



Cheptirim & 2 others v Kandie & 3 others (Environment and Land Appeal E009 of 2024) [2024] KEELC 13894 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13894 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E009 OF 2024
MAO ODENY, J
DECEMBER 19, 2024**

BETWEEN

**ZEPHANIAH CHERUTICH CHEPTIRIM 1ST APPELLANT
BENARD KIBET CHERUTICH 2ND APPELLANT
LORGIS LOGISTICS LIMITED 3RD APPELLANT**

AND

**CHRISTOPHER K KANDIE 1ST RESPONDENT
AMOS KANGOGO CHEBII 2ND RESPONDENT
CHARLES YEGO TOROTICH 3RD RESPONDENT
WILLY KURGAT 4TH RESPONDENT**

(Being an Appeal from the Judgment and Decree of the Principal Magistrate's Court by Hon. Y.I Khatambi- Principal Magistrate delivered on 14th July, 2023 in Nakuru CMELC No 54B of 2021)

JUDGMENT

1. This appeal arises from the Judgment and decree of the Honourable Y.I Khatambi- Principal Magistrate delivered on 14th July, 2023 in Nakuru CMELC No 54B of 2021. The Appellants being aggrieved by the said judgment lodged a Memorandum of Appeal dated 14th February, 2024 and listed the following grounds:
 1. The Learned Magistrate misdirected herself on the law and in fact in finding that the Respondents are the legal and beneficial owners of all property known as Plot Number 293 being part of L.R NO 6207/2 Nakuru.



2. The Learned Magistrate misdirected herself on the law and in fact in finding that the sale of Plot Number 293 being part of L.R NO 6207/2 Nakuru by the 1st Appellant to the 2nd and 3rd Appellants was fraudulent.
 3. The Learned Magistrate misdirected herself on the law and in fact in finding that the 1st Appellant had no proprietary right/interest over the land at the time of the sale; and
 4. The Learned Magistrate misdirected herself on the law and in fact in holding that the 1st Appellant could not pass a good title to the 2nd and 3rd Appellants.
2. A brief background to this appeal is that the Respondents filed a suit against the Appellants in the lower court seeking the following orders:
- a. A declaration that the Plaintiffs are the legal and beneficial owners of all that property known as plot number 293 being part of LR NO 6207/2 Nakuru.
 - b. An order of permanent injunction restraining the Defendants, their servants and/or agents from alienating, transferring, entering and/or dealing with that parcel of land known as Plot number 293 being part of LR NO 6207/2 NAKURU, or in the alternative, a declaration that the sale of Plot number 293 by the 1st Defendant to the 2nd and 3rd Defendants is illegal and fraudulent.
 - c. Costs of the suit.
 - d. Any other order the court may deem fit to grant.
3. The suit was heard and the trial magistrate entered judgment in favour of the Respondents as against the Appellants in the following terms:
- a. A declaration do issue to the effect that the plaintiffs are the legal and beneficial owners of all property known as plot number 293 being part of LR NO 6207/2 Nakuru.
 - b. A declaration that the sale of plot number 293 by the 1st defendant to the 2nd and 3rd defendant was fraudulent.
 - c. The plaintiff is awarded costs.
 - d. Right of appeal 30 days.

Appellants Submissions

4. Counsel for the Appellant filed submissions dated 8th October, 2024 and identified the following issues for determination:
 - a. Whether the Respondents are the legal and beneficial owners of Plot No. 293 (Part of L.R No 6207/2 Nakuru)?
 - b. Whether the sale of Plot No 293 by the 1st Appellant to the 2nd and 3rd Appellants was fraudulent?
 - c. Whether the 1st Appellant had proprietary rights over the land at the time of the sale?
 - d. Whether the 1st Appellant could pass a good title to the 2nd and 3rd Appellants?
 - e. Who should bear the costs of this Appeal?



5. On the first issue, counsel submitted that ownership of land is proved through documentation and registration and that the Appellants provided documentary evidence to support their claim of ownership: vide a sale agreement dated 19th September, 2012, the allocation/ beacon certificate issued in his name dated 28th April, 2014, Bank deposit records and other financial documents related to the purchase.
6. Counsel submitted that the trial court erred in law and fact by finding that the Respondents were the legal and beneficial owners of Plot No 29. Counsel relied on Section 107 of the Evidence Act and submitted that the Respondents were obligated to produce evidence that the 1st Appellant purchased the land on behalf of the group and that without such evidence, their assertion that the 1st Appellant acted as an agent or trustee for the group is unsubstantiated.
7. On the second issue, counsel submitted that the appellants acted in good faith throughout the transaction and the 2nd and 3rd Appellants took reasonable steps to ensure the legality of the sale.
8. According to counsel, there was no evidence presented before the trial court that met the threshold for fraud and relied on Section 26 (1) of the Land Registration Act and the cases of Tum & 2 others vs Towett & 5 others (Environment & Land Case 501 of 2017) [2022] KEELC 13790 (KLR), Kuria Kiarie & 2 others vs Sammy Magera [2018] eKLR and Evans Otieno Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR.
9. On the third issue, counsel relied on Article 40 of the Constitution of Kenya, Section 24 of the Land Registration Act, 2012 and submitted that the registered proprietor has the right to enjoy use of land including the right to transfer. Counsel asserted that the 1st Appellant, as the legitimate and registered owner, had every right to dispose of the land.
10. On the fourth issue, counsel submitted that the 2nd and 3rd Appellants conducted due diligence and there is no evidence to suggest any procedural irregularity or illegality in the transaction. Further, the title passed to the 2nd and 3rd Appellants should be recognized as legitimate and cited the case of Lawrence Mukiri vs Attorney General & 4 others [2013] eKLR and urged the court to allow the appeal with costs.

Respondents' Submissions

11. Counsel for the Respondents filed submissions dated 30th October, 2024 and relied on Section 23 of the Sale of Goods Act and submitted that the nemo dat quod non habet principle stipulates that one cannot give what he does not have. Counsel submitted that the rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else.
12. It was counsel's further submission that an unauthorized transfer of a title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title while the person who received the invalid title owns nothing. Counsel submitted that the Appellants have not demonstrated how the trial court misdirected itself in law and in fact in finding that the Respondents were the legal and beneficial owners of the suit property.
13. Counsel further submitted that there is no dispute that the 1st Appellant was involved in fraudulent dealings over the suit property and relied on the case of Elijah Makeri Nyangw'ra vs Stephen Mungai Njuguna & another [2013] eKLR. Counsel submitted that the Respondents discharged the evidentiary burden and relied on Sections 107 and 109 of the Evidence Act.



14. Mr. Kirui submitted that the Respondents have demonstrated how the 1st Appellant lacked proprietary interest over the suit land by the time he purported to sell the same to the 2nd and 3rd Appellants and cited the case of *Mwangi James Njehia vs Janetta Wanjiku Mwangi & another* [2021] eKLR.
15. It was Mr. Kirui's submission that the 1st Appellant had no good title to pass to anybody and further that the 2nd and 3rd Appellants were not innocent purchasers for value without notice as they failed to adduce evidence that they paid the purchase price of Ksh 4,500,000/= to the 1st Appellant's bank account. Counsel urged the court to find that the Appeal has no merit and be dismissed with costs.

ANALYSIS AND DETERMINATION

16. I have carefully considered the record, the grounds of appeal, the rival submissions by counsel, the cited authorities and the law and this being a first appeal, I have to re-evaluate and consider afresh the evidence tendered before the trial court and come to a conclusion, one way or another. This duty was reiterated in the case of *Abok James Odera t/a A.J Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where this Court pronounced itself 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. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.”

17. The issue for determination is whether the appeal has merit and whether the Learned Trial Magistrate erred in fact and law in arriving at the decision, which is appealed against.
18. The Learned Trial Magistrate in a well-reasoned Judgment stated as follows:

“The court has carefully considered the rival submissions and the authorities presented in support thereof. The evidence on record demonstrates that the plaintiffs and the 1st defendant purchased the suit parcel of land jointly and shared the same equally. The 1st defendant later sold his portion of land to the 1st plaintiff. The chronology of events clearly demonstrates that the 1st defendant had no proprietary right/interest over the land at the time of sale. I make this observation on the premise that the 1st defendant had sold off his portion to the 1st plaintiff. Noting the foregoing, the 1st defendant could not pass a good title to the 2nd and 3rd defendant, the sale was premised on fraud and misrepresentation. One cannot sell that which does not belong to him. The defendants on the other hand had a duty to exercise due diligence in order to establish the ownership history prior to the sale, they failed to do. As a consequence they cannot claim to be purchasers for value without notice...”

19. The Plaintiffs (now Respondents) in the lower court produced a list of documents dated 3rd July, 2017 which contains a sale agreement dated 12th May, 2014 between the 1st Appellant herein and the 1st Respondent whereby the 1st Appellant is described as a vendor and owner of 0.15 acre being his share on plot No. 293 within LR No 6207/2 situate at Kabarak within Nakuru County and measuring 0.75 of an acre.
20. From the evidence and the documents produced, the Appellant admitted that they had a joint Bank account where they were saving money from their butchery business. It was also evident that they were doing this as a group and had a fixed deposit of Kshs 900,000/ at Transnational Bank and that they



took a Bank loan of Kshs. 840,000/ to purchase a plot. The Appellant also admitted that they took this loan against the fixed deposit, as it had not matured.

21. It is further on record that the Appellant entered into a sale agreement for the sale of his interest in the suit land. He later feigned illiteracy and stated that the Respondents misrepresented the terms that were included in the sale agreement. The court indicated in the Judgment that the Appellant spoke in Kiswahili, Tugen, and the counsel who prepared the sale agreement testified that the parties understood the terms of the agreement before execution.
22. It should also be noted that the Appellant never raised the issue of misrepresentation /fraud or particulars in his defence. He can therefore not raise it at the appeal stage as the issue did not arise. The Appellants claimed that they were bona fide purchasers but from the evidence, they do not fit the description of bona fide purchasers.
23. It is in evidence which was not disputed that the Appellant was convicted on a charge of stealing by agent in respect of the suit property. The Respondent also submitted that there was no proof of payment of Kshs. 4,500,000/.
24. In the case of Samuel Kamere Vs. Land Registrar, Kajiado (2015) eKLR, the Court of Appeal stated:

“.... there is nothing in evidence to show that the Appellant paid valuable consideration, or indeed, any consideration at all, for the property. He did not produce a bank statement evidencing the cash withdrawal, or provide any relevant proof of payment. Further, no sale agreement was produced showing that a purchase had taken place. There was no seller in evidence who testified. He did not produce any acknowledgements confirming receipt of the purchase price. Without such evidence, we are not satisfied that that the appellant actually paid any consideration, and if at all, to whom....”
25. I have considered the record of Appeal, the submissions, and the authorities and find that the Learned Trial Magistrate applied the law and fact correctly and there is no need to interfere with the Judgment. The Appeal is therefore dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 19TH DAY OF DECEMBER 2024.

M. A. ODENY

JUDGE

