DW2 undertook a forensic examination of the Deceased's signatures in the Transfer for Lease dated 10th November 2005 and sale agreement dated 13th October 2005 and the Deceased's known signatures from his company's documents, and made a finding that the signatures were not made by the same person. The Appellant's evidence in this regard through the testimony by PW4, was that he could not undertake a forensic examination of the transaction documents as he did not have the known signatures of the Deceased. In essence the Appellant did not controvert the forensic findings as regards the authenticity of the Deceased's signatures in the Transfer for Lease dated 10th November 2005 and sale agreement dated 13th October 2005. In light of this evidence, we cannot fault the trial judge for finding that the Appellant's title was not regularly acquired.
24. We also note that the evidence of the Deceased's hospitalization was first introduced by the Respondents in documents filed with their original Statement of Defence filed in the ELC dated 7th December 2011, and the Appellant's allegations that the evidence was contrived and was an ambush has no basis. In addition, the claims as regards the forgery of the Deceased's signatures, and non-payment of the purchase price were specifically pleaded and particularized in the Respondents' Counterclaim. The Respondents, have proved to the required standard that there was fraud and illegality on the part of the Appellant in the procurement of the Deceased's signatures on the subject sale agreement and transfer of lease, and in his allegations and evidence of payment of the purchase price. In the circumstances, it therefore follows that all the subsequent actions by the Appellant arising from the forged sale agreement and transfer of lease were also fraudulent, including the registration of the Appellant as proprietor of the suit property, and the participation of the Appellant and relevant land registry officials in this regard.
25. No basis has therefore been demonstrated by the Appellant to justify any interference with the judgment of the ELC. This appeal accordingly fails, and is dismissed with costs to the Respondents.
26. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MARCH 2022.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL



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

Signed

DEPUTY REGISTRAR

