



**Kilonzo v Muasya & 2 others (Environment and Land Appeal
18 of 2020) [2024] KEELC 4184 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4184 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 18 OF 2020**

CA OCHIENG, J

MAY 13, 2024

BETWEEN

HENRY MUNYAO KILONZO APPELLANT

AND

AMY MUASYA 1ST RESPONDENT

**KATELEMBO ATHIANI MUPUTI CO-OPERATIVE SOCIETY
LIMITED 2ND RESPONDENT**

MACHAKOS LAND REGISTRAR 3RD RESPONDENT

*(Being an Appeal from the Judgment of Machakos Chief Magistrate's Court in
ELC Case No. 110 of 2018 delivered on 28th May, 2020 by Hon. E.H. Keago (SPM))*

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the 19th June, 2020, the Appellant appealed against the Judgment delivered by Hon. E. H. Keago on 28th May, 2020 at the Chief Magistrates' Court in Machakos vide CM-ELC No. 110 of 2018 between Henry Munyao Kilonzo versus Amy Muasya and 2 Others. The trial court had made a determination that the Appellant's interest on the suit plot had been defeated by the registration of the 1st Respondent and that the 2nd Respondent was liable to compensate the Appellant for the full value of Kshs. 2,000,000.00.
2. The Appellant, being dissatisfied with the said Judgment, filed a Memorandum of Appeal dated the 19th June, 2020 based on the following grounds:
 1. That the learned trial Magistrate erred in law and in fact in finding that the Plaintiff had not proved his case on a balance of probabilities.



2. That the learned trial Magistrate erred in law and in fact in finding that the Appellant herein had not proved the 1st Respondent's collusion with the 2nd Respondent despite not producing any agreement showing purchase of property.
3. That the learned trial Magistrate erred in law and in fact by failing to appreciate the development made by the Appellant and the current market value of the property in reaching a finding of the value the 2nd Respondent is supposed to compensate him.
4. That the learned trial Magistrate erred in law and in fact by failing to find that the title held by the 1st Respondent was fraudulently acquired.

Reasons Wherefore the Appellant prayed for the following orders:

1. That this Appeal be allowed.
 2. That costs of the Appeal be awarded to the Appellant.
 3. Any other relief that this honorable court deems fit to grant the Appellant.
3. The Appeal was canvassed by way of written submissions.

Submissions by the Appellant

4. The Appellant in his submissions contended that the Appeal has merit and should be allowed for various reasons. He argued that the 1st Respondent had been irregularly allocated the suit plot and issued with a Certificate of Title, without producing any Sale Agreement for the sale and transfer in her favour. He claimed to have been in a continuous uninterrupted possession of the suit plot, insisted that the doctrine of first in priority dictates that he acquired proprietary interest in the said suit plot by dint of purchase from one Grace Mumbua Nzomo, who had bought it, in 1987 from the 2nd Respondent, with a transfer made in his favour. To buttress his averments, he relied on Section 26 of the [Land Registration Act](#) as well as the following decisions: [Duncan Kabui v Samuel Bede Igembo & Another](#) (2014) eKLR and [Gichinga Kibuthia v Caroline Nduku](#) [2018] eKLR.

Submissions by the Respondents

5. The 1st Respondent in her submissions outlined the role of the Appellate Court and insisted that the Appellant had not attained the required evidentiary standard to prove his case. On whether the trial court under-quoted the value of the suit plot, she submitted that a party is bound by their pleadings and the Appellant had under prayer (d) of the Plaint sought for a refund of the full purchase price for the land together with interest. She contended that the Appellant had not proved that she committed fraud on her acquisition of the suit plot being Machakos Town Block 3/480. She argued that the Appellant sought to defeat a good title by producing receipts and a transfer form issued by a person named Grace Mumbua, none of which are instruments of conveyance under Section 43(2) of the [Land Registration Act](#). She further submitted that the circumstances under which the Land Registrar can cancel a title to land are spelt out under Sections 26 and 80(1) of the [Land Registration Act](#) 2012 and that all the Appellant did, was allege fraudulent collusion without any proof. To support her arguments, she relied on Section 26 of the [Land Registration Act](#) as well as the following decisions: [Bwire v Wayo Sailoki \(Civil Appeal 032 of 2021\)](#) KEHC (24 January 2022) (Judgement); [Selle & Another v Associated Motor Boat Co. Ltd & Others](#) (1968) EA 123; [China Zhongxing Construction Company Ltd v Ann Akuru Sophia](#) [2020] eKLR; [Yalwala & 3 others \(Sued in their capacity as Board of Trustees of Chavakali Yearly Meeting of Friends \(Quakers\)\) v Kadenge & 3 Others \(Environment & Land Case 4 of 2021\)](#) (2022) KEELC 2510 (KLR) (21 July 2022); [Vijay Morjaria vs Nansingh, Madhusingh Darbar &](#)



another [2000] eKLR; Kinyanjui Kamau v George Kamau (2015) eKLR; Openda v Anh (1984) KLR 208 and Njuwangu Holdings Ltd v Langata KPA Nairobi & 5 Others (ELC No. 139 of 2013).

Analysis and Determination

6. Upon consideration of the Memorandum of Appeal, Record of Appeal and the rivalling submissions, the following are the issues for determination:-
 - a. Who was the first allottee of the suit plot?
 - b. Whether the 1st Respondent legally and procedurally acquired title to the suit plot.
 - c. Whether the Appeal is merited.
7. The background against which the Appeal was brought was a suit filed by the Appellant as Plaintiff as against the Defendants (Respondents) being Machakos CM-ELC No.110 of 2018 between HEnry Munyao Kilonzo -v- Amy Muasya & 2 Others. In the said suit, the Appellant herein alleged to have entered into a Sale Agreement over the suit Plot No. 1992 with one Grace Mumbua Nzomo, who had bought the same from the 2nd Defendant (2nd Respondent). It was then alleged that the 2nd and 3rd Defendants (Respondents) unlawfully caused the processing of the Certificate of Title for suit Plot No. 1992 in favour of the 1st Defendant (1st Respondent). The Plaintiff (Appellant) sought for the following orders:-
 - a. A declaration that the Plaintiff has a legal and equitable interest in the land known as Machakos Town Block 3/480.
 - b. A permanent injunction restraining the Defendants whether by themselves or their servants or agents from dealing, subdividing, constructing, disposing, trespassing, interfering, charging and/or whatsoever dealing with the land known as Machakos Town Block 3/480.
 - c. An order directing the 3rd Defendant to cancel the title made in favour of the 1st Defendant and substituting it with the Plaintiff.
 - d. In the alternative an order that the 2nd Defendant returns the full purchase price for the land together with interest.
 - e. Cost of the suit.
 - f. Any other suit Honourable Court deems just to grant.
8. There is no Statement of Defence from the Record of Appeal but it is apparent that the suit was opposed, by the 1st Defendant owing to the witness statements on record and the evidence adduced by two Defence witnesses during hearing. However, in the lower court file, there was a Defence filed by 1st Defendant.
9. This being a first Appeal, this court is alive to its duty to re-evaluate and re-analyze the evidence presented in the lower court exhaustively and make its own independent conclusion, bearing in mind, it never had a chance to interact with the witnesses. This role was well articulated in the case of Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR where it was held as follows:-

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine



whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way...”

10. As to who was the first allottee of the suit plot and if the 1st Respondent legally and procedurally acquired title to the said suit plot.
11. In this instance, the Appellant as PW1 testified that he purchased Plot No. Katelembo 1992 (later known as Machakos Town Block 3/480), hereinafter referred to as the ‘suit plot’, from one Grace Mumbua Nzomo in the year 2014, for Kshs. 2,000,000. Further, that Grace Mumbua Nzomo had purchased the said plot in 1987 from the 2nd Respondent for Kshs. 120,000. The Appellant claimed he took possession of the suit plot and had been utilizing the land. The Appellant produced the Sale Agreement, Transfer form, various receipts and a receipt for transfer fees paid to the 2nd Respondent in the year 2014. PW1 informed Court that he confirmed from the 2nd Respondent’s Register that Grace Mumbua Nzomo was owner of the suit plot. PW2 Grace Mumbua Nzomo confirmed selling the suit plot to the Appellant. Further, that after purchase, transfer of the suit plot was effected to him, by the 2nd Respondent. She testified that she had purchased the suit plot from the 2nd Respondent in 1987 and in 2014, sold it to the Appellant. PW1 further testified that the 2nd Respondent had transferred the suit plot to the 1st Respondent who obtained a title being Machakos Town Block 3/480. Both PW3 Jackson Mutua Makau and PW4 Jane Mboka Maithya confirmed that Grace Mumbua Nzomo was allotted the suit land. They all knew the location of the said plot and confirmed Grace Mumbua Nzomo sold the said land to the Appellant. The 1st Respondent as DW1 confirmed she is the owner of the suit plot, which she purchased from the 2nd Respondent from 2013. She produced a Plot Allocation Slip dated the 14th January, 2013 and various bank transfer slips for transactions made in 2013. She confirmed that she got her Certificate of Title in 2016. During cross-examination, she explained that it is her father Peter Mwasia who made payments on her behalf. She admitted that, before purchase of suit plot, she had seen a fence in 2012 which was removed in 2018. DW2 Nathan Nagwili Mwanga, one of the directors’ of the 2nd Respondent confirmed he did not have authority nor documents, to represent the 2nd Respondent in court. He stated that he could not speak for the taskforce as he was not its member. He testified that the 1st Respondent acquired the suit plot on 14th January, 2013 and was issued with a Plot Allocation Slip. He was aware of the Katelembo Taskforce but claimed there was no complaint made therein, in respect to the suit plot.
12. The trial Magistrate after considering the evidence presented, in his Judgment noted that the Appellant did not prove his allegations of fraud as against the 1st Respondent and held that the Appellant’s claim had been defeated by registration of the 1st Respondent’s title. He proceeded to dismiss the suit, upheld the 1st Respondent’s title and directed 2nd Respondent to compensate the Appellant.
13. I wish to reproduce some excerpts from the Judgment from the trial Court where the Hon. Magistrate observed as follows:-

“However, the 1st Defendant called the executive secretary that appeared before court and sought to challenge the ownership of the suit property by the Plaintiff. He didn’t avail any records to show how the 1st Defendant acquired title including the record books. There was no contract that was availed by the 1st Defendant. The said witness was not reliable in that he concealed most of the information that was within their knowledge. They also failed to file defence on the issue of the Plaintiff having been issued with the documents for the 2nd Defendant after he entered into an agreement with the Plaintiff... From the above analysis and the evidence on record it’s clear that the Plaintiff bought plot no. 1992 from PW2 and the same was transferred to him and later subsequently it was registered in the name of the 1st



Defendant with the assistance of the 2nd Defendant. The 2nd Defendant did receive transfer fees from the Plaintiff yet they proceeded to effect transfer in favour of the 1st Defendant. They are the ones who caused the confusion in the whole transaction.”

14. On perusal of the exhibits produced in the lower court, I note there were receipts produced by PW1 which emanated from the 2nd Respondent. I note there is a receipt from the 2nd Respondent, dated the 4th August, 1987 issued to Grace Mumbua Nzomo for Kshs. 120,000 for purchase of Plot No. 1992. Further, the Transfer Form from Grace Mumbua Nzomo to Henry Munyao Kilonzo for the suit plot is dated the 10th November, 2014 and it is signed by officials of the 2nd Respondent. Further, there is indication therein that Transfer fees of Kshs. 20,000 was indeed paid for the suit plot. From the lower court, the 2nd Respondent did not file a Defence to controvert the Appellant’s averments nor to challenge the documents as presented, hence as a court I have no reason to dispute the documents produced by the Appellant, as genuine and confirm he purchased the suit plot from the initial allottee Grace Mumbua Nzomo. In the circumstances, I hold that Grace Mumbua Nzomo was the initial allottee of the suit plot, which she in turn sold to the Appellant.
15. Which brings me to the question that if indeed the suit plot had been initially allotted to Grace Mumbua Nzomo, who in turn sold it to the Appellant, then was it available for sale to the 1st Respondent, in 2013, who in turn got a Certificate of Title in 2016. Further, would this defeat the first allotment. To my mind, I opine that the answer is NO, since the plot had already been allotted, while the initial allottee took possession thereof, and there is no indication the allotment was cancelled, then it was not only illegal but irregular for the 2nd Respondent to sell the said plot to the 1st Respondent. If so, did the 1st Respondent acquire a proper title.
16. On validity of title, I wish to make reference to Section 26(1) of the [Land Registration Act](#) which provides as follows:-

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.” Emphasis mine
17. It is worthnoting that the 1st Respondent even before paying the full purchase price, as evident in the copies of cheques including receipts produced, was immediately issued with a Plot Allocation Slip dated 14th January, 2013. Further, most payments were made by Peter Mwasia Kaithi who is her father and it emerged that he was a member of the 2nd Respondent. In the receipt dated the 14th January, 2013, there is no indication DW1 was purchasing the suit plot as no plot number is indicated therein. DW2 had claimed there was no complaint about the suit plot but if so, then why was the Appellant including PW2 summoned to the Katelembo Taskforce to present documents in respect to the suit plot. To my mind, I find that there was an element of fraud and collusion by officials of the 2nd Respondent including the father to the 1st Respondent who was transacting on her behalf. I hold that the evidence



- of DW2 was not plausible as he simply came without authority of the 2nd Respondent, to support DW1's claim.
18. Since the Appellant paid the transfer fees to the 2nd Respondent and took possession of the suit plot, I find that this created his proprietary interest over the suit plot and he was the first in priority to receive a Certificate of Title, which was not to be.
19. In the case of *Munyu Maina Vs Gathiba Maina*, Civil Appeal No.239 of 2009, the Court of Appeal held that:-
- "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."
20. Further, in Civil Appeal No. 246 of 2013 *Arthi Highway Developers Limited Vs West End Butchery Limited & Others*, the Court of Appeal expressly stated thus:-
- "Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the *Land Registration Act* set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act."
21. In applying the legal provisions I have cited above as well as principles enunciated in the quoted decisions, to the circumstances at hand, I note the 2nd Respondent did not oppose the Appellant's suit hence the Appellant's claim as against it, is deemed admitted. Further, I find that the Appellant produced all relevant documents confirming PW2 was the initial allottee of the suit plot. In my view it was irregular for the 2nd Respondent to dispose of the suit plot to the 1st Respondent as it was no longer available to be transferred to a third party. The Appellant is in possession of the suit plot while the 1st Respondent admitted she has never been in possession of the said land.
22. In the circumstances, I find that the 1st Respondent hence did not acquire a proper title to the suit plot since the root of the said title was fettered. Further, since DW1 admitted that she saw a fence on the suit plot in 2012, I hold that she was hence aware there was an encumbrance thereon which was already an overriding interest on the land. Further, she failed to notify the occupant of the suit plot of her intended purchase and proceeded to do so, as well as process the title. To my mind, there was indeed an element of irregularity including misrepresentation at the point the 1st Respondent was processing the title to the suit plot. In my view, she is the one who should have been ordered to obtain compensation for her plot from the 2nd Respondent and not the Appellant.
23. In the circumstances, I find that the learned trial Magistrate erred in law and in fact in finding that the Appellant had not proved his case on a balance of probabilities yet in his analysis, he confirmed that DW2 from the 2nd Respondent's office never produced records or contract to demonstrate how the 1st Respondent acquired her title from them. Further, I find that the learned trial Magistrate erred in law and in fact in finding that the Appellant herein had not proved the 1st Respondent's collusion with the 2nd Respondent despite not producing any agreement showing purchase of property. It was erroneous for the trial Magistrate to fail to appreciate the development made by the Appellant and the current market value of the property in reaching a finding on the value the 2nd Respondent is supposed to compensate him.



24. In the foregoing, I find the Appeal merited and will proceed to set aside the Judgment in the lower court and make the following final orders:-
- i. A declaration be and is hereby issued that the Appellant has a legal and equitable interest in the land known as Machakos Town Block 3/480.
 - ii. A permanent injunction be and is hereby issued restraining the Respondents whether by themselves or their servants or agents from dealing, subdividing, constructing, disposing, trespassing, interfering, charging and/or whatsoever dealing with the land known as Machakos Town Block 3/480.
 - iii. An order directing the 3rd Respondent to cancel the title made in favour of the 1st Respondent and substitute it, with the name of Henry Munyao Kilonzo.
 - iv. Costs of the Appeal and the lower Court case is awarded to the Appellant, but to be borne by the 2nd Respondent only.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13TH DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of

Kilonzo holding brief for D.M. Mutinda for Appellant

Ombaso holding brief for Wesonga for 1st Respondent

Court Assistant – Simon/Ashley

