



Wanjala & another v Enock (Environment and Land Appeal E011 & E008 of 2023 (Consolidated)) [2025] KEELC 1420 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1420 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E011 & E008 OF 2023 (CONSOLIDATED)
EC CHERONO, J
MARCH 20, 2025**

BETWEEN

JOHANES WANJALA 1ST APPELLANT

FLORENCE MMBONE 2ND APPELLANT

AND

EMILY NAFULA ENOCK RESPONDENT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND APPEAL E008 OF 2023

BETWEEN

FLORENCE MMBONE APPELLANT

AND

EMILY NAFULA ENOCK RESPONDENT

(Being appeals from the judgment of Hon. P.Y.Kulecho, Principal Magistrate-Webuye delivered on the 15/08/2023 at Webuye Law Courts in SPM ELC Case No.24 of 2022)

JUDGMENT

1. In ELCLA E011 of 2023, Johanes Wanjala, the Appellant, was the 2nd Defendant, while Emily Nafula Enock, the Respondent, was the Plaintiff in the former suit/lower court case. This appeal was consolidated with ELCLA No. E008 of 2023, in which Florence Mmbone, the Appellant, was the 1st Defendant in the original suit, with Emily Nafula Enock also appearing as the plaintiff. The two appeals were merged, with ELCLA 011 of 2023 designated as the lead file.



2. The former suit before the trial court was instituted by the Respondent herein vide a Plaint dated 06/07/2021 where she sued the Appellant and another for the following orders;
 - a. As per paragraph 6 above.

The plaintiff seeks for orders to forcefully evict the 1st defendant from the plaintiff's house and the demolition of the illegal and unlawful structures constructed by the 2nd defendant on the land parcel no. Bokoli/Misikhu/2257 and further a permanent injunction restraining the defendants by themselves, servants, Agents and/or any person acting through their instructions from encroaching, trespassing or occupying the plaintiff's land parcel no. Bokoli/Misikhu/2257 measuring approximately 0.61ha.
 - b. Costs and interests.
 - c. Any other relief this honourable court may deem fit to grant.
3. It was the Respondents case that she is the registered owner of land parcel no. Bokoli/Misikhu/2257 measuring approximately 0.61ha hereinafter referred to as the 'suit land'). That the Appellant, without any colour of right encroached and/or trespassed on the suit land and constructed structures thus infringing on her proprietary rights. That efforts to have the Appellant vacate have been futile.
4. The Appellant filed a statement of defence dated 04/02/2022 where they argued that the suit land was purchased by Romanos Donyi Lumanye now deceased from Daniel Wafula Wambulwa and was comprised in title no. Bokoli/Misikhu/619 registered in the name of Charles Makokha Wambulwa. That the said Romanos Donyi Lumanye was the husband of Florence Mmbone, one Grace Lumanye Ndonge and the Respondent in that order. That the said Romanos Donyi Lumanye also purchased 50 x 100 ft land comprised in title no. Bokoli/Misikhu/619 from John Wekesa Wambulwa. That the said land was divided amongst his three wives. That the Respondent later sold her portion to one Geoffrey Ongoma and purchased land elsewhere. Therefore, the respondent's registration as the sole registered owner of the suit land was fraudulent and intended to dis-inherit the other family members.
5. The particulars of fraud against the Respondent were set out thereunder. It was further stated that the Romano Doyi Lumanye(deceased) had prior to his death sold a portion of the land to the Appellant. The Appellant claimed against the Respondent for cancellation of her registration as the proprietor of the suit land and for the transfer of the Appellant's share to him.

Evidence before the trial court

6. The matter proceeded by way of viva voce evidence. The Respondent called one (1) witness while the Appellant called three (3) witnesses.
7. PW1 Emily Nafula Enock adopted her witness statement dated 06/07/2021 as her testimony-in-chief. She referred to her list of documents containing five (5) items which she produced as P-Exhibit 1-5. The exhibits are; her national identity card, a copy of certificate of search for LR NO.Bokoli/Misikhu/2257, copy of title for LR No.Bokoli/Misikhu/2257, letter of consent and an agreement dated 28/11/2008 respectively. It was her evidence that she purchased the suit land together with her husband which was curved out from LR No. Bokoli/Misikhu/619 where they put up their house and resided until his demise and she obtained title much later.
8. On cross-examination, she testified that she resided on the land with her husband which land they purchased from one Daniel Wafula Wambulwa and later bought an access road from Wekesa Wambulwa. That she has neither sold the piece of land nor sub-divided it as alleged. It was her evidence that the Appellant and others entered the suit land in the year 2012 after her husband died. She testified that



before the death of her husband, he sold a portion of land to one Geoffrey Ongoma Omuhaya vide an agreement dated 19/11/2010. She stated that she was not privy to the agreement dated 12/03/2012 between her husband and one Musa Daudi. That they bought the suit land before the succession process involving the land was over.

9. DW1 Florence Mbone Omaso adopted her witness statement dated 27/01/2022 as his testimony-in-chief where she reiterated the averments in the statement of defence. It was her evidence that the respondent sold her share of land through an agreement dated 09/11/2020 between Romanos Donyi Lumanyi and Geoffrey Ongoma Omuhaya witnessed by the herself (the respondent). She produced her list of documents containing 7 items and D-Exhibit 1-7.
10. DW2-Johannes Wanjala adopted his witness statement dated 27/01/2022 as his testimony-in-chief. He testified that he bought a quarter of an acre from one Musa Daudi who had bought it from Ramanos Donyi Lumanyi and has developed the same.
11. DW3 Edward Muganda Wamukana adopted his witness statement dated 04/02/2022 as his testimony-in-chief. He stated that he was a village elder and confirmed that the said Romanos Donyi Lumanyi had land in the area. He testified that the Respondent did not sell her portion of land and moved elsewhere and that at the time of his death, the said Ronanos was co-habiting with the Respondent on the piece of land.
12. Upon considering the evidence before it, judgment was delivered by the trial court on 15/08/2023 allowing the Respondent's claim and further issuing an order for eviction against the Appellant within sixty (60) days and for each party to bear their own costs.
13. Aggrieved by the said judgment, the Appellant in ELCLA E011 of 2023 preferred the current appeal vide a Memorandum of Appeal dated 09/09/2023 and set forth the following Grounds of Appeal:
 - a. That the honourable magistrate erred in both law and fact when she failed to find that the appellant was a bona fide purchaser for value thereby occasioning a miscarriage of justice.
 - b. That the honourable magistrate erred in both law and fact when she held that the sale agreement between the deceased and one Daudi Musa was voidable due to failure by the deceased to seek the joint owners written consent prior to selling a portion thereof as stipulated under Section 91 of the *Land Registration Act* No. 3 of 2012 thus applying the said law retrospectively hence occasioning a miscarriage of justice.
 - c. That the honourable magistrate erred in both law and fact when she held that a presumption was established that the subject land was jointly owned by the deceased and the plaintiff but failed to find thus that the portion occupied by the appellant was procedurally sold by Daudi Musa who had also purchased the same from the deceased.
 - d. That the honourable magistrate erred in both law and fact when she held that the appellant had not filed a counter-claim when indeed under paragraph 15 of their statement of defence dated 04/02/2022 the appellant had sought for cancellation of the respondent's registration as the proprietor of land registration no. Bokoli/Misikhu/2257 and transfer the same to the appellant and the 1st defendant therein in their respective shares.
 - e. That the honourable magistrate erred in both law and fact when she failed to find that the contents of the appellants statement of defence was not challenged in ways due failure by the respondent to file a reply to defence hence there was joinder of issues as provided for in Order 2 Rule 12 of the Civil Procedure Rules (CPR)2010 and which failure amounted to an admission of the facts and law in the statement of defence.



- f. That the honourable magistrate erred in both law and fact when she failed to find that the appellant had indeed proved the particulars of fraud on the part of the respondent hence occasioning a miscarriage of justice.
 - g. That the judgment is founded on a suit that was irregularly and unprocedurally transferred from Kimilili SPMCC to Webuye SPMCC hence contravening the provisions of Section 18 of the Civil Procedure Act, Chapter 21 Laws of Kenya.
 - h. That the honourable magistrate failed to find that the portion the deceased sold to Daudi Musa is the portion the deceased solely purchased and thereby the respondent had no capacity to obtain title thereto.
 - i. That the honourable magistrate erred in both law and fact when she held that the title held in possession of the respondent was sufficient proof of ownership without regard that the respondent had failed to show that the process of acquisition of the same was illegal.
 - j. That the honourable magistrate erred in both law and fact when she failed to find that the ownership per se was not sufficient proof that the respondent had proved her case against the appellant.
 - k. That the honourable magistrate failed to take into account the submission and case law cited by the appellant hence showing open bias.
 - l. That the honourable magistrate erred in both law and fact when she failed to find that the appellant was in occupation for apporportion measuring 0.1ha out of land parcel no. Bokoli/Misikhu/619 by the time the respondent allegedly acquired title deed for land parcel no. Bokoli/Misikhu/2257 hence occasioning miscarriage of justice.
14. The Appellant prays that the appeal be allowed and an order be issued dismissing the Respondents suit and allowing the Appellants' counter-claim. Secondly that the Appellant be awarded costs of this appeal and those of the lower court.
 15. On the other hand, the Appellant in ELCLA E008 of 2023 preferred a memorandum of appeal dated 04/09/2023 on the following grounds;
 - a. The trial magistrate erred in law and in fact in failing to appreciate the appellant is a co-wife to the respondent and therefore entitled to LR NO. Bokoli/Misikhu/2257 contrary to the evidence on record.
 - b. The trial court having appreciated the fact that one Romanos Donyi Lumanye(deceased) purchased a portion of land from LR No. Bokoli/Misikhu/619 which is now registered as Bokoli/Misikhu/2257 erred in law and in fact in failing to hold that the said portion of land formed part and parcel of the deceased's estate which ought to undergo succession proceedings and distributed to the beneficiaries.
 - c. The trial magistrate erred in law and in fact in holding that the respondent did not obtain the title to the said land fraudulently when the court applied wrong principles in respect of proving fraud contrary to the evidence on record.
 - d. The trial court erred in law and in fact in holding that the appellant entered the land in question while the respondent was in Nairobi contrary to the fact that the appellant was residing on the land and the respondent had knowledge of the same.



- e. The trial magistrate erred in law and fact in failing to appreciate the fact that the land in question had been subdivided by the deceased into three portions and each portion given to the three wives and that the respondent sold the portion.
 - f. The trial magistrate erred in law and in fact in holding that upon the demise of one Romanos Donyi Lumanye the husband of both the appellant and the respondent, the respondent had the right to process registration of the said land in his sole name contrary to evidence on record.
 - g. The judgment was against the weight of evidence on record.
16. The Appellant sought to have the appeal allowed with costs, the trial court's judgment set aside and substituted with an order cancelling the Respondent's title LR NO. Bokoli/Misikhu/2257 and ordering it to revert in the name of Ramanos Donyi Lumanye(deceased).

Submissions on the appeal.

17. When this appeal came for directions, the parties agreed that the same be canvassed by way of written submissions.
18. The Appellant filed submissions dated 17/01/2025 where he faulted the trial court for not finding in his favour yet he was a bonafide purchaser for value without notice. Reliance was placed in inter alia the case of Dina Management Limited vs. County Government of Mombasa & 5 Others (Petition 8 (E010 OF 2021) (2022) KESC 30 (KLR). It was submitted that the trial court retrospectively applied the provisions of the Land Registration Act No. 3 of 2012 by insisting that the respondents consent ought to have been sought to make the sale to the said Musa Daudi valid. He relied in the case of JOO vs. MBO, Federation of Women Lawyers (FIDA) & another Petition no. 11 of 2020 (2023) KESS 4 (KLR) (Family) 27 January 2023 (Judgment). The Appellant also argued that its prayers as per paragraph 15 for cancellation of the Respondent's title amounted to a counter-claim and the court's finding were misguided and amounted to a miscarriage of justice. Reliance was placed in the case of; Ndishu & Another vs. Muriungi (Civil Appeal 3 of 2020(2022) KEHC 2 KLR (21 January 2020(Judgment).
19. It was also submitted that the Respondent failed to file a reply to the defence therefore joined in the issues and averments set out in the statement of defence as per Order 2 Rule 12 of the Civil Procedure Rules. He cited the case of Unga Millers vs. James Munene Kamau (2005) eKLR. It was the Appellants further submission that the particulars of fraud stated in the statement of defence were not traversed and as such proved the said particulars on a balance of probabilities. He urged the court to allow the appeal.
20. The Appellant in ELCLA E008 of 2023(Florence Mbone) filed submissions dated 22/11/2024 where she submitted that the relationship between the Respondent and her co-wives ought to be considered in relation to the suit property which was purchased by their husband. That the suit property belonged to their husband solely therefore part of his estate and the findings by the trial court that there was a co-tenancy was erroneous. That the Respondent did not prove that she purchased the suit land and the access road jointly with their deceased husband and the title she holds issued on 16/03/2021 was obtained fraudulently.
21. The Respondent in her submissions dated 13/11/2024 argued that the trial court correctly applied the legal principles in addressing the issues brought out by the parties in determining the dispute. That the court rightly determined that the alleged sale from the deceased to Daudi Musa, and subsequently to the Appellant, Johanes Wanjala, was irregular and lacked the necessary consent from the co-tenant, the Respondent herein.



Legal Analysis and Determination

22. I have considered the appeal, submissions by the parties and the authorities relied on. I have also considered the impugned judgment and the trial court's record. This being a first appeal, parties are entitled to and expect a re-hearing, re-evaluation and re-consideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see the witnesses testify and therefore, give due allowance for that.
23. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;
- [A]n appeal to this Court from a trial...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 allowances in this respect.
24. Before considering the issues in this appeal, let me lay out the set of facts as pleaded by all parties in brief.
25. The Respondent's case is that she is the registered proprietor of the suit land as per the certificate of search and title deed produced as P-Exhibit 1 & 2 which land she had purchased together with her late husband Romanos Donyi Lumanye from one John Wekesa Wambulwa vide an agreement dated 28/11/2008. She therefore claims that the Appellants had no right being there and sought to have them evicted and permanently enjoined from re-entering the suit land.
26. Johannes Wanjala's (hereinafter referred to as the 1st appellant) case on the other hand is that he purchased land measuring 0.1ha from one Musa Daudi vide an agreement dated 13/09/2018 which was produced as D-Exhibit 5b. That the said Musa Daudi had purchased the said share from Ramanos Donyi Lumaye vide an agreement dated 12/03/2018 produced as D-Exhibit 5a. That therefore the respondent was not entitled to the entire suit land and that the title was obtained fraudulently.
27. Florence Mmbone's (hereinafter referred to as the 2nd appellant) case was that she was the 1st wife of the late Romanos Donyi Lumanye and that the suit land solely belonged to her husband. She produced two agreements dated 07/02/2003 and 28/11/2008 as D-exhibit 2 & 3. That her said husband had shared the land amongst his three wives including the Respondent who had in turn sold her share (½ acre) to one Geoffrey Ongoma Omuhanya vide an agreement dated 19/11/2010 produced as D-Exhibit 4. Further, she argued that her husband had also sold 0.1ha to one Musa Daudi who had in turn sold to the 1st appellant vide agreements produced as D-Exhibit 5a 7 5b referred to in the preceding paragraph. It was therefore her case that the Respondent had no share in the suit land and that her title was fraudulent.
28. The Appellants are faulting the trial court on various grounds as can be seen from their grounds of appeal. In my view, the said grounds can be condensed into the following issues for determination in this appeal;
- a. Whether the title held by the respondent (Emily Wafula Enock) was acquired legally and procedurally in law?
 - b. What reliefs should be issued?
 - c. Who will bear the costs?



29. It is not contested that the Respondent is the registered proprietor of the suit land having been so registered on 16/03/2021. Section 24 of the *Land Registration Act* No 3 of 2012 states that 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. Section 25 of the said Act provides that 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—to encumbrances charges or leases shown on the register and the overriding interests as stated in Section 28 of the Act.
30. Section 26 of the *Land Registration Act*, 2012 provides;
- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme
31. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land that can only be challenged on grounds stipulated as above. In the present case, the title produced by the respondent shows that the suit land is registered in her name. That position was challenged by the appellants on the grounds of fraud as was particularized in the statement of defence.
32. It is imperative to note that the fact of ownership and holding of a title document by itself, is not enough. The holder of the title document, which is being challenged, is obliged to tender before the Court, evidence to show how that title was obtained. The owner of the title must justify its validity. This court adopts and restates the position of the law as underscored vide the decision in the case of *Munyua Maina vs Hiram Gathiha Maina* [2013] eKLR, where the Honourable Court of Appeal held as hereunder,
- “We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
33. The Court of Appeal in *Vijay Morjaria vs Nansingh, Madhusingh Darbar & another* [2000] eKLR held that:
- “It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is



also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

34. On the standard of proof required for claims based on fraud, courts have held that the standard of proof is higher than in the ordinary civil cases. In *Koinange & 13 others vs Charles Karuga Koinange* 1986 KLR the court held that:

“When fraud is alleged by the Plaintiffs the onus is on the Plaintiffs to discharge the burden of proof. Allegations of fraud must be strictly proved, although the standard of proof may not be so heavy as to require proof beyond a reasonable doubt, something more than a balance of probabilities is required.”

35. The Respondent in support of her title produced a sale agreement dated 28/11/2008 between John Wekesa Wambulwa as vendor and Romano Donyi Lumanje and Emily Nafula Enock as purchasers for the sale of land measuring 53 x 100ft forming part of LR NO. Bokoli/Misikhu/619 which was registered in the name of Wambulwa Maudende. There was also produced another agreement dated 07/02/2003 between Daniel Wafula Wambulwa as vendor and Romano Donyi Lumanje and Emily Nafula Enock as purchasers for land measuring approximately 2 acres forming part of LR NO. Bokoli/Misikhu/619.
36. It is therefore clear from the evidence that the said purchases were joint purchases by Romano Donyi Lumanje and Emily Nafula Enock. As such, the two properties belonged to the two and not to Ramano as alleged by the Appellants. I would add that no credible evidence was tendered by the Appellants to show that the intention of the purchasers in the said agreements was that Romanos would be the sole proprietor/owner of the properties. The note presented by the Appellants as D-Exhibit 6 is insufficient to refute/challenge the evidence established from the agreements.
37. Based on the facts of this case, Romanos and the Respondent did not secure the registration of the suit land in their names after purchase. As a result, the intended nature of ownership is undefined to this court.
38. In the present case, although the land was not registered, the sale agreements in the present case do not specify the purchasers' shares. Therefore, this court can only presume that the intention was for the land to be held as a joint tenancy noting that the land was purchased in the year 2003 and 2008. The Court of Appeal in *Peter Mburu Echaria v. Priscilla Njeri Echaria*, Civil Appeal No. 75 of 2001 held as follows:

A joint tenancy connotes equality for there is a rebuttable presumption that where two or more people contribute the purchase price of property in equal shares they are in equity joint tenants. The equal contribution results in a joint tenancy unless there is contrary evidence to show that irrespective of the registration there was no equal contribution

39. In the case of *Isabel Chelangat v Samuel Tiro Rotich & 5 others* (2012) eKLR, the court stated as follows;

“...a joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares...A joint tenancy imparts to the joint owners, with respect to all other persons than themselves, the properties of one single owner. Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner. Joint tenancy carries with it the right



of survivorship and “four unities”. The right of survivorship (*jus accrescendi*) means that when one joint owner dies, his interest in the land passes on to the surviving joint tenant.”

40. Counsel submitted that under Sections 101(1), 102(1) and 103 (1) of the Registered *Land Act* [now repealed], a joint tenancy arose whenever land was conveyed or devised to two or more persons without any word to show that they were to take distinct and separate shares. It is clear from Section 101(1) of the repealed Act that where an instrument of conveyance (in this case the sale agreement) was made in favour of two or more persons, both the instruments and the resultant registration were required to specify whether the two or more persons were joint proprietors or proprietors-in-common. Where they were proprietors-in-common, the instrument and the resultant registration (parcel register) were required to show the share of each proprietor. The repealed Act did not have a default framework spelling out the presumption that was to be made in the event of failure to specify whether the proprietorship was joint or in common.
41. In this case therefore, I am inclined to find and hold that the purchasers intended the land to be held as a joint-tenancy. Further and as can be seen from the evidence of DW3, the Respondent resided on the suit land with her deceased husband and the 2nd Appellant seems to have come in later after the suit land had already been purchased.
42. The 1st Appellant claims that he is a bona-fide purchaser for value without notice and that he is entitled to his purchased share of 0.1ha. In *Margaret Ngonge Gachoka vs Stephen Gachanja & others* (2022) eKLR, the court cited with approval *Katende vs Haridar & Co. Ltd* (2008) 2 E A 173, that for one to qualify as a bona-fide purchaser, he has to hold a certificate of title; how he purchased the land in good faith, he did not know about fraud; the vendor had an apparent valid title; bought without any notice of any fraud, bought for valuable consideration and lastly, that he was not a party to any fraud. In *Dina Management Ltd vs County Government of Mombasa & 5 others* Petition (8) (E010) of 2021 (2022 KESC 30 (KLR) 21st April 2023 (Judgment), the court cited with approval *Samuel Kamere vs Land Registrar Kajiado* (2015) eKLR, where it was held that a bona-fide purchaser must among other things establish that he had carried due diligence to determine the lawful owner from whom he acquired a legitimate title.
43. The 1st Appellant argues that he purchased his claimed portion of land from one Musa Daudi who had bought from Ramanos Donyi Lumanje. As had been established from the sale agreements produced in evidence, the suit land was jointly purchased by Romano Donyi Lumanje and Emily Nafula Enock therefore it was co-owned by the two. For the 1st Appellant’s argument to succeed, he is required to prove the above factors discussed in the abovementioned cases, key among them is the issue on due diligence.
44. Although the suit land was not registered in the name of the Respondent and Ramanos at the time of alleged purchase, it was upon him to establish from the said Musa Daudi the status of ownership in terms of the actual owners and the position of the title. He was duty bound to establish the structure of ownership before purchasing the same. The Court further finds and holds that where a property is owned by more than one person, no one owner has a superior right to the other. Further, the law requires that if the Defendant needed to deal with the land, he ought to have sought the consent of the Plaintiff before he could have any dealings with the suit land. However, such consent should not unnecessarily be withheld, but the same must be sought.
45. If he would have done this, the 2nd Appellant would have established that the said Ramanos was not the sole owner of the suit land and that the consent of his co-owner (the respondent). not even as a spouse as was the argument of the trial court was essential in the circumstances. It is trite that if land is co-owned, one co-owner cannot deal with the property without the consent of the other as no one



co-owner has a better right than the other. The alleged sale therefore from Ramanos to Musa Daudi was marred with misrepresentations and therefore irregular. In *Gichinga Kibutha vs. Caroline Nduku* (2018) eKLR, the court held that concerning a contract, fraud includes the suggestion as a fact which he does not believe to be true, the active concealment of a fact by one having knowledge or belief of the fact, a promise made without the intention of performing it, any other fact-filled to deceive and any such act or omission or the law declares to be fraudulent. In *Mohmed Shahanaz Butt & others vs Kenya Revenue Authority & 2 others* (2020) eKLR, the court held that the plaintiff ought to have done due diligence before purchasing the property, and by failing to do so, they were the authors of their misfortune.

46. The 1st appellant argued that the Respondent did not file a reply to defence and as a result, the averments in the joint statement of defence remained uncontroverted. However, a perusal of the record of appeal filed in ELCLA E008 of 2023 reveals that a reply to defence dated 10/02/2022 was actually filed. This argument is false and therefore falls by the wayside. The 1st appellant also argued that they had filed a counter-claim alongside the statement of defence. As can be seen from the joint statement of defence dated 04/02/2022, the Appellants did not specifically state that they had filed a counter-claim and neither did they file a verifying affidavit to show that they intended to file one in accordance with Order 4 Rule 2(5) and Order 7 Rule 5 (a) of the Civil Procedure Rules. Nothing in the said statement of defence connotes the intention to file a counter-claim such that the provisions of Article 159 can be applied.
47. From my analysis of the material placed before the trial court and the impugned ruling, I find that the learned trial Magistrate neither failed to fully analyze and evaluate the evidence nor did he reach a wrong decision.
48. The upshot of my finding is that none of the grounds of appeals have been proved. Consequently, this appeal is hereby dismissed with each party to bear their own costs.
49. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF MARCH, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Wattangah for the Respondent.

M/S Wanyama appearing with Mr. Athunga for the Appellants.

Bett C/A

