



REPUBLIC OF KENYA



**Mugo v Njeri & 3 others (Environment and Land Appeal
E084 of 2022) [2023] KEELC 17546 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17546 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E084 OF 2022**

**JG KEMEI, J
MAY 25, 2023**

BETWEEN

DICKSON MUGENDI MUGO APPELLANT

AND

LUCY NJERI 1ST RESPONDENT

JOHN NJUKI MWANGI 2ND RESPONDENT

PETER KARANJA MWANGI 3RD RESPONDENT

JOSEPH MWANGI MUGA 4TH RESPONDENT

*(Being an appeal against the Judgment of Hon M. Kinyanjui
(PM) in Kiambu ELC No. 14 of 2018 delivered on the 3/10/2022)*

JUDGMENT

1. The Appellant was the Plaintiff in the trial Court. He averred that he is the registered owner of parcels Kiambu/Mun/5/3415 and 3416 (hereinafter the suit land). These parcels were excised from parcel No Kiambu/Municipality Block 5/929. He purchased the two for valuable consideration from George Mugo Mwangi in December 2017.
2. The Plaintiff alleged that the Defendant has illegally trespassed on the land and sought the following orders:-
 - a. A permanent injunction restraining the Defendant, her servants, agent or employees from entering, trespassing and/or doing any act of waste on the suit premises Kiambu/Municipal Block 5 (Kiamumbi) 3415 and Kiambu/Mun. Block 3416.
 - b. Eviction orders.



- c. Costs of the suit.
 - d. Interest on (c) above at Court rates.
 - e. Any other or such further relief (s) as this Honourable Court may deem just and expedient.
3. The Defendant denied the Plaintiff's claim that she is a trespasser and averred that she has occupied the land since 2005 with the permission of the Interested Party – Esther Mwendu Mwangi, Joseph Mwangi Muga, Peter Karanja Mwangi and John Njuki Mwangi. She stated that she is an employee and close family friend of the 2nd – 4th Respondents who are beneficiaries of the estate of Charles Mwangi Muga.
 4. The 2nd, 3rd and 4th Defendants averred that George Muga Mwangi was not the registered owner of the land and that he acquired it illegally. That the 1st Defendant occupies the land with their permission and authority and therefore she is not a trespasser. That the land belonged to their father Charles Muga Mwangi and not George Muga Mwangi.
 5. In their counterclaim the 2nd – 4th Defendants sought the following orders:-
 - a. A declaration that the Plaintiff acquired title Kiambu/municipality 5 Block (Kiamumbi)/929 and subsequent subdivision being Kiambu/municipality 5 Block (kiamumbi)/3415 And Kiambu/municipality 5 Block (kiamumbi)/3416 illegally, irregularly and fraudulently.
 - b. An order directing the cancellation of the titles Kiambu/municipality 5. Block (kiamumbi)/3415 And Kiambu/municipality 5 Block (kiamumbi)/3416.
 - c. An order of permanent injunction restraining the Plaintiff, his agents, employees, assigns or anyone claiming to have authority from him from entering into, taking possession, utilizing, claiming or in any way interfering with the proprietorship and use of the said properties.
 - d. An order directing the Plaintiff to pay costs of this Counter-Claim.
 6. Upon hearing the suit the Court entered Judgment in favour of the Defendants as follows:-
 - a. A declaration that the Plaintiff acquired title No Kiambu/Municipality Block 5/929 and subsequent subdivisions being Kiambu/Municipality Block 5/3415 and Kiambu/Municipality Block 3/3416 illegally, irregularly and fraudulently.
 - b. Order of permanent injunction restraining the Plaintiff, his agents, employees, assigns or anyone claiming to have authority from him from entering into taking possession utilizing claiming or in any way interfering with the proprietorship and use of the said property.
 - c. Cancellation of the Title Kiambu/Municipality Block 5/3415 and Kiambu/Municipality Block 5/3416 and the same reverts to the Estate of late Charles Mwangi and parties do conclude Succession No 147 of 1990.
 - d. I make no orders as to costs.
 7. Aggrieved by the said Judgment rendered on the 3/10/2022 the Appellant filed this appeal on the grounds as follows:-
 - a. The learned trial Magistrate erred in law and in fact in failing to find that the Kiamumbi Farmers' Cooperative Society Limited did not illegally transfer the shares to the Appellant as he was a nominee under the Co-operatives Societies Act.
 - b. That the learned Magistrate erred in fact and in law when it applied wrong principles of law that the Appellant had wrongfully obtained bad title yet there was no proof of any act of irregularity



and/or fraud against the Appellant in obtaining titles to land parcel No Kiambu/municipality Block 5(kiamumbi) 3415 and 3416.

- c. That Learned Court erred in fact and in law when it adjudged the case in full ignorance of Co-operatives Societies Act knowing that the Respondents did not have any interest in the aforesaid land.
 - d. That the Honourable Court misguided itself on the application of Societies and Succession law for transfer of shares that are statutory nominated by declaring Appellants investment of Title No Kiambu/municipality Block 5 (kiamumbi)3415 and 3416 and transfer of Share Certificates number 108 ballot No 1342 were irregularly issued.
 - e. That the learned trial Magistrate erred in law and in fact in admitting hearsay evidence by the Respondents and DW2 without warning herself against dangers of so doing otherwise leading to miscarriage of justice.
 - f. The learned trial Magistrate erred in reasoning by failing to appreciate that the 2nd Respondent did not prove any fraud or irregularity on the part of the Appellant.
 - g. The learned trial Magistrate erred in law and in fact in cancelling the Appellant's title deeds.
 - h. The learned trial Magistrate erred in law and in fact in concluding the Appellant did not exercise due diligence.
8. The Appellant has sought the following orders on appeal-
- a. This Court be pleased to allow this appeal and set aside the entire Judgment by the Magistrate Court.
 - b. This Court be pleased to make a finding allowing the claim in Kiambu Elc No 14 of 2018.
 - c. Costs be awarded to the Appellant.
9. On November 17, 2022 parties entered a consent which consent was adopted by the Court in the following terms:-

“By Consent the Notice of Motion of 5/10/2022 be compromised as follows:-

- a. Status quo to be maintained – the Respondents in the Appeal remain on the property. The titles of the 2 properties are in the name of the Appellant.
- b. There be a restriction to be registered on LR Nos. Kiambu/Municipality/Block 5/ (Kiamumbi)/3415 and Kiambu Mun./Block 5(Kiamumbi)/3416 prohibiting any dealings on the suit properties pending the hearing and determination of this appeal.
- c. The Appellant to file the Record of Appeal within 60 days in default these orders shall lapse.
- d. No orders as to costs.”
 1. On the 27/2/2023 the parties elected to prosecute the appeal by way of written submissions.
 2. The law firm of Njeri Kuria filed written submissions on behalf of the Appellant. The law firm of Njoroge Kugwa filed written submissions on behalf of the Respondents.
 3. The Appellant submitted that he acquired the suit land from George Muga Mwangi who in turn acquired it from Kiamumbi Farmers' Co-operative Society as a nominee



of his late father. That the transfer was in conformity with Section 37 (1) (a) of the Co-operative Society Act. That the land was not part of the estate of their late father. His father had bequeath the same to him by way of nomination.

4. The Appellant relied on Section 39(1) of the Act. In addition in buttressing the point that nominated property is not subject to the Law of Succession, the Appellant relied on the case of *Re Estate of Faith Muita, Deceased* (2016)eKLR as follows:-

“7. One other thing to note about nominations is that they operate under the rules of a particular scheme. Although they dispose of property upon death, they do not comply with the requirements of a will, and they are therefore not subject to the law of succession. The property the subject of a nomination does not form part of the nominator’s estate, for the reason that the funds are meant to be paid to the nominee of the nominator. The person to whom the funds ought to be paid is designated. Nominated funds cannot pass by the will of the nominator. The said funds, the subject of the nomination, cannot vest in the personal representatives of the nominator for the simple reason that they do not form part of his or her estate. It is for that reason that the person holding the funds, or the scheme manager, need not require a grant of representation before paying out the funds to the nominee or beneficiaries. The direction is that the funds be paid out on death, so the person holding the funds should only require proof of death before making the payment.”

14. That equally in *Benson Mutuma Muriungi vs C.E.O Kenya Police Sacco & Another* [2016]eKLR the Court held as follows:-

“(9) Literary works provide useful information. For instance, William Musyoka, Law of Succession at pages 235 and 236 discusses some types of assets that do not vest in the deceased’s personal representatives; such property include:-

- (a) Property held by the deceased as a joint tenant;
- (b) Sums payable under a discretionary pension scheme;
- (c) Property subject matter of a donatio mortis causa; and
- (d) Property of the deceased which is the subject of a statutory nomination made by the deceased.

- (13) On this category of properties, Musyoka J In the Matter of the Estate of Carolyne Achieng’ Wagah (Deceased) Nairobi High Court Succession Cause No 1374 of 2004, clearly stated the law as follows:

“It is the law that funds the subject of a nomination do not form part of the nominators estate, and therefore such funds cannot pass under the will of the deceased or vest in his personal representative. Such funds are not subject to the succession process, and should be dealt with in accordance with the law governing nomination. Nominations are statutory, in the sense of them being specifically provided for by a particular statute.”



15. It was submitted that the Kiamumbi SACCO transferred shares due to the late Charles Mwangi Muga to George who was duly nominated by the Deceased. The nomination and transfer of shares was done pursuant to the *Co-operative Societies Act*. That George acquired a good title. That the suit property was not part of the free assets of the estate of Charles Muga Mwangi. That if indeed there was a dispute then the 2nd – 4th Respondents failed to pursue the matter in the Co-operative Tribunal as set out in Section 76 of the *Co-operative Societies Act*.
16. Reliance was placed on the case of *Paul Kanja Kamau vs. Stima SACCO Society Ltd* [2020]eKLR where the Court held:-
 45. In light of the foregoing, I do not think that either this court or the trial court had initial jurisdiction to entertain a dispute arising out of Sacco business as provided under Section 67(3) of the *Sacco Societies Act*, or a dispute concerning the business of a Co-operative Society as provided in Section 76 of the *Co-operative Societies Act*. Parliament intended that the initial jurisdiction in such cases be exercised by the Tribunal.
 46. This is not to say the court has no jurisdiction in disputes between a Sacco and its members. Its jurisdiction is, however, set out as appellate jurisdiction under the *Co-operative Societies Act*. The High Court can interfere with the Tribunal's award on appeal as expressly stated in Section 81 of the *Co-operative Societies Act*.
 50. I should point out that the parties did not raise this matter as an issue for determination. However, it is trite that the court, when faced with a glaring issue which the parties have not raised but which has an effect on jurisdiction, has the inherent jurisdiction and discretion to deal with the matter.”
17. Arising from the foregoing the Appellant insists that he acquired the title to the suit property from the seller legally devoid of any fraudulent dealings.
18. The Respondent submitted that there is no relationship between the Appellant and the Co-operative Society and that the relationship was between the Society and the seller of the land.
19. That the seller failed to proof any evidence showing his nomination or transfer of shares. The only evidence before Court was a letter from the Society stating that the seller had been nominated.
20. The Respondents blamed the seller for removing restrictions on the suit land without a Court order or the participation of the Respondents.
21. It was the submission of the Respondents that the Appellant acquired a title that was tainted with fraud under Section 26(1) (a) of *Land Registration Act*.
22. The Respondents opined that the Appellant filed the case in Court in the first place and if he thought the Tribunal was the correct forum then he should have filed the case in that forum.
23. Further that the relationship between the Appellant and the Society is not proximate to allow the Appellant the capacity to file the suit before the Tribunal.
24. That there was no ground pleaded against the Appellant on account of fraud. Fraud was alleged against the PW2 by the 2nd Respondent in the counterclaim.

Determination

25. The key issues for determination are:-



- a. Whether there was nomination of the shares belonging to previous owner in the SACCO.
 - b. Whether there was intermeddling of the property.
 - c. What orders should the Court issue.
26. It is not in dispute that the land parcel No Kiambu/Municipality Block 5/929 emanated from Kiamumbi Farmers' Co-operative Society Ltd, which shares were held in the name of Charles Mwangi Muga.
 27. The 2nd – 4th Respondents are children (sons) of the late Charles Mwangi Muga. They accused their brother George Muga Mwangi of fraudulently acquiring the land and fraudulently sold it to the Appellant.
 28. Charles Mwangi Muga the father of the 2nd – 4th Respondents was a shareholder in Kiamumbi Farmer's Co-operative Society Ltd as a member No 108. He died on 28/5/1986.

Fraud against George Muga Mwangi

29. It is on record that the 2nd – 4th Respondents pleaded fraud against their brother George Muga Mwangi yet they failed to enjoin the said Mwangi in the suit. The cause of action against a person not enjoined cannot succeed. I do not need to discuss it further.

Nominated asset

30. Domestic literary works have provided useful definitions on nomination under succession law. William Musyoka, J in his book on "Law of Succession" defines a nomination as a direction made by one person, the nominator, to another who is holding investments on the nominator's behalf, to transfer the money upon the nominator's death to the nominee—who was chosen by the nominator while the nominator was still alive. The nomination is made while the nominator is still alive, but, like a will, the gift is only effective when the nominator has passed away. Although it disposes of property upon death, a nomination operates in accordance with the provisions of a specific scheme and is exempt from the *Law of Succession Act's* requirements. There are two categories of nominations, statutory nominations and nominations made under a discretionary pension plan.
31. Nominations are devices that operate outside of the law of succession. A nomination is defined (see Parry and Clark: The Law of Succession, 11th edition, Thomson/Sweet & Maxwell, London, 2002 pg. 4 and Catherine Rendell: Law of Succession, Macmillan, London, 1997 pgs. 10 and 11) as a direction given by a nominator to another person or entity who or which is holding funds on her behalf, to pay the funds on the nominator's death to a nominee appointed by the nominator during the nominator's lifetime. The nomination or direction by the nominator only takes effect after the death of the nominator.
32. In Kenya, nominations are typically made in relation to investments and savings in cooperative societies, provident funds, and pension plans. The *Co-operative Societies Act* of 1997 establishes statutory requirements for nominations. According to Section 39(1) of the *Co-operative Societies Act* of 1997, upon the death of a member, a cooperative society may transfer the deceased member's share or interest to: a person nominated in accordance with the Act or the rules made under it; or, in the absence of a nomination, to such person as may appear to be the deceased member's personal representative. The shares can only be transferred to the deceased member's personal representative, if there is no formal nomination in place.



33. The trustees under discretionary pension schemes are typically given discretion under the rules of the scheme to exercise their discretion in favour of the nominated person or disregard the nomination entirely and pay the deceased's dependents. Thus, the nomination under discretionary pension schemes is not binding on the trustees of the scheme. The nominations made under discretionary pension plans are different from statutory nominations in that they do not bind the pension fund's trustees; rather, they seek to meet the deceased person's preferences. The trustees are not required to give the nominee the nominated funds. The funds from the discretionary pension scheme are not part of the estate of the deceased.
34. The Court in *Benson Mutuma Muriungi vs. C.E.O. Kenya Police Sacco & Another* [2016] eKLR elaborates that as a general rule, discretionary pension schemes may allow the contributor to nominate a third party who will receive the member's benefits on the death of the contributor. However, such nomination is merely indicative of the deceased's contributor wishes; it neither gives property rights to the nominee nor legal ownership of any part of the Trust to the deceased contributor so as to form part of the deceased's estate. Similarly, the trustees are not bound to pay the nominated funds to the nominee. The reason is because the trustees are the legal owners of the Trust property.
35. Nevertheless, the discretion of the Trustees is guided at first instance by the nomination which is taken to be the wishes of the deceased contributor. And where the trustees exercise their discretion in favour of the nominated person, they pay the lump sum or pension directly to the third party.
36. A classic example is Rule 19 of the *Retirement Benefits (Individual Retirement Benefits Schemes) Regulations 2000*, the scheme rules state that in the event of a member's death, benefits due under the scheme should be paid to the beneficiary they have designated, or, in the absence of a beneficiary designation, to the member's dependents, at the discretion of the trustees. There is a restriction that the trustees may, for specific justifications, refuse to pay the designated beneficiary. Similar language can be found in Rule 23 of the *Retirement Benefits (Occupational Retirement Benefits Schemes) Regulations 2000*.
37. *In the Matter of the Estate of Carolyne Achieng' Wagah (Deceased)* Nairobi High Court Succession Cause No 1374 of 2004, the Court clearly stated the law as follows:
- “It is the law that funds the subject of a nomination do not form part of the nominators estate, and therefore such funds cannot pass under the will of the deceased or vest in his personal representative. Such funds are not subject to the succession process, and should be dealt with in accordance with the law governing nomination. Nominations are statutory, in the sense of them being specifically provided for by a particular statute.”
38. The character of the by-laws under the *Co-operative Societies Act* is stated in Sections 12 and 13 of the said *Act* that: Once by-laws are registered, they bind the society and the members thereof to the same extent as if they were signed by each member and contained covenants on the part of each member for himself and his personal representatives to observe all the provisions of the by-laws.
39. The by-laws also regulate the operations of the Sacco on all matters contained in the by-laws. Again, these by-laws regulate the relationship among the Sacco, members, their nominees and their personal representatives as the case may be. Of importance, these by-laws give effect to the statutory nominations provided for in the enabling laws. The by-laws do not confer power to make statutory nominations or power to pay dues of a deceased member to such nominees; they simply give the Sacco the practical mechanism on how members will nominate their respective nominees under the law.



40. Furthermore, *In Re Estate of Faith Muita (Deceased)* [2016]eKLR the Court held that nominations operate under the rules of a particular scheme. As such, the property that forms the subject of a nomination does not form part of the nominator's estate, for the reason that the funds are meant to be paid to the nominee of the nominator. Although they dispose of property upon death, they do not comply with the requirements of a will, and they are therefore not subject to the law of succession.

Is a Nominated property subject to succession?

41. The property being nominated does not pass through a will and is not a part of the nominator's estate. Since it is not a part of the nominator's estate, it does not vest in the personal representatives of the deceased. As a result, the payer (the individual holding the investment) before transferring assets to the nominee, is not required to get a grant (of probate or letters of administration). The payer will only need to see the nominator's death certificate before making payment because the direction is to pay upon death.
42. The disposal of benefits, deposits, interest and dividend due to the deceased member is regulated by the Co-operatives Act and By-laws of the Sacco. Thus, nominated property does not fall under the guidelines provided by the *Law of Succession Act*. Similar to the beneficiary under a will, the nominee has no claim to the funds while the nominator is still alive. Instead, the nominator is free to do as they want with the assets at any moment during their lifetime. A nomination may be revoked by a later nomination, the nominator's subsequent marriage, the nominee's passing before the nominator. A future will or codicil cannot revoke a nomination.
43. The 2nd – 4th Respondents claim is that the suit land belonged to their father and the same ought to have been subject to Succession of his late estate which is ongoing so that the beneficiaries benefit from it.
44. PW2 led evidence that his father nominated him and upon his death his shares were transferred to him. He produced PEX No 2, 3, 4 and 5 transfer of shares and membership to him.
45. It is on record that the Society confirmed that the suit land was transferred to George Mwangi Muga on 13/8/1993 in accordance with the nomination by his father.
46. The letter states:-

“Kiamumbi Farmers Co-operative Society Limited

30-1-97

M/s Njiru Mbogo & Co. Advocates,

Box 34209,

NAIROBI

Dear Sir,

RE: In The Matter Of The Estate Of Mwangi Muga (deceased)

We refer to your letter Ref. 506/6/89 on the above subject, and a copy of letter from our father one Esther Mwendu Mwangi.

The shares and membership of the late Mwangi Muga were transferred to his nominee, a George Muga Mwangi on 13/6/95 in accordance with Co-operative Society's Act, Cap 490 Section 37(1) (a) and arbitrary legislature 11 Rules under Section 24 of Cap 430.



The transaction was thus properly done and endorsed by full management committee meeting.

Yours faithfully,

K. Gachichio

Chairman

For Management Committee Kiamumbi F.C. S Ltd.”

47. Section 39(1) of the *Co-operative Societies Act* provides as follows:-

(1) On the death of a member, a co-operative society may transfer the share or interest of the deceased member to—

- (a) the person nominated in accordance with this Act and any rules made thereunder; or
- (b) if there is no person so nominated, such person as may appear to the Committee of the society to be the personal representative of the deceased member; or
- (c) if either of such persons is not qualified under this Act and any rules made thereunder or the by-laws of such society for membership, such person, specified by the nominee or personal representative, as the case may be, who is so qualified, or may pay to such nominee or personal representative, as the case may be, a sum representing the value of such member’s share or interest ascertained in accordance with any rules made under this Act or by-laws of the society:

Provided that—

- (i) in the case of a co-operative society with unlimited liability, such nominee or personal representative, as the case may be, may require the society to pay him the value of the share or interest of the deceased member ascertained in the manner mentioned in this subSection; or
- (ii) in the case of a co-operative society with limited liability, the society shall transfer the share or interest of the deceased member to such nominee or personal representative, as the case may be, being qualified in accordance with this Act or any rules made thereunder or the by-laws of such society for membership of the society, or on his application within one month of the death, to any person specified in the application, who is so qualified.”

48. I find that the evidence of nomination was not challenged by the Respondents. The Magistrate gave this evidence a wide berth leading to the wrong decision.

49. I agree with the decisions relied on by the Appellant in *Re Estate of Faith Muita (Deceased)* [2016]eKLR where it was held:-

“7. One other thing to note about nominations is that they operate under the rules of a particular scheme. Although they dispose of property upon death, they do not comply with the requirements of a will, and they are therefore not subject to the law of succession. The property the subject of a nomination does not form part of the nominator’s estate, for the reason that the funds are meant to be paid to the nominee of the nominator. The person to whom the funds ought to be paid is designated. Nominated funds cannot pass by the will of the nominator. The said funds, the subject of the nomination, cannot vest in the personal



representatives of the nominator for the simple reason that they do not form part his or her estate. It is for that reason that the person holding the funds, or the scheme manager, need not require a grant of representation before paying out the funds to the nominee or beneficiaries. The direction is that the funds be paid out on death, so the person holding the funds should only require proof of death before making the payment.”

Intermeddling

50. It is the case of the 2nd – 4th Respondents that the registration of the shares and transfer of the land to the Appellant was fraudulent.

51. On this point the trial Court held:-

“The Society transferred the shares belonging to the late Charles to George Muga however, this was clearly illegal as the Succession Cause had not been determined and this being the property of a deceased the Law of Succession must be applied. Following the transfer the Defendants were disgruntled and they lodged various complaints and restrictions on the suit land. However without their knowledge George managed to get the restrictions lifted on 13/9/2017 and he sold the suit land and transfer was done on 21/12/2017 which is a short three months. This was clearly a scheme by the said George to quickly dispose off the land for his benefit and to the detriment of the other beneficiaries. The Defendants were never summoned before the restrictions were lifted and I can only read fraud on the part of the said George.”

52. Having held that the shares were not subject to the Law of Succession the Court is satisfied that there was no intermeddling of the deceased assets before Succession. In any event evidence was led that the shares were not part of the Succession of the estate of the deceased in Succession Cause No 147 of 1990.

Fraud & Illegality

53. The Appellant led evidence that he carried due diligence on the land before purchasing it. Having held that the land was lawfully transferred to George Mwangi Muga, I find that no fraud and or illegality was proven by the Respondents against the Appellant. The Appellant is a bonafide purchaser for value without notice.

54. Having disposed of all the issues raised in the Appeal, I find the appeal is merited.

55. It is allowed as prayed.

56. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 25TH DAY OF MAY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Ochieng HB Ms. Njeri for Appellant

Ms. Waigwa for 1st – 4th Respondents

Court Assistants – Kevin & Lilian

