



**Nkuraru v Mbogori (Environment and Land Appeal 15 of 2021)
[2023] KEELC 15919 (KLR) (20 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15919 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL 15 OF 2021
AK BOR, J
FEBRUARY 20, 2023**

BETWEEN

SOLOMON MWOBODIA NKURARU APPELLANT

AND

CHARLES MUTHURI MBOGORI RESPONDENT

JUDGMENT

1. The Appellant filed Nanyuki Chief Magistrates Court Civil Suit No. 39 of 2016 against the respondent on 5/4/2016 in which he averred that vide a sale agreement dated 18/7/2007 he sold $\frac{1}{4}$ of an acre piece of land to the Respondent. The plot was to be excised from Plot number 299 Katheri (the Katheri plot). The sale did not go through and he proposed to sell Nanyuki Marura Block 8/1533 (Nturukuma) (the Nturukuma land) to the defendant. He claimed that he gave the Respondent the original title as security and to enable him conduct a search. He later discovered that the respondent had fraudulently transferred the Nturukuma land to his name, trespassed on it and was utilising it.
2. He gave particulars of fraud on the part of the respondent as obtaining registration of the Nturukuma land by false pretenses, obtaining registration without the necessary documents and illegally transferring the Appellant's land to himself. He sought cancellation of the title over the Nturukuma land and rectification of the register by having the title registered in his own name as the bona fide owner of the land. He also sought general damages for trespass.
3. In his defence filed in court on 27/6/2016, the Respondent admitted that he entered into an agreement with the Appellant for the purchase of the Katheri plot. He averred that the Appellant failed to perform his part of the bargain under the agreement and later sold to him the Nturukuma land. He denied that he received the title over the Nturukuma land as security or for such purposes. He contended that upon transfer of the Nturukuma land to his name, he was entitled to enjoy all the rights and interests appurtenant to his registration. He urged that the Appellant's claim was misconceived, an afterthought and an abuse of the court process.



4. The case was heard by Ms. Njeri Thuku, Principal Magistrate who vide the judgment delivered on 15/2/2019 dismissed the Appellant's claim and awarded the Respondent costs.
5. Being aggrieved by that decision, the Appellant lodged Nyeri ELC Appeal No. 10 of 2019. The matter was transferred to Nanyuki on 19/8/2021.
6. The main grounds of appeal are that the Learned Magistrate erred in finding that the Appellant did not prove fraud despite the overwhelming evidence tendered; the court erred in failing to find that the Appellant had no privity of contract with the Respondent and that the transfer of the Appellant's land was therefore fraudulent and illegal; and the court erred by failing to find that the Respondent did not have a good title to the suit property.
7. The other grounds are that the Learned Magistrate introduced extraneous evidence which was not pleaded and that she disregarded the evidence of the Appellant and applied the doctrine of constructive trust which was not pleaded. Further, that the court failed to analyse and consider the entire evidence and the law and arrived at a wrong decision. The Appellant also faulted the Learned Magistrate for disregarding the provisions of the [Land Control Act](#).
8. The appeal was canvassed through written submissions. In his submissions filed in court on 21/9/2022, the Appellant stated that he sold the Katheri plot to the Respondent vide the agreement dated 18/7/2007. That there was a delay in registration of the Katheri plot and he promised to give the Respondent alternative land. It was his submission that he gave the Respondent a copy of the title deed for the Nturukuma land to conduct an official search. He later discovered that the Respondent had fraudulently transferred the Nturukuma land to his name.
9. The Appellant submitted that he pleaded particulars of fraud in paragraph 6 of his plaint. He relied on the decision in *Katende v Haridas and Company Limited* [2008] 2 E.A. where the court stated that fraud could also be imputed on a person. The Appellant submitted that the Respondent merely alleged that all the necessary documents were executed to effect the transfer of the Nturukuma land without producing those documents. Further, he contended that the Respondent did not pay the stamp duty. He urged that a careful perusal of the evidence on record could only lead to the inference that fraud was committed by the Respondent. The Appellant relied on [Kenya Highway Authority v Shalien Masood Mughal & 5 others](#) [2017] eKLR on the point that courts should nullify titles by land grabbers who stare at your face and wave the title of the land grabbed.
10. The appellant relied on section 26 of the [Land Registration Act](#) on the issue that a title can be defeated on account of fraud. He also relied on article 40 (6) of the [Constitution](#) which removes the protection from property found to have been illegally acquired.
11. The appellant argued that the Respondent alleged that there was a handwritten agreement for the purchase of the Nturukuma land yet he did not produce such agreement.
12. The appellant relied on section 3 (3) of the [Law of Contract](#) which provides that no suit is to be brought upon a contract for disposition of an interest in land unless there is a written agreement which is executed.
13. The appellant submitted that he had proved that he neither sold nor transferred the Nturukuma land to the respondent who he contended did not provide any completion documents. He argued that the title held by the respondent could not be taken by the court as *prima facie* evidence that the Respondent was the absolute and indefeasible owner of the Nturukuma land.



14. The appellant faulted the Learned Magistrate for observing that the value of the Nturukuma land had gone up and the appellant wanted to get the land back so that he could sell it for a higher value yet the parties did not plead this.
15. The appellant submitted that the trial court misdirected itself when it applied the doctrine of constructive trust and when it took the view that the lack of consent from the land control board did not vitiate the right of a party in possession. In the Appellant's view, the trial court applied the doctrine of constructive trust and estoppel which were neither pleaded nor proved.
16. The appellant maintained that being agricultural land, the Nturukuma land was a controlled transaction under section 6 of the *Land Control Act* and that the agreement became void if the necessary consent was not given under section 9 of that Act. He submitted that he did not go to land control board to seek consent which was a mandatory document before a transfer of land could be effected.
17. On his part, the respondent submitted that he entered into an agreement with the appellant for the purchase of the Katheri plot. Being unable to complete the sale transaction, the appellant offered him the Nturukuma land in exchange for the Katheri plot. He mentioned that that offer was made 5 years after they entered into the first agreement.
18. The respondent testified that in the same year in 2011, they executed all the requisite transfer documents being the transfer document and the land control board consent application forms. That he surrendered his pin, identity card, passport photos and Kshs. 3,000/= to the appellant who then processed the transfer. When the title was ready, he called the respondent and they collected it from the lands office. He invited the court to look at the part in the proceedings where the Appellant admitted during cross-examination that he signed the transfer for the suit property.
19. The Respondent submitted that the burden of proving fraud lay with the Appellant pursuant to section 107 of the *Evidence Act*. Further, that the standard of proof for fraud was not beyond reasonable doubt but was more than the ordinary standard in civil suits of a preponderance of the evidence. The respondent relied on *Demutilla Nanyama Pururmu v Salim Mohamed Salim* [2021] eKLR and *Kinyanjui Kamau v George Kamau* [2015] eKLR on the issue that allegations of fraud must be pleaded and straightly proved.
20. The respondent submitted that the appellant set out to discharge the burden of proof in the allegations of fraud by cross examining him and that when he stated that he could not produce the transfer form, land control board consent and the evidence of payment of stamp duty, he then invited the court to find that fraud was committed.
21. The respondent urged that there is a presumption of regularity of government actions as the Court of Appeal stated in *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR. The court stated that there was a presumption of regularity through which the court presumed that official duties had been properly discharged and all procedures were duly followed until the challenger presents cogent and clear evidence to the contrary. That the Land Registrar must therefore be deemed to have discharged his statutory duty of effecting a transfer of the Nturukuma land upon all the prerequisites being dissatisfied.
22. The respondent went further to contend that if such a presumption were to be displaced and an adverse finding made against the Land Registrar, that would not be proper because the Land Registrar was not joined as a party to this suit.
23. The respondent had difficulty seeing how the trial court applied the doctrine of constructive trust. He supposed that the Appellant may have considered that the doctrine was applied because the court relied



on the decision in *Will Kimutai Kitilit v Michael Kibet* [2018] eKLR whose ratio was that equity had been elevated to the constitutional status.

24. The respondent pointed out that parties entered into the agreement dated 18/7/2007 and the instant transaction was a derivative of that sale agreement which the appellant was unable to complete and in exchange offered the respondent the Nturukuma land which he accepted. He added that the equities binding the parties could not permit the appellant to renege on the derivative bargain. The respondent maintained that his title was protected by section 26 of the *Land Registration Act*.
25. The issue for determination is whether the court should allow the appeal and enter judgment in terms of the plaint dated 1/4/2016 by ordering the Land Registrar to cancel the respondent's title over the Nturukuma land and issue a title over the land in the appellant's name.
26. It is not in dispute that the appellant entered into the sale agreement dated 18/7/2007 with the respondent over the Katheri plot which was to be excised from the bigger portion. The consideration of Kshs. 200,000/= was paid to the appellant in full but he did not complete the transaction. He claimed that when the respondent demanded a refund of his money he proposed to give the respondent the Nturukuma land for a consideration of Kshs. 1,500,000/=. He claimed that he gave the Respondent the title to conduct a search before they entered into a sale agreement. His contention was that they never entered into any agreement but that the respondent transferred the Nturukuma land to his name.
27. The appellant's explanation that he gave the respondent the title over the Nturukuma land for purposes of doing a search is not believable because one does not require the original title deed to conduct a search, a copy of the title suffices. There is no evidence to support the appellant's allegation that he was to sell the Nturukuma land to the respondent at Kshs. 1,500,000/=. No explanation was given by the appellant for not following up the transaction over the Nturukuma land after giving the respondent the original title over that land. It is noteworthy that the appellant had received the full consideration for the Katheri plot from the respondent but failed to complete that sale and was only getting into the second transaction over the Nturukuma land because he was not able to refund the money the Respondent paid him for the Katheri plot.
28. The respondent contended that it was the appellant who processed the transfer of the Nturukuma land to his name and that he gave the appellant the documents necessary to effect the transfer together with Kshs. 3000/= for registration of the transfer. On this aspect, the court prefers the evidence of the respondent over that of the appellant mainly because the appellant admitted during cross examination that he signed the transfer for the Nturukuma plot. Signing the transfer form and tendering the original title over the land to the respondent can only have been intended for purposes of transferring the land to the Respondent.
29. The appellant claimed that he learned in July 2013 that the respondent had used the title over the Nturukuma land as security for a loan and proceeded to register a caution against the land. Were it true that the respondent had illegally transferred the Nturukuma land to his name, then the appellant would have been expected to file suit as soon as he learned of that development. That he waited from July 2013 until 5/4/2016 to file suit yet he knew the land had been offered as security for a loan and was liable to be sold in case of default by the respondent is not how a reasonable person would act in similar circumstances.
30. The respondent submitted that courts presume that official duties were properly discharged and that all procedures were duly followed. The presumption to be made in this matter is that the transfer of the Nturukuma land to the respondent's name was properly done unless the appellant can rebut that presumption through cogent, clear and uncontroverted evidence.



31. The appellant failed to bring the Land Registrar to give evidence on how the transfer of the Nturukuma land was effected to the respondent yet the burden to prove impropriety in the transfer lay on the appellant. He did not add the Land Registrar as a party to the suit for registering the transfer. The appellant failed to prove that his title was fraudulently transferred to the Respondent.

32. The appeal is dismissed with costs to the respondent.

DELIVERED VIRTUALLY AT NANYUKI THIS 20TH DAY OF FEBRUARY 2023.

KOSSY BOR

JUDGE

In the presence of:

Ms. N. Wachira holding brief for Mr. A. Chweya for the Appellant

Mr. M. Mwangi holding brief for Mr. T. Mbaaro for the Respondent

Ms. Stella Gakii- Court Assistant

