



**Nganda v Mutuku & 2 others (Environment and Land Appeal
17 of 2020) [2024] KEELC 6274 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6274 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 17 OF 2020
A NYUKURI, J
SEPTEMBER 25, 2024**

BETWEEN

BENEDICT JOEL NGANDA APPELLANT

AND

MUMBI MUTUKU 1ST RESPONDENT

JOB WAMBUA 2ND RESPONDENT

MUNYAL NGOVU 3RD 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 2020 in Machakos CMC Civil Case No. 91 of 2011)

JUDGMENT

Introduction

1. This appeal was filed by Benedict Joel Nganda who challenges the judgment of Honourable C. Ocharo delivered in Machakos CMCC No. 91 of 2011 on 21st May 2020. In the impugned judgment, the trial court found that although the suit property was fraudulently obtained by the appellant’s cousins and subsequently sold to the respondents, the respondents were innocent purchasers for value and were in possession of the suit property, hence the only recourse the appellants had, was to sue the persons who sold the land to the respondents. Consequently, the trial court dismissed the appellant’s suit with costs.

Background

2. By a plaint dated 1st March 2011, the plaintiff (the appellant herein) sued the defendants (the respondents herein) seeking eviction of the defendants from parcel of land known as Katheka Kai Block 4/66 (suit property), which they had allegedly trespassed on in 2009 and put up structures thereon, on the basis that they had purchased the same from the plaintiff’s relatives.



3. In response, the 2nd and 3rd defendants filed a joint statement of defence dated 20th April 2011 denying the plaintiff's claim and averred that they purchased the suit property from the real owners thereof. The 1st defendant filed a statement of defence dated 27th April 2011 and reiterated the contents of the joint statement of defence of the 2nd and 3rd defendants. They denied the plaintiff's claim and alleged to have purchased the suit property from the real owners.
4. The matter proceeded by way of viva voce evidence. The plaintiff presented one witness while the defence presented two witnesses.

Plaintiff's evidence

5. PW1 was Benedict Joel Nganda the plaintiff. He testified that the parcel of land known as Katheka Kai Block 4/66 (suit property) belongs to him. He stated that the same has no title deed but that it was previously owned by Katheka Kai Cooperative Society for Farmers (hereinafter referred to as Katheka Kai). He gave a history of the suit property and stated that his late grandmother was a shareholder at Katheka Kai whose share was divided into three and given to three persons as follows; Mbuli Mutua 18 acres; Mukili Mutua 17½ acres and Munini Mutua 17½ acres. That the three were his grandmother, mother and auntie respectively. He stated that the land was surveyed, he got his parcel and paid Kshs. 10,000/- to Katheka Kai for transfer.
6. He further testified that a son of his grandmother, who is his uncle, one Jackson Kilonzo Mutua sued him vide Land Tribunal Case No. 8 of 2003. That the decision was in favour of the plaintiff and when the late Jackson Mutua filed a judicial review case before the High Court in Machakos Judicial Review Case No. 22 of 2006, the same was dismissed and the Tribunal's decision upheld. Further that no appeal was preferred against the said decision.
7. It was his testimony that he found the defendants on his land without his permission and that they alleged to have bought the land from the plaintiff's cousins Moses and Patrick. He maintained that the defendants had no right over the suit property. He also stated that the grant of letters of administration issued to the persons who sold land to the defendants were revoked by the High Court.
8. He produced the decree regarding the decision of the Land Disputes Tribunal; receipt for transfer from Katheka Kai; transfer form; letter dated 9th November 2005 from Katheka Kai; judgment in Machakos HCC Mis. Judicial Review Case No. 22 of 2006; demand letter from Sila & Co. Advocates; and a ruling from the High Court revoking grant in favour of the vendors of the suit property.
9. In cross examination, he stated that he bought the land, and the same was not inherited as his grandmother, mother and aunt bought it. He stated that the Tribunal awarded 18 acres to Mbuli Mutua; 17½ acres to Muki Mutua and 17½ acres to Muli Mutua. He stated that his name was not on the decree and that the transfer form shows transfer was from Mbuli Mutua to Joel Nganga and that the letter from Katheka Kai shows that he is the owner. Further that he was given 17½ acres and 18 acres making it 35½ acres. He stated that after Jackson died his sons wished to sell the land and that the grant of letters of administration issued to Jackson's sons was in regard to Jackson's land alone. That marked the close of the plaintiff's case.

Defendants' case

10. DW1 was Mumbe Wambua Eunice who stated that she started living on the suit property in 2009. She averred that she bought the suit property from Muange Kilonzo and that the basis of the purchase showing that the land belonged to the seller was the grant issued to him. She stated that no one was on the land and that she has built her home there and does not know the plaintiff.



11. In cross examination, she stated that she was not a defendant in the suit and that she had not produced any sale agreement. She also stated that she had no title deed. She stated that the plaintiff did not allow her to live on the land. He stated that she did not know Mumbi Mutuku and that Munyao Ngovu lives near her land but has not built on the land. She stated that she was not aware of the Tribunal decision or the decision from the High Court in regard to the judicial review case.
12. DW2 was Josephat Munyao Ngovu who adopted the contents of his witness statement dated 25th April 2013 as his evidence in chief. His testimony was that he bought land known as Block 4/44 from one Josiah Munuka and his brothers. Further that he had no dealings with the plaintiffs and was a stranger to the land and averments made by the plaintiff.
13. In cross-examination, he stated that he was party to the land sale transaction with the defendants and received money. He stated further that the transfer to the plaintiff was fake. He stated that Jackson Kilonzo Mutua was his father and that he had a case with the plaintiff at the Land Disputes Tribunal which the plaintiff won. He alleged that the plaintiff used forged documents to win the case at the Tribunal. He conceded that this father having been dissatisfied with the Tribunal decision filed the Judicial Review Case No. 22 of 2006 and that on 9th July 2010, the judicial review case was dismissed with costs.
14. He stated that he filed a Succession Cause and obtained a grant of letters of administration. That thereafter they sold the suit property to the defendants. He stated that the deceased was the plaintiff's mother but that when succession was done they did not secretly include the suit property. He confirmed that the plaintiff sought to nullify the grant and a decision in that regard was made, which he had not appealed against. He confirmed that the person who signed the letter from Katheka Kai was the secretary thereof. He also stated that the original member of the share was Mbuli Mutua and that he relied on the grant to transfer the land in dispute. In reexamination, he stated that the land belongs to all the beneficiaries of Mbuli Mutua and not just the plaintiff. Further that Mbuli Mutua's 18 acres were subject of the suit. That marked the close of the defence case.
15. It is upon consideration of the evidence that the learned trial magistrate found that the evidence showed as follows; "the plaintiff was among the rightful beneficiaries of the suit property and ought to have been involved in its disposal. However, his cousins fraudulently obtained a grant of representation and disposed off the property. "Does this sale then become invalid by virtue of revocation of the grant? I find not, for reasons that as at the time the defendants purchased the property, due process had been followed. The defendants were right to have acquired the said property".
16. The trial court went further to state as follows;

"In any event, the plaintiff does not reside in the suit land. The defendants have been in occupation of the same since 2008 and it would be against the rules of natural justice to proceed and issue the orders sought by the plaintiff. The defendants were innocent purchasers who cannot be punished for wrongs of fraudulent administrators. It would therefore follow that the plaintiff's recourse lies with his cousin who defrauded him by concealing material facts from the court. There is nothing to stop a lawful owner from having a peaceful enjoyment of his property.

From all the evidence, therefore I am not satisfied that the plaintiff has established his case on a balance of probability and therefore proceed to dismiss the suit with costs to the defendants."



17. It is the above decision that provoked the instant appeal vide a memorandum of appeal dated 22nd June 2020 in which the appellant cited 6 grounds of appeal as follows;
1. That the learned trial magistrate erred in law and in fact in sanctifying the sale agreement of the suit land having confirmed that the entire process was illegal, unprocedural and contrary to the law in that the seller had been found to have fraudulently obtained grant of representation.
 2. That the learned trial magistrate erred in law and in fact in failing to appreciate that the obtained grant of representation used to sell the suit land had been illegally obtained by the seller and that he had no title.
 3. That the learned trial magistrate erred in law and in fact in faulting the appellant on alleging that he has not resided on the suit land, he loses and the defendant had been in occupation.
 4. That the learned trial magistrate erred in law and fact in finding that the respondents had been in occupation since 2008 which was not supported evidence on record.
 5. That the learned trial magistrate erred in law and fact by failing to appreciate that since 2003 the appellant has been litigating on the suit property and the transfer of the property between the defendants was actually conducted during the litigation.
 6. That the learned trial magistrate erred in law and fact by recognizing the sale when there was no consent with Land Control Board pursuant to Section 6 of the Land Control Act Cap 302.
18. Consequently, the appellant sought the following orders;
- a. Allow this appeal.
 - b. Set aside the findings of the lower court.
 - c. Costs of this appeal be borne by the respondents.
 - d. Any other or further order this Honourable Court may deem fit or just to grant.
19. The appeal was canvassed by way of written submissions. On record are the appellant's submissions dated 3rd March 2023 and the respondents' submissions dated 7th July 2022.

Appellant's submissions

20. Counsel for the appellant submitted that the suit property was initially the share of the appellant's mother one Mbuli Mutua as per the records of Katheka Kai; which land was transferred to the appellant on 8th November 2005. Counsel argued that the suit property had been subject of dispute in Machakos District Land Disputes Tribunal vide Tribunal Case No. 163 of 2001 between the appellant and his uncle Jackson Kilonzo Mutua. That the decision of the award was made in favour of the appellant and was adopted as judgment vide Machakos CMCC MISC. Appl. No. 8 of 2003. Counsel pointed out that Mutua Kilonzo and Moses Kilonzo acting in their capacity as legal representatives of the estate of Jackson Kilonzo Mutua filed Judicial Review Case No. 22 of 2006 challenging the decision of the tribunal, but the case was dismissed. Counsel submitted that petitioners in Machakos HC Succession Cause No. 237 of 2002 fraudulently included the suit property as part of the assets of the late Jackson Kilonzo Mutua and purportedly sold the same to the defendants.
21. Regarding the issue as to whether the respondents lawfully purchased the suit property as argued in grounds 1 and 2 of the appeal, counsel submitted that the trial court erred in that it confirmed that the entire process was illegal and unprocedural as the vendor had been found to have fraudulently obtained



grant of representation. Counsel argued that the suit property was not property owned by the late Jackson Kilonzo Mutua and did not form part of his estate, which resulted in the appellant obtaining nullification of the grant in Machakos High Court Succession Cause No. 237 of 2002. Counsel contended that the trial court having found that “the plaintiff was among the rightful beneficiaries of the suit land” erred in legitimizing the respondents alleged purchase to the appellant’s detriment.

22. On the 3rd, 4th and 5th grounds of appeal, counsel submitted that the respondents’ illegal occupation of the suit property did not negate the fact that the suit property lawfully belonged to the appellant having been lawfully transferred from his mother Mbuli Mutua to the appellant, a fact not disputed by the respondents. Counsel maintained that the suit property was subject to litigation since 2003 and therefore the respondents are not innocent purchasers.
23. Reliance was placed on the case of Lawrence Mukiri v. Attorney General & 4 Others [2013] eKLR on elements to demonstrate an innocent purchaser. Counsel contended that the respondents having failed to demonstrate that the vendors had an apparent valid title; and having failed to conduct due diligence, failed to show that they were innocent purchasers. Counsel referred the court to the cases of Daniel Kipruto Metto v. Chase Bank (Kenya) Limited [2018] eKLR and Esther Ndegi Njiru & Another v. Leonard Gatei [2014] eKLR for the proposition that a purchaser is obligated to conduct due diligence.
24. It was further contended that the sale to the defendants was not blessed with Land Control Board consent contrary to Section 6 of the *Land Control Act*.

Respondents’ submissions

25. Counsel for the respondents submitted that Section 93 of the *Law of Succession Act* provided that a transfer of an interest in immovable property by a legal representative of the deceased shall be valid notwithstanding subsequent revocation or variation of the grant. Counsel argued that the decree sought to be enforced did not provide for the appellant and that it was affecting other persons. Counsel argued that the appellant did not have grant of representation for any of the named persons. Counsel maintained that the suit property was not transferred to the appellant because Mbuli Mutua did not sign the transfer dated 8th November 2005. Counsel argued that it was not regular to transfer the land in the absence of the late Mbuli Mutua and in the absence of letters of administration for her estate. Counsel maintained that the transfer to the respondents was lawful.

Analysis and determination

26. The court has carefully considered the appeal, rival submissions and the entire record. The nine grounds of appeal raise one substantive issue which is whether the respondents’ occupation of the suit property is lawful.
27. The duty of this court as the first appellate court is to reassess, reexamine, reconsider and reevaluate the evidence in the lower court and arrive at its own conclusions taking into account the fact that it had no advantage of seeing or hearing witnesses and give due allowance for that (See *Selle & Another v. Associated Motor Boat Co. Ltd* [1968] EA 123)
28. In the instant suit, it is not disputed that the suit property which has no title, originally belonged to Mbuli Mutua the appellant’s mother, and her share at Katheka Kai. Further, it is not disputed that the suit property was subject of a dispute in Machakos District Land Disputes Tribunal Case No. 163 of 2001 which was filed by Jackson Kilonzo Mutua against Joel Nganda the appellant herein. In that case, the Tribunal ordered that the suit property be shared as follows; 18 acres to Mbuli Mutua; 17½ acres to Mukii Mutua and 17½ acres to Munini Mutua. That decision was adopted as judgment of the court in Machakos CMC Misc. Appl. 8 of 2003. Although Patrick Mutua Kilonzo and Moses Kilonzo



who were the legal representatives of the estate of Jackson Kilonzo Mutua challenged the decision of the Tribunal at the High Court in Machakos vide Machakos HC Judicial Review Application [No. 22 of 2006](#), the same was dismissed with costs.

29. In the meantime, Robert Muange Kilonzo and Stephen Mutiso Kilonzo filed a succession cause for Mbuli Mutua vide Machakos HC Succession Cause No. 237 of 2002 and obtained confirmation of grant in December 2005. In the confirmed grant, they included the suit property which they distributed to themselves. Subsequently, they entered into sale agreements with the respondents in 2009 purporting to sell the suit property.
30. In 2017, the appellant filed summons for revocation and annulment of grant issued to Robert Muange Kilonzo and Stephen Mutiso Kilonzo. On 25th September 2018, the High Court decided in favour of the appellant and found that the appellant's name has omitted from the list of beneficiaries of the deceased's estate and disputed property was included as forming part of the estate of the deceased. The court further found that the grant was obtained and confirmed by making a false statement and concealment from court of material facts.
31. The respondents do not contest the trial court's finding that the grant was obtained and confirmed by fraud, and the sale of the suit property to them was by fraud. Their only contention is that they were innocent purchasers and that Section 93 of the [Law of Succession Act](#) protects them.
32. Article 40 (1) and (6) of [the Constitution](#) provides for protection only of the right to lawfully acquire and own property and thus protection does not extent to property that is unlawfully acquired. The same provides as follows;
 40.
 - (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property —
 - (a) of any description; and
 - (b) in any part of Kenya.
 - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
33. Therefore legal protection to property ownership is concerned with the legality of the process of acquisition. If the acquisition process is unlawful, it does not matter whether or not the person who acquired it was party to the illegality or not. Therefore Article 40 (6) removes protection from an innocent purchaser.
34. In this case, the respondents' position is that they purchased the suit property on the basis of the confirmed grant in regard to the estate of the late Mbuli Mutua. That confirmed grant was produced by the appellant. In the said grant, the court stated in regard to share at Katheka Kai and all the listed properties as follows;

All the deceased's assets listed in the 2nd column of the schedule be registered in the joint names of Robert Muange Kilonzo and Stephen Mutiso Kilonzo on their behalf and in trust of other beneficiaries.
35. Although the confirmed grant was revoked and annulled, it is therefore clear from the wordings of the orders in the confirmed grant that besides Robert Muange Kilonzo and Stephen Mutiso Kilonzo, other beneficiaries of the estate of Mbuli Mutua had proprietary rights in the suit property. It therefore



- follows that from the confirmed grant the two held the suit property in trust for other beneficiaries, and could not sell the same without permission and participation of all those in whose trust they held the suit property. I have considered the sale agreements produced by the respondents and there is nothing therein to show that all the beneficiaries of the estate of the late Mbuli Mutua consented to the sale.
36. Are the respondents innocent purchasers for value without notice? An innocent purchaser for value without notice must demonstrate that they purchased the property at a valuable consideration and in issue in good faith, without notice that the person selling the property did not have good title. It therefore follows that an innocent purchaser must have conducted due diligence expected of them, it demonstrates some form of innocence and lack of notice.
 37. In the case of *Lawrence Mukiri v. Attorney General & 4 Others* [2013] eKLR, the court stated that a bonafide purchaser must demonstrate 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 at the time of purchase;
 - d. The vendors had apparent valid title;
 - e. He was not party to any fraud.
 38. In the instant matter, the respondents stated that they purchased the suit property on the basis of the confirmed grant. Is a confirmed grant proof of ownership of property? I do not think so. A confirmed grant provides for the mode of distribution or sharing of property of a deceased person. Whether the property belongs to the named deceased cannot be ascertained from a confirmed grant. In this case, the respondents did not provide any evidence of conducting a search at Katheka Kai who held the property for its members. Had this search been done, the respondents would have been provided information from Katheka Kai a kin to the letter dated 9th November 2005 from Katheka Kai produced by the appellant showing that their updated records showed that Benedict Joel Nganda was the owner of the suit property. This having not been done, it is clear that the respondents did not conduct due diligence before the alleged purchase. In addition, the 3rd respondent who is a son of Jackson Kilonzo Mutua, was aware that his father lost his claim over the suit property before the Land Disputes Tribunal and the High Court in the judicial review application and therefore could not lawfully sell the suit property to the respondents. For the above reasons, I hold and find that the respondents are not innocent purchasers for value.
 39. Besides, as the court had decided in the case against the late Jackson Kilonzo Mutua regarding the suit property, it is clear that the suit property was not his, and did not form part of his estate, and hence his sons could not get through succession, that which their father was unable to get through litigation. Besides, they could not lawfully sell that which did not belong to them.
 40. Having considered the findings at the trial court, I agree with the findings thereof that the administrators of Mbuli Mutua fraudulently obtained grant of representation and fraudulently purported to sell the suit property. I however with respect, do not agree with the trial court's findings that land unlawfully and fraudulently acquired by the administrators of the estate of Mbuli Mutua could confer lawful ownership on the respondents. Even where a purchaser is an innocent purchaser for value, legal protection to acquisition and ownership of property does not extend to them where the sold property was not lawfully acquired by the vendor. In the case of *Dina Management Limited v. County Government of Mombasa and 5 Others* [2023] eKLR the Supreme Court took the view that



protection for a bonafide purchaser for value without notice does not apply where title to the property was unlawfully obtained.

41. Therefore the trial court was wrong in finding that the plaintiff's recourse lied with his fraudulent cousins. An innocent purchaser has no greater right than an innocent proprietor. In my view, applying the import of the provisions of Article 40 (6) of *the Constitution* of Kenya 2010, the legal protection of an innocent proprietor supersedes that of an innocent purchaser. It is up to the innocent purchaser to pursue the fraudsters and not the innocent proprietor. Therefore, the trial court's in finding that the vendors were fraudsters and ironically upholding the purchasers claim while sending away the innocent proprietor empty handed is legitimizing and validating an illegality which in my view amounted to an injustice, and a violation of the provisions of Article 40 (6) of *the Constitution*.
42. The appellant produced a receipt to show payment for transfer at Katheka Kai and a letter dated 9th November 2005 from Katheka Kai showing that the suit property was transferred to him and Katheka Kai's records amended to reflect that status. He also produced a decree where he had been sued by Jackson Kilonzo Mutua where Mbuli Mutua was given 18 acres. It is therefore clear that Katheka Kai having transferred the suit property to the appellant and there having been no dispute on that transfer, as the suits by Jackson Kilonzo were dismissed, the appellant proved that he is the lawful owner of the suit property. The respondents have no permission from the appellant to be on the suit property and therefore their presence thereon is unlawful and amounts to trespass. In the premises, the appellant deserves to have quiet occupation of his property and to get orders that the respondents should be evicted from the suit property. Therefore, I find that occupation by the respondents is unlawful and does not confer any proprietary rights on them.
43. For the above reasons, the appeal succeeds, the lower court judgment delivered on 21st May 2020 is hereby set aside. This court substitutes the lower court's decision with an order that judgment be and is hereby entered for the plaintiff (appellant herein) against the defendants (respondents herein) jointly and severally as follows;
 - a. The defendants shall give vacant possession to the plaintiff on the parcel of land known as Katheka Kai Block 4/66 in 90 days of the date of this judgment. In default, eviction order to issue against the defendants, their servants, agents or anyone claiming through them.
 - b. The costs of this appeal and the costs in the court below are awarded to the appellant herein.
44. 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;

Ms. Nzilani holding brief for Mr. Makundi for appellant

No appearance for respondents

Court assistant – Abdisalam

