



**Machira v Kabucwa & another (Environment and Land Appeal
17 of 2021) [2024] KEELC 3700 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 17 OF 2021**

JO OLOLA, J

MAY 9, 2024

BETWEEN

JAMES MUHINDI MACHIRA APPELLANT

AND

SYMON NDORIA KABUCWA 1ST RESPONDENT

EDWARD WAHOME MWIGOIYA 2ND RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable A. Mwangi, Senior Resident Magistrate as delivered on 29th April, 2021 in Karatina PMCC No. 4 of 2019.
2. By a Complaint dated and filed in the Lower Court on 28th January 2019, as amended on 12th February, 2019, James Muhindi Machira (the Appellant) sought for Judgment against the two Respondents herein for:
 - (a) An order that the title held by the 2nd Defendant for L.R. No. Magutu/Gathehu/1153 be cancelled forthwith;
 - (b) An order that the 2nd Defendant do give vacant possession of L.R. No. Magutu/Gathehu/1153 and in default the Defendant to be evicted therefrom;
 - (c) General damages for fraudulent conversion and trespass into the Plaintiff's suit property;
 - (d) Costs of the instant suit; and
 - (e) Any other and or further orders that this Court may deem fit and just to grant.
3. The basis of those prayers was the Appellant's contention that at all times relevant to the suit, he was the beneficial owner of the suit property which was registered in the name of the 2nd Respondent.



4. It was the Appellant's case that on or about 20th August 2008, he had executed a Sale Agreement between himself and the 1st Respondent for sale by himself of a portion of a parcel of land known as Magutu/Gathehu/417 at a consideration of Kshs.230,000/-. It was the Appellant's contention that the 1st Respondent paid him a sum of Kshs.150,000/- after which the 1st Respondent failed, neglected and/or refused to settle the balance. On 16th September 2015, the Appellant informed the 1st Respondent that he had rescinded the said contract and refunded all the money he had received as part payment to the 1st Respondent.
5. The Appellant avers that on or about 25th February 2014, he was shocked to receive a letter dated the same day from the 1st Respondent informing him that the 1st Respondent had carried out a sub-division of L.R No. Magutu/Gathehu/417 and that the 1st Respondent was now the registered proprietor of the resulting L.R No. Magutu/Gathehu/1153 (the suit property).
6. It was the Appellant's case that the purported transfer and registration of the suit property into the 1st Respondent's name was fraudulent as the Appellant had never executed any transfer documents in favour of the 1st Respondent. The Appellant further contended that the second registration of the suit property in the name of the 2nd Respondent was illegal, null and void as the 1st Respondent did not have a good title to pass to the 2nd Respondent.
7. Symon Ndoria Kabuchwa (the 1st Respondent) was opposed to the Appellant's claim. In his Statement of Defence dated 28th February 2019 as filed in the Lower Court, the 1st Respondent admitted entering into the Sale Agreement with the Appellant but asserts that the same was subject to the completion of Nyeri High Court Succession Cause No. 149 of 2001. The 1st Respondent avers that upon its completion and partition of the original L.R No. Magutu/Gathehu/417, the administrators of the Estate of Machira Munyiri transferred the suit property to himself with the full knowledge, consent and authority of the Appellant.
8. The 1st Respondent further states that upon being registered as the proprietor thereof he subsequently transferred the suit property to a third party and he has no further interest thereon. The 1st Respondent avers that he invited the Appellant to collect the balance of the purchase price of Kshs.80,000/- but the Appellant declined to do so.
9. Edward Wahome Kagoiya (the 2nd Respondent) was similarly opposed to the Appellant's claim. In his Statement of Defence dated 16th March 2020, the 2nd Respondent asserts that he is the registered proprietor of the suit property having purchased the same from the 1st Respondent for valuable consideration.
10. The 2nd Respondent denied being involved in any fraud in the sale transaction between himself and the 1st Respondent and avers that he did due diligence which revealed that the 1st Respondent was the registered proprietor of the suit property at the time of sale.
11. Upon hearing the Parties in the dispute and in her Judgment rendered on 29th April, 2021 aforesaid, the Learned Trial Magistrate made a finding that the 1st Respondent had acquired the title deed for the suit property legally and that he had a good title to transfer to the 2nd Respondent. It was further the Court's finding that the allegations of fraud had not been proved and the Appellants suit was thereby dismissed.



12. Aggrieved and dissatisfied by the said determination, the Appellant moved to this Court and lodged the Memorandum of Appeal dated 25th May, 2021 urging this Court to set aside the said Judgment in its entirety on the grounds:
 1. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Appellant's case had been proved on a balance of probability and that there was evidence to support the same;
 2. That the Learned Trial Magistrate erred in law and fact when she failed to address herself on the issue of fraudulent transfer and registration of the suit property despite there being evidence in support of the same;
 3. That the Learned Trial Magistrate erred in law and fact in entirety dismissing the Appellant's case without addressing herself on the issues raised by the Appellant in his filed statements and submissions since he had rescinded the contract over frustration by the 1st Respondent and refunded the amount he had received;
 4. That the Learned Trial Magistrate erred in law and fact in failing to evaluate the entire evidence presented by the Appellant;
 5. That the Learned Trial Magistrate erred in law and fact in basing her Judgment on the wrong principals (sic) of the law; and
 6. That the Learned Trial Magistrate erred in fact and law for awarding costs of the suit to the Respondents against the Appellant despite the circumstances that led to the suit.
13. As the first Appellate Court, this Court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and thereafter to proceed to make its own conclusions about it, of course, bearing in mind that this Court did not have the opportunity of seeing and hearing the witnesses first hand [See *Selle & Another -v- Associated Motor Boat Company Limited & Others* (1968) EA 123].
14. In that respect, I have carefully perused and considered the Record of Appeal as well as the Judgment of the Learned Trial Magistrate. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the Parties herein.
15. In my considered view, the six(6) Grounds of Appeal raised in the Appellant's Memorandum of Appeal relate to one major ground, namely, whether or not the Learned Trial Magistrate erred in failing to appreciate that the Appellant had proved his case on a balance of probabilities and that there was sufficient evidence to support the same.
16. By his Complaint as amended on 12th February 2020, the Appellant had sought an order to the effect that the title held in the name of the 2nd Respondent for the parcel of land known as Magutu/Gathehu/1153 be cancelled and that the 2nd Respondent do grant vacant possession thereof and in default, that he be evicted therefrom. In addition, the Appellant had sought for General damages for fraudulent conversion and trespass to the suit property.
17. In support of his case the Appellant told the Court that on or about 20th August 2008, he had executed a Sale Agreement through which he sold to the 1st Respondent a portion of a parcel of land known as Magutu/Gathehu/417 at a consideration of Kshs.230,000/-. It was the Appellant's case that the 1st Respondent failed, neglected and/or refused to pay the balance.



18. The Appellant told the Court that as a consequence of that failure, he did on 16th September, 2015 inform the 1st Respondent that had rescinded the said agreement and that he thereby refunded all the money he had received as part payment to the 1st Respondent. It was therefore the Appellant's position that the purported transfer and registration of the suit property into the 1st Respondent's name was fraudulent as he had not executed any transfer documents in favour of the 1st Respondent.
19. It was the Appellant's contention that since the 1st Respondent had not acquired any good title to the suit property, the subsequent transfer and registration of the same in the name of the 2nd Respondent was equally tainted with illegality and that the same was therefore null and void for all intents and purposes.
20. The two Respondents however rejected the Appellant's accusations. According to the 1st Respondent the Sale Agreement was subject to the completion of Nyeri High Court Succession Cause No. 149 of 2001 which was in relation to the Appellant's family. It was the 1st Respondent's case that upon completion of the said case, the Administrators of the Estate of Machira Munyiri did partition the original L.R. No. Magutu/Gathehu/417 after which they transferred the suit property to the 1st Respondent with the full knowledge, consent and authority of the Appellant.
21. The 1st Respondent asserted that upon being registered as the proprietor of the suit property he sold and transferred the same to the 2nd Respondent for valuable consideration. That position was supported by the 2nd Respondent who told the Court that prior to the purchase of the suit property, he did due diligence which revealed that the suit property was registered in the name of the 1st Respondent. It was therefore the 2nd Respondent's case that he was a bona fide purchaser for value without notice of any defects on the title.
22. Having heard and considered the testimonies of the witnesses and the evidence placed before her, the Learned Trial Magistrate concluded as follows at Page 8 of her Judgment:

“... Although the Plaintiff denies that the administrators of the estate of the late Machira Munyiri are the ones who transferred the land to the 1st Defendant, their submissions that “the 1st Defendant fraudulently acquired the suit property by using the administrators of the suit land to assist him to transfer the suit property to his name...” gives credence to the testimony by the 1st Defendant that it was the Administrators of the estate who transferred the land to him with the knowledge and consent of the Plaintiff. This is the more probable position as opposed to that of the Plaintiff otherwise the Plaintiff who allegedly learnt of the transaction in 2015 would also have sued the administrators for fraud if he believed that they fraudulently transferred the land to the 1st Defendant. I do find that the administrators transferred the land to the 1st Defendant.”

23. As it were, the basis of the Appellant's case against the Respondents was the contention that the suit property had been fraudulently transferred to the 1st Respondent's name in particular, in spite of the fact that the Appellant had not executed any transfer documents in favour of the 1st Respondent. As the Court of Appeal stated in *Vijay Morjaria -v- Nansingh Madhusingh Darbar & Another* (2000) eKLR:

“It is well established that fraud must be specifically pleaded and that particulars of the 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 these acts were done fraudulently. It is



also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

24. In his Amended Plaintiff dated 12th February 2020, the Appellant pleads as follows at Paragraph 9a thereof:

“9a. The Plaintiff contends that the purported transfer and registration of the suit property into the 1st Defendant’s name was done through fraudulent means as the Plaintiff is categorical that he had never executed transfer documents in favour of the 1st Defendant.”

25. The Appellant went ahead as required to give the particulars of the alleged fraud under Paragraph 9b of the Plaintiff as follows: Particulars of Fraud by the 1st Defendant

- (i) Causing the suit property to be registered in the 1st Defendant’s name without the Plaintiff’s consent;
- (ii) Purporting that the Plaintiff had transferred the suit property in (the) 1st Defendant’s name;
- (iii) Conversion of the suit property; and
- (iv) Causing the transfer of the suit land in year 2004 to the 2nd Defendant whereas the same was subject of Nyeri High Court Succession Cause No. 149 of 2001 where confirmation of grant was issued in year 2006 but Summons for Revocation of Grant dated 10th November, 2008 of Confirmed Grant (sic) is still pending in Court.”

26. From a perusal of the Sale Agreement dated 20th August, 2008 as executed between the Appellant and the 1st Respondent, (Page 31 of the Record), it was evident that the Appellant was selling a portion of the property known as Magutu/Gathehu/417 measuring some 30 x 120 feet to the 1st Respondent. As at the time of the said sale, the said parcel of land was still in the name of the Appellant’s father Machira Munyiri whose estate was the subject of the then on-going Nyeri High Court Succession Cause No. 149 of 2001; In the Matter of the Estate of Machira Munyiri.

27. It was also clear that the Agreement was entered into in the full knowledge of the said Succession proceedings. In that respect, Paragraph 2 thereof provided as follows:

“2. That the vendor shall immediately obtain the title deed by registering the grant in Nyeri High Court Succession No. 149 of 2001 and subsequently apply to the Mathira Divisional Land Control Board for the consent to sub-divide and transfer the portion of 30 x 120 feet to the purchaser.”

28. As it would turn out, the Appellant had no legal capacity to sub-divide the said L.R No. Magutu/Gathehu/417. That was so because some two years before the Parties executed the Sale Agreement, a Certificate of Confirmation of Grant had been issued on 27th February, 2006 in the said Nyeri High Court Succession Cause No. 149 of 2001 to some three individuals, namely, Cecilia Mukuhi Machira, James Kinyua Machira and John Wanjau Machira.

29. At the trial before the Lower Court, the Appellant confirmed that those were the administrators of the estate and that they are the ones who sub-divided L.R No. Magutu/Gathehu/417. While the Appellant insisted that he did not execute any transfer documents in favour of the 1st Respondent, it was apparent and there would have been no such requirement on his part. From a perusal of the Green Card for the original parcel of land (Page 92 of the Record) it was evident that L.R No. Magutu/Gathehu/417 was only on 17th October, 2008 transferred to the names of the joint Administrators aforesaid as well as



the other beneficiaries who included the Appellant. Prior to that date, the same was in the sole hands of the Administrators

30. That would lend credence to the 1st Respondent's testimony that as at the time they entered into the Sale Agreement, the Appellant "could not sign anything" and that it was the Appellant that sent him to deal with the Administrators of the estate who in turn took him to the Land Control Board for consent to the transfer.
31. That would also be the reason that the Appellant despite his concession at some point during his cross-examination that the administrators sub-divided the land and transferred the same, he did not see it fit to join the said joint Administrators in this suit.
32. It was interesting to note that while the Appellant purports that he rescinded the Sale Agreement and refunded the 1st Respondent the deposit so far paid on 16th September 2015, the Appellant himself concedes that more than a year earlier on 25th February 2014, he had received a letter from the 1st Respondent's Advocate informing him that the suit property had been registered in the name of the 1st Respondent. The said letter authored by Maina Karingithi & Company Advocates (Page 34 of the Record) addressed the Appellant thus:

Re: Deposit Of Kshs.80,000/- Balance Of Purchase Price By Symon Ndoria Kabuchwa

We refer to the sale of land Agreement executed between you as the vendor and Symon Ndoria Kabuchwa over sale of part of L.R No. Magutu/Gathehu/417 on 20th August, 2008 as well as the acknowledgement dated 13th March, 2009.

As is well within your knowledge, our client became the registered proprietor of L.R No. Magutu/Gathehu/1153. However, despite request you have not collected the balance of Kshs.80,000/- to clear the purchase price. The full amount of Kshs.80,000/- has now been deposited with us for onward transmission to yourself. Kindly therefore avail yourself to this office on any working day upon receipt of this letter to collect the same."
33. It was not until some 17 months later that the Appellant wrote to the 1st Respondent on 16th September, 2015 purporting to rescind the contract due to what he termed "frustration" and enclosing a Bankers cheque of Kshs.150,000/-. While it may have taken rather long for the 1st Respondent to clear the balance of the purchase price, it was apparent that the 1st Respondent had exploited Clause 1(b) of the Agreement which had provided that the balance of the purchase price "shall be paid upon transfer" of the suit property. There was also evidence that the Banker's cheque sent by the Appellant was returned to him vide a letter dated 1st October, 2015 from the 1st Respondent's Advocates (Page 36 of the Record).
34. Arising from the foregoing, I was not persuaded that the Learned Trial Magistrate erred in any way in her findings that the 1st Respondent had committed no fraud and that the 2nd Respondent had acquired a good title to the suit property.
35. It follows that I did not find any merit in this Appeal. The same is dismissed with costs to the Respondents.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9TH DAY OF MAY, 2024.

In the presence of:

No appearance for the Appellant

Mr. Maina for the 1st Respondent



Mr. Wachira Muturi holding brief for L. Mwai for the 2nd Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE

