



**Chui & another v Maina & 2 others (Environment & Land Case  
E024 of 2021) [2023] KEELC 18940 (KLR) (18 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18940 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E024 OF 2021**

**A OMBWAYO, J  
JULY 18, 2023**

**BETWEEN**

**GEORGE NJUGUNA CHUI ..... 1<sup>ST</sup> APPELLANT**

**DANIEL WAWERU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PATRICIA WANJIRU MAINA ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNTY SURVEYOR NAKURU ..... 2<sup>ND</sup> RESPONDENT**

**TAYARI FARMERS COMPNAY LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal against the judgment by honorable E.G NDERITU (Chief Magistrate) in Molo CMELC 121 of 2015 read on the 21st September 2021)*

**JUDGMENT**

1. Josiah Macharia whose estate is represented by Patricia Wanjiru Maina (hereinafter referred to as the 1<sup>st</sup> respondent) filed a suit in the Chief Magistrates' Court at Molo being Molo Chief Magistrates Civil No 121 of 2015 against George Njuguna Chui, Daniel Waweru (hereinafter referred to as the appellants) and the County Surveyor Nakuru claiming that at all material times prior to this suit the respondent herein was an absolute owner of all part and parcel of land reference number Mau summit/Molo Block 7/403 (Tayari) which land he bought from his cousins the current registered owner.
2. That upon the demise of the first allottee, the beneficiaries of the estate of the late Andrew Gachuru in the year 2013, visited the suit land and noted the land was being occupied by unknown persons and they reported the matter to the chairman of tayari farmers who wrote them a letter dated 15<sup>th</sup> May 2013 to take to the Registrar but when the same was taken the registrar advised that they needed to Petition for a grant of letters of administration intestate in respect of their father's estate which they



- did. Upon confirmation, the beneficiaries transferred the land into their names and since they are all out of the country decided to sell the same to the respondent.
3. The respondent visited the land and found that the appellants were fully in occupation of the suit land and could not access the same.
  4. The 1<sup>st</sup> respondents claim against the 1<sup>st</sup> and 2<sup>nd</sup> appellants in the lower court was a permanent injunction restraining them, their servant, employees, relatives and/or agents from interfering with the respondents land in any way whatsoever and to give vacant possession of the same and that the appellants were to be shown their rightful boundaries of the suit land .
  5. The appellants on their part filed defence generally denying the allegations by the respondents and specifically stating that as neighbors they have had exclusive occupation possession and use of all the parcel of land known as Mau Summit Block 7/402 and 404 and they were not aware of any boundary dispute involving themselves and the respondent.
  6. The appellants further stated that their parcels of land being Mau Summit Block 7/402 and Mau summit/Molo Block 7/403 (Tayari) 404 were lawfully acquired through membership and shareholding in Tayari Farmers Co. Limited. The respondent had never been a member and or shareholding of Tayari Farmers Company and his alleged land did not exist on the ground. The appellants contended that their respective parcels of land were duly surveyed by M/s Olweny Surveyors and consequently the 1<sup>st</sup> respondent has no valid claim against them.
  7. The appellants further contended that they had not encroached and or interfered with the plaintiff's alleged land as the same did not exist on the ground and the respondent was not entitled to an order of injunction and or any other relief. In the lower court, the appellants prayed that the suit be dismissed with costs.
  8. Pw1 Josiah M Njuguna stated that he purchased the suit land No. Mau Summit/ Block 403(Tayari) from his cousins. They had inherited the land from their father Andrew Njuguna Gachuru who had bought from a company selling the land to Tayari farmers' Co-operative Limited. He produced the receipts of purchase. Andrew Njuguna Gachuru died in an accident in 1988 and left his children very young. When they became of age, they obtained grants of administration and pursued their fathers' rights and obtained title in Mau Summit/ Block 403(Tayari. When they moved on the ground they found people had occupied the land. On cross examination, he states that the land is between Mau Summit/ Block 402(Tayari) and Mau Summit/ Block 404(Tayari) but was being occupied by the appellants.
  9. PW2 Anthony Mbui produced a grant of the letters of administration intestate in the estate of the late Andrew Njuguna Gachuru . He produced the confirmed grant. The property being administered in Mau summit) Molo Block 7/403.
  10. Pw3, John Kipruto, the land surveyor testified that there was an order of the court dated 14<sup>th</sup> December 2015 to pick and establish the sizes of boundary of parcels Mau Summit/Molo. Block 7/400,401,402,403-409 at Tayari farm. He visited the land as per the order and considered a survey and found that all the parcels of land existed both on the original map and the ground. The parcel No. Mau Summit/Molo Block 7/403 was on the map and was registered and there was title. PW2 was recalled and produced a title deed to show that he purchased the land.
  11. The defence called George Njuguna Chui who stated that Mau Summit/Molo Block 7/403 was his as he was given by his father in-law. He relied on his statement. He was given title to the suit land. However, he produced title to parcel number Mau Summit/Molo Block 7/402 and not Mau Summit/ Molo Block 7/403. DW2, Daniel Kamau Waweru a resident of Tayari testified that parcel number



- 7/404 belonged to Monica Njeri. DW3, Charles Njehia Nganga gave a historical background of the whole parcel of land during demarcation but did not explain how parcel No. 403 came to being and how it was allocated to Andrew
12. DW4 was Milton Kamau Mbugua the last chairman of Tayari Co-operative society whose evidence was that the main register of the company showed that Andrew Gachuru was given parcel number Mau Summit/ Block 403(Tayari) and title deed issued. Andrew Njuguna Gachuru was a member of the society. Members of the Society trespassed on the land after learning that he had passed on.
  13. After considering the evidence on record and submissions the learned magistrate found as follows

“I have duly considered together with the evidence as set out above. Issues for determination are first whether the suit land Mau Summit Block 7/403 exists, whether the same belongs to the plaintiff herein and whether, the 1<sup>st</sup> and 2<sup>nd</sup> defendant have trespassed therein. Whether the order of permanent injunction restraining 1<sup>st</sup> and 2<sup>nd</sup> defendant from the suit land should issue as sought, whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants counterclaim is proved, whether the plaintiff should be permanently restrained as sought in the counterclaim and whether the 2<sup>nd</sup> defendant is wrongly enjoined in the suit and finally who should bear the cost.”
  14. The learned magistrate found that there was evidence of the existence of the suit land given by John Kipruto a surveyor who did a survey. According to the learned magistrate, the surveyor produced the report that demonstrated the existence of the suit-land. The learned magistrate found that the land existed on the map and that there was a title deed. The learned magistrate further found that the property was transferred to the administrators of the estate of Andrew Macharia Njuguna.
  15. On the second issue as to whether the suit land belonged to the respondent, the honorable magistrate found that the title of the land is in the names of Christine Gachuru Charles, Keguora Gachuru and George Nguru Gachuru and that the 1<sup>st</sup> respondent produced the purchase agreement from the registered owners as prima facie evidence of ownership. The learned magistrate found that the appellants had trespassed into the respondents land and granted the orders that were sought by the 1<sup>st</sup> respondent.
  16. The appellants have come to this court on appeal and pray that the orders of the subordinate court issued on the entire judgment of Hon. E G Nderitu (C.M) delivered on 21<sup>st</sup> September 2021 in Molo CMELC No.212 of 2015; Josiah Macharia Versus George Njuguna Chui & 3 others be vacated and/or set aside and the substituted with an order of this honorable court. That the costs before this honorable court and trial court be awarded to the appellants herein.
  17. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence ...”
  18. It was also held in *Mwangi v Wambugu* [1984] KLR 453 that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a



- misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.
19. In *Kiruga –vs- Kiruga & Another* [1988] eKLR, the court held an appellate court could not properly substitute its own factual finding for that of a trial court unless there was no evidence to support the finding or unless the Judge was plainly wrong.
  20. The grounds of appeal can be summarized into two namely, that the learned magistrate erred in law and facts by finding that the appellant had failed to prove that the respondent had fraudulently obtained the title in respect of the suit property, known as Mau Summit/ Block 7/403(Tayari). This court finds that the defendant did not counter-claim and did not plead any fraud in the defense. No particulars of fraud were given by the defendants and that no evidence of fraud was produced by the defendants. Fraud is a serious allegation that must be clearly and specifically pleaded and particularized and proved. I do find that there was no evidence advanced by the appellants to enable the Magistrate make a finding that the 1<sup>st</sup> respondent was guilty if fraud.
  21. In the case of *Vijay Morjaria V Nansingh Madhusingh Darbar & Another*, [2000] Eklr, the Court of Appeal pronounced the following:

“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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts...”
  22. In the case of *Gladys Wanjiru Ngacha V Treresa Chepsaat & 4 Others*, [2013] eKLR where it held that:

“... 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.

It is not enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court. In *Mutsonga vs. Nyati* (1984) KLR 425, at pg 439, this Court held: “Whether there is any evidence to support an allegation of fraud is a question of fact”. We find that the appellant did not prove fraud on the part of the respondents...”
  23. In the case of *Vivo Energy Kenya Limited V Maloba Petrol Station Limited & 3 Others*, [2015] eKLR where the Court of Appeal cited with approval its holding in *Central Kenya Ltd V Trust Bank Ltd & 4 Others*, CA No. 215 of 1996 where it stated as follows:

“...The appellant has made vague and very general allegations of fraud against the respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima face proof was much heavier on the appellant in this case than in an ordinary civil case...”
  24. Reference was further made to the case of *Gichinga Kibutha v Caroline Nduku*, [2018] eKLR where the Environment and Land Court (ELC) listed the following as the key elements of fraud:
    - a. false representation of an existing fact;
    - b. with the intention that the other party should act upon it;



- c. the other party did act on it; and
- d. the party suffered damage.

25. In the second ground, the appellant contends that the learned magistrate erred in considering the surveyors report that showed that the land No. 403 existed and measured 0.52 Hectares. On this I do find that his ground has no basis as the surveyor's report being an expert's report, the learned magistrate had the discretion to consider it though not bound by the same. This court finds that the learned magistrate cannot be faulted for considering the surveyor's report in totality and arriving at the decision that the suit land existed and belonged to the respondent because the report was the opinion of an expert that though did not bind the learned magistrate she was at liberty to rely on the same in the absence of another opinion so long as the same was logical. Moreover, the said opinion had been sought by the court. Ultimately, the appeal is dismissed with costs.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 18<sup>TH</sup> DAY OF JULY 2023.**

**A. O .OMBWAYO**  
**JUDGE**

