



REPUBLIC OF KENYA



**KENYA LAW**  
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**Masieyi (Suing for and on behalf of the Estate of the Late Fredrick Masieyi Shitonda) v Kagucia (Environment and Land Appeal E002 of 2021) [2023] KEELC 27 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 27 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E002 OF 2021**

**DO OHUNGO, J**

**JANUARY 18, 2023**

**BETWEEN**

**FLORENCE NGOSIA MASIEYI (SUING FOR AND ON BEHALF OF THE ESTATE OF THE LATE FREDRICK MASIEYI SHITONDA) ..... APPELLANT**

**AND**

**BURUGU KAGUCIA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Senior Resident Magistrate Court at Mumias (Hon. W.K Cheruiyot, Senior Resident Magistrate) delivered on 18th January 2021 in Mumias ELC No. 141 of 2018 Florence Ngosia Masieyi v Burugu Kagucia)*

**JUDGMENT**

1. The background of this appeal is that through plaint dated May 12, 2011, Florence Ngosia Masieyi (hereinafter “Florence”) filed a suit in the High Court at Kakamega on behalf of the estate of the late Fredrick Masieyi Shitonda (hereinafter “Fredrick”). She named George Gitau Mungai as the first defendant, Mary Mukami George as the second defendant, and the respondent herein as the third defendant. Pursuant to a ruling delivered in the High Court on February 3, 2015, the suit against first and second defendants was struck out, thereby leaving the respondent herein as the sole defendant. The suit was later transferred to the subordinate court.
2. Florence averred in the plaint that Fredrick was the registered proprietor of the parcel of land known as North Wanga/Kholera/459 and that shortly after his death in the year 2006, the plaintiff discovered that the said parcel had been subdivided into North Wanga/Kholera/937 (the suit property) and North Wanga/Kholera/936. That North Wanga/Kholera/936 was registered in Fredrick’s name while the suit property was registered in the respondent’s name. She further averred that that the subdivision of North Wanga/Kholera/459 and transfer of the suit property to the respondent was fraudulent. She therefore prayed for an order of registration of Fredrick as the proprietor of the suit property.



3. The respondent filed a statement of defence and counter claim dated May 30, 2011 wherein he stated that Fredrick initially sold his interest in the suit property to George Gitau Mungai and that Mary Mukami George subsequently received it as a gift from George Gitau Mungai on March 17, 1992. That on November 6, 1995, the respondent purchased the suit property from Mary Mukami George for valuable consideration, that he is a bona fide purchaser for value without notice, and that having obtained title in 1995, he has had uninterrupted possession since then. He also averred that the suit against him was barred by virtue of section 7 of the Limitation of Actions Act. The respondent therefore prayed that the suit be dismissed with costs and that judgment be entered against Florence for an order that he is the registered proprietor of the suit property, mesne profits from 2008 and costs.
4. Upon hearing the matter, the subordinate court (Hon WK Cheruiyot, Senior Resident Magistrate) delivered judgment on January 18, 2021 dismissing the Florence's suit and allowing the respondent's counter claim by granting an order that the respondent is the registered proprietor of the suit property.
5. Aggrieved by the judgment, the appellant filed this appeal on January 22, 2021 on the following grounds:
  1. That the learned magistrate erred in law and fact in ignoring the appellants evidence and exhibits while arriving at his impugned judgment.
  2. That the learned magistrate erred in both law and fact in failing to appreciate the evidence that the respondent's title was tainted as it is a subdivision of original land owned by the deceased husband to the plaintiff, who still has in her possession title deed for mother title N/Wanga/Kholera/459 which was not challenged by respondent.
  3. That the learned magistrate erred in both law and fact in failing to consider the lease agreement produced by the plaintiff in proof of element of respondent's fraudulent title.
  4. That the learned magistrate erred in both law and fact in holding that the respondent proved his counterclaim when he failed miserably.
  5. That the learned magistrate erred both in law and fact in holding that the appellant failed to prove her case when she did on standard required by law.
  6. That the learned magistrate erred both in law and fact in striking out the 1<sup>st</sup> and 2<sup>nd</sup> defendants initially in this suit, thus crippling appellants case in trial court.
  7. That the learned magistrate erred in both law and fact in holding that the appellant ought to be condemned to pay costs for both her claim and respondent's counter claim when the respondents claim was partially granted.
  8. That the learned trial magistrate decision was contrary to weight of evidence on record and adduced by the appellant orally in court.
6. During pendency of the appeal, Florence passed away on January 25, 2021. Her son Joseph Masieyi Owinyi obtained letters of administration *ad litem* in respect of both Florence's and Fredrick's estates and sought to be allowed to substitute Florence. His application was allowed on December 6, 2021.
7. The appeal was canvassed through written submissions. The appellant filed his submissions on March 1, 2022. He submitted that the trial court in making its decision did not consider the plaintiff's evidence and list of documents including a lease agreement and the original title deed to prove that the defendant's title was tainted as the defendant was aware that the late Fredrick Masienyi was a registered owner of the original number N/Wanga/Kholera/459 giving rise to the suit property yet particulars



of fraud had been set out and proved. The appellant further submitted that the court disregarded the plaintiff's evidence only by virtue of the fact that George Gitau Mungai and Mary Mukami George who were initially defendants were not party to the suit yet the plaintiff (deceased) testified and confirmed that there was a lease agreement made between Fredrick and George Gitau Mungai on February 20, 1980 to last for 12 years and that during the lease period, Fredrick passed on leaving Florence in care of his property and that since the lease was ongoing, Florence only started possessing the land after the lapse of the lease prompting her arrest by the respondent.

8. The appellant further submitted that from the testimony in Mumias Criminal Case Number 850 of 2008, Florence had original title to land parcel North/Wanga/Kholera/459 and was in the process of undergoing succession and that the respondent in his testimony relied on the trial court's judgment in Criminal Case Number 850 of 2008 yet the judgment never pronounced itself on the issue of authenticity of title between titles for North/Wanga/Kholera/459 in possession of the Florence and that in possession of the respondent. The appellant therefore urged that the appeal to be allowed.
9. The respondent filed his submissions on April 4, 2022 and submitted that if the court finds and decrees as requested in the Memorandum of Appeal, then no orders would be made in favour of either side which would translate to legal absurdity. In submitting on whether the appellant placed enough evidence to prove fraud against the respondent, the respondent invoked section 108 of the *Evidence Act* and submitted that he proved that he had bought the suit land and that faced by the evidence, the trial court made its decision. That the counter claim was proved as opposed to the plaint. The respondent further submitted that title number North/Wanga/Kholera/459 existed until it was subdivided as shown in the green card and that at no time did the suit land have two parallel registrations. The respondent also submitted that parcel No. North/Wanga/Kholera/936 remained in the appellant's family while the suit property was sold by Fredrick to George Gitau Mungai and later to Mary Mukami George from whom the respondent purchased it and obtained title on November 6, 1995. That the plaint against him was filed in 2011 about 17 years after his registration contrary to Section 7 of the *Limitation of Actions Act*.
10. It was the respondent's further submission that the striking out of parties in the initial suit was done by the High Court and that the appellant cannot blame that on the trial court and that in any event, the appellant failed to challenge the striking out through review or appeal is therefore barred by the doctrine of estoppel from raising it at this stage. The respondent therefore urged that the appeal be dismissed with costs.
11. This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/ a Machira & Co Advocates* [2013] eKLR.
12. With the above guidelines in mind, I have carefully considered the grounds of appeal, the entire record, and the parties' respective submissions. The issues that arise for determination are whether fraud was established and whether the reliefs sought by the parties ought to have issued.
13. The appellant's case from the onset was that the respondent was the registered proprietor of the parcel of land known as North Wanga/Kholera/937 (the suit property). In support of her case, the appellant put on record copies of registers in respect of the suit property as well as North Wanga/Kholera/459



and a certificate of search in respect of the suit property as of August 12, 2008. The documents show that the respondent became the registered proprietor of the suit property on November 6, 1995.

14. As a registered proprietor of land, the respondent is entitled to the rights and privileges accorded by the law. Under section 26 of the *Land Registration Act*, the court is required to accept the respondent's certificate of title as proof of ownership. Nevertheless, the title can be nullified on the ground of fraud or misrepresentation to which the respondent is proved to be a party or if it is shown that it was acquired illegally, unprocedurally or through a corrupt scheme.
15. Through her complaint, Florence sought nullification of the respondent's title on the ground of fraud. As has been repeatedly held, fraud is a serious allegation that must be pleaded and proved to a standard above balance of probabilities but not beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR.
16. The particulars of fraud that Florence pleaded at paragraph 10 of her complaint were that George Gitau Mungai discreetly transferred the suit property to himself, that George Gitau Mungai became the registered proprietor of the suit property without surrender of the original title of North Wanga/Kholera/459, that the respondent became the registered proprietor of the suit property with full knowledge that it belonged to Fredrick and that the respondent only began using the suit property upon Fredrick's demise. It will be noted that the particulars of fraud targeting George Gitau Mungai were rendered of no effect the moment the suit against him was struck out. In any case, the appellant's claim that she had in her possession the original of the title in respect of North Wanga/Kholera/459 was not proven. She did not call the land registrar to testify and verify that the document that she claimed to be the original of the title was a genuine and valid document.
17. I note that the register in respect of North Wanga/Kholera/459 shows that the said title was closed on April 24, 1980 upon subdivision into North Wanga/Kholera/936 and the suit property. Parcel North Wanga/Kholera/936 was registered in the name of Fredrick on April 24, 1980. By the time he passed away in 2006, Fredrick had lived with the fact of subdivision for 26 years. He even further subdivided North Wanga/Kholera/936 on July 5, 2000 into at least 3 new plots. Clearly, he was aware of the transactions, which transactions he embraced without any complaint. I agree with the learned magistrate that fraud was not established. It follows therefore that the appellant's case was bound to fail.
18. To the extent that the respondent's title remained unchallenged, he was entitled to the declaration that he was the registered proprietor of the suit property. Regarding the claim for mesne profits, I note that mesne profits are what a person who is a victim of wrongful occupation of his land by another receives from the aggressor. See *Mistry Valji v Janendra Raichand & 2 others* [2016] eKLR. I agree with the learned magistrate that the respondent did not establish the claim for mesne profits.
19. In view of the foregoing discourse, I find no merit in this appeal. I dismiss it with costs to the respondent.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF JANUARY 2023.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

No appearance for the appellant

No appearance for the respondent



**Court Assistant: E. Juma**

