



**Chepkirui v Kusero & another (Environment and Land Appeal  
E038 of 2023) [2025] KEELC 1458 (KLR) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1458 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E038 OF 2023**

**JA MOGENI, J**

**MARCH 24, 2025**

**BETWEEN**

**EVALYNE CHEPKIRUI ..... APPELLANT**

**AND**

**GEROFREY TUERERE KUSERO ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, RUIRU ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the Judgment of the Hon. Principal Magistrate J.A  
Agonda (Ms.) delivered on the 15th August 2023 in Ruiru ELC No. 051 of 2022)*

**JUDGMENT**

1. This is an appeal against the Judgment of the Hon Principal Magistrate J.A Agonda delivered on 15/08/2023 in Ruiru ELC No. E051 of 2022. In the Judgment the learned trial Magistrate, upon considering the evidence before her found that the 2<sup>nd</sup> Respondent herein granted the 1<sup>st</sup> Respondent ownership of title No. Ruiru Kiu Block2/23708, 709 and 710.
2. The Appellant, being dissatisfied with the said Judgment, filed the present Appeal on the grounds raised in her Memorandum to wit;
  1. That the Learned trial Magistrate erred in law by failing to give concise statement of the case, a concise statement of evidence adduced by parties, the points of determination, the decisions thereon and reasons of her Judgment pronounced on 15<sup>th</sup> August 2023.
  2. That the Learned Magistrate erred in law and fact in failing to consider the submissions tendered by the Appellant herein vis-à-vis those of the 1<sup>st</sup> Respondent hence arriving at the wrong decision.



3. That the Learned Trial Magistrate greatly misdirected herself in treating the submissions of the Appellant very superficially thereby erroneously arriving at a wrong conclusion on the issue of ownership.
  4. That the Learned Magistrate erred in law and fact in failing to consider the evidence tendered by the Appellant herein vis-à-vis those of the Respondents and the Pleadings filed in Court.
  5. That the Learned trial Magistrate erred in law and fact by wholly disregarding the evidence and oral testimony submitted before the Court.
  6. That the Learned Magistrate erred in law and in fact in her Ruling by failing to appreciate the gravity of the issue raised by the Appellant and the submissions filed by the Appellant.
  7. That the decision of the Learned trial Magistrate is against settled principles of law.
3. The Appellant thus sought that the Appeal be allowed and the Judgment of the Honorable Principal Magistrate delivered on 15/08/2023 be varied, set aside and/or reviewed accordingly. The Applicant also sought for the costs of the Appeal.
  4. It is proper to first trace the history of the dispute between the two parties in this appeal. The dispute between the Appellant who is the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who are 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the suit in the lower Court came to Court by way of a Plaint dated 21/03/2022. In that Plaint the Appellant in this appeal sued the Respondents and sought orders that included a temporary and permanent injunction against the Respondents from transferring the suit property, a declaration that the Appellant is the rightful owner of the suit properties in question, a mandatory injunction against 1<sup>st</sup> Respondent to surrender the title documents to the suit properties to the Appellant and demolish illegal structures, a transfer and rectification of title by the 2<sup>nd</sup> Respondent conferring title to the Appellant; punitive, aggravated and general damages, mesne profits and costs of the suit.

**The Plaintiff's case.**

5. In the Plaint the Plaintiff's case was around 2019 when the 1<sup>st</sup> Defendant made a verbal offer to the Plaintiff to assist her with the amalgamation and subdivision of the land parcel RUIRU KIU/1099 and that by 2020 the amalgamation was done producing the title Ruiru Kiu Block2/23549 and in turn the Plaintiff would take care of the 1<sup>st</sup> Defendant's costs together with subdivision costs.
6. That upon completion of the sub-division producing 16 parcels the Plaintiff paid the 1<sup>st</sup> Defendant Ksh 104,650 and in exchange the Plaintiff was to give her the titles but he only gave her 13 titles stating that the other three titles were still being processed.
7. The Plaintiff followed up with 2<sup>nd</sup> Defendant's office and realized that the three titles were registered in the name of the 1<sup>st</sup> Defendant who claimed that this was his compensation as had been agreed with the Plaintiff.
8. It was the Plaintiff's case that the 1<sup>st</sup> Defendant having transferred the three titles to himself namely Ruiru Kiu Block2/23708, Ruiru Kiu Block2/23709 and Ruiru Kiu Block2/23710, he went ahead deposited them as security in Ruiru Court for three Criminal cases. Whereupon the Plaintiff reported this matter to Ruiru Police Station under OB No. 18 of 2021 and then filed the suit upon which this appeal is predicated.
9. The Plaintiff in her evidence confirmed to the Court that they had a verbal agreement with the 1<sup>st</sup> Defendant which was to the effect that the 1<sup>st</sup> Defendant would prompt her when payments were



required and she sent the same via mpesa. She supported this averment by producing exhibit 24 showing the payments.

10. That despite demand the 1<sup>st</sup> Defendant refused to transfer the suit properties to her and this prompted her placing a caution on the suit properties and filing of the suit upon which the appeal is predicated. She denied ever attending the Land Control Board meeting and placing her thumb print on documents produced by the 1<sup>st</sup> Defendant transferring the suit properties to the 1<sup>st</sup> Defendant and claimed fraud and or misrepresentation on the part of the 1<sup>st</sup> Defendant. She also denied entering into an oral agreement to transfer the suit properties to the 1<sup>st</sup> Defendant.

### **The Defendants' defence.**

11. The 2<sup>nd</sup> Defendant filed a defence statement only seeking that the Plaintiff's case against the 2<sup>nd</sup> Defendant be dismissed but never called any witness at the hearing.
12. On the part of the 1<sup>st</sup> Defendant, he filed a defence and counter-claim dated 23/09/2022 and made two prayers; seeking to have the caution registered by the Plaintiff against the suit property to be deregistered and the cost of the suit. The 1<sup>st</sup> Defendant averred that there was an oral agreement to transfer the three suit properties to him as compensation for the cost of the amalgamation and subdivision.
13. The 1<sup>st</sup> Defendant testified that he received Kesh 105,000 from the Plaintiff for the work of subdivision but that it was not enough for the task. Since the Plaintiff was not able to pay for the cost of the work at hand she agreed to transfer to him the three suit properties. There was also filed a counterclaim. In that counterclaim the 1<sup>st</sup> Defendant pleaded that he is the duly registered proprietor of the three suit properties. That the three suit properties were a compensation to cater for survey costs and acquisition of the sixteen titles and related work done.
14. The 2<sup>nd</sup> Respondent did not participate in the Appeal.
15. The Court issued its directions on 22/10/2024 to the effect that the Appeal be disposed of by way of written submissions wherein parties complied.

### **Plaintiff's Submissions**

16. The Appellant submissions dated 25/11/2024 were filed by the firm of Maragia & Partners Advocates. The Appellant identified two issues for determination namely; whether the Defendant acquired the title to the suit property by fraudulent means and whether the 1<sup>st</sup> Respondent rebutted the Appellant's claim in Court.
17. The gist of the Appellant's written submissions were to the effect that the 1<sup>st</sup> Respondent acquired title by fraudulent means. That the 1<sup>st</sup> Respondent submitted false documents to the Land Registry to the effect that he was the one eligible to be registered as the absolute proprietor of the suit property. That in submitting the false documents to the Land Registrar the 1<sup>st</sup> Respondent made the Registrar believe that he was indeed the owner of the suit property.
18. It was her submission that she neither sold nor transferred the suit properties or any portion thereof to the 1<sup>st</sup> Respondent and that she has continued to be deprived of her ownership, possession and occupation of the suit properties. She has relied on the case of Eunice Grace Njambi Kamall And Another vs The Hon. Attorney General and 5 Others Civil Suit No. 976 of 2012 where the Court quoted the case of Fletcher vs Peck 10 US 87 (1810) in illustrating how other jurisdictions have handled the issue of sanctity of title and plight of innocent third parties. My reading of this case does not endear



me to see how the issue of third parties come here and so I am not persuaded that the case is relevant to the issue at hand.

19. It is the Appellant's contention that there was fraud and/or misrepresentation in obtaining the title deeds by the 1<sup>st</sup> Respondent. She also submitted that the 1<sup>st</sup> Respondent did not rebut the Appellant's claim that she never attended the Land Control Board meeting. That the 1<sup>st</sup> Respondent did not produce, a transfer, sale agreement, declaration of value, stamp duty receipt and or Land Control Board Receipt to lend credence to his claim of having acquired the suit properties in the proper manner. She submitted that she reported the alleged fraud to the Directorate of Criminal Investigations (DCI) and the investigations are ongoing. She even submits that the 1<sup>st</sup> Respondent has been arrested and charged although there was no proof of the pending Criminal case adduced.
20. The Appellant also relied on the cases of *Edward Muriga (through Stanley Muriga vs Nathaniel R Schutts Civil Appeal No 23 of 1997*, *Motex Knitwear Limited vs Gopites Knitwear Mills Limited* [2009] eKLR, *Micheal Njiru Kariuki vs Ferdinand Ndungu Waititu & 3 Others* [2021]eKLR.
21. The gist of the cases are that where a Defendant does not call witnesses to give evidence on his behalf it means that the claim made by the Defendant in the defence and counterclaim are unsubstantiated. Also that if no evidence is tendered to support an averment in a pleading, in this case a defence, then the averment stands as a mere statement. The Appellant also submitted that since the 1<sup>st</sup> Respondent did not rebut her evidence, then it remains uncontroverted.
22. The Plaintiff filed a reply to the 1<sup>st</sup> Defendant's defence and defence to counter-claim dated 14/02/2023 and repeated the averments in the Plaint. She also stated that the money paid to the 1<sup>st</sup> Defendant was more than enough to undertake the task at hand.
23. In her conclusion the Appellant urged the Court to allow the appeal.
24. On his part, through the firm of Kanyi Kiruchi & Company Advocates, the 1<sup>st</sup> Respondent filed their submissions dated 24/10/2024 and also raised two issues for determination namely; whether the 1<sup>st</sup> Respondent's title for the 3 plots were acquired lawfully and whether the Appeal is merited.
25. It was the 1<sup>st</sup> Respondent's submission that all the steps required to acquire a piece of land were religiously followed. That the Plaintiff failed to prove fraud and that the transfer in the property happened when the Land Control Board granted consent. He relied on the case of *Munyu Maina vs Hiram Gathiha Maina* (2013) eKLR and he submitted that he proved the legality of the title deeds and he was not merely waving the title under challenge but that had proved their legality of the said title. The 1<sup>st</sup> Respondent also relied on the cases of *DGM vs EWG* [2012] eKLR, *Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others* (2013) eKLR, *Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others* [2015] eKLR. In the foregoing cases the 1<sup>st</sup> Respondent contended that the Appellant had failed to prove fraud in the lower Court to the required standards. That the Learned Magistrate did not err by her finding that fraud was not proved as was stated in the Arthi Case (supra).
26. He contended in his submissions that the Appellant failed to convince the Court on how her thumbprints were on the transfer document. Further that it was not the responsibility of the 1<sup>st</sup> Respondent to produce evidence of payment of stamp duty and transfer forms. He stated that the appeal has no merits and that the appeal is nothing but empty/mere assertions with no evidence which should be dismissed with costs.



## Analysis and Determination

27. Having considered the Record of Appeal, the Grounds of Appeal, the responses and the submissions, I find that the following issues render themselves for determination:
- i. Whether the Learned Magistrate erred in finding that there was no fraud in transfer and registration of the suit property to the 1<sup>st</sup> Respondent.
  - ii. What orders should I issue.

### **i. Whether the Learned Magistrate erred in finding that there was no fraud in transfer of the suit property to the 1<sup>st</sup> Respondent**

28. This is a first appeal, it is the duty of this Court to re-evaluate the evidence and draw its own conclusions. This is an important legal principle stated in the often quoted case of *Selle – Vs- Associated Motor Boat Co. Limited* 1968 E.A. 123.
29. It my duty to also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982-88] 1 KAR 278).
30. PW1, the Appellant testified and she adopted her statement dated 21/3/2022 as her evidence. She contends that she purchased the land parcel RUIRU KIU /1099 in 2012 and then she procured the services of a surveyor who subdivided the parcel into thirteen new titles for purposes of subdivision. She later realized that the subdivision was not economical and she made a decision to amalgamate and then re-subdivide. That she commissioned the 1<sup>st</sup> Respondent to undertake the task through a verbal agreement where after the 1<sup>st</sup> Respondent making the verbal offer to undertake the task in 2019 to assist the Appellant with the task the Appellant agreed. In 2020 the tasks of amalgamation was concluded producing title number Ruiru Kiu Block2/23549.
31. That the 1<sup>st</sup> Respondent agreed verbally with the Appellant to subdivide Ruiru Kiu Block2/23549 and the Appellant would cater for costs of the subdivision. That the 1<sup>st</sup> Respondent undertook the task and produced sixteen parcels and the Appellant made final payment of Kesh 104,650 which is to cater for the task. Only that at completion the 1<sup>st</sup> Respondent only submitted 13 (thirteen) titles not 16(sixteen) titles. This led to the Appellant reporting the matter to DCI.
32. The Appellant supported her claim of payment by producing the mpesa remittances and the 1<sup>st</sup> Respondent also did not dispute receiving the said amount. The Plaintiff also called PW2 who testified about the value of the suit properties which his report indicated was Kesh 2,000,000. The 1<sup>st</sup> Respondent did not rebut the evidence of the valuer. He however claimed to have been given the suit properties to compensate for the cost of the subdivision. He did not present a breakdown of the costs and did not also show the Court how he utilized the Kesh 104,650 which he received although on his part he said he was paid Kesh 105,000.
33. The 1<sup>st</sup> Respondent testified that the said Kesh 105,000 was not enough. He did not adduce any evidence to show how much more he needed and whether this was communicated to the Appellant. Only choosing to state that the Appellant compensated his costs by giving him the three plots.
34. Now from the information on record by PW2 in his report the suit property costs Kesh 2,000,000 per plot. How would it be that the 1<sup>st</sup> Respondent paid himself Kesh 6,000,000 to undertake the tasks of subdividing and producing the sixteen nay thirteen titles? Is the process of subdivision that



expensive? A rough calculation puts the processing of one title to Kesh 461, 538 if we took it that he produced thirteen titles. The 1<sup>st</sup> Respondent did not produce in Court any breakdown of the work undertaken which have made the Court to come up with a decision whether the three titles valued at Kesh 2,000,000 each was a fair price for the work done.

35. Further there is no evidence presented in Court by the 1<sup>st</sup> Respondent lend credence to the claim of having been “given” the three plots and the procedure followed. Whereas he claims to have gone with the Appellant to the Land Control Board, there is no evidence tabled before the Court of sale agreement, transfer of the suit property from the Plaintiff to 1<sup>st</sup> Defendant, stamp duty receipt, declaration of value, minutes of the Land Control Board meeting, or document showing the gifting and or any consideration paid for the suit property.
36. The Court in Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [supra] stated that in a case of fraud, the word fraud need not be mentioned or used but that the facts stated in the pleadings must be so stated to show that fraud was used. Leading to the irregularities and illegalities complained of.
37. The Land Registrar the 2<sup>nd</sup> Defendant chose to conveniently only file a defence and call no evidence therefore refusing to guide the Court on how the 1<sup>st</sup> Respondent acquired the title. For a transfer of property to have been properly executed, the Land Registrar must have been presented with the letter of consent to transfer obtained from Land Control Board, and a valuation of property to assess appropriate stamp duty should be available. These documents were neither presented by the Land Registrar nor the 1<sup>st</sup> Respondent who is claiming ownership.
38. Just by the missing documents which is problematic, I am left wondering how the 1<sup>st</sup> Respondent acquired a good title deed to the suit property. This Court is therefore left with the conclusion that there was a misrepresentation and or illegality that led to the transfer of the suit property to the 1<sup>st</sup> Respondent which finding ought to have been made by the Learned Magistrate after taking the evidence presented and scrutinizing the registration documents that were laid before the Court.
39. Fraud is a serious matter which must be proved to the required standard as already stated. In R.G Patel vs Lalji Makanji 1957 E.A 314, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”
40. I have no doubt in my mind that the Plaintiff herein has distinctly pleaded the facts on which fraud is alleged against the 1<sup>st</sup> Defendant. The next step however was for the Plaintiff to prove those allegations to the required standard.
41. And where, as in this case, fraud is alleged, and further noting that the prayers sought involve rectification, amendment or cancellation of the land register, the Court is bound to bear in mind the content of Section 80 of the [Land Registration Act, 2012](#) which is as follows:

“80 Subject to subsection (2), the Court may order the rectification of the register

  - (1) by directing that nay registration be cancelled, or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
  - (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease, or charge for valuable consideration unless the proprietor had knowledge of the omission,



fraud or mistake or substantially contributed to it by any act, neglect or default.” (emphasis: mine)

42. Section 3(3) of the Law of Contract Act provides that no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit is founded is;

- “(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.”

43. The wording of the above provisions is in mandatory terms. The Appellant in her evidence denied giving for work done the suit properties to the 1<sup>st</sup> Respondent which in essence means that there was never a transfer of the suit properties. In this case the existence of a duly executed transfer by the parties is critical and expected. It is evident that the 1<sup>st</sup> Respondent herein never had any such agreement for this transaction. Although in his evidence he testified that it was an oral agreement, which clearly violates Section 3(3) of the Law of Contract. The Court has not given leeway for oral agreements although the Learned Magistrate chose to find that there was an oral agreement and that it is legally permitted to have oral agreements.

44. This may be the case in other contracts but NOT for transfer of interest in land this MUST be in writing. There being no sale agreement nor valid transfer as per the requirements of the law between the Appellant and the 1<sup>st</sup> Respondent then, the transfer of the suit land to the 1<sup>st</sup> Respondent therefore became unattainable. The action undertaken to transfer the suit properties is illegal.

45. The well-known aphorism, “he who asserts must prove” was augmented by the Court of Appeal in Jennifer Nyambura Kamau vs. Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 [2013] eKLR as follows;

“We have considered the rival submissions on this point and state that 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.”

46. In this case the 1<sup>st</sup> Respondent failed to call crucial witnesses and/or avail crucial documents to assert his ownership over the suit properties through his counter claim. I am therefore not in agreement with the trial Magistrate that the Appellant did not prove his case on a balance of probabilities.

## ii. What orders should I issue?

47. Ultimately in conclusion, having taken all the evidence, the submissions adduced, the authorities herein by the parties concerned and the applicable law into consideration, I hereby grant the following orders:



1. The Appeal is hereby allowed.
2. The entire Judgment delivered by the trial Court Principal Magistrate Ruiru ELC No. E051 of 2022 on 15/08/2023 is hereby set aside.
3. An order is hereby issued directing the Land Registrar Ruiru to revoke and cancel title in the 1<sup>st</sup> Respondent's name in Title Numbers Ruiru Kiu Block2/23708, Ruiru Kiu Block2/23709 and Ruiru Kiu Block2/23710 and register the titles in favour of the Appellant.
4. The costs of the Appeal is awarded to the Appellant to be borne by the 1<sup>st</sup> Respondent.

48. Orders Accordingly.

**DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 24<sup>TH</sup> MARCH 2025.**

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**MOGENI J**

**JUDGE**

In the presence of:-

Ms. Maragia for the Appellant

Mr. Wachira holding brief for Mr. Kanyi for the 1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent - Absent

Melita - Court Assistant

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**MOGENI J**

**JUDGE**

