



**Ole Kariankei v Ole Nkoitiko (Environment and Land Appeal
E009 of 2022) [2023] KEELC 19034 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19034 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E009 OF 2022**

**CG MBOGO, J
JULY 26, 2023**

BETWEEN

KANTET OLE KARIANKEI APPELLANT

AND

MARTINE OLE NKOITIKO RESPONDENT

JUDGMENT

1. The appellant herein being aggrieved by the whole of judgment of George Wakahiu CM, in Narok CM ELC No 59 of 2018 delivered on April 13, 2022 appeals to this court vide the memorandum of appeal dated September 28, 2022 on the following grounds: -
 1. That the learned magistrate's judgment delivered on April 13, 2022 is prejudicial, unjust and unfair.
 2. That the learned magistrate erred in law and fact by failing to take into consideration the points of law tendered before it.
 3. The learned Hon Magistrate erred in law and in fact in failing to consider and analyse the entire evidence of the witnesses and thereby arrived at the wrong finding and decision.
 4. That the trial court failed to appreciate the evidence of the appellant.
 5. The learned Hon. Magistrate erred in law and in fact by invoking/considering facts otherwise extraneous.
 6. The decision of the trial court was and is against the weight of evidence thus bad in law.
 7. That the learned magistrate erred in law when he upheld an erroneous position that the respondent had a valid title to parcel no Cis-Mara/Ewasongiro/936 notwithstanding glaring evidence of illegalities and unprocedural transfer by the respondent.



2. The appellant prays that the judgment of the Hon George Wakahiu, CM in respect of Narok CM ELC No 59 of 2018 delivered on April 13, 2022 be set aside and the appeal herein be allowed with costs to the appellant.
3. The memorandum of appeal was canvassed by way of written submissions. The appellant filed written submissions dated April 18, 2023. The appellant raised four issues for determination as listed below: -
 - a. Whether the Hon Magistrate erred in law in his judgment by holding that transfer of parcel LR No Cis-Mara/Ewasongiro/936 to the respondent was legal hence respondent's title was valid in law.
 - b. Whether the respondent's title to the suit property Cis-Mara/Ewasongiro/ 936 is impeachable.
 - c. Whether the appellant should be declared the bonafide proprietor of the suit property LR No Cis-Mara/ Ewasongiro/936.
 - d. Who is to bear the costs of the appeal.
4. On the first issue, the appellant submitted that the trial court erred in fact and in law in finding that the sale agreement was good to convey good title to the respondent as the appellant allegedly executed an agreement for parcel no 204 but transferred the suit property. That it should be noted that the purported sale agreement did not state that it was explained to the appellant in his native language and voluntarily executed the same as he only admitted to executing a lease agreement with the respondent.
5. The appellant submitted that it is manifest that the transfer of parcel no 936 was unprocedural and illegal as there was no sale agreement written in support thereof. The appellant relied on the case of *Silverbird Kenya Limited versus Junction Limited & 3 Others* [2013] eKLR and submitted that no sale agreement was produced in court and none existed as per the evidence.
6. The appellant further submitted that the trial court erred in finding that the transfer instrument for the suit land to the respondent was legal despite the illegalities flagged and that the trial court also erred in failing to address how the transfer was complete without surrender of the original title which the appellant still holds, yet procedure for unavailable title was never followed. The appellant relied on the cases of *Evanson Wambugu Gachugi versus Simon Wainaina Gatwiki & 2 Others* [2014] eKLR and *Munyu Maina versus Hiram Gathiba Maina*, Civil Appeal No 239 of 2009.
7. The appellant invited this court to look at the transfer that was received for registration on October 4, 2010 as the vendor (appellant) was in prison and could not have appeared before the said advocate Onduso and sign the transfer having been imprisoned on February 20, 2009 and released on February 20, 2011. Also, that the trial court failed to consider the identity of the transferor and transferee which was not verified by Onduso, Advocate. Also, the appellant submitted that the transfer was not in the prescribed form as at the date the alleged transfer occurred.
8. The appellant urged this court to take judicial notice of the plaint by the respondent in PMCC 11 of 2010 as CisMara/Ewasongiro/814 was not subdivided as of this date and consequently, the suit property which came off L.R. No. 814 did not exist and that the appellant did not appear at the advocate's office to execute transfer for the suit property or appear at the Land Control Board meetings since he was in prison during that period. The appellant relied on the cases of *Estate Sonsira Limited & Another versus Samuel Kamau Macharia & 2 Others* [2020] eKLR and *David Ole Tukao versus Francis Arap Muge & 2 Others* [2014] eKLR.



9. The appellant further submitted that the trial court erred in law and in fact by determining that the court issued a transfer order consequent to the appellant's hide and seek a fact that has no foundation. Further, that the decree referred to relates to parcel LR No 204 and not the suit property that was subsequently illegally transferred. In addition, that the trial court failed to find that no spousal consent was sought and obtained to aid the transfer which is another illegality and that on cross examination, no document was presented authorising subdivision of parcel no. 814 which was registered in the name of the appellant.
10. The appellant further submitted that the trial court erred in fact by making a similar finding and declared the transfer legal against the evidence available and the provisions of the law. Further, that it determined that there was constructive trust yet it was not pleaded by the respondent and it was an error by the trial court to invoke evidence not pleaded and appear to plug holes in the respondent's case rather than apply the law as it exists.
11. The appellant further submitted that the transfer of the suit property is impeachable and for this reason, the appeal meets the threshold as was in the case of *Ephantus Mwangi versus Duncan Mwangi Wambugu* (1982-88) 1 KAR 278.
12. In conclusion, the appellant submitted that the appeal has merit and ought to be allowed in his favour with costs.
13. The respondent filed written submissions dated April 22, 2023 and filed in court on May 29, 2023. The respondent issues for determination are similar to those of the appellant and, therefore, there is no need to reproduce the same.
14. On the first issue, the respondent submitted that the agreement for sale was for parcel of land registered as Cis-Mara/Ewaso Ngiro/204 which the appellant is well aware of the transaction emanating from the sale agreement dated May 3, 2004 as he sought the remaining payment of Kshs 20,000/- although he claims to be illiterate. The respondent referred to the acknowledgement produced at page 191 of the record of appeal. As such, the respondent submitted that the appellant has attempted to mislead this court as to the nature of the agreement at page 32. The respondent relied on the case of *The Speaker of Kisii County Assembly versus James Omariba Nyaoga* [2015] eKLR.
15. The respondent further submitted that his title changed numbers from Cis-Mara/ Ewaso Ngiro/204 to 720/721, to 814/815 and to 936/937 and as such, at the time of the sale agreement, the title was still registered as Cis-Mara/Ewaso Ngiro/204. Further, that the appellant refused to surrender the title and, in an attempt to defeat justice, caused three sub-divisions on his land. The respondent submitted that a sale transaction matter cannot be a moving target but definite grounded on a valid sale agreement. That the parcel referred to as Cis-Mara/Ewaso Ngiro/204 may change numbers but the parcel of land remains the same on the ground. Further, that despite its new reference number being Cis-Mara/Ewaso Ngiro/936, it is the same parcel of land referred to in the sale agreement dated May 3, 2004.
16. The respondent further submitted that being bound by the sale agreement and having performed his obligations under the contract, the respondent made every attempt to compel the appellant to comply with the objects of the agreement. The respondent relied on the cases of *Sisto Wambugu versus Kamau Njuguna* [1983] eKLR and *Thomas Openda versus Peter Martin Ahn* [1984] eKLR.
17. The respondent further submitted that he obtained orders in Civil Case No 11 of 2010 which were issued on September 14, 2010 and by this time, the appellant had already subdivided the suit property to Cis-Mara/Ewaso Ngiro/814 which title was issued on March 2, 2010. That the appellant is well aware of the facts and of his own non-compliance.



18. On the issue that the transfer is tainted with illegalities, the respondent submitted that he adduced evidence before the trial court to the contrary as forensic document examiner answered all questions and discharged all doubts surrounding the signature, thumb print and impressions of the appellant on the sale agreement, acknowledgment of receipt of payments, transfer of land form and the application for consent for of the Land Control Board Consent. Reliance was placed in the case of *Alice Chemutai Too versus Nickson Kipkurui Korir & 2 Others* [2015] eKLR.
19. The respondent further submitted that the appellant has previously admitted before a competent court that there was a sale agreement of land transaction between himself and the respondent in Criminal Case No 825 of 2008.
20. The respondent further submitted that the issue of the appellant's appearance at the firm of Onduso, Advocate is settled as the Advocate that drew the sale agreement testified on the identity of the appellant while executing the sale agreement. That contrary to the assertions made by the appellant, the date of receipt of transfer of land form must not be the same as the date of signing and the fact that the form was submitted on any day after it was signed by the appellant does not defeat the legitimacy of the transfer of land.
21. On whether there was spousal consent, the respondent submitted that the appellant's wife testified in paragraph 14 of her sworn statement that she would like her husband(appellant) to pay back the money he took from the respondent and leave their land intact. Also, that it is on record that the appellant's wife cooked the respondent's tea when the Surveyors were demarcating the land. The respondent submitted that the claim that he be refunded his purchase price is not agreeable to him.
22. Further that the issue of dates on the registration of transfer of the land form as being after the issuance of the respondent's title are sensationalised as the District Land Registrar submitted under oath that such small clerical errors are common and not fatal.
23. The respondent submitted that there is no such fraud or mistake on the title that the appellant has established to warrant amendment or cancellation of the register. The respondent relied on the cases of *Koinange & 13 Others versus Charles Karuga Koinange* [1986] eKLR, *Joseph Gitari versus Mutbui Chomba & 7 Others* [2018] eKLR and *Elijah Makeri Nyang'wara versus Stephen Mungai Njuguna & Another* [2013] eKLR.
24. The respondent further submitted that the appellant has failed to prove the particulars of fraud against him and that as evidenced by the testimony of the five witnesses in the primary suit, the process through which title number Cis-Mara/Ewaso Ngiro/936 was processed complied fully with the law.
25. On who should bear costs, the respondent submitted that he had been awarded costs in the lower court and the respondent has missed the opportunity to enjoy his property to the exclusion of others despite his ownership. Also, that he has incurred huge expenses in litigation before various firms of advocates. The respondent relied on the case of *Supermarine Handling Services Limited versus Kenya Revenue Authority* [2010] eKLR (Civil Appeal 85 of 2006).
26. This is a first appeal and the law is that this court is entitled to revisit the evidence on record, evaluate it and arrive at its own conclusion. Often times, an appellate court will not interfere with the findings of fact by the trial court unless they were based on no evidence at all or were arrived at on a misapprehension of it or the trial court is shown to have acted on wrong principles in arriving at those findings as it was held in *Mwanasokoni versus Kenya Bus Service Ltd* (1982 – 88) I KAR 278.



27. In addition, this court must also take into account the fact that it did not have the opportunity of seeing or hearing the witnesses and must therefore make due allowance in that respect – *Selle & Another versus Associated Motor Boat Co. & Others* (1968) EA 424.
28. I have carefully analysed and considered the grounds of appeal, the written submissions filed together with the authorities and at this stage, this court in determining whether the memorandum of appeal has merit or otherwise, will look at the history of the title No Cis-Mara/Ewaso Ngiro/ 936 registered in the name of the respondent and see whether in acquiring the same, the respondent followed due process vis a vis the submissions of both parties and whether the trial court in arriving at its decision, applied the law in a fair and just manner.
29. The appellant instituted a suit against the respondent vide a plaint dated March 13, 2012 before the High Court in Nakuru in Civil Case No. 90 of 2012 seeking the following orders: -
- a. The sale of land agreement dated May 3, 2004 and the transfer be declared null and void for all intents and purposes.
 - b. The judgment and decree in SRMCC No 11 of 2010 and all consequential orders and registration be declared null and void.
 - c. That title number Cis-Mara/Ewaso Ngiro/ 936 be cancelled and the same be reverted back to the plaintiff.
 - d. That the defendant by himself, his servants and agents be permanently restrained from interfering in any way whatsoever with title number Cis-Mara/Ewaso Ngiro/936.
 - e. Damages.
 - f. Costs and interest.
30. In the plaint, the appellant stated that the he was originally the registered proprietor of title no. Cis-Mara/Ewaso Ngiro/720 measuring approximately 37.06 hectares which he subsequently sub-divided into two portions; Cis-Mara/Ewaso Ngiro/ 814 and 815 measuring 34.58 and 2.43 hectares. Further, that the defendant instituted suit in Narok SPMCC No 11 of 2010 claiming that he had entered into a sale agreement in respect of title No Cis-Mara/Ewaso Ngiro/ 204 on or about May 3, 2004 and by the time the sale agreement was entered into, Cis-Mara/Ewas Ngiro/ 204 had been subdivided into two portions ie Cis-Mara/Ewaso Ngiro/720 and 721 way back in the year 2002. Also, that the court authorised the Land Registrar to issue a title deed to the respondent from this title Cis-Mara/Ewaso Ngiro/204.
31. The appellant further stated that at the time the suit was commenced, the title no Cis-Mara/Ewaso Ngiro/204 had been subdivided to parcel no. 720/721 and the parcel no 720 was divided into two portions giving rise to parcel no. 814/815 and that the respondent wrongfully and unlawfully used the decree to cause subdivision of parcel no. 814 into two portions which gave rise to Cis-Mara/Ewaso Ngiro/ 936 and 937 which measures approximately 32.56 and 2.02 hectares.
32. The appellant pleaded issues of illegalities on the decree, sale agreements and the transfer and issuance of the title deed with respect to parcel no 936.
33. The respondent filed a defence which is not contained in the record of appeal but from the lower court record dated July 3, 2013. In the defence, the respondent while denying the contents of the plaint, stated that he instituted Narok SPMCC No 11 of 2010 with respect to the breach of the sale agreement dated May 3, 2004 and which he obtained against the appellant. Further, that the processing



and issuing of new titles was for both parties and was to be guided by the mutation form and while denying the contents of paragraph 10 of the plaint, the respondent stated that the appellant applied for subdivision of Cis-Mara/Ewaso Ngiro/ 814 by the mutation form dated July 7, 2008 and that the appellant wilfully transferred parcel no. 814 to the respondent and consented to the same being subdivided.

34. The respondent further denied any illegality on the decree and averred that the sale agreement was witnessed and met the conditions set for a legal sale agreement. Also, he stated that the appellant breached the contract despite being paid the purchase price.
35. The matter proceeded before Kullow, J where the appellant (PW1) and Saroni Kariankei (PW2) testified and the appellant's case was marked as closed. On April 23, 2018 Kullow J noted that the matter fell under the jurisdiction of the magistrates' courts and transferred the file to the lower court for hearing and determination.
36. The respondent's case proceeded for hearing on July 17, 2019 when the respondent testified. Further defence hearing proceeded on May 11, 2021 when Erotas Onyango (DW2) and Juliet Maritim (DW3) testified. On November 24, 2021, Tom Chepkwesi (DW4) and Ken Too (DW5) testified.
37. Going back to the trial before court, it was the appellant's evidence that he never sold the land to the respondent but only leased the same to him. The appellant in his evidence informed the court that he did not know the parcel number but had a title which he produced for Cis-Mara/814 measuring approximately 34.55 hectares. The appellant denied the signature on the agreement and testified that at the time, the respondent would go to his house when he was drunk and take his thumb print. The appellant produced the sale agreement marked as PEx No 2 and further testified that he was imprisoned in the year 2009 for owing Kshs 80,000/- and was released in the year 2011 and it was not therefore possible for him to execute the transfer of land form. He produced the release order marked as PEx No 3. The appellant denied the knowledge of the Land Control Board consent as he never went there and neither did he authorise or bring Surveyors for purposes of subdivision. He further testified that he was not aware of any suit filed in Narok for the subdivision of his land as he was serving time in prison and maintained that his property was never subdivided and that he was also not aware of the existence of a mutation form dated July 7, 2008.
38. On cross examination, the appellant testified that he never recorded a statement with his advocates, that he was never paid any money and could also not recall signing for money that he received at the advocates' office.
39. PW2 who is wife to the appellant testified that they leased out the land to the respondent who later claimed to have bought it from the appellant. However, the only money she was aware of was for the lease and that when the respondent told her about the sale, she referred the respondent to her husband who was aware of the talk. PW2 further testified that she hid the title from the appellant and the respondent so that they could not transfer the land and together with her husband they were arrested. That later, the respondent filed suit against the appellant who was in prison during that time and later they learnt that the respondent had obtained title to the land and left them with five acres only.
40. The respondent, in his defence testified that when he bought parcel number 204, he was with two other people who also bought land under different agreements and that he bought 85 acres at Kshs 10,000/- per acre. That an agreement for the sale of land was prepared by Maritim Advocate in her office and he saw the appellant sign the agreement. Also, that his wife was aware of the same. That he paid the purchase price in two instalments, the first payment was Kshs 830,000/- and they agreed that he pays the balance of Kshs 20,000/- when he got the transfer. That he later paid the appellant Kshs 20,000/- who avoided him when it came to the issue of transfer. That later, when he met the appellant



at home, he refused to transfer the parcel of land and he informed the elders that he had not sold the land and upon the elders being shown the agreement, the appellant said that he would only give the respondent half of the 85 acres.

41. The respondent further testified that he reported the matter to the Criminal Investigations Department where the appellant was charged and later imprisoned for three years. That during this time, the appellant was summoned while in prison but never appeared in court.
42. On cross examination, the respondent testified that he conducted a search before he entered into an agreement and at the time, parcel no 204 had not been subdivided. The respondent testified that the mutation form was for parcel no 814 and that the appellant signed the mutation form on May 23, 2008 before he was jailed in the year 2009.
43. In his evidence, DW2 testified that the sale agreement dated May 3, 2004 and the application to the Land Control Board Consent were all signed by the appellant. Also, in her evidence, DW3 testified that she drafted the agreement which both parties executed in the presence of Nahu Ogeto Otamba and that the appellant was paid Kshs 830,000/- in her office which she signed an acknowledgement. On re-examination, DW3 testified that the transfer is a copy which does not have a number which according to her, it is valid.
44. DW4 testified that the copy of the transfer is a draft which purports to be for a parcel number that was not clear and that based on the decree of the court dated September 14, 2010, the land registrar at the time was supposed to transfer the parcel of land to the respondent.
45. On cross-examination, DW4 testified that the parcel transferred was 814 whereas the decree was in respect to parcel no. Cis-Mara/Ewaso Ngiro/ 204 and that there was no document authorising subdivision of 814. With respect to parcel no 204, DW4 testified that he had no documents and cannot tell whether it was in existence as per the date of the agreement and if stamp duty was paid, he would not know.
46. DW5 testified that parcel no 936 was a subdivision of 814 whose date of transfer was September 27, 2010. He acknowledged an error on the date which was received for registration indicated as October 4, 2010 whereas registration was on September 27, 2010. DW5 further testified that Ochege Onduso-Advocate witnessed the appellant as transferor although the same does not have a date. And as such, that the certificate may not be properly executed. It was his evidence that the transfer was effected, there was a letter of consent and that stamp duty was paid. He further testified on re-examination that the fact that the executor of the transfer document forgot to indicate the date does not make the documents as invalid.
47. In arriving at its determination and finding, on whether the sale agreement was legal, the trial court found that it was valid and binding and was not convinced that the appellant proved that indeed there existed special circumstances that would relieve him from the contract.
48. On whether the transfer was illegal, the trial court found that the appellant received the deposit as agreed but had no valid reason for failing or refusing to transfer the consent and that the appellant's conduct then constituted sufficient reason for the court to intervene and issue an order for transfer and as such it was legal.
49. On whether the appellant was entitled to the orders sought, the trial court found that the respondent's title was valid and indefeasible.
50. Having looked at the above, it is not in doubt that the parties entered into a sale agreement dated May 3, 2004 for the sale and purchase of land known as Cis-Mara/ Ewaso Ngiro/ 204 as can be seen from the



report of the forensic expert witness who concluded that the appellant herein executed the agreement. However, the attention of this court is drawn to the history of parcel no 204 and 814. A closer look at the recitals in the agreement dated May 3, 2004 shows that the appellant herein as the registered proprietor of that plot known as Cis-Mara/Ewaso Ngiro/ 204 measuring approximately (130) One Hundred Thirty acres of which he is desirous of selling Eighty Five (85) acres to a ready and a willing purchaser on the terms and conditions as herein agreed. It is clear to me that the appellant was indeed the owner of parcel no. 204 which measured 130 acres. Out of the 130 acres, the respondent purchased 85 acres.

51. It is from parcel no 204 that gave birth to parcel no 720 and 721 as a result of subdivision which later parcel no 720 gave rise to parcel no 814 and 815. Parcel no 814 was then subdivided giving rise to parcel no 936 and 937. In my view, the trial court was proper in its finding and in arriving at the conclusion that there existed special circumstances that would relieve the appellant from the contract.
52. There was evidence that the appellant indeed entered into a valid sale agreement with the respondent even from his own admission in the Criminal Case No 825 of 2008 where he admitted that indeed the facts stated therein were true. The evidence of PW2 also pointed out to an admission of fact where the appellant's wife hid the original title deed to avoid any transfer of the title and in that case, the respondent was left with no option but to seek assistance from the court.
53. From the above, it can be seen that the appellant by all means was reluctant to transfer the suit property being parcel no 936 to the respondent which required the court's intervention. In my view, due process was followed.
54. Arising from the above, I see not merit in the memorandum of appeal dated September 28, 2022 and the same is hereby dismissed with costs to the respondent. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 26TH DAY OF JULY, 2023.

HON. MBOGO C.G.

JUDGE

18/7/2023.

In the presence of:

CA:Chuma

