



REPUBLIC OF KENYA



KENYA LAW
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**Kananu v Kirimi (Environment and Land Appeal E107 of 2021)
[2023] KEELC 16480 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E107 OF 2021**

CK YANO, J

MARCH 22, 2023

BETWEEN

SARAH KANANU APPELLANT

AND

MORRIS KIRIMI RESPONDENT

*(Being an appeal from the judgment and decree of Hon. A.G Munene P.M
in Maua CMC ELC no. 40 of 2014 delivered on 15th September, 2021)*

JUDGMENT

Introduction

1. The appellant Sarah Kananu filed this appeal against the whole decision/judgment of Hon AG Munene PM in Maua CMC ELC NO 40 of 2014 delivered on September 15, 2021 and set out the following 6 grounds of appeal:
 - i. That the learned trial magistrate erred in fact and in law by finding that the respondent had proved his case to the required standard of proof and that the applicant had failed to prove her case.
 - ii. That the learned trial magistrate erred in fact and in law by failing to consider the evidence presented by the appellant and her witnesses and thereby dismissing her defence.
 - iii. That the learned trial magistrate erred in fact and in law by failing to appreciate that the suit land was ancestral land that belonged to the appellant's father and forefathers before her.
 - iv. That the learned trial magistrate erred in fact and in law by failing to consider that the appellant had been in occupation of the suit land all her life.



- v. That the learned magistrate erred in fact and in law by deviating from the principles and spirit of the Constitution of Kenya.
 - vi. That the whole of the judgment of the learned trial magistrate was against the weight of the evidence tendered and the law applicable.
2. The appellant prayed that the appeal be allowed and judgment of the learned trial magistrate be set aside and the appellant's case be allowed and that costs of the appeal and subordinate court be provided for.

Background of The Appeal

3. The gist of the case in a nutshell is that the respondent filed a plaint dated February 13, 2014 where he prayed for an order of eviction do issue against the appellant from land No Amwathi/Maua/313, costs of the suit and any other or better orders the Honourable court may deem fit and just to grant.
4. The respondent averred that he is the sole registered owner of all that parcel of land known as Amwathi/Maua/313 and that he purchased the said parcel of land from one Peter Kamenchu M'Ikunyua and that the same was duly transferred to him but the appellant who has been living there has totally refused to give vacant possession thereof.
5. It was the respondent's contention that appellant has her own parcel of land but insists on utilizing both her land and the respondent's land.
6. The appellant filed her defence dated March 7, 2014 wherein she admitted that respondent is the registered owner of land parcel No Amwathi/Maua/313 but added that the same was illegally, unprocedurally and fraudulently obtained.
7. The appellant averred that she is the actual owner of that parcel of land having been left to her by her father.
8. It was the appellant's contention that the suit land was transferred long after the death of her father Gabriel M'mukindia who was the registered owner.
9. The matter was ultimately set down for hearing and in his judgment, the trial court found that the respondent had proved his claim and granted the prayers sought.

Appellant's Submission

10. Being aggrieved by the said judgment and decree, the appellant filed his appeal. The appeal was canvassed by way of written submissions. The appellant filed her submissions dated November 21, 2022 through the firm of Meenye & Kirima Advocates while the respondent filed his dated December 17, 2022 through the firm of Mutembei & Kimathi Advocates.
11. In her submissions the Appellant summarized the grounds set out to only one issue: whether the learned trial magistrate erred in law and fact by finding that the respondent had proved his case to the required standard of proof and that the appellant had failed to prove her case.
12. The appellant submitted that it is no doubt that the suit property is registered in the name of the appellant and as a registered proprietor he holds a certificate of lease and deemed to be the absolute and indefeasible owner as provided by section 26 (1) of the Land Registration Act, which 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 encumbrance, 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.
13. The Appellant submitted that there are however exceptions in Section 26 (1) (a) & (b) which provides that the said certificate of title can be challenged if the same was acquired through fraud, misrepresentation, unprocedurally, illegally or through corrupt scheme.
14. The Appellant submitted that the respondent's case is that he is the registered owner of the suit property and the Appellant who is his aunt has refused to move out of the said suit land. The Appellant averred that she denied that she is a trespasser and alleged that she was on the suit property by virtue of being the daughter of Gabriel Mukindia who was the initial proprietor of the suit land. The Appellant contends that her father never sold the suit land to Peter Kamencu who subsequently sold it to the Respondents herein. The Appellant alleged that she pleaded fraud which claim failed.
15. The Appellant submitted that even though the claim of fraud against the respondent failed, the respondent failed to show the nexus of how he came to obtain title of the suit land and thus it is her contention that the respondent did not obtain proper title to the suit land.
16. The Appellant stated that whereas the respondent claims that he bought the suit land from Peter Kimencu who bought the same from the Appellants father, Gabriel Mukindia who is deceased neither the land sale agreement between Peter Kimencu and Gabriel Mukindia nor between the Respondent and Peter Kimencu were adduced in support of the allegation.
17. The Appellant cited Section 3(3) of the Law of Contract Act which provides: -
- ' No suit shall be brought upon a contract for disposition of an interest in land unless-
- a) The contract upon which the suit is founded-
 - i. Is in writing,
 - ii. Is signed by all the parties thereto: and
 - b) The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.'
18. The Appellant submitted that the above provision of law is supported by section 44 (1) of the Land Registration Act which provides that every instrument affecting the disposition under the Act shall be executed by each of the parties consenting to it and in accordance with the provisions of the said section.
19. The Appellant further submitted that the above sections of the law express that no disposition of land shall be entered into without a written agreement for sale and that it is elementary law that any instrument for sale of land cannot be made orally but should be written down.
20. The Appellant submitted that it is their humble submission that there being no such agreements, the purported sale as alleged by the respondent never transpired because if the same were true, then the



- respondent would have in his possession the requisite agreement for sale duly executed by the said Gabriel Mukindia revealing how Peter Kimencu came to be in possession of the suit land.
21. The Appellant opined that the strength of the respondent claim was expressly barred by the provisions of Section 3 (3) of the [Law of Contract Act](#) and Section 5 of the [Civil Procedure Act](#).
 22. The Appellant further submitted that the respondent did not call any member of the family of the late Gabriel Mukindia to corroborate the existence of the alleged sale agreement between the deceased and Peter Kimencu and only called as witnesses Peter Kimencu and his wife, which witnesses according to the appellant, clearly have a selfish interest in the suit land.
 23. The Appellant stated that she acted in person in the lower court and perhaps failed to ask the right questions or file the proper pleadings in support of her claim. That whereas one cannot plead ignorance in a court of law, it is important to appreciate that the respondent's case on its own has such glaring gaps and weaknesses that even without a defence, the same ought to have failed.
 24. The Appellant submitted that it was the duty of the respondent to discharge the proof as to how he acquired the suit property and even though it was not in contention that he bought the suit land from one Peter Kimencu whom he called as one of the witnesses, that there was no proof of sale. The appellant contended that the respondent and Peter Kimencu could have connived to benefit illegally.
 25. The Appellant submitted that the court has a wide scope of discretion that allows itself to ask the questions that the appellant ignorantly failed to ask in the lower court and that natural justice dictates the court look beyond that which has been presented before it and make the necessary orders in as far as such orders are not repugnant and too far off from the facts in hand.
 26. The Appellant's submitted that whereas she failed to file the proper defence and failed to ask the respondent the right questions during trial, on its own, the respondent's case did not meet the required standard of proof that was necessary for the Honourable trial court to grant the orders as it did.
 27. It is the Appellant submission that the trial magistrate erred by finding that the respondent had proved his case to the required standard of proof and prayed that the Honourable court overturns the subject judgment and consequently allow the appeal with costs both in this court and in the lower court.
 28. The Appellant relied on the case of [Leo Investment Ltd v Estuarine Estate Ltd \(2017\) eKLR](#)

Respondent's Submissions

29. The Respondent submitted that the main issue for determination that is manifesting from the grounds of appeal outlined in the memorandum of appeal is whether the learned trial magistrate erred in law and fact by finding that the respondent had proved his case to the required standard of proof and that the appellant had failed to prove her case.
30. The respondent cited Section 24(a) and 25(1) of the [Land Registration Act](#), No 3 of 2021 which provide as follows:
 24. '(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;'
 - '25 (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the



proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject.'

31. The respondent submitted that within the provisions of Section 25 (1) of the [Land Registration Act](#), purchaser for valuable consideration or by order of the courts is protected. The respondent stated that he has the title deed registered in his name and consequently, the provisions of Section 24 (a) and 25 of the [Land Registration Act](#) applied to him.
32. The respondent relied in the case of *Katende V Haridar & Company Limited (2008) 2 EA 173* where the Court of Appeal in Uganda held that:
- ' For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:
- a) He holds a certificate of title,
 - a) He purchased the property in good faith,
 - b) He had no knowledge of the fraud,
 - c) He purchased for valuable consideration,
 - d) The vendors had apparent valid title,
 - e) He purchased without notice of any fraud,
 - f) He was not party to any fraud.'
33. The respondent submitted that under Section 26 (1) of the [Land Registration Act](#), a certificate of title issued by the Registrar shall be taken by the courts to be conclusive evidence of proprietorship. That nonetheless, the section provides that the title of that proprietor is subject to challenge under the following circumstances:
- 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.
34. The respondent stated that in the instant appeal, the respondent currently holds the certificate of title to the suit land and is in actual possession and it is therefore without doubt that he is the absolute and indefeasible owner as provided for under Section 26 of the [Land Registration Act](#) and further that the respondent's title is also shielded from being defeated by section 25 unless proved otherwise.
35. The respondent submitted that the Land Adjudication Officer gave evidence where he confirmed that the land was properly transferred to the respondent.
36. The respondent further submitted that at the trial court the appellant's claim against the respondent was that the suit parcel of land was fraudulently transferred to the respondent, but she never stated the particulars of fraud nor did she file any counterclaim to have the ownership documents of the suit land cancelled.
37. The respondent submitted that it is a principle of the law that the party who alleges must prove. That the appellant alleges that the transfer of the suit land from the deceased all the way to respondent was



fraudulent raises the question of whether the appellant proved to the required standard the allegations of fraud against the respondent.

38. The respondent relied on the case of *Urmila w/o Mabendra Shah v Barclays Bank International Ltd & Another [1979] eKLR* where the court took the view that the onus to prove fraud in a matter is on the party who alleges it.

39. Similarly, the respondent relied on the case of *Vijay Morjaria v Nansigh Madhusingh Darbar & Another [2000] eKLR*, where Tunoi JA (as he then was) stated as follows:

' It is well established that fraud must be specifically pleaded and the particulars of the fraud alleged must be stated on the face of the pleadings. 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 that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.'

40. The respondent submitted that given the seriousness of the allegations, the onus was on the appellant to provide evidence to the court of the alleged fraud which evidence must meet the standard of proof as was underscored by the court In *Central Bank of Kenya v Trust Bank Limited & 4 Others [1996] eKLR*, as being beyond that of a balance of probabilities but not beyond reasonable doubt. In that case, the court rendered itself as follows:

' The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in the ordinary civil case.'

41. The respondent submitted further that in the instant case the appellant needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the court would make a finding that indeed there was fraud in the transaction leading to the transfer and registration of the suit land in the name of the respondent and that he had knowledge of it.

42. The respondent stated that the court should take into consideration that no criminal charges or proceedings were laid against the respondent over the transfer and registration of the suit land and that it is clear from the foregoing that there was no demonstration of fraud and that in fact the suit land had actually been transferred to the respondent during the lifetime of the deceased who had not raised any complaint before he died.

43. The Respondent submitted that the instant appeal is not tenable and should be dismissed with costs.

44. The respondent relied on the case of *Moses Paranta and Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia – Civil appeal No 411 of 2018*, and *Demutilla Nanyama Pururmu v Salim Mohamed Salim [2021] eKLR Civil Appeal No 138 of 2018*.

Analysis and Determination

45. I have perused and considered the record of appeal, the grounds of appeal, the submissions made and the authorities. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusions reached by the learned magistrate were justified on the basis of the evidence presented and the law in order to draw my own independent conclusion, but bearing in mind that I neither saw nor heard the witnesses testify and making due allowance for this (see *Selle v Associated Motor Board Company Ltd [1968 EA 123]*)



46. It was also held in the case of *Mwangi v Wambugu [1984] KLR 453* that an appellate court will not normally interfere with a finding of fact of the trial court unless such finding is based on a misrepresentation of the evidence, or where the court has clearly failed on some material point to take account of particular circumstances or probabilities.
47. In this matter, there are only two issues I find for my consideration.-;
- Whether the respondent had proved his case to the required standard and whether there was any evidence of fraud proved against the appellant.
48. The court has carefully perused the record. The respondent's evidence was that he was the registered owner of the suit land Amwathi/Maua/313. That he purchased the land from one Peter Kamenchu who had bought the same from one Gabriel M'Mukindia, father to the appellant. The appellant produced a confirmation of ownership letter, transfer letter, application for transfer of land as well as the title deed in his name as exhibits.
49. The respondent also called witnesses who confirmed that he purchased the suit land from the said Peter Kamenchu. Among the witnesses who testified in support of the respondent's is the Land Adjudication Officer who case confirmed that the land was transferred to the respondent.
50. In the case of *Dr Joseph Arap Ngok Vs Justice Moiyo Ole Keiwua & 5 others Nairobi Civil appeal No 60 of 1997*, it was held that Section 23 (1) of the then Registration of Titles Act (now reproduced substantially as Section 25 and 26 of the *Land Registration Act*) gives an absolute and indefeasible title to the owner, and that the title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party.
51. Section 26 (1) of the *Land Registration Act* provides that:
- ' 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 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.'
52. In her evidence, the appellant seem to have alluded that the respondent acquired title fraudulently. However, the appellant never gave the particulars of fraud and did not also lead any evidence to support her allegations. Allegations of fraud must be pleaded and strictly proved, although the standard of proof may not be heavy as to require prove beyond reasonable doubt, but something more than a mere balance of probabilities is required. General accusations are not sufficient to prove fraud.
53. In the case of *Ndolo v Ndolo [2008] 1 KLR 742*, it was held 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; in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.'

54. In the case of *Gladys Wanjiru Ngacha v Theresa Chepsaat & 4 Others [2013] eKLR* the Court of Appeal held that:

' Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than mere balance of probabilities is required and that it is not enough for the appellant to have pleaded fraud. The Appellant ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court.'

55. In *Central Bank of Kenya v Trust Bank Limited & 4 Others [1996] eKLR*, proof of fraud was held as being beyond that of a balance of probabilities. In that case, the Court of Appeal rendered itself as follows:

' The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in the ordinary civil case.'

56. In addition, section 107 of the *Evidence Act* states as follows:

Burden of proof

'whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts.'

57. Section 108 of the *Evidence Act* provides that-;

' The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.'

58. Lastly as a warning to a litigant, section 109 of the same Act states as follows:

' The burden of proof as to any fact lies on the person who wishes the court to believe it's existence, unless it is provided by any law that the proof of that fact lies on any particular person.'

59. In this case, the Appellant pleaded fraud against the respondent but never particularized the same nor tender any evidence in proof. It was incumbent upon the appellant to prove the allegations of fraud to the standard required by law. However, no such evidence was tendered by the appellant and the trial court rightly dismissed her allegations

60. Since it was not in dispute that the respondent is the registered proprietor of the suit land and in the absence of any evidence to the effect that the land was registered fraudulently or with misrepresentation as per sections 24, 25, and 26 of the *Land Registration Act*, I find that the respondent had proved his case and the trial court rightly found in favour of the respondent.

61. Considering the totality of the evidence in this case, and applying the legal principles outlined in law, I am satisfied that the learned trial magistrate was justified in arriving at the decision he made. The findings and holding of the learned Magistrate were well founded and I find no basis to interfere with the same. The appellant's submissions that she was acting in person cannot assist her since it is trite that ignorance of the law is no defence.



62. In the result, I find no merit in the appellant's appeal and the same is hereby dismissed with costs to the respondent.

63. Orders accordingly.

Dated, signed and delivered at Meru this 22nd day of March 2023

IN THE PRESENCE OF

M/s Asuma holding brief for Mutembei for respondent

No appearance for appellant

Court Assistant - Kibagendi

C.K YANO

JUDGE

