



**Migweta v Muthui (Sued as the legal representative of Eutyclus Muthui) & 2 others (Environment and Land Appeal E036 of 2021) [2023] KEELC 16479 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16479 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E036 OF 2021**

**CK YANO, J**

**MARCH 22, 2023**

**BETWEEN**

**JULIUS MWARI MIGWETA ..... APPELLANT**

**AND**

**KIMATHI MUTHUI (SUED AS THE LEGAL REPRESENTATIVE OF  
EUTYCHUS MUTHUI) ..... 1<sup>ST</sup> RESPONDENT**

**MUTHUI COFFEE TRADE DEVELOPMENT CO LTD ..... 2<sup>ND</sup> RESPONDENT**

**LINCO STORE LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background of the appeal**

1. The proceedings leading to this appeal were commenced by the appellant herein against the respondents herein through a plaint filed in court on March 22, 2013, and which was amended on April 18, 2013 and further amended on March 2, 2015 in the Chief Magistrate's Court at Meru civil suit No 341 of 2014. I note however, that the further amended plaint does not form part of the record of appeal. The reliefs sought by the appellant were a declaration that transfer of whole Land Parcel No Nyaki/Kithoka/1726 was fraudulent, an order that the appellant is entitled to 2 acres and rectification of the register, an adjustment of boundaries for LR NO Nyaki/Kithoka/1823 to read measuring 0.89 acres instead of 1.32 acres on the ground and LR Nyaki/Kithoka/1726, an order of mandatory permanent injunction restraining the 3<sup>rd</sup> respondent from entering, trespassing into a portion measuring 2 acres or interfering with the quiet possession by the appellant of the 2 acres and costs of the suit.
2. According to the further amended plaint, the appellant pleaded that the late Jeremiah M'Igweta M'Ingetu was the registered owner of original land parcel No Nyaki/Kithoka/345 measuring 10 acres and in 1992, the deceased subdivided the said land into three parcel No 1724, 1725 and 1726. That



land parcel No Nyaki/Kithoka/1724 was subdivided into two portions Nyaki/Kithoka/1822 (which was further subdivided into Nyaki/Kithoka/ 4248 and 4249) and LR No Nyaki/Kithoka/1823.

3. It was pleaded that the appellant sold to the 1<sup>st</sup> respondent a portion measuring 0.396 Ha (0.98) acres out of land parcel No Nyaki/Kithoka/1823, but that on the ground the respondent took a bigger portion than what was sold to him thus affecting the subdivisions of LR No 1822 (now 4248 and 4249). That the deceased had also sold a portion measuring 3 acres out of land parcel no Nyaki/Kithoka/1726 to the 1<sup>st</sup> respondent's late father Eutyclus Muthui (deceased) while the appellant and his family settled on the remaining 2 acres which he enormously developed. The appellant averred that his homestead is spread over LR NO Nyaki/Kithoka/1725 and 1823. The appellant contended that the respondents illegally annexed the 2 acres of LR NO Nyaki/Kithoka/1726.
4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a defence dated April 8, 2015 in which they admitted purchasing LR No Nyaki/Kithoka/1823 from the appellant and they took possession of the same. They deny taking more acreage than what sold to them. They also deny that they owe the appellant 2 acres or any land out of LR NO Nyaki/Kithoka/1726.
5. The 3<sup>rd</sup> respondent filed a defence dated April 29, 2015 denying the appellant's claim.
6. The appellant testified and called one witness and closed his case while the respondents called two witnesses and closed their case.
7. In his judgment, the learned trial magistrate who heard the case found that the appellant had failed to prove his case against the respondents on a balance of probabilities and dismissed the suit with costs to the respondents.
8. Being dissatisfied with the judgment, the appellant lodged this appeal. In the memorandum of appeal dated February 25, 2021, the appellant raised the following grounds:-
  1. That the learned magistrate failed in law and in fact in using a handwritten agreement without having the author of the said agreement and without having the signatures having been subject to document examiners for verification.
  2. That the learned magistrate erred in law and fact by considering a handwritten sale of land which did not meet the provisions of Section 3 of the *Law of Contract Act*, Chapter 23 Laws of Kenya as far as sale of land agreement are concerned.
  3. That the learned magistrate failed to consider or sufficiently consider the lengthy submissions and judicial authorities filed by the appellant.
  4. That the learned magistrate erred in law and fact in that he misconstrued and misinterpreted the provisions of the *Civil Procedure Act* and as a result came to the wrong conclusion.
  5. The learned magistrate erred and misdirected himself in law and fact by framing and determining the wrong, irrelevant, extraneous and or inappropriate issues of law contained in the said judgment and or by not addressing the correct and all relevant issues arising from the parties' evidence/claims.
  6. That the learned magistrate erred and misdirected herself in law and fact by assuming and concluding that the correct sale of land agreement was the one filed by the respondent despite the appellant having filed a sale agreement that was executed by an advocate and further making a conclusion without the experts report on the authenticity of the signatures.



7. That the learned magistrate erred in law and fact by ignoring and/or refusing to consider the proper evidence on record and or took into consideration irrelevant and or extraneous matters and or matters not in issue/dispute and or ignored was biased in evaluating evidence on record thereby resulting to the detriment of the appellant.
  8. That the learned magistrate failed in law and in fact by taking into account that the appellant had a proper agreement drawn by an advocate and attested to by witnesses and putting into consideration a hand written agreement produced by the respondents.
  9. That the learned magistrate failed in law and in fact by considering ambiguous scene visit report presented by the District Land surveyor which did not clearly identify the parcel of land occupied by each party and the measurements of the each piece of land.
  10. That the learned magistrate erred in law and fact by directing herself to the wrong issues and or by not addressing correct and relevant issues arising from the parties pleadings/claims
  11. That the learned magistrate failed to find that the whole defence was/is a sham, unmeritorious, vexatious, embarrassing, and frivolous and an abuse of the court process
  12. That the learned magistrate erred in law and in fact by failing to find that the appellant had proven his case on a balance of probabilities.
  13. That the learned magistrate erred and misdirected herself in law and fact by applying the wrong test and principles of contract in determining whether or not the respondent's sale of land agreement was valid.
  14. That the learned magistrate erred in law and fact by failing to appreciate the correct factual and legal import of acknowledgement receipt presented by the appellant in the trial court.
9. The appellant prays for the appeal to be allowed and the decision made by the subordinate court on January 27, 2021 to be set aside and an order for retrial with costs of this appeal and in the lower court to be borne by the respondents.
  10. Pursuant to directions given by the court, parties filed written submissions through their respective advocates on record.

### **Appellant's Submissions**

11. In his submissions dated October 26, 2022 filed through the firm of DM Nyamu & Co Advocates, the appellant submitted that the learned magistrate failed in law and in fact in using a written agreement without having the author of the said agreement and without having the signatures having been subjected to document examiners for verification.
12. The appellant cited the provisions of Section 3 (3) of the *Law of Contract Act* Cap 23 Laws of Kenya which provides as follows-
  - (3) No suit shall be brought upon a contract for the 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.



13. It is the appellant's submissions that the respondent's sale of land agreement does not satisfy the requirements of Section 3(3) of the Law of Contract Act which is couched in mandatory terms to be the foundation of their claim against the appellant. That in the circumstances, the respondent's claim must fail for being in contravention of the said provisions of law, and faulted the trial court for concluding that the correct sale of land agreement was the one filed by the respondent and not that of the appellant.
14. It is also the appellant's submissions that the trial court ignored the appellant's submissions thus denying the appellant the right to fair trial as enshrined in Articles 50 (2) (e) of the Constitution. That if the said submissions and authorities were considered, the trial court would have established that indeed the appellant proved his case on a balance of probabilities as provided in law. That similarly the learned magistrate misconstrued and misinterpreted the provisions of the Civil Procedure Act and as a result came to a wrong conclusion.
15. The appellant also submitted that the learned magistrate failed in law and in fact by considering an ambiguous scene visit report presented by the District Land Surveyor which did not clearly identify the parcel of land occupied by each party and the measurements of each piece of land, and which report did not reflect the correct position on the ground and therefore prejudiced the appellant. The appellant submitted that the respondent's defences are full of mere denials and hence no valid defence or triable issues were raised in their defence. It is the appellant's submission that there was miscarriage in the manner in which the trial court handled the case before the lower court and urged the court to allow the appeal as prayed.

#### **1<sup>st</sup> & 2<sup>nd</sup> Respondents' Submissions**

16. In their submissions dated November 14, 2022 filed through the firm of Mwangi G & Co Advocates, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that it is trite law that he who alleges must prove as well articulated in Section 107 of the Evidence Act. It is their submissions that it is the duty of a party to present its evidence before the court and the presentation of both sets of agreements were not disputed at any particular point in time by the parties. That it is now well established that submissions, however persuasive cannot replace pleadings and the appellant by trying to introduce new pleadings vide submissions is an action that has already been overtaken by events. The respondents relied on the case of Daniel Toroitich Arap Moi Vs Mwangi Stephen Muriithi & another (2014) eKLR.
17. The 1<sup>st</sup> and 2<sup>nd</sup> respondent's submitted that there were no doubts or aspersions that were cast over the legitimacy of the sale agreements presented by both the appellant and the respondents. The respondents argued that in a deliberate ploy to mislead this Honourable court the appellant reiterates a piecemeal extract of the impugned judgment and in particular page 15 and submitted that the factual basis is that the respondents provided a genuine sale agreement over the entirety of the sale of this land by the appellant's now deceased father. That whether the agreement was handwritten and/or typed had no bearing upon the legitimacy of the sale transaction as the Act refers to the agreement being in writing.
18. It is the respondents submissions that prior to the amendment of the Law of Contract Act in 2003 that brings into focus the section as quoted by the appellant herein, it was provided that an oral sale agreement over land was valid, a note or memorandum executed by the parties was valid and that if there was handing over of possession then the agreement was valid. That the agreement was done in the year 1992 and therefore no questions as to validity can be raised. They relied on the case of Charles Mwirigi Miriti Vs Thananga Tea Growers Sacco Ltd & another (2014) eKLR and submitted that issues to do with forgery and/or fraud are to be specifically pleaded. That in the entirety of the proceedings no evidence was pleaded and/or tendered to the effect that the respondents participated in any fraudulent



transaction and/or forgery. That issues of fraud and/or forgery necessitate a higher burden of proof than that of on a balance of probabilities as in normal cases. The respondents relied in the case of [\*Vijay Morjaria Vs Nansingh Madhusign Dabar & another \[2000\] eKLR.\*](#)

19. It is the 1<sup>st</sup> and 2<sup>nd</sup> respondents' submission that the appellant had not proved his case against the respondents and urged the court to have the appeal dismissed with costs.

### **Analysis And Determination**

20. I have perused and considered the record of appeal, the grounds of appeal and the submissions made. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyze the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the evidence presented and the law.

21. In this case, the appellant's claim as pleaded in the further amended plaint was that his late father, Jeremiah M'Igweta M'Ing'etu (deceased) was the registered owner of original land parcel No Nyaki/Kithoka/345 measuring approximately 10 acres before the same was subdivided into three portions known as Land parcel Nos Nyaki/Kithoka/1724, 1725 and 1726. That subsequently, the deceased subdivided parcel No 1724 into two portions, to wit, Nyaki/Kithoka/1822 and 1823. That land parcel No Nyaki/Kithoka/1822 was further subdivided into Nyaki/Kithoka/4248 and 4249. The appellant alleged that the deceased sold a portion measuring 0.98 acres out of land parcel No Nyaki/Kithoka/1823 to the 1<sup>st</sup> respondent, but on the ground the 1<sup>st</sup> respondent took a bigger portion. That the deceased also sold a portion measuring 3 acres out of land Parcel No Nyaki/Kithoka/1726 to the 1<sup>st</sup> respondent's late father Eutyclus Muthui (deceased) who instead fraudulently and irregularly transferred the whole parcel into his name.

22. In the further amended plaint, the appellant gave particulars of fraud as follows:-

- (a) Transferring whole parcel No 1726 instead of 3 acres,
- (b) Forging the signatures of the late Jeremiah M'Igweta M'ingetu,
- (c) Transferring whole land without the knowledge of the deceased Jeremiah M'Igweta M'Ing'etu,
- (d) Transferring whole land without following the laid down procedures in law,
- (e) Transferring LR NO Nyaki/Kithoka/18323 to himself a portion measuring 1.32 acres instead of 0.89 acres with the result that LR NO Nyaki/Kithoka/1823 is bigger on the ground and mutation form.

23. There are only three issues for my consideration-;

- i. Whether there was any evidence of fraud proved against the respondents.
- ii. Whether the sale of land agreement produced by the respondents did not meet the provisions of Section 3 of the [\*Law of Contract Act.\*](#)
- iii. Whether the decision of the learned trial magistrate was against the weight of the evidence and the law.

Whether there was any evidence of fraud proved against the respondents.

24. In this case, it is not in dispute that the appellant's late father, Jeremiah M'Igweta M'Ing'etu (deceased) was the owner of the original parcel of land LR NO Nyaki/Kithoka/345. Before he passed on, the deceased subdivided his land into various portions, among them land parcel No Nyaki/Kithoka/1726 and Nyaki/Kithoka/ 1823. The appellant's case is that before his demise the deceased sold a portion



measuring 3 acres that was to be excised from Nyaki/Kithoka/1726 to the 1<sup>st</sup> respondent's deceased father, the late Eutychus Muthui (deceased). That however, the whole parcel of land was transferred instead of the 3 acres that was allegedly sold.

25. In the case of *RG Patel Vs Lalji Makanji (1957) EA 314*, it was held that:
- ' Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required'
26. In this case, appellant admits that there was a sale in writing of the suit parcels of land. Whereas the appellant alleged that the 1<sup>st</sup> respondent took a bigger portion of land than that which was sold to him, the evidence on record indicates that the Land Registrar Meru Central and the District Surveyor Meru Central visited the suit lands and found that each party was in occupation of their respective parcel of land.
27. Further, although the appellant alleged that his deceased father only sold 3 acres out of land parcel No Nyaki/Kithoka/1726 to the 1<sup>st</sup> respondent's father and not the entire 5 acres, I note that in his witness statement which was filed on March 25, 2013 and which the appellant adopted as his evidence in chief, he admits that the sale was in writing and the respondents had a copy of the agreement. Indeed the respondents produced a handwritten sale agreement showing that the two deceased persons entered into an agreement for the sale of the whole parcel No Nyaki/Kithoka/1726 on April 4, 1992. It is questionable therefore how the appellant was able to secure a typed sale agreement dated September 10, 1990 when the same did not form part of his original bundle of documents, and when he had expressly acknowledged that it was the respondents who were the ones in possession of the sale agreement over the said land.
28. The appellant submitted the sale agreement relied on by the trial magistrate that was produced by the respondents was a forgery.
29. In the case of *Jennifer Nyambura Kamau Vs Humphrey Mbaka Nandi [2013] eKLR*, the Court of Appeal stated that;
- ' It is not enough for the respondent to have pleaded fraud; he must tender evidence that prove the particulars of fraud to the satisfaction of the trial court.'
30. In the same case, the Court of Appeal stated as follows;
- ' Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that '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 that those facts exist: Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.'



31. In the case of *Ndolo Vs Ndolo (2008) 1 KLR 742*, the Court stated-;

' 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.'

32. In the case of *Gladys Wanjiru Ngacha Vs 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.'

33. 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.'

34. Being guided by the above decisions of the Court of Appeal, which are binding on this court, I find that the burden in this case lies on the appellant who alleges that the respondents' sale agreement was a forgery. The appellant did not tender any evidence to support the fraud pleaded and also did not even deem it fit to call any expert witness to support his allegations. Relying on the material on record, in my view the trial magistrate was justified in believing the respondents' and not the appellant. Therefore, I see no reason to fault the finding of the learned magistrate with regard to the sale agreements in question. I find that there was no fraud proved against the respondents.

Whether the sale agreement produced by the respondents did not meet the provisions of Section 3 of the *Law of Contract Act*.

35. The appellant submitted that the agreement that was produced by the respondents did not satisfy the requirements of Section 3 (3) of the *Law of Contract Act*. Section 3 (3) of the *Law of Contract Act* provides as follows:

- (3) No suit shall be brought upon a contract for the 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.

36. I note that the sale agreement that was produced by the respondents and which the trial court relied on in its judgment was in writing. I do agree with the respondents' submission that whether the agreement



was handwritten and/or typed had no bearing upon the legitimacy of the sale transaction. The words used in Section 3(3) of the *Law of Contract Act* is in writing. The appellant's argument that the sale agreement is not valid simply because it is handwritten therefore has no basis. I find that the agreement met the requirements of Section 3(3) of the *Law of Contract Act*.

Whether the decision of the learned magistrate was against the weight of the evidence and the law.

37. The prayer sought by the appellant were grounded on the allegation of fraud. It is trite law that the registration of a person as proprietor of any land can be cancelled on the basis of fraud. In this case, it was not enough for the appellant to have pleaded fraud. He ought to have tendered evidence that prove the particulars of fraud to the satisfaction of the trial court. In this case, I am not persuaded that the appellant tendered sufficient evidence to prove the alleged fraud on the part of the respondents. I hold that the learned magistrate did not err in finding that the appellant failed to prove his case against the respondents on a balance of probabilities.
38. In totality, my evaluation of the evidence and applicable law to the facts of this case shows that the appellant did not prove fraud on the part of the respondents and his case was rightly dismissed by the trial court.
39. In the result, the appeal herein has no merit and is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MERU THIS 22<sup>ND</sup> DAY OF MARCH 2023.**

**In the presence of**

Kiogora Nganga for 3<sup>rd</sup> respondent

Ms Mukaburu holding brief for MS Nyamu for appellant

**Court Assistant Kibagendi**

**C.K YANO**

**JUDGE**

