



Mutuku v Mutuku (Suing as the Administrator of the Estate of the Late Morris Mutuku Kioko) (Environment and Land Appeal 22 of 2019) [2025] KEELC 2891 (KLR) (26 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2891 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 22 OF 2019
NA MATHEKA, J
MARCH 26, 2025

BETWEEN

PETER MBWIKA MUTUKU APPELLANT

AND

DOMINIC NDUNDA MUTUKU (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE MORRIS MUTUKU KIOKO) RESPONDENT

JUDGMENT

1. The Appellant herein Peter Mbwika Mutuku being aggrieved by the Judgment given on 15th May, 2019 in Kithimani SRMCC No. 55 of 2014 - Dominic Ndunda Mutuku (Suing as the administrator of the Estate of the late Morris Mutuku Kioko) v Peter Mbwika Mutuku by Honourable G. Shikwe (Mr.) Senior Resident Magistrate appeals to this Honourable Court against the whole of said Judgment and sets down the following grounds of appeal;
 1. The learned trial Magistrate erred in law and in fact in finding that the Appellant had acquired title to the suit property unprocedurally.
 2. The learned trial Magistrate erred in law and in fact in holding that Respondent, had proved his claim against the Appellant when evidence tendered in support of the claim was wanting.
 3. The learned trial Magistrate erred in law and fact in deciding the case against the weight of evidence on record and misdirected himself when he shifted the burden of proof from the Respondent to the Appellant.
 4. The learned trial Magistrate failed to consider submissions by Counsel for the Appellant and failed to critically analyse the same and accord it due weight particularly on the issue of fraud in acquisition of the title.



5. The learned trial Magistrate erred in law and fact in failing to appreciate sufficiently or at all the judicial nature of the case that was before him and as such failed to properly take into account the legal principles regarding impeachment of a title of registered proprietors.
 6. The learned trial Magistrate erred in law and fact by failing to properly scrutinize and evaluate the evidence tendered by the Respondent thereby reaching a wrong conclusion that Appellant's title should be nullified by the Land Registrar Machakos.
 7. The learned trial Magistrate erred in law and fact when he took into account extraneous matters which were not issues for determination before him.
 8. The learned trial Magistrate failed to consider and analyse critically the evidence of the Appellant thereby arriving at a wrong decision.
 9. The learned trial Magistrate erred in law in failing to uphold the sanctity of the Appellant's title to the suit property.
 10. The decision of the learned trial Magistrate was plainly wrong and biased against the Appellant.
 11. The Judgment of the trial court is against the weight of evidence tendered and has occasioned a tremendous miscarriage of justice to the Appellant.
2. The Appellant seeks for orders that;
- a. The Appeal be allowed.
 - b. The whole Judgment of the Subordinate Court in Kithimani SRMCC No. 55 of 2014 be set aside and substituted with an order dismissing the suit with costs.
 - c. The Appellant be granted costs of the Appeal and costs in Kithimani SRMCC No. 55 of 2014.
3. This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another v Shah* [1968] EA 93 where it was held that;
- “I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”
4. In the trial court, the appellant averred to be the registered proprietor of Land Parcel No Ndalani/ Ndalani Block 1/175. He produced the transfer of shares document, the Certificate of Title Land Parcel No Ndalani/Ndalani Block 1/175 dated 21st October 1992 and payment receipts for the transfer receipt issued to Nduku Kilonzo. Having produced a certificate of title, the appellant established himself as the registered proprietor of the suit property. A certificate of title is conclusive evidence of



proprietorship and I find that he is the absolute and indefeasible owner of the suit property. Section 26 of the [Land Registration Act](#) states;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

5. The respondent has stated that the appellant fraudulently acquired title to the suit property and prayed to court to cancel the title and rectify the register. To succeed in claiming fraud, the plaintiff/respondent not only needs to plead but also particularize it by laying out water tight evidence upon which the court would make such finding. It is therefore trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the Court of Appeal in case of *Kuria Kiarie & 2 Others v Sammy Magera* [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts .”

6. The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules. As regards the standard of proof, this court in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR expressed itself as follows;

“... it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo -v - Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

7. The respondent is challenging title to the suit property and testified that his father had 150 shares at Matungulu Yatta Ranching Company and he was allocated 472 to 477 each plot had 8 acres. He was also allocated a commercial plot in Kithimani market. He produced the allocation card, the original share certificate and payment receipts. He confirmed that his family is in possession of the said plots



since 1970 and when his father passed away in 1998 the appellant came to claim ownership of plot 475. That his title deed is dated 1992 yet they have been living there. That his brother had been charged in a criminal court over the suit land and was acquitted. PW2 Mutuku Ngolo testified that his plot is No. 452 and No. 475 is his neighbour and the appellant and his family have always been in possession. During a site visit the trial magistrate confirmed that the respondents were in possession of the suit property. The trial magistrate held on page 9 of his judgement that;

“That Mutuku Kioko was owner of the 7 plots is not in dispute in my view. The plaintiff has produced old wheathered receipts evidencing the payments made by the father to Matungulu Yatta Ranching dating as far back as 1968. There is also a handwritten allocation note dated 31/10/1985 which shows that he was allocated the seven plots therein. In my view he has demonstrated through documentary evidence and witness testimony which was corroborated by a neighbour who has lived there for more than 35 years that the family owned and was in possession of the seven plots therein.”

8. The appellant testified that he is a member of Matungulu Yatta Ranching and owns 36 shares. He bought the shares from Nduku Kilonzo in 1990. She transferred the shares of her late husband Makau Kilonzo. He produced the transfer of shares document. The shares entitled him to 4.5 acres on dry land, one acre at farrow and a plot of 15x 100 at Kithimani market. He did not call any other witness to corroborate his evidence.
9. The appellant as the registered proprietor is protected by the doctrine of indefeasibility of title as established under the Torrens system of registration anchored on Section 26 of the [Land Registration Act](#). His title to the suit property as a registered proprietor remains indefeasible unless it is shown the title was obtained through fraud or misrepresentation and proved he is a party to that fraud. The appellant has not produced any evidence that the seller Nduku Kilonzo was a shareholder of Matungulu Yatta Ranching Company. No evidence that she had letters of administration or authority to sell on behalf of her husband. No allotment letters were produced of the said suit land to her husband. Indeed, it is in evidence that the appellant has never taken or been in possession of plot No. 475.
10. I find that the respondent presented enough evidence before the learned magistrate to challenge the appellant’s title to the suit property within the confines of the law. The learned magistrate did not err in finding the plaintiff is the legal of the suit property. I find no probable reason to disturb the judgement of the trial court and this appeal is dismissed with costs to the respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF MARCH 2025.

N.A. MATHEKA

JUDGE

