



**Moile v Metian (Environment and Land Appeal E002 of 2023)
[2024] KEELC 6974 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6974 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E002 OF 2023
LC KOMINGOI, J
OCTOBER 17, 2024**

BETWEEN

TURANTA NKURRUNA MOILE APPELLANT

AND

DICKSON SOLITEI METIAN RESPONDENT

*(Being an Appeal against the Judgement of Hon. Gicheha in
Kajiado ELC Case No. E003 of 2022 delivered on 13th June 2023)*

JUDGMENT

1. The learned Hon. L. Gicheha (CM) in her Judgement dated and delivered on 13th June 2023 in Kajiado ELC Case No E003 of 2022 held:

“... The plaintiff has been in the land since 2001 that is about 21 years before this suit was filed. He has developed it, but in all the 21 years as the development was done by the Defendant, the Plaintiff remained silent.

I find that the Plaintiff has not availed any evidence to prove fraud by the defendant and to controvert the Defendant case that they did enter into an agreement which the defendant complied with, and the land was transferred to his name. For this reason I find the Plaintiff has not proved his case on a balance of probability and the suit is hereby dismissed with costs.”

2. Aggrieved by this judgement, the Appellant has filed an Appeal on the grounds that:
 1. The Hon. Magistrate erred in law and in fact in deciding on a matter never raised by the Respondent to wit limitation of time.



2. That the Hon. Magistrate erred by rendering herself on the issue of limitation of time without giving the Appellant an opportunity to cross examine or reply.
 3. The Hon. Magistrate erred by failing to consider evidence by the Appellant.
 4. The Hon. Magistrate erred by failing to hold that the Appellant had proved elements of fraud against the Respondent.
 5. The Hon. Magistrate erred by ignoring evidence from defence that showed that the Appellant did not execute an agreement, consent and transfer forms to transfer the subject matter to the Respondent.
 6. The Hon. Magistrate erred by failing to consider that the Appellant had proved his case to the required standards.
3. This appeal was canvassed by way of written submissions.

The Appellant's submissions

4. Counsel while relying on the submissions filed at the lower court and the ones filed herein, submitted that the Learned Trial Magistrate erred in dismissing the Appellant's suit on grounds that it was time barred despite this not being raised by the Respondent. In this regard, the Appellant was neither given an opportunity to be cross examined nor a fair hearing.
5. Counsel further submitted that the Learned Trial Magistrate did not consider the Appellant's evidence that he never entered a sale agreement with the Respondent nor executed any transfer documents. Therefore, the transfer was fraudulently effected. Additionally, the transfer was unprocedural because the Respondent also admitted that he was not required to produce any consent or transfer forms at the Lands Registry.

The Respondent's submissions

6. At the time of writing this judgement, the Respondent had not filed their submissions. Only the Notice of address for service was filed.

Analysis and Determination

7. I have considered the grounds of appeal, record of appeal, the written submissions and the authorities cited, I find that the issues for determination are:
 - i. Whether the learned trial Magistrate failed to consider evidence adduced by the Appellant that the land was fraudulently transferred to the Respondent.
 - ii. Whether the learned trial Magistrate erred by not finding that the Appellant had proved his case to the required standard;
 - iii. Whether the learned trial Magistrate erred in determining that the suit was time barred an issue which was not raised by the Respondent.
 - iv. Whether the Appellant is entitled to the orders sought.
 - v. Who should bear costs of the appeal?



8. This being a first appeal, it is the duty of the Court to reconsider the evidence tabled at the trial court, re-evaluate it and draw its own conclusion bearing in mind that it neither saw nor heard the witnesses. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
9. Similarly in *South Nyanza Sugar Company Limited v Leonard O. Arera* (2020) eKLR Mrima J observed thus;

“As the first appellate court it is now well settled that the role of this Court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter (See the case of *Selle & another v Associated Motor Boat Co. Ltd.*”
10. By the Plaint dated 17th January 2022 and Amended on 31st January 2023, the Appellant (who was the Plaintiff in the lower court) claimed that property Kajiado/Purko/801 belonged to him before it was irregularly transferred to the Respondent and the alleged fraud was discovered in the year 2021. The Appellant gave the particulars of fraud as;

“Failure to enter into an agreement, failing to obtain consent and execute transfer documents, tendering forged documents for registration, and obtaining title to land by fraud.”
11. The Appellant therefore sought for a declaration that the registration of the suit property in the Respondent’s name was null and void and that the register be rectified and title issued in his name and the title issued to the Respondent be cancelled. In his witness statement, he indicated that he only negotiated the sale, but it was never completed and he did not execute any documents in favour of the Respondent.
12. In the Respondent’s statement of defence, he sought for dismissal of the suit on grounds that he and the Appellant entered into an agreement and the Appellant lawfully transferred the suit property to him on 19th April 2001. The allegation of fraud was therefore incorrect. In his witness statement, he stated that he purchased the suit property on 19th April 2001 for a consideration of Kshs 1,400,000. He paid Kshs 1,010,000 and the balance was paid by transferring to the Appellant his plot No 483 situated at Ilbissil Trading Centre.
13. Turanta Nkurruna Moile testifying as PW1 stated on cross examination “The plot belongs to me. I did not sell the land. I know Dickson Solitei. He is my brother. His father and my father are brothers. I sold him 5 acres. He then transferred all the land to himself. Purko 802 has been sold..... I sold 10 acres to each of the persons. I did not receive any money from my brother. He gave me a plot in exchange of 1 acre. I am speaking the truth. I had plot 210 then subdivided into 3, 801, 802 and 803....”
14. The Respondent on his part stated on cross examination;

“After I bought the land I entered into an agreement. I bought the land 24 years ago. I do not have the consent. There were no photographs being put at the time. I paid Kshs 1 million. I bought for Kshs 40,000/= per acre. He is the one threatening me by trying to get back what he sold me. Date of agreement is dated 19th April 2001. The title shares the same date with the agreement....”
15. The Respondent produced a sale agreement dated 19th April 2001 for the sale of Kajiado/Purko/801 measuring approximately 14.16 hectares for Kshs 1,400,000/=. He was to pay cash Kshs 1,010,000/= and a plot with eight rental units at Ilbissil trading centre worth Kshs 390,000/=



16. It is worth noting that the said agreement is not signed by the parties. This offends Section 3 of the Law of Contract Act, (cap 23 Laws of Kenya) which provides that;

“Contracts for sale of land should be;

- a. In writing.
- b. Signed by all parties that will be subjected to the terms of the contract and
- c. Signature of each party attested to by a witness who was present when the party was signing the contract.”

As stated earlier the Agreement of sale produced by the Respondent has not met the above conditions.

17. I find that the Learned trial magistrate erred when she observed;

“The defendant has produced an agreement which I note that the Plaintiff has not stated it is a forgery.”

With due respect I disagree. The duty of the Court was to subject the said agreement to the above mentioned conditions and come to a conclusion that it was a valid agreement.

The fact that the Plaintiff did not state it is a forgery is not one of the ingredients of a validly executed agreement.

18. It was the Respondent’s claim that he paid the full purchase price. There is however no evidence that Kshs 1,010,000/= was paid to the Appellant. The burden to prove that Kshs 1,010,000/= was paid rested with the Respondent.

Though on the trial at the lower court, the Respondent did not attempt to prove that he had paid Kshs 1,010,000/=. The Appellant has denied receiving such monies.

19. I find that there was lack of consideration for the contract which vitiated the contract hence the same was rendered null and void.

In the case of Esther Kabugi Njuguna v Martha Chebet & 3 others (2020) eKLR Mutungi J Observed thus;

“Having found and held that there was no proof of payment of the purchase price to the plaintiff and/or that the Plaintiff had signed the transfer of the suit land in favour of the 1st Defendant, it follows that the sale transaction was voidable on account of lack of consideration and that the transfer effected in favour of the 1st Defendant was ineffectual and could not confer any interest....”

20. It is not in dispute that the suit property is agricultural land and consent had to be sought from the Land Control Board. Section 6(1) of the Land Control Act, Cap 302 provides that;

“Each of the following transaction;

- a. The sale agreement transfer is void for all purposes unless the Land Control Board for that land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”



There is no evidence that approval and consent of the Land Control Board was sought and obtained. The Respondent admitted that no consent of the Land Control Board was sought.

21. I note that the suit property was transferred on the same date as the sale agreement. No explanation was offered by the Respondent. I find that the transfer is therefore null and void for lack of consent from the Land Control Board.

22. The Respondent told the Court that the Appellant did not execute any transfer form because it is not a requirement then. This cannot be true. Section 110 (1) of the *Registration Land Act* (Repealed) required a person executing an instrument to appear before the Land Registrar and unless known to the Land Registrar had to be accompanied by a credible witness for the purpose of establishing his identity.

The above section is now what is Section 45 of the *Land Registration Act*, No 3 of 2012.

23. It is not in dispute that the Appellant herein did not execute any transfer in favour of the Respondent. The registration of the Respondent as the owner of the suit property was fraudulent and or illegally obtained.

In the case of *Esther Kabugi Njuguna* (*supra*) Mutungi J held;

“On the issue of whether or not the transfer of the suit property was validly effected to the 1st Defendant by the Plaintiff there is contestation as to whether the Plaintiff actually signed the transfer. The Plaintiff denied that he did. That in effect shifted the burden to prove that the Plaintiff signed the transfer to the 1st Defendant. The instrument of transfer alleged to have been signed by the Plaintiff was not tendered in evidence. It was not indicated by the 1st Defendant when, if at all the transfer was executed and before whom since a transfer relating to a disposition of land required that the signatures of the persons signing be witnessed and attested as provided under by law. Under the Repealed Registered Land Act, Cap 300 Laws of Kenya Section 109 and 110....”

24. The Respondent has failed to demonstrate how the transfer was executed.

25. Having found that the sale was null and void for lack of consideration, consent from Land Control Board, and a duly executed transfer, the Appellants story is more believable.

In the trial at the Lower Court he conceded that he sold one (1) acre to the Respondent. On the basis of this admission the Respondent can get the said one (1) acre of the suit property.

26. I find that the Learned Trial Magistrate did not make any finding on the issue of Limitation under Section 10 of the *Limitation of Actions Act* and this ground fails.

27. In conclusion I find that the Appellant has demonstrated that he did not sell the suit property to the Respondent and any registration in favour of the Respondent was fraudulently obtained. He is entitled to the orders sought.

28. Accordingly I find merit in this appeal and I hereby set aside the Judgement of the Lower Court and substitute with the following Orders:

- i. That a declaration is hereby issued that the registration of the Respondent as the owner of Kajiado/Purko/801 is null and void.



- ii. That the Land Registrar is hereby directed to rectify the Land Register for Kajiado/Purko/801 by deleting the name of the Respondent and replacing with that of the Appellant and titles be cancelled and a new are issued on the name of Turanta Nkurruna Moile within Ninety (90) days from the date of this Judgement.
- iii. That thereafter the Appellant do transfer one (1) acre out of the suit property to the Respondent.
- iv. That the Appellant shall have costs of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 17TH DAY OF OCTOBER 2024.

L. KOMINGOI

JUDGE

In the presence of:

N/A for the Appellant.

Mrs. Omenta for the Respondent.

Court Assistant – Mutisya.

