



**Gitau & another v Ngugi & another (Environment and Land Appeal
E037 of 2022) [2023] KEELC 586 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E037 OF 2022**

**BM EBOSO, J
JANUARY 30, 2023**

BETWEEN

MOSES MBURU GITAU 1ST APPELLANT

MARGARET NJOKI MBURU 2ND APPELLANT

AND

NELLIE WANJIRU NGUGI 1ST RESPONDENT

LAND REGISTRAR, RUIRU 2ND RESPONDENT

(Being an Appeal against the Judgment of Hon. C.K Kisiangani (SRM) delivered in Ruiru Senior Principal Magistrate Court on 21/4/2022 in Ruiru MCL & E Case No 86 of 2020)

JUDGMENT

Background

1. This appeal challenges the Judgment rendered on April 21, 2022 by Hon CK Kisiangani, SRM, in Ruiru SPMC Environment and Land Case No 86 of 2020. The two appellants in this appeal [Moses Mburu Gitau and Margaret Njoki Mburu] were the plaintiffs in the said suit. The two respondents in this appeal were the two defendants in the trial court. The dispute in the suit revolved around the question of validity of the two parallel titles that the appellants on one part and the 1st respondent on the other part held, relating to land parcel number Ruiru/Mugutha Block 1/T 178 [hereinafter referred to as 'the suit property']. Before I dispose the key issues that fall for determination in the appeal, I will outline a brief background to the appeal.
2. Through a plaint dated August 11, 2020, the appellants sought the following reliefs against the respondents: (i) a permanent injunction restraining the 1st respondent against interfering with the suit property; (ii) a declaration that the appellants were the rightful proprietors of the suit property; (iii) an



- order prohibiting the 2nd respondent against unlawfully interfering with the suit property in collusion with the 1st respondent or any other person; and (iv) costs and interest of the suit [sic].
3. The case of the appellants was that in September 2001, they purchased the suit property from the 1st respondent through one Ng'ang'a Kanina at a purchase price of Kshs 140,000. They paid the above purchase price to the 1st respondent through the said Ng'ang'a Kanina. They contended that the said Ng'ang'a Kanina had the 1st respondent's authority to sell the land to them on her behalf.
 4. They further contended that in September 2004, a title deed was issued to them. Subsequently, in 2015, the 1st respondent asked them to vacate the land. They reported the matter to the Police and Police investigations revealed that the 1st respondent had procured a second parcel register and a second title deed relating to the suit property. The appellants contended that upon being summoned by the Police, the 1st respondent agreed to surrender her title deed to the 2nd respondent's office for cancellation but she never did so. They later established that the 1st respondent had sold the suit property to Miriam Ngendo Njuguna and Peter Thurania Ibeere.
 5. The 1st respondent responded to the suit through a defence and counterclaim dated February 26, 2021. She contested the appellants' claim. Her case was that she never sold the suit property to the appellants; she never authorized Ng'ang'a Kanina to sell the suit property to the appellants; she never received purchase price from the appellants; she never conveyed the suit property to the appellant; and she had never parted with the title documents relating to the suit property. She contended that she acquired the suit property from M/s Nyakinyua Investment Limited in 1993 and her title was subsequently processed in 2011. She admitted that there were two parallel registers and title deeds and attributed this anomaly to the appellants and the 2nd respondent. She urged the trial court to dismiss the appellants' claim.
 6. Through the counterclaim, she sought the following reliefs against the respondents: (i) a permanent injunction prohibiting the appellants against trespassing on or interfering with the suit property; (ii) a declaration that she was the rightful owner of the suit property; (ii) an order directing the appellants to vacate the suit property; and costs of the suit.
 7. Both the original record of the trial court and the record of appeal do not contain pleadings by the 2nd respondent. At the hearing in the trial court, only the 1st appellant testified. On part of the defence, only the 1st respondent testified.
 8. Upon conclusion of trial and upon receipt of written submissions, the trial court rendered the impugned Judgment in which it made findings to the effect that the appellants had failed to prove their case. The trial court further made a finding to the effect that the 1st respondent had proved her counterclaim against the appellants. The trial court dismissed the appellants' case and allowed the 1st respondent's counterclaim. The appellants were condemned to bear costs of the suit.

Appeal

9. Aggrieved by the Judgment of the trial court, the appellants brought this appeal, through a memorandum of appeal dated May 5, 2022. They advanced the following four verbatim grounds of appeal:
 1. That the Lower Court erred in law and in fact by dismissing the plaintiffs' suit.
 2. The Lower Court erred in law and in fact by ignoring clearly the pleadings, both the oral and documentary evidence, and the submissions therein filed by the plaintiffs without any basis in law and in fact.



3. That the Lower Court in its finding erred in fact and in law by considering issues that were not pleaded by the parties in their pleadings nor adduced in evidence thus effectively bending/distorting the rules of law and natural justice.
 4. That the Lower Court erred in law and in fact by dismissing the plaintiffs' suit and allowing the 1st defendant's counterclaim.
10. The appellants prayed for the following verbatim reliefs from this court:
- (1) The entire judgement and the subsequent decree of the Lower Court in SPMC Number 86 of 2020 – Moses Mburu Gitau & Margaret Njoki Mburu vs Nellie Wanjiru Nguri & Ruiru District Land Registrar be and is hereby set aside and that the suit in the Lower Court be allowed as pleaded in the plaint dated the August 11, 2020 and filed in the Lower Court on the August 13, 2020; Defence and counterclaim dated February 26, 2021 and filed in court on the March 1, 2021 be dismissed.
 - (2) That the costs in the Lower Court and in the Appeal be awarded to the Appellants/Plaintiffs

Submissions

11. The appeal was canvassed through written submissions dated September 30, 2022, filed by M/s A I Onyango & Co Advocates. Counsel did not submit on individual grounds of appeal as itemized in the memorandum of appeal. Counsel argued that the trial court erred in law and in fact by ignoring the documentary evidence tendered by the appellants. Counsel faulted the trial court for 'requiring that the plaintiffs [now the appellants] ought to have produced a registered copy of the authority to sell the suit property.' Citing the provisions of Section 3 of the *Law of Contract Act*, counsel contended that there was no law requiring that an agent must have a registered authority in order to sell land on behalf of a principal. Counsel contended that the documents produced by the appellants satisfied the requirements of Section 3 of the *Law of Contract Act*. Counsel contended that the appellants lawfully acquired the suit property through the sale agreement executed by Ng'ang'a Kanina on behalf of the 1st respondent.
12. Contending that the appellants were the lawful owners of the suit property, counsel submitted that Section 28 of the repealed Registered Land Act and Section 26 of the *Land Registration Act* protected the appellant's title. Counsel argued that the 1st respondent had failed to impeach the appellants' title and invited the court to allow the appeal, noting that the appellants' appeal was special because the trial court did not cancel their title.
13. The 1st respondent filed written submissions dated September 5, 2022 through M/s Wambui Ngugi & Co Advocates. Counsel for the 1st respondent referred the court to the evidence of the 1st appellant during cross examination, in which the 1st appellant stated that: (i) the sale agreement was not signed by the 1st respondent; (ii) he did not pay purchase price to the 1st respondent; (iii) purchase Price was paid to Nganga Kanina; (iii) the appellants and the 1st respondent did not go to the Land Control Board to obtain a consent; and (v) the title deed held by the appellants was processed by advocate Wakahu Mbugua and not the 1st respondent. Counsel contended that the entire transaction contravened the mandatory requirements of Section 3 of the *Law of Contract Act* and that it was clear from the evidence on record that the title documents held by the appellants were acquired illegally.



14. Counsel argued that the 1st respondent having denied selling the suit property to the appellants, it was the duty of the appellants to prove the legality of their title. Counsel added that if indeed the title exhibited by the appellants, bearing the 1st respondent's name, dated October 14, 1994, existed in 2001, the agreement dated October 13, 2001 would have contained the survey particulars of the suit property.
15. On the submissions by counsel for the appellants impeaching the 1st respondent's acquisition of the land, counsel for the 1st appellant submitted that there was no dispute about the 1st respondent's ownership of the land, adding that the appellants' case in the trial court was that they purchased the land from the 1st respondent, hence it was contradictory for the appellants to question the 1st respondent's acquisition of the suit property in the first place.
16. Lastly, counsel faulted the appellants for trying to sneak into the record of appeal documents that were not part of the record of the trial court. Counsel urged the court to dismiss the appeal.

Analysis and Determination

17. I have perused and considered the entire record of the trial court;
The record of appeal in this appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues that fall for determination in this appeal. The appellants advanced four grounds of appeal which raise the following five (5) key issues: (i) Whether the appellants proved sale of the suit property to them by the 1st respondent; (ii) Whether the appellants proved conveyance of the suit property to them by the 1st respondent; (iii) Whether the appellants proved fraud in the acquisition of the title held by the 1st respondent dated May 27, 2011; (iv) Whether the 1st respondent proved fraud in the acquisition of the title held by the appellants dated September 30, 2004; (v) What order should be made in relation to costs of this appeal. I will dispose the five issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
18. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the 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 analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.'
19. The above principle was similarly outlined in *Abok James Odera t/a AJ 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.'
20. The first issue in this appeal is whether the appellants proved sale of the suit property to them by the 1st respondent. In her defence, counterclaim, and evidence, the 1st respondent denied selling the suit property to the appellants. She denied receiving any purchase price from the appellants. She also denied conveyancing the suit property to the appellant. Consequently, it was the duty of the appellants as the



parties alleging sale and conveyance, to first and foremost, prove to the required standard, that the 1st respondent sold to them the suit property.

21. The appellants' allegation of sale of the suit property to them by the 1st respondent was anchored on three alleged agreements dated September 23, 2001; October 6, 2001; and October 13, 2001. None of the said agreements was executed by the 1st respondent. All the three agreements were allegedly executed by one Ng'ang'a Kanina. The appellants did not lead evidence by the said Ng'ang'a Kanina to demonstrate to the court that he had been duly appointed by the 1st respondent to execute the relevant land sale and land disposition documents on behalf of the 1st respondent and to receive purchase price on behalf of the 1st respondent.
22. Counsel for the appellants contended that the letter dated June 12, 2001, purported to have been written by the 1st respondent, vested in Ng'ang'a Kanina full authority to sell the suit property on behalf of the 1st respondent. The appellant denied authorizing Ng'ang'a Kanina to sell the suit property. What the appellants were expected to demonstrate, in the circumstances, was evidence to the effect that Ng'ang'a Kanina had been properly vested with powers to execute instruments disposing the 1st respondent's interest in the suit property on behalf of the 1st respondent.
23. The alleged contract for sale of the 1st respondent's interest in the suit property was, in essence, an instrument for disposition of an interest in land. It was governed by the framework in Section 3(3) of the *Law of Contract Act* [as it existed in 2001] and the framework in the Registered Land Act [now repealed]. These were the relevant applicable substantive laws at the time.
24. Section 3 of the *Law of Contract Act* prior to the 2001 amendments provided as follows:

' (3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-

- (i) Has in part performance of the contract taken possession of the property or any part thereof; or
- (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.'

25. On the other hand, Sections 116 and 117 of the repealed Registered Land Act contained the following framework on appointment of an agent for the purpose of disposing an interest in land registered under the Act:

' 116.

- (1) Upon the application of the donor or the donee of a power of attorney which contains any power to dispose of any interest in land, such power of attorney shall be entered in the register of powers of attorney and the original, or with the consent of the Registrar a copy thereof certified by the Registrar, shall be filed in the file of powers of attorney.



- (2) Every such power of attorney shall be in the prescribed form or such other form as the Registrar may in any particular case approve, and shall be executed and verified in accordance with sections 109 and 110.
- (3) The donor of a power of attorney registered under this section may at any time give notice to the Registrar in the prescribed form that the power has been revoked, and thereupon the revocation shall be entered in the register of powers of attorney and noted upon the power, and the notice shall be filed in the file of powers of attorney.
- (4) Any interested person may give notice in writing to the Registrar that a power of attorney which has been registered under subsection (1) has been revoked by the death, bankruptcy or disability of the donor or the death or disability of the donee, accompanied by such evidence as the Registrar requires, and thereupon the revocation shall be entered in the register of powers of attorney and noted upon the power, and the notice shall be filed in the file of powers of attorney.
- (5) Subsections (3) and (4) do not apply to a power of attorney given for valuable consideration during any time during which it is, by virtue of the terms thereof, irrevocable. (6) If owing to the length of time since the execution of a power of attorney or for any other reason the Registrar considers it desirable, he may require evidence that the power has not been revoked, and may refuse to register any disposition by the donee of the power of attorney until satisfactory evidence is produced.

117.

- (1) A power of attorney which has been registered under Section 116 and of which no notice of revocation has been registered under that section shall be deemed to be subsisting as regards any person acquiring any interest in land affected by the exercise of the power, for valuable consideration and without notice of revocation and in good faith, or any person deriving title under such a person.
- (2) Any person making any payment or doing any act in good faith in pursuance of a power of attorney registered under section 116 shall not be liable in respect of the payment or act by reason only that before the payment or act the donor of the power had died or become subject to a disability or become bankrupt, or had revoked the power, if the fact of death, disability, bankruptcy or revocation was not at the time of the payment or act known to the person making or doing the payment or act.'

26. The tenor and import of the above legal frameworks is that, in relation to the question as to whether or not the appellants proved sale of the suit property to them by the 1st respondent, the appellants were required to demonstrate that the 1st respondent personally signed the sale agreements they were relying on. In the alternative, they were required to demonstrate that Ng'ang'a Kanina who allegedly signed the sale agreements on behalf of the 1st respondent held a duly executed and registered power of attorney, donated to him by the 1st respondent, authorizing him to execute the sale agreement and the transfer instruments on her behalf and to receive purchase price on her behalf. They did not tender



- that evidence. In the absence of that critical evidence, they cannot be said to have proved sale of the suit property to them by the 1st respondent. That is my finding on the first issue.
27. The second issue is whether the appellants proved conveyance of the suit property to them by the 1st respondent. The 1st appellant testified as PW1. During cross-examination, he stated that they did not attend the Land Control Board to obtain consent, adding that the advocate is the one who processed the title that they were waving. The 1st respondent having denied conveying the suit property to the appellants, the appellants were expected to lead evidence by the alleged advocate to demonstrate how he procured the title that the appellants were waving.
28. Consent of the Land Control Board was not the only missing conveyance instrument. The most glaring irregularity related to the transfer instrument which the appellants relied on. The transfer is at pages 18 and 19 of the record of appeal. The transfer was undated, unstamped and unregistered. An undated, unstamped and unregistered transfer cannot be said to be a valid transfer instrument that could generate the title held by the appellants. The 1st respondent denied signing the said undated, unstamped and unregistered transfer. In the absence of evidence of consent of the land control board, and in the absence of a duly executed, dated, stamped and registered transfer, the appellants cannot be said to have proved conveyance of the suit property to them by the 1st respondent. That is the court's finding on the second issue.
29. The third issue is whether the appellants proved fraud in the acquisition of the title held by the 1st respondent. The case of the appellants was that the 1st respondent sold to them the suit property in 2001 and subsequently conveyed to them the suit property in 2004. They contended that the 1st respondent subsequently, in 2011, colluded with the 2nd respondent and procured a parallel land register and a parallel title deed relating to the suit property. I have considered the above contentions. From the record of the trial court, there was no evidence to support the allegation of sale of the suit property to the appellants by the 1st respondent. There was no proof of conveyance of the suit property to the appellants by the 1st respondent. Consequently, the allegations that the 1st respondent sold and conveyed the suit property to the appellants and subsequently procured a fraudulent parallel land register and a fraudulent parallel title deed in 2011 were not proven. That is the finding of the court on the third issue.
30. The fourth issue is whether the 1st respondent proved fraud in the acquisition of the title held by the appellants. The 1st respondent contended that she acquired the suit property in 1993. It was her case and evidence that she had never sold the suit property to the appellants. She did not execute the sale agreements which the appellants were relying on. She did not execute the undated, unstamped, and unregistered transfer which the appellant were relying on. She did not receive any purchase price from the appellants. The appellants were not able to demonstrate that the 1st respondent sold and conveyed to them the suit property.
31. The Court of Appeal emphasized the obligation of the holder of a challenged title in the case of *Munyu Maina v Hiram Gathiba Maina [2013] eKLR* in the following words:
- ' When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal.'
32. In the suit before the trial court, the 1st respondent contested the appellants' case and contended that she had neither sold nor conveyed the suit property to the appellants. The burden of proof therefore lay with the appellants to demonstrate that the 1st respondent sold and conveyed to them



the suit property and subsequently procured a parallel land register and parallel title deed. They did not discharge that burden. During trial, the 1st respondent led consistent evidence supporting her case and demonstrating that she did not sell and convey the suit property to the appellants. The court is, in the circumstances, satisfied that the 1st respondent proved that the title held by the appellants was procured fraudulently.

33. On costs, the principle that guides our courts in determining questions relating to costs is contained in Section 27 of the *Civil Procedure Act*. The general principle is that costs follow the event. In the present appeal, no special circumstances have been demonstrated to warrant a departure from the general principle.
34. The result is that this appeal is devoid of merit. It is dismissed for lack of merit. The appellants shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 30TH DAY OF JANUARY 2023

B M EBOSO

JUDGE

Mr Onyango for the Appellants

Ms Wambui for the 1st Respondent

Court Assistant: Hinga

