



**Njagi v Njagi & 7 others (Environment and Land Appeal E001 of 2023)
[2023] KEELC 21928 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21928 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E001 OF 2023**

CK YANO, J

NOVEMBER 30, 2023

BETWEEN

FRANCIS GITONGA NJAGI APPELLANT

AND

FELISTER ITHIMA NJAGI 1ST RESPONDENT

ROSE KAGENDO MUNENE 2ND RESPONDENT

EVALISTUS MIRITI NJAGI 3RD RESPONDENT

MARY KARIMI 4TH RESPONDENT

BENEDICTA IGOKI NJAGI 5TH RESPONDENT

TIRAOSA IGOJI 6TH RESPONDENT

PAULINE KAWIRA NJAGI 7TH RESPONDENT

ALEX TWALA NJAGI 8TH RESPONDENT

JUDGMENT

Introduction

1. The respondents sued the appellant vide a plaint dated 31st October, 2019 seeking for an order directing the lands registrar to immediately cancel the registration for LR No. Muthambi/Chaminga/1131 and Muthambi/Chamunga/1131 and the same to be restituted/restored to the status of LR. No. Muthambi/Chamunga/492, in default the land Registrar, Meru South, be directed by an order of the Honourable Court to cancel the registration for LR No. Muthambi/Chaminga/1131 and Muthambi/Chamunga/1131 and the same to be registered in the name of Felister Ithima Njagi the 1st Respondent herein, that the court be pleased to make any orders as it may deem expedient, just, equitable and fit to grant and the costs of the suit be provided for.



2. The respondents pleaded that they are relatives of the Appellant and beneficiaries to the estate of the late Victoriano Njagi (deceased). That the Appellant is a son to the 1st respondent and a brother to the 2nd to 8th respondents. That during the succession process of the estate of the late Victoriano Njagi (deceased), the Appellant was appointed by the respondents to be the administrator to the said estate.
3. The respondents further pleaded that at the conclusion of the succession process LR No. Muthambi/Chamunga/492 was intended to go to their elderly mother, Felister Ithima Njagi, the spouse to the deceased. That during distribution and registration of the deceased's properties to the beneficiaries, the Appellant duped and/or took advantage of the ignorance and advanced age of the 1st respondent and fraudulently caused LR No. Muthambi/Chamunga/492 to be registered in his name against the beneficial interest of the 1st respondent.
4. It was pleaded further that the Appellant secretly and without the knowledge of the respondents caused LR No. Muthambi/Chamunga/492 to be subdivided into LR No. Muthambi/Chaminga/1131 and 1131 and the same were consequently registered in his name.
5. The respondents averred that while thinking and believing that LR. No. Muthambi/Chamunga/492 was her property, the 1st respondent allowed some of the respondents herein who together with the Appellant are her children to undertake developments on the said property not knowing that the appellant had fraudulently subdivided and caused the resultant portions to be registered in his name.
6. The respondents further pleaded that the Appellant had then threatened to sell off the said property against the interest of the 1st respondent and co-respondents. That the Appellant's acts are fraudulent, inequitable, unlawful and morally unjustifiable.
7. The respondents particularized particulars of fraud, malice and of loss and damage.
8. The Appellant denied the claim and filed a statement of defence and counter-claim dated 15th November, 2019 in which he accused the 8th Respondent herein for illegally entering upon the suit properties and erecting structures thereon.
9. In the counter-claim the Appellant averred that he is the registered owner of the suit properties LR. Nos. Muthambi/Chaminga/1131 and 1131 being the resultant subdivisions of LR. No. Muthambi/Chamunga/857 which the appellant claimed he attained as a gift from the 1st Respondent who was then the registered owner.
10. In the counter-claim, the appellant prayed for orders of permanent injunction and demolition of structures against the 8th Respondent.
11. The trial court heard and determined the matter and entered judgment for the respondents against the Appellant as prayed for in the plaint. It is the above judgment which has provoked this appeal.
12. In the Memorandum of Appeal dated 13th January, 2023, the appellant has set out the following grounds of appeal:
 1. That the learned trial magistrate erred in law and fact in making a finding that the trial court had jurisdiction to entertain the suit despite determining that the dispute between the parties concerned the distribution of the estate of a deceased person.
 2. That the learned trial magistrate erred in law in relying on the decision made in *Mbula Muoki Ndoto & Another v Kenya Power and Lighting Company Limited* [2017]eKLR as conferring jurisdiction to the trial court whereas the facts and circumstances of that case are completely distinguishable from the facts, circumstances and reliefs sought in the suit before her.



3. That the learned trial magistrate erred in law in failing to apply the appropriate standard of proof in a claim premises on an allegation fraud.
 4. That the learned trial magistrate erred in law and fact in arriving to a conclusion that the Respondents had established the allegation of fraud without analyzing and considering the appellant's defence and evidence.
 5. That the learned trial magistrate erred in law and fact in failing to consider the merits or demerits of the Appellant's Counter-claim.
 6. That the learned trial magistrate erred in law in depriving he Appellant of the ownership and proprietorship of property when the constitutional and statutory threshold for such deprivation was not satisfied.
 7. That the learned trial magistrate erred in law and fact in failing to make a finding that the orders sought by the Respondents were unenforceable in light of the evidence adduced by the appellant.
 8. That the learned trial magistrate rendered a judgment that is against the weight of the evidence.
13. The appellant is seeking that the judgment made in Chuka CM ELC Case No. 63 of 2019 delivered on 14th December 2022 by Hon. J. M. Gandani – Chief Magistrate, be set aside, the respondents' suit be dismissed and judgment be entered as prayed in the appellant's counter-claim and the appellant be awarded costs of the appeal and the primary suit.
 14. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 22nd July, 2023 through the firm of Basilio Gitonga, Muriithi & Associates Advocates while the respondents filed their submission dated 2nd August 2023, through the firm of Waklaw Advocates.

Appellant's Submissions

15. Regarding grounds 1 and 2, the appellant submitted that he challenged the jurisdiction of the lower court to adjudicate on the matter owing to the fact that issues directly relating to the administration and distribution of the estate of a deceased person were extensively raised. In the view of the appellant's advocate, the suit before the lower court was filed as an environment and land case and not a probate dispute. Leaned counsel for the appellant submitted that the trial court, sitting as an Environment and Land Court, could not be expected to pronounce itself in the manner proposed by the Respondents, both in evidence and written submission. It was further submitted that the decisions in *Salome Wambui Njau (Suing as administratrix of the estate of Peter Kiguru Njuguna (deceased) v Caroline Wangui Kiguru* [2013]eKLR as cited with approval in *Mbula Muoki Ndolo & another v Kenya Power and Lighting Company Limited* [2017]EKLR were distinguishable and the trial court erred in relying on them. That in the present case, the proceedings in the probate court had already been concluded and that the only available avenue for the respondents to reopen the succession cause through an application for revocation of grant if they were dissatisfied with the manner in which the estate of the deceased was distributed. Learned counsel for the appellant also relied on the case of the *Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR and *Elijah Njeru Mugo & Another v Njeru Samauel M'Rwingo* [2021]eKLR.
16. With regard to grounds 3, 4 and 6, learned counsel for the appellant submitted that the respondents did not particularize with specificity the nature of the alleged fraud and also failed to move the same. That the Respondents failed in their endeavor to bring out the acts constituting fraud both in the pleadings and evidence. The appellant's counsel cited Section 24 (a) and 26 of the *Land Registration Act* and



Section 107 of the *Evidence Act* and relied on the case of *Joseph Kipkoeb Chemor v Kimaiyo Chemor & Another* [2019]eKLR, *Peter Gicharu Njiriri v Richard Wanyonyi Sitati* [2019]eKLR and *Vijay Morjaria v Nausingh Madhusingh Darbar & Another* [2000]eKLR and submitted that the allegation of fraud was not only insufficiently pleaded but was also not proved.

17. Regarding ground 5 of the appeal, the appellant's counsel submitted that he had raised a counter-claim against the 8th Respondent who did not attend court to defend the same during the hearing and argued that it follows that the claim was admitted. Counsel for the appellant relied on the case of *Moses Theuri Ndumia v G. Transporters Limited & Another* [2018] eKLR and argued that the trial court did not consider whether the counter-claim had merit or not and therefore erred.
18. On ground 7 of the appeal, the appellant pointed out that the Respondents sought for cancellation of LR. Nos. Muthambi/Chaminga/1131 and 1131 and for their reversion to LR No. Muthambi/Chamunga/492. That however, those two parcels were not subdivisions of LR No. Muthambi/Chamunga/492 but rather LR. No. Muthambi/Chamunga/852. According to the appellant, the judgment rendered by the trial court is practically unenforceable.
19. It is the appellant's submission that the evidence adduced before the trial court fell short in numerous respects to support the claim as presented in the plaint and submitted that this appeal is meritorious and prayed for the same to be allowed with costs.

The Respondent's Submissions

20. Learned counsel for the Respondents submitted that the parties herein are members of the same family, the 1st Respondent being the mother to the 2nd to 8th Respondents together with the appellant. He summarized the case that was before the trial court and submitted that the judgment rendered by the learned trial magistrate is proper and sound in law and cannot in any way or manner be faulted.
21. Learned counsel for the Respondents cited the definition of fraud in the Black's Law Dictionary and submitted that the acts by the Respondent were fraudulent. That the matter was no longer a dispute for the domain of the probate and Administration court but one of dispute on wrongful registration of a property after succession had been conclusively and fully settled. It is the Respondents' submission that this is a matter for the ELC and cited Section 26 (4) of the *Environment and Land Court Act* as well as Article 162 (2) of *the constitution* and relied on the case of *Joseph Madegwa v Gaylord Avedi* [2018]eKLR and *Amos Tirop Matui & Another v Festus K. Kiprono & 2 Others* [2018] eKLR. Learned counsel for the Respondents pointed out that the appellant did not raise a preliminary objection regarding the issue of jurisdiction.
22. It was further submitted that the counter-claim was moot the moment the trial court determined that the appellant had no claim over the suit properties. They cited the Black's Law Dictionary and relied on the case of *Evans Kidero v Speaker of Nairobi City County Assembly & Another* [2018] eKLR. The Respondents prayed for the appeal to be dismissed with costs and the judgment of the trial court to be upheld.

Analysis And Determination

23. I have perused and considered the record of appeal, the grounds of appeal and the submissions by the parties. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-analyze the evidence on record to determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law.
24. The issues for determination in this appeal as I can deduce from the grounds of appeal are:



- i. Whether the trial court had jurisdiction to entertain the suit.
 - ii. Whether the respondents' claim which was premised on fraud had been proved.
 - iii. Whether the counter-claim had merit.
 - iv. Whether the decision of the learned trial magistrate was against the weight of the evidence.
 - v. Whether this appeal has merit.
25. The Appellant has submitted that the trial court, sitting as an Environment and Land Court, did not have jurisdiction to adjudicate on the matter. It is the Appellant's submission that the issues related to the administration and distribution of the estate of a deceased person and therefore ought to have been canvassed in a probate court.
26. On the question of jurisdiction, the learned trial magistrate correctly captured it when she stated:
- “It is trite law that jurisdiction is everything. This was captured in the Owners of Motor Vessel Lilian ‘S’ v Caltex Oil (Kenya) Limited where Nyarangi J.A stated:
- “Jurisdiction is everything. Without it, a court had no power to make one more step. Where a court has no jurisdiction, there would no basis for a continuation of proceedings...”
27. Indeed, in the above case, the Court of Appeal was categorical that a court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.
28. On the source of jurisdiction, it was held in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others* [2012] eKLR that:
- “A court's jurisdiction flows from either *the constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”
29. I have perused the material on record. Whereas the Appellant's contention is that the dispute is a succession matter and therefore should not have been adjudicated by a court sitting as a Land court, the evidence on record show that the succession matter was already concluded and the estate of the deceased had been distributed. Indeed, the appellant conceded that he had titles over the suit properties already registered in his name. The said title deeds were also produced as exhibits in the case. It was the Respondents' case that during the succession process of the Estate of the late Victoriano Njagi (Deceased), the appellant was appointed as the administrator of the said estate. That at the conclusion of the succession cause, LR No. Muthambi/Chamunga/492 was to be distributed to 1st Respondent who is a widow of the deceased and mother to the appellant and the 2nd to 8th Respondents. The respondents averred that during the distribution and registration, the appellant fraudulently caused the said parcel of land to be subdivided and had the resultant subdivisions registered in his name.
30. The jurisdiction of the Environment and Land Court to hear and determine disputes relating to the environment, use and occupation of and title to land is provided for under Article 162 (2) (b) of *the constitution* of Kenya. Further, Section 13 of the *Environment and Land Court Act* gives the court the power to hear and determine disputes relating to among others, title to land. The said provisions are replicated under Section 90 of the *Magistrates' Courts Act*, 2015. Indeed, some magistrates have been gazetted to hear environment and land matters. Therefore, it is my view that since the issue was in regard to the titles held by the Appellant, and specifically the question of how the same were acquired, the trial court had the requisite jurisdiction to hear and determine the matter. I am not persuaded that



the probate court still had the jurisdiction to adjudicate over the matter since it had already concluded the dispute that was before it by distributing the estate of the deceased.

31. The next issue for determination is whether fraud had been proved by the Respondents against the Appellant to the required standard. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities, but not beyond reasonable doubt.
32. In the case of *R.G Patel v Lalji Njakani* cited in the case of *Gladys Wanjiru Ngacha v Theresa Chepsaat & 4 Others* [2013]eKLR where the court of Appeal held that:

“Allegations of fraud must be strictly proved: although the standard of proof beyond reasonable doubt, something more than mere balance of probabilities is required that it is not enough for the appellant to have pleaded fraud. The appellant ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court.”
33. In the case of *Ndolo v Ndolo* [2008] IKLR it was stated:

“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probability, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”
34. I have perused the record of appeal herein. In the plaint dated 31st October 2019, the Respondents pleaded that the respondents and the appellant are all related and were the beneficiaries to the estate of the late Victoriano Njagi (Deceased). The 1st Respondent is the widow of the deceased while the 2nd to 8th Respondents and the appellant are their children. It was pleaded that at the conclusion of the succession cause, LR. No. Muthambi/Chamunga/492 was distributed to the 1st Respondent. However, during the registration, the appellant took advantage of the ignorance and advanced age of the 1st Respondent and fraudulently subdivided and transferred the resultant subdivisions LR Nos. Muthambi/Chaminga/1131 and 1131, in his name. In the plaint, the Respondents also listed the particulars of fraud as “causing LR No. Muthambi/Chamunga/492 to be subdivided into LR No. Muthambi/cahmunga/1130 and Muthambi/Chamunga/1131 and the same to be fraudulently registered in the defendant’s name.”
35. In his counter-claim, the appellant pleaded that he obtained LR No. Muthambi/Chamunga/857 as a gift from the 1st Respondent. He admitted that LR. No. Muthambi/Chaminga/1131 are resultant subdivision of LR No. Muthambi/Chamunga/857. However, the certificate of confirmation dated 16th January, 2008 in respect of succession cause No. 23 of 2007 (PM’s Court Chuka) – (In the matter of the Estate of the late Victoriano M’Kea M’Rocha Nkoroi alias Victoriano Njagi Rucha) which was produced as an exhibit indicates that the 1st Respondent got a share of the property known as Muthambi/Chamunga/492. I have not seen the property known as Muthambi/Chamunga/857 among the properties distributed in the said succession cause. And even if parcel No. 492 was subdivided into parcel Nos. 857 and 858 and then into 1130 and 1131, the 1st Respondent in her evidence was categorical that she did not transfer her share No. 492 to the 1st Respondent as alleged by the 1st Respondent. As to whether registration of the suit properties in the name of the Appellant was done fraudulently, the evidence on record proved the same. It is my finding that the trial court was correct in its finding that the appellant’s claim that he was given the land by the 1st Respondent was false and any registration and subdivision were obtained fraudulently. The 1st Respondent denied



the Appellant's allegation of having been gifted the land and the evidence of 1st Respondent was corroborated by the evidence of the other witnesses.

In this case, I am satisfied that the allegation of fraud was specifically pleaded and proved to the required degree. I find no reason to fault the conclusions reached by the learned trial magistrate. Further, it follows that the counter-claim which was founded on titles that were fraudulently acquired must fail.

36. Having looked at the material on record, it is my finding that the learned trial magistrate correctly addressed her mind to the issues in the case and rightly determined in favour of the Respondents. I find that based on the evidence that was adduced before the trial court, and the material on record, the learned trial magistrate was justified in arriving at the decision she made. The findings and holdings by the learned magistrate were well founded and I uphold the same. The appellant's counter-claim is also dismissed with costs.
37. In the result, I find no merit in the appellant's appeal and the same is hereby dismissed with costs to the Respondents.
38. It is so Ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 30TH NOVEMBER, 2023

C.K YANO

JUDGE

In the presence of:

Court Assistant – Martha

Muriithi for the Appellant

Kirimi for the Respondents

