



**Kandava (Suing as the legal representative of the Estate of Samuel Mbogo Kandava aka Mbuko Kandava) v Wamutte & 2 others (Sued as the legal representatives of the Estate of Raphael Warui Wamutte alias Raphael John Wamutte) (Environment and Land Appeal 4 of 2022) [2023] KEELC 22657 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 22657 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL 4 OF 2022**

**A KANIARU, J  
MARCH 21, 2023**

**BETWEEN**

**VIRGINIA RUGURU KANDAVA (SUING AS THE LEGAL REPRESENTATIVE  
OF THE ESTATE OF SAMUEL MBOGO KANDAVA AKA MBUKO  
KANDAVA) ..... APPELLANT**

**AND**

**RACHAEL MUTHONI WAMUTTE ..... 1<sup>ST</sup> RESPONDENT**

**PATRICK WAMITI WARUI ..... 2<sup>ND</sup> RESPONDENT**

**PETER MACHARIA WAMUTTE ..... 3<sup>RD</sup> RESPONDENT**

**SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF RAPHAEL  
WARUI WAMUTTE ALIAS RAPHAEL JOHN WAMUTTE**

*(An appeal from the judgment of Hon. H. Nyakweba in Embu  
CMCC NO. 146 OF 2018 delivered on 29th September 2020)*

**JUDGMENT**

1. The appeal herein arose from the judgment of the lower court (Hon. H. Nyakweba, PM) in civil suit No 146 of 2018 delivered on 29.9.2020. That Judgment itself was in respect of a suit in which the appellant – Virginia Ruguru Kandava – had impleaded the respondents – Rachael Muthoni Wamutte, Patrick Wamiti Warui and Peter Macharia Wamutte – in the lower court for fraud allegedly perpetrated by one Raphael John Wamutte, a deceased person closely related to each of them and of whose estate Rachael Muthoni Wamutte and Patrick Warui are the legal representatives. The respondents themselves were also accused of fraud relating to the manner they conducted succession proceedings



for the estate of Raphael John Wamutte and subsequent transmission of ownership of the Land to Peter Macharia Wamute.

2. The respondents had filed a defence in the lower court in which they denied the appellant's entire claim. The judgment that ensued after prosecution of the suit resulted in the dismissal of the appellants suit and that is what provoked the appeal.
3. The appeal is premised on four (4) grounds as follows;
  1. The trial magistrate erred in Law and fact in wrongly finding that there was no evidence to prove that Samuel Mbogo Kandava was also the same person known as Mbuko Kandava, yet there was on record a supporting affidavit sworn by the appellant on 13.6.2018 in Miscellaneous Succession Cause No 37 of 2018 (Embu) which affidavit clearly deposed that Samuel Mbogo Kandava was her biological father and was also known as Mbuko Kandava.
  2. The trial magistrate erred in law and fact by failing to find that in the absence of any other evidence to the contrary, the said affidavit sworn on 13.6.2018 by the appellant was unrebutted and therefore persuasive and conclusive prove that Samuel Mbogo Kandava and Mbuko Kandava was one and the same person.
  3. The trial magistrate erred in Law and fact in finding that the appellant did not prove fraud against the respondents despite the court having previously ruled that the application for consent of the Land control Board form dated 17.1.1973 were not signed by Mbuko Kandava as claimed by the respondent in their pleadings.
  4. That although the trial magistrate properly directed himself that both the application for consent of Land Control Board and the transfer of Land Form dated 17.1.1973 were not signed by Mbuko Kandava as alleged and pleaded by the respondents, nevertheless the trial magistrate thereafter erred in Law and fact in dismissing the suit and failing to find that the respondents, by reasons of the forgery contained in the application and transfer forms aforesaid, could not inherit a good title in respect of L.R. Gaturi/ Weru/ 232 from their deceased father, Raphael Warui Wamutte.
4. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on 4.11.2022. The submissions essentially focused on fraud. The appellant submitted that fraud was demonstrated in the lower court not only on a balance of probabilities "but also beyond reasonable doubt" This court was asked to consider the submissions made in the lower court and make a finding that fraud was demonstrated.
5. The respondent's submissions were filed on 9.11.2022. The respondents submitted, inter alia, that the appeal has no merits as there was no fraud demonstrated in the manner the 3<sup>rd</sup> respondent became the registered owner of the land. The trial court was said to have been properly guided by the issues framed by both sides for determination. The trial court was further said to have properly analysed the issue of fraud and made the correct findings. The respondents were said to have lawfully acquired the land. The appellant was said to have failed to demonstrate that her late father was ever registered as the owner of the land.
6. I have considered the appeal as filed, rival submissions, and the lower court record. The duty of the court while handling a first appeal like this one is as stated in *Selle Vs Associated Motor Boat Company Limited (1968) EA 123*, which is to assess or re-evaluate the evidence on record, and make its own conclusions while giving due allowance to the fact that it is the court appealed from which saw and heard the witnesses and therefore had some advantage in that regard.



7. The fraud alleged in the matter largely consists in misrepresentation of the identity of the owner of the land in dispute leading to illegal transfer of the same land to a different person. Tied to this issue is also the allegation that the appellant is not being truthful to the court when she asserts that Samuel Mbogo Kandava is the same person as Mboku Kandava. According to the respondents, the two are different persons.
8. The lower court addressed itself to these issues and found that fraud was not proved and that Samuel Mbogo Kandava and Mboku Kandava were not shown to be one and the same person.
9. I have looked into the issue of fraud as pleaded and subsequently addressed by the appellant in the lower court. I have also considered how the lower court handled the issue. Fraud is not a tort of timeless relevance. Under section 4 of the *Limitation of Actions Act* (cap 22), the tort of fraud has a lifespan of three (3) years and the calculation of the three years start when fraud is committed or, as per section 26 of the same Act, at the time the fraud is discovered. Either way, fraud ceases to be an actionable wrong three years after it is perpetrated or three years after its discovery.
10. The appellant talked of having conducted a search which led to her discovery that the disputed land is registered in the name of a person other than her deceased father. She didn't indicate the date of this discovery in her plaint and the same date is not stated in her evidence. This was a fatal omission on her part. Her allegations of fraud were evidently steeped in history and that history itself spans several decades. She needed to come clear on the date of her discovery to dispel any feeling or suspicion that her action is time-barred.
11. The other aspects of fraud alleged by the appellant are, or should be, closely intertwined with the issue of whether the appellants deceased father had the two names attributed to him by her. In my view, the lower court addressed this issue of names well in its judgment and my reading of the evidence before the lower court is that the appellant did not demonstrate well that her deceased father answered to the two names in his life. It stands to reason therefore that even had the issue of an action based on fraud been satisfied from time perspective, it would still be difficult to tell who between the two names it was committed against.
12. The issue of the deceased having two names needed to be addressed well by the appellant. It seems clear to me that the grant she obtained in order to file the suit had only one name. By law, that is the name that should guide the court. If the appellants deceased father had another name that could not be vouched for through documents, abundant evidence needed to be made available that that other name was his own. As things stand, it appears to be only the appellant who is alleging that the father had another name. The appellant needed to bring more evidence given that the other side had denied the issue.
13. The upshot, in light of the foregoing, is that the merits of the appeal herein have not been demonstrated. I see no need of interfering with the decision of the lower court. I therefore dismiss the appeal with costs to the respondents.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21<sup>ST</sup> DAY OF MARCH, 2023.**

In the presence of;

Munene for Ms Fatuma Wanjiku for respondents

Ms Mureithi for Eddie Njiru for appellant

Court Assistant – Leadys

**A. KANIARU**



**JUDGE ELC – EMBU**

**21. 3.2023**

