



**Paul v Muthuri (Sued as the legal representative Of the Estate  
of Charles Muthuri Rugiri) (Environment and Land Appeal  
E050 of 2023) [2024] KEELC 5784 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5784 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E050 OF 2023**

**CK NZILI, J**

**JULY 24, 2024**

**BETWEEN**

**JOSEPH MAGIRI PAUL ..... APPELLANT**

**AND**

**DICK MUTUGI MUTHURI (SUED AS THE LEGAL REPRESENTATIVE OF  
THE ESTATE OF CHARLES MUTHURI RUGIRI) ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. E.M Ayuka –  
PM in Nkubu PM ELC No. 32 of 2019 delivered on 27.7.2023)*

**JUDGMENT**

1. What is before the court is the memorandum of appeal dated 13.12.2023 pursuant to leave granted on 6.12.2023 to appeal out of time. The major complaint by the appellant, who was the plaintiff at the lower court is that it should not have dismissed his suit since he had pleaded and proved fraudulent acquisition of L.R No. Nkuene/Mitunguu/463 by the respondent's father, but unfortunately, the trial court found the evidence insufficient to sustain the claim.
2. As an appellant court of the first instance, the mandate is to relook at the lower court file afresh and come up with independent findings on facts and law, while giving credit to the trial court that had the benefit of observing and hearing the witnesses firsthand. See *Selle & another vs Associated Boat Company Ltd* (1968) E.A 121.
3. The appellant at the lower court had filed a plaint dated 17.4.2019, claiming to be the genuine and legitimate owner of L.R No. Nkuene/Mitunguu/463, measuring 0.81 ha bought from the late Materu M'Mbutura in 1974 and a title deed issued in 1991.
4. The appellant averred that in attempts to include his son Charles Muthuri Magiri as co-owner in 2007, the respondent sought to assist him to which he surrendered his I.D. card and the original title deed



to him only for the respondent to illegally, fraudulently, secretly and without his knowledge, consent, authority and in breach of fiduciary duty included his name as co-owner of one acre and the balance to the appellant. The appellant averred that the respondent took advantage of his illiteracy, represented himself as the son of the appellant since they shared similar names, obtained 1 acre of land without any consideration, used pretense and misled the land registrar to register him as the owner of 1 acre of land.

5. The appellant prayed for:
  - a. Declaration that he was the sole owner of the suit property and the inclusion of the respondent's name as one of the owner acre of the land as fraudulent or illegal.
  - b. Removal or cancellation of other respondent's names from the register for it to revert to the original status.
  - c. Permanent injunction and general damage for trespass.
6. Through a statement of defense dated 14.5.2019, the respondent denied the claim. On the contrary, he averred that both of them jointly owned L.R No. Nkuene/Mitunguu/463 in equal shares. The respondent averred that the transfer of land was a controlled transaction the appellant had not explained the circumstances leading to him seeking the land control board consent in the respondent's name and not his son's.
7. The respondent denied any alleged fraud or illegality in the registration as owner of 1 acre of the suit land. He termed the suit as sub-judice in view of Meru Chief Magistrates Civil Case No. 515 of 2018, between the parties over the same subject matter.
8. The respondent averred that he bought a portion of the suit land measuring 1 acre from the late Mitiri Mbutura, the original owner of the land, who decided to have the same registered in the partys' joint names. The respondent did not plead to the contents of paragraph 6 of the plaint that between 1990 and 2007, he was working as a bank manager of Meru Central Farmers Corporation and was a credit friend of the appellant when he decided to change ownership of his land to include the names of his son.
9. At the trial, Joseph Magiri Paul testified as PW 1. Relying on his witness statement dated 71.4.2019 as his evidence in chief. PW 1 told the court that the respondent, though not a relative was his great friend and his son shared similar names with him. Further, PW 1 said that the respondent unlawfully transferred his one acre of the suit land to this name, yet he had no authority from him and they had not entered into any written agreement. He produced a copy of the title deed, a copy of the register, photographs and a court order as P. Exh No's. (1), (2), (3) & (4).
10. PW 1 denied exchanging or engaging either the respondent or anyone else to transact over his land, least of all over one acre as alleged by the respondent. PW 1 told the court that the dispute had previously been referred to the land dispute tribunal.
11. In cross-examination, PW 1 told the court that the respondent took advantage of him and used pretenses to transfer 1 acre of land to his name and obtained a title deed on 9.10.2007 in their joint names. PW 1 acknowledged that all along, the respondent had kept his title deed without surrendering it, leading to numerous reports to the police. He said that he filed the suit 12 years after the said registration.
12. PW 1 said that the land was 2 acres and was under use by both of them. PW 1 said that his sole intention there was to register his son as a co-owner of the land, but the respondent took advantage of him and the similarities of the names of his son to insert the name as if he was the son; otherwise, the land initially solely owned by him. Again, PW 1 acknowledged that he made no complaint to the land control board



- members or sued them for the changes. He told the court that he had surrendered all his documents, including those of his son who did not sign the same to the respondent for he was not present at the time. PW 1 also said that the respondents had another land next to the suit land as L.R No. 462. He denied entering into any sale agreements relating to the land which he bought from Fabian Mutegi. He also denied attending any land control board meeting.
13. Charles Muthuri Magiri testified as PW 2. He told the court that he was born in 1980 as per an identification card, which he displayed to the court. He denied signing any transfer documents over the suit land. Similarly, he denied surrendering his card and pin certificate as well as appending his signature on the land control board form. PW 2 termed the transfer of 1 acre of land to the respondent as fraudulent. He said that the tribunal declined jurisdiction hence the reason the suit was filed late in court.
  14. Kithinji Maingi testified as PW 3. He confirmed that the parties were his neighbors. As a grandson of the late Njuki Nkoroi, the initial owner of L.R No. Nkuene/Mitunguu/169, he told the court that when the appellant bought the land, he found his family in the neighborhood and started utilizing the land.
  15. PW 3 added that the appellant subdivided the land among his sons in 2006 and out of trust, he requested the respondent to assist him in regularizing or formalizing the subdivisions with the lands office, given that he was working as a bank manager. PW 3 said that the appellant trusted the respondent as a friend only to fraudulently transfer 1 acre of the land under their joint names. PW 3 clarified that the respondent equally bought a parcel of land in the area.
  16. Dickson Mutugi Muthuri testified as DW 1. Relying on a witness statement dated 24.5.2019, he told the court that his late father passed on in 2021. According to the deceased, the appellant was his neighbor and co-owner of L.R No. Nkuene/Mitunguu/463, initially belonged to M'Mitiri M'Mbutura (deceased), who sold it to them, including his L.R No. Nkuene/Mitunguu/464. Relying on the deceased's statement he told the court that the appellant was registered initially as owner of 2 acres as L.R No. Nkuene/Mitunguu/463 inclusive of his L.R No. 464. He stated that the late M'Mitiri M'Mbutura talked to the appellant to transfer to him one acre of L.R No. 463 that was adjacent to L.R No. 464, in exchange for 1 acre of land that he had bought as a subdivision of L.R No. 462. Further, he stated that all of the parties, according to the deceased statement, were in agreement that the appellant be given one acre as a subdivision of L.R No. 462 and for him to give him one acre out of L.R No. 463.
  17. Similarly, he said the deceased father took possession of 1 acre, and the appellant took possession of one acre in exchange, which he even allowed 1 of his sons to develop or occupy. Additionally, the witness said that the deceased stated that in 2008, he sued the appellant to have the land partitioned to separate the title, but the suit was stayed by an order issued in Meru Judicial Review No. 100 of 2008. DW1 denied the alleged fraud, given that the appellant willingly attended a land control board meeting that issued consent to include his late father's name as owner of 1 acre of L.R No. 463. DW 1 produced a copy of the title deed for L.R No. Nkuene/Mitunguu/463, green card for the same, bundle of photographs as D. Exh No. 1-3, respectively.
  18. In cross-examination, DW 1 told the court that L.R No Nkuene/Mitunguu/463 was registered under the appellant's name on 21.5.1991 as per D. Exh No. (2), while the name of the respondent was inserted on 19.9.2007. DW 1 told the trial court that he had no documents or an agreement showing how his later father's name was inserted to become a co-owner of the land in 2007.
  19. DW 1 acknowledged that a copy of the records showed that the appellant bought the land from Mutoria Mutura. Further, DW 1 admitted that the appellant had a son known as Charles Muthuri Magiri (PW 2), similar names as those of his late father. He insisted that his late father acquired the



- one acre of the appellant's land so that he would consolidate his portion following on exchange of the parcels. DW 1 told the trial court that he had no copy of the register showing what the appellant acquired in exchange for the 1 acre of land acquired by the deceased. DW 1 told the trial court that his late father was the owner of L.R No. 464, bought 1 acre from L.R No. 462 and was uncertain in whose name the land was registered or exchanged for the benefit of the appellant.
20. Fabiano Mutege testified as DW 2. He told the court that he was a son of the late Matiri M'Mbutura, who sold L.R No. Nkuene/Mitunguu/463 to the parties herein. He said that his late father trusted the appellant so much that his land was registered under his name even before he cleared the same, who was advanced in age. DW 2 told the court that the appellant took advantage of his late father and took possession of 1 acre of land bought by the respondent within former L.R No. 462, while the respondent took possession of 1 acre next to his L.R No. 464.
  21. DW 2 said that the appellant had bought two portions while the respondent had bought three portions out of his late father's expansive land, which they each developed without a dispute until his late father passed on. Since the respondent had bought one acre sandwiched between the two parcels, DW2 told the court that his late father suggested that 1 acre of land be hived from L.R No. 462, to be given to the appellant, who in turn would give the respondent one acre out of L.R No. 463, to have the appellant's land on one side and the respondent on the other side as one expansive portion.
  22. DW 3 told the court that the intention was effected by the appellant attending a land control board meeting following which a land control board consent was issued and the registration effected. He termed the appellant's claim as baseless. DW 3 went on to state that he had no such sale or land exchange agreements in support of his assertions, nor was he a party in the land control board meeting.
  23. Rael Karea, while associating her evidence with that of Dw2, testified as DW 3. As a daughter of the late Mutura, who died in 2008, she confirmed that she was not a party to the land sale agreements.
  24. This appeal was admitted for hearing on 11.4.2024. The appellant was directed to file a record of appeal within 60 days from the date of admission.
  25. A mention date was fixed for 13.6.2024. The appellant did not attend the mention. The parties were notified of the directions by an email sent to Kiogora Arithi@yahoo.com and gmuthurilawfirm@yahoo.com, on 13.6.2024 at 12.16 hours.
  26. The appellant even without filing a record of appeal as ordered, filed written submissions dated 2.7.2024. The appellant submitted that the respondent was deceased by the time DW 1 testified at the lower court. In the written submissions, Dick Mutugi Muthuri is listed as sued in his capacity as the legal representative of the estate of Charles Muthuri Rigiri. After the respondent was allowed to substitute the defendant, it appears pleadings were not amended to reflect the said changes.
  27. Be that as it may, the appellant submitted that the respondent was unable to prove the contents of paragraphs 6-8 of the defence on the circumstances leading to the registration as a co-owner of the suit land, for no documentary evidence was tendered to support any sale or land exchange agreements, land control board consents, land control application forms, minutes and transfer forms. Reliance was placed on Simon Kyunguti vs Krushali Enterprises Ltd (2019) eKLR, Munyu Miana vs. Hiram Gathiha Maina C.A No. 239 of 2009 and Alice Chemutai Too vs Nickson Kipkurui Korir & Others (2015) eKLR.
  28. The issues calling for court determination are:
    - i. If there is a competent record of appeal.
    - ii. If the appeal has merits.



29. This court ordered the appellant to file a record of appeal by 11.6.2024. None was uploaded to the e-filing system by the set deadline. Instead, the appellant filed written submissions dated 2.7.2024. By letter to the Deputy Registrar dated 5.7.2024, the appellant blamed the trial court and this court for not supplying lower court proceedings and judgment despite a request for the same by a letter dated 28.7.2023, on 10.8.2023 and payments made on 31.8.2023. In the said letter, the appellant indicated that they were informed that the lower court file was forwarded to this court on 25.7.2023.
30. This court, by a ruling in Meru ELC Misc Application No. E009 of 2023, delivered on 6.12.2023, was told by the appellant that a copy of the judgment and proceedings after typing was availed to them on 25.9.2023. The affidavit in support had been sworn by the appellant on 22.9.2023. The respondent confirmed by a replying affidavit dated 4.10.2023 that proceedings and judgment were supplied on 25.9.2023. The lower court file was forwarded to this court by a letter dated 8.4.2023 and was received on 8.4.2024.
31. Between 10.8.2024 and 8.4.2024, there is no evidence that the appellant went to the lower court to collect the proceedings if any were missing after the supplied copies on 25.9.2023. Similarly, after the appeal was admitted on 11.4.2024 and the appellant notified of its admission and mention for 11.6.2024, there is no evidence that he followed up and ensured collection of the proceedings, if any, from the court file.
32. The reasons, therefore, contained in the letter dated 5.7.2024 are a red herring and show the reluctance by the appellants to comply with court orders or directives to fast-track his appeal. Had the appellant been vigilant or diligent, he would have applied for an extension of time to file a record of appeal. Unfortunately, the appellant would swear on oath receipt of proceedings on 25.9.2023 and use the same reason for not filing a record of appeal.
33. The record of appeal was nevertheless uploaded to the system on 22.7.2024, without leave of court to admit it out of time and to extend the time within which to file it. I find the failure to file the record of appeal on time, filing it outside time, and failing to seek leave to file it outside time fatal.
34. As to the merits of the appeal, fraud and illegality must be specifically pleaded and proved on a balance higher than in ordinary suits. See *Arthi Highway Developers Limited vs West End Butchery Limited & 6 others (2015) eKLR*, *Central Kenya Limited vs Trust Bank & 4 others (1996) eKLR*. A claim based on fraud must also be filed within three years after the cause of action had arisen as per Section (4) of the *Limitation of Actions Act* or within three years after its discovery as per Section 26 thereof. The respondent has raised a preliminary objection on time-limitation, res-judicata, and abuse of the court process. P. Exh No's. (1) & (2) indicate that the respondent became the registered owner of L.R No. Nkuene/Mitunguu/463, jointly with the appellant on 9.10.2007.
35. The suit was filed on 17.4.2019. The appellant was initially sued in Meru CMCC No. 515 of 2008 by the respondent. Therefore, the appellant was aware of the joint ownership of his land by 2008. My finding therefore is that the suit was filed 16 years after the cause of action accrued. The suit was therefore stale.
36. As to evidence of fraud or illegality, the entries to the title register were made by the land registrar who issued the title deed. The burden of proof is on he who alleges specific facts to prove their existence. The legal burden never shifts from the plaintiff as held in *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & another (2004) 1 E.A 334* cited with approval in *Simon Kyunguti vs Krushali Enterprises Ltd (supra)*. It was upon the appellant to prove that the respondent abused his privilege, took advantage of the appellant's illiteracy, unjustly used the documents that were honestly given to him to facilitate the transfer to the names of his son and that investigations done established that the respondent used



his names similar to that of the appellant's son. The appellant should have led evidence that his son was a minor and that the deceased falsely represented himself to the land control board and the land registrar to obtain the land by pretenses as if he was the son.

37. Evidence from the land control board chairman and the land registrar was not called to support the averment on the irregularities, in the manner the land came to the joint names of the parties. Evidence from the police that the appellant reported that the respondent was withholding and or detaining his title deed was not availed before the trial court. Fraud or illegality cannot be inferred from the facts. The burden was upon the appellant to call for and obtain the documents that were used to jointly transfer the land into the names of the appellant and respondent and subject them to a forensic investigation that the appellant did not execute them.
38. In the absence of cogent and tangible evidence to sustain fraud or illegality, I find the appeal before the court both incompetent and lacking merits. It is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 24<sup>TH</sup> DAY OF JULY, 2024**

In presence of

C.A Kananu/Mukami

Miss Mugo for appellant

Mr. Gikunda for Muthuri for the respondent

**HON. C K NZILI**

**JUDGE**

