



**Areri v Muriuki & 3 others (Environment and Land Appeal
E035 of 2023) [2024] KEELC 4612 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4612 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E035 OF 2023**

JG KEMEI, J

JUNE 6, 2024

BETWEEN

PETER NYAGAKA ARERI APPELLANT

AND

PHILIP MWAI MURIUKI 1ST RESPONDENT

MAHIRA HOUSING COMPANY LIMITED 2ND RESPONDENT

DISTRICT LAND REGISTRAR, RUIRU 3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL 4TH RESPONDENT

*(Being an Appeal from the Judgment and Decree of Hon. Kisiangani,
SRM in Ruiru CM E&LC No. 186 of 2021 delivered on 23/3/2023)*

JUDGMENT

1. This appeal arises from Judgment rendered on 23/3/2023 by Hon. C. K. Kisiangani in Ruiru CMCC 186 of 2021. The Appellant was the 2nd Defendant in the trial Court while the 1st Respondent was the Plaintiff.
2. The dispute in this Appeal revolves around the question of ownership of parcel Ruiru Kiu Block 10/ Mahira 789.
3. In the Amended Plaintiff dated 27/5/2022 the 1st Respondent averred that he is a bona fide shareholder and allottee of Plot No. 635 measuring 50x80ft having acquired it in 2006 from the 2nd Respondent upon payment of requisite fees.
4. That on acquisition he took possession and built structures thereon. That all was well until January 2012 when he was sued by the 2nd Respondent claiming that he had illegally occupied the suit land. This suit being Milimani CMCC 259 of 2012 was dismissed by the Court on 14/5/2019. Following



the dismissal, the 1st Respondent filed Misc. Case No. 77 of 2020 at Milimani Court seeking orders to compel the 2nd Respondent to transfer the suit land to him. It is the case of the 1st Respondent that the Appellant sought joinder into the suit on the grounds that he held a title issued to him in 2012. That the Appellant acquired the suit land fraudulently as enumerated under paragraph 14 of the amended Plaintiff.

5. The 1st Respondent sought the following orders:-
 - a. The Plaintiff be declared as the rightful allottee/beneficial owner of Plot No. 635 Mahira Co. Ltd alias LR Ruiru Kiu Block 10/Mahira 789.
 - b. An order of declaration that registration and issuance of title to the 2nd Defendant or any other person under whom he acquired his certificate of title for plot No. 635 alias L.R. No. Ruiru/Kiu Block 10/789 was irregular, illegal and fraudulent thus incapable of vesting to the 2nd Defendant or any other person proprietary rights over the suit property.
 - c. An order directing the Land Registrar Ruiru to cancel the 2nd Defendant's title and to re-issue title in favour of the Plaintiff.
 - d. In the alternative to prayer (a), (b) and (c) above, an order of declaration that the Plaintiff is entitled to be registered as the proprietor of plot No. 635 alias L.R. Ruiru/Kiu Block 10/789 as against the 2nd Defendant or any other person on account of the Plaintiff's adverse possession of the suit property having been in open, quiet, continuous and uninterrupted occupation and possession thereof by the 2nd Defendant for a period of over 12 years.
 - e. An order of permanent injunction restraining the 1st and 2nd Defendants their agents or servants from trespassing, entering or dealing with plot No. 635 Mahira Housing Co. Ltd LR Ruiru Kiu Block 10/Mahira 789.
 - f. An order of general damages.
 - g. Cost of the suit.
6. The Appellant filed an amended Statement of Defence and Counterclaim dated 14/9/2022. His case is that the suit land plot No. 635 measuring 50x80ft was sold to him by one Lucy Wanjiru Muchiri and was issued with a title in 2012. That as soon as he commenced construction on the suit land the 1st Respondent appeared and laid claim on the same. In his counterclaim he sought the following orders:-
 - a. A perpetual order of injunction restraining the Plaintiff by himself, his agents, servants and/or in any manner from trespassing upon, entering into or in any manner interfering with the 2nd Defendant's property known as Ruiru Kiu Block 10/Mahira/789.
 - b. An order of eviction directing the Defendant to vacate L.R. No. Ruiru Block 10/Mahira/789.
 - c. General damages.
 - d. Costs of the counter-claim.
 - e. Any other relief as this Court may deem fit and just to grant.
7. Upon conclusion of the hearing the trial Court rendered its impugned Judgment dated 23/3/2023 in which the Learned Magistrate identified two issues; who is the rightful owner of the suit and whether the 2nd Defendant's counterclaim has merit.
8. The trial Court granted the following orders:-



- a. The counterclaim by the 2nd Defendants fails.
 - b. The Plaintiff is hereby declared as the rightful allottee/beneficial owner of Plot Number 635 Mahiira Co. Ltd LR Ruiru Kiu Block 10/Mahira 789.
 - c. A declaration is hereby issued that the registration and issuance of title to the 2nd Defendant or any other person under whom he acquired his certificate of title for Plot 635 alias LR Ruiru Kiu Block 10/Mahira 789 was irregular, illegal and fraudulent thus incapable of vesting to the 2nd Defendant or any other person proprietary rights over the suit property.
 - d. The 1st Defendant is hereby directed to issue the Plaintiff with the relevant registration documents for the suit property to enable him process the title deed in his favour.
 - e. An order is hereby issued directing the Land Registrar, Ruiru to cancel the 2nd Defendant's title and re issue the same in favour of the Plaintiff subject to presentation of the relevant documents for registration.
 - f. An order of permanent injunction is hereby issued restraining the 1st and 2nd Defendants, their agents or servants from trespassing, entering or dealing with Plot number 635 Mahira Housing Co. Ltd LR Ruiru Kiu Block 10/Mahira 789.
 - g. A claim for general damages fails since there is no evidence for the damage suffered.
 - h. Each party to bear its own cost of the suit and counter claim.
 - i. R/A explained. There be a 30 days stay of execution.
9. Aggrieved by the Judgment of the trial Court the Appellant moved this Court on appeal based on the following grounds:-
- a. That the Learned Trial Magistrate erred in law and in fact when she proceeded to give a Judgment which was wholly against the weight of evidence.
 - b. That the Learned Trial Magistrate misdirected herself in law and fact when she ordered cancellation of Title No. Ruiru Kiu Block 10/Mahira/789 registered in the name of Appellant. In a manner which was contrary to the provisions of the Land Registration Act No. 3 of 2012.
 - c. That the Learned Trial Magistrate erred in law and in fact when she proceeded to validate the 1st Respondent land transaction with a deceased person when it was clear that the persons purporting to act on behalf of the deceased did not have the capacity to do so.
 - d. That the Learned Trial Magistrate erred in law and fact when she directed registration of title in the name of the 1st Respondent when the documents in support of his title were not executed by the person he was claiming to have purchased from.
 - e. That the Learned Trial Magistrate erred and misdirected herself in law and fact when she failed to evaluate the Appellant's evidence and submission before her and as a result she arrived at an erroneous decision.
10. The Appellant sought the following orders on appeal:-
- a. That the Appeal be allowed.
 - b. That the Judgment and Decree in Ruiru CME&LC No. 186 of 2021 be set aside and the Appellant's counter-claim be allowed.



- c. That the costs of this Appeal be borne by the 1st Respondent.
 - d. That this Honourable Court makes such further or other orders as it may deem fit and just to grant.
11. The Appellant's submissions dated 28/3/2024 were filed by the firm of Nzamba Kitonga Advocates, Counsel for the Appellant raised the following issues for determination:-
- a. Whether the learned trial Magistrate misdirected herself in law and fact when she proceeded to validate the 1st Respondent's transaction with Joseph Karuru Wairimu when the alleged transaction were performed by a person who had no authority in law to do so.
 - b. Whether the learned trial Magistrate misdirected herself in law and fact when she proceeded to cancel the Appellant's title.
 - c. Whether the learned trial Magistrate overlooked the fact that neither of the documents relied upon by the 1st Respondent was executed by the alleged deceased Jane Karuru.
 - d. Whether a party is bound by its pleadings.
12. Counsel for the Appellant submitted that the plot certificate dated 9/8/2005, transfer of the plot and acknowledgement letter by Joseph Karuru all dated 9/8/2005 were executed on the same day and more than two years after the alleged demise of the original owner Jane Wairimu Karuru. That the transfer from the deceased to the 2nd Respondent was not produced in Court. In addition, that according to the aforesaid documents the vendor was Joseph Karuru and not Jane Wairimu. In the absence of any transfer documents duly executed by the alleged deceased owner and in the absence of Grant of Letters of Administration mandating the sons of the alleged deceased owner to execute the documents Counsel for the Appellant, submitted that the trial Court grossly erred in law and fact in holding that the 1st Respondent was the legitimate owner of the property.
13. Counsel for the Appellant faulted the 1st Respondent for failing to enjoin the estate of the alleged deceased owner as a party in the proceedings. Counsel for the Appellant submitted that the actions of the alleged original owner's sons and the 1st Respondent demonstrated a possible intermeddling with a deceased person property.
14. It was further submitted by the Counsel for the Appellant that the cancellation of the Appellant's title on account of fraud was unfounded because the particulars of fraud were not proven and further that there was no evidence as to whether the Appellant defrauded the 1st Respondent in any way.
15. In conclusion Counsel for the Appellant submitted that the 1st Respondent never proved fraud against the Appellant, neither did he proof that he has a good title.
16. The 1st Respondent's submissions dated 13/5/2024 were filed by the law firm of Makuno Gachoya & Associates. Counsel for the 1st Respondent submitted that the suit land in dispute is plot No. 635 that emanated from Mahira Housing Company Limited. This property was later registered as Ruiru/ Kiu Block 10 (Mahira) 789.
17. That the suit land was initially allocated by the 2nd Respondent to Jane Wairimu Karuru in 1987. That it is the same plot that was allegedly allocated to Lucy Wanjiru Muchiri by the 2nd Respondent from whom the Appellant purchased from in 2011.
18. Counsel for the 1st Respondent submitted that there is no evidence on how and when Lucy Wanjiru Muchiri acquired the property. The Appellant was faulted for failing to call Lucy Wanjiru Muchiri as



a witness during the trial to shed light on her allocation of the plot by the 2nd Respondent. Counsel further submitted that the alleged purchase of the property between the Appellant and Lucy Wanjiru Muchiri is shrouded in mystery for want of documentation such as an agreement of sale, transfer documents, receipt of registration fees and stamp duty on transfer. The 3rd Respondent confirmed during the trial that the records at the Land Registry did not contain any of these documents. Clearly demonstrating that the acquisition by the Appellant was irregular and unlawful due to lack of requisite transfer form and the mandatory registration fees and stamp duty.

19. Counsel for the 1st Respondent submitted that the 1st Respondent's acquisition of the suit land was supported by documentary evidence which was confirmed by Joseph Karuru Wairimu the son of the original allottee. That indeed the purchase of the property by the 1st Respondent was prior to the death of Jane Wairimu Karuru and the same was formal and proper and accepted by the 2nd Respondent. In any event if the 2nd Respondent required Grant of Letters of Administration from the estate of Jane Wairimu Karuru it would have demanded so, argued by Counsel.
20. Counsel for the 1st Respondent submitted that the 2nd Respondent accepted the letter from the area Chief and consent from the children of Jane Wairimu Karuru who had previously entered into the transaction with the 1st Respondent when she was alive.
21. On the question of possession and development Counsel for the 1st Respondent submitted that the 1st Respondent had always been in possession and occupation of the suit property a fact within the knowledge of the 2nd Respondent which prompted the filing of Civil Case No. 259 of 2012 in which the 2nd Respondent alleged that the 1st Respondent was in illegal occupation of the suit property.
22. In conclusion counsel for the 1st Respondent urged the Court to dismiss the appeal with costs.
23. Having read and considered the entire record of the trial Court, the Record of Appeal, the Grounds of Appeal and the rival submissions of the parties, the key questions for determination is whether the trial Court erred in ordering for the cancellation of the Appellant's title; secondly whether the appeal is merited and thirdly who meets the cost of the appeal.
24. This Court sitting as the first Appellate Court has a duty to analyse, evaluate, assess, weigh, interrogate and scrutinise the evidence before it and arrive at its own independent conclusion.
25. In doing so the Court must warn itself that it has not heard or seen the witnesses unlike the trial Court.
26. It is not in dispute that the Appellant and the 1st Respondent are contesting the suit land. It is also not in dispute that the description of the land is No. 635 now registered as Ruiru Kiu Block 10 (Mahira) 789.
27. Further it is also not in dispute that the Appellant was issued with a title for the suit land in the year 2012.
28. It is trite that ownership and acquisition of property is governed by law. Conversely, a title that is proven to have been acquired through other means is not protected in law. The provisions of Article 40(6) of *the Constitution* stipulates that the right to property does not extend to property that has been found to have been unlawfully acquired.
29. Section 26 of the *Land Registration Act* equally details methods in which a title may be impugned or challenged. It states as follows:-

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as



proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.

(2) A certified copy of registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

30. Courts have distilled principles in which a Court determining ownership between two persons need to consider. In the case of *Hubert L. Martin & 2 Others Vs. Margaret J. Kamar & 5 Others* [2016]eKLR where the Court stated as follows:-

“A Court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

31. In the case of *Munyu Maina Vs. Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 where the Court of Appeal held that:-

“We have stated that when a registered proprietor’s root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

32. The gist of the decisions of the Court in the above cases is that both the Appellant and 1st Respondent must lead cogent evidence to establish the root of their titles.

33. In answer to the first question I will then examine the documentary evidence placed before the trial Court by the Appellant and the 1st Respondent. It was the Appellant’s case that he acquired land from one Lucy Muchiri in 2011 executed an agreement of sale and conducted due diligence at the 2nd Respondent’s offices while he confirmed that the name of Lucy Muchiri was not in the members’



register. That said the Appellant informed the Court that he had neither the agreement of sale nor a copy of the member's register or evidence of payment of the purchase price to the said Lucy Muchiri. I have closely perused the trial Court record and I have confirmed that none of the documents were produced before the trial Court. On the contrary the 1st Respondent produced the following documents ie members register containing the name of Jane Wairimu Karuru as the owner of plot No. 635. This demonstrates that Jane Wairimu Karuru was the original allottee of the land. In the absence of a members register in the name of Lucy Muchiri the trial Court made the correct decision when it concluded that the said Lucy Muchiri did not own the property.

34. Evidence was led that Jane Karuru sold the land to the 1st Respondent and this was confirmed by the Assistant Chief of the area as well as the consent of the sons of the said Jane Karuru that their mother indeed sold the land to the 1st Respondent in her lifetime and that they had no claim over the land. Refer to the letter dated 9/10/2004. Following this confirmation, the 2nd Respondent issued plot certificate No. 635 to the 1st Respondent after payment of Kshs. 7,000/- on the 9/8/2005. The plot certificate issued to the 1st Respondent was duly executed by the officials of the 2nd Respondent and its dated 9/8/2005. It is on record that the Certificate for the Appellant was issued on 3/11/2011 by the 2nd Respondent. Going by the principle of first in time clearly the Certificate of the 1st Respondent was first in time and that of the Appellant was issued six (6) years later. The Court finds that the land having been transferred to the 1st Respondent in 2005, was not available for alienation or for transfer to the Appellant in 2011.
35. It was the Appellant's case that Lucy Muchiri had not obtained a title by the time he purchased the land from her. That he was issued with a title on 1/2/2012. He also led evidence that he did not sign any transfer forms because it was not necessary and the stamp duty was paid by the 2nd Respondent. Section 37 of the [Land Registration Act](#) provides that:-

“Transfers

1. A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.
2. A transfer shall be completed by—
 - a. filing the instrument; and
 - b. registration of the transferee as proprietor of the land, lease or charge.”

36. Section 43 of the [Land Registration Act](#) provides:-

“Instruments of dispositions

1. Every instrument effecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.
2. No instrument effecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.



3. The provisions of subsection (2), shall not apply to any disposition that is exempt from registration.
 4.”
37. Last but not least Section 44(5) of the [Land Registration Act](#) requires a transferee besides executing the instrument shall attach the following:-
- a. a copy of an identity card or passport; and
 - b. a copy of a Personal Identification Number certificate;
 - c. passport-size photographs;
 - d. where applicable, a marriage certificate; or
 - e. a copy of the certificate of incorporation, in the case of a corporate entity; or such other identification documents as the Cabinet Secretary may prescribe.
38. The Land Registrar, Ruiru testified and informed the Court that there was no transfer document to the Appellant in his records neither was there any evidence of payment of stamp duty. The evidence of the Land Registrar is in agreement with the evidence of the Appellant that he did not produce evidence of sale agreement between Lucy Muchiri and himself, there was no transfer between Lucy Muchiri or the 2nd Respondent executed by the Appellant, nor payment of stamp duty or transfer or all the documents referred to in paragraph 37 above. The import of his evidence attest to a title having been issued to the Appellant without any documentary evidence to support it contrary to law. In his own case the Appellant attested to holding an illegal title. The Appellant has not explained the root of title, so I find.
39. In conclusion the Court finds that the land was allocated to Jane Wairimu Karuru; the said Jane Wairimu Karuru sold the land to 1st Respondent to meet the costs of her medical care in her lifetime; Jane Wairimu Karuru was a member of the 2nd Respondent as shown in the members register adduced at the trial; the evidence was adduced to support that the said Lucy Muchiri was not a member of the 2nd Respondent; sale of the land by Jane Karuru was confirmed by the local Chief and her sons; the 2nd Respondent approved the transfer of the suit land to the 1st Respondent in 2005; save for the sale agreement and the title; there are no transfers of land between the Appellant and the said Lucy Muchiri; the land was transferred to the 1st Respondent by the 2nd Respondent in line with the agreement of Jane Wairimu Karuru in 2005; in 2011 therefore the 2nd Respondent held no title to the land to support alienation to the Appellant; the suit land was not available having been transferred to the 1st Respondent in 2005; the Land Registrar confirmed that the registration of the Appellant was not supported by any documents required in law and could not explain how the title was registered in the name of the Appellant; the Appellant has not explained the root of his title. All in all the Court found that the 1st Respondent has a better title to that of the Appellant.
40. It is the conclusion of this Court that the Appellant has not proven any right or interest in the land acquired in a regular and legal manner.
41. Based on the evidence analysed above, in totality, the Court finds that the Appeal is not merited. It is dismissed with cost in favour of the 1st Respondent.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 6TH DAY OF JUNE, 2024
VIA MICROSOFT TEAMS.**



J G KEMEI

JUDGE

Delivered online in the presence of;

Mutemi for Appellant

Gachimu for 1st Respondent

2nd, 3rd and 4th Respondents - Absent

Court Assistants – Phyllis & Oliver

