



**Muindi v Mutua & another (Environment and Land Appeal 23 of 2019)
[2024] KEELC 6278 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6278 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 23 OF 2019
A NYUKURI, J
SEPTEMBER 25, 2024**

BETWEEN

CLAUDIA ALEXIOUS MUINDI APPELLANT

AND

MRS. ROSE KATILE MUTUA 1ST RESPONDENT

MESHACK MUTUA 2ND RESPONDENT

(Being an Appeal from the Judgment of Chief Magistrate's Court at Machakos by Hon. C. A. Ocharo, SPM delivered on 21st day of May 2019 in Machakos CM ELC Case No. 3 of 2018)

JUDGMENT

Introduction

1. This appeal was filed by Claudia Alexious Muindi challenging the judgment of Hon. C. A. Ocharo delivered on 21st May 2019 in Machakos Chief Magistrates Court ELC Case No. 3 of 2018. In the impugned judgment, the learned magistrate allowed the respondents' claim on the basis that they had proved ownership of the suit property while the appellant had failed to demonstrate the root to her title.

Background

2. By a plaint dated 30th August 2006, the respondents herein (who were the plaintiffs in the lower court) sought the following orders against the defendant (the appellant herein);
 - a. A declaration order that the title deed No. 377119 issued on 7.9.2005 to the defendant is null and void ab initio.
 - b. A declaratory order that the said plot No. 1403 belong to the plaintiffs.



- c. Costs and interests of the suit at court rates.
 - d. Any other and/or further relief that this Honourable Court may deem fit at the circumstances of this suit.
3. The plaintiffs' case was that they are owners of Plot Number 1403 (suit property) at Katelembo Athiani Muvuti Farming & Ranching Cooperative Society Ltd (hereinafter referred to as Katelembo) having purchased the same on 24th January 2004 from one Makewa Komu who was member Number 2942 of Katelembo. Their complaint was that the defendant fraudulently and unlawfully obtained title No. 377119 of the said Plot No. 1403 which she registered in her name vide title No. Athi River/Athi River Block 1/460. They stated the particulars of fraud.
 4. In a statement of defence dated 12th September 2006, the defendant denied the plaintiffs' claim and stated that he purchased Plot No. 1403 on 13th July 1992 as shown in the official receipt number 093106 at Kshs. 7,000/- and that therefore, the said plot could not have been available for sale on 24th January 2004 when the plaintiffs purported to purchase the same. She stated that she was properly and rightfully registered as owner of the suit property and his title could not be defeated by virtue of the provisions of Sections 27 and 28 of the now repealed Registered Land Act Cap 300 Laws of Kenya.
 5. The matter proceeded to hearing by viva voce evidence. The plaintiff presented 7 witnesses while the defendant presented one witness.

Plaintiffs' evidence

6. PW1, Meshack Mutua Musau testified that together with his wife, the 2nd respondent herein he bought the suit property from one Makewa Komu's wife and sons namely Mutheu Makena and Nicholas Makewa through Katelembo, a land buying society, on 24th January 2004. He stated that the parties to the transaction went to the offices of Katelembo, paid for the transfer and entered into an agreement at Katelembo, where the purchase price was Kshs. 200,000/- which he paid by instalments till completion.
7. He further stated that he was given copies of the identity cards of the vendors; allocation clip (ballot slip) share showing membership; death certificate of Makewa Komu and the agreement. Further that Katelembo gave him a letter signed by three officials to be taken to Machakos Land Registry to obtain title and on reaching the registry only to realize that the suit property already had a title deed issued in the name of the defendant. He stated that he took possession of the suit property in 2004 but that the defendant's father tried to get him out of the land in 2014. He pointed out that the defendant's registration is entry No. 2 in the register while entry No. 1 is registration in the name of Katelembo; as the suit land was originally registered in the name of Katelembo and was a subdivision of land owned by Katelembo. He stated that title in the defendant's name was not lawfully registered.
8. He produced a sale of land agreement; a letter from Katelembo dated 4th April 2005; a search and green card for the suit property; receipt for Kshs. 5,600/- for transfer; agreement by the family of Makewa Komu; membership card of Makewa Komu; and ballot slip.
9. In cross examination, he stated that he had not been a member of Katelembo. He stated that when he bought the land, the owner had already passed on and the vendors did not show him the grant of letters of administration. In reexamination, he stated that what the society required from him was a death certificate and family members of the deceased.
10. PW2 was Rose Mutua Katile, the 2nd plaintiff. She adopted the contents of her witness statement dated 22nd January 2015. Her evidence mirrored the evidence of PW1 and she stated that together with PW1



who is her husband, they purchased the suit property from the Mutheu Makewa and her sons which they now occupy. She stated that when they sought to get title, they realized that the land was registered in the defendant's name.

11. In cross examination, she stated that she got a letter from Katelembo to assist her get title. In reexamination, she stated that Katelembo did not oppose the sale of the suit property to the plaintiffs.
12. PW3 was Kioko Makewa son of Makewa Komu. He confirmed that in 2004, the family of Makewa Komu sold the suit property to the plaintiffs at a consideration of Kshs. 200,000/- which was paid in full. He stated that he did not know Claudia Alexious Muindi the defendant and that they had never sold the suit property to her.
13. In cross examination, he stated that his father's land was Plot No. 1403 and that they have never been shown any other land neither has he ever heard that Plot N. 1320 was being sold. He stated that his mother was deceased.
14. PW4 was Nicholas Nzioka Makewa the son of Makewa Komu. He testified that Plot No. 1403 belonged to his father who was member No. 2942 and that after his father died, the family sold the land to the plaintiffs. Further that he did not know the defendant. In cross examination, he stated that the did not know about Plot No. 1320.
15. PW5 was Stephen Mutua. This witness was stood down to allow the plaintiffs' counsel file a supplementary list of witnesses.
16. PW6 was Daniel Mbithi Kasinga. He testified that he knew the plaintiffs and that he was member No. 2159 and in 2005, he was elected committee member of Katelembo and in 2007 as honorary Secretary of the committee. He stated that the plaintiffs were the owners of the suit property which they were in occupation.
17. In cross examination, he stated that the suit property belonged to Makewa Komu and that he did not know who was the registered owner of the suit property. He stated that the society would allocate 2 plots, and that Makewa Komu had only one plot. Further that he did not know that Makewa Komu had sold one plot earlier. He stated that allocation of plots was done in 1971 and one plot could not be sold at Kshs. 7,000/-. He stated that he was aware the society was selling plots to members and non members. He stated that the society entered into sale agreements and plots were not bought using slips. He stated that the defendants' receipt could not be receipt of purchase of 2.04 acre plot.
18. In re-examination, he stated that the society records showed that Plot No. 1403 was owned by Makewa Komu and that the society was not responsible for issuance of title deeds. He stated that the receipt of the defendant did not have Katelembo stamp and that as the date of the receipt, the property was about Kshs. 40,000/- to Kshs. 50,000/- and not Kshs. 7,000/-.
19. PW7 was Stephen Mutua a Land Surveyor in Machakos. He stated that the plaintiffs presented their case before the task force where he was a secretary. He stated that both parties were summoned where they were heard and a finding made that the same belonged to the plaintiffs and a recommendation for cancellation of the defendants' title. He produced the task force report as an exhibit.
20. In cross examination, he stated that there was a case in court in regard to the task force, but the case was stayed and that an order served on the taskforce after they had delivered their decision. In reexamination, he stated that the taskforce was gazetted in 2016. This marked the close of the plaintiffs' case.



Defendant's case

21. DW1 was Johnson Musau Muindi who had the power of attorney from Claudia Muindi the defendant. He stated that the defendant was his daughter. He stated that the suit property was sold by Katelembo in 1992 to the defendant and Katelembo issued a receipt. He stated that on the same day, he also bought Plot Nos. 1401 and 1402 at the same price and the said plots are still owned by him to date. He stated that the title deed was retained by the taskforce and that he filed suit in the High Court which stayed the decision of the taskforce. He stated that he was issued with an authorization certificate No. 1403 and a plot allocation slip. He produced receipt of Kshs. 7,000/-; copy of title; power of attorney; search certificate and authorization certificate.
22. On cross examination, he stated that he had no identification card. He stated that he had no sale agreement in regard to his purchase of the suit property. Further that upon purchase of the suit property, his daughter took possession thereof by rearing chicken on the suit property for 10 years. He stated that when the plaintiffs entered the suit property, he did not file any case against them. Further that the chairman of Katelembo signed receipt dated 13th July 1992 while the plot allocation slip was issued by Katelembo's surveyor although the document does not indicate that it is from Katelembo. He confirmed appearing before the taskforce and stated that he presented his evidence before the taskforce. In reexamination, he stated that the plaintiffs entered the suit property in 2004 and filed this suit in 2006. That marked the close of the defence case.
23. It is upon consideration of the evidence that the learned trial magistrate entered judgment for the plaintiffs upon making a finding that the plaintiffs had demonstrated lawfully purchasing the suit property while the defendant had no sale agreement and that the authorization certificate produced by the defendant does not state its origin. Further, the court found that the plaintiffs were in possession of the suit property and no suit for their eviction had been filed. The court also found that the defendant failed to explain how she obtained title. On that basis the court allowed the plaintiffs' claim.
24. Aggrieved with the above decision of the trial court, the appellant herein challenged the judgment of the trial court vide a memorandum of appeal dated 17th June 2019 citing the following grounds;
 - a. The learned trial magistrate grossly erred in failing to decide the issue of ownership of the suit land before the purchase by either the plaintiffs or the defendant so as to determine who between the respective sellers had a better title to pass.
 - b. The learned trial magistrate erred in upholding the purported sale of land alleged to belong to a deceased person and in the absence of a confirmed grant with respect to the estate of the deceased.
 - c. The learned trial magistrate erred when she ignored the evidence on record that a member of the society was entitled to one plot of the size as was the subject of the suit and that the late Makewa Komu from whose widow the plaintiff claimed to have purchased the suit land had sold his Plot No. 1320 during his lifetime.
 - d. The learned trial magistrate was grossly wrong in holding that the appellant's title deed was not obtained procedurally notwithstanding the evidence adduced with regard to the purchase and allotment and subsequent issuance of title deed pursuant to the society's records held by the Land Registrar.
 - e. The learned trial magistrate erred when she based her decision on the fact that the defendant obtained her title deed thirteen years after purchase.



- f. Holding that the root of the defendant's title was not traceable was questionable and without explanation the trial magistrate misdirected herself as this amounted to shifting the burden of proof to the defendant hence an error in law.
 - g. The learned trial magistrate erred in failing to appreciate and hold that there were no sufficient grounds to order for cancellation of title number Athi River/Athi River Block 1/460.
 - h. The learned trial magistrate erred in ordering the cancellation of the title deed of the suit land in the absence of any or any sufficient evidence with regard to fraud or misrepresentation, illegality, unprocedurality or corruption
 - i. The decision of the said magistrate was against the weight of the material presented to her.
25. Consequently, the appellant sought the following orders;
- a. Her appeal be allowed.
 - b. The judgment and decree of the trial magistrate court be reversed.
 - c. The costs of this appeal and those of the court below be awarded to the appellant.
26. This appeal was disposed by way of written submissions. On record are appellant's submissions filed on 25th October 2022 while the respondents filed their submissions on 12th April 2023.

Appellant's submissions

27. Counsel for the appellant submitted that the trial court failed to consider the appellant's evidence in arriving at its decision. It was contended for the appellant that the evidence on record established that the appellant was entitled to the suit property as he holds a clean title including the allocation slip issued to her by Katelembo. Counsel maintained that the respondents' evidence that the widow and son of the late Makewa Komu had no land to sell as the deceased had sold his land during his lifetime as PW5 had confirmed that each member was only entitled to one plot.
28. Counsel argued that the appellant's title was legally acquired for valuable consideration and that there was no fraud or misrepresentation proved. It was further submitted for the appellant that no evidence was adduced by the respondent to justify cancellation of the appellant's title.
29. It was further submitted for the appellant that it was demonstrated that the appellant had equitable interest in the suit property. Counsel contended that the trial court failed to address the question as to who between the two sellers of the suit property had better title to pass. Counsel argued that without a confirmed grant, the widow had no good title to pass to the respondents. Counsel faulted the respondents' failure to join Katelembo to the suit and argued that the only conclusion is that Katelembo had no issue with the appellant's title.
30. Reliance was placed on Section 26 of the [Land Registration Act](#) for the proposition that the trial court failed to establish the particulars of fraud pleaded, and arrived at a wrong conclusion.

Respondents' submissions

31. Counsel for the respondent submitted that the trial court rightly made a determination on the issue of ownership of the suit property before alleged purchase by both the appellant and the respondents. It was further argued for the respondents that the respondents herein produced before the trial court, a letter from Katelembo dated 4th April 2005 confirming that the respondents were the genuine owners of the suit property having purchased the same. Further that the respondents produced membership



- card showing that the late Makewa Komu was member No. 2942 and owner of Plot No. 1403 and a sale agreement which means that the trial court did not err in upholding the sale of the suit property.
32. Regarding Plot No. 1320, counsel submitted that there was no evidence on record to show that the late Makewa Komu sold the said plot. Counsel submitted that PW3 testified that he used to accompany his father to the offices of Katelembo and that they were shown Plot No. 1403 but that he had never heard of Plot No. 1320 being sold; while PW4 stated that he did not know about Plot No. 1320. Counsel further submitted that the appellant did not adduce any evidence to prove that the late Makewa Komu had Plot No. 1320.
 33. In supporting the trial court judgment, the respondents' counsel submitted that the trial court was right in holding that the appellant's title was not obtained procedurally as the appellant testified that he had no sale agreement in regard to the suit property and that the Plot Allocation Slip was issued by a surveyor from Katelembo but had no indication that it was from Katelembo. Counsel argued that the trial court's decision was based on the fact that the appellant failed to explain the process and circumstances of obtaining his title. Counsel argued that PW6 testified that Katelembo used to do sale agreements by its officials and that an allocation slip cannot be construed as a sale agreement. Counsel contended that the appellant failed to produce documents from Katelembo to the Land Registrar indicating that he was the lawful owner of the suit property. Counsel argued that the appellant's title was not traceable.
 34. Reliance was placed on Section 3(3) of the Law of Contract Act, and Section 26 of the Land Registration Act for a proposition that sale of land is demonstrated by a written contract and a title is only indefeasible if it was lawfully obtained.
 35. Counsel referred to the cases of Mike Maina Kamau v. Attorney General [2017] eKLR, Gateway Investment Ltd v. Tajmal Limited & 3 Others [2006] eKLR and Athi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR among others, for the proposition that the process of acquisition of title is material in determining its legality. Counsel concluded that the trial court was right in cancelling the appellant's title.

Analysis and determination

36. The court has carefully considered the appeal, parties submissions and the entire record. The appellant raised nine grounds of appeal. However, the same coalesce around three main issues, namely;
 - a. Whether the respondents proved that the appellant obtained title to the suit property unlawfully.
 - b. Whether the respondents proved that they were the lawful owners of the suit property.
 - c. Whether the trial court erred in allowing the respondents' claim.
37. It is trite that the duty of a first appellate court is to reanalyze, reassess and reconsider the evidence before the trial court and make its own independent conclusions bearing in mind that it had no advantage of hearing or seeing the witnesses and therefore give due allowance for that (See *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123). The duty of the first appellate court to independently, fairly and fully consider the evidence and make a decision on the facts and the law is crucial as the court is ordinarily the final court of fact.
38. Legal protection on the right to property is limited to property lawfully acquired. Article 40 (1) and (6) of the Constitution of Kenya provides that the right to property is protected but does not extend to any property that has been found to have been unlawfully acquired. Therefore, at the core of protection



of the right to acquire and own property, is the legality of the process of acquisition. If the property is lawfully acquired, then it attracts legal protection, but where the same is unlawfully acquired, then the same is exposed non legal protection.

39. This position is reinforced in the provisions of Section 26 (1) of the [Land Registration Act](#) which provides 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.

40. It is therefore clear that although a title is prima facie evidence of indefeasibility and absolute ownership by the registered proprietor, where it is proved and or found that the same was obtained by unlawful means including fraud, misrepresentation, want of procedure or corruption, such title can be challenged on those grounds.

41. In the case of *David Kiptugen v. Commissioner of Lands & 4 Others* [2015] eKLR, the court held as follows;

The acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position, then all one would need to do is manufacture a lease or a certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.

42. Similarly, in *Munyu Maina v. Hiram Gathiha Maina* [2013] eKLR, the Court of Appeal held as follows;

We state 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 and 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.

43. In the instant case, the respondents claim before the trial court is that on 24th January 2004, they purchased Plot No. 1403 at Katelembo from the family member of the late Makewa Komu, only to realize that the appellant had obtained title thereof being title Number Athi River/Athi River Block 1/460. They maintained that the appellant's process of acquiring title to the suit property was marred with fraud and illegality, because the appellant obtained registration of the suit property when the same belonged to the respondents. In response, the appellant's defence was that he purchased Plot No. 1403 on 13th July 1992 from Katelembo at a consideration of Kshs. 7,000/-. The respondents produced a land sale agreement dated 24th January 2004, letter from Katelembo dated 4th April 2005; certificate of official search; transfer from Katelembo; agreement dated 4th April 2004; Katelembo membership



card of Makewa Komu; payment receipts for transfer and plot allocation slip. On the other hand, the appellant produced a receipt from Katelembo dated 13th July 1992; plot allocation slip; copy of title; certificate of official search and power of attorney.

44. Therefore the documents supporting the appellant's title are the receipt dated 13th July 1992 and plot allocation slip, while documents supporting the respondents' claim is the sale agreement, membership card of the late Makewa Komu and allocation slip. It was on these competing documents that the trial court was to determine the ownership of the suit property.
45. Having considered the evidence on record, it is not disputed that Plot No. 1403 at Katelembo was initially lawfully allocated by Katelembo to the late Makewa Komu by virtue of his membership of Katelembo, a land buying company. It is also not in dispute that Plot No. 1403 at Katelembo was registered as Athi River/Athi River Block 1/460 in the appellant's name on 7th September 2005. The only contention is whether the said plot was lawfully sold to the appellant by Katelembo.
46. Section 107 of the *Evidence Act* places the burden of proof in a case on the plaintiff while Section 108 of the said Act provides that the burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side. Besides, Section 109 of the *Evidence Act* provides that the burden of proof of any particular fact lies on the person who wishes the court to believe in its existence unless proof of such fact is placed on any particular person by law.
47. In this case, the respondents having proved that the suit property was lawfully owned by Makewa Komu by dint of his membership of Katelembo a fact conceded to by the appellant, it was upon the appellant to demonstrate that his alleged purchase of the suit property from Katelembo was lawful. I have considered the appellant's witness statement dated 16th October 2014 which was adopted as his evidence in chief. Her position was that she purchased the suit property from Katelembo and therefore the respondents could not purchase the same property in 2004 as the same had been sold to her 12 years earlier. Since there are two alleged purchases in contention in this matter; one by the appellant and another by the respondent, it was incumbent on the appellant to demonstrate that Katelembo owned the suit property before the alleged sale; while the respondents were obligated to show that Makewa Komu lawfully owned the suit property before the sale of the same. On whether there was a sale of land between Katelembo and the appellant, no sale agreement was produced and therefore it is not clear whether such sale did occur and what the terms of the sale were.
48. The issue of Parcel 1320 was only raised in cross examination of the respondents' witnesses but the same was never mentioned in the appellant's testimony, or pleadings despite the appellant's contention in submissions that the legality of her purchase of the suit property was premised on the fact that Plot No. 1403 was exchanged with Plot No. 1320 which the late Makewa Komu disposed.
49. Having considered the evidence on record, it is clear that there is no evidence on record to show that at the alleged time of sale to the appellant, Katelembo owned Plot No. 1320, or exchanged that plot with the late Makewa Komu and a consideration thereof lawfully acquired Plot No. 1403. As there is no evidence that Plot No. 1403 was lawfully transferred from Makewa Komu to Katelembo, it is clear that Katelembo did not own the suit property as at 13th July 1992 when the appellant alleges to have bought the same.
50. Having not been owners of the suit property, Katelembo had no capacity to sell the same to the appellant. The appellant who is therefore a stranger in relation to the suit property, has no capacity and cannot question what the family of the late Makewa Komu could or could not do with the land owned by the deceased Makewa Komu. If the family chose to sell the property with or without grant of letters of administration, the only persons who could question the legality of that transaction would



be the family members of the late Makewa Komu and not third parties like the appellant. In this case, several family members of the late Makewa Komu testified and confirmed that the family sold the suit property to the respondents.

51. Therefore this court is convinced that the respondents lawfully purchased the suit property from the lawful owners thereof, while the appellant purchased the property from an entity that did not own the suit property. In the premises, I find and hold that the respondents proved that the appellant's registration of the suit property was unlawful as the same was obtained from an entity that did not own the suit property and therefore lacked capacity to sell the same. On the other hand, the respondents having demonstrated that they lawfully purchased the suit property, have proved to be lawful owners of the same and are entitled to legal protection.
52. Section 80 of the Land Registration Act provides for cancellation of title where registration is unlawfully obtained and states as follows;
 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 who is in possession and had acquired the land, lease or charge for valuable consideration, 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.
53. In this case, the registration of the suit property in the appellant's name was unlawfully done as the appellant had no sale agreement to show she purchased the suit property and the entity alleged to have sold the suit property to her did not have capacity to sell the same. Hence the trial court had the power to order cancellation of the registration of the suit property in the appellant's name.
54. In the premises, I agree with the trial court's findings that the root of the appellant's title could not be traced and the appellant failed to explain how she obtained title and therefore the title was not lawfully or procedurally hers.
55. In the end, I find no merit in the appeal which I consequently dismiss, with costs to the respondents.
56. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF SEPTEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Uvyu for respondents

No appearance for appellant

Court assistant – Abdisalam

