



REPUBLIC OF KENYA



**JMK v JM & another (Environment and Land Appeal E022 of 2022)
[2024] KEELC 4924 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E022 OF 2022**

**CK NZILI, J
JUNE 19, 2024**

BETWEEN

JMK APPELLANT

AND

JM 1ST RESPONDENT

EGM 2ND RESPONDENT

*(Being an appeal from the Judgment of Hon. Mrs. L.N Juma (SRM)
delivered on 19th April 2022 in Meru C.M ELC Case No. 51 of 2020)*

JUDGMENT

1. The appellant, who was the 2nd defendant together with the 2nd respondent herein, had been sued by the plaintiff through a plaint dated 16.7.2020. As the father of the 1st respondent and the registered owner of L.R No. Kiirua/Naari/xxxx, the 1st respondent, a wife, had claimed that part of the family land was illegally and unprocedurally sold and transferred to the appellant without her spousal consent. She averred that the appellant evicted and fenced off the land and, hence, lost her source of livelihood. Further, the 1st respondent termed the sale and transfer subject to and in breach of family trust and a previous land control board consent, where her husband had agreed to transfer the land to her.
2. The 1st respondent sought a declaration that the land belongs to her, cancellation of the title register and a replacement of the name of the appellant with her name, eviction of the appellant from the land, and lastly, a permanent injunction stopping anyone from interfering with her possession of the suit land.
3. The 2nd respondent was served with a summons to enter an appearance on 23.7.2020. A return of service was filed by Babylon Mutahi on 27.7.2020. A request for interlocutory judgment was subsequently filed on 28.9.2021, against the 2nd respondent. He did not participate in the suit despite service with subsequent court processes.



4. On his part, the appellant relied on a statement of defense and counterclaim dated 9.9.2020. The appellant admitted that he was the absolute registered owner of L.R No. Kiirua/Naari/5429 which was acquired legally and procedurally for a valuable consideration from the 2nd respondent, after which he took vacant possession as a subdivision of L.R No. Kiirua/Naari/xxxx. He denied any alleged fraud, illegality, or breach of any trust as alleged by the 1st respondent.
5. By way of a counterclaim, the appellant averred that the title deed issued on 17.6.2019 was indefeasible and that he took vacant possession of L.R No. Kiirua/Naari/xxxx, measuring $\frac{1}{4}$ an acre with effect from 13.11.2014 and had been enjoying quiet possession until 16.10.2019, when he found out that someone had allegedly destroyed his food crops valued at Kshs.60,000/= only for this suit to be filed. He suspected that the 1st respondent had a hand in the crop destruction.
6. The appellant, as the plaintiff in the counterclaim, sought a permanent injunction stopping the 1st respondent from trespassing upon entering, accessing, or in any way tampering or interfering with anything inside the boundaries of L.R No. Kiirua/Naari/xxxx.
7. From the record of appeal and the lower court file, this court was unable to find any reply to the defense and defense to the counterclaim filed by the 1st respondent.
8. At the trial, Jayne Makena Gituma testified as PW 1. Relying on a witness statement dated 16.7.2021 as her evidence in chief. The 1st respondent told the court that she was a biological daughter of the 2nd respondent and the registered owner of ancestral land L.R No. Kiirua/Naari/xxxx, held in trust for the family. PW 1 said that her father sold part of the land to a third party, leading to her mother placing a caution against the title. PW 1 said that the caution was lifted on condition that the 2nd respondent would subdivide the land into four portions, one in her favor. She said that the father made the subdivisions, and a land control board consent was obtained over L.R No. Kiirua Naari/xxxx, followed by a transfer form duly signed in her favor by the 2nd respondent.
9. PW 1 said that she was surprised that the appellant was illegally sold and transferred the same parcel by her father. She produced a copy of the receipt for the caution as P. Exh No. (1) land control board consent dated 21.2.2019 as P. Exh No. (2) proceedings at the land registrar's offices over rate caution as P. Exh No. (3); an application to withdraw the caution as P. Exh No. (4), mutation form as P. Exh No. (5) copy of an application dated 18.2.2019 for subdivision for L.R No. 5429 as P. Exh No. (6), transfer form duly signed by the 2nd respondent dated 27.11.2019 as P. Exh No. (7), valuation report for stamp duty as P. Exh no. (8), search for L.R No. xxxx as P. Exh No. (9), official search certificate as P. Exh No. 10 (a) – (d), copies of pleadings filed by his brother in ELC No. 52 of 2020 and order dated 5.8.2020 as P. Exh No. (11), judgment dated 10.6.2021 as P. Exh No. (12).
10. PW 1 termed the sale agreement dated 13.11.2014 as lacking any witness on behalf of the family a spousal consent or a land control board consent. She said that a land control board could not grant a land control board consent twice for the same land. He also said that she made a response to the counterclaim on 23.10.2020.
11. In cross-examination, PW 1 said that the sale agreement dated 13.11.2014, came when there was already a caution placed against the title register by her mother and that when her father appeared before the land consent board and signed a transfer form in her favor, he did not disclose that he had sold and transferred the same parcel of land to the appellant.
12. Benda Elijah Aritho testified as PW 2. As a mother to PW 1 and a wife to the 2nd respondent, she told the court that L.R No. Kiirua Naari/xxxx belonged to her husband, and she was not aware that he sold and transferred L.R No. Kiirua/Naari/xxxx, a subdivision to the 2nd respondent, given that her



- spousal consent was not sought or obtained. She termed the sale and transfer as irregular and aimed at displacing her from the land, making her stay in a rented land.
13. In cross-examination, PW 2 confirmed that her caution was lifted, only for her husband to change tune and sell the land contrary to the condition in the lifting of the caution, to pave the way for the subdivisions and transfer of the land in favor of her children given that she had separated with him in 2005. PW 2 said that her son MB acquired his share of the land. However, after she went with the 2nd respondent to the land control board, he later changed and sold the second portion to the appellant instead of transferring it to the 1st respondent.
 14. Moses Gitune testified as PW 3. He confirmed that he had sued his father in ELC No. 52 of 2020 where he obtained a judgment. He produced the judgment as P. Exh No. (12). Further, PW 3 confirmed that the 1st respondent attended a land control board meeting for its consent, which was issued and a transfer form duly signed, only for their father to sell and transfer the land to the appellant. He said that the appellant had initially bought another portion with their consent, but in the second portion, he never sought their consent at all, yet the land was ancestral.
 15. James Muthomi testified as DW 1 After adopting his witness statement dated 9.9.2020 as his evidence in chief, DW 1 told the court that on 13.11.2014, he wrote a sale agreement with the 2nd respondent, who offered to sell to him ¼ of an acre of L.R No. Kiirua/Naari/xxxx for Kshs.200,000/=. DW 1 said that he made a down payment of Kshs.25,000/= at the signing of the sale agreement, took vacant possession, and later, on 18.2.2019, cleared the balance. Further, DW 1 said that the land was excised from the original parcel and was issued with a title deed on 17.6.2019. He denied knowledge of any caution or the 1st respondent's cause of action, for he dwelt with the 2nd respondent as the absolute owner of the land.
 16. Subsequently, DW 1 produced copies of the sale agreement, acknowledgment receipts for payment, title deed, and an agricultural officer's crop damage assessment report as D. Exh No's. 1-6.
 17. DW 1 confirmed that none of the seller's two wives or children witnessed the sale agreement, land control board consent or the transfer or the payment of the purchase price. DW 1 admitted that the sale agreement occurred in 2019 after the caution had been lifted. He further admitted that he had no application for the land control board consent, a letter of consent or transfer form, which must have preceded the issuance of the title deed.
 18. Similarly, DW 1 said he could not ascertain when he went to the land control board, obtained the land control board consent, lodged the transfer form, or made payments for the stamp duty. He said that all the accompanying documents were at the land registrar's offices. DW 1 denied any fraud, for the caution had been lifted for everyone to get their land. DW 1 said that when he made the final payment of Kshs.65,000 in February 2019, he had no reason to suspect that the seller was doing it fraudulently on account of his actions on 18.2.2019.
 19. Mary Ann Njeri, the Land Registrar Meru central registry, was called as DW 2. She was, however stood down for lack of accompanying documents. The trial court declined a request for an extension of time to file and produce additional documents since time to do so had expired after 14 days following an order made on 25.11.2021. The appellant's case was ordered closed.
 20. The appellant moved this court through a memorandum of appeal dated 10.5.2022. He faults the trial court's judgment made on 19.4.2022, for condemning him to lose the land, yet he was a bonafide innocent purchaser; for impeaching his title yet there were no specific pleaded and proved alleged fraudulent activities; for failing to appreciate that the sale had commenced way back in 2014, hence



predated the 1st respondents claim to the land and for delivering the judgment yet there was a valid order arresting the judgment until 27.4.2022.

21. With leave of court, parties were directed to canvass the appeal by way of written submissions. The appellant relied on written submissions dated 29.5.2024, that the trial court misapprehended his case and evidence tendered; the judgment was untenable; how the land was acquired after four years of the deceased father was not considered, and that there was no valid counterclaim. The 1st respondent relied on written submissions dated 31.5.2024, that the trial court was correct since the appellant failed to support his title deed with the requisite paper trail as held in *Daudi Kiptugen vs Commissioner of Lands* (2015) eKLR, *Alice Chemutai Too vs Nickson K Korir and others* (2015) eKLR, *Arthi Highway Developers Ltd vs West End Butchery* (2015) eKLR, the *Land Control Act* and the *Law of Contract* by Michael Furmston 3rd ed 2007.
22. The mandate of this court is set out under Section 78 of the *Civil Procedure Act*. In *Selle & another vs Associated Motor Boat Co. Ltd & others* (1968) E.A 123. It was observed that a court is not necessarily bound to accept the findings of fact by the court below. It executes the mandate by way of a retrial, reconsidering the evidence, evaluating it, and drawing its conclusions while making due allowance for the trial court had seen and heard the witnesses.
23. The issue raised by the 1st respondent through a plaint dated 16.7.2020 regarded illegality, fraud, and breach of trust. The particulars were pleaded in paragraphs 10, 11, 12 & 13 of the plaint. The 1st respondent had pleaded explicitly that her father had already sought and obtained a land control board consent followed by a duly signed land transfer form for L.R No. Kiirua/Naari/xxxx in her favor, that the subsequent transfer and registration to the appellant was illegal, unprocedural and irregular, for lack of spousal consent and breach of trust given the land was not available for a third party in view of the previous agreements, consents and transfer alluded to above.
24. The 1st respondent produced as exhibits the initial application for land control board consent, the consent, the transfer forms dated 27.11.2019 and payments, the minutes for a meeting at the land registrar's office, leading to the lifting of the caution made on 8.2.2017 and the ruling on 12.4.2017, the mutation form duly signed by the 2nd respondent dated 21.12.2018 and copies of official search dated 25.2.2019.
25. In the statement of defense and counterclaim dated 9.9.2020, the appellant, at paragraph 4 thereof, averred that he bought the land on 23.11.2014, took vacant possession, and hence denied any particulars of illegalities and fraud set under paragraph 10 (a) – (d). Further, in paragraphs 5 and 6 thereof, he denied that the land registration No. Kiirua/Naari/xxxx was encumbered, or that he engaged in any alleged illegal, unlawful, or fraudulent scheme solely or jointly with the 2nd respondent to breach the trust set out in paragraph 12 of the plaint. Given such clear pleadings by the appellant, ground number 2 of the appeal lacks merits.
26. Parties are bound by their pleadings and issues flow from the pleadings. In this case, the 1st respondent had specifically pleaded illegality, fraud, irregularity, and breach of trust as a means of impeaching the title held by the appellant as per Sections 24, 25, 26, 28, and 29 of the *Land Registration Act*. It is trite law that when a title is under attack, a party cannot just flash out the instrument of ownership but must go behind the title and prove that its acquisition was regular, formal, lawful, and procedural. See *Alice Chemutai Too vs Nickson Kipkurui & 2 others* (2015) eKLR and *Dr. Ngok vs Moijjo Ole Keiwua & 4 others* (1997) eKLR.
27. In this appeal, it was the appellant who was invoking the doctrine of legality and regularity. The 1st respondent alluded to and supported the basis of her trust, arising from her estranged mother, whom



she called as PW 2, and her brother PW 3. Exhibits were produced among them proceedings at the land registrar's office where it came out clearly that the 2nd respondent had two wives. DW 1 confirmed these facts and admitted that none of the seller's two wives and or children were witnesses to the sale agreement or the land control board application, or consent and or to the payment of the balance and writing the second agreement.

28. The appellant was unable to support his title deed with any paper trail before its issuance, including a land control board application form, land control board consent letter, transfer forms duly signed and lodged with the land registrar, and documents to show the payment of stamp duty or registration fees. The appellant was given adequate time to file further documents before the hearing. None were filed or produced before the trial court to sustain his defense and counterclaim that he was a bonafide purchaser for value without notice of any adverse claim by the 1st respondent.
29. The appellant failed to call the 2nd respondent to demonstrate that he was the first in time to acquire a land control board consent, transfer forms, and registration of the land in a regular formal and procedural manner. In cross-examination, DW 1 admitted that he had no supporting documents to show when he attended the land control board meeting, obtained a land control board consent, signed and lodged the land transfer form and obtained a title deed after paying registration fees and stamp duty. It is the procedure that a party will keep the receipts and the copies once they have been lodged with the land registrar.
30. Though the appellant called DW 2, she was unable to produce anything to sustain his defense on legality and procedural compliance in obtaining the title deed. The burden is on who is likely to lose if specific facts are not established under Sections 107 – 111 of the *Evidence Act*. The appellant failed to discharge the evidential burden that his title deed was issued legally, procedurally, and regularly. See *Raila Odinga & others vs IEBC* (2017) eKLR.
31. The 1st respondent had pleaded breach of trust. A constructive trust is automatically imposed when a person who is already a trustee takes advantage of his position for his benefit. Further, the 1st respondent produced exhibits to show that her father had obtained a land control board consent and signed transfer forms in her favor for the same parcel of land. The intention to find trust was evident. See *Juletabi African Adventure Ltd vs Christopher Michael Lockley* (2017) and *Twalib Hatayan Twalib Hatayan & another vs. Said saggar Ahmed Al- Heidy & others* (2015) eKLR.
32. The appellant was unable to rebut the existence of the trust before he acquired his title. There were already red flags on the titles register as there was in existence a caution by PW 2. So, the appellant must have been aware of the claim. He cannot feign ignorance, for under Section 29 of the *Land Registration Act*, due diligence was expected of him. In cross-examination, DW 1 admitted knowledge of the circumstances leading to the lifting of the caution. Again, the appellant did not prove that he served the order of stay of proceedings and the outcome of the ruling in his application, whose ruling was on 27.4.2022.
33. The upshot is that I find the trial court was proper in its conclusion on facts and the law. The appeal has no merits. It is dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 19TH DAY OF JUNE, 2024

HON. C K NZILI

JUDGE

In presence of



C.A Kananu

Appellant

Miss Mugwe for respondent

Kimathi for Kaumbi for the appellant

