



**Kimere & another v Murage & another (Environment and Land Appeal
E016 of 2023) [2024] KEELC 4735 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E016 OF 2023**

JM MUTUNGI, J

JUNE 13, 2024

BETWEEN

JOSEPH WANJOHI KIMERE 1ST APPELLANT

KARIMI KIMERE 2ND APPELLANT

AND

GEOFFREY MUTHI MURAGE 1ST RESPONDENT

FRANCIS MAINA MURIUKI 2ND RESPONDENT

*(An Appeal arising from the Judgment of Honourable Magistrate. A.K Ithuku delivered on
7th November 2019 in CMCC No. 197 of 2000 in the Chief Magistrate's Court at Kerugoya)*

JUDGMENT

1. The subject of this appeal is land parcel Mutira/Kirunda/1434 measuring 0.24 Ha (suit land) that was initially owned by Solomon Kimeri Nguro, (deceased) and against whom the suit in the Lower Court abated. From the evidence on record, the deceased transferred the suit land to the 1st Respondent by way of gift, who subsequently sold it to the 2nd Respondent vide a sale agreement dated 26.05.1999.
2. Through a Plaintiff filed on 1st September 2000, the Appellants sought a declaration that the transfer of the disputed land to the 1st Respondent and its subsequent transfer to the 2nd Respondent was null and void. Further, they prayed for retransfer of the said land back to the name of the deceased. Their claim was based on the argument that the deceased held the suit land in trust for himself and the appellants and that the 1st Respondent fraudulently transferred the suit land in his name. It was affirmed through the evidence presented that the disputed land originated from the subdivision of the land parcel identified as Mutira/Kirunda/204, previously owned by the deceased. The subdivision created four separate portions, two of which were subsequently transferred to the two appellants



- involved in the case. The 1st Appellant testified that he has been cultivating beans, maize and coffee in the suit land.
3. The 1st Respondent filed a Statement of Defence on June 4th 2018, in which he refuted the claims made in the Plaint. He averred that the land parcel known as Mutira/Kirunda/204 was subdivided, resulting in new land parcels Nos. Mutira/Kirunda/1431 to 1434. Further, he stated that the deceased gifted him land parcel No. Mutira/Kirunda/1434 during his lifetime. He stated that the land acquisition was not fraudulent, as the deceased voluntarily subdivided the original land as per the mutation form which he executed by thumb printing and he additionally secured the necessary consent from the Land Control Board. The 1st Respondent clarified that he transferred the ownership of land parcel Mutira/Kirunda/1434 to the 2nd Respondent, who thereby obtained legitimate title to it.
 4. The 2nd Respondent filed his Statement of Defence and Counterclaim dated 11th October 2000 and denied the claims in the Plaint. He contended that the transfer of the suit land in his name was ordered by the Court in Civil Suit No. 297 of 1999. In his Counterclaim, the 2nd Respondent sought a permanent injunction to issue against the Appellants, their agents and/or their servants from interfering with the suit land. His claim was based on the assertion that, although he was the land's rightful owner, the appellants were cultivating in the suit land and had barred him from entering it. Furthermore, they continued cultivating the land and even went as far as to actively drive him away from the land. The 2nd Respondent testified that he bought the land in 1999 and that the Appellants have been utilising the suit land and have barred him from accessing and using his land.
 5. By its Judgment dated 7th November 2019, the Trial Court declared that the appellants had not demonstrated their case on a balance of probability and thus dismissed the suit. In regard to the counter-claim, the Trial Court found that the 2nd Respondent was the legal owner of the suit land and issued a permanent injunction restraining the Appellants from interfering with the suit land.
 6. Aggrieved and dissatisfied with the decision of the Court, the Appellants appealed to this Court against the decision and filed a Memorandum and Record of Appeal dated 24.03.2022, respectively.
 7. The Appellants Memorandum of Appeal set out 3 grounds of appeal as follows:-
 1. That the Learned Magistrate erred in law by deciding the matter in favour of the Respondents despite the evidence produced in Court.
 2. That the Learned Magistrate erred in law in failing to consider/ disregarding the Appellants evidence as well as that of their witnesses which contained crucial information while arriving at his Judgment.
 3. That the Learned Magistrate erred both in law and fact in failing to consider relevant matters in arriving at the said decision in favour of the Respondents as against the Appellants.
 8. The Appellants pray that the Court set aside the judgment in Kerugoya CMCC No. 197 of 2000 and they be awarded the costs of the appeal. The Appeal was canvassed by way of written submissions as per the directions of the Court.
 9. The Appellants filed their written submissions on 01.02.2024. The Appellants argued that the Trial Magistrate did not take into account existing orders from Kerugoya SRM LDT No. 30 of 2000. These orders were to the effect that the 1st Respondent had no claim to the land and directed that the suit land should be registered under the name of Solomon Kimere (deceased). The Appellants argued that



to the extent that the Tribunals orders had not been set aside, was sufficient proof that the 1st Respondent was not the owner of the land he purported to transfer to the 2nd Respondent. The Appellants further argued that the Trial Court did not take into account the apparent discrepancies within the title abstracts, which showed that the 1st Respondent was listed as the owner of the land on 15.9.1998 even though the initial owner was not registered until 20.8.1999. According to the Appellants, the sequence of events suggested that the 1st Respondent's acquisition of the title was achieved through fraudulent means.

10. I have considered the record of the appeal and the Appellants' submissions and the issues that arise for determination in the appeal are as follows:-
 1. Whether the trial court erred in law and facts by failing to find that the 1st Respondent acquired his title to the suit land by fraudulent means.
 2. Whether the Trial Magistrate erred in law and fact in issuing a permanent injunction restraining the Appellants from interfering with the suit land in anyway.
11. This being an appeal of first instance, the Court is duty bound to appraise and re-evaluate the evidence in keeping with the principle enunciated in the Court of Appeal Case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.

Whether the Trial Court erred in law and facts by failing to find that the 1st Respondent acquired his title to the suit land by fraudulent means.

12. The Appellants contended that the Trial Court overlooked critical evidence indicating that the deceased was not mentally competent at the time of the property transfer. Further the Appellants argued that there were existing orders from the Land Dispute Tribunal confirming that the suit land rightfully belonged to the deceased, and that the same ought to be retransferred to the deceased name. The Appellants further pointed out inconsistencies in the copy of the green card and argued that this could have an indication that the 1st Respondent's title was acquired fraudulently. Lastly, the appellants argued that the registration of the property in the name of the 2nd Respondent on May 13, 2000, occurred before the sale agreement was finalized which according to the Appellants indicated that the consent given to transfer the title of the disputed land to the 2nd Respondent was both illegal and fraudulent.
13. In the Judgment the subject of this Appeal, the Trial Magistrate determined that the Appellants failed to present any medical documentation to affirm that the deceased was suffering from any medical infirmity that could have rendered him incapable of carrying out any legal transactions.
14. The Appellants admitted in their evidence that their deceased father had during his lifetime voluntarily and freely subdivided land parcel Mutira/Kirunda/204 into four (4) portions to create land parcels Mutira/Kirunda/1431, 1432, 1433 and 1434. The subdivisions were effected on 20/8/98 and the deceased had duly executed the Mutation for land parcel Mutira/Kirunda/204 by thumb printing as per the copy of the Mutation dated 8/7/1998. The Mutation was registered on 20th August 1998. The deceased was registered as the owner of the four (4) subtitles on 20/8/1998 as per the abstracts of title (Green cards) exhibited in evidence at the trial. The green cards indicate the deceased transferred the parcels of land as follows:-
 - i. Land parcel Mutira/Kirunda/1431 to Joseph Wanjohi Kimere on 21/4/1999.
 - ii. Land parcel Mutira/Kirunda/1432 registered in names of Solomon Kimere Nguro (deceased) on 20/8/1998 was not transferred out.



- iii. Land parcel Mutira/Kirunda/1433 registered in name of Karimi Kimere Nguro on 13/4/2000.
 - iv. Land parcel Mutira/Kirunda/1434 transferred to Geoffrey Muthii Murage on 15/9/1998 by the deceased as a gift.
15. The Appellants have contended that the deceased was of unsound mind and lacked the mental capacity to execute the transaction in favour of the 1st Respondent. As rightly held by the Trial Magistrate no medical evidence and/or report was adduced in evidence to demonstrate that the deceased had been adjudged to be of unsound mind. There was further no evidence that the deceased had been adjudged to be mentally incapacitated by a competent Court after inquiry as required under Section 26 of the [Mental Health Act](#). It is evident the deceased determined to subdivide and distribute his land during his lifetime and the Appellants do not raise any issue in regard to the parcels of land transferred to themselves. If the deceased had capacity to execute the transactions in the Appellants favour why would he lack capacity to effect the transaction in favour of his grandson? The transactions were all being carried out at around the same time and there can be no basis to hold that deceased was of sound mind when he dealt with the transactions relating to his sons but was of unsound mind when he dealt with the transaction relating to the 1st Respondent who was his grandson.
16. The deceased had every right to deal with his property in the manner he wished and he cannot be said to have been unreasonable as he provided for the Appellants who were his sons. There was nothing that was averse in him making provisions for his grandson. The 1st Respondent testified that his grandfather transferred the parcel of land Mutira/Kirunda/1334 as a gift. The Learned Trial Magistrate was justified to find the deceased did not lack capacity to transact and that no fraud was proved by the Appellants to vitiate the transfer of the parcel of land to the 1st Respondent. It is never sufficient to allege fraud as allegations of fraud must not only be specifically pleaded and particularised, they must also be proved to the required standard. The Appellants did not meet that threshold of proof above the usual proof on a balance of probabilities though not as high as proof beyond a reasonable doubt as is required in Criminal cases.
17. The 1st Respondent in his filed statement of defence before the Lower Court, he admitted having sold the suit land to the 2nd Respondent and having been fully paid the consideration. During the trial his evidence was totally at variance with what he pleaded as he took the position that he executed the transfer in favour of the 2nd Respondent under coercion and under duress. The Learned Trial Magistrate was justified to dismiss his evidence as it could not be reconciled with his pleading. The cardinal rule of practice is that parties are bound by their pleadings and a party is not free to plead one thing and at the trial adduce evidence to prove another thing. The evidence of the 2nd Respondent matched with the statement of defence filed by the 1st Respondent and it was thus not difficult for the Trial Magistrate to find in favour of the 2nd Respondent.
18. The Appellants during the trial and in the appeal have contended that the Learned Trial Magistrate failed to give consideration to the fact that Land Disputes Tribunal had heard the dispute and made a decision against the 1st Respondent. The trial Magistrate in his Judgment observed that no proceedings before the Tribunal were availed and hence placed no bearing on the Tribunal's alleged decision. I have equally perused the record of appeal and I have not come across any proceedings or order from the Tribunal. Even if there were such proceedings before the Tribunal, it is very likely that they would have been exercising their mandate in excess of their jurisdiction since title had already been issued to the 1st Respondent. The Land Disputes Tribunal by virtue of the provisions of Section 3(1) of the [Land Disputes Tribunal Act](#), Cap 303A (now repealed) had no jurisdiction to deal with disputes relating to title to land. Hence the Tribunal proceedings would have been of no consequence.



19. Having made a finding that the transfer of the suit property to 1st Respondent was valid, it followed that the 1st Respondent as the registered owner was at liberty to deal with the suit property in the manner he pleased as the owner thereof. It was thus within his right to sell the property to the 2nd Respondent. The 2nd Respondent following the purchase and transfer acquired a valid title and was entitled to enjoy the full rights of ownership and use of the land.
20. There is yet another reason why the Appellants appeal was doomed to fail. In the suit before the Lower Court, the Appellants sought to have the transfer of land parcel Mwerua/Kirunda/1434 made to the 1st Respondent and subsequently to the 2nd Respondent declared a nullity and for the title to be reverted to the deceased (who was the 1st Plaintiff). When the deceased passed away he was not substituted and hence the 1st Plaintiff's suit against the Respondents abated. The deceased estate after the suit abated was not represented in the suit and no reliefs could be made in favour of the estate and/or against the estate after abatement. Without a personal legal representative of the deceased estate the suit was essentially crippled as the deceased estate who would have been a beneficiary if reliefs were to be made in favour of the deceased were no longer, a party in the proceedings.
21. In the premises and upon a careful evaluation of the record of appeal and the evidence, I am satisfied that the Learned Trial Magistrate was justified to come to the decision that he did. I find no basis upon which I could fault his Judgment. The appeal is devoid of any merit and is dismissed with costs to the Respondents.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 13TH DAY OF JUNE 2024.

J. M. MUTUNGI

ELC - JUDGE

