



Letshego Kenya Limited v Muriithi & 3 others (Environment and Land Appeal E052 of 2021) [2024] KEELC 3585 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3585 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E052 OF 2021**

JG KEMEI, J

APRIL 11, 2024

BETWEEN

LETSHEGO KENYA LIMITED APPELLANT

AND

SAMUEL KUNYIHA MURIITHI 1ST RESPONDENT

GEORGE MUHORO THUKU 2ND RESPONDENT

ROBERT GITAU NDURUMA 3RD RESPONDENT

LANDLINK INVESTMENT 4TH RESPONDENT

(Being an appeal from the Judgment and orders of Hon J A Agonda (PM) in CMELC No 57 of 2020-Ruiru delivered on the 3/6/21)

JUDGMENT

Introduction

1. The Appeal arises from the Judgment and decree of the trial Court set out above in which the Appellant was the 3rd Defendant and the 1st – 4th Respondents were the Plaintiff, the 1st, 2nd and 4th Defendants respectively.
2. The Plaintiff in the trial Court sued the Defendants seeking declaratory orders that he is the legal owner of plot 1 (one) measuring 40 feet by 70 feet to be curved out of the Ruiru Block 1/418 with the resultant title being Ruiru East Block 1/5359, in the alternative, the Plaintiff sought reimbursement of the purchase price plus interest at commercial rates from the 1st Defendant and costs of the suit. It was the Plaintiff's case that on the 28/5/2007 he entered into a sale agreement for the purchase and sale of plot one with the 1st Defendant- in the sum of Kshs 205,000/-. The subject land was to be excised from parcel No Ruiru East Block 1/418 and upon full payment took possession. That upon purchase,



he developed the land and connected utilities being electricity to the suit land. That at the time of purchasing the land the 2nd Defendant held the plot under a share certificate obtained from Landlink Investments. That no sooner had he taken possession and commenced development of the suit land than the 2nd Defendant emerged in 2017 and claimed the land. He produced a title issued in 2016 in his name. He also learned that the 2nd Defendant had used the title to secure a loan from the 3rd Defendant and expressed apprehension of a pending exercise of its statutory power to recover the loan. That he is a bonafide purchaser for value without notice.

3. The 3rd Defendant denied the Plaintiff's claim vide its statement of defense dated the 1/7/2020. It averred that the Plaintiff's interest in the suit land if any cannot supersede nor rank in pari passu to the 3rd Defendant's interest because the Plaintiff's claim is founded on an agreement of sale entered into in 2007 which cannot confer any interest to him; the Plaintiff's interest if any is not registered ; no evidence of payment of the purchase price to the seller; no Land Control Board consent was sought and obtained; no transfer of the land to the Plaintiff; the claim for specific performance is now time barred since 12 years has expired since the agreement was entered; the Plaintiff failed to assert title if any.
4. Further that the 2nd Defendant held a title and executed a charge in favour of the 3rd Defendant to secure a loan facility in the sum of Kshs 1.6 Million advanced to one Ruth Njeri Chege (Njeri). That the said Njeri has defaulted on the loan and upon issuance of statutory notice the property was sold by public auction on 22/6/2020 to Geoffrey Kithinji and Rose Wanjiru Chege. That the suit is overtaken by events since it was commenced after the successful conclusion of the public auction. That in any event the prayers sought cannot be granted as the new owners of the land are not parties to the suit.
5. From the record the 2nd, 3rd and 4th Defendants failed to enter appearance nor file a defence.
6. The Plaintiff's case was led by the Plaintiff as PW1. He relied on his witness statement dated the 14/9/2020 and produced documents marked as PEX 1-4 in support of his claim. That he purchased the land from the 1st Defendant who held a share certificate from the 4th Defendant. That before the purchase he carried out due diligence in the offices of the 4th Defendant and ascertained that the share certificate held by the 1st Defendant was genuine. That upon taking possession he developed the land and connected electricity thereon. That in 2016 the 2nd Defendant came to the land claiming ownership of the property on the strength of a title deed in his name. That the 2nd Defendant who claims to have a title has never set foot on the land. That later he learned that the land had been charged by the 2nd Defendant to the 3rd Defendant and that default had occurred and the land sold in a public auction.
7. In cross the witness explained that he purchased plot 1 Block 5. That save for the share certificate he did not have any title over the suit land. He stated that he did not obtain Land Control Board consent, purchase price receipts and transfer documents. Further he added that though he learnt that the land was sold in an auction, he has not enjoined the new owners of the land.
8. Winnie Roi Wafula testified and introduced herself as the legal officer of the 3rd Defendant. That on application the 3rd Defendant advanced a loan facility to Ruth Njeri Chege of Kshs 1.6 Million secured by the title No Ruiru East Block 1/5359 registered in the name of the 2nd Defendant. That Njeri defaulted and the 3rd Defendant issued the necessary notices to the 2nd Defendant in vain leading to the public auction of the land on the 22/6/2020 at the sum of Kshs 3 Million. In cross she admitted that though they carried out a search before advancing the loan to Njeri, she did not produce the said search.
9. Upon hearing the case the trial Court entered Judgment in favour of the Plaintiff as follows;
 - a. A declaration be and is hereby issued that the Plaintiff is the legitimate owner of Plot 1 curved out of Ruiru East Block 1/418 with the resultant title being Ruiru East Block 1/5359.



- b. A permanent injunction restraining the 3rd Defendant, its agents, servants and any person claiming from interfering and or transferring to third parties all that parcel of land Plot 1 curved out of Ruiru East Block 1/418 with the resultant title being Ruiru East Block 1/5359.
 - c. The all transactions registered on Plot 1 curved out of Ruiru East Block 1/418 with the resultant title being Ruiru East Block 1/5359 be cancelled and the Land Registrar, Ruiru be and is hereby directed to rectify the land register of suit property to reflect the name of the Plaintiff Samuel Kunyiha Muriithi as its proprietor.
 - d. The costs of this suit is awarded to the Plaintiff and the 3rd Defendant is condemned to pay the costs herein.
10. The 3rd Defendant was aggrieved by this Judgment and triggered the current appeal filed by a Memorandum of Appeal on the following grounds;
- a. The Learned Trial Magistrate misread the pleadings, mis-recorded proceedings, misapprehended the evidence, framed illogical issues for determination and arrived at a decision that is plainly per incuriam.
 - b. The Learned Trial Magistrate erred in law and fact in holding that the 1st Respondent was the lawful owner of property Title Number Ruiru East Block 1/5359 based on a vague Sale Agreement for a property only described as Plot 1 Block 5.
 - c. The Learned Trial Magistrate erred in law and fact in holding without a scintilla of evidence that Title Number Ruiru East Block 1/5359 was the resultant title for Plot 1 Block 5.
 - d. The Learned Trial Magistrate erred in law and fact in holding without evidence that the 1st Respondent had proved occupation of Title Number Ruiru East Block 1/5359.
 - e. The Learned Trial Magistrate erred in law in holding that the 1st Respondent acquired ownership of Plot 1 Block 5 without evidence of settlement of the purchase price, transfer forms in his favour, Land Control Board Consent and the time bar on the rights acquired through the Sale Agreement dated 28th May 2007.
 - f. The Learned Trial Magistrate erred in directing that title for Title Number Ruiru East Block 1/5359 be rectified to reflect that the 1st Respondent is the lawful proprietor when the 1st Respondent has never been the registered proprietor.
 - g. The Learned Trial Magistrate erred in law and fact in invalidating the title in the name of the 3rd Respondent and the resultant charge in favour of the Appellant without evidence or fraud or corruption in the acquisition of the title by the 2nd Respondent and creation of the charge in favour of the Appellant.
 - h. The Learned Trial Magistrate erred in law in shifting the burden of proof to the Appellant when the allegation impugning title was made by the 1st Respondent.
 - i. The Learned Trial Magistrate erred in law and fact in cancelling the auction sale of Title Number Ruiru East Block 1/5359 for the reason that the 1st Respondent was not served with statutory yet the 1st Respondent has never been the registered owner over the suit property while the charger was duly served with all requisite notices.



- j. The Learned Trial Magistrate erred in law and fact in cancelling the auction sale of Title Number Ruiru East Block 1/5359 to Geoffrey Kithinji Ithae and Rose Wanjiru Chege without their participation effectively condemning them unheard.
11. Consequently, the Appellant sought the following orders on appeal;
- a. That this Court be and is hereby pleased to allow the appeal.
- b. This Court be and is hereby pleased to set aside the Judgment delivered on 3rd June 2021 in Ruiru PM ELC Case No 57 of 2020 and substitute it with a decision of this Court.
- c. This Court be and is hereby pleased to dismiss the 1st Respondent's suit in Ruiru PM ELC Case No 57 of 2020.
- d. Costs of this appeal and the suit before the trial Court be borne by the 1st Respondent.
12. The Appellant filed submissions through the firm of Oundo Muriuki & Co Advocates dated the 21/7/2023. The firm of Koki Nthuli & Co Advocates filed written submissions on behalf of the 1st Respondent dated the 1/8/2023.
13. Counsel for the Appellant submitted that there was no agreement for sale for Ruiru East Block 1/5359 between the 1st Respondent and the 2nd Respondent. The 1st Respondent claim is on plot No 1 - block 5. The Court did not receive any evidence to demonstrate that plot 1 and parcel Ruiru East Block 1/5359 is one and the same. The Court was faulted for making a finding that there were two competing titles and yet the 1st Respondent stated clearly in evidence that he had not obtained a title in his name for plot No 1-block 5. Further it was submitted that no evidence was led to demonstrate the 2nd Respondent ever was registered as owner of the parcel Ruiru East Block 1/5359. That the Court made a fatal assumption that plot No 1 and parcel Ruiru East Block 1/5359 are one and the same without any evidence of a search and or a survey map to show that the two parcels refer to one parcel on the ground.
14. The trial Court was further faulted for making a finding that the 1st Respondent had occupied the land while no evidence in support was presented before it. That the electricity connection does not indicate the description of the property and that it cannot have been Parcel Ruiru East Block 1/5359. Relying on the decision of the Court in *Joshua Muema Sita & others v Jipe Multipurpose Cooperative Society & 4 others* (2022)eKLR the Appellant submitted that occupation is a question of fact and no evidence of such occupation was led by the 1st Respondent.
15. The 1st Respondent was faulted for failing to complete the transaction over a period of 13 years from 2007. That any cause of action founded on the agreement of sale lapsed by effluxion of time in 2009 and therefore the claim of the 1st Respondent had no legs to stand. Further that the Court received no evidence at all, least of all with respect to fraud and or illegality, to impeach the title of the 3rd Respondent and therefore erred in ordering the cancellation of the title.
16. The appeal is opposed by the 1st Respondent on the grounds that ; the trial Court properly determined that the 1st Respondent was the bonafide owner of the suit land from the evidence placed before it; the 1st Respondent purchased the land before the register had been opened and titles issued and that explains why the 1st Respondent held a share certificate representing ownership of the land; applied for electricity using plot No 418 as it would have been impossible to so obtain connection without a title reference; the Appellant admitted that they did not visit the property before advancing the loan and therefore cannot state that the 1st Respondent was not in occupation. Finally relying on the decision of the Court of Appeal in *Wambui v Mwangi & 3 others* [2021] KECA eKLR where the



Court distilled the following principles; every subsequent act premised on a nullity cannot accrue legitimacy or legality; since sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at another person; a Court of law cannot protect title to land which has been obtained illegally or fraudulently merely because a person is entered on the register as a proprietor.

17. Having considered the record of appeal, the memorandum of appeal, the written submissions together with the trial Court record and all the material placed before this Court the following issues are for determination; whether the 1st Respondent proved his case in the trial Court; whether the appeal is merited; who meets the cost of the appeal.
18. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123, this principle was enunciated as thus:

“...this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that 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....”

19. The Court is also to interfere with the discretion of the Court where it is shown that the same was exercised contrary to the law or that the magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law the decision is plainly wrong. See *Mbogo v Shab* [1968] EA 93.
20. This appeal is against the Judgement of the trial Court in which the Court declared the 1st Respondent as the legal owner of the property and that the title in the name of the 2nd Respondent and charged to the Appellant was irregular and invalid.
21. In the trial Court the case of the 1st Respondent is that he acquired plot No 1 – Block 5 through a sale agreement with the 2nd Respondent in 2007, obtained a share certificate from the 4th Respondent, took occupation and developed the land but in 2016 it came to his knowledge that the 3rd Respondent was claiming the land on account of a title he held. Later he learned that the land had been sold to third parties through a public auction. He sought declaratory orders that he is the legal owner of parcel 5359 and in the alternative refund of the purchase price from the 2nd Respondent
22. The Appellant’s case was that it advanced a loan to Njeri and the title 5359 was used as security to guarantee the loan and upon default it issued the necessary notices in law and finally the land was sold by public auction in 2020 to third parties not before this Court.
23. Sections 107, 109 and 110 of the [Evidence Act](#) provides as follows on the issue of burden of proof;

“ 107. Burden of proof

- (1) Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

110. Proof of admissibility

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.”

24. The 1st Respondent bore the burden to prove his claim in the suit. I have perused the agreement of sale of 2007 between the 1st and the 2nd Respondents. The land the subject of sale is described as Plot No 1 -Block 5 measuring 40 ft by 70 feet. There was no evidence led by the 1st Respondent to demonstrate that plot 1 – Block 5 is the same as parcel Ruiru East Block 1/5359. The title for parcel Ruiru East Block 1/5359 shows that it is in block 1 and not block 5. The Court would have expected evidence in form of a RIM sheet Map or a mutation in answer to the question whether the two parcels refer to the same plot or better still evidence led by the Land Registrar/The Government Surveyor to assist the Court distinguish between the two parcels.
25. Other than the sale agreement and the share certificate the 1st Respondent failed to table evidence of duly registered transfer, Land Control Board consent, payment of the purchase price, payment of stamp duty on the transfer. He alleged that by the time he bought the land titles to the lands had not been issued /registered. He did not show any action that he took from 2007 to 2020 to secure his interest in the land if any.
26. Section 37 of the [Land Registration Act](#) provides as follows;

“ 37. Transfers

- (1) A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.
- (2) A transfer shall be completed by—
 - (a) filing the instrument; and
 - (b) registration of the transferee as proprietor of the land, lease or charge.”

27. Equally Section 44 of the [Land Registration Act](#) provides as follows;

“ 44. Executions of instruments in writing

- (1) Except as otherwise provided in this Act, every instrument effecting any disposition under this Act shall be executed by each of the parties consenting to it, in accordance with the provisions of this section.
- (2) The execution of any instrument referred to in subsection (1), by a person shall consist of appending a person’s signature on it



or affixing the thumbprint or other mark as evidence of personal acceptance of that instrument.

- (3) The execution of any instrument referred to in subsection (1) by a corporate body, association, co-operative society or any other organization shall be effected in the presence of either an advocate of the High Court of Kenya, a magistrate, a Judge or a notary public.
- (4) An instrument executed out of Kenya shall not be registered unless it has endorsed on it or attached to it a certificate in the prescribed form completed—
 - (a) if the instrument was executed in the Commonwealth, by a judge, magistrate, notary public, commissioner for oaths; or
 - (b) if the instrument was executed in a foreign country outside the Commonwealth, by any other person or class of persons as the Cabinet Secretary may prescribe.
- (5) The transferee shall in addition to executing the instrument, attach the following—
 - (a) a copy of an identity card or passport; and
 - (b) a copy of a Personal Identification Number certificate;
 - (c) passport size photographs;
 - (d) where applicable, a marriage certificate; or
 - (e) such other identification documents as the Cabinet Secretary may prescribe.”

28. In the absence of compliance with the law as set out above the Court finds that the 1st Respondent failed to demonstrate any interest in the suit land at all.

29. Section 26 of the *Land Registration Act* provides as follows;

“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, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
30. In the absence of any title to the suit land the Court is unable to offer protection to plot 1 in Block 5 claimed by the 1st Respondent.
31. The above section of the law also provides ways in which a title can be impugned that is to say on the ground of fraud or misrepresentation to which the person is provide to be a party or where the certificate of title has been acquired illegally procedurally or through a corrupt scheme. The Court finds that the 3rd Respondent wields a title parcel Ruiru East Block 1/5359 issued in 2016 and on the encumbrance section is a charge registered in favour of the Appellant in 2018. The Hon Magistrate made a finding that the title was fraudulently acquired by the 3rd Respondent. Despite keen perusal of the pleadings in the trial Court and the evidence led thereto, I fail to find any pleading on fraud or illegality and or evidence of fraud and or illegality. The Court finds that the title of the 3rd Respondent was not impeached by the 1st Respondent and the Court erred in making a finding unsupported in evidence.
32. The Appellant led evidence that it advanced monies to Njeri on the security of parcel 5359 owned by the 3rd Respondent. That on default, it issued the necessary notices leading to the exercise of its statutory power of sale through public auction of parcel Ruiru East Block 1/5359 in 2020. The 1st Respondent led no evidence and the Court received no evidence to impugn the process of the exercise of the Statutory Power of Sale by the Appellant at all. In any event the right person to challenge the same would have been the 3rd Respondent and not the 1st Respondent who had not privity of contract with the Appellant in as afar as the charge is concerned.
33. There is another reason that militates against the orders granted by the trial Court. Unchallenged evidence was led that the land was sold to third parties namely Geoffrey Kithinji Ithai and Rose Wanjiru Chege who have not been enjoined into the suit as the orders made would, in all fairness adversely, affect their title.
34. In the end I find that the appeal is merited. It is allowed as follows;
- a. The Judgment of the trial Court dated 3/6/2021 is hereby set aside.
 - b. The 1st Respondent’s suit in the trial suit is dismissed for want of proof.
 - c. The Appellant shall have costs for both the Appeal and trial Court.
35. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 11TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kiplangat for the Appellant



Ms. Mugo for the 1st Respondent
2nd, 3rd and 4th Respondents - Absent
Court Assistants – Phyllis/Oliver

