



REPUBLIC OF KENYA



**Miira v Mburu & another (Civil Appeal 156 of 2021)
[2023] KEHC 2945 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2945 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 156 OF 2021
RB NGETICH, J
MARCH 30, 2023**

BETWEEN

JULIUS WAINANINA MIIRA APPELLANT

AND

BERNARD GITAU MBURU 1ST RESPONDENT

**GITHUNGURI CONSTITUENCY RANCHING COMPANY LIMITED 2ND
RESPONDENT**

JUDGMENT

1. This is an appeal from the decision of the Senior Resident Magistrate Court in Ruiru SRMCEL No 341 of 2020. The appellant filed a suit against the Respondent *vide* the plaint filed on September 8, 2020, seeking the cancellation of the 1st Respondent as the proprietor of 0.75 acres comprised in share certificate No 2505 (BN) in Githunguri Constituency Ranching Company limited and an order declaring the Plaintiff as the *bonafide* proprietor of the suit property.
2. The trial court in its judgment decided that the Plaintiff failed to prove its case to the required standard and proceeded to dismiss the same with no orders as to costs because the Defendants did not participate in the proceedings.
3. Aggrieved by the judgment of the trial court, the Appellant filed a Memorandum of Appeal dated August 26, 2021 citing six (6) grounds as follows;
 - a. That the learned trial Magistrate erred in law and in fact in failing to appreciate that the Appellant herein was a *bonafide* proprietor of 0.75 acres in share certificate No 2505 BN Githunguri Constituency Ranching Company Limited the 2nd Respondent.



- b. That the learned trial Magistrate erred in law and in fact in failing to appreciate that there was a fraudulent transfer of the Appellant's property into the names of the 1st Respondent herein by the 2nd Respondent.
 - c. That the learned trial Magistrate erred in law and in fact in failing to appreciate that the Appellant had sufficiently proved the occurrence of fraud in the transfer of the suit property into the names of the 1st Respondent.
 - d. That the trial Magistrate erred in law and in fact in failing to appreciate that the Respondent herein did not enter appearance and/ or file their defence despite being properly served.
 - e. That the learned trial Magistrate erred in law and in fact in failing to appreciate that there was a valid agreement for sale of the property provided by the Plaintiff to the court.
 - f. That the learned trial Magistrate erred in law and fact in failing to appreciate that the Respondents herein intend to divest the Appellant's right to property as enshrined in the [Constitution](#).
 - g. The Appellant urged this court to set aside the judgment of the trial court and allow the appeal with costs to the appellant.
4. The appeal was heard through written submissions. The Respondents did not participate in the appeal despite service.

Appellant's Submissions

5. Counsel for the appellant filed submission on April 7, 2022 and submitted that the testimony and evidence of the appellant were overwhelming and the trial court failed to find the appellant had proved its case on a balance of probability and failed to consider that the Respondent did not defend themselves.
6. Counsel further submitted that the appellant proved the allegation of fraud committed by the Respondents and the Appellant stands to suffer irreparable harm as the 2nd Respondent has failed to transfer the suit property; that the appeal stands a high chance of success.

Analysis And Determination

7. This being the first appellate court, I have a duty to analyze and re-assess the evidence on record and arrive at my own determination. This I do with the knowledge that unlike the trial court, I did not have the benefit of observing the demeanor of witnesses. For this, I give due allowance. This position was held by the Court of Appeal in the case of *Selle Vs Associated Motor Boat Co* [1968] EA 123 where the court stated as follows: -

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”



8. In view of the above, I have perused the lower court record and find that the issue for determination is whether there was fraudulent transfer of the Appellant's property by the Respondents.
9. Record show that the Respondent did not participate in the trial court proceedings and the suit proceeded for formal hearing. The appellant adopted his witness statement and testified that the 1st Respondent had colluded with the 2nd Respondent and had the parcel of land registered in his name. He produced a copy of the sale agreement and the application to lodge a caution dated March 20, 2014. According to the Appellant, the property comprising of 0.75 acres in share certificate No 2505 BN Githunguri, Constituency Ranching Company Limited belongs to Joseph Gathuru Karonji the vendor of the property.
10. The trial court opined that the appellant had not proved the allegation of fraud as alleged in the plaint.
11. I note that the learned trial Magistrate in her finding stated that the appellant failed to prove that he is the owner of the suit property and has been deprived of the same by the Defendant's fraudulent actions.
12. The trial court went ahead to state that as follows: -

“the plaintiff failed to adduce evidence to demonstrate that the property comprising of 0.75 acres in share certificate No 2505 BN Githunguri, Constituency Ranching Company Limited belonged to Joseph Gathuru Karonji ... that there was no evidence tabled by the plaintiff to demonstrate the 1st Defendant misrepresented himself as the owner of the suit property and faked ownership papers”.
13. The allegation of Fraud consists of deceitful actions which may be made through either positive assertions or concealment of facts. It is settled law that where a charge of fraud is intended, the particulars of fraud must be pleaded and particularized. The statement of claim must contain the full allegations of the fraud.
14. Section 2 of the *Registration of Titles Act* defines fraud as follows:-

“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”
15. I have perused the plaint dated September 1, 2020, in which the appellant herein particularized the allegations against the Respondent. However, the appellant has not demonstrated to the court how the 1st Respondent misrepresented himself as the owner of the said 0.75 acres, how he faked ownership documents, and obtained the share certificate from the 2nd Appellant without paying consideration. These allegations were not demonstrated through evidence, which would have been crucial to the trial court in determining the issue of fraud by the 1st Respondent.
16. Section 24 of the *Land Registration Act* provides as follows: —
 - 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; and
 - b. The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges



belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.

17. Further Section 25 of the *Land Registration Act* states as follows: -

“(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: —

- a. To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- b. To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

18. For the Appellant to successfully challenge the title of the 1st Respondent, he must prove that the title to 0.75 acres in share certificate No 2505 BN Githunguri, Constituency Ranching Company Limited was obtained, procured and/or transferred to the 1st Respondent by fraud; and that the 1st Respondent was a party to the fraud.

19. Further, Section 107 of the *Evidence Act* Cap 80 of the Laws of Kenya states 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”.

20. The Appellant therefore ought to give evidence to prove the existence of fraud. In the trial court, the appellant despite stating the property was owned by Joseph Gathuru Kironji did not adduce sufficient evidence to prove that the said Joseph was the rightful owner of the property.

21. The trial court found the Appellant failed to particularize the allegations of fraud with respect to the actions of the Respondents. There is no sufficient ground to warrant interference with the Trial Court’s finding on the Appellant’s claim against the Respondents. From the foregoing I find that the Appeal herein lacks merit.

22. Final Orders:-

1. I hereby dismiss this appeal.
2. Costs to the Respondent.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 30TH DAY OF MARCH, 2023

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RACHEL NGETICH

JUDGE

In the presence of:



Martin – Court Assistant

Ms. Kiarie holding brief for Ndungu Mwaura for the Appellant

No appearance for the Respondents

