



**Kariuki v Magomere (Environment and Land Appeal 23 of 2020)
[2023] KEELC 17810 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 23 OF 2020**

SO OKONG'O, J

JUNE 8, 2023

BETWEEN

GEOFFREY KARIUKI APPELLANT

AND

FRED NYANDAYA MAGOMERE RESPONDENT

*(Being an Appeal from the judgment and decree of Hon. J.K. Ngarngar
CM in Kisumu CMCELC No. 392 of 2018 delivered on 13th June 2020)*

JUDGMENT

1. This appeal is challenging the judgment and decree of Hon. J.K. Ngarngar CM delivered on 13th June 2020 in Kisumu CMCELC No. 392 of 2018 (hereinafter referred to as “the lower court”). The Respondent filed the lower court suit against Joel Okello Apiyo, William Nyanjwa Okidi and Arthur Audi Arua (hereinafter referred to as “the original Defendants”) on 3rd November 2015. The Appellant was subsequently joined in the suit as the 4th Defendant through an amended plaint dated 4th September 2017 filed in court on 5th September 2017. In the amended plaint the Respondent sought judgment against the original Defendants and the Appellant for:
 - a. A temporary injunction restraining the original Defendants and the Appellant, their employees, agents, representatives, assigns or any other person acting through their direction from trespassing, building on or in any other way dealing or interfering with the Respondent’s parcel of land known as Kisumu Municipality/ Block 6/334 (hereinafter referred to as “the suit property”) pending the hearing and determination of the suit.
 - b. A permanent injunction restraining the original Defendants and the Appellant, their employees, agents, representatives, assigns or any other person acting through their direction from trespassing, building on or in any other way dealing or interfering with the suit property.



- c. An order of eviction of the original Defendants and the Appellant, their employees, agents, representatives, assigns or any other person from the suit property.
 - d. General damages for trespass.
 - e. Mense profit against the original Defendants.
 - f. Costs of the suit and interest from the date of filing the suit until payment in full.
 - g. Any such relief as the Court may deem just to grant.
2. The Respondent averred that he was the bona fide and sole registered proprietor of the suit property at all material times. The Respondent averred that in May 2015, he went to the suit property and was shocked to find that the original Defendants and the Appellant had without his consent, authority, lawful excuse, and/or justification, trespassed upon the suit property. The Respondent averred that the original Defendants and the Appellant's said actions were tantamount to a criminal offence of trespass to land as well as a wrong that was actionable. The Respondent averred that as a result of the said acts of trespass, he had suffered immense losses and damages as he was unable to utilise his property for any development. The Respondent averred that the original Defendants and the Appellant had continued to trespass upon the suit property and had refused, failed, and/or declined to grant vacant possession to the Respondent.
 3. The original Defendants filed a joint statement of defence in which they denied the Respondent's claim in its entirety. The original Defendants averred that the Respondent was neither the bona fide nor the sole registered proprietor of the suit property. The original Defendants averred that if indeed the Respondent was registered as the owner of the suit property then the said registration was carried out irregularly and fraudulently. The original Defendants pleaded several particulars of fraud against the Respondent.
 4. The original Defendants contended that the Respondent effected the transfer of the suit property to his name without the requisite consent or a duly executed transfer form signed by the previous owner. The original Defendants averred further that the Respondent effected the transfer of the suit property to his name without the previous owner applying for consent and without paying any consideration. The original Defendants averred that the Respondent effected the transfer of the suit property without following due process in that the Respondent did not pay the requisite stamp duty and the requisite taxes.
 5. The original Defendants denied that they were trespassers on the suit property. The original Defendants averred that they were lawfully on the suit property as servants and/or agents of the Appellant herein who was the legal and /or previous registered proprietor of the suit property. Upon being joined to the suit as 4th Defendant, the Appellant filed a defence and a counter-claim against the Respondent on 27th November 2018. In his defence, the Appellant denied the Respondent's claim in its entirety. The Appellant averred that he was at all material times the registered owner of the suit property and that he was in actual possession thereof. The Appellant averred that upon the filing of the lower court suit by the Respondent against the original Defendants in 2015, the Appellant learnt that the Respondent had fraudulently and illegally transferred the suit property from the name of the Appellant to his name. The Appellant averred that the transfer and registration of the suit property into the name of the Respondent was done fraudulently and irregularly. The Appellant pleaded several particulars of fraud and irregularity on the part of the Respondent. In his counter-claim, the Appellant sought judgment against the Respondent for;



- a. An order for cancellation of the Respondent's registration as the proprietor of the suit property effected on 7th September 2009 and an order reverting the property to the name of the Appellant.
 - b. Costs.
 - c. Interests.
6. The lower court heard the Respondent's claim and the Appellant's counter-claim and rendered its judgment on 13th June 2020. The lower court entered judgment in favour of the Respondent against the original Defendants and the Appellant as prayed for in the Plaint save for the claim for mesne profits that was dismissed. The original Defendants and the Appellant were restrained from trespassing on or having any dealings with the suit property. They were further ordered to vacate the suit property and to pay general damages of Kshs. 300,000/- for trespass. The Appellant's counter-claim was dismissed with costs.
7. The Appellant was aggrieved by the said decision and preferred the present appeal. In his Memorandum of Appeal dated 15th June 2020, the Appellant challenged the lower court's judgment on the following grounds;
1. The trial Magistrate erred in law and fact in failing to find that the Respondent had not proved his case on a balance of probabilities as required.
 2. The Learned Trial Magistrate erred in law and fact in finding that the Respondent's title was regularly and procedurally obtained contrary to the evidence on record.
 3. The Trial Magistrate erred in law and fact in failing to hold that the Respondent's title was acquired fraudulently and/or illegally.
 4. The Trial Magistrate erred in law and fact in failing to find that non-production of documents of transfer and agreement by the Respondent rendered his registration as the owner of the suit property and the title issued to him invalid.
 5. The Trial Magistrate erred in law and fact in holding that the mere registration of the Respondent as the owner of the suit property rendered his title indefeasible.
 6. The Trial Magistrate's judgment was against the evidence on record
8. The Appellant prayed for the appeal to be allowed, the Respondent's suit in the lower court dismissed and the Appellant's counter-claim allowed.
9. This Appeal was heard by way of written submissions. The Appellant filed his submissions on 27th February 2023 while the Respondent filed his submissions on 8th February 2023. I have considered the pleadings and proceedings of the lower court, the judgment of the court, the grounds of appeal put forward by the Appellant, and the submissions by the parties. From the Appellant's grounds of appeal, the issues arising for determination in this appeal, in summary, are whether the lower court erred in its finding that the Respondent was the lawful proprietor of the suit property and that the Appellant had failed to establish that the Respondent acquired the property fraudulently and irregularly. This being a first appeal, the court has a duty to consider and re-evaluate the evidence on record and to draw its own conclusions on the issues that were raised for determination before the lower court. However, the court has to bear in mind that it did not have the advantage of seeing and hearing the witnesses who testified before the lower court. See, *Verani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269 and *Selle v. Associated Motor Boat Co. Ltd.* [1968] E.A 123 on the duty of



the first appellate court. The court will also not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v. Sunday Post Ltd.* [1958] E.A 424 and *Makube v. Nyamuro*[1983] KLR 403.

10. I will consider the Appellant’s grounds of appeal one after the other. I find no merit on ground one of appeal. Ground one of appeal concerns the burden and standard of proof. Having carefully reviewed the cases that were presented to the lower court for determination by both parties and the evidence that was tendered, I am unable to fault the lower court’s finding that the Respondent had proved his case on a balance of probabilities. In my view, the court was not well served by both parties and what the court did was the best it could do in the circumstances. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

The *Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.” (emphasis added)”

11. Apart from the legal burden of proof, there is the evidential burden of proof which keeps shifting during the trial. The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, *Raila Amolo Odinga & Another v. IEBC & 2 Others* [2017] eKLR had the following to say on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.



[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law....”

12. In *Miller v. Minister of Pensions* [1947] 2 All ER 372, Denning J. stated that:

“Thus proof on a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained”.

13. I am of the view that the Respondent having established that the suit property belonged to him by producing in evidence a copy of his certificate of a lease and a search on the title of the suit property showing that the property was registered in his name, the burden shifted to the Appellant who was challenging the Respondent’s title on the ground that the same was acquired irregularly and fraudulently to establish the alleged irregularities and fraud. The Appellant submitted that the Respondent had failed to produce documentary evidence to rebut the Appellant’s testimony that the Respondent’s title was acquired fraudulently. The allegations of fraud and irregularities in the acquisition of the Respondent’s title were made by the Appellant. The burden was on the Appellant to prove the same. The Appellant placed no evidence before the court showing that the suit property was acquired from him by the Respondent fraudulently so as to shift the burden back to the Respondent. The Appellant who claimed that he was still the owner of the suit property did not place before the court a copy of his certificate of lease for the suit property to demonstrate that he never surrendered the same to the Respondent. The Appellant did not also place before the court evidence showing that he was still paying land rates and land rent for the suit property. The only document that was produced in evidence by the Appellant was a copy of the register for the suit property which supported the Respondent’s claim that he was the registered owner of the suit property. The Appellant was also hard-pressed to explain why he never reported to the Police the alleged fraudulent acquisition of the suit property by the Respondent.

14. The Appellant had submitted that the Respondent failed to produce the agreement for sale between him and the Appellant and the instrument of transfer that was executed by the Appellant as exhibits during the trial. The Appellant had also submitted that no evidence of payment of consideration was adduced by the Respondent. Section 26(1) of the *Land Registration Act*, 2012 provides that:

“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.”

15. As I have stated earlier in the judgment, the Respondent produced in evidence his certificate of lease and a search both showing that he was the registered owner of the suit property. According to Section 26 of the [Land Registration Act](#), the said certificate of lease was prima facie evidence that the Respondent was the owner of the suit property. The burden was on the Appellant to rebut this presumption by establishing his claim that the title was acquired fraudulently and irregularly. I am not persuaded that the Appellant discharged this burden. I am therefore unable to fault the lower court on its finding that the Respondent had proved his case against the Appellant.
16. I find no merit on grounds two and three of appeal for the same reason I have given above. The Respondent having proved that he was the registered owner of the suit property and that he had a title to the property, in the absence of any evidence by the Appellant showing that the title was acquired fraudulently and irregularly, the lower court had no basis for making such a finding.
17. With regard to ground 4 of appeal, I am of the view that the Respondent had produced prima facie evidence that he was the lawfully registered owner of the suit property. The burden was on the Appellant who was challenging his title to prove otherwise. None production of the sale agreement or instrument of transfer in evidence without more could not amount to evidence of fraud. The Appellant had a duty of demonstrating that he still had a title to the suit property. The burden would then have shifted back to the Respondent to tender evidence on how he acquired the suit property. In any event, I have noted from the proceedings that the Respondent wanted to produce a copy of the agreement of sale that he entered into with the Appellant but the production was objected to by the Appellant’s advocate on the ground that he had not been served with a copy of the document. The Appellant cannot, therefore, use the non-production of the sale agreement as evidence of fraud on the part of the Respondent. It is therefore my finding that the lower court did not err in not finding that failure to produce the sale agreement or instrument of transfer by the Respondent rendered the registration of the Respondent as the owner of the suit property and the issuance to him of a certificate of lease invalid.
18. With regard to ground five of appeal, it is not correct as claimed by the Appellant that the lower court took the registration of the Respondent as the owner of the suit property as evidence of the indefeasibility of his title. A reading of the judgment of the lower court shows that the court was alive to the provisions of sections 24, 25 and 26 of the [Land Registration Act](#), 2012. The lower court was alive to the grounds under section 26 of the said [Act](#) on which a registration can be challenged. The court considered whether the Appellant had satisfied the court that any of the grounds set out in section 26 for challenging a title had been established by the Appellant and found in the negative. I therefore find no merit in this ground of appeal.
19. On ground six of appeal, the lower court cannot be faulted in its finding that the Appellant had not proved fraud and illegality in the acquisition of the suit property by the Respondent. The Appellant merely made allegations of fraud and irregularities in his counter-claim and nothing more. It is settled that fraud must be pleaded with the necessary particulars and proved to a standard beyond a balance of



probabilities. In *Vijay Morjaria v. Nansingh Madhusingh Darbar & another* [2000] eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

20. In *Railal Gordhanbhai Patel v Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:

“Allegation 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.”

21. In *Virani t/a Kisumu Beach Resort v. Phoenix of East Africa Assurance Co. Ltd* [2004] 2 E.A KLR 269, the court held that:

“Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt”.

23. The Appellant merely set out particulars of alleged fraud and illegalities in his counter-claim but failed to prove the same to the required standard. The lower court cannot therefore be faulted in its finding that the Appellant had failed to establish fraud and illegality upon which the Respondent’s title could be challenged.

24. On the last ground of appeal, I am not in agreement with the Appellant that the judgment of the lower court was against the weight of evidence. In my view, the judgment of the lower court was firmly grounded on the evidence on record that supported the entry of judgment in favour of the Respondent and the dismissal of the Appellant’s counter-claim.

Conclusion:

25. In conclusion, this court finds no merit in the appeal before it. The same is dismissed with costs to the Respondent.

DELIVERED AND DATED AT KISUMU ON THIS 8TH DAY OF JUNE 2023

S. OKONG’O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. P.D. Onyango h/b for Mr. Kowinoh for the Appellant

Mr. Ojuro for the Respondent

Ms. J. Omondi-Court Assistant

