



**Njagi v Migwi (Environment and Land Appeal E007 of 2023)
[2024] KEELC 5121 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 5121 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

**A KANIARU, J
APRIL 25, 2024**

BETWEEN

JOSEPH MUTURI NJAGI APPELLANT

AND

SEVERIAN WAIRIMU MIGWI RESPONDENT

*(Being an appeal from the judgement of Honourable Edwin N. Wasike PM in Siakago
MCL & E no. 9 of 2018 delivered by the Principal Magistrate Hon Ngii on 09.03.2023)*

JUDGMENT

1. This appeal arose from the judgment of the lower court at Siakago (Hon Edwin Wasike, PM) delivered on 9.3.2023. The Appellant – Joseph Muturi Njagi – had impleaded the Respondent– Severian Wairimu Njagi - in the lower court vide a plaint dated 01.03.2018 seeking, inter alia, a declaration that land parcel Nthawa/Siakago/2581 lawfully belonged to him as the successor of Edward Herbert Njagi Ngunyuu and that the registration of the respondent as the proprietor of the said parcel was fraudulent, illegal, null and void. He was also seeking that the respondent and anyone associated with her be evicted from the suit land and be permanently barred and restrained from utilizing the said land or interfering with the appellants occupation and use of the same.
2. The appellant’s case at trial was that the suit land Nthawa/Siakago/2581 belonged to his deceased father - Edward Herbert Njagi - who died in the year 2005. That succession proceedings were filed in respect of the deceased’s estate and upon confirmation of the grant, the suit parcel of land was inherited by the appellant. That after the succession proceedings, he visited that lands office at Siakago seeking to have the parcels of land he had inherited registered in his name. That it is at that point when he was informed that the suit land did not belong to his father as it was registered in the name of the respondent.



3. That upon obtaining a copy of the register of the suit land, he was surprised that the same showed the respondent as the proprietor of the land and that she had been registered as such on 07.05.2007. That he found this to be strange as his father died in the year 2005 yet the suit land was transferred to the respondent in the year 2007, which was two years after his father's death. That he had previously done a search of the suit land on or about 2008 and at the time, his father was the registered owner of the land.
4. It was his case further, that the suit land had on it premises comprising of a bar and a lodging constructed thereon by his father before he died which had been leased to the defendant. That the registration of the suit land in favour of the respondent was irregular, unlawful and fraudulent as there were no transfer forms executed by his deceased father transferring the land to the respondent and neither was there a consent from the land control board. At the hearing where he was actually the sole witness, he testified that at the time of his father's death, he was in Mombasa and was informed of his death by his relatives. That the respondent had purchased a different parcel of land, being plot no. 2576.
5. He accused the respondent of forging documents to have herself registered as the proprietor of the suit land and that she forged the green card of the suit land. He also accused the registrar of removing the authentic green card from the records. The registrar was however not made party to the suit. He informed the court that he was not aware that the respondent had purchased the suit land in 1997 at a purchase price of Kshs. 100,000 (One hundred thousand) or that her business started running in 1997. He also said that the respondent was not paying rent from the period of 2005 up to 2018.
6. He had in evidence a copy of the register of the suit land (without the name of the respondent), a copy of the deceased's death certificate, a copy of the certificate of confirmation of grant, a copy of the register of the suit land (this time with the name of the respondent, application for registration of caution, form for caution and a receipt for registration of caution).
7. The respondent had filed a defence in the lower court case where she stated that she had purchased the suit land from the late Edward Herbert Njagi Ngunyu for value and had lodged all the necessary transfer documents which were duly executed at the lands registry and lawfully obtained change of ownership. She denied any allegations of fraud, illegality, and/ or irregularity and put the appellant to proof.
8. At the hearing, the respondent on the other hand testified as DW1 and called one witness - Christopher Waititu Kamau - as DW2. She adopted her written statement as evidence and testified that she knew the respondent as he was the son of Edward Njagi Ngunyi who is deceased. Her case was that the deceased met her after he learnt that she was looking for land to buy. That he took her to the suit land and she confirmed to him that it suited her preference. That they agreed she would pay the purchase price of Kshs. 100,000. That the deceased obtained the land control board consent. That there was no written sale agreement as the sale agreement was verbal and that she paid the purchase price in cash.
9. Further that she was accompanied by DW2 when she was withdrawing the sum of Kshs. 100,000 from the bank which she gave to him and he rushed to the deceased who was queuing to deposit it at the bank in exchange for the transfer documents of the suit land. The deceased gave her transfer documents at that particular moment. That she took possession of the land around April 1997 after paying the purchase price and she erected permanent structures on the land including a bar and rest rooms. That she obtained compliance certificate from the physical planner which was issued on 19.09.2000 and which she produced as her exhibit no. 2. She was issued with a title deed in the year 2007. That around 1999 and 2000 she also bought another parcel of land registration no. 2576 from the deceased.
10. That around 2001 and 2002, they went to Siakago Law Courts where the Honourable magistrate signed the transfer documents of the suit land and parcel no. 2576 in the presence of the deceased and



PW2. That after the transfer documents were executed, she did not lodge them immediately but held them for several years since she knew the suit land had legally passed to her and therefore she didn't see the urgency to lodge them at the land registry. That when she got money in 2007, she went to lodge all the documents for change of ownership at the lands office in Embu where she was issued with a title deed in her name. She denied that she acquired the land illegally or that she forged any documents as she did not have the capacity to alter the records at the lands office. She also produced in evidence the title deed for the suit land as Exhibit no. 1.

11. DW2 on the other hand testified that he was the one who introduced the deceased to the respondent, who intended to purchase land. That he witnessed the payment of the purchase price of Kshs. 100,000 over the suit land. He confirmed that the respondent started developing the land by putting up a bar and restaurant business which became operational in 1998 and to which they were frequent customers. That in 1999, the deceased sold parcel 2576 which was adjacent to the suit land to the respondent which she paid for in instalments until she completed payment. That he also witnessed the signing of the transfer documents at Siakago law courts by the magistrate and that the respondent told him she did not have money to lodge the documents for change of ownership at the time and that she would lodge them later, which she did in 2007.
12. The trial court at Siakago in a judgement delivered on 09.03.2023 held;
 - a. That the appellant had the burden of producing cogent evidence to substantiate his claim. That this is a case where the respondent stated that she bought land from the deceased way back in the year 1997. The deceased passed on in the year 2005 and that is about 8 years after the alleged sale agreement. Nowhere in these proceedings has it been shown that the deceased lamented about the defendant's occupancy of the suit property.
 - b. That the appellant stated in her statement that he used to stay in Mombasa and only came back home upon the death of his father. The question that begs is how he could have known the dealings that his late father had with the respondent.
 - c. That the appellant alleges the respondent fraudulently caused the name of his father to be removed in the proprietorship section of the register and instead caused her name to be entered. It is common logic that the Land Registrar is the custodian of all vital land documents. How then could the defendant make such alterations and yet she does not work at the lands office. And if that were the case then the plaintiff ought to have included the Land Registrar in his suit.
 - d. The appellant was never at one point registered as the owner of the suit land and he never dealt with it substantially and so it was doubtful that he has any capacity to question how his father dealt with the same considering the fact that his father never raised any complaint.
 - e. That the respondent was able to demonstrate how she bought the land from the deceased and after executing all the relevant documents the same was transferred in her favour. She availed a witness, DW2, who corroborated her claim. She established that she is the registered owner of the suit land and the appellant has failed to repudiate the claim.
 - f. The court found no merit in the appellants claim and dismissed the same with costs to the respondent.
13. The outcome of the lower court case is what triggered the appeal now before me. The memorandum of appeal came with fifteen (15) grounds as follows:
 1. That the learned principal magistrate erred in law and fact in not finding that the appellant's entire suit had merit and ought to have been granted the orders sought.



2. That the learned principal magistrate erred in law and fact in not finding that the appellant had a *prima facie* case and that he had demonstrated that he had a valid claim to plot number 2581.
3. That the learned principal magistrate erred in law and fact in not considering that the respondent had admitted in court that she didn't have the relevant supporting documents to support her claim.
4. That the learned principal magistrate erred in law and fact in not considering that the appellant had asked for assistance in the said matter at Siakago police station due to the fact that the respondent had caused the said subject matter to be registered in her name fraudulently and the appellant was issued with an OB number and the respondent arrested but later released under unclear circumstances.
5. That the learned principal magistrate erred in law and fact in not considering that the respondent did not produce any document to support that she had bought the said land.
6. That the learned principal magistrate erred in law and fact in not considering that there was discrepancy in the respondent's date of acquiring her title and the date of his late father's death.
7. That the learned principal magistrate erred in law and fact in not considering that the respondent is a stranger to the family of the appellant.
8. That the learned principal magistrate erred in law and fact in not considering that the matter in dispute is family land and the respondent was intermeddling with the same contrary to the law of succession.
9. That the learned principal magistrate erred in law and fact in not considering that the appellant had appealed against part of the ruling/order after being dissatisfied vide ELC Civil Appeal no. 15 of 2018 Embu and it was allowed.
10. That the learned principal magistrate erred in law and fact in not considering that the respondent took advantage of the appellant and even never challenged the said grant.
11. That the learned principal magistrate erred in law and fact in not considering that the appellant was not served with some of the respondents documents therefore was condemned unheard contrary to our constitution.
12. That the learned principal magistrate erred in law and fact in not considering that the appellant through his advocate had applied for restraining orders of the respondent not to enter the said Nthawa/Siakago/2581 but later was surprised that the same was cancelled or done away with and the appellant was not involved accordingly.
13. That the learned principal magistrate erred in law and fact in not considering that there was conflict of interest between the advocate representing the appellant and the advocate representing the respondent.
14. That the learned principal magistrate erred in law and fact in failing to give the necessary weight to the appellant's evidence.
15. That the judgement was against the weight of the evidence adduced.

The court was urged to set aside the trial courts judgment, allow this appeal and the costs of the appeal be awarded to the appellant.



14. It was agreed that the appeal be disposed of by way of submissions. The record shows that only the appellant filed his submissions which was done on 08.11.2023. He gave a chronology of events and submitted that some of the key issues in the case was that his late father died on 20.05.2005 whereas the respondent had the suit land transferred to her in the year 2007, two years after his father's death. That neither did his deceased father nor mother mention in their life time any intention to sell the suit land. That the respondent did not produce in evidence the consent to transfer land nor the sale agreement or any receipts. That the respondent acquired the said land illegally and fraudulently and the same ought to be given to the appellant by virtue of succession cause no. 454 of 2008 in the High Court of Kenya at Embu. The cases of *Eddah Wangu & Another v Sacilia Magwi Kivuti (deceased) substituted with Ribereta Ngai* [2021] eKLR, *Jonah Kabugo v Martin Mbaya & Others* [2018]eKLR were cited in support of the submissions.
15. I have considered the appeal filed as well as the submissions of the parties and their arguments. My duty as the first appellate court is to re-evaluate and re-assess the evidence that was before the lower court and make my own conclusions while bearing in mind that the lower court had the advantage of handling the evidence first hand. The decided cases of *Selle v Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo v Shah* [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower court unless I am completely convinced that the lower court was wholly wrong in its appreciation of the evidence before it.
16. From the material before me, the clear question for determination is whether the respondent acquired registration of the suit land in her favour by way of fraud.
17. It is well settled that fraud is a serious allegation and the party alleging it must plead it, particularize it, and then strictly prove it to a standard higher than the usual one in civil cases of proof on a balance of probabilities but abt lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR, *Kinyanjui Kamau v George Kamau* [2015] eKLR.
18. Section 26 of the *Land Registration Act* also obligates this court to accept certificates of title as conclusive evidence of proprietorship, unless the provisos under section 26 (1) (a) or (b) are established. To be more precise, the grounds on which a title can be nullified are if there is evidence of fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
19. It is not in dispute that the respondent is the registered proprietor of the suit land. The burden of proving that she acquired the said registration by way of fraud lay on the appellant as required by Section 107 of the *evidence Act* which places the burden of proof on the person who wishes the court to believe a certain state of affairs exists. The appellant's case was that he was not aware of any transaction that took place transferring ownership of the suit land to the respondent from his deceased father. As far as he was concerned, his deceased father had merely leased the premises thereon comprising of a bar and lodgings to the respondent and which lease had expired. He was also complaining that the respondent had been registered as proprietor of the suit land long after the death of his father which he found to be strange.
20. The respondent on the other hand explained that she had purchased the land from the appellant's father in 1999. She called a witness who testified that he witnessed the whole transaction from the point of sale to the point of transfer of the land to the respondent. Though there was no written sale agreement nor were the documents of transfer produced in evidence, the respondent did produce in evidence an approval from the Director of physical planning for a commercial development on the suit land issued to her in 2000 during the lifetime of the deceased. She testified that she erected permanent



structures on the land including a bar and restrooms. The said approval could not have been issued to the respondent were she not the owner of the suit land. A critical consideration in this judgment is that the respondent had gone into possession after buying the property.

21. Again, the respondent was very categorical that the instruments of transfer were executed in the lifetime of the deceased but due to financial constraints, she was unable to lodge them at the lands office for registration immediately. This is not something that is uncommon or something that can be said to be evidence of fraud. A transfer can be validly registered even after the death of the transferor as was observed in the court of appeal case of *Kagina v Kagina & 2 others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment) thus:

“We have revisited that rival position on the record and agree with the position taken by the Judge that a deceased person has capacity to divest himself of property during his lifetime known in law as gifts inter vivos which in the Judge’s opinion and correctly so in our view are not only protected under the Act but are also sanctionable by a court of law irrespective of whether they are perfect or imperfect. By perfect is meant, complete, meaning the transfer of the gift inter vivos in favour of the beneficiary was elected and completed during the lifetime of the deceased while by imperfect is meant the transfer of the gift in favour of the recipient was incomplete as at the time of the demise of the deceased. As correctly observed by the Judge, lack of completion of the process of transfer does not of itself render the gift inter vivos invalid. It can be perfected by the grant holder if there is no contest over it, or alternatively sanctioned by a court where proven.

Our take on the above rival position is that we find no mis-appreciation or misapplication of the law on intermeddling. The position taken by Tanui, J in the *Gitau & 2 others v Wandai & 5 others case [supra]* is the correct threshold to be applied by a court addressing a complaint of alleged intermeddling in a deceased person’s estate and which we find from the record the Judge properly appreciated and applied.”

22. Also, as the trial court rightfully observed, the appellant was said to be residing in Mombasa and only came back after the death of his father. He would therefore not be able to ascertain whether his father disposed of the land or not or what transactions he carried out in relation to the land. I am also persuaded as the trial was court that the appellant was not able to prove any evidence of fraud on the part of the respondent in acquiring the suit land. He was not able to discharge his burden of proof and therefore this court finds no reason to interfere with or disturb the lower court judgement.
23. The appeal is hereby dismissed with costs to the respondent.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH APRIL, 2024.

In the presence of

Momanyi for respondent,

Court Assistant - Leadys

A. KANIARU

JUDGE- ELC, EMBU

25/04/2024

