



**Kiarie v Nefat & 2 others (Environment and Land Appeal  
2 of 2020) [2023] KEELC 665 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 665 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 2 OF 2020  
BM EBOSO, J  
JANUARY 25, 2023**

**BETWEEN**

**CHARLES MWANGI KIARIE ..... APPELLANT**

**AND**

**MARGARET WAMBUI NEFAT ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR - THIKA ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Judgment of Hon M. W Wanjala (SRM) delivered in the  
Chief Magistrate Court at Thika on 19/12/2019 in Thika CMC Civil Case No 1292 of 2015)*

**JUDGMENT**

**Background**

1. On 15/12/2015, Charles Mwangi Kiarie [the appellant in this appeal], vide a plaint dated 25/11/2015, instituted a suit in the Chief Magistrate Court at Thika. He named the following as defendants in the suit: (i) Margaret Wambui Nefat [the 1st respondent in this appeal]; (ii) the Attorney General [the 2nd respondent in this appeal]; and (iii) the Land Registrar–Thika [the 3rd respondent in this appeal]. He sought against them the following reliefs: (i) a declaration that he was the absolute proprietor of Land Parcel Number Ruiru/Ruiru West Block 3/2335 [the suit property]; (ii) an order rectifying the parcel register relating to the suit property to erase a duplication relating to the title held by the 1st respondent; and (iii) costs of the suit.
2. His case was that, in or about 5/9/2003, after a lawful acquisition of the suit property through purchase, he was registered as the absolute proprietor of the suit property. In 2006, he obtained an official search on the suit property, confirming that he was, indeed, the registered proprietor of the suit property. In 2014, he applied for another official search on the land and the response he got was that



his documents were a duplication of the 1st respondent's title documents. He termed the response from the Land Registry as a fraudulent attempt by the 1st respondent and by Officers in the Land Registry, to confer on the 1st respondent rights over the suit property. Consequently, he sought the above reliefs. The plaintiff further contended in his pleadings and evidence that, he had cohabited with the 1st respondent from 1996 to 2002, but the cohabitation did not constitute a marriage. Lastly, he contended that he sent the 1st respondent to buy the land on his behalf.

3. The 1st respondent entered appearance and filed a statement of defence and counterclaim dated 19/1/2016. Her case was that she purchased the suit property in 1998, and she was subsequently registered as proprietor of the suit property in 2006. She denied fraud in the obtention of her title, and contended that the title documents which the appellant was waving were fraudulent. It was her case that the suit property had never belonged to the appellant. She added that she contracted a Kikuyu customary marriage with the appellant and the customary marriage had been blessed with a daughter. She denied the appellant's contention that he sent her to buy the land for him.
4. By way of counterclaim, she sought the following reliefs against the appellant: (i) a declaration that she was the bonafide owner of the suit property; (ii) an order cancelling the title documents bearing the appellant's name; and (iii) costs of the suit.
5. The 2nd and 3rd respondents filed a joint statement of defence dated 20/5/2016, through which they denied the allegations made in the appellant's plaint. It was the case of the 2nd and 3rd respondents that, if at all the suit property was registered in the name of the 1st respondent, the registration process leading to registration of the 1st respondent as proprietor of the suit property was effected based on documents presented to the 3rd respondent; that the registration was effected after the 3rd respondent exercised due diligence; and that the registration was done on the belief that the documents were genuine. The 2nd and 3rd respondents contended that the 3rd respondent had performed his duties as prescribed by the law; without fraud; without any illegality; and with due professionalism.
6. Trial proceeded before Hon. M W Wanjala (SRM) who subsequently rendered the impugned Judgment on 19/12/2019. The trial magistrate made a finding to the effect that the appellant had failed to prove his claim and that the 1st respondent had proved her counterclaim as required under the law. The trial magistrate rendered himself thus:

“A careful analysis of all the evidence on record shows that it is more probable than not that the case by the 1st defendant is credible as compared to the plaintiff's case. I am not satisfied, after analyzing all the evidence on record, that the plaintiff acquired his title documents without fraud. In this regard therefore, I do dismiss his suit with costs. On the other hand, I am satisfied that the 1st defendant bought the land and acquired the title documents procedurally. I therefore allow the counterclaim as sought. The costs shall attract interest at court rate from the date hereof.”

## Appeal

7. Aggrieved by the Judgment and orders of the trial court, the appellant brought this appeal through a memorandum of appeal dated 15/1/2020. He advanced the following nine *verbatim* grounds of appeal:
  1. The Learned Magistrate misdirected himself in failing to analyse the totality of evidence adduced and therefore arrived at the wrong decision.
  2. The Learned Magistrate misdirected himself in alluding to facts not supported by any evidence.



3. The Learned Magistrate misdirected himself in relying on the testimony of DW2 - Mwangi Ngachare where there were clear discrepancies and also the testimony was inconsistent with the evidence adduced.
  4. The Learned Magistrate erred in law in failing to find the suit property not available for the subsequent registration in favour of the 1st respondent.
  5. The Learned Magistrate misdirected himself in failing to appreciate the fact that DW2 had already sold the plot to the appellant when he went to collect the certificate of lease from the Society.
  6. The Learned Magistrate totally misguided himself on the facts and the law in making orders to cancel the title issued to the appellant.
  7. The Learned Magistrate erred in law in relying on contradictory and inconsistent evidence of witnesses.
  8. The Learned Magistrate misdirected himself in alluding to fraud on the part of the appellant in so far as it related to registration of land parcel Ruiru/Ruiru West Block 3/2335 in favor of the appellant when there was no evidence of such fraud.
  9. The Learned Magistrate misdirected himself in alluding that the 1st respondent was the purchaser of the suit property where no evidence was given as to where she got the purchase price as she was not working at the time of the alleged purchase.
8. The appellant prayed for an order setting aside the impugned Judgment and declaring him as the absolute proprietor of the suit property. Further, he urged this court to order rectification of the parcel register through cancellation of the registration existing in the name of the 1st respondent.

### **Submissions**

9. The appeal was canvassed through written submissions dated 24/8/2022, filed through M/s Waithera Mwangi & Co Advocates. Counsel for the appellant identified the following as the four issues that fell for determination in the appeal: (i) Whether the Trial Magistrate erred in relying on extraneous and irrelevant matters and in holding that the appellant acquired the suit land fraudulently and illegally; (ii) Whether the Trial Magistrate erred in relying on contradictory and inconsistent evidence of the 1st respondent; (iii) Whether the Trial Magistrate erred in failing to apply the doctrine of first registration; (iv) Who is to bear costs of the suit.
10. On whether the trial magistrate erred in relying on extraneous and irrelevant matters in holding that the appellant acquired the suit land fraudulently and illegally, counsel submitted that the trial court disregarded the evidence that was placed before it showing that the appellant was registered as proprietor of the suit property in 2003 after acquiring it, and that in 2006, she conducted a search which reflected him as the registered proprietor. Counsel further argued that the trial court failed to consider the fact that the appellant was issued with a title deed by Uiguano wa Kirere Society and any error relating to the name of the original owner should be attributed to the Land Registry. Counsel added that the trial court failed to consider that typographical errors can be made by the Land Registry and the same can be corrected as long as they do not affect the interest of the proprietor.
11. On whether the trial magistrate erred in relying on contradictory and inconsistent evidence of the 1st respondent, counsel contended that whereas the 1st respondent contended that she purchased the suit property in 1998, the receipt exhibited showed that the appellant and the 1st respondent started paying for the land in 1992. Counsel added that whereas the 1st respondent had contended that she



- purchased the suit property at Kshs 75,000, the sale agreement exhibited showed that the p/price was Kshs 70,000. Counsel added that the 1st respondent failed to provide evidence relating to the source of the purchase price.
12. On whether the trial magistrate erred in failing to apply the doctrine of first registration, counsel contended that the appellant's title having been issued in 2003, it was the first in time and ought to have prevailed. Counsel urged the court to allow the appeal and award the appellant costs of the appeal.
  13. The 1st respondent opposed the appeal through brief written submissions filed by M/s Mwiha & Mutai Company Advocates. Counsel faulted the appellant for conducting searches on the suit property and contended that there were questions as to why a property owner would be conducting regular searches on a title that he believed to be genuine. Counsel added that the trial court was right in concluding that because there were rival title documents, the right thing to do was to analyze the rival documents. Counsel further submitted that the appellant admitted that he never met the vendor, adding that the appellant failed to prove that the 1st respondent acted as his agent in the acquisition of the suit property. Counsel for the 1st respondent observed that there were many inconsistencies in the appellant's documents. It was further argued by counsel for the 1st respondent that the appellant's contention that he withdraw the purchase price from his bank account was unsupported. Counsel faulted the appellant's documents of title, noting that: (i) the certification on the lease was undated; (ii) the lease was undated and unregistered; (iii) there was no consent of the land control board; and (iv) no transfer was executed by the vendor to convey the suit property to the appellant.
  14. Counsel for the 1st respondent added that whereas the 1st respondent called the transferor as a witness and the transferor denied selling the suit property to the appellant, the appellant did not lead evidence relating to the transfer. Counsel argued that it was not possible to conclude all transactions relating to registration of the suit property in the name of the vendor and transfer of the suit property into the name of the appellant and issuance of the appellant's title in one day. Counsel argued that there could not be a valid certificate of lease without a registered lease. Counsel urged the court to dismiss the appeal.

### **Analysis and Determination**

15. I have perused and considered the original record of the trial court together with the record of appeal, including the memorandum of appeal. I have also considered the parties' rival submissions, the relevant legal framework, and the prevailing jurisprudence on the issues that fall for determination in this appeal. The appellant's counsel condensed the nine grounds of appeal into three key issues. The fourth issue identified by counsel for the appellant relates to costs of the appeal.
16. Taking into account the grounds of appeal and the parties' submissions, the following are the four issues that fall for determination in this appeal: (i) Whether the appellant proved fraud in the generation of the title document held by the 1st respondent; (ii) Whether the 1st respondent proved fraud in the generation of the title document held by the appellant; (iii) Whether the trial court erred in failing to apply the doctrine or principle of first registration in relation to the rival title documents; and (iv) What order should be made in relation to the costs of this appeal. Before I dispose the four issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction over judgments of lower courts.



17. 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 Kesbar 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.”

18. 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.”

19. The first and second issues identified for determination in this appeal are intertwined. I will therefore analyze and dispose them simultaneously. The two issues revolve around the question of proof of fraud in the generation of the rival titles held by the appellant and the 1st respondent respectively. There was common ground that there was a previous original beneficial owner of the suit property. There was also common ground that the said original beneficial owner was the ultimate first registered proprietor of the suit property. Further, there was common ground that the said previous owner was the seller of the suit property.
20. The rival claimants produced their respective leases, purportedly issued to the original beneficial owner (the vendor). The appellant identified the said original beneficial owner (vendor) in his witness statement as Mwangi Gachare. On her part, the 1st respondent identified the said original beneficial owner (vendor) in her witness statement as Mwangi Ngachare [the difference in the spelling of the two names is noted]. The two rival title holders both contended that they purchased the suit property from this same original beneficial owner who was ultimately registered as the first proprietor before conveying the land to them respectively.
21. Whereas the appellant contended that a Mr Mwangi Gachare sold and conveyed to him the title he was waving, he did not lead evidence by the said Mwangi Gachare. He merely relied on a parcel register showing that the suit property previously belonged to Mwangi Gachare who was registered as a first proprietor on 5/9/2003. He was not able to present the said Mwangi Gachare as a witness to confirm to the court that he, indeed, sold and conveyed to him the suit property.
22. In his evidence-in-chief, the appellant testified that he had never met the Mwangi Gachare who sold and conveyed to him the suit property. It was his further evidence that he did not personally process the title he was waving. It was his evidence that his title was processed by his advocate. He did not lead evidence by the advocate who processed the title he was waving.
23. The parcel register which the appellant relied on was opened on 5/9/2003. On the same day Mwangi Gachare was registered as proprietor. On the same day, the land was transferred into the appellant's name. On the same day, the appellant was issued with the title he waved during trial. He was unable to explain how he procured a registration of the land into Mwangi Gachare's name (the alleged vendor) and on the same day he similarly procured registration of a transfer into his name without meeting the vendor and without attending the Land Control Board with the vendor to procure the requisite consent.



24. That was not all. The lease which the appellant relied on as the foundation of his title was not signed by the Land Registrar and was not registered. What are the legal implications of an unregistered lease? Without a registered lease, no valid parcel register could be opened in the name of Mwangi Gachare. Without a valid parcel register, no valid certificate of lease could be processed and issued in the name of Mwangi Gachare. Indeed, there was no evidence of issuance of any certificate of lease to Mwangi Gachare. In the absence of the above, no lawful transfer could be effected in favor of the appellant.
25. In a myriad other ways, the appellant failed to demonstrate that the title document he was waving was issued through due process. He did not present any evidence of consent of the Land Control Board; he did not present evidence of a duly signed, stamped, and registered transfer; and he did not present evidence of payment of stamp duty and registration fees. He did not present any sale agreement signed by him and the vendor to demonstrate that he indeed purchased the suit property from the alleged Mwangi Gachare.
26. On her part, the 1st respondent led evidence by the vendor who sold to her the land, Mwangi Ngachare. The said vendor testified as DW2. He identified himself as Mwangi Ngachare and not Mwangi Gachare. He confirmed that he sold the suit property to the 1st respondent. He denied selling the suit property to the appellant. The 1st respondent produced a lease by the Commissioner of Lands, dated 2/2/2006. The lease was registered on 17/5/2006, leading to the opening of a parcel register on the same day. The parcel register showed that on 17/5/2006, Mwangi Ngachare was registered as proprietor of the suit property. It also showed that on 23/5/2006, a certificate of lease was issued to Mwangi Ngachare. It further indicated that on 27/6/2006, the land was transferred to the 1st respondent by Mwangi Ngachare, leading to the issuance of the title that is held by the 1st respondent.
27. The 1st respondent demonstrated that she had lived on the suit property from the time she purchased it. She also demonstrated that she had developed the suit property. She lived on it at the time of trial.
28. Our courts have umpteen times stated that whenever the validity of a title is challenged, it is not enough for the holder of the challenged title to wave the title and proclaim its indefeasibility. Not too long ago, the Court of Appeal stated the following in *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR regarding the obligation of a registered proprietor of land whose title is challenged on the ground of fraud or other illegalities:

“...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.....”
29. The appellant contended in his pleadings that he sent the 1st respondent to buy the suit property for him. No evidence was tendered to support the allegation of agency between the two.
30. The totality of the foregoing is that the appellant did not prove fraud in the generation of the title held by the 1st respondent. Conversely, the 1st respondent proved that the title held by the appellant was generated without the requisite foundational documents and requirements, such as a registered lease; a sale agreement; a consent of the land control board; and the requisite conveyance instruments, hence its generation was fraudulent. Those are my findings on the two issues.
31. The third issue is whether the trial court erred in failing to apply the doctrine or principle of first registration in relation to the rival titles. The doctrine or principle of first registration was outlined and



applied in the case of *Dr Joseph N. K arap Ngok v Justice Moijo ole Keiwa and 4 others*, Civil Application No NAI 60 of 1997 [the Arap Ngok case] in the following terms:

“In cases of double allotment, a party who has been issued a good title takes precedence over all other alleged equitable rights to the title. Neither the Plaintiff nor the 1st Defendant has brought any evidence of a title to the suit plot, and their interests in the suit plot therefore remain equitable interests.

...“Section 23(1) of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act set out below) gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title. Otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

32. Counsel for the appellant faulted the trial court for not applying the principle of first registration. The principle of first registration was never intended to countenance the opening of parallel land registers or issuance of parallel titles. A registered land is supposed to have only one parcel register and one title. Secondly, the facts relating to the Arap Ngok Case are clearly distinguishable from the facts in the present dispute. In the Arap Ngok Case, there was only one registered title and what Arap Ngok held was an allotment letter. Noting that the existing title had been generated out of an allotment letter similar to what Arap Ngok held, the Court of Appeal held [and I agree with the holding] that in cases of double allotment, the rights of a party who has been issued with a good title takes precedence over all other alleged equitable rights. No fraud was established in the procurement of the rival allotment letter. The principle in the Arap Ngok decision was never intended to sanctify irregularly or fraudulently generated titles. I do not, in the circumstances, find any error on the part of the trial court in failing to apply the principle in the Arap Ngok case.
33. On costs, the two guiding principles are that: (i) the court’s jurisdiction to award costs is discretionary; and (ii) that exercise of the discretion is guided by the general principle that costs follow the event [see Section 27 of the *Civil Procedure Act*]. In the present appeal, no proper basis was laid to warrant departure from the general principle in Section 27 of the *Civil Procedure Act*. Consequently, the appellant will bear costs of the appeal.
34. In summary, my findings on the four issues in this appeal are as follows:-
  - i. The appellant did not prove fraud in the generation of the title document held by the 1st respondent.
  - ii. The 1st respondent proved fraud in the generation of the title document held by the appellant.
  - iii. The trial court did not err in failing to apply the doctrine of first registration in relation to the rival title documents; and
  - iv. Costs follow the event, meaning that the appellant shall bear costs of the suit.

### **Disposal Order**

35. The result is that this appeal lacks merit. The appeal is dismissed for lack of merit. The appellant shall bear costs of the appeal.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 25TH DAY OF  
JANUARY 2023**

**B M EBOSO**

**JUDGE**

Ms Mwaura for the 1st Respondent

Mr Maina holding brief for Ms Waithera Mwangi for the Appellant

Court Assistant: Ms Osodo

