



**Kiugi (Suing as the Legal Representative of the Estate of David Kiugi Nchebere - Deceased) v Kimathi (Sued as the Legal Representative of the Estate of M'Magiri Kamurani - Deceased) & 3 others (Environment and Land Appeal E029 of 2023) [2024] KEELC 5638 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5638 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E029 OF 2023**

**CK NZILI, J**

**JULY 31, 2024**

**BETWEEN**

**MARY KIUGI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DAVID KIUGI NCHEBERE - DECEASED) ..... APPELLANT**

**AND**

**STEPHEN KIMATHI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'MAGIRI KAMURANI - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**JULIUS MURIUNGI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'MAGIRI KAMURANI - DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

**THE LAND REGISTRAR IMENTI NORTH DISTRICT ..... 3<sup>RD</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The appellant, who was the 1<sup>st</sup> defendant at the lower court, had been sued by the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, who were the plaintiffs, together with the 3<sup>rd</sup> and 4<sup>th</sup> respondents as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for fraudulently, unlawfully, illegally and secretly transferring to the appellant L.R No. Kiirua/Ruiru/1502 which was initially registered in the name of the late M'Magirika Kamurani, without the consent or knowledge of the deceased family. The 1<sup>st</sup> and 2<sup>nd</sup> respondents sought:
  - a. Declaration that the suit land belonged to the estate of the deceased.
  - b. Cancellation of the title deed to revert to the estate of the deceased.
  - c. Permanent injunction.



- d. Eviction of the appellant from the suit land.
2. The appellant opposed the suit by a statement of defence filed on 8.8.2019. He averred that by a sale agreement dated 29.10.2018, the deceased sold to him a portion of L.R No. Kiirua/Ruiri/1028, which was later subdivided into the suit land that was legally transferred and registered under his name. He denied any alleged fraud, illegality or irregularity in acquiring the land.
  3. Further, the appellant averred that he was a bonafide purchaser for value; hence, the 1<sup>st</sup> and 2<sup>nd</sup> respondents were out to deprive him of the property maliciously and unlawfully through a frivolous, vexatious and in a suit raising no valid cause of action.
  4. The 3<sup>rd</sup> and 4<sup>th</sup> respondents opposed the suit by a statement of defence dated 20.11.2019. It was averred that the 3<sup>rd</sup> and 4<sup>th</sup> respondents were duty-bound in law to register all instruments and conveyances that were presented in accordance with the law. They denied any alleged fraud, collusion or illegality in the registration of the appellant as the owner of the suit land. Additionally, the 3<sup>rd</sup> and 4<sup>th</sup> respondents averred that they merely performed a statutory duty in strict compliance with the law in registering the appellant upon their satisfaction that the documents presented for registration were in order. The 3<sup>rd</sup> and 4<sup>th</sup> respondents denied receiving any demand letters before the suit was filed.
  5. In reply to the 3<sup>rd</sup> and 4<sup>th</sup> respondents' statement of defence, the 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that the 3<sup>rd</sup> and 4<sup>th</sup> respondents abrogated their statutory mandate by colluding and fraudulently depriving them of their land contrary to the mandate stated. They termed the statement of defence as raising no triable issues.
  6. At the trial, Stephen Kimathi testified as PW 1. Relying on a witness statement filed on 29.7.2019 as his evidence in chief. He told the court that he was a son of the late M'Magiri Kamurani, who died in 2005, leaving behind his L.R No. Kiirua/Ruiri/1502, to which he applied for letters of administration, namely Succession Cause No. 90 of 2018, after which, while attempting to implement the grant in 2019, he established that the land was in the name of the appellant, with effect from 12.6.2018, yet there was no record showing how the transfer took place.
  7. Upon enquiries from the 3<sup>rd</sup> respondent, PW 1 told the court that no explanation was forthcoming despite several correspondences. PW 1 told the court that the land could not be transferred by their father in 2018 when he was long dead. PW 1 relied on a copy of the records as P. Exh No. (1), letter dated 9.4.2016 and 10.6.2019 as P. Exh No. 2(a) and (b), death certificate as P. Exh No. (3), grant as P. Exh No. (4), O.B. No. 9.7.2019 as P. Exh No. (5), sale agreement as P. Exh No. (6), search certificate as P. Exh No. (7). PW 1 said that he made the discovery when he visited the land registrar's officers. Further, PW 1 stated that the initial land was 2 acres and that only 0.16 was sold to the appellant as per P. Exh No. (6). PW 1 disputed the contents of MFI D "3", and said he was utilizing the land. He termed the transfer and the consent presented to the land registrar as fraudulent since the seller was already dead at the time. PW 1 said that the transfer did not indicate if there had been succession proceedings before the transfer for the estate of the seller.
  8. PW 1 added that the appellant was only occupying 0.25 acres that he purchased while the rest of the land was under his occupation. He termed the transfer made in 2018 as irregular since the registered owner had died in 2005. Further, PW 1 said that the appellant had only been handed over the title deed by his late father for purposes of subdivision of his portion of 0.25 acres, but instead, he did not surrender it.
  9. Julius Muriungi testified as PW 2. Relying on his witness statement filed on 29.7.2019 as his evidence in chief. PW 2 associated himself with the evidence of PW 1 a co-legal representative to the estate of his



- late father. He confirmed that all that the appellant acquired from his father was as per P. Exh No. (6). PW 2 told the court that his late father gave each of them 1.5 acres next to the appellants' land that he had occupied for over ten years. He said that the appellant had, however, vacated the land after their father passed on, since he was not entitled to more than 0.25 acres of the said land so long as he cleared the purchase price. He produced the certificate of confirmation of grant as P. Exh No. (8).
10. Mary Kiugu testified as DW 1 following substitution after her husband passed on. She relied on the deceased replying affidavit sworn on 8.8.2019 as her evidence in chief. DW 1, told the court that her late husband bought the suit land from the late M'Mugira Kamurani in 1981 through a sale agreement dated 29.10.1981, took vacant possession and continued to develop it extensively. DW 1 told the court that the deceased eventually transferred the land to him as per copies of the transfer forms and consent. She produced the title deed issued on 31.1.2019 as D. Exh No. (1), sale agreement as D. Exh No. (2), transfer form as D. Exh No. (3) letter of consent as D. Exh No. (4). She termed the land sale, transfer and registration in favour of her late husband as regular, lawful and procedural. DW 1 said that she was the one who bought the land in 1975 and lived on it till 2019. Additionally, DW 1 produced an application for land control board consent, land certificate and acknowledgement receipt as D. Exh No's 5-8, respectively.
  11. In cross-examination, DW 1 insisted that they bought two acres of the land in 1975 and not in 1981, as per P. Exh No. (2) for Kshs.7,000/=. DW 1 said that they did not make full payment of the purchase price at the time, though she was confident the balance was paid on a later date she could not recollect. DW 1 was unable to avail of any sale agreement reflecting the purchase of 2 acres from the deceased in 1986. She disputed the agreements produced as D. Exh No. (2), depicting the land that her husband had bought as 0.16 acres. DW 1 acknowledged that as per D. Exh No. (7) only part payment of Kshs.1,000/= was made.
  12. Nevertheless, DW 1 insisted that a balance of Kshs.6,000/= was subsequently paid to the seller. DW 1 was unable to produce any documents reflecting payment of the balance of the deceased seller. Similarly, DW 1 was unable to produce any sale agreement relating to Parcel L.R No. 1502.
  13. DW 1 clarified to the court that though D. Exh No. (3) was dated 1986; it was only in 2018 that the land was eventually registered in favour of her late husband. She said that the transfer form was presented to the land registrar on 4.12.1986 but could not tell why the transfer was not effected in 1986. She, however, said that the transfer form was again presented to the land registrar on 5.2.2002, but did not go through until 2018, since the 1<sup>st</sup> and 2<sup>nd</sup> respondents' children had lodged cautions or inhibitions against the title register.
  14. DW 1 similarly said D. Exh No. (7) was a receipt dated 31.1.2007, meaning that the transfer form was also presented to the land registrar then only for the same to be effected after the death of the seller. She said the title deed in the name of her late husband was eventually issued on 31.1.2019.
  15. The appellant faults the trial court through a memorandum of appeal dated 26.4.2023 for:
    - i. Refusing to adjourn the case and forcing the appellant, layperson, to proceed with her defence in the absence of her advocate on record, hence prejudicing her case.
    - ii. Failing to consider and evaluate the pleadings of her defence, evidence and exhibits.
    - iii. Not finding that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had failed to discharge the burden of proving fraud in the absence of a forensic audit of the documents used in the transfer and registration process dated 24.2.1986, 6.3.1986 and 25.3.1986.



- iv. Exceeding his jurisdiction by purporting to direct how Meru CMCC Succession Case No. 90 of 2018 should proceed and in effect, sitting as a probate court.
  - v. Not laying a basis for awarding the appellant 0.16 ha out of L.R No. Kiirua/Ruiriri/1502 and denying her the balance or giving it to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
  - vi. Offending Order 21 Rule (4) Civil Procedure Rules.
16. With leave, parties agreed to canvass the appeal through written submissions. The mandate of this court to hear and determine the appeal is governed by Section 78 of the *Civil Procedure Act*. The court has to re-evaluate the lower court record with a fresh mind and come up with independent findings as to facts and the law. See *Gitobu Manyara & others vs AG (2016) eKLR*. Having perused the pleadings, evidence tendered grounds of the appeal and written submissions, the issues calling for my determination are:
- i. If the 1<sup>st</sup> and 2<sup>nd</sup> respondents pleaded and proved fraud, illegality and irregularity in the manner that the appellant acquired title to the suit land.
  - ii. If the appellant discharged her evidential burden that her late husband's title to the suit land was procedurally, formally, regularly and lawfully acquired, to be entitled to protection by the law.
  - iii. If the appellant was accorded a fair hearing during her defence and at the delivery of the judgment.
  - iv. Whether the appeal has merits.
17. The cause of action before the trial court as pleaded by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was that the late M'Magiri Kamurani died on 29.08.2005 as the registered owner of L.R No. Kiirua/Ruiriri/1502 and that his family only sought and obtained a grant on 20.11.2018, which was subsequently confirmed. Therefore, going by the copy of the records, the 1<sup>st</sup> and 2<sup>nd</sup> respondents took the view that any transfer and registration of title deed respecting the suit land after his death and before they obtained confirmed letters of grant was illegal, fraudulent, irregular and unprocedural.
18. The 1<sup>st</sup> and 2<sup>nd</sup> respondents urged the trial court to invalidate entry number 3 and 4 of the copies of records made on 12.6.2018 and 31.1.2019 granting the appellant a title deed, otherwise as per P. Exh No. (16), the only existing sale agreement between the appellant's late husband and their late father was on 0.16 ha whose total purchase price was never cleared by the deceased.
19. On her part, the appellant insisted that there was a valid sale agreement dated 29.10.1981 out of L.R No. Kiirua/Ruiriri/1028 later on subdivisions of L.R No. 1502, which was regularly, procedurally and lawfully transferred and registered under the deceased name. The appellant produced D. Exh No's. 1-8.
20. It is trite law that when a title deed is under attack, every paper trail towards its root must be tendered by he who alleges that the same was procedurally, lawfully and regularly obtained. See *Dr. Ngok vs Moijjo Ole Keiwua & others (1997) eKLR*. On the other hand, fraud, illegality and misrepresentation must be specifically pleaded and proved on a balance higher than in ordinary suits. See *Arthi Developers vs West End Butchery Limited and 6 others (2015)*, *Vijay Morjaria vs Nansigh Madhusingh Darbar & another (2000) eKLR*.
21. It is trite law that the property of a dead person vests in his estate upon death, whether in testacy or intestacy, by dint of Sections 79 & 80 of the *Law of Succession Act*. A grant of letters of administration becomes effective from the date of the making of a grant, unlike a grant of probate that relates back



- to the date of death, to authenticate any acts of the executor done between the date of death and the date of making the grant.
22. Section 45 of the *Law of Succession Act* outlaws any dealings, and any such dealing with the property of a deceased person otherwise amounts to intermeddling with the estate and is criminal. See in Re-Estate of Barasa Kanenje (deceased) Succession Cause No. 263 of 2002 (2020) KEHC (K.L.R.) 30<sup>th</sup> July (2020) Ruling.
  23. The power to determine matters relating to title to land use and occupation of the land of a deceased person falls under the jurisdiction of this court under Articles 162 & 165 (5) of *the Constitution*, the Environments Land Court Act, Sections 1 & 101 of the *Land Registration Act* and Sections 2 (b) and 150 of the *Land Act*. Disputes between third parties and the estate of the deceased relating to the land envisaged above fall under this court. Such disputes do not fall under the probate court.
  24. In Re-estate of Joseph Muke Muguti (deceased), 2018 eKLR, the court cited Re-estate of Gitau – deceased (2002) 2 KLR 430 and observed that according to Section 3 of the *Law of Succession Act*, "estate" means the free property of a deceased person that is to say, property that he was legally competent to dispose of during his lifetime, freely and which did not terminate with the deceased's death. In Johnson Muinde Ngunza and another vs Michael Gitau Kiarie & others (2017) eKLR, the court observed that the *law of succession act* recognizes a purchaser's rights and, as per the Act, a purchaser means a purchaser for money or money worth.
  25. In Zachariah Wambugu Gathimu & another vs John Ndungu Maina (2019) eKLR, the court cited Elija Makeri Nyagwara vs Stephen Mungai Njuguna & another (2013) eKLR, that Section 26 (1)(b) of the *Land Registration Act* does not protect impeachment of title of an innocent purchaser or innocent title holder whose title was obtained illegally, unprocedurally or through a corrupt scheme.
  26. In this appeal, it is not disputed that by the time the deceased passed on, the suit land was under his name, going by the copy of records. The title deed held by the appellant's late husband was issued on 31.1.2019, before the 1<sup>st</sup> and 2<sup>nd</sup> respondents were issued with confirmed letters of grant on 20.11.2018. In MCfoy vs United Africa Co. Ltd (1961) 3 ALL ER 1169, the court observed that if an act is void, then it is in law a nullity and every proceeding which is founded on it is also bad, for one could not put something on nothing and expect it to stay there without collapsing.
  27. The burden was on the appellant to show that her late husband had paid consideration for the subject parcel of land, documents of transfer were procedurally obtained, signed and executed by the seller during his lifetime, were submitted for registration and paid for during the lifetime of the deceased and obtained thereof before his death.
  28. In Daudi Kitpugen vs Commissioner of Lands and others (2013) eKLR, the court observed that the acquisition of title could not be construed only as an end result since the process of acquisition was equally material and therefore, any document of title that was not acquired through a proper process could not be a good title. See also Shimoni Resort vs Registrar of Titles & others (2016) eKLR and Katende vs Harridar Co. Ltd (2008) 2 E.A 173.
  29. Section 3 (3) of the *Law of Contract Act* provides that a contract for the disposition of land must be in writing, signed by all the parties thereto and witnessed by a witness who was present when the contract was signed by such parties. A contract, to be valid must also have an offer of acceptance and consideration. The sale agreement relied upon by the appellant was for 0.16 ha and not 0.81 ha. It varies from D. Exh No. (2). Payment of total consideration was not proved by the appellant D. Exh No. 3 related to 0.81ha and not 0.16 ha that was obtained for Kshs.7,000/=. How it changed from 0.16 ha to 0.81 ha for the same amount was not clarified by the appellant P. Exh No. (7) shows that as



- of 21.8.2008 the land was still under the name of the deceased. So if D. Exh No. (3) was actually lodged on 5.2.2002, it means that as of 2005, it had not been registered, even if lodged at the lands registry.
30. DW 1 failed to call the land registrar to confirm when the transfer forms were lodged and registered in favour of the appellant. D. Exh No. (3) was not accompanied by the photographs, pin certificate and ID cards of both the transferee and the transferor. The date of registration, the signature and the stamp by the land registrar were also missing on the face of the document.
  31. In order for the appellant to enjoy the title, she had to show that the property was purchased in good faith and for value. See *Mwangi James Njehia vs Janneta Wanjiku Mwangi & another* (2021) eKLR. DW 1 was unable to confirm whether the consideration was cleared when it was cleared and acknowledged receipt of the seller and if it was for 2 acres or 0.16 ha. Parole evidence may not be introduced to vary the terms and conditions of the contract. Parties are expected to have reduced all the terms and conditions into writing. The appellant appeared to disown the sale agreement. Unfortunately, the one relating to two acres was not brought before the trial court, by the appellant. Inconsistencies in the documents used to transfer and register the titles were not clarified by the 3<sup>rd</sup> and 4<sup>th</sup> respondents that whatever was submitted for registration and used to issue a title deed to the appellant's late husband, met the procedural and statutory requirements.
  32. Evidence of payment of stamp duty and registration fees was equally missing. The rights of the deceased estate were protected under Section 24 of the *Land Registration Act*, and therefore, the appellant and, by extension, the 3<sup>rd</sup> and 4<sup>th</sup> respondents had no standing to interfere with the suit land unless they received the requisite valid or statutory instruments duly signed by the legal representatives of the estate of the deceased, which were never available at the time the transfer was effected on 31.1.2019. See *David Kamunya Kingori & another vs Wambui Nderitu & others* (2020) eKLR.
  33. The process of transfer, registration and issuance of title was fraught with irregularities, illegalities and was equally fraudulent and aimed at disinheriting the 1<sup>st</sup> and 2<sup>nd</sup> respondents, as the bonafide beneficiaries of the estate. In *Marteve Guest House Ltd vs Njenga & others* (Civil appeal 400 of 2018 (2022) KECA 539 (K.L.R.) 28<sup>th</sup> April 2022) Judgment, (with the dissent of W. Karanja J.A), the court observed that no court should enforce an illegal contract or allow itself to be made an instrument of enforcing the obligations alleged to arise out of a contract or transaction which was illegal, if the illegality was duly brought to the notice of the court and that every act premised on a nullity could not accrue legitimacy or legality. The court further said that the sanctity of title was never intended or understood to be a vehicle for fraud or illegalities or an avenue for unjust enrichment at another person's expense.
  34. In this appeal, the documents used to transfer and register the title were suspect and prepared by the appellant's late husband to deceive the land registrar that the seller had obtained the entire purchase price and was also alive at the time of the registration of the transfer forms and the issuance of title. The court cannot sanction an illegality.
  35. As to whether the appellant was denied a fair hearing, the lower court's record shows that a final adjournment was issued to the appellant on record before her lawyers and applied to cease acting a day before the hearing on 26.8.2022. The trial court dismissed the same. Leave to appeal was granted to the appellant. Counsel opted to leave the court precincts. No appeal was ever filed against the said orders made on 26.8.2022. The 1<sup>st</sup> and 2<sup>nd</sup> respondents closed their cases on 9.2.2021, and the matter was listed for a defence hearing. The appellant was absent on that day. An adjournment was sought, and a hearing for 15.4.2021 was issued. Another adjournment was sought, leading to a hearing date fixed for 29.6.2021 and 30.9.2021.



36. Subsequently, another adjournment was sought and granted to the appellant on 4.8.2022. Come 26.8.2022, the appellant sought for an adjournment that was denied. From the record, the trial court cannot be faulted for finding that the appellant was guilty of endless adjournments of the opposite parties. Therefore, from the record, the appellant was granted ample opportunity to offer her defence which she misused. The scales of justice must be balanced between the expeditious disposal of suits vis a vis locking parties to litigation from court. See *Japhet Pais Kilonga & others vs Mombasa Auto Care Ltd* (2015) eKLR. The appellant was seeking endless adjournments which were causing injustice and defeated the rights of the respondents. See *Savannah Development Co. Ltd vs Merchantile Co. Ltd* C.A No. 120 of 1992.
37. Sufficient cause was not given as to why an application for ceasing to act was filed late. See *Mbithuka Titus vs Jackline Mutindi* (2020) eKLR. The granting or refusal of an adjournment is a matter of discretion. There were good reasons, in my view, to refuse the adjournment. See *H.K Shah & another vs Osman Otto* (1946) 14 E.A.C.A 45. The court finds no injustice occasioned to the appellant.
38. As to Order 21 Rules 4 and 5 of the Civil Procedure Rules, the court in *Chandaria vs Njeri* (1982) K.L.R. 84 observed that the failure to deal with many of the issues makes a judgment unsatisfactory and amounts to a mistrial. The obligation to give reasons for the decision has a constitutional dimension; otherwise, the decision would be devoid and hollow. See *Public Service Board of New South Wales vs Osmond* (1986) 159 CLR 656. In this appeal, I find the trial court substantially complied with Order 21 Rules 4 and 5 of the Civil Procedure Rules. The upshot is that I find the appeal lacks merits. It is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31<sup>st</sup> DAY OF JULY, 2024**

In presence of

C.A Kananu/Mukami

Kerubo for the appellant

Thangicia for 1<sup>st</sup> & 2<sup>nd</sup> respondent

AG for 3<sup>rd</sup> & 4<sup>th</sup> respondent

**HON. C K NZILI**

**JUDGE**

