



**Omumatera v Nyangala (Environment and Land Appeal E049 of 2021)
[2023] KEELC 16575 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16575 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E049 OF 2021
DO OHUNGO, J
MARCH 28, 2023**

BETWEEN

GILBERT OMUMATERA APPELLANT

AND

CHARLES ATANDA NYANGALA RESPONDENT

*(Being an appeal from the judgment and decree of the Principal
Magistrate Court at Butere (Hon. F. Makoyo, Principal Magistrate)
delivered on 26th October 2021 in Butere MCELC No. 8 of 2019)*

JUDGMENT

1. Litigation leading to this appeal traces its roots to plaintiff dated March 28, 2019 in which the respondent averred that his father, one Alexandra Inyangala (deceased) was the proprietor of land parcel number Marama/Shiraha/1196 (suit property) and that on or about May 30, 2009, the deceased sold the suit property to the appellant. That the appellant “later on started expanding the land beyond that which he was allocated and encroached into the [respondent’s] land.” The respondent went on to aver that he was willing to refund the purchase price of KShs 130,000 to the appellant. Without expressly pleading that the appellant was guilty of any fraud, the respondent listed some particulars of fraud and went ahead to pray for “nullification of the [appellant’s] name from [the suit property]”.
2. The appellant filed his defence wherein he admitted purchasing the suit property from the deceased but denied the allegations of acquiring more land than purchased. He therefore urged the Subordinate Court to dismiss the suit with costs.
3. Upon hearing the matter, the Subordinate Court (Hon. F. Makoyo, Principal Magistrate) delivered judgment on October 26, 2021, cancelled the appellant’s title and directed that the suit property reverts to the deceased for purposes of succession where the appellant can assert his claim as a liability to the estate.



4. Aggrieved by the judgment, the appellant filed this appeal on November 19, 2021. The following grounds of appeal are listed on the face of the memorandum of appeal:
 1. The learned trial magistrate erred in law and in fact in holding that the title deed to the suit property was obtained by fraud and misrepresentation.
 2. The learned trial magistrate erred in law and in fact in allowing the respondent's case while the same was not proved on a balance of probability.
 3. The learned trial magistrate erred in law and in fact in holding that the title deed was obtained illegally, unprocedurally and or through a corrupt scheme while the evidence on record pointed otherwise.
 4. The learned trial magistrate erred in law and in fact in failing to give due consideration to the overwhelming documentary evidence produced by the appellant in proof of his title.
 5. The learned trial magistrate erred in law and in fact in granting orders which were never sought.
 6. The trial magistrate's findings and decision is contrary to the evidence on record and the weight of evidence.
5. The appeal was canvassed through written submissions. The appellant submitted that the suit property was a subdivision of parcel number 973 and that it was registered in the appellant's name on March 20, 2009 following a sale agreement made on January 22, 2009. That as of 22nd January 2009, the original parcel number 973 had not yet been subdivided to create the suit property and that the sale agreement correctly referred to the property purchased as a portion since it was still part of parcel number 973. He further argued that the finding that he had purchased a portion of the suit property was erroneous. He therefore urged this court to allow the appeal.
6. In response, the respondent argued that he established before the subordinate court that the appellant purchased only a portion of the suit property. He therefore urged that the appeal be dismissed with costs.
7. This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See [Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR.
8. I have considered the pleadings, the evidence, and submissions of the parties. The issue that emerges for determination is whether the respondent was entitled to the reliefs that he had sought.
9. There is no dispute that as at the date of filing of the suit and trial, the appellant was the registered proprietor of the suit property. The appellant is therefore entitled to the rights, privileges, and benefits under section 24 of the [Land Registration Act](#). Further, section 26 of the Act obligates the court to accept the appellant's certificate of title as conclusive evidence of proprietorship, unless of course the provisos under section 26 (1) (a) or (b) are established. The said sections provide as follows:

24. Interest conferred by registration



Subject to this Act—

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ...

26. Certificate of title to be held as conclusive evidence of proprietorship

- (1) 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. ...

10. Thus, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

11. A perusal of the plaint shows that the respondent did not specifically state the ground upon which he was attacking the appellant's title. Although he pleaded particulars of fraud, there is no averment in the plaint expressly stating that the appellant was guilty of any fraud. Fraud is a serious allegation. It is for that reason that the law requires that an allegation of fraud be expressly pleaded, particularised, and strictly proven on a standard higher than that required in ordinary civil cases. This was restated by the Court of Appeal in *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR 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. ...

12. Pleading particulars of fraud in the absence of an express averment that there was fraud is not enough.

13. There is no dispute that the appellant and the deceased entered into a sale agreement pursuant to which the deceased sold land to the appellant. Although the respondent pleaded in his plaint that the agreement was entered into on May 30, 2009, that is not likely to be the correct date since the deceased passed away on May 30, 2009. Instead, the correct date seems to be January 22, 2009 as can be seen



in the agreement that was produced by the appellant and going by the respondent's case that the suit property was transferred to the appellant prior to the deceased's death.

14. The respondent's case was that the appellant purchased only a portion of the suit property but instead acquired the whole of the suit property. It must be remembered that the suit property in the matter before the subordinate court was land parcel number Marama/Shiraha/1196. The respondent did not produce any copy of register to show the history of the suit property. A perusal of the copy of the title deed that was produced by the appellant shows that the suit property is a subdivision of land parcel number Marama/Shiraha/973. The title deed further shows that the first edition of the register in respect of the suit property was opened on February 26, 2009 and that the entry pursuant to which the appellant became the registered proprietor is entry number 2 dated March 20, 2009. In other words, the suit property came into existence after the sale agreement of 22nd January 2009. It is thus apparent that the word "portion" as used in the sale agreement did not mean a portion of land parcel number Marama/Shiraha/1196 but most likely a portion of the mother parcel Marama/Shiraha/973.
15. I further note that the respondent stated in his testimony that the appellant purchased 1.5 acres, which roughly translates to 0.60 hectares, the size of the suit property as captured in the title deed. The respondent did not support his allegations of "expansion" with any surveyor's report showing any sketch and measurements to warrant such a conclusion. Clearly, the learned magistrate fell into error in agreeing with the respondent's assertion that the appellant purchased a portion of the suit property. Since the particulars of fraud were hinged on the claim that the appellant purchased a portion of land parcel number Marama/Shiraha/1196 but acquired the whole of it, the respondent was required to strictly prove that the sale agreement was in respect of land parcel number Marama/Shiraha/1196 and if so, in what way the appellant acquired more than the 1.5 acres that was agreed. Further, to warrant nullifying a title on the basis of fraud or misrepresentation, it must be shown that the registered proprietor was party to the fraud or misrepresentation. The respondent failed to establish fraud or misrepresentation or any of the grounds for nullification of title.
16. I have said enough to show that the respondent failed to prove his case in the Subordinate Court. He was thus not entitled to the reliefs that he had sought. I hold that this appeal has merit.
17. In view of the foregoing, I make the following orders:
 - a. This appeal is allowed.
 - b. The judgement of the Subordinate Court is set aside and replaced with an order dismissing the respondent's case.
 - c. The appellant shall have costs of this appeal and costs of the case before the Subordinate Court.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF MARCH 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Masakhwe holding brief for Mr Kowino for the appellant

Ms Toloyi for the respondent

Court Assistant: E. Juma

