



**Isaboke v Nyakundi (Civil Appeal 114 of 2017)  
[2021] KECA 42 (KLR) (23 September 2021) (Judgment)**

Neutral citation: [2021] KECA 42 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 114 OF 2017  
S OLE KANTAI, HA OMONDI & M NGUGI, JJA  
SEPTEMBER 23, 2021**

**BETWEEN**

**JOSEPH OMB Aire ISABOKE ..... APPELLANT**

**AND**

**MARTHA MACHOKA NYAKUNDI ..... RESPONDENT**

*(An Appeal arising from the Judgment/Decree in the Environment & Land Court of Kenya at Kisii (J. M. Mutungi, J.) delivered on 12th May 2017 in ELC Case No. 495 of 2013)*

**JUDGMENT**

1. The central issue in the suit before the High Court of Kenya, Kisii, revolved around ownership of a parcel of land known as Title No. Central Kitutu/Bogetaorio/2292 (the suit land). Joseph Ombaire Isaboke (the appellant) claimed in the suit against Martha Machoka (the respondent) that he had purchased the suit land from the respondent's husband one Patrick Machoka Nyakundi and his father Nyakundi Moirongo on diverse dates in the years 2003 and 2004. That he had planted bananas and taken occupation of the suit land but that on 11th December, 2013 the respondent entered the suit land, evicted him and occupied it. He thus sought a declaration that the suit land belonged to him and an order of eviction against the respondent.
2. The respondent filed a statement of defence in which she denied the claim and averred that the appellant had obtained title to the suit land through fraud. Some of the particulars of fraud set out in the defence pertained to the fact that the appellant had presented an application to the Land Control Board in the name of Nyakundi Moirongo (the registered owner) knowing that he was dead; that a Letter of Consent dated 25th August, 2005 was addressed to a dead person (the registered owner having died on 1st July, 2005); and that a transfer was thus purportedly executed by a deceased person. It was further taken as a defence that the respondent's husband had no capacity to sell the suit land and that the transaction was void for lack of consent of the Land Control Board to transfer.



3. The suit was heard by Mutungi, J. who in a Judgment delivered on 12th May, 2017 found the suit unmerited; he dismissed it and ordered that the title to the suit land in the name of the appellant be surrendered to the Land Registrar for cancellation.
4. The appellant takes issue with those findings and has raised six grounds of appeal in the Memorandum of Appeal drawn by his lawyers, J.O. Soire & Company Advocates. The Judge is faulted in law for holding that some sale agreements introduced in evidence were null and void; that the Judge was wrong to fault validity of those agreement or consent of the Land Control Board when the deceased had consented to the same; that there was a shifting of the burden of proof and the Judge erred by holding that the title held by the appellant was not valid; that the Judge erred by ordering cancellation of title without a prayer being sought and, finally, that the Judge erred in law in deciding the case against the weight of evidence. We are asked to set aside the Judgement of the High Court and allow the suit with attendant costs.
5. When the appeal came up for hearing before us on 19th July, 2021 on a virtual platform learned counsel Mr. Soire appeared for the appellant while learned counsel Mr. Samwel Nyariki appeared for the respondent. Both counsel had filled written submissions which they did not wish to highlight. They left the whole matter for our consideration and decision.
6. In his submissions, the appellant relates the history of the matter as we have summarized from the pleadings, submitting that consent of the Land Control Board was validly given. Counsel faulted the Judge for doubting the authenticity of the minutes of the Manga Land Control Board submitting that they were genuine and given under the hand of the District Officer of the area. Counsel submitted that the deceased had executed all the agreements and application to the Land Control Board for consent to subdivide the suit land and later consent to transfer. Counsel cited Order 6 rule 6 [\*Civil Procedure Rules, 2010\*](#) for the submission that courts must decide cases on the basis of the evidence and pleadings placed before them and that parties are bound by their pleadings. Counsel submitted that it was wrong for the Judge to order cancellation of the title. In final submissions counsel for the appellant faults the Judge for not finding in favour of the appellant when there was overwhelming evidence in proof of the appellant's case.
7. In opposing the appeal the respondent relied on written submissions filed at the High Court. Counsel submits that title to the suit land was fraudulently obtained; that the appellant was guilty of intermeddling with the estate of the deceased contrary to Section 45 of the *Law of Succession Act* and we are asked to dismiss the appeal.
8. We have considered the record, submissions and the law.
9. The appellant testified as the sole witness in support of the claim – that he purchased the suit land, then numbered Title “63” from Patrick Nyanchoka Nyakundi; that there were 4 separate agreements where he would purchase portions at different times. He confirmed that the suit land was at the material time registered in the name of Nyakundi Moirongo (the father of Patrick Nyachoka Nyakundi and the father in law of the respondent). He produced 4 agreements into evidence and testified that he had on two different occasions attended the relevant Land Control Board accompanied by the deceased; that consent to subdivide and later consent to transfer were given and he obtained title to the suit land on 15th September, 2005. A surveyor had handled the transaction which showed that consent of the Land Control Board had been given on 28th August, 2005. He denied obtaining the land fraudulently but in cross-examination he confirmed that it was Patrick Nyakundi Machoka who sold him the land;



Patrick was not the registered owner and some of the agreements were executed in the absence of the registered owner. He said:

“... The consent shows the consent was granted on 28th August, 2005. By this date the registered owner was deceased. He died on 1st July, 2005. Nyakundi Muorongo the registered owner did not anywhere in the agreements indicate that he had consented to his son selling land ...”

10. In testimony before the Judge the respondent denied that the suit land had been sold to the appellant and contended that she knew that the appellant had leased land from her father in law for 10 years. The learned Judge analyzed the evidence and found as fact that the land the subject of the agreements for sale were governed by the provisions of the Land Control Act and the agreements became void after the expiry of 6 months from the date they had been made since there was no evidence that an application for consent of the Land Control Board had been made. The Judge also found that the person who had purported to make the agreements was not the registered owner.
11. We have perused those agreements. There is one dated 28th May, 2003 which identifies the vendor as Patrick Machoka Nyakundi; the purchaser is the appellant. It relates to a parcel of land known as East Kitutu/Bogetario/63 and a portion of 50 x 100 feet is to be sold to the appellant. There is an undated agreement which identifies the parcel of land as East Kitutu/Bogetario/63 and the said Patrick Machoka Nyakundi is identified as vendor and he is selling a portion of 70 x 150 feet to the appellant. In the agreement dated 14th April, 2004 again Patrick Machoka Nyakundi sells to the appellant “E.K. Bogetario 8/2228”. On 20th November, 2004 the same Patrick Machoka Nyakundi sells to the appellant a plot measuring 50 x 50 feet from an unidentified parcel of land.
12. It was common ground that the suit land was at the material time registered in the respondent’s father in law’s name (Nyakundi Moirongi). Permit for Burial showed that he had died on 1st July, 2005 aged 91 years. Letter of Consent in respect of transfer of the suit land was given at a meeting on 28th August, 2005. The parties to that transfer were Nyakundi Moirongi (as transferor) and the appellant as transferee.
13. The learned Judge perused all the documents produced in evidence including handwritten minutes of the Land Control Board of the area and found that consent to transfer could not be given when there was evidence that the deceased was dead.
14. We are in full agreement with those conclusions.
15. Patrick Machoka Nyakundi did not own any land and it follows that he had no capacity to enter those agreements at all. The purported consent to transfer given by the Land Control Board of the area which showed that Nyakundi Moirongi, the registered owner of the land, had attended a meeting on 25th August, 2005 was invalid as the said person had died on 1st July, 2005. Dead men belong to their graves and cannot attend meetings at all.
16. The Judge was right to invalidate the said transaction, the respondent having proved particulars of fraud set out in the defence. The appellant did not adduce any evidence on how those other parcels of land – E.K. Bogetario 8/2228 – had been created. There were no mutation forms to show how subdivision of the original land had been done and there was no evidence that the original owner of the land had been involved at all in the transaction on his land.
17. On the complaint by the appellant that the Judge was wrong to give orders not sought it is clear to us that the whole dispute between the parties related to validity or otherwise of the title held by the appellant. It was established to the required standard that the title was obtained fraudulently. The



parties in the pleadings and evidence made a case in respect of the title and it was within the courts mandate to determine. Parties are free to lead evidence and leave the matter for the court to decide – see *Odd Jobs v Mubia* where this Court stated:

“With respect to the learned Judge, that issue does not flow from the pleadings. However, that notwithstanding, a court may base a decision on an unpleaded issue where, as here, it appears from the course followed at the trial, that the issue has been left to the court for decision – see *Odd Jobs vs Mubia* [1974] EA 476”.

18. On the whole the appeal has no merit and we dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**H. OMONDI**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

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

Signed

DEPUTY REGISTRAR

