



**Borura v Bosire (Environment and Land Appeal E008 of 2023)
[2024] KEELC 6871 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6871 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E008 OF 2023**

M SILA, J

OCTOBER 22, 2024

BETWEEN

CATHERINE BOSIBORI BORURA APPELLANT

AND

VINCENT KAUNDA BOSIRE RESPONDENT

(Being an appeal against the judgment of Hon. C. Ocharo, Senior Principal Magistrate, delivered on 1 August 2023 in the suit Kisii CMCCELC No. 160 of 2018)

JUDGMENT

(Respondent filing suit claiming that the appellant wrongfully obtained registration of the suit land; respondent alleging that he had purchased the suit land from a person holding a beneficial interest and that the registered proprietor was to subdivide the land and issue him with title to the portion purchased; respondent claiming that he had taken possession but had to leave after his wife died and that subsequently the appellant took advantage of his absence to mislead the registered proprietor that the respondent had relinquished his interest to the appellant and title could be transferred to her directly; law providing that title is to be taken as prima facie evidence that it was properly issued; therefore plaintiff must provide cogent evidence that the title is subject to cancellation; original proprietor not called as a witness and neither was any person called as a witness to attest to the allegation that there was misrepresentation by the appellant; no evidence of any misrepresentation proved; no proper sale agreement displayed between the proprietor of the suit land and the respondent that could be enforced; in any event the seller or previous proprietor not sued in order to enforce the purported sale agreement; trial court falling into error in relying on a witness statement that was never admitted in evidence; witness statements not evidence unless adopted or in other way admitted as evidence; appellate court not persuaded that the trial court was correct in proceeding to cancel the title of the appellant; appeal succeeds and judgment of the trial court substituted with an order that the respondent's suit is dismissed)



1. The appellant is dissatisfied with the judgment of the Magistrates' Court delivered on 1 August 2023 and has preferred an appeal to this court.
2. To put matters into context, the respondent commenced suit by way of a plaint filed on 16 April 2013. He amended the said plaint twice, first on 13 May 2013, and subsequently he filed a further amended plaint on 15 October 2015. The plaintiff pleaded that in 1996, he purchased land measuring 60 x 100 feet or 0.04 ha from one Peter Gichana Moseti also known as Oginda Kegwaro Moseti, who he alleged had in turn purchased the same land from one Momanyi Ouru Soo (deceased) and Soo Motari. This portion so purchased was said to be from the larger land parcel Central Kitutu/Mwabundusi/142. The respondent pleaded that he took possession soon after the purchase and planted tea. He averred that in the year 2012 he was surprised to find that what he had purchased had become registered in name of the appellant and bearing the registration Central Kitutu/Mwabundusi/1845 (the suit land). He pleaded that the appellant obtained registration by way of fraud of on the following particulars :
 - a. Causing the land to be registered in her name while she knew that it belonged to the respondent,
 - b. Causing the land to be transferred to her without the knowledge of the respondent,
 - c. Misrepresenting herself to Soo Motari as the bona fide purchaser of the land while she was not, and;
 - d. Presenting herself to the lands office and purporting to be the person entitled to the suit land.
3. In the further amended plaint, the respondent sought the following orders :
 - a. A declaration that he is the rightful owner of the suit land;
 - b. A declaration that the registration of the suit land in favour of the appellant was fraudulent hence null and void;
 - c. An order for cancellation of the title of the appellant and in place he be registered thereof;
 - d. Eviction of the appellant;
 - e. General damages for trespass and fraud;
 - f. Costs;
 - g. Any further relief deemed just.
4. The appellant filed defence through the law firm of M/s Ochoki & Company Advocates. She did not deny that the respondent had purchased the suit land as he had pleaded in the plaint. She however pleaded that her husband paid its full value to the respondent and the respondent agreed to have the land registered in her name. She refuted the particulars of fraud and asked that the suit be dismissed. On 29 July 2013, the appellant changed counsel from M/s Ochoki & Company, to M/s P.N Morigori & Company.



5. It was not pleaded by either party, but it emerged in evidence, that the parties are actually close relatives as the appellant is wife of the respondent's brother named Andrew Bosire.
6. At the hearing of the suit, the respondent (as plaintiff) relied on a prerecorded witness statement which he supplemented by oral evidence in court. In his evidence, the respondent testified that he bought the suit land from one Peter Gichana Moseti in 1996 for Kshs. 30,000/=. Peter was said to be son of Soo Motari who was the registered proprietor of the land. The respondent stated that upon purchase he cultivated the land and grew tea which matured and he started harvesting it. He tried to have the seller transfer to him the land but the title was charged to a bank. He testified that in 2010, his wife died and he moved with his children to Wanjare area after the funeral, and he left his property to his family, that is his mother and brother generally. He stayed there until the year 2012. When he returned, he found his elder brother and members of his family picking the tea. He wanted to claim back his land, but his elder brother contended that the land belonged to him. He stated that they held a case at the Assistant Chief's office and his brother alleged that he (respondent) had sold the land to him. He was surprised to later find the land registered in name of the appellant. He denied selling the land to his brother and alleged that they took advantage of his misfortune and grabbed the land from him. He testified that he went to Soo Motari and asked him whether he is the one who transferred the land to the appellant; Soo Motari told him that the appellant informed him that he had sold the land to her, and when he saw her picking tea, he believed her and gave her the title. He testified that the appellant convinced Soo Motari to go to the Land Control Board and transfer the land to her.
7. He conceded in cross-examination that he has not sued Soo Motari (Mr. Motari). He claimed that Mr. Motari had written a statement admitting his mistake but died before he could testify. The exhibits he produced were the land register of the suit land (Green Card) , sale agreement dated 20 June 1996, an undated photograph which allegedly shows him working on the land with his wife, burial permit for his wife dated 1 July 2010, and a demand notice dated 25 February 2013.
8. With that evidence, the respondent closed his case.
9. DW-1 was the appellant. She testified that they have had a good relationship with the respondent and she even raised him and used to take him to school. She stated that she bought the land from Soo Motari for Kshs. 50,000/= which she personally gave him in 2011 and they went to the Land Control Board. She however had no sale agreement. She denied that in 2010, her husband bought the land from the respondent. She testified that she was the one who planted the tea on the land in the year 2011. She denied writing any statement with the law firm of M/s Ochoki & Company Advocates previously on record for her and neither was she aware that her husband had recorded any statement for the case.
10. With that, the appellant closed her case.
11. Counsel filed their respective submissions, culminating in the impugned judgment delivered on 1 August 2023.
12. In her judgment, the trial Magistrate questioned how the appellant got registered as proprietor since she did not display a sale agreement between herself and Soo Motari.



She also found that there was no proof of payment of the purchase price. She added that there was no evidence that the appellant appeared before the Land Control Board. On the other hand she found that the respondent had produced a copy of a sale agreement and had explained how the title was not transferred to him. She found that he had proved, through the photograph that he exhibited, that he was in possession of the land, and she was persuaded that the appellant took possession of the suit land while the respondent was away for his wife's burial rites. She further held that she was mindful that the original owner of the suit land had recorded a statement in the case that forms part of the record but unfortunately died before the hearing of the suit. She held that the contents of that statement have not been challenged save for a general denial by the appellant. She held that if indeed the appellant wished the court to believe that her registration was procedural and not fraudulent, she ought to have disproved the allegations of fact on the acquisition of the property by the respondent and her alleged subsequent acquisition in 2010. She found that in any event, the appellant had contradicted herself in her statement of defence and witness statement as to the mode of acquisition. She held that such inconsistency left the court to question the truthfulness of her testimony, more so in light of absence of any documentary evidence to support her case. She held that though the appellant had pleaded that her registration of the suit land was proper, she had not proved it. She found that the respondent had proved his case with regard to his purchase of the land in 1996 from the registered owner. She found that it is not denied that the appellant had unlawfully entered the land sometimes in 2011 and had remained on it without the respondent's consent. She found for the respondent and also awarded her a sum of Kshs. 80,000/= as damages for trespass.

13. Aggrieved, the appellant has filed this appeal on the following grounds (paraphrased for brevity) :
1. That the trial Magistrate erred both in law and fact in holding that the appellant obtained the certificate of title by fraud when the same was transferred by the registered proprietor;
 2. That the trial magistrate erred in law and fact in not considering the evidence and submissions of the defence;
 3. That the trial magistrate erred in law and fact in not appreciating that the suit land was transferred to the appellant by the registered proprietor in accordance with the law;
 4. That the trial magistrate erred in law and fact in awarding the respondent general damages when the appellant was the registered owner of the land and could not therefore trespass on to her own land;
 5. That the trial magistrate delivered a judgment void of any orders capable of enforcement hence ambiguous in nature;
 6. That the trial magistrate failed to appreciate that the particulars of fraud were never proved to the required standard.

The appellant wishes to have the judgment set aside and the respondent's suit dismissed.



14. The appeal was argued through written submissions and I have taken note of the submissions filed by counsel for the appellant and counsel for the respondent.
15. This being a first appeal, I stand guided by the dictum made in *Selle & Another v Associated Motor Boat Company Limited & Others* [1968] EA 123 where it was stated as follows by Sir Clement De Lestang, VP at page 126 :

“ 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 aspect. 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.”

16. The case of the respondent was that he purchased the suit land in 1996 but the land was not transferred to him because the title had been charged. He claimed to have been in possession of the land and planted tea until the year 2010 when his wife died and he had to relocate. When he came back in 2012, he found the appellant in possession and also found out that she had already acquired title to the suit land. He of course denied selling the suit land to the appellant. The appellant’s case as pleaded in the defence was that the appellant’s husband paid full value to the respondent and the respondent agreed to have the appellant registered as proprietor. The evidence given was however different, in that the appellant asserted that she purchased the land directly from the registered proprietor, and that she consequently became rightfully registered as proprietor.
17. In his pleadings, the respondent claimed that the appellant became registered as proprietor through fraud, in that he misrepresented to the original owner that she had purchased the land when she had not. Indeed one of the orders sought was to have a declaration that the appellant procured registration through fraud and hence her registration was null and void. It is here that I opt to start my analysis of the case.
18. It is trite that he who alleges must prove. The burden of proving that the appellant obtained registration by fraud was therefore upon the respondent. Section 26 of the *Land Registration Act*, does provide protection to title, and provides that the Certificate of Title is to be taken as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. The whole of Section 26 is drawn as follows :

26. Certificate of title to be held as conclusive evidence of proprietorship

- (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.

- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

19. Section 26 (1) presumes that a title issued was properly issued. That is why that section provides that a Certificate of title is to be taken as prima facie evidence that the person named as proprietor is the rightful registered proprietor. In other words, there is presumption that a title issued is a good title, and that the person holding it is the rightful proprietor of the land indicated in the title. Title of course can be nullified if the vitiating factors in Section 26 (1) (a) and (b) are proved, that is, that the proprietor obtained registration through fraud or misrepresentation to which he was a party or the title was obtained illegally, unprocedurally, or through a corrupt scheme. A court can only nullify the title of a registered proprietor if the court is convinced that these vitiating factors are proved. If cogent evidence is not provided by the person who seeks to nullify title, then the presumption that the title is a legitimate title must be given effect.
20. In our case, is there really any cogent evidence that the appellant obtained registration by fraud or misrepresentation to which she was a party, or is there sufficient evidence that the title was procured illegally, unprocedurally, or through a corrupt scheme? In my opinion, there is none, or at least none to the required standard.
21. For starters, the plaintiff himself did not fault the documentation process leading to issuance of title to the appellant. He never contended that Soo Motari did not follow the due process in transferring the title to the appellant. He never raised issue that there was no consent from the Land Control Board or that the requisite transfer documents were never obtained. It was erroneous in my view, for the trial court to now insist that a failure by the appellant to provide a sale agreement, or a Land Control Board consent, or the documents thereof, would imply that there was no proper transfer of the land to the appellant. This was never in issue in the case.
22. What the respondent alleged was that there was misrepresentation by the appellant, i.e, that the appellant went to Soo Motari and convinced him that he (respondent) had relinquished his interest to her. This is what in my opinion the court needed to be convinced of i.e that there is sufficient evidence that Soo Motari was persuaded through misrepresentation to transfer title to the appellant, despite having earlier sold or sanctioned a sale of the suit land to the respondent, and that he acted on that misrepresentation to so transfer the title to the appellant. There was never adduced any evidence of misrepresentation. Mr. Motari never testified to say that he acted on any misrepresentation. No other witness came to affirm that he/she heard the appellant mislead Mr. Motari. The allegation that Mr. Motari acted on misrepresentation was



the mere heresay of the respondent which could not be relied upon as cogent evidence of misrepresentation.

23. Now, it will be recalled that the respondent had alleged that he purchased the suit land from Soo Motari which means that Soo Motari is be the person who was vested with the duty of transferring title to him. If it was the case of the plaintiff, and it was indeed his case, that Soo Motari wrongfully transferred title to the appellant, and that it was him (respondent), who had an agreement for purchase of the land, then he needed also needed to sue Soo Motari in his suit in order to enforce the purported sale agreement that he had with him or one that had his stamp of approval. He could not only sue the appellant, as the appellant had no sale agreement with him, and had no duty to transfer title to him. In essence, he needed to prove that he had a valid sale agreement for the suit land which was enforceable, and also needed to prove that there was fraud and/or misrepresentation in the manner in which the appellant got title.
24. I am afraid that on the above points the respondent could not succeed in his case. I have already pointed out that he never sued Soo Motari. or his estate assuming that he is deceased, nor did he sue whoever sold to him the land. Without suing Soo Motari he could not be able to enforce the purported sale agreement. Moreover, even looking at the document that was produced as a sale agreement, that document cannot invite this court to believe that there was a valid enforceable sale agreement for the suit land. The alleged sale agreement was drawn as follows :

20 June 1996

Plot Agreement

This agreement takes effect from this day 20-6-1996 between :

1. Seller : Oginda Kegwaro Moseti ID No. (redacted)
2. Buyer : Vincent Kaunda Bosire ID No. (redacted)

The buyer has paid the seller Kshs. 30,000/= the plot approximate feet 60 by 100. The plot has no cash crop or permanent building on it.

Witnesses

1. Mainira Nyabiage
2. John Soo
3. George Otaro
4. Teresia Nyaboke
5. Samson Moseti

25. The above, by any stretch of imagination, cannot be said to be a legally enforceable agreement between the registered proprietor Soo Motari and the respondent in respect of the suit land. At the outset, it will be observed that the purported sale agreement sale does not identify the land being sold. Nowhere does it say that the land that is the subject of the sale is land to be carved out of the larger land parcel Central Kitutu/ Mwabundusi/1845 owned by Soo Motari. Secondly, even if we were to assume that the subject matter of the land being sold was the suit land, that agreement is not executed by the registered proprietor of the land being sold. Soo Motari, who was the registered



proprietor, has not signed that sale agreement as the vendor. The seller noted in the sale agreement is one Oginda Kegwaro and it has not been demonstrated that he had any registrable interest on the suit land or any beneficial interest. No evidence was ever presented to demonstrate that Oginda Kegwaro had purchased the land from Soo Motari, or from the son of Soo Motari as claimed. There is certainly nothing that shows that Oginda Kegwaro could sell the suit land to the respondent. Even assuming that Oginda Kegwaro had earlier purchased the land from a son of Soo Motari who was entitled to sell, there would have to be sanction from the registered proprietor, and an acknowledgment that he has no problem with the sale and an undertaking that he will transfer title to the buyer. There is none in this case. It cannot therefore be said that through the purported sale agreement of 20 June 1996, the respondent proved that he had purchased the suit land.

26. Apart from failure to prove purchase through a sale agreement, the respondent did not produce any consent of the Land Control Board approving the sale of the land to him. The evidence showed that this was agricultural land which was therefore subject to issuance of consent of the Land Control Board as required by Section 6 (a) of the *Land Control Act* which inter alia requires sale of agricultural land to be subject to issue of consent by the Land Control Board. No Land Control Board consent was ever displayed by the respondent to support any claim of purchase of the suit land.
27. This court cannot therefore hold that the respondent proved that he purchased the suit land. Without proving purchase of the suit land, the respondent could not succeed in having the title of the appellant nullified.
28. As I said earlier, there was no burden placed on the appellant to demonstrate that she got title rightfully. The law already presumes that the title she holds is a good title, unless proved otherwise. The initial owner of the land was Soo Motari and he never sued the appellant to allege that the appellant fraudulently acquired the title. In other words he had no problem with the transfer of the suit land to the appellant.
29. In his evidence, the respondent claimed that Soo Motari had written a witness statement in his favour but he died before he could testify. In her judgment, the trial Magistrate did in fact place reliance on this purported statement of Soo Motari. That was erroneous. A witness statement filed in compliance with Order 3 Rule 2 of the Civil Procedure Rules, 2010, or indeed any other witness statement, is not to be relied on by a court as evidence, unless it is adopted by the witness, or in any other way it is admitted as evidence during trial. A court is not at liberty to rely on statements of persons who have not been called as witnesses, and whose statements have not, in any other acceptable way been admitted as evidence. Those statements have no probative value without being admitted as evidence and cannot be relied upon as evidence unless so admitted. If the makers of the statements are not called as witnesses, and such statements are not admitted as evidence, they no longer form part of the evidential record of the court. A court should not be swayed by what is stated therein. It was thus erroneous for the trial court to now look at the witness statement of Soo Motari and rely on it, when Soo Motari was never called as a witness and/or his statement admitted as evidence. It was of course said that Soo Motari died, but there was no proof of this. Even if he was dead, his statement, without some form of admission as evidence, could not be relied upon. The purpose of a witness statement is to inform the opposite party of the nature of evidence that is expected to be presented at trial so as to avoid trial



by ambush. That witness statement is not evidence, unless adopted by the witness, or in any other acceptable way, as I have taken some trouble to elaborate, is admitted as evidence. A trial court cannot rely on witness statements that have not been admitted as evidence.

30. The trial court also made heavy weather of the conflict between the pleadings of the appellant, her witness statement, and her evidence in court. There was of course a conflict but that conflict in the circumstances of this case cannot help the respondent. The respondent needed to prove that he had purchased the suit land, which in my opinion, he failed to prove. He also never sued the person who purportedly sold to him the land and/or the person who had the legal duty of transferring the land to him. Without first jumping those two hurdles, there is no way the respondent could succeed in nullifying the title of the appellant irrespective of the contradictions between her evidence and her pleadings.
31. The long and short of it is that I am not persuaded that the respondent made out a case for the cancellation of the title of the appellant to the land parcel Central Kitutu/Mwabundusi/1845. This appeal therefore succeeds. I proceed to set aside the judgment of the trial court. I substitute that judgment with an order that the respondent's suit is dismissed with costs. The appellant will also have the costs of this appeal.
32. Judgment accordingly.

DATED AND DELIVERED THIS 22 DAY OF OCTOBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in presence of :

Mr. Morigori for the appellant

No Appearance on the part of Mr. Anyona for the respondent

Court Assistant – David Ochieng'

