



REPUBLIC OF KENYA



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**Kimutai v Nalakiti & 2 others (Environment and Land Appeal
E112 of 2022) [2024] KEELC 5652 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E112 OF 2022**

JG KEMEI, J

JULY 30, 2024

BETWEEN

HARRIET KARAMBU KIMUTAI APPELLANT

AND

PARSANKA MUNKE NALAKITI 1ST RESPONDENT

MWALIMU SUKARI COMPANY LIMITED 2ND RESPONDENT

LAND REGISTRAR, RUIRU 3RD RESPONDENT

*(An appeal from the judgement of Hon C K Kisiangani (SRM)
in MCL&E No 165 of 2021 Ruiru delivered on the 3/11/2021)*

JUDGMENT

Introduction

1. Aggrieved by the judgement aforesated the Appellant who was the plaintiff in the trial Court moved this Court on appeal and framed 13 grounds of appeal as follows;
 - a. The Learned Magistrate erred in fact and law in finding that the 1st Respondent is the bona fide owner of the suit property.
 - b. The Learned Magistrate erred in fact and in law by failing to appreciate the evidence adduced at the trial to the effect that the suit property was allotted to the Appellant vide Plot Allocation Certificate No. 1105 dated 2nd June, 1998.
 - c. The Learned Magistrate erred in fact and in law by failing to appreciate that the suit property had been allocated to the Appellant and the same was not available for alienation, allocation or transfer to any other person.



- d. The Learned Magistrate erred in fact and in law by holding that there was double allocation of the suit property and proceeded on a misapprehension of the law to uphold the subsequent allocation of the suit land to the 1st Respondent.
 - e. The Learned Magistrate erred in fact and in law by misapprehending the provisions of Section 25 of the [Land Registration Act](#), 2012 and proceeded on wrong principles of law to uphold the irregularly and illegally acquired title deed over the suit land.
 - f. The Learned Magistrate erred in fact and in law by failing to consider and apply Section 26(1) (b) [Land Registration Act](#), 2012.
 - g. The Learned Magistrate erred in fact and in law by failing to uphold the equitable maxim that “between equal qualities, the first in order of time shall prevail” and proceeded to uphold the second allocation of the suit land to the 1st Respondent.
 - h. The Learned Magistrate erred in fact and in law in giving a Judgment that was against the weight of evidence.
 - i. The Learned Magistrate erred in fact and in law by dismissing the Appellant’s suit despite strong evidence tendered by the Appellant.
 - j. The Learned Magistrate erred in fact and in law by dismissing the suit to the effect of allowing the 1st Respondent to unjustly enrich himself at the Appellant’s expense.
 - k. The Learned Magistrate erred in fact and in law by failing to consider all the issues raised by the Appellant in its written submissions.
 - l. The Learned Magistrate erred in fact and in law by misapprehending the evidence and failing to give due weight to the evidence of the Appellant while giving undue weight to the evidence of the 1st Respondent.
2. Upon admission of the appeal, the parties herein elected to canvass the appeal by way of written submissions which submissions I have read and considered.

The written submissions

3. Counsel for the Appellant submitted that the Appellant having been allocated the plot in 1983, fulfilled all the conditions with regard to the allotment, there was no property available for allocation to the 1st Respondent in 2006. That the 1st Respondent did not provide evidence to show that the allotment to the Appellant was ever annulled to pave way for the allocation of the plot to the 1st Respondent.
4. On whether the Appellant proved her case on a balance of probabilities, Counsel for the Appellant answered this in the affirmative. Counsel was emphatic that unlike the 1st Respondent the Appellant produced all the documents evidencing purchase of the land, payment receipts, balloting, allotment letter and the title processing fees and various correspondences between her and the 2nd Respondent appraising her of the progress being made in the processing of the title in her name.
5. The 1st Respondent on the other hand claimed to have purchased the land from the 2nd Respondent but failed to produce a sale agreement nor a transfer conveying the land to him. Though he led evidence that the receipts were lost, he nevertheless produced them at the hearing despite not serving the Appellant with the same.



6. In closing, Counsel submitted that the 1st Respondent having failed to prove the root of the title that he holds the same can be impeached through the lens of Section 26(b) of the [Land Registration Act](#) for which the Court was urged to so do.
7. Counsel for the 1st Respondent submitted that the 1st Respondent acquired the suit land in 2006 from the 2nd Respondent and made the necessary payments to the Company. That thereafter as fate would have it he lost the sale agreement and the receipts and upon reporting to the Company, the Company informed him that since he had paid for the land he needed not to worry as he was a bonafide purchaser and proceeded to process the title deed which was ultimately issued in the year 2007.
8. Counsel submitted that the 1st Respondent took possession of the land, constructed a house and settled his family thereon and all was well until 2019 when he stumbled on a caution lodged against the title in 2011 by the Criminal Investigation Department at the Lands Registry. He reported the matter at the Kasarani Police Station but did not get much help. In 2020 he obtained orders in Misc Application No. 1 of 2020 to remove the restriction. In addition, Counsel submitted that at the time of purchase, the 1st Respondent was informed by the Company that it was selling those parcels that the shareholders had failed to pay.
9. Counsel for the 3rd Respondent framed a single issue for determination by the Court; Whether the learned trial Magistrate properly exercised her discretion in issuing the orders that she did?
10. Counsel cited the cases of James Nioroge Gitau Vs. Lucy Chepkurui Kimutai (2018) eKLR and the case of Munvu 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 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.”
11. Counsel for the 3rd Respondent was emphatic that the Appellant having not been issued with a title had not established any interest in the suit land. In addition, her case was not made any better by the fact that she did not take possession of the suit land. In addition, it was submitted that there was no evidence tabled before the Court to show that the 1st Respondent’s title was tainted by fraud and that only the officials of the 2nd Respondent could have explained why they first allocated the suit property to the Appellant as shown by her documentation then sold it to the Respondent and processed the title deed in his name in the year 2007 and why they did not process the Plaintiffs title. The Court was urged to dismiss the appeal.

Analysis and Determination

12. Having considered the appeal in totality, the trial Court record, the written submissions and all the materials placed before the Court, the issues that commend themselves for determination are; whether the Appellant proved her case on a balance of probabilities; whether the 1st Respondent was a bonafide purchaser for value; whether the impugned judgment ought to be set aside; who meets the costs of the appeal.
13. As a first appellate Court, this Court’s duty is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that it did not have the



opportunity of seeing and hearing the witnesses first hand. The duty of the Court in a first appeal such as this one was stated in *Selle & Another Vs. Associated Motor Boat Co. Ltd. & Others* (1968) EA 123 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 Court 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 demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”

14. The guiding parameters for this Court are therefore, on first appeal; the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions; secondly, 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 him; and lastly 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.

Burden of Proof

15. It is trite that he who alleges must prove. The burden of proof in civil cases is on a balance of probabilities. The burden of proof is anchored in statute. Sections 107 – 109 of the [*Evidence Act*](#) provide;

“

“107. Burden of proof

- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

16. In this case the Appellant led evidence that in 1981 she was employed as a teacher by the Teachers Service Commission and posted to Nanyuki High School. She learnt from her teacher colleagues that the 2nd Respondent was advertising for sale of land at Ruiru and she got interested and bid for one acre.



- She paid Kshs 1,260 on the 25/1/83 being the charges for the costs of the plot and legal fees and stamp duty (see receipt No 1139 of 25/1/83). On the 16/11/83 she paid another sum of Kshs 1300 being additional costs for the plot and was issued with a receipt No 6103 by the 2nd Respondent. On the 2/7/1983 the 2nd Respondent wrote to her requiring her to pay survey fees in the sum of Kshs 770/- which was receipted on 5/4/1983. She was issued with a ballot No MICC/02/1070 for plot No 2214 dated the 3/12/1983. On 15/6/1989 the 2nd Respondent wrote to the Appellant informing her that the title processing exercise was at the final stages and that her plot No 2214 had been registered as Ruiru/Ruiru East Block3/1257 as per the RIM. That later the 2nd Respondent rebranded to Mwalimu Sukari Company Limited and on 15/6/1992 directed the Appellant to pay 1570/- being title processing fees which she duly complied on 13/8/1992 and receipted accordingly.
17. She stated that the 2nd Respondent informed her that her transfer form had been lost and called upon her to resign afresh which she did and returned to the 2nd Respondent. On the 15/1/1998 she was asked to pay for the title collection fee and was issued with a plot allocation certificate No 1105 for the suit land dated the 2/6/1998. On 2/7/2001 she paid a sum of Ksh 2000/- being title processing fees. In 2002 the Appellant stated that she got a visa to relocate to United States of America and wrote to the 2nd Respondents official, a Mr Macharia directing him to issue her title to either of her two sons for collection. Her late son Anthony Kiplimo wrote to Mr Macharia on the 12/6/2003 following up on the title. On the 5/8/2011 Kibet , her second son carried out a search of the property and was shocked to discover that unknown to her and without her consent the suit land had been registered in the name of the 1st Respondent on the 17/9/2007. Her son reported the matter to the Kasarani Police Station upon which a restriction was lodged on the title by the Directorate of Criminal Investigations who also prepared an investigation report which recommended the annulment of the title of the 2nd Respondent. Upon carrying out a search on the 4/2/2021, she discovered that the restriction had been removed without her knowledge and consent vide SPMCC NO 401 of 2020 – Ruiru.
 18. PW2 – Kenneth Kibet Kimutai introduced himself as the son of the Appellant and stated that after the death of his brother Anthony, he followed up the processing of the title with the 2nd Respondent’s office who advised him to collect the title from their lawyer, one Mr Muhoro. Mr Muhoro informed him that the title was not among the ones he held for collection by members and asked him to follow up with the Land Registrar’s office at Thika. That he obtained the RIM from the Survey of Kenya and searched the title upon which he discovered that it was registered in the name of the 1st Respondent. He reported the matter to Kasarani Police Station and in the Company of the police officers went to the suit land and constructed a temporary structure on the property to signify their mother’s interest. The DCI also lodged a restriction on the title but was removed and the structure later demolished by the 1st Respondent.
 19. PW3 - Kennedy Kirimi Mutwiri stated that he is the nephew of the Appellant and reiterated the evidence as given by PW2.
 20. The 1st Respondent led his own evidence and stated that he lives at Mwalimu farm and that he is a pastor. He produced documents in support of his case being the receipt dated the 7/3/2006, 1/10/2006 and 13/10/2006 totaling Kshs 40,000/- . In addition he produced the List of Documents dated the 16/12/2021 which comprised the title, certificate of search 25/11/2019, photo of a family structure on the land, Ruling in SPMCC Misc. No 1 of 2020 issued on the 27/5/2020 removing the restriction and the green card (register) for the title.
 21. He led evidence that in 2006 he heard that the 2nd Respondent was selling land and intimated his interest in the same. That he carried out a search of the title which confirmed that the 2nd Respondent was the owner. He paid for the land and obtained title in 2007 and thereafter took possession,



constructed a house and settled in with his family. That all was well until 2010 when some people came and erected a temporary structure on the land. That he reported the incident to the police station with my title deed. That later a restriction was lodged on the title which on his instigation was removed by the Court in 2020.

22. In cross the 1st Respondent informed the Court that he lost the search and the sale agreement in regards to the suit land between him and the 2nd Respondent. That he reported the loss of the same to the Company. That he paid for the land in cash and was issued with receipts. He was showed the land by the surveyor whom he cannot recall his name. The witness denied demolishing the structure built by the PW2 and PW3 on the basis that he could not take the law into his hands since the structure was constructed bin the presence of the police officers.
23. It is trite that the legal burden of proof, unlike the evidentiary burden of proof does not shift. The majority decision of the Supreme Court in Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another Vs. IEBC & 2 Others (2017) eKLR had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof: - a

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law....”

24. Furthermore, in the case of Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 3 Others (2014) eKLR the Supreme Court held inter alia:

“The person who makes such allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already discharged initial burden. The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue.”

25. Section 3(3) of the [Law of Contract Act](#) states as follows;

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—



- (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap.526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

- 26. It is the law that for any disposition in land the same must be in writing. The Appellant has led cogent evidence to show that she purchased the land, paid for the same, balloted and obtained a plot certificate number, paid for the title processes, survey and other charges and was shown the land on the ground and the vendor who had the obligation to process the titles for the buyers wrote numerous letters appraising her of the progress they were making in the exercise. On a balance of probability, the Court finds that the Appellant has discharged her burden of proof that she acquired a good title in the land in 1989 and what was pending was the administrative formalities of title processing.
- 27. In the Court of Appeal case of Munyu Maina Vs. Hiram Gathiha Maina Nyeri Civil Appeal No. 239 of 2009 [2013] eKLR the Learned Judges stated that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.
- 28. The Appellant having discharged the legal burden of proof, the evidential burden shifted to the 1st Respondent to show that he acquired the title legally. The burden of proof in this suit or proceeding would lie on that person who would fail if no evidence at all were given on either side. The 1st Respondent is bound to fail if he does not show evidence that he acquired a good title. The 1st Respondent led evidence that he acquired the land in 2007. At this time the land was not available having been successfully been sold to the Appellant in 1989. It is interesting that Mr Macharia who the Appellant had informed about her relocation to United States of America is the same one who is alleged to have sold the land to the 1st Respondent knowing too well that the land belonged to the Appellant.
- 29. Further the 1st Respondent failed to produce the sale agreement, the transfer, the ballot or plot certificate if any with respect to the suit land. The Court presumes that these documents were not available and therefore the title issued to the 1st Respondent has no basis in law.
- 30. Section 26 of the *Land Registration Act* that provides as follows:-

“26.

- (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.”

31. The 1st Respondent stated as follows during the trial;

“When I purchased the land I was told that this land belongs to teachers. I was told that the lands being sold are for the teachers who have failed to pay the amount directed. The Company showed me all the documents. I was not shown the plaintiffs documents. Apart from paying for the title deed I did not sign any other documents. I just paid then I was called to take the title. I was not told about the transfer forms. I did not pay stamp duty. When I did the search before buying the land was registered in the name of Mwalimu Sukari Company Limited. I dealt with Mr Macharia from the 2nd defendant office. I do not know his other name.”

32. In the case of Arthi Highway Developers Limited Vs. West End Butchery Limited & 6 Others [2015] eKLR the Court of Appeal in handling similar facts held as follows;

“It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the Land Registration Act, 2012 will have a positive impact for land investors in future.”

33. Disposition of land in Kenya is provided for in law. Section 37 of the Land Registration Act and amplified by Regulation 49 of the Land Registration (General) Regulations provide as follows:-

“ 37. 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.

49. Requirements for transfer

- (1) Subject to section 37(1) of the Act an application for the transfer of any interest in land shall be in Form LRA 33 set out in the Sixth Schedule.
- (2) An application under paragraph (1) shall be supported by—
 - (a) the original title documents;
 - (b) where applicable, a land rent clearance certificate;



- (c) a land rates clearance certificate;
- (d) where applicable, the consent of the head lessor;
- (e) any consent required for registration unless a particular consent has been endorsed on the instrument of transfer;
- (f) where applicable, a form for Valuation of Stamp Duty, duly filled and approved by a government valuer; and
- (g) any other document as may be required under the Act, these Regulations or any other written law.”

34. The 1st Respondent admitted that he acquired land devoid of a sale agreement, transfer Land Control Board consent including payment of stamp duty. The Court holds that the title of the 1st Respondent was procured through a corrupt scheme between the 1st Respondent and Mr Macharia and the 2nd Respondent and the same cannot be allowed to stand.

Bonafide purchaser

35. A bonafide purchaser is an innocent party who purchases property without notice of any other party's claim to the title of that property. In the case of Lawrence Mukiri Vs. Attorney General & 4 Others [2013] eKLR where the Court stated what amounts to "bonafide purchaser for value, thus:

“... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;
- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;
- f. He was not party to any fraud.”

36. A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.

37. The 1st Respondent led evidence and informed the Court that he carried out a search which confirmed that the 2nd Respondent was the legitimate owner of the land. He failed to produce the said search and instead feigned loss of the same. The green card produced by the 1st Respondent shows that the land was registered for the first time in 2007 and not later. In 2006 when he claims to have acquired the land, the land had not been titled and there would be no search and if he carried out a search at the 2nd Respondent's register, he would have found that the suit land was already acquired by the Appellant. The 2nd Respondent therefore did not hold any apparent or real title to the suit land. The 2nd Respondent had no interest in the land and could not convey any to the 1st Respondent. The 2nd Respondent therefore sold nothing and the 1st Respondent acquired nothing in the alleged transaction.



38. The totality of the evidence before the Court is that the 1st Respondent cannot be said to have acquired any good title. There is absolutely no bonafides on his part and therefore his title does not enjoy the protection of the law.

Revocation of title.

39. Section 80 of the *Land Registration Act* provides as follows;

“Rectification by order of Court

1. Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
2. The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

40. The Court finds that the 1st Respondent holds a hollow title devoid of any legal legitimacy in law. Mandated by the provisions of Section 80 of the *Land Registration Act*, the Court finds that this title is null and void and cannot be allowed to stand. It is so revoked.

41. The last issue for determination is who bears costs? Section 26 of the *Civil Procedure Act* provides that costs generally follows the event. The Supreme Court in the case of Jasbir Singh Rai & 3 Others Vs. Tarlochan Singh Rai & 4 Others [2014] eKLR affirmed that costs must always follow the event unless the Court has a good reason to order otherwise.

42. Ultimately the appeal is merited. It is allowed as follows;

- a. The appeal is allowed.
- b. The judgement of the Hon C K Kisiangani delivered on the 3/11/2022 be and is hereby set aside.
- c. The prayers in the plaint dated the 25/10/2021 be allowed
- d. The costs shall be in favour of the Appellant both in the trial Court and on appeal.

43. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30TH DAY OF JULY 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Nkirote HB Mureithi for the Appellant

1st Respondent in person

2nd and 3rd Respondents – Absent but served

Court Assistants – Phyllis/Oliver

