Mlaho & another (Suing on Behalf of the Estate of Charles Mulano Ngui a.k.a Charles Mlaho Ngui) v Ngui (Environment and Land Appeal E023 of 2023) [2024] KEELC 4663 (KLR) (Environment and Land) (14 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4663 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VOI

ENVIRONMENT AND LAND

ENVIRONMENT AND LAND APPEAL E023 OF 2023

EK WABWOTO, J

JUNE 14, 2024

[FORMERLY MOMBASA ELCA E036 OF 2023]

BETWEEN

CHRISTOPHER NGUI MLAHO ..... 1ST APPELLANT

FAUSTINA KIMBWERE MLAHO ..... 2ND APPELLANT

SUING ON BEHALF OF THE ESTATE OF CHARLES MULANO NGUI A.K.A CHARLES MLAHO NGUI

AND

CHARLES LERUMASI NGUI ..... RESPONDENT

JUDGMENT

1. This is an Appeal against the judgment and decree of the Magistrate Court at Taveta delivered on 27th April 2023 by Hon. D. M. Ndungi (PM) in respect to Taveta ELC No. E001 of 2021.

2. Vide a plaint dated 22nd December 2020, the Plaintiffs (now Appellants) had sought the following orders:-

    a. A declaration that Plot no. Taita Taveta/Lake Jipe Scheme/414 belongs to the late Charles Mulano Ngui a.k.a Charles Ngui.

    b. A declaration that the Defendant has acquired Plot No. Taita Taveta/Lake Jipe Scheme/414 illegally.

    c. The Defendant's title deed for Plot No. Taita Taveta/Lake Jipe Scheme/414 if any be cancelled and revoked.

3. The trial court upon considering the suit before it found that the Plaintiffs had failed to prove their case on a balance of probability and proceeded to dismiss the suit with costs to the Defendant.

4. The Appellants being dissatisfied with the trial court's judgment, filed the instant appeal vide the Memorandum of Appeal dated 23rd May 2023. The Memorandum of Appeal had 18 grounds enumerated as follows:-

    1. That the learned trial Magistrate erred in fact and in law in failing to consider the evidence before him in support of the Appellant's case.

    2. That the learned trial Magistrate erred in law and in fact in holding that the Appellants had no right to collect the Title Deed from the Land Registrar on behalf of their deceased father Charles Mlano Ngui.

    3. That the learned trial Magistrate erred in fact and in law in holding that the Title Deed produced by the Appellants as exhibit was wrongfully and illegally obtained.

    4. That the learned trial Magistrate erred in fact and in law in holding that the Appellants did not prove the allegations of fraud or a corrupt scheme to the required standards.

    5. That the learned trial Magistrate erred in law and in fact in holding that non-joinder of government officers to wit the Land Registrar, Land Adjudication Officer and the Attorney General was fatal.

    6. That the learned trial Magistrate erred in law and in holding that the Land Registrar acted rightly and regularly by gazetting the Title Deed as lost and subsequently issuing another Title Deed, yet it was in the knowledge of the Land Registrar that the Title was not lost and infact it was in the Appellants' possession.

    7. That the learned trial Magistrate erred in law and in fact in holding that the Land Registrar did not rectify but re-issued the same Title, yet the Title issued to the Respondent was different from that held by the Applicant.

    8. That the learned trial Magistrate erred in law and in fact in holding that the Title issued in the name of Charles Ngui referred to the Respondent and not the Appellants' deceased father.

    9. That the learned trial Magistrate erred in law and in fact in holding that the documents tendered by the Respondents on the process of acquisition of the Title were stronger that those tendered by the Appellants.

    10. That the learned trial Magistrate erred in law and in fact in holding that the Respondent is the bona fide owner of the suit parcel No. Taita Taveta/Lake Jipe Scheme/414.

    11. That the learned trial Magistrate erred in law and in fact in failing to acknowledge that the Title Deed held by Appellants was issued first and as along as it existed no other title issued for the same portion until the earlier one was revoked by a competent court.

    12. That the learned trial Magistrate erred in law and in fact in holding that the Title produced by the Appellants in the name of Charles Ngui referred to the Respondent herein Charles Lerumasi Ngui and not the appellants' now deceased father Charles Mulaho Ngui.

    13. That the learned trial Magistrate erred in law and in fact in holding that the Appellants failed to prove their case that the Respondent fraudulently illegally acquired the Title he produced as exhibit.

14. That the learned trial Magistrate erred in law and in fact in holding that the Appellants did not prove that they incurred any loss or damage as a result of Respondent's occupation.

15. That the learned trial Magistrate erred in law and in fact in dismissing the Appellants' suit with costs without properly evaluating evidence produced and all the exhibits.

16. That the learned trial Magistrate erred in law and in fact in failing to find that the Appellant Title was the valid one.

17. That the learned trial Magistrate erred in law and in fact in failing to find that the Respondent's Title Deed was issued when the Appellants were still holding and in possession of Title Deed of the suit parcel of land.

18. That the learned trial Magistrate erred in law and in fact in delivering a decision not supported by the evidence on record and adduced in court.

5. The Appellants sought the following reliefs in the appeal:-

    1. This Appeal be allowed with costs to the Appellants.

    2. The judgment of the court in ELC Suit no. E001 of 2021 – Taveta delivered on 27th April 2023 dismissing the Appellants suit be set aside.

    3. Judgment be entered in favour of the Appellants against the Respondent as prayed in the Appellants plaint dated 22nd December 2020.

6. The Appeal was canvassed by way of written submissions. The Appellants filed her written submissions dated 18th January 2024. No submissions had been filed by the Respondent as at the time the court retired to write its judgment.

7. The Appellants submitted that the trial court erred in law and in fact in dismissing their case with costs. It was argued that the Appellants had filed their suit on behalf of the estate of their late father Charles Mulano Ngui a.k.a Charles Mlaho Ngui who was the registered proprietor of the suit parcel of land Taita Taveta/Lake Jipe Scheme/414 situate in Taveta. Their father passed away on 27th January 2004 but title was issued later on 8th August 2012. The Appellants came to realize that the Respondent had been issued with another title for the same parcel on 15th October 2020 the same having been issued fraudulently for the reasons that he shares the same name Charles Ngui with the Appellants' father.

8. It was also submitted that the Appellants' father was issued with the letter of offer dated 2nd January 1997 and upon satisfying its requirements, a title deed was issued in his name on 8th August 2012. It was submitted that the Respondent equally alleged that he was issued with an offer letter dated 2nd January 1997 however his title was issued after a replacement of a lost title. The Appellants reiterated that the Respondent's title was issued fraudulently and reliance was placed in the following cases which the court has considered: Kisumu Misc. No. 80 of 2008 *Republic v Kisumu District Lands Officer & Another* (2010) eKLR; *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* (2016) eKLR and *Munyu Maina v Hiram Gathiha Maina* (2013) eKLR.

9. The Appellants also relied on Sections 26(1) and Section 80(1) of the *Land Registration Act* and urged the occur to allow the appeal and grant the reliefs sought.

10. The court has considered the entire record of the Appeal and written submissions filed by the Appellants. The Appellant's itemized 18 grounds of appeal. In determining the issues raised in the Appeal, and as submitted by the Appellants in their submissions, this court is cognizant of its duty

on a first appeal. The case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123, cited with approval in *China Zhongxing Construction Company Ltd v Ann Akuru Sophia* (2020) eKLR, in the following terms:

> "I accept Counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular, this curt is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif v Ali Mohamed Sholan* (1995). 22 EACA, 270)."

11. In the same case of *China Zhongxing Construction Company Ltd v Ann Akuru Sophia* (2020) eKLR, the court noted that the Court of Appeal for East Africa took the same position in *Peters v Sunday Post Limited* (1958) EA 424 where Sir Kenneth O'Connor stated as follows:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their lordships in the House of Lords in *Watt v Thoma* (1) (1974) AC 484.
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> > "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not say that a judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact but it is a cogent

circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

12. In view of the citations propounded above, three complementary principles ensue; first, on first appeal, the court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; second, in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and third, it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

13. The following issues stand out as salient issues for determination which can dispose the Appeal:-

    i. Who is the legitimate owner of the suit property.

    ii. Whether the trial court was justified based on the facts, evidence and the law in arriving at the decision to dismiss the Appellants suit before the lower court.

    The court shall now proceed to determine the said issues sequentially.

Issue No. (i) Who is the legitimate owner of the suit property?

14. The Appellants' case was that they are the children of the late Charles Mulaho Ngui the registered proprietor of Plot No. Taita Taveta/Lake Jipe Scheme/414. Their father was the first to be allocated the suit property and that the Respondent later fraudulently acquired another title for the same.

15. Christopher Mlao who testified as PW1 during trial stated that their father was the first to be allocated the land even though the Respondent is currently occupying the same as he started cultivating it in the year 2018. When cross-examined he stated that the Respondents title deed did not have his father's middle name. He also stated that he never objected to the notice by the Land Registrar seeking to replace the Respondent's title that was lost. He was not aware of any fraud committed by the Respondent and that he also did not attend any meeting to address the issue of the issuance of double allotment at Lake Jipe Settlement Scheme. He also stated that he did not return the original title deed despite being requested by the Land Registrar to do so. In re-examination, he stated that his father was not working on the said land.

16. Faustina Kibere Mlaho who testified as PW2 stated in cross-examination that she was not aware of any meeting to address the issue of double allocation. She also stated that she was aware that the lands office had written to the Respondent that he was the owner of the land even though that was false.

17. The Respondent Charles Lerumasi Ngui testified as DW1 and it was his testimony that he was allotted the land on 2nd January 1997 and complied with all the conditions. The Land Registrar issued a gazette notice dated 30th July 2020 seeking to revoke the title deed issued to the Appellants' father but no objection was raised. He also stated that he is currently in occupation of the land. When cross-examined he also stated that he had produced a letter from the Assistant Chief dated 26th May 1997 confirming his full names are Charles Lerumasi Ngui.

18. Both the Appellants and the Respondent are laying claim to the suit property known. Interestingly, they are both claiming on the basis of allocation at one point or the other. From the evidence that was tendered, it was not disputed that the Respondent is in possession of the suit property and further that both parties have title to the same. has a title to the same. Both parties having laid claim to the property are deserving proprietary protection and to adequately donate this protection this Court must look

into the root to ownership of the suit property. This approach was well appreciated in the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR. Equally in the case of Nairobi High Court Civil Suit No. 1024 of 2005(O.S), *Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

> "We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest".

19. In *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:

> "…. the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein."

20. In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), *Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

> "We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest".

21. In *Mwangi James Njehia v Janetta Wanjiku Mwangi & another* [2021]eKLR, the Court of Appeal stated as follows:

> "38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have "purchased' properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi."

22. In *Alberta Mae Gacie v Attorney General & 4 Others* [2006] eKLR the court stated as follows:

> "Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title

deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come...."

23. Section 26(1) of the *Land Registration Act* provides as follows:

> " The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner 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."

24. From the evidence that was adduced herein, both the Respondent and the Appellants' father were allotted the suit property on 2nd January 1997. Evidence was adduced to the effect that the Respondent had been confirmed as the bonafide owner of the suit land vide the letter dated 13th August 1997 issued by James G. Kamau, Jipe Settlement Project Manager. There was also evidence adduced that the Respondent is currently and has been in occupation of the suit property. The said testimony was never challenged and or controverted by the Appellants.

25. In respect to the aspect of fraud as pleaded by the Appellants, it is trite law that any allegations of fraud must be pleaded and strictly proved. From the perusal of the record of appeal and the testimony that was tendered before the trial court, the Appellants' witness were unable to proof the particulars of fraud that were pleaded. In the circumstances this court is satisfied that the Respondent was able to demonstrate a good root of title of his ownership of the suit property. In view of the foregoing, it is the finding of this Court that the Respondent's title is entitled to protection of the law. The Appellants has not proved any of the grounds set out in Section 26 of the *Land Registration Act* to warrant the impeachment of the same. The Respondent is the legitimate and lawful owner of the suit property.

Issue No. (ii) Whether the trial court was justified based on the facts, evidence and the law in arriving at the decision to dismiss the Appellants case

26. It was submitted by the Appellants that the trial court erred in law and in fact in dismissing the Appellants case, however this court having arrived at the finding that the Respondent was able to establish a good root of his title before the trial court, the court equally finds that the trial court did not err in dismissing the Appellants case.

27. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, this court finds no fault with the decision of the trial court. Consequently, the entire appeal fails and is hereby dismissed.

28. On the issue of costs, costs are in the discretion of the court and in any event to a party who is successful. However in this case, the court directs each party to bear own costs of the appeal.

Final orders

29. In conclusion, this court issues the following final orders:-

i. The Appeal is devoid of merit and is dismissed.

ii. Each party to bear own costs of the appeal.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 14TH DAY OF JUNE, 2024.

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Mwanzia for Appellants.

Mr. Madara for Respondent.

Court Assistant: Patrick Maina.