



**Githugu v Guthua & another (Civil Appeal 161 of 2017)
[2022] KECA 1288 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KECA 1288 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 161 OF 2017
W KARANJA, F SICHALE & S OLE KANTAI, JJA
NOVEMBER 18, 2022**

BETWEEN

NANCY WANGECHI GITHUGU APPELLANT

AND

DOMINIC KARIMI GUTHUA 1ST RESPONDENT

NELSON KARIMI NGIRIGACHA 2ND RESPONDENT

(An appeal from the Judgment of the Environment & Land Court at Kerugoya (Olao, J), dated 28th July 2017 in (ELC Civil Appeal/ Cross Appeal No. 43 of 2004)

JUDGMENT

1. This is a second appeal arising from the judgment of the Environment & Land Court sitting at Kerugoya (Olao, J.) dated 28th July 2017, inter alia, dismissing the 2nd respondent's appeal with respect to land parcel No. Mutira/Kianjege/385 and further dismissing the appellant's Cross Appeal Kerugoya ELC Appeal No. 43 of 2004.
2. The brief background to the appeal relates to land parcel number Mutira/Kianjege/75 measuring 5 acres belonging to Githugu Nyamu (deceased), who was the appellant's father.
3. It was the appellant's case that her father was allegedly selling 2 acres of his land to the 2nd respondent but the 2nd respondent defrauded him of his 5 acres and failed to pay consideration for the 2 acres that he was buying, whereupon he allegedly subdivided the land into 2 portions of 2 ½ acres each, being Mutira/Kianjege/348 and Mutira/Kianjege/347. That, the 2nd respondent further subdivided Mutira/Kianjege/348 into 2 portions being Mutira/Kianjege/385 measuring 2 acres and Mutira/Kianjege/386 measuring half acre and further subdivided Mutira/Kianjege/347 to Mutira/Kianjege/359 measuring 1 acre and Mutira/Kianjege/ 360 measuring 1 ½ acres and subsequently transferred Mutira/Kianjege/386 and Mutira/Kianjege/360 to the 1st respondent. That, the appellant



subsequently lodged cautions over all the land parcels prompting the 2nd respondent to file suit in the lower court being Kerugoya SPMCC No. 379 of 2010, whereupon the appellant also filed suit being Kerugoya SPMCC No. 403 of 2010, seeking, inter alia, transfer of the said parcels to herself as the Administrator of the Estate of her late father whereupon the 2 suits were subsequently consolidated with Kerugoya SPMCC No. 403 of 2010, being the lead file and vide a judgment delivered on 26th July 2012, S.N Ndegwa P.M, entered judgment, inter alia, in favour of the appellant herein and dismissed the counter claim by the 2nd respondent against the appellant herein.

4. Being dissatisfied with the judgment of the lower court, the 2nd respondent filed an appeal against the appellant herein whereas the appellant on the other hand filed a cross appeal against the 1st respondent namely; Kerugoya ELC Civil Appeal No. 43 of 2004.
5. Vide a judgment delivered on 28th July 2017, (Oloa, J) dismissed the 2nd respondent's appeal with respect to land parcel number Mutira/Kianjege/385 and further partly allowed his appeal with respect to land parcel number Mutira/Kianjege/359 and dismissed the cross appeal by the appellant herein thus provoking the instant appeal and cross appeal by the appellant and the 2nd respondent respectively, that are now currently before us.
6. The appellant in her Memorandum of Appeal lodged in Court on 17th November 2017, has raised the following grounds of appeal:
 1. The Learned Superior Court Judge erred in fact and in law in failing to order the 1st respondent herein to transfer land parcel No. Mutira/Kianjege/360 and 386 when there was a finding that the 2nd respondent who transferred the same to the 1st respondent had irregularly acquired the same and could not pass good title to him.
 2. The Learned Magistrate erred in fact and in law in holding that the respondent had proved his case failing to hold that the respondent herein was not an innocent purchaser as he bought the land knowing fully well that the same belonged to the appellant's father who was ill and protested when the land was illegally acquired from him.
 3. The Learned Superior Court Judge erred in fact and in law in varying the lower court judgment concerning land parcel No. Mutira/Kianjege/359 when it was not sought for by any of the parties in the ground of appeal.
 4. The Learned Superior Court Judge erred in fact and in law in failing to allow the appellants appeal against the 2nd respondent.
7. The 2nd respondent (though indicated as the 1st respondent) in the Notice of Cross of Appeal lodged in Court on 13th February 2018, faulted the learned Judge for, inter alia, making orders against him. He contended that the court had no jurisdiction to issue the same as the suit had been filed out of time.
8. The appeal was urged by way of written submissions with oral highlights by the parties on 13th July 2022. Ms Anne Thungu learned counsel appeared for the appellant whereas Ms Wanjiru Wambugu appeared for the 1st respondent. There was no appearance for the 2nd respondent.
9. The appellant sought to argue the 4 grounds of appeal together and submitted that the learned Judge erred in not cancelling the title of the 1st respondent who had purchased the land from the 2nd respondent who had acquired the same fraudulently and that further both the High Court and the lower court found that the 2nd respondent had converted 5 acres fraudulently but failed to cancel the title of the 1st respondent.



10. Regarding the 2nd respondent's cross appeal, it was submitted that this being a second appeal, the respondent could not raise such extraneous matters at this point and that in his appeal before the High Court, he had only raised 4 grounds of appeal and none of them touched on the jurisdiction of the court or limitation of time and that the cross appeal raised issues of fact. He also faulted the High Court for finding that the suit had been filed within time.
11. On the other hand, it was submitted for the 1st respondent that the appellant's appeal was fatally incompetent in that the appellant in the High Court had not filed an appeal against the 2nd respondent as he had only filed an appeal as against the 1st respondent herein and an appeal cannot be directly filed from the lower court to this Court.
12. It was further submitted that the appellant had deviated from all the pleadings in respect to the cause of action against the 1st respondent. Regarding the 2nd respondents cross appeal, it was submitted that the 2nd respondent had not filed any submissions nor served the same upon the 1st respondent. Consequently, we were urged to strike out this appeal.
13. This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina v Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings, inter alia, that on a second appeal, the Court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of *Martin versus Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held, inter alia, that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.
14. Having carefully considered the record in the light of the rival submissions set out above, the issue (s) that fall for our determination is as follows:

1. Whether the Learned Judge erred in law in not cancelling the title of the 1st respondent who had purchased the land from the 2nd respondent who had acquired the land through fraudulent means.

15. As we have alluded to earlier, this is a second appeal. As such this Court is enjoined to confine itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered.
16. In the instant case there were concurrent findings of fact by both the lower court and the High Court that indeed the appellant was able to prove that the 2nd respondent had fraudulently transferred 2½ acres out of land parcel No. Mutira/Kianjege/375 to himself instead of 2 acres as per the agreement dated 13th September, 1977 between himself and the deceased.
17. Equally, both the courts below made concurrent findings of fact that there was no evidence of fraud attributable to the 1st respondent herein. The learned Judge while addressing this issue in his judgment stated as follows:



With regard to land parcels No. Mutira/Kianjege/360 and 386 which Dominic Karimi Guthua had purchased from Nelson Ngirigacha Kimanga, the trial magistrate made the following findings;

“As for the 2nd defendant, it has not been proven that when he purchased land parcels Mutira/Kianjege/360 and 386 from the 1st defendant he knew that they had problems. The plaintiff stated the same as well he will thus retain the same.”

What the trial magistrate was stating was that no evidence of fraud had been proved as against Dominic Karimi Guthua who was the 2nd defendant in the trial before the subordinate court. In my view, that finding was also founded on sound evidence because Nancy Wangechi Githugudid not lead any evidence of fraud against Dominic Karimi Guthua. Indeed, in her evidence in chief she exonerated him from blame when she said;

“I would not know how 2nd defendant acquired this parcel of land but he said he proclaimed (sic). I would not know if he was aware that the land had a problem whilst purchasing it.”

Dominic Karimi Guthua himself said he bought the land parcels No. Mutira/Kianjege 386 and 360 from Nelson Ngirigacha Kimanga in 1983 and 1982 respectively and paid the entire purchase price. He stated that he conducted a search at the lands office and found both titles clean and there were no people living on the said parcels. In her cross appeal against Dominic Karimi Guthua, Nancy Wangechi Githugu avers that the trial magistrate erred in failing to order him to transfer land parcels No. Mutira/Kianjege/360 and 386 when she had held that the same were irregularly acquired and that the trial magistrate erred in failing to hold that Dominic Karimi Guthua was not an innocent purchaser and had also come to court with unclean hands. Having made the finding that Dominic Karimi Guthua purchased the land parcel numbers Mutira/Kianjege/360 and 386 without any knowledge “that they had problems”, the trial magistrate was entitled to make the order that she did leaving those parcels to Dominic Karimi Guthua as no evidence of fraud had been proved against him. The titles to land parcels No. Mutira/Kianjege/360 and 386 are in the names of Dominic Karimi Guthua and were produced in evidence at the trial. Under Section 26 (1) (a) of the *Land Registration Act*, those titles cannot be expunged except:

“on the ground of fraud or misrepresentation to which he person is proved to be a party.”

There was no evidence of either fraud on part of Dominic Karimi Guthua in the manner in which he obtained the titles to land parcels No. Mutira/Kianjege/360 and 368 nor any evidence that he was a party to the fraudulent activities of Nelson Ngirigacha Kimanga. In the circumstances, Nancy Wangechi Githugu’s cross appeal against Dominic Karimi Guthua in relation to land parcels No. Mutira/Kianjege 360 and 368 is dismissed.” (Emphasis ours.)

18. From the circumstances of this case and both the subordinate and the High Court having arrived at concurrent findings that there was no evidence of fraud on part of the 1st respondent in the manner in which he obtained the titles to land parcel numbers Mutira/Kianjege/360 and 368 nor that he was party to the fraudulent activities of the 2nd respondent, we have no reason or basis to fault the learned Judge for not cancelling the 1st respondent’s title. Additionally, having perused the record, it has not been shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered. Accordingly, this ground of appeal is without merit and the same must accordingly fail.



19. Regarding the 1st respondent's contention that the instant appeal is fatally incompetent for the reason that the appellant had not filed an appeal against the 2nd respondent in the ELC and that she could not now purport to join the 2nd respondent in the current appeal, it is our considered opinion that this issue is moot bearing in mind the fact that the 2nd respondent did not participate in the current proceedings. Consequently, nothing turns on this point.
20. The upshot of the foregoing is that the appellant's appeal is without merit and the same is hereby dismissed with costs.
21. Turning to the 2nd respondent's cross appeal, we have looked at the 2nd respondent's Memorandum of Appeal before the ELC Court dated 21st August 2012, where the 2nd respondent had raised 4 grounds of appeal viz-a viz the Notice of Cross Appeal filed in this Court on 13th February 2018, where the 2nd respondent is raising 9 grounds of cross appeal.
22. The issues that the 2nd respondent is now raising cannot be the subject of determination by this Court as they were never before the ELC and the 2nd respondent cannot now be heard to raise the same. In any event, the 2nd respondent did not participate in these proceedings and neither did he file nor serve any submissions pursuant to the directions given by this Court on 6th June 2018.
23. Given the prevailing circumstances, the only inevitable conclusion that we arrive at is that the 2nd respondent's cross appeal is without merit and the same is hereby dismissed in its entirety with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

