



**Warari v Wangora & another (Civil Appeal 504 of 2019)
[2022] KECA 1334 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1334 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 504 OF 2019
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA
DECEMBER 2, 2022**

BETWEEN

RAPHAEL MUGWANJA WARARI APPELLANT

AND

JACOB MWANTO WANGORA 1ST RESPONDENT

DISTRICT LAND REGISTRAR 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Kajiado (C. Ochieng, J.) delivered on 23rd October 2018 in ELC Case No. 15 of 2017 - Formerly Nairobi ELC No 101 of 2001)

JUDGMENT

1. By a plaint dated January 11, 2001 filed in the High Court of Kenya at Nairobi as Civil Case No 101 of 2001 (which was subsequently transferred to the Environment and Land Courts (ELC) at Kajiado as ELC Case No 15 of 2017), the appellant, Raphael Mugwanja Warari, sued the 1st and 2nd respondents, Jacob Mwanto Wangora and the District Land Registrar, Kajiado, together with the Olkejuado County Council (the council), claiming that he, the appellant, was allocated plot No 14573 (formerly plot No 305/279), Ngong, by the commissioner of lands, and on the authority of the council, on September 2, 1991.
2. In the suit, the appellant prayed for: rectification of the register and cancellation of the certificate of title in respect of LR No Ngong Township/Block 1/423 (the suit property) issued to the 1st respondent; a declaration that the suit property belonged to him; an order for a permanent injunction to restrain the respondents from alienating, dealing in, transferring or trespassing on the suit property; general damages; costs and interest thereon.



3. The 1st respondent denied the appellant's claim vide his statement of defence dated July 1, 2009. He contended that he was lawfully issued with a certificate of title to the suit property way before the institution against him by the appellant of Chief Magistrate's Civil Case No 6464 of 1995 over the suit property; that the suit aforesaid was dismissed on September 9, 2004; that prior thereto, the appellant had unprocedurally invoked the jurisdiction of the High Court of Kenya at Nairobi by filing Civil Case No 101 of 2001 during the pendency of the suit in the magistrate's court; that his title to the suit property was absolute and indefeasible at law; and that the appellant was not entitled to any of the prayers sought. He urged the court to dismiss the appellant's suit against him with costs.
4. The 2nd respondent also filed a statement of defence dated March 24, 2004 contending that, if at all he registered the 1st respondent as the owner of the suit property, he did so lawfully in the bona fide belief that he was discharging his statutory duties. According to him, the appellant's suit was bad in law in that it offended the provisions of the Government Proceedings Act. He prayed that the same be dismissed as against him.
5. In its statement of defence dated February 13, 2001, the council, which is not party to this appeal, denied the appellant's claim and contended that the area known as Ngong had not been surveyed at the material time; that the appellant had no legal right over the suit property, and that such rights had not arisen in favour of any party; and that the appellant's suit was bad in law for duplicity. It prayed that the same be dismissed with costs.
6. In its judgment delivered on October 23, 2018, the ELC (Christine Ochieng, J) dismissed the appellant's suit and found that the suit property had been subdivided into two plots, namely: LR No 14572, which was allocated to the appellant, and LR No 14573, which was allocated to the 1st respondent. In her findings, the learned judge had this to say:

From the evidence presented by PW1 and DW1 it is evident that Ol Kejuado County Council that was the allotting authority, subdivided plot no 305/279 into two, allocated the same separate numbers and allotted the separate portions to the plaintiff as well as the 2nd defendant respectively. According to the letters of allotment, sketch map and letters from the County Council of Ol Kejuado presented in court, it is evident that the two plots are separate entities.

According to the letter dated the November 16, 1994 the clerk to council Mr AM Leina explains that LR No 14573 and 14572 (formerly 305/ 329B and 305/279 Ngong) are two distinct plots with LR No 14573 belonging to the 2nd defendant while LR No 14572 belongs to the plaintiff. He clarified to the commissioner of lands that his reference 11955/11.43 dated September 2, 1991 should be disregarded as it contradicts the fact that the plot is two parcels and insists the survey plan should be respected. This letter was in response to the commissioner of lands letter dated the March 23, 1994 seeking clarity on the LR 305/ 329B and 305/279 Ngong. According to a letter dated the May 23, 1995, the plaintiff was later directed by the clerk to the council to cease encroaching on parcel number 305/329 B and remove his fence. All these are indicative that the plaintiff was well aware the two plots were different and this was clarified by the county council that was the allotting authority.

It is not in dispute that both the plaintiff and the 2nd defendant all had their respective certificate of leases processed and issued. Since the Ol Kejuado County Council that was the allotting authority had already shed light on the two plots and directed the commissioner of lands to issue the certificate of leases, I hold that the two parcels of land were distinct and LR No 14573 (305/329 B) now Block 1/423 Ngong was hence available for allocation.



Even if the plaintiff's rights were violated as claimed, because he had initially been allotted the land, but since the same was subdivided by the said allotting authority that prepared a fresh survey plan, issued new letters of allotment and gave direction to the commissioner of lands to prepare the certificate of lease in the 2nd defendant's name, this do not point to fraud on the part of the 2nd defendant nor the fact that the said land was acquired fraudulently. If the plaintiff had an issue with the subdivision of the plot prior to issuance of the certificate of lease, he should have taken it up with the allotting authority and not the 2nd defendant before filing this suit.

The plaintiff claims that the 2nd defendant fraudulently acquired the suit land. The burden of proof was upon the plaintiff to present evidence to prove that the Ol Kejuado County Council did not allot the suit land to the 2nd defendant and further the commissioner of lands declined to issue the certificate of lease and the one presented in court by the 2nd defendant was hence fake. But he however failed to adduce any evidence to prove the said allegations of fraud.

Based on the evidence adduced above, and in relying on section 26(1) and 24(b) of the [Land Registration Act](#), as well as being persuaded by the above cited authorities, the court finds that the 2nd defendant has indeed satisfied the legal proviso that he is the proprietor of the suit land and hence has absolute ownership including all rights and privileges appurtenant to it. I further find that the 2nd defendant's certificate of lease supersedes the plaintiff's alleged letters of allotment over the suit land and will proceed to uphold it.'

7. Aggrieved by the judgment of C Ochieng, J, the appellant moved to this court on appeal on the grounds that:
- 1) The learned trial judge erred in fact and generally misapprehended the facts of the matter thus holding that it was the appellant's evidence that LR No 14573 (Ngong Township/block1/423) was allocated to the 1st respondent/2nd defendant thus ultimately basing her reasoning on this fact and arriving at a wrong decision.
 2. The learned trial judge misdirected herself and arrived at the decision that original plot No 305/279 was subdivided into two and one plot allocated to the appellant and another to the 1st respondent despite the appellant's evidence that Original Plot No 305/279 was allocated to him.
 3. The learned trial judge erred in law and in fact in taking judicial notice that in processing of certificate of lease it was the county council that provided authority for issuance of certificate of lease despite the appellant asserting he had been issued with an allotment letter on the September 2, 1991 as relates to both LR No 14572 (Ngong Township/block 1/424) and LR No 14573 (Ngong Township/block 1/423) being a subdivision of Original Plot No 305/279 thus LR No 14753 was not available for allotment.
 4. The learned trial judge erred in law and in fact in failing to find that the 1st respondent/2nd defendant fraudulently obtained the certificate of lease for LR No 14753 (Ngong Township/block 1/423) despite the fact that the 1st respondent did not contest the fact that he settled the land processing fees in the name of the appellant.
 5. The learned trial judge erred in law and in fact in holding that LR No 329B and 305/279 were distinct properties despite the appellant leading evidence to demonstrate that original plot No



305/279 was allocated to the appellant and subdivided into two portions LR 14572 and LR 14573.

6. The learned trial judge erred in law and in fact in failing to take into account the evidence of PW2, Mr Anthony Macharia Kariuki despite the fact that his evidence was not challenged by the respondents.'
8. In support of his appeal, the appellant filed written submissions dated September 2, 2020. On the authority of *Mbau Sawmills Limited vs Attorney-General and another [2015] eKLR*, he submitted that a letter of allotment was contractual and legal, and that it could not be wished away. Citing the case of *Ikiaria M'Rinkanya and another vs Gilbert Kabere M'Mbijiwe [1982-1988 1 KAR 196]*, the appellant contended that once a parcel of land is allocated, the same becomes private property and is no longer available for allocation to another person, unless the first allocation is validly and lawfully cancelled. He concluded his submissions by arguing that there is no guarantee of a title that is acquired by fraud or misrepresentation, or where it has been acquired illegally, unprocedurally or through a corrupt scheme (see *Esther Ndengi Njiru and another vs Leonard Getei Mbugua [2020] eKLR*). He urged us to allow the appeal as prayed.
9. In opposition to the appeal, the 1st respondent filed his written submissions dated November 18, 2020. On the factual background of the dispute, he submitted that the suit property was not a subdivision of plot No 305/279; that he was allotted plot No 305/329 which, upon survey of the Ngong area, became LR No 14573, which was later converted to title No Ngong Township/Block 1/423; that the appellant was issued with title No Ngong Township/Block 1/424 from LR No 14572 which, before survey, was known as plot No 305/279; and that no initial letter of allotment to the appellant was produced in evidence in support of his claim.
10. According to the 1st respondent, the receipts in acknowledgement of payments on account of the conveyance, registration, stamp duty and survey fees were erroneously issued in the appellant's name, by which time he (the 1st respondent) had already been issued with a letter of allotment; that he made those payments by cheque, which was not disproved; and that the allegations of fraud with which he had been charged were dismissed. He asked us to dismiss the appeal with costs.
11. This being a first appeal, it is our duty to re-evaluate and re-examine the evidence adduced at the trial and draw our own conclusions. In doing so, we must bear in mind the fact that we have not had the benefit of seeing and hearing the witnesses first-hand and, accordingly, take into account that fact.
12. This approach was adopted in the persuasive decision of our predecessor court in *Dinkerrai Ramkrishan Pandya vs R 1957 EA p 336*. In that case, the court cited with approval the case of *Figgis vs R 19 KLR p 32*, which had adopted the principle in *The Glannibanta (2) (1876) 1 PD p 283* where the court had this to say at p 287:

' The great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanor and manner of the witnesses who have been seen and heard by him are, as they were material elements in the consideration of the truthfulness of their statements. But the parties to the cause are nevertheless entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and 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.'



13. We also take to mind the decision in *Highway Developers Limited v West End Butchery Limited and 6 others [2015] eKLR* citing the case of *Selle vs Associated Motor Boat Co [1968] EA p 123*, which was also a case in point. In *Selle's* case (*ibid*), this court held:

' 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.'

14. Having examined the record of appeal and the grounds on which it is founded, we are of the considered view that the appeal stands or falls on our findings on the following issues of law and fact in respect of which learned counsel for the appellant and for the 1st respondent filed written submissions as aforesaid: whether the appellant had a right of claim over the suit property, to wit, LR Ngong Township/Block 1/423; whether, in any event, the 1st respondent's title to the suit property was liable to challenge by the appellant; and what orders we ought to make in determination of the appeal, including orders as to costs.
15. On the 1st issue, the factual background of the competing claims is instructive. From the evidence on record, it is clear that the genesis of the competing claims were two distinct, but unregistered parcels of land known as plot No 305/279 and 305/329B; that the appellant had fenced the two plots off claiming the right of ownership contrary to the survey plan No 119755/II dated December 8, 1993 (the survey plan); that according to the survey plan, LR 14573 (formerly 305/329B) belonged to the 1st respondent while LR No 14572 (formerly No 305/279) belonged to the appellant; that the two plots were subsequently surveyed, allocated and separately registered in the names of the appellant and the 1st respondent; that upon allotment and registration, the appellant was allotted plot No 305/279, which later became LR No 14572, and for which title No Ngong Township/Block 1/424 was issued to him; and that the 1st respondent was allotted plot No 305/329B, which later became LR No 14573, and for which title No Ngong Township/Block 1/423 was issued to him. Accordingly, the appellant became the first registered proprietor of LR No Ngong Township/Block 1/424 and, on the other hand, the 1st respondent became the first registered proprietor of LR No Ngong Township/Block 1/423 (the suit property).
16. The appellant claimed that he had been allotted the suit property; that, thereafter, the council fraudulently gave authority to the commissioner of lands to allot the same plot to the 1st respondent, who fraudulently paid for the survey, conveyancing and registration fees using the appellant's name; and that the 2nd respondent wrongfully and unlawfully registered the 1st respondent as the owner of the suit property leading to the first registration and issuance of a certificate of title in his name.
17. It is noteworthy that the alleged fraud or illegality was not proved as against the respondents or either of them. Indeed, the charge against the 1st respondent on that account in Nairobi Magistrate's Court Criminal Case No 810 of 2007 was dismissed. The question is, whether in the absence of proven fraud, misrepresentation, illegality, unprocedural conduct or proof of a corrupt scheme on the part of the 1st respondent, the appellant's claim over the suit property would stand. It would not.
18. We need not overemphasise the fact that mere allegation of fraud or misrepresentation, or other illegality or corrupt scheme, would not suffice. In *Kuria Kiarie & 2 Others vs Sammy Magera [2018] eKLR*, the Court of Appeal had this to say with regard to the standard of proof in fraud:

' Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof



upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.'

19. Section 26(1) of the [Land Registration Act](#), 2012 affirms the sanctity of title to immovable property and the indefeasibility thereof in the absence of fraud, misrepresentation or other unlawful conduct in its acquisition. The section reads:

' 26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.'
20. Prior thereto, sections 27, 28 and 143 of the Registered Land Act (repealed), under which the suit property was registered, protected the proprietary rights of a registered owner in similar terms as section 26(1) of the Land Registration Act.
21. It is noteworthy that the 1st respondent's certificate of title to the suit property was issued by the registrar on September 14, 1995. From that date on, the 1st respondent was the 'absolute and indefeasible owner' of LR No Ngong Township/Block 1/423 in the absence of fraud or misrepresentation on the part of the 1st respondent in its acquisition. We find nothing on the record as put to us to suggest that the 1st respondent acquired his certificate of title illegally, unprocedurally or through a corrupt scheme.
22. This court in [Embakasi Properties Limited & another vs Commissioner of Lands & another \[2019\] eKLR](#) held:

' Although it has been held time without end that the certificate of title is: 'conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof,' it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the [Land Registration Act](#), 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired 'illegally, unprocedurally or through a corrupt scheme.'

23. Indeed, the 1st respondent's absolute ownership of the suit property, and the indefeasibility of his title thereto, renders it free from challenge except on the above-mentioned grounds as recognised by statute law and decisions of this court. It is also instructive that it was a first registration. In view of the foregoing, we reach the inescapable conclusion that acquisition by the 1st respondent of the certificate of title to the suit property leaves the appellant without any right of claim. In the circumstances, the



certificate of title issued to the 1st respondent was, and remains, valid. Accordingly, we find nothing to fault the learned judge for dismissing the appellant's claim. Simply put, the 1st respondent's certificate of title is absolute and indefeasible.

24. Our finding on the first issue is decisive of the second, namely; whether the 1st respondent's title to the suit property is liable to challenge by the appellant. Having found no evidence of fraud, misrepresentation or other illegality on the part of the 1st respondent, we hold that the 1st respondent remains the absolute and indefeasible owner of the suit property and, in effect, the appellant's appeal fails. Accordingly, we hereby order and direct that:

1. The appellant's appeal be and is hereby dismissed;
2. The judgment and decree of the Environment and Land Court of Kenya at Kajiado Christine Ochieng, J) dated October 23, 2018 be and is hereby upheld; and
3. The costs of this appeal be borne by the appellant

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2022.

K M'INOTI

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JUDGE OF APPEAL

DR KI LAIBUTA

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JUDGE OF APPEAL

M GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

