



Elias & another v Hezekiah & 2 others (Suing as the Legal Representatives and Administrators of the Estate of Kinga M’abira – Deceased) (Environment and Land Appeal 2 of 2022) [2023] KEELC 429 (KLR) (1 February 2023) (Judgment)

Neutral citation: [2023] KEELC 429 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL 2 OF 2022
CK NZILI, J
FEBRUARY 1, 2023**

BETWEEN

MUNGANIA MUTWIRI ELIAS 1ST APPELLANT

PURITY NTINYARI MURITHI 2ND APPELLANT

AND

STELLA KATHAMBI HEZEKIAH 1ST RESPONDENT

SAVELA WANJA M’ABIRIA 2ND RESPONDENT

JENNIFFER KANANA M’ABIRA 3RD RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF
THE ESTATE OF KINGA M’ABIRA – DECEASED**

(Being an appeal from the Judgment of Hon. S. Ndegwa SPM Githongo delivered on 26.7.2021)

JUDGMENT

1. By a memorandum of appeal dated 23.8.2021, the appellants who were the defendants at the trial court faults the judgment of the trial court for:- shifting the burden of proof to the appellants; invalidating the sale agreement between the appellants and the deceased; finding the land control board consent irregularly obtained; finding that the appellant did not produce any evidence of sale; for disregarding the evidence of the advocate who drew the sale agreement and the land registrar; for finding the respondents entitled to damages and lastly for going against the facts and the law.
2. In the case of *Gitobu Imanyara & 2 others vs AG* (2016) eKLR the court held that a 1st appellate court’s mandate is by way of retrial by reconsidering the evidence, making its own evaluation and drawing its own conclusions bearing in mind that it has neither seen nor heard the witnesses and should make some allowance for that. On the same line the courts in *Peters vs Sunday Post* (1958) E.A 424 and *Abok*



James Odera t/a AJ Odera & Associates vs John P. Machira t/a Machira and Co. (2013) eKLR took the view that if there was no evidence to support a particular conclusion, the court should not hesitate to decide and this can only be done through re-evaluation, re-assessment and re-analysis of the extracts of the record to establish if the conclusion by the trial court can stand or not and give reasons either way.

3. At the trial court the respondents' claim as contained in the plaint dated 6.5.2015, against the appellants as the legal representatives and administrators of the estate of their brother the late Kiunga M'Abira and the registered owner of LR No. Abothuguchi/Gitie/960 was that they had illegally, unlawfully, fraudulently and or procedurally transferred into themselves and trespassed into their late brothers land shortly after his death.
4. The respondents sought for the invalidation of the transfers and registration on account of fraud, cancellation of the title, transfer of the land to the estate of the deceased and for general damages. The plaint was accompanied by a list of witness statements and documents of the even date and a supplementary list of documents dated 24.4.2017.
5. By a defence dated 16.6.2015, the appellants denied the contents of the plaint and specifically averred that they bought the suit land from the deceased in April 2014 for Kshs.500,000/= leaving a balance of Kshs.100,000/= payable after the transfer. The appellants averred that the deceased signed the transfer forms together with the completion documents, passed the title before his demise and collected the balance of the purchase price hence there was nothing owed to his estate. Through a reply to defence dated 19.6.2015, the respondents insisted that the appellants acquired the suit property after the deceased had passed on while the sale agreement or transfer forms were null and void in law; that the issue had been dealt with at both the elders and chiefs' level and the appellants informed that they had no good title to the land.
6. At the trial, Stella Kathambi Hezekiah, PW 1 relied on an authority dated 4.5.2015 to sign the affidavit on behalf of her co-respondents. She adopted her witness statement date 4.5.2015 as her evidence in chief. Her evidence was that her late father Jackson M'Inila owned Parcel No. Abothuguchi/Gitie/213 which he had subdivided into LR No. Abothuguchi/Gitie/966 and transferred the same to the deceased. That the deceased was sick for long until he passed on 21.11.2014 following which in December 2014, they established the alleged transfers made on 27.11.2014 yet he was already dead.
7. PW 1 said that they enquired from the appellants who became uncooperative hence referred the matter to the area chief. She produced a copy of the death certificate as P. Exh No. (1), Limited grant as P. Exh No (2), chiefs' letter as MFI P no(3), a copy of an official search as P. Exh No. (4), copy of records as P. Exh No. (5), caution form as P. Exh No. (6), an appliciaotn for consent as P. Exh No. (7), affidavit by Kinya M'Abiria as P. Exh No. (8), a land control board consent as P. Exh No. (9) and a ruling in Meru H.C Succession Case No. 39 of 2019 as P. Exh No. (10). PW 1 confirmed that the deceased had no surviving wife or children by the time he passed on.
8. In cross examination, PW 1 said that she was not aware of the land control board meeting held on 21.8.2014, the subsequent consent issued on same date and the transfer form dated 21.10.2014. Further, PW 1 admitted that the deceased before he met his death was staying with one Kiunga and that one Elias was simply helping the deceased so as to benefit from him.
9. PW 2 was David Murangiri, a young brother of the deceased. He associated his evidence as that of PW 1 save to state that they were never invited to attend any land control board meeting or to witness the sale agreement. He confirmed that it was the 1st appellant in occupation of the suit land. In cross examination, PW 2 admitted that the deceased was alive in August 2014 and that the signature, photograph and the affidavit sworn on 2.10.2014 appeared to belong to and signed by the deceased.



- PW 2 also said that it was PW 1 who used to assist the deceased but could not tell who cleared both the hospital bill and catered for the burial expenses.
10. PW 3 was Bernard Kibira Kamwaro, a land registrar Meru Central registry. He told the court that as per the land records transfer forms were lodged and processed on 27.11.2004 accompanied by the application for consent dated 19.8.2014. Additionally, PW 3 said it was possible to transfer the land if the documents were prepared before the transferor died even though afterwards a grant for letters of administration was mandatory. He however stated that it was not mandatory for the transferor to personally attend his registry during the transfer process. Similarly, PW 3 confirmed that the land was transferred on 2.10.2014 since the transfer documents were prepared by a duly authorized person hence valid. PW 3 said that his office was never notified of the death of the deceased otherwise they would not have affected the transfer.
 11. Robert Murori the Chief Kiija Location testified as PW 4. He acknowledged writing MFi P No. (3) which he produced as P. Exh No. 3, following a complaint by the respondents over trespass to the suit land by the appellants.
 12. DW 1 was Purity Ntinyari, the 3rd appellant herein. She adopted her witness statement dated 25.5.2017 and produced a sale agreement dated 5.4.2014 as DMFI No. (1) and confirmed that an application for a land control board consent was signed by the deceased following which a letter of consent was issued. She vehemently denied that the transfer documents were signed after the death of the deceased but admitted that they were lodged with the land's office six days after his death, the reasons being that the deceased fell sick soon after signing the documents, during which time the appellants were busy taking care of him in and out of the hospital.
 13. DW 1 also said that they took the deceased to their advocates offices to follow up on the registration. She also ascertained that the deceased was living on the suit land until his death where he was also buried. Further, DW 1 also said that the purchase price was paid in three instalments of Kshs.300,000/=, 100,000/= and lastly Kshs.100,000/= upon the transfer.
 14. DW 1 told the court that she knew that the deceased was living alone on the suit land which he had acquired from his late father, while his relatives were occupying the neighboring parcel. She stated that she informed the deceased relatives about the sale including one Mr. Erastus Mbogori M'Abiri and one Gitonga then working at the land's office. DW 1 admitted that the deceased was not accompanied by any relative when they appeared before the land control board.
 15. In addition, DW 1 said that thereafter all the transfer forms were lodged at the land's registry by their advocates though later since they were taking care of the deceased hence the reason that the transfer was affected upon his death. She stated both that the sale and transfer were done lawfully since all the documents had been legally executed by the deceased.
 16. DW 1 however clarified that during the burial, there was a lot of tension hence the reason she could not formally notify the relatives on the burial day but she eventually made a protest during the succession proceedings.
 17. The 2nd witness for the appellants was Lawrence Mugambi Mungania an advocate who drew and executed the sale agreement and the transfer documents. He told the court that the deceased, his brother Elias and the appellants in early 2014 sought for his services to transact on the suit land and he informed them on the requirements. He testified that after being availed the requisite documents, he prepared a sale agreement at Kiunga's home which parties executed on 5.4.2014 in his presence. He produced the sale agreement as D. Exh No. 1. Later on, DW 2 said that he prepared a land control



- application form and the transfer forms which were duly executed by the parties under his direction including the affidavit by the deceased.
18. DW 2 also said that he left the original transfer forms with the parties so that they could lodge the same at the land's office. The witness confirmed that the appellants were his relatives save that the deceased was not accompanied by his relatives at the time he executed the documents. Further DW 2 confirmed that he never witnessed the purchase price being paid before him nor was he aware that Kshs.100,000/= was due to the estate of the deceased.
 19. Concerning the illness of the deceased, DW 2 said the deceased appeared sickly at the time of executing the transfer forms or the sale agreement. Lastly DW 2 said that he was unaware that the suit land was transferred after the seller had passed on.
 20. Following the close of defence case parties filed written submissions dated 22.2.2021 and 17.5.2021. The respondents relied on Sections 45 of the *Law of Succession Act, Zachariah Wambugu Gathimu & another vs John Ndungu Maina* ELC NO. 244 of 2017 at Nyahururu & *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & another* (2013) eKLR. The appellants relied on Section 26 of the *Land Registration Act, Railal G. Patel vs Lalji Meghji* (1957) C.A 315, *Solomon Aminani vs Salome Mutenyo Otunga* (2016) eKLR.
 21. The trial court in a judgment dated 26.7.2021 returned a verdict in favour of the respondents which the appellants herein have urged the court to overturn on the grounds aforesated
 22. With the the direction of court and by consent, parties opted to canvass the appeal by written submissions dated 22.7.2022 and 17.7.2022 respectively.
 23. In this appeal the appellants submitted that there was enough evidence and documents tendered over the validity of the sale agreement and the transfer which the trial court overlooked particularly the evidence of the advocate and the land registrar who drew and registered the said documents. Reliance was placed on *Kuria Kiarie & 2 others vs Sammy Magera* (2018) eKLR.
 24. The appellant that submitted the failure by the respondents to tender or produce the minutes from the land control board meeting and a handwriting expert to disprove the signatures of the deceased made the respondents claim and evidence weak.
 25. As to shifting of the burden of proof, the appellant submitted that fraud must not only be pleaded but proved to the required standards as held in *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* (2015) eKLR which the respondents failed to prove by joining as a party, the land registrar and or marshalling enough evidence to support their claim based on fraud.
 26. Regarding the general damages of Kshs.200,000/= the appellants submitted the respondents never adduced evidence in support of any damage suffered on account of trespass or loss of user; which though acknowledged in the judgment the trial court nevertheless proceeded to award, yet the deceased was the one who put the appellants into possession during his lifetime hence Section 3 (1) of the *Trespass Act* was not applicable.
 27. The respondents on their part submitted that they pleaded fraud at paragraphs 8 (a) – (g) and 8 (a) – (f) of the plaint and testimony given to the effect that the transfer occurred after the deceased died without compliance with the law of succession. The respondents submitted that the application for the land consent was contradictory and taken out without following due process; that there was no proof of lease agreement prior to the sale and that of payment of stamp duty and registration fees to that effect.
 28. On grounds 5 & 6 of the appeal, the respondents submitted that DW 2 in his evidence contradicted the evidence of the appellants while the trial court found there was trespass hence the subsequent general



- damages since the title held by the appellants was invalid under Section 26 of the [Land Registration Act](#), reliance was placed on [Eliza Nyagwana \(Supra\)](#).
29. Having gone through the pleadings, evidence tendered, the grounds of appeal and written submissions, at issue is whether the respondents proved that the sale, transfer and the registration of the land in the names of the appellants was illegal, unlawful, irregular, fraudulent and unprocedural.
 30. The primary pleadings in the suit were the plaint dated 6.5.2015, the defence dated 16.6.2015 and a reply to defence dated 19.6.2015.
 31. It is trite law that fraud, illegality and misrepresentation must be pleaded and proved. Order 2 Rule (4) and 10 of the [Civil Procedure Rules](#) requires that fraud, illegality and misrepresentation be pleaded, the particulars be specific and that a defendant to a suit for the recovery of land to specifically plead to it including the issue of possession by himself and through tenants.
 32. In this suit, the appellants at paragraph 3 of the defence acknowledged that fraud had been pleaded and its particulars; stated that they bought the land for Kshs.500,000/=, a title passed before the death of the deceased but before he had received the balance of Kshs.100,000/= after the transfer. The appellant pleaded that the sale and transfer was lawful and just, save that they never pleaded that they had taken vacant possession and the date it occurred.
 33. Given that the particulars of fraud, illegality and unlawfulness of the sale and transfer was admitted and traversed by the appellants as pleaded, the next question is whether the respondents proved the same to the required standards as held in [Arithi Highway Developers Ltd vs West End Butchery Limited & 6 others](#) (2015) eKLRas well as [Virjay Morjaria vs Nansingh Madhusingh Darbar & another](#) (2000) eKLR.
 34. The respondents produced a death certificate, Limited grant, chiefs' letter, search certificates, copy of records, transfer documents and the ruling in the succession case. The bone of contention by the respondents was that the transfer documents were lodged and registered after the deceased had passed on and therefore the title passed after the death of the registered owner, hence calling for a legal representative to have participated in the transfer and registration.
 35. The appellants on the other hand pleaded, testified and submitted that the transfer forms were executed prior to the death but submitted for registration soon afterwards hence there was no fraud, illegality and unprocedural irregularity on their part.
 36. In the case of [Zacharia Wambugu Gathima \(supra\)](#), the court cited with approval [Bahola Mkalindi vs Michael Seth Kiseme & others](#) (2012) KLR where it was stated that before Section 55 of the [Law of Succession Act](#) was complied with, no properties of a deceased person could be transferred and that such a registration was a nullity. The court also cited [Elijah Makeri Nyagwana \(supra\)](#), where it was held that a title obtained unprocedurally could be impeached under Section 26 (1) of the [Land Registration Act](#). The court held that the doctrines of estoppel and equity could not be invoked to sanitize an illegality.
 37. In the case of [in Re-estate of Chesimbili Sindani \(deceased\)](#) (2021) eKLR, the court held that under Section 62 of the [Law of Succession Act](#) the personal representative relates back his power to the date of death of the proprietor of land.
 38. In the case of [Mary Watiri Mwangi \(suing as representative of the Estate of Kiburio Kamutu\) vs Timothy Kimani Kiburio & 3 others](#) (2018) eKLR, the issue of the registration of the land barely two months after the deceased had passed on without authority in form of succession cause was at issue. The explanation was that before death the deceased had executed all the necessary documents. The



- court invalidated the transfer for lack of a land control board consent guided by David Sironga Ole Tunkai vs Francis Arap Muge & 2 others (2014) eKLR.
39. Further in the case of Grace Waruunu Ngigi & another vs Ngugi Nguri & 4 others (2002) eKLR, a transfer had been presented to the land registrar 24 days after the death of the registered owner. The court held the same was a nullity since the estate of the deceased could only have been dealt with under the law of succession after his death and not otherwise.
 40. In this suit, the appellants admitted that the transfer and land control board consents were executed before 21.11.2014 but the transfer form was lodged on 27.11.2014 which was 6 days after the deceased had passed on.
 41. DW 2 admitted that his law firm was not involved in lodging the transfer documents but had left them with the appellants to effect them. On the other hand, DW 1 testified that it was the lawyers DW 2 who lodged the transfer forms.
 42. The law is that once the title deed is under question all the paper trail towards its acquisition comes under question and a title holder cannot just waive the same but has provide every document to show that the title was acquired lawfully. See Dr. Joseph Arap Ngok vs Justice Moiwo Ole Keiwua & 5 others, Civil Appeal No. Nai 60 of 1997.
 43. In this suit the appellants never produced the receipts for stamp duty, registration fees and documents to show that the transfer documents were lodged earlier than 27.11.2014. The land registrar was clear that registration could not occur while the deceased was no more. The letters of grant were issued much later. Similarly, appellants were unable to prove payment of Kshs.400,000/= to the deceased or even the payment of the balance of ksh.100000/=.
 44. Therefore, and guided by the case law aforementioned, the appellants being the alleged care givers of the deceased knew as a matter of fact that he was already dead by the time they lodged and processed the transfer and registration of the title under their names. They did not disclose to the land registrar material facts which were necessary to him. Similarly, they did not involve the immediate family more so when they knew he had no surviving wife or children.
 45. The appellants were also to pay the balance of the purchase price upon the transfer. As at the hearing, there was no evidence of payment of the same to the legal representatives. The transaction either way required the involvement of the legal representatives for its completion even if the court were to find the transfer documents lodged before the demise of the deceased.
 46. In the circumstances, my finding is that the trial court reached the correct decision both on facts and the law. There was however no evidence tendered on general damages.
 47. The upshot is the appeal is dismissed with costs save on the aspect of general damages which is hereby set aside.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 1ST DAY OF FEBRUARY, 2023.

In presence of:

C/A: Kananu

Mrs. Mutegi for appellant

Miss Mukaburu for respondent

HON. C.K. NZILI



ELC JUDGE

