



REPUBLIC OF KENYA



**Osindo v Okeyo (Environment and Land Appeal E014 of 2022)  
[2023] KEELC 17277 (KLR) (11 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17277 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND APPEAL E014 OF 2022**

**AY KOROSS, J**

**MAY 11, 2023**

**BETWEEN**

**SYLVESTER OWINDO OSINDO ..... APPELLANT**

**AND**

**SYLVESTER OLANG OKEYO ..... RESPONDENT**

*(Being an appeal from the judgment of the Hon. Principle Magistrate  
C.N.Sindani delivered on 29/3/2022 in Ukwala PM ELC Case No. 10 of 2015)*

**JUDGMENT**

**Background**

1. Sylvester Olang Okeyo, (the ‘respondent’ herein) sued Sylvester Owinda Osindo (the ‘appellant’ herein). In his claim dated March 3, 2021, he asserted he had sold land parcel LR No North Ugenya/Sega/3803 (‘suit property’) to the appellant at a consideration of Ksh 400, 000/-.
2. According to him, the transaction was null and void for failing to obtain a spousal or a land control board (LCB) consent. He pleaded and particularised fraud. The suit property and North Ugenya/Sega/3802 (‘adjoining land’) were allegedly subdivisions of LR No North Ugenya/Sega/3710 (‘mother parcel’). He allegedly owned the adjoining land. He sought for cancellation of the suit property’s title, costs and interest.
3. The appellant responded to the suit by a defence and counterclaim dated March 23, 2021 averring the absence of the land control board (LCB) and spousal consent could vitiate the contract between the parties. In addition, the doctrines of constructive trust and proprietary estoppel overrode the absence of these consents. In his counterclaim, the appellant averred despite the contract being on the size he purchased, the ground situation was different; the suit property had a deficit.



4. The appellant prayed for the respondent's claim to be dismissed, a declaration the contract was valid, caution lodged by the respondent over the suit property be removed, permanent injunction, damages and costs.
5. The respondent replied by filing a reply to defence and defence to counterclaim dated April 19, 2021. He reiterated the averments made in his claim.
6. Despite filing a defence and counterclaim, the appellant did not testify and his case was closed. After the respondent had testified and closed his case, the trial court in its judgment dismissed the appellant's counterclaim and granted the respondent the reliefs sought in his claim.

### **Appeal To This Court**

7. Aggrieved by the impugned judgment, the appellant lodged an appeal on several grounds. Most of the grounds were repetitive and in appreciation of these repetitions or probably their irrelevance, the appellant abandoned some of them entirely and collapsed others into 3 grounds. These grounds can aptly be summarised as: -
  - a. The trial court erred when it found the appellant had fraudulently obtained the suit property by failing to obtain the LCB and spousal consent.
  - b. The trial court erred in law and fact by improperly applying provisions of law and legal principles.
  - c. The trial court erred in law and fact in finding the appellant had fraudulently encroached on the adjoining land.
8. The appellant sought several reliefs: the entire impugned judgment be set aside and he be found the suit property's legal owner. In the alternative, the entire proceedings and judgment be set aside and a re-trial be conducted and costs of the appeal and lower court suit be awarded to him.
9. The appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

10. Mr Musungu, counsel for the appellant, filed written submissions dated February 21, 2023. He identified six issues for determination;(a) whether the appellant fraudulently obtained the suit property by failing to obtain the LCB and spousal consent (b) whether the absence of these consents vitiated the contract (c) whether the appellant fraudulently encroached on the adjoining land (d) whether the appellant was entitled to the reliefs sought (e) what was the current status of the land and, (f) who bears the costs of the appeal.
11. On the 1<sup>st</sup> issue, counsel submitted the respondent did not plead or prove the suit property was matrimonial property, that such matrimonial interests were overriding rights or there was a beneficial right over it. The *Matrimonial Property Act* came into force on January 16, 2014 which was after the transaction had taken place. Counsel placed reliance on section 12 (1) of this Act.
12. On the 2<sup>nd</sup> issue, counsel submitted the respondent did not prove the LCB consent was not obtained. Article 10 (2) of the *Constitution* recognised equity as a principle of justice. The doctrine of constructive trust and proprietary estoppel which superseded the *Land Control Act* sufficed in the circumstances of the case. To buttress his position, he cited two Court of Appeal decisions; *William*



Kipsoi Sigei v Kipkoech Arusei & John Tunge [2019] eKLR and Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri [2014] eKLR. In the latter, the court found: -

‘the respondent had created a constructive trust in favour of all individuals who had paid the purchase price for respective plots and the trial court erred in failing to note that consent of the Land Control Board is not required where a trust is created over agricultural land.’

13. On the 3<sup>rd</sup> issue and placing reliance on section 107 (1) of the Evidence Act, counsel submitted that the onus was on the respondent to prove that the appellant had encroached onto the adjoining land.
14. On the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> issues, counsel respectively submitted the appellant was entitled to the orders sought, the orders of the trial court had been executed and sought costs.

### **Respondent’s Submissions**

15. M/s Maloba, the respondent’s counsel, filed her written submissions dated March 13, 2023. She did not identify any issue for determination.
16. Relying on sections 12 (1) of the Matrimonial Property Act and 6(1) of the Land Control Act, she submitted a spousal consent was a prerequisite if a property was matrimonial. The respondent’s testimony was not rebutted by the appellant. The absence of the LCB consent rendered the transaction void.
17. According to counsel, pursuant to section 7 of the Land Control Act, the only recourse was for the respondent to refund the purchase price since the contract was void. The appellant’s action of encroaching the adjoining land amounted to fraud. The appellant did not adduce evidence hence his claim was properly dismissed.

### **Analysis and Determination**

18. Being a 1<sup>st</sup> appellate court, this court is alive that before reaching its own conclusions, its duty is to analyze and re-assess the evidence on record and not to introduce extraneous matters not dealt with by the parties in their evidence. It will bear in mind that it neither saw nor heard the witnesses and shall give allowance in that respect. See Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR and Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2EA 212,
19. Before I proceed further, I must address certain issues that emerged. Firstly, in their submissions, both parties have adduced new evidence without seeking leave in accordance with order 42 rule 27 of the Civil Procedure Rules. This line of evidence will be disregarded. Secondly, since no prejudice will be occasioned to either party, reference shall be made to proceedings in the trial court record since the record of appeal is incomplete. Lastly, the appellant did not adduce evidence before the trial court and his evidence remained mere allegations and unsubstantiated. Therefore, it was imprudent for him to rely upon them on appeal.
20. Having carefully considered the record of appeal, submissions of counsels, provisions of law cited including authorities, I will adopt the condensed grounds which were earlier highlighted in this judgment as the issues for determination. Because of a correlation of all the grounds, they will be addressed together.
21. By the provisions of section 26 (1) of the Land Registration Act, a court shall *prima facie* deem the certificate of title issued by a registrar as evidencing the person named as proprietor as the absolute and indefeasible owner. It cannot be challenged except on grounds of fraud or misrepresentation to



- which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
22. In the well cited Court of Appeal decision of *Artbi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR, the court expressed itself on how a claim of fraud, should be pleaded and proved as follows: -
- ‘As a serious accusation, fraud ought to be specifically pleaded and proved on higher balance of probability but not beyond reasonable doubt. It is not necessary that the word Fraud be stated or used, but the facts stated in the pleading must be so stated to show that fraud was used, and the circumstances leading to reasonable inference that fraud, illegalities and irregularities were the cause of the loss or damage complained.’
23. In referring to John Willard, *A Treatise on Equity Jurisprudence* 147 Platt Potter Ed, 1879), *Black’s Law Dictionary*, 11<sup>th</sup> Edn, defined fraud as follows;
- ‘Fraud has been defined to be, any kind of artifice by which another is deceived. Hence, all surprise, trick, cunning, dissembling, and other unfair way that is used to cheat any one, is to be considered as fraud.’
24. In his claim, the respondent postulated fraud on 3 grounds; encroaching onto the adjoining land, failing to pay consideration for the encroached portion and failing to obtain the LCB consent. In support of his case, he produced an official search certificate of the suit property, agreement for sale and demand letter.
25. In the impugned judgment the trial magistrate stated and held;
- ‘...there is no application from(sic) the land control board consent...it is not clear how subdivision and transfer arrived...the plaintiff argues that the process was unprocedural...I allow the suit.’
26. From this impugned judgment, the trial court neither analysed whether fraud was proved to the required standards nor did it make a finding on it. In arriving at its decision, the trial court did not apply any statutory proviso, legal principles or judicial precedents.
27. It merely allowed the respondent’s claim and entered judgment for the respondent. Notwithstanding this and being guided by order 42 rule 27 of the *Civil Procedure Rules*, this court has jurisdiction to settle issues and pronounce its judgment on appeal if there was sufficient evidence on record.
28. Although both parties made heavy weather on the spousal consent. The impugned judgement did not make a finding on it. Paragraph 4 of the plaint stated ‘...the transaction was void *ab initio* for lack of ... spousal consent on the part of the plaintiff’s spouse.’
29. Although this paragraph averred absence of a spousal consent rendered the contract void, it lacked certain material facts. What was the cause of action that would warrant cancellation of the suit property’s title? Was it fraud, misrepresentation, illegality, unprocedural conduct or a corrupt scheme? How did the circumstances occur? Who was his spouse? Was the suit property matrimonial property? It is trite law parties are bound by their pleadings.
30. His pleadings and evidence were bereft of material facts and the trial court was left with nothing to analyse. This may explain why the trial court was silent on such a finding. See order 2 rule 10 of the



Civil Procedure Rules. When faced with scant and generalised pleadings, the Court of Appeal in Bruce Joseph Bockle v Coquero Limited [2014] eKLR stated: -

‘A general allegation of fraud or illegality and misrepresentation as was the case here was not sufficient to infer liability on the part of those who are said to have committed it...the Civil Procedure Rules require the parties to state a very explicit case of fraud or illegality, or rather of facts suggesting fraud or illegality.’

31. Arthi Highway Developers Limited v West End Butchery Limited (supra) cited Bullen & Leake & Jacobs, Precedent of pleadings 13<sup>th</sup> Edition at page 427 which stated: -

‘general allegations, however strong may be the words in which they are stated, are insufficient to amount to (sic) an averment of fraud of which any court ought to take notice.’

32. In the absence of pleading a particular cause of action that would warrant rendering the contract void, setting out some actual fact or circumstances which taken together imply, or at least very strongly suggest that fraud, misrepresentation, illegal, unprocedural conduct or a corrupt scheme must have been committed, the respondent’s claim on the absence of spousal consent rendering the contract void *ab initio* failed to meet this threshold of order 2 rule 10 of the Civil Procedure Rules. Since the trial court did not address itself on this claim, I find this claim by the respondent failed to meet the legal standards.

33. I will now turn to the assertions of fraud which he specifically pleaded and particularized and establish if they were proved to the required legal threshold. From the definition of fraud which was stated earlier in this judgment, for fraud to suffice, there must be some ploy by which the person alleging it was deceived or betrayed. It amounts to the deliberate misrepresentation of facts by using trickery for the purpose of depriving someone of treasured ownership of a property.

34. From the evidence adduced before the trial court, the respondent did not prove the particulars of fraud to the required standards. Fraud is quasi criminal in nature. The respondent did not lead evidence that he was betrayed or misled by the appellant for him to transfer or subdivide the suit property without obtaining the LCB consent. This act did not amount to fraud.

35. The other particulars were that the appellant had unlawfully encroached on the adjoining land without paying for it. Apart from his assertions, he did not produce any document such as a survey report, a registry index map or an official search certificate to show he was the registered owner of the adjoining land.

36. He did not prove to the required standards these acts amounted to fraud by being duped to cede some land without consideration. In my honest opinion, these acts did not meet the ingredients of fraud but rather they alluded to trespass or a boundary dispute.

37. The respondent was at the heart of the contract. It would be obnoxious for him to let the appellant who was an equal participant in the transaction to wholly shoulder blame for the alleged fraud without laying blame on himself too. For the benefit of doubt, fraud was not proved. See Steadman v Steadman (1976) AC 536, 540.

38. It is my finding the respondent did not prove fraud to the required standards. I find the appellant has succeeded on all the collapsed grounds of appeal.

39. Having reanalyzed the totality of the evidence and applicable law, I ultimately find the trial court erred in allowing the respondent’s case without applying the applicable legal provisions and principles. I also find the trial court erred in failing to establish whether the respondent’s pleadings were properly



pleaded on the claim of spousal consent or that he proved the particulars of fraud to the required standards.

40. For the foregoing reasons, I find the appeal has merit. I hereby set aside the entire impugned judgment and decree of trial court and hereby dismiss the respondent's claim that was before the trial court with costs to the appellant. The appeal is hereby allowed with costs to the appellant.

**DELIVERED AND DATED AT SIAYA THIS 11<sup>TH</sup> DAY OF MAY 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

**11/05/2023**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

**In the Presence of:**

N/A for the appellant

N/A for the respondent

**Court assistant: Ishmael Orwa**

