



**Kiriinya v Kiriinya (Environment and Land Appeal E085 of 2022)  
[2024] KEELC 4912 (KLR) (19 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4912 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E085 OF 2022**

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

**BETWEEN**

**JAPHET MURITHI KIRIINYA ..... APPELLANT**

**AND**

**DANIEL GATOBU KIRIINYA ..... RESPONDENT**

*(Being an appeal from the judgment in **Githongo ELC E15**  
of 2020 delivered by Hon. S. Ndegwa – SPM on 9.12.2022)*

**JUDGMENT**

1. The appellant as the plaintiff at the lower court, had sued the respondent as the defendant, a brother and a son of the late Bernard Kiriinya Ntimitu, who passed on 10.3.2016 after subdividing L.R No. Abothuguchi/Kithirune 2006 – 2009, in favor of each of his sons.
2. The appellant averred that he was allocated, settled and has extensively developed his portion, namely L.R No. Abothuguchi/Kithirune/2009, while the respondent was allocated two acres in the Nturukuma area, which, unfortunately, he sold and misused the proceeds.
3. The appellant averred that on 24.9.2020, the respondent shocked him by serving him with notice to vacate his land by the end of 2020. In a shocking turn of events, the appellant averred he caused an official search over the title to his land only to establish that the land reserved for him had been fraudulently transferred and registered on 8.1.2020 in favor of the respondent, yet the registered owner died on 10.3.2016.
4. The appellant termed the transfer and registration as invalid, illegal, unprocedural, and irregular since the suit land was ancestral or family, reserved for him, and was done after the demise of the registered owner, who could not have attended the land control board meeting or signed the transfer form. Therefore, the appellant sought the cancellation of the registration and a declaration that the transfer and subsequent registration were illegal and fraudulent.



5. Through a statement of defense and counterclaim dated 27.10.2021, the respondent denied the appellant's claim. He averred that their late father subdivided the initial suit land into five portions and attended a land control board meeting in 1995, where the appellant was issued with L.R No. 1258, while L.R No. 2009 was issued to him. He denied that he was issued any land at Nturukuma.
6. By way of a counterclaim, the respondent, as the plaintiff in the counterclaim, averred that he was the registered owner of L.R No. Abothuguchi/Kithirune/2009, following transfer to him by the late father. The respondent averred that the appellant herein wrongfully entered into the suit land in 2003 and has remained in possession, which he terms as continuing trespass, despite notices, demands, or complaints made to the area chief over the illegal occupation which has caused him loss and damage. The respondent prayed for a declaration that he was the registered owner of the suit land and an order for eviction.
7. At the hearing, the appellant testified as PW 1 and called Gideon Thurania, Johana M'Rukaria and Lucy Karambu as his witnesses who adopted as evidence in chief their filed witness statements dated 28.3.2024.
8. PW 1 told the court that he was born in 1954 and that his father owned L.R No. Abothuguchi/Kithirune/1048, which he subdivided into L.R No. 2006 – 2010 in favor of John Mbuya, Samuel Mbaabu, Julius Mworira and Japhet Murithi, respectively.
9. PW 1 said that his late father was polygamous, and after giving the respondent 2 acres in Nturukuma, he sold it and left for Maua town. PW 1 said that he took possession of L.R No. 2009 and has extensively developed it by planting 500 coffee trees, 1000 tea bushes, ½ an acre of banana trees, and several exotic and macadamia trees. He said that he had lived therein with his family, out of which two of its members passed on and are buried in the land.
10. Similarly, PW 1 said that it was shocking to receive a notice to vacate the land from the respondent dated 24.9.2020 and more surprised to find out a transfer and registration of his portion on 8.1.2020, long after his late father passed on. He denied being privy to any land control board meeting where consent to transfer his land was issued; otherwise, he had nowhere else to call home. PW 1 relied on a copy of the eulogy, certificate of an official search for LR No. 2009, a copy of the green card, a copy of the mutation form, and the demand letter as P. Exh No's. 1 to 5, respectively.
11. Moreover, PW 1 said that his late father had five sons and subdivided the land in 1995, leaving a portion for himself. He denied attending any land control board meeting in 1995, for the subdivision. Similarly, PW 1 refuted any allegations that the respondent had lived on the suit land or that entry by him to the suit land occurred in 2003 since he had all along lived on the suit land since 1995.
12. As to L.R No. 1258, PW 1 admitted it was registered under his name, measuring 3 acres, which he acquired directly from his late grandmother. PW 1 clarified that the fact that he acquired L.R No. 1258 did not mean that he was not entitled to a share of 2 acres of land from his late father's inheritance.
13. Further, PW 1 admitted that after the discovery of the fraud, he made no report to the police. PW 2 & 3 confirmed that the appellant has been living and developing the suit land since acquiring it from his late father in 1995. PW 3 similarly confirmed that he was present when the late Ntimitu subdivided his lands among all his sons. PW 4, as a sister to the appellant, told the court that her late father subdivided LR No. 1048 measuring 8 acres among his sons from the 2 houses except the respondent who had been given land in Nturukuma – Nanyuki measuring two acres.
14. Daniel Gatobu Kiriinya testified as DW 1. Relying on his witness statement dated 25.7.2022 as his evidence in chief, DW 1 told the court that during land adjudication in 1963, the rule was that



- one could not be allocated two parcels of in the same area, so his late father registered L.R No. Abothuguchi/Kithirune/1258, in the name of Muriuki, son of Kiriinya, later transferred to the name of his elder brother, the appellant, who had constructed a house on L.R No. Abothuguchi/Kithirune/1048 before the subdivisions in 1995.
15. DW 1 further dated that when he wanted to construct a house in 1993, his late father allowed him to build a 3-bedroom house on L.R No. 1258, measuring 3 acres and which was close to L.R No. 1048. DW 1 said that in 1994, he cautioned L.R No. 1258, after learning that his late father was about to transfer the same to the appellant, yet he had built his three-bedroomed wooden house on the said land.
  16. In addition DW 1 said that after having a family meeting, his late father agreed to give him a portion of his mother's title, of which he lifted the caution leading to the subdivision in October 1995, where each of them was shown their respective subdivisions, leaving his late father 1 acre of land being L.R No. 2010 reserved for his wives and daughters.
  17. The respondent told the court that following the subdivisions, the appellant remained on L.R No. 2009, now allocated to him, while his house remained on L.R No. 1258. DW 1 told the court that in October 1995, all of them attended the land control board meeting together with their late father, who gave them consent for the transfers and had since lived in harmony with the appellant until the late father passed on on 10.3.2016.
  18. DW 1 said that after the death, he asked the appellant to transfer to him 2 acres of L.R No. 1258, since he had built a house there, refused and even demanded that he vacate the land only for him to process and obtain a title deed in 2020, and demand that the appellant vacates his land in vain. DW 1 said that instead of vacating, PW 1 went ahead and demolished his house, threw out all his belongings, including furniture and eventually denying him access to the land. DW 1 relied on a copy of the official search for L.R No. 2009, green cards for L.R No. 2009 and 1258 as D. Exh No. 1, 2 & 3. He denied any fraud in acquiring the title deed on 8.1.2020 since his late father signed all the land control board consent in 1995. He said that all the transfer forms and the land control board consents were executed by the late father for the five subdivisions and lodged regularly with the land registrar.
  19. Further, DW 1 confirmed that the appellants had been on the suit land all his life while he was living on L.R No. 1258, though his late father had, after a series of meetings, asked each of them to move to their rightful parcels of land. Further, DW 1 said that when L.R No. 1258 was registered in 1954, PW 1 was still a minor. He denied acquiring 2 acres of land at Nturukuma from his late father, which he later on disposed of.
  20. DW 2, a brother to DW 1, relied on his witness statement filed on 25.7.2022. He told the court that in November 1995, their late father subdivided L.R No. 1048 into L.R No's. 2006, 2007, 2008, 2009 and 2010 in favor of Joseph Mbaya, Samuel Mbaabu, Julius Mwebia, Daniel Gatobu, and Kiriinya Ntimitu. During that date, at the land control board, PW 1 indicated that he had no interest in any portion of L.R No. 1048, since he already had L.R No. 1258 transferred to him by their father. DW 2 said that each of the sons were given a land control board consent to process their title deed and that DW 1 acquired his title deed in 2020.
  21. DW 2 told the court that there was an agreement that the appellant transfers 2 acres of L.R No. 1258 to the respondent in exchange for L.R No. 2009 and equally to avoid demolishing the house on L.R No. 1258, only for PW 1 to change after their father passed on and instead demanded that the respondent vacate his land altogether, leading to this suit.
  22. Eventually, DW 2 produced copies of the title deed for L.R No. Abothuguchi/Kithirune/2066, 2009, 2010, 2005 and 2008 as D. Exh. No's. 4-8, respectively. DW 2 confirmed that the sons attended the land



- control board with their late father in 1995. He denied that his share was the Nturukuma land, given that his late father had sold it to his brother-in-law and husband to Lucy Karambu. DW 2 admitted that some of the appellant's relatives were buried on L.R No. 2009. DW 3 Esther Kiriinya, testified as DW3 and relied on her witness statement dated 18.7.2022. She told the court that they were blessed with five boys and five girls, among which the deceased subdivided L.R No. 1048 into five portions among the sons except the appellant, who owned L.R No. 1258, which he has since subdivided and sold a portion to third parties.
23. DW 3 confirmed that the appellant has been living on L.R No. 2009, though his rightful share was L.R No. 1258, which unfortunately is also occupied by the respondent, who should move to his rightful land, L.R No. 2009. She termed the appellant as the aggressor and cause of breach of peace by invading the land, demolishing the respondent's structure, and going to the extent of chasing her away from the land. DW 3 confirmed that she attended the land control board meeting with her late husband in 1995 where after the subdivisions were affected.
  24. Similarly, DW 3 confirmed that the two parties had initially amicably agreed to swap places, but the appellant changed his mind and started staking a claim on the two parcels of land.
  25. After the close of the defence, the trial court rendered its judgment, now appealed against by the appellant. The appellant faults the trial court for:
    - i. Misapprehending the claim, evidence tendered and hence reaching wrong and untenable decisions.
    - ii. Failing to find the suit as proved to the required standard.
    - iii. For failing to tackle the main and real issues in contention and instead dwelling on extraneous or non-issues.
    - iv. Failing to find that the counterclaim was not proved.
    - v. Failing to find that the respondent's evidence was fabricated and produced by witnesses who did not pass the test of cross-examination.
    - vi. Being biased.
  26. A court of appeal of first instance has to reanalyze, re-hear, and re-appraise the lower court record to come up with independent findings as to facts and law, bearing in mind that the trial court had an opportunity to see and hear the witnesses firsthand. See *Selle v Associated Motor Boat Co. Ltd & others* [1968] E.A 123, *Gitobu Imanyara & others v AG & others* [2016] eKLR.
  27. In this appeal, the appellant's claim was based on fraudulent, irregular, and illegal transfer and registration of L.R No. Abothuguchi/Kithirune/2009, initially reserved for him to the name of the respondent on 8.1.2020. The main complaint was that the initial registered owner passed on on 10.3.2016, yet the transfers and registration in favor of the respondent occurred on 8.1.2020.
  28. In *Vijay Morjaria v Nansigh Madhusing Darbar & another* [2000] eKLR, the court said fraud must be specifically pleaded and that particulars of the alleged fraud must be stated on the face of the pleadings. In *CBK Ltd v Trust Bank Ltd & others* [1996] eKLR, the court said fraud and conspiracy to defraud were serious allegations whose burden of proof was higher than in ordinary civil cases.
  29. Section 38 of the *Evidence Act* provides that entries in the public record made on official duty are admissible. The onus was on the appellant under Sections 107 – 112 of the *Evidence Act* to prove through tangible and cogent evidence that the process of the subdivision of L.R No. 1048 to L.R No's.



- 2006 – 2010 generally and specifically L.R No. 2009 in favor of the respondent was tainted with fraud, illegality, irregularity and was a result of corrupt scheme. See *Kamene Ndolo v George Matata Ndolo* [1996] 1 KLR (G & F) 742.
30. Fraud cannot be inferred from the facts. It must be pleaded and proved. The appellant relied on a eulogy, an official search, a copy of the records and mutation form dated 20.11.1995. The mutation form did not include the names of the beneficiaries. It did not include the name of the appellant as the would-be beneficial owner of L.R No. 2009. The mutation had no registration details. Evidence was not tendered to show that the documents used to process L.R No. 2009 were forgeries and did not emanate from the deceased.
  31. The appellant failed to call any evidence from the chairman of the land control board meeting done between October and December 1995 indicating that the deceased did not attend any such meeting to subdivide the suit land in favor of his sons, wives and daughters. DW 1, 2 & 3 were clear that their late father and husband attended a land control board meeting in October/November 1995, for a subdivision of his land, which was used to process D. Exh No. 4-8, respectively PW 2, 3 and 4 were in agreement with DW 1, 2 & 3 that a land control board meeting occurred in 1995.
  32. The evidence by the appellant and his witnesses was at variance with paragraph 12 of the plaint, alleging that the registered owner never attended any land control board meeting to effect the subdivisions leading to the transfers in favor of his children and himself, in trust for his two wives and the daughters.
  33. In an attempt to impeach the title deed under Section 26 (1) of the *Land Registration Act*, the appellant made vague and very general allegations of fraud or illegality. The appellant failed to call the chairman of the land control board committee and the land registrar who effected the transfers. The appellant had alleged that it was the respondent who committed the fraud. Evidence had to be led showing that the respondent presented forged documents to the land registrar to effect the registration.
  34. Evidence that L.R No. 2009 was meant for the appellant and not the respondent in the initial transfers was not verified by any documentary evidence. The occupation of the suit land before subdivisions occurred is not in dispute regarding L.R No's. 2009 and 1258. Evidence that the two parties were directed to settle the issue by their late father before 2016 amicably has not been disputed by the appellant. See *Eva Kimea & another vs Nawal Abdulrahaman Abdalla Mombasa Civil Appeal 52 of 2014*. The appellant failed to call any forensic or criminal investigative report that the documents used by the respondent to acquire title for the suit land were forged, illegal, unsigned, or purportedly signed by the registered owner after he had long passed on. See *Tabitha Mordekai Mwita v Joseph Wambura John* [2016] eKRL.
  35. Regarding the counterclaim, the respondent had alleged trespass to L.R No. Abothuguchi/Kithirune/2009 by the appellant. Evidence tendered by both parties and their witnesses showed the circumstances under which the two came to undertake constructions and or possess L.R No's. 2009 and 1258, before the subdivisions were effected following the land control board meeting in 1995. Both parties were shown where to erect their houses by the registered owner at the time. The subdivisions did not align with the existing occupation on the ground, and that is why evidence by DW 1, 2 & 3 was clear that the main plaintiff had consented to the occupation of his land by the plaintiff in the counterclaim.
  36. Similarly, the plaintiff in the counterclaim knew that the appellant had erected his homestead on the suit land long before the subdivisions occurred to effect L.R No. 2009. The entry into and occupation of the L.R No. 2009 was with the consent of the then-registered owner. It cannot be termed as a wrongful entry in 2003 as alleged by the respondent. All the respondent's witnesses confirmed that the appellant had lived on L.R No. 2009 all his life.



37. Trespass refers to unjustified occupation of private land without the permission, consent, or authority of the registered owner. The respondent acquired the title deed in 2020 while the appellant was already in occupation of the land. The title acquired by the respondent was subject to occupation and possessory rights of his brother who had been in occupation of the land courtesy of his late father. In his evidence, DW 1 told the trial court the learned that this late father was transferring L.R No. 1258 to the appellant, yet he was in occupation of it, hence the reason that he placed a caution on it. Further, DW 1 told the trial court that he was assured that he would be given another portion in occupation by the appellant so long as the two could agree to give in exchange for 2 acres of L.R No. 1258. The respondent testified that the appellant changed his mind after his late father passed on and started laying a claim on the two parcels of land.
38. Section 3 (9) of the *Trespass Act* provides that any person who, without reasonable excuse, enters his or remains upon, or erects any structure on or cultivates on private land without the consent of the occupier thereof is guilty of an offense. Entry into the land by the appellant was consented to by his late father, and so was that of the respondent on L.R No. 1258. None would, therefore, term the occupation of the land of the other as illegal or unjustified. Each of them knew the position of the other and had acquiesced to it.
39. In *Tabitha Mordekai Mwita v Joseph Wambura John* (supra), the court said that entry and occupation of the suit land without title must be justified; otherwise, it would amount to trespass. In *David Ngoge Alfons v Joshua Monyancha Kiyondi* [2014] eKLR, the court observed that once the plaintiff established he was a registered owner, the burden shifted to the defendant to justify his entry and continued occupation of the suit property.
40. In this appeal, the defendant to the counterclaim had pleaded and proved his occupation, and developments which had preceded the issuance of title to the plaintiff to the counterclaim in 2020. Equity shall suffer no wrong without a remedy. Intergenerational equity is grounded in Article 60 (1) (a) of *the Constitution* and Section 28(b) of the *Land Registration Act*. See *Mbui Mukangu v Gerald Mutiwri Mbui* C.A No. 281 of 2000.
41. Registration of title is a creation of law, and one must look into the considerations surrounding it. See *M'Inanga vs M'Lintari* Supreme Court of Kenya No. 10 of 2018. It would, therefore, be unconscionable and unjust for the court to order an eviction when the respondent acquired the title deed while aware of the overriding rights of use, occupation, and possession by his brother. The respondent knew the reality on the ground. See *Kanyi Mburugu v Zipporah Wanjiru Mwoni* [2008] eKLR.
42. The respondent cannot avoid the interest of the appellant arising from actual occupation without legal title, which is equitable rights binding on land and against the respondent. See *Samuel Kariuki Mwangi & another v Njuru Mwangi* [1986] eKLR. I find the counterclaim was not proved to the required standard to justify the issuance of declaratory orders of exclusive ownership and the eviction of the appellant from the suit land. The counterclaim lacked a titular heading, and the requisite filing fees appear missing from the record of appeal.
43. The trial court failed to analyze the facts, evidence, and nature of entry, possession, and occupation by the appellant on the land with the consent and approval of the initial registered owner. The court should not have therefore, termed the appellant as a trespasser to the land. The appeal is allowed to the extent that the counterclaim was not proved to the required standards.
44. Costs to the appellant.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU**



**ON THIS 19<sup>TH</sup> DAY OF JUNE, 2024**

In presence of

C.A Kananu

Appellant

Obiria Mokuu for appellant

Igweta for the respondent

**HON. C K NZILI**

**JUDGE**

