



REPUBLIC OF KENYA



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**Muchanga v Wabomba (Environment and Land Appeal E006 of 2021)
[2024] KEELC 3277 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3277 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E006 OF 2021**

EC CHERONO, J

APRIL 11, 2024

BETWEEN

PAUL OKUMU MUCHANGA APPELLANT

AND

GEOFFERY BARASA- WABOMBA RESPONDENT

*(Being an appeal arising from the Judgment of Hon.G.Adhiambo
(SPM) dated 27TH October, 2021 in SPM- ELC Case no. 55 of 2019)*

JUDGMENT

1. This appeal arises from the judgment of the Senior Principal Magistrate Hon. G.Adhiambo delivered on 27th October 2021 in Kimilili Chief Magistrate Court- ELC Case No.55 OF 2019.
2. The brief background of this case is that vide a plaint dated 7th November, 2019 the appellant sought for judgment against the respondent in the following terms;
 - a. An order of eviction, evicting the defendant, the defendant’s agents, workers, servant, children, wife or wives and any other person claiming through the defendant from land parcels no. Bokoli/Misikhu/1368.
 - b. A permanent injunction against the defendant, the defendant’s agents, workers, employees, children, wife, wives and any other persons claiming through the defendant from trespassing, entering, encroaching and/or entering land parcel No. Bokoli/Misikhu/1368.
 - c. General damages for trespass and loss of user of land parcel no. Bokoli.Misikhu/1368.
3. It was the appellants case that he is the registered owner of Land Parcel No. Bokoli.Misikhu/1368 measuring 0.4 Ha (‘the suit land’) having acquired his title deed in the year 2017 after a successful transfer from the original owner David Mang’eni Wekulo who is now deceased. He averred that the



- respondent without any colour of right or permission entered the suit land and constructed a house thereon claiming ownership. It was his statement that he resisted the trespass but the respondent declined to vacate the said land.
4. The respondent in response to the plaint filed his statement of defence and counterclaim dated 13th December, 2019 denying the appellants claim as contained in the plaint. He averred that if at all the appellant obtained and holds the title to the suit land, the same was obtained fraudulently. He went ahead and listed particulars of fraud on the part of the appellant. It was his statement that he has been in notorious occupation of the suit land since the year 2016 where he has put up a construction.
 5. In his counter-claim he averred that the original owner of the suit land died in the year 2010. He stated that the original parcel of land was Bokoli/Misikhu/1142 which was sub-divided into three portions thus Bokoli/Misikhu/ 1367,1368 and 1369 which plots were to be shared to the deceased family. The respondent stated that in order to source funds to facilitate the succession process, the family of the deceased approached him to purchase the suit land which he did for a consideration of Kshs. 443,432/= in an agreement witnessed by local administrators. He thereafter took vacant possession of the suit land and begun to develop the same.
 6. It was his contention that there was no way David Mang'eni-Deceased executed transfer documents in the year 2017 to facilitate issuance of a title to the appellant. He therefore sought for the certificate of title held by the appellant to be cancelled and for him to be registered as the proprietor of the suit land and for a permanent injunction to issue against the appellant restraining him from laying any claim over the suit land. Finally, he sought to have the appellants suit dismissed with costs.
 7. The suit was set down for hearing where the appellant called three witnesses in support of his case while the respondent called two witnesses. The trial court upon hearing and determining the issues before it delivered its judgment on 27th October, 2021 dismissing the appellants case and the respondent's counterclaim and ordering that the title in the name of the appellant be cancelled forthwith to revert to the name of the original owner David Mangeni and for each party to bear its own costs.
 8. Being aggrieved by the trial courts judgment, the appellant instituted the current appeal vide his memorandum of appeal dated 18th November, 2021 on the following grounds; -
 - a. That the trial learned Magistrate erred in law and fact when she misdirected herself on when had the interest in the suit land passed to the appellant hence arriving at a wrong conclusion that both appellant and respondent were intermeddlers.
 - b. That the trial learned Magistrate erred in law and fact when she misdirected herself on the principle governing bonafide purchaser for value without notice hence cancelled the appellants title.
 - c. That the trial learned Magistrate erred in law and fact when she introduced facts not pleaded for in the pleadings and proceeded to issue orders that were erroneous thus cancelling the appellants title deed hence arriving at a wrong conclusion.
 - d. That the trial learned Magistrate erred in law and fact when she ignored the appellants documents and submissions thus arriving at a wrong conclusion.
 9. The appellant sought to have the appeal allowed, for the court to set aside the lower courts judgment and evaluate facts and evidence on record and arrive at its own conclusion and for the costs to be awarded to him.



10. Directions were taken to have the appeal canvassed by way of written submissions. However, neither of the parties filed submissions as directed.
11. I have read the Memorandum of Appeal, the Record of Appeal and the court record generally and identify the following as the issues that emerge for determination:
 - a. Whether or not the appellant obtained title of the suit land fraudulently.
 - b. Whether the respondent proved his proprietary interest over the suit land.
 - c. Whether the parties are entitled to the orders sought.
 - d. Whether or not the trial court erred in ordering for a cancellation of the appellants title to revert to the original owner.
 - e. What order to make on costs.
12. This court as a first appellate court can therefore examine the evidence afresh and make a determination on the Appellants' claim on its merits, as per *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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 ...”
13. From the framing of the memorandum of appeal, it is clear that the Appellants impugn the trial court's judgment on the ground that the court misdirected itself on the pleadings, evidence as provided and principles of the law.
14. As earlier mentioned, the appellant called three witnesses who relied on their written statements. The appellant produced into evidence a copy of sale agreement, notice to attend Webuye Land District Tribunal, copy of title deed of the suit land, copy of title deed for Bokoli/Misikhu/1368 as PExhibit 2, 3,4 and 5 respectively. The appellant and his witnesses endeavored to prove that he obtained the title to the suit property lawfully. It was his evidence that he bought the suit land from Ronald Marisho Mangeni, the son of the registered owner and took occupation in the year 2008 while the respondent came into the land in 2018.
15. It emerged from PW2's evidence that the original land was land parcel no. Bokoli/Misikhu/28 which was divided into 2 portions i.e. 1141 and 1142 which plots were shared to the deceased's two wives. It was stated that the suit land is a sub-division of Bokoli/Misikhu/1142.
16. The respondent called two witnesses who relied on their witness statements. The respondent produced a sale agreement and letter to the land registrar as D-Exhibit 1 and 2. His evidence was that he bought his portion of land after the death of the deceased from his widow.
17. From the evidence presented before court, it is common ground that the appellant is the registered proprietor of the suit land having been issued with a certificate of title on 29th December, 2017. The



Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

18. Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... 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... 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, unprocedurally or through a corrupt scheme.”

19. A Certificate of Title issued by the Registrar upon registration therefore 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 and the title of that proprietor shall not be subject to challenge except – on the grounds stated above. Additionally, Article 40 of the Constitution guarantees the property rights of every person and provides under Article 40(3) that no person shall be deprived of property or of any interest in or right over property of any description without prompt and just compensation being made to the person deprived of the property.

20. In the case of *Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR the court while considering the repercussion of Section 26(1) above held that;

...the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.... the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme...

21. The respondent in his statement of defence averred that the appellant obtained his title fraudulently. It was his assertion that the appellant obtained title of the suit land in the year 2017 yet the registered owner of the suit land died in the year 2010. It was also his allegation that the appellant must have presented forged documents meant to mislead the land registrar so as to obtain title. It was further alleged that the title as issued to the appellant was issued whilst there was a restriction place on the title therefore secretly obtaining the title without following the due process by colluding with rogue lands officials.

22. The law requires that fraud must not only be specifically pleaded but also strictly proved. In the case of *Vijay Morjaria V Nansing M. Darbar & Another* [2000] eKLR, Tunoi J.A. (as he then was) held as follows regarding proof of fraud:

“It is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must,



of course, be set out, and then it should be stated that those acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts”

23. Further, although the standard of proof of fraud is not beyond a reasonable doubt, it is higher than proof on a balance of probabilities required in other civil claims. In *RG Patel Vs Lalji Makanji* (1957) EA 314 the court expressed itself as follows:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required”

24. I have re-examined the testimony of the respondents with regard to the allegation of fraud on the part of the appellant and note that the respondents D-Exhibit 3 which is a copy of the register indicates that the original owner of the suit land was David Mang’eni Wekulo-Deceased to whom title was issued on 10th November, 2008. The second entry which appears to have been cancelled is a restriction entered vide a letter from the area chief Misikhu- Location which was registered on 23rd February, 2009. The third entry is the registration of the appellant as the proprietor of the suit land which is recorded as the 2nd entry with the restriction having been cancelled. It is not clear under what circumstances the restriction was lifted.

25. Notably, the appellant did not rebut the allegation by the respondent that there was a restriction placed on the land at the time of registration of his title or explain the circumstances under which the restriction was cancelled. This court finds that the appellant did not produce a certificate of search to show the status of the land prior to his purchase, he did not provide a letter from the chief-Mikhisu area clarifying the issue of the restriction. There was also no court order presented that ordered the removal of the restriction and/or a lands official called to explain the circumstances as can be seen in the register as presented.

26. Section 78 of the [Land Registration Act](#) lays down the law regarding removal of restrictions.

78. Removal and variation of restrictions (1) The Registrar may, at anytime and on application by any person interested or at the Registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order that the removal or variation of a restriction.

(2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.

27. I subscribe to the decision in *Munyu Maina-vs-Hiram Gitiha* (2013) eKLR, where it was held, inter alia;

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

28. This court therefore finds that the element of fraud as pleaded have been proved. Having concluded as above, I find that the credibility of appellants title is shaken therefore, he cannot invoke indefeasibility



of title where the process of acquisition of the title is irregular. It therefore follows that the appellant is not worthy of the orders sought in his plaint.

29. On the other hand, the respondent claimed that he was the bona fide owner of the suit land having purchased the same from the family members of the deceased who were raising funds to facilitate the succession process. The respondent therefore asked the court to cancel the appellants title and order that the same be registered in his name and for a permanent injunction against the appellant.
30. To prove ownership of the suit land, the respondent dangled a sale agreement dated 22nd March, 2016 in which he is said to have purchased plot no Bokoli/Mikhisu/1368 at Kshs. 443,432 from one Berita Nasaka Simiyu. The respondent contends that the property was allegedly sold to him to facilitate the succession process of the estate of the deceased. This ideally connotes that the purported seller was not the legal representative of the deceased's estate.
31. Section 45 of the Law of Succession Act prohibits the intermeddling of a deceased asset; "No intermeddling with property of deceased person..." The effect of the above provision of the law is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorized to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.
32. It is therefore clear from the facts as presented by the respondent that the sellers in the agreement dated 22nd March, 2016 did not have the capacity to engage in the transaction. See Section 3(3) of the Law of Contracts Act where capacity is a key element for a party to engage in any legal and enforceable contract. Further, the respondent cannot claim to be a bona-fide purchaser having been aware of the fact that the property he was allegedly purchasing belonged to a deceased and that the seller did not have capacity to engage in the transaction having not been appointed as an administrator in accordance with the law. The respondents claim equally fails.
33. I therefore find that the trial court did not err in finding that both the appellant and the respondent failed in their claims.
34. I note that the trial court in exercising its discretion ordered for the cancellation of the title deed for land parcel no. Bokoli/Mikhisu/1368 issued in favour of the appellant and for the same to revert to the name of the deceased David Mang'eli Weluko in line with the provisions of Section 80 of the Land Registration Act.
35. From my analysis of the material placed before the trial court and the impugned judgment, I find that the learned trial Magistrate neither failed to fully analyze and evaluate the evidence nor reached a wrong decision. I also find that the trial Magistrate appropriately informed herself on the principles of law invoked and fully addressed herself on the same viz-a-viz the evidence presents and no miscarriage of justice was occasioned.
36. The upshot of my finding is that none of the grounds of appeal has been proved. I therefore find the appeal devoid of merit and the same is hereby dismissed with costs.
37. Orders accordingly.

DATED AND SIGNED AND DELIVERD AT BUNGOMA THIS 11TH DAY OF APRIL, 2024.

.....

HON.E.C CHERONO

ELC JUDGE



In the presence of;

1. Appellant/Advocate-absent
2. Respondent/Advocate-absent
3. Bett C/A present

