



**Uwazi Enterprises Limited v Karia & 4 others (Environment and Land Appeal
E113 of 2021) [2024] KEELC 7370 (KLR) (22 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7370 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E113 OF 2021
BM EBOSO, J
OCTOBER 22, 2024**

BETWEEN

UWAZI ENTERPRISES LIMITED APPELLANT

AND

PATRICK MUKUMBO KARIA 1ST RESPONDENT

JOSEPH NGURU GICHIA 2ND RESPONDENT

PETER NJOKA KARIA 3RD RESPONDENT

LAND REGISTRAR - THIKA 4TH RESPONDENT

THE HON ATTORNEY GENERAL 5TH RESPONDENT

*(Being an Appeal against the Judgment of Hon M W Wanjala, Senior Resident Magistrate,
delivered on 25/11/2021 in Thika Chief Magistrate Court MCL& E Case No 273 of 2018)*

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered by Hon M. W Wanjala on 25/11/2021 in Thika Chief Magistrate Court MCL & E Case No 273 of 2018. Patrick Mukumbo Karia [the 1st respondent in this appeal] was the plaintiff in the said suit. Joseph Nguru Gichia [the 2nd respondent in this appeal] was the 1st defendant. Uwazi Enterprises Limited [the appellant in this appeal] was the 2nd defendant. The Land Registrar - Thika and the Attorney General were the 3rd and 4th defendants respectively. Peter Njoka Karia was the 5th defendant. It does emerge from the record of appeal that Patrick Mukumbo Karia and Peter Njoka Karia are brothers.
2. The dispute in the trial court revolved around a transfer effected on 20/5/2013 in the land register relating to land parcel number Ruiru East/Juja East Block 2/2394. The land was registered in the name



of Patrick Mukumbo Karia on 17/8/1989. On 20/5/2013, the impugned registration was effected, transferring the land to Joseph Nguru Gichia. On 4/7/2013, Joseph Nguru Gichia transferred the land to Uwazi Enterprises Limited. The land was subsequently subdivided and on 28/8/2013, the land register relating to the land was closed. Entry No 8 which relates to the subdivision of the land and closure of the land register indicates that the 32 resultant subdivision titles were Ruiru East/Juja East Block 2/16573 to 16604.

3. The two key issues to be determined in this appeal are: (i) Whether the trial court erred in decreeing cancellation of the 32 subdivision titles, namely, Ruiru East/Juja East Block 2/16573 to 16604, without properly satisfying itself on the question of the current registered ownership of the 32 subdivision titles; and (ii) Whether the 1st respondent proved his case to the required standard. Before I dispose the two issues, I will outline a brief background to the appeal, setting out the parties' respective cases in the trial court.
4. Suffice it to state that, the relevant factual background was outlined in this court's preceding ruling rendered on 17/7/2023. That factual background remains unchanged.
5. For clarity and for convenience purposes, I will, in this Judgment refer to Uwazi Enterprises Limited as the appellant. Patrick Mukumbo Karia, Joseph Nguru Gichia and Peter Njoka Karia will be referred to by their respective first names; Patrick, Joseph and Peter. Land parcel number Ruiru East/Juja East Block 2/2394 will be referred to as parcel number 2394 of the suit land. Before I delve into the two issues that fall for determination in the appeal, I will outline a brief background to the appeal.

Background

6. Through a plaint dated 19/12/2018, Patrick sued: (i) Joseph; (ii) the appellant; (iii) the Land Registrar - Thika; (iv) the Attorney General; and (v) Peter. He sought against them: (i) a declaration that Ruiru East/Juja East Block 2/2394 belonged to him; (ii) an order directing the Land Registrar to rectify the land register relating to Ruiru East/Juja East Block 2/2394 by cancelling the registers relating to the 32 subdivision parcels surveyed out of the suit land, ie Ruiru East/Juja East Block 2/16573 to 16604, to reflect Patrick as the bonafide owner of the land; (iii) general damages; and (iv) costs of the suit.
7. The case of Patrick was that he was at all material times the registered proprietor of land parcel number Ruiru East/Juja East Block 2/2394 [the suit land]. In 2013, Peter purported to illegally sell the land to Joseph and the duo, together with the Land Registrar, caused the land to be fraudulently transferred to Joseph, who in turn fraudulently caused the land to be transferred to the appellant. He contended that he was not privy to the alleged fraudulent sale and transfers. It was his case that Peter had been investigated and criminal charges had been preferred against him.
8. Joseph and Peter filed a joint statement of defence dated 21/2/2019. They admitted that indeed Patrick was the registered proprietor of parcel number 2394. They contended that parcel number 2394 was sold to Joseph by Patrick through "legal and proper procedure" pursuant to which Joseph "gained legal title" to the land after which he transferred the land to the appellant. They contended that Joseph purchased the land from Patrick and not from Peter, adding that any involvement by Peter was "as an agent and/or assistant" of Patrick.
9. The appellant filed a statement of defence dated 21/2/2019 in which it denied Patrick's contention that the registrations were fraudulent. It added that it was an innocent purchaser who acquired the land for value from Joseph after conducting proper due diligence which revealed that Joseph was the registered proprietor of the land. It was the case of the appellant that the transaction between it and Joseph was "a basic contract of willing buyer willing seller and all formalities were followed to the letter." The appellant urged the trial court to dismiss Patrick's suit.



10. The original record of the trial court and the records filed in this appeal do not contain the defence that was filed by the Attorney General. They only contain Patrick's reply to the defence.
11. During trial, Patrick testified as PW1 and closed his case. It was his evidence that he neither sold nor transferred parcel number 2394 to Joseph. It was his further evidence that when he learnt about the alleged sale, he reported the matter to the Police and the Police carried out investigations which established that Peter and Joseph had purported to enter into a sale agreement relating to the land. Among the 17 exhibits that Patrick produced was a hand written sale agreement attributed to Peter and Joseph, which he said he had obtained from the Investigating Officer. Also produced was a statement which Joseph allegedly tendered to the Investigating Officer, in which Joseph had indicated that Peter sold to him the land on behalf of Patrick.
12. Joseph testified as DW1. He maintained his position that he purchased parcel number 2394 from Patrick. He was, however, not able to tender any documentary evidence relating to the relevant sale contract, consent of the Land Control Board, transfer instrument and payment of purchase price to Patrick. He disowned the hand written sale agreement attributed to him and Peter. During cross-examination, he admitted signing the written statement that he made to the Police Investigating Officer but stated that some of the contents of the written statement he made to the Police were not true.
13. Peter testified as DW2. His evidence in cross-examination was that his brother, Patrick, told him "to sell the land on his behalf." He conceded that he did not have a power of attorney to sell the land. He stated that his brother's instructions to him to sell the land on his behalf were not in writing. He disowned the sale agreement attributed to him and Joseph. It was his evidence that there was no written agreement between him and Joseph. He added that the criminal case against him was fabricated.
14. The appellant led evidence by George Gacheru Gitau who testified as DW3. His testimony was that the appellant purchased the suit property from Joseph at Kshs 3,200,000 through a sale agreement dated 31/5/2013. He added that the appellant conducted a search before entering into the sale agreement. It was his evidence that the appellant was an innocent purchaser for value.
15. The Land Registrar did not tender evidence. Secondly, the land registers relating to the 32 subdivisions were not tendered as evidence.
16. Upon receiving submissions from the parties, the trial court [Hon M W Wanjala] rendered the impugned Judgement in which he made a finding to the effect that Patrick [the 1st respondent] had proved his case to the required standard. The trial court granted the reliefs that were sought in the plaint. Joseph [the 2nd respondent] and Peter [the 3rd respondent] were condemned to pay costs of the suit.

Appeal

17. Aggrieved by the findings and award of the trial court, the appellant brought this appeal through a memorandum of appeal dated 21/12/2021. The appellant advanced the following nine (9) grounds of appeal.
 1. That the learned trial magistrate erred both in fact and in law in failing to consider the appellant's defence which raised triable issues.
 2. That the learned trial magistrate erred in law and fact by failing to consider adequately or at all the evidence placed on record by the appellant.



3. That the learned trial magistrate erred in law and in fact by failing to consider adequately or at all the matters raised in the appellant's submissions together with the authorities referred to therein.
 4. That the learned trial magistrate erred in holding that the applicant/appellant is the current holder of the resultant 32 titles of Ruiru East/Juja East Block 2/2394, being Ruiru East/Juja East Block 2/16573 to Ruiru East/Juja East Block 2/16604, despite the applicant/appellant indicating in their pleadings and testimony that the resultant titles had all been transferred to third parties.
 5. That the learned trial magistrate erred in law by holding that on the balance of probabilities favoured cancellation of the resultant titles while not considering that the said resultant titles are held by several third parties. [sic]
 6. That the learned trial magistrate erred in law by not taking into consideration sanctity of the title that at the time the applicant/appellant purchased the property, the records held by the Registrar of Lands indicated that the property belonged to Joseph Nguru Gichia.
 7. That the learned trial magistrate erred in law by not holding that the applicant/appellant was an innocent purchaser for value despite the applicant/appellant providing binding precedents.
 8. That the learned trial magistrate misdirected himself by failing to find that by dint of the fact that the Land Registrar was not called upon to testify as to the validity or lack thereof of the process of transfer of land from the 1st respondent to the 1st appellant, the 1st respondent was estopped from pleading invalidity of the transfer. [sic]
 9. That the learned trial magistrate erred in law and fact by making general statement without giving reasons or arriving at proper conclusions.
18. The appellant prayed for an order setting aside the Judgment of the trial court. He further prayed for costs of the appeal and costs of the suit in the trial court.

Appellant's Submissions

19. The appeal was canvassed through written submissions dated 10/2/2024, filed by M/s Manjau Maitethia & Associates Advocates. Counsel for the appellant identified the following as the four issues that fell for determination: (i) Whether the 1st respondent proved fraud on the part of the appellant; (ii) Whether the appellant was a bonafide purchaser for value without notice; (iii) Whether the appeal should be allowed; and (iv) Who should bear the costs of the appeal.
20. On whether the 1st respondent proved fraud on the part of the appellant, counsel submitted that the 1st respondent failed to discharge the burden of proving that the transfer of the suit property to the appellant was fraudulent and illegal as required under Section 107 of the *Evidence Act*. Counsel relied on the decision in the case of *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR. Counsel faulted the 1st respondent for intentionally misleading the trial court that Thika CMC Criminal Case No CMCC 5236 of 2015 filed against the 3rd respondent was still ongoing while being aware that the same had been concluded and the 3rd respondent had been acquitted of the charges. Counsel for the appellant relied on the decisions in the cases of *Eviline Karigu (Suing as Administratrix of Estate of Late Muriungi M'Chuka alias Miriungu M'Gichuga) v M'Chabari Kinoro* [2022] eKLR and *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR.
21. On whether the appellant was a bonafide purchaser for value without notice, counsel relied on the definition of a bonafide purchaser in the *Black's Law Dictionary 8th Edition* and the decision in the



case of *Martevé Guest House Limited v Njenga & 3 Others* [2022] eKLR where the court quoted the case of *Lawrence P Mukiri v Attorney General & 4 Others* [2013] eKLR where the court listed the essential elements of a bonafide purchaser. Counsel contended that the appellant was an innocent purchaser for value, adding that the appellant neither collided with the 1st respondent nor was he aware of the dispute between the 2nd and 3rd respondent with regard to the suit property. Counsel further contended that the appellant was introduced to the 2nd respondent by a broker but they nonetheless conducted due diligence before entering into the sale agreement, including procurement of a search which revealed that the 2nd respondent was the registered owner of the suit property and that there were no encumbrances against the title. Counsel added that the appellant visited the suit property to ascertain occupation before entering into the sale agreement. Counsel submitted that a bonafide purchaser without notice has absolute and unqualified defence against the claim of any prior equitable owner. Counsel urged this Court to uphold the aforementioned position and set aside the Judgment of the lower court.

22. On whether the appeal should be allowed, counsel submitted that it was evident that the 1st respondent failed to prove his case on a balance of probabilities. Counsel contended that the learned trial magistrate erred in law and in fact in finding that the balance of probabilities favoured the 1st respondent's claim. Counsel urged the Court to allow the appeal and set aside the Judgment and Decree of the lower court.
23. On costs, counsel relied on Section 27 of the *Civil Procedure Act* and the principle that costs follow the event. Counsel submitted that the appellant brought this appeal because the 1st respondent failed to prove his case on a balance of probabilities, hence the appellant ought to be awarded costs of the appeal and costs of the suit at the lower court.

1st Respondent's Submissions

24. The 1st respondent filed written submissions dated 20/3/2024 through M/s Ishmael & Co. Associates Advocates. Counsel for the 1st respondent identified the following as the four issues that fell for determination: (i) What is the scope of jurisdiction of a first appellate court? (ii) What is the specificity with which fraud or irregularity need to be pleaded? (iii) What is the role of the Land Registrar in registration of titles and can the Registrar's registration of a fraudulent transfer validate the resultant title? and (iv) Who should bear costs of the appeal.
25. On the scope of jurisdiction of a first appellate court, counsel for the 1st respondent submitted that a first appellate court is under a duty to subject the entire evidence and the Judgment to a fresh and exhaustive examination with a view to reaching its own conclusions in the matter. Counsel contended that the lower court considered all evidence adduced before reaching its conclusion. Counsel further argued that no reason had been demonstrated for this court to interfere with the impugned Judgment. Counsel relied on the decision in the case of *Peter M. Kariuki v Attorney General* [2014] eKLR. Counsel added that a reconsideration and re-evaluation of the evidence will result in the same conclusion that was reached by the lower court.
26. On the specificity with which fraud and irregularity should be pleaded, counsel relied on the decision in the case of *Kinyanjui Kama v George Kamau* [2015] eKLR in submitting that fraud ought to be pleaded, particularized and proved to a standard higher than on a balance of probability. Counsel contended that the 2nd respondent was aware that the suit property belonged to the 1st respondent given that he stated in his statement that the 3rd respondent had informed him that he was selling it on behalf of his sickly brother, the 1st respondent. Counsel further argued that despite having the knowledge that the suit property belonged to the 1st respondent, the 2nd respondent did not seek proof of authority to sell from the 3rd respondent but instead proceeded to make payments for an illegal and unlawful purchase. Counsel added that the purported sale agreement dated 7/5/2013 relied



on by the 2nd respondent was between him and the 3rd respondent who did not have a power of attorney to act on behalf of the 1st respondent. Counsel argued that if indeed the 3rd respondent was conducting the sale on behalf of the 3rd respondent, then the alleged purchase price for the suit property would have been paid to the 1st respondent. Counsel submitted that the trial court rightly arrived at the conclusion that fraud and irregularities had been demonstrated and that the 1st respondent had proved that the 2nd to 5th respondents had dealt with the suit property fraudulently.

27. On what the role of the Land Registrar is in the registration of a title and on whether the Land Registrar's registration of a fraudulent transfer validates the resultant title, counsel relied on Section 26 (1) (b) of the *Land Registration Act* to submit that the title of an innocent purchaser is impeachable if it is proved that the title was obtained illegally, un-procedurally or through a corrupt scheme. Counsel added that the title holder need not have contributed to the vitiating factors. Counsel relied on the decisions in the cases of *Elijah Makeri Nyagwara v Stephen Mungai Njuguna & Another* [2013] eKLR and *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR in support of his argument. Counsel added that the lower court had powers to order the rectification of the land register given that it was satisfied that the registration had been occasioned by fraud.
28. On who should bear the costs of the appeal, counsel relied on Section 27 of the *Civil Procedure Act* in submitting that costs should ordinarily be awarded to the successful litigant. Counsel urged the Court to award the costs to the 1st respondent.

2nd and 3rd Respondents' Submissions

29. The 2nd and 3rd respondents filed written submissions dated 25/6/2024 through M/s GMLAW Advocates. Counsel for the 2nd and 3rd respondents urged the Court to re-analyze the entire case taking into account that the evidence produced by the 1st respondent lacked the threshold to merit the trial court's verdict which was made in favour of the 1st respondent. Counsel relied on the decision in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123.
30. Counsel argued that the burden of proof rested with the 1st respondent and it ought not to have been shifted to the appellants or to the 2nd - 5th respondents at any stage of the proceedings. Counsel added that it was the onus of the 1st respondent to prove the elements of fraud and that any attempt to shift the burden of proof to either the appellant or the 2nd - 5th respondents was unacceptable. Counsel contended that the onus was on the 1st respondent to prove the elements of fraud. Counsel relied on the decision in the case of *Ahmed Mohammed Noor v Abdi Aziz Osman* [2019] eKLR to support his argument. Counsel faulted the 1st respondent for failure to summon the 4th respondent to verify whether all the requisite transfer documents were filed prior to the transfer of the suit property to the 2nd respondent. Counsel contended that as long as the 2nd respondent was issued with a title deed after the transfer of the suit property from the 1st respondent, it remained the bonafide owner of the suit property. Counsel relied on Section 26 of the *Land Registration Act* to submit that the fact that a party holds title is prima facie evidence that he is the proprietor of the property and has legally acquired title over the same. Counsel added that the 2nd respondent conferred good title to the appellant. Counsel urged the Court to find that the 1st respondent's suit lacked merit and was properly dismissed.
31. On who should bear the costs of both the appeal and the suit in the lower court, counsel relied on the principle that costs follow the event. Counsel contended that the 1st respondent should bear the costs of both the suit and the appeal for having brought a frivolous claim against the other parties.
32. The 4th and 5th respondents did not tender submissions in the appeal.



Analysis and Determination

33. The court has read and considered the original record of the trial court; the record filed in this appeal; the additional evidence that was admitted pursuant to the leave granted on 17/7/2023; the grounds of appeal; and the parties' respective submissions. As observed in the introductory part of this Judgment, the following are the two key issues that fall for determination in this appeal: (i) Whether the trial court erred in decreeing cancellation of the 32 subdivision titles, namely, Ruiru East /Juja East Block 2/16573 to 16604, without properly satisfying itself on the question of the current registered ownership of the 32 subdivisions; and (ii) Whether the 1st respondent proved his case to the required standard. Before I dispose the two issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
34. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:
- “As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
35. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
36. Did the trial court err in decreeing cancellation of the 32 subdivision titles without satisfying itself on the question of the current registered ownership of the 32 subdivisions? The appellant raised this issue as ground numbers 4 and 5 in the following verbatim words:
4. That the learned trial magistrate erred in holding that the applicant/appellant is the current holder of the resultant 32 titles of Ruiru East/ Juja East Block 2/2394, being Ruiru East/ Juja East Block 2/16573 to Ruiru East/ Juja East Block 2/16604, despite the applicant/ appellant indicating in their pleadings and testimony that the resultant titles had all been transferred to third parties.
5. That the learned trial magistrate erred in law by holding that on the balance of probabilities favoured cancellation of the resultant titles while not considering that the said resultant titles are held by seral third parties. [sic]”
37. The guiding legal framework on judgments relating to claims for cancellation of title is found in Order 21 rule 6 of the Civil Procedure Rules which provides as follows:
- “Where there is a prayer for a judgment the grant of which would result in some alteration to the title of land registered under any written law concerning the registration of title to land, a certified copy of the title shall be produced to the court before any such judgment is delivered.”



38. The tenor and import of the above framework is that, a court seized of a plea for an order cancelling title to any parcel of land is obligated to demand to be furnished with a certified copy of the relevant title or certified copy of the relevant land register for the purpose of satisfying itself that all the current registered proprietors have been joined to the suit as defendants and have been afforded the opportunity to be heard on the plea for cancellation of the impugned title.
39. As a first appellate court, I have perused the record of the trial court. The only land register produced before the trial court was a certified copy of the closed register relating to Ruiru East/ Juja East Block 2/2394. Similarly, the only title produced before the trial court was a copy of the title that related to Ruiru East/ Juja East Block 2 2394. None of the certified copies of registers relating to the 32 subdivisions was produced. Similarly, none of the 32 subdivision titles was produced. Consequently, it emerges that the trial court proceeded to cancel the 32 subdivision titles without establishing the identity of the registered proprietors of the 32 subdivision parcels.
40. In its ruling rendered on 17/7/2023, this appellate court issued an order directing the Land Registrar to place before this court certified copies of the land registers relating to the 32 subdivisions as additional evidence. It is not clear whether the order was served on the Land Registrar. What is clear is that none of the land registers has been availed in tandem with the order of the court. The appellant's attempt to place the land registers before this court through a supplementary record of appeal aborted because the said land registers did not form part of the original record of the trial court and could not, in the circumstances, form part of the original record of appeal. They could only be admitted as additional evidence tendered before this court under Section 78 (1) (b) of the *Civil Procedure Act*.
41. It is clear from the foregoing that the trial court's omission to call for certified copies of the 32 subdivision titles or certified copies of the 32 subdivision registers was grave to the extent that the impugned Judgment cannot stand. The impugned Judgment cannot stand because the subdivision titles were cancelled by the trial court without the court establishing the current registered proprietors of the 32 subdivision titles and without the court satisfying itself that the registered proprietors had been given the opportunity to be heard.
42. Fresh trial will be conducted, during which the trial court will be expected to comply with the mandatory requirements of Order 21 rule 6 of the Civil Procedure Rules and satisfy itself that all persons appearing in the 32 land registers as proprietors of interest in the 32 subdivision parcels have been joined to the case as defendants and have been accorded the opportunity to be heard on the plea for cancellation of the 32 subdivision titles.
43. Having taken the view that this is a matter that should go for fresh trial, the court will refrain from making any pronouncement on the second issue because doing so may prejudice the parties when they go for fresh trial.
44. On costs, given that the omission to call for certified copies of the 32 subdivision titles and registers was occasioned by the trial court, parties will bear their respective costs of this appeal.
45. In the end, this appeal is allowed on the above ground in the following terms:
 - a. The Judgment rendered on 25/11/2021 in Thika Chief Magistrate Court MCL & E Case No 273 of 2018 is wholly set aside.
 - b. Fresh trial shall be conducted before a different magistrate who shall ensure compliance with the requirements of Order 21 rule 6 of the Civil Procedure Rules and ensure joinder of all affected parties.
 - c. Parties will bear their respective costs of this appeal.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 22ND DAY OF
OCTOBER 2024**

B M EBOSO

JUDGE

In the presence of:

Mr. Muturi for the Appellant

Ms Wairimu for the 1st Respondent

Mr. Muriithi for the 2nd and 3rd Respondents

Court Assistant: Melita

