



**Kinara v Laisa (Environment and Land Appeal E040 of 2021)
[2023] KEELC 21715 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21715 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E040 OF 2021
DO OHUNGO, J
NOVEMBER 21, 2023**

BETWEEN

ELCAH A KINARA APPELLANT

AND

BOSCO W LAISA RESPONDENT

*(Being an appeal from the judgment and decree of the Senior Principal
Magistrate's Court at Butali (Hon. Z J Nyakundi, Senior Principal Magistrate)
delivered on 16th September 2021 in Butali MCELC No. 115 of 2018)*

JUDGMENT

1. The background of this appeal is that the respondent filed Plaintiff dated September 9, 2010 in the High Court at Kakamega against the appellant herein. The matter was later transferred to this court and ultimately to the Subordinate Court where it became Butali MCELC No 115 of 2018. The respondent averred in the Plaintiff that he was the administrator of the estate of Jacob Laisa Mufutu (deceased) who was the registered proprietor of the parcel of land known as Kakamega/Chekalini/85 (the suit property) in respect of which the deceased was repaying a loan to the Settlement Fund Trustees (SFT).
2. The respondent further averred that Jacob Laisa Mufutu (hereinafter Mufutu) approached Semion Kinara (hereinafter Kinara) who was the appellant's husband and verbally agreed with Kinara that Kinara would help him to repay the loan and that upon Kinara settling the loan Mufutu was to give him part of the suit property. That Mufutu died before a formal agreement could be entered into and that Kinara also died later in 1995 without any changes in the ownership of the suit property. The respondent went on to aver that the appellant fraudulently caused the suit property to be subdivided in the year 2007. He therefore prayed for judgment against the appellant for orders that the court "do deregisters the subdivision of land parcel number Kakamega/Chekalini/85 and do reinstate the original number as registered under the names of Laisa s/o Mufutu." He also prayed for costs.



3. The appellant filed Statement of Defence in which she admitted being Kinara's widow as well as the administratrix of his estate. She averred that Kinara purchased 8 acres of the suit property from Mufutu and that Mufutu obtained consent of the Land control Board pursuant to which the suit property was subdivided into Kakamega/Chekalini/744 which he transferred to Kinara and Kakamega/Chekalini/743 which he retained. She denied the allegations of fraud and added that she inherited Kinara's land following succession proceedings. She therefore urged the court to dismiss the suit with costs.
4. Upon hearing the matter, the Subordinate Court (Hon. Z J Nyakundi, Senior Principal Magistrate) delivered judgment on September 16, 2021 wherein he ordered as follows:
 - i. The sub-division of parcel No Kakamega/Chekalini/85 be and is hereby cancelled and the same reverts back to the original owner.
 - ii. The subsequent title No Kakamega/Ckelaini/743 & 744 (sic) are hereby nullified.
 - iii. That a county government registrar (sic) and surveyor be called to curve out 3 acres of land parcel No Kakamega/Chekalini/85 to the defendant.
 - iv. That the defendant do meet costs of the suit.
5. Dissatisfied with that outcome, the appellant appealed to this court through Memorandum of Appeal dated September 20, 2021, which was drawn and filed on his behalf by SBA Mukabwa & Co Advocates. Subsequently, Sitati & Mwangi Advocates took over conduct of the appeal through Notice of Change of advocates filed on November 25, 2021. Simultaneously, Sitati & Mwangi Advocates filed Amended Memorandum of Appeal amended on November 24, 2021.
6. The following grounds of appeal are listed on the face of the amended Memorandum of Appeal:
 1. That the learned magistrate erred in law and fact by ignoring the statement issued by the respondent at the tribunal wherein he admitted that the land his father the late Mr Laisa sold the appellant was 8.75 acres which is equivalent to 3.5 hectares and rightfully so indicated in the green card which document was also ignored as documentary evidence hence leading the learned magistrate to erroneously pronounce a judgment of 3 acres to the appellant instead of 3.5 hectares as indicated in the title and the green card.
 2. That the learned magistrate erred in law and fact by adopting the Lugari Land Disputes Tribunal decision which was quashed by the High Court in the High Court Judicial Review Case No 21 of 2010.
 3. That the learned magistrate erred in law and fact by adopting the High Court *ex parte* judgment against the appellant which was set aside by the high court on October 22, 2012 to enable the land dispute to be decided on merit.
7. In view of those grounds, the appellant urged this court to reverse the judgment of the subordinate court, to grant her "her rightful portion of land equivalent to 3.5 hectares as per the measurements indicated in the green card and the title deed which she has been occupying since 1981 upon subdivision by the County Government Registrar and Surveyor." She further urged this court that "her claim to be adjudged is legitimate."
8. The appeal was canvassed through Written Submissions. I note that SBA Mukabwa & Co Advocates filed Written Submissions on behalf of the appellant on March 1, 2023 while Sitati & Mwangi Advocates filed Written Submissions on behalf of the appellant on March 6, 2023. I will disregard



- the submissions filed by SBA Mukabwa & Co Advocates in view of the Notice of Change of Advocates filed by Sitati & Mwangi Advocates on November 25, 2021. A perusal of the record of the subordinate court also shows that the said court granted leave to Sitati & Mwangi Advocates to take over representation of the appellant on September 14, 2021.
9. The appellant argued that the respondent did not prove his allegations of fraud to the required standard. That she did not initiate the subdivision of the suit property and that she only inherited Kakamega/Chekalini/744 through transmission upon the death of Kinara. That the application for consent of the Land Control Board for subdivision of the suit property was initiated by Mufutu who also signed transfer dated June 2, 1988 to Kihara.
 10. The appellant further argued that the learned magistrate erred in adopting the decision of the Lugari District Land Disputes Tribunal dated March 26, 2008 to conclude that Kinara was entitled to only 3 acres since the said decision was quashed in Kakamega Judicial Review No 21 of 2010. The appellant also faulted the decision of the learned magistrate to rely on the *ex parte* judgment that was delivered in this matter on June 14, 2012 since the said judgment was subsequently set aside on October 22, 2012. Relying on [*Kuria Kiarie & 2 others v Sammy Magera* \[2018\] eKLR](#) and [*John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* \[2017\] eKLR](#) and [*Elizabeth Kamene Ndolo v George Matata Ndolo* \[1996\] eKLR](#), the appellant urged this court to allow the appeal.
 11. On his part, the respondent argued that he proved fraud and that there was no dispute that Mufutu died on June 28, 1988, yet the subdivision of the suit property was done on October 5, 1993. That the mutation form that was resubmitted in the year 2007 was so resubmitted long after the suit property was subdivided in the year 1993 and was not signed by Mufutu. That no evidence was adduced by the appellant to show that Kinara purchased 8 acres of land. He further argued that the appellant did not plead fraud as one of the grounds of the appeal.
 12. Regarding the contention that the learned magistrate adopted the quashed decision of the tribunal, the respondent submitted that the tribunal's judgment may have had an influence on the judgment of the subordinate court, but it did not prejudice the appellant in any way. On the contention that the learned magistrate relied on the *ex parte* judgment that was delivered in this matter on June 14, 2012, the respondent argued that nowhere in the judgment of the subordinate court was there any implication that the subordinate court was relying on the said judgment. The respondent therefore urged this court to dismiss the appeal with costs.
 13. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See [*Abok James Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* \[2013\] eKLR](#).
 14. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. As correctly pointed out by the respondent, a reading of the Amended Memorandum of Appeal amended on November 24, 2021 shows that the appellant did not challenge the decision of the subordinate court on account of failure to prove fraud. Nevertheless, a first appeal is essentially a rehearing. Since the respondent grounded his case before the subordinate court on allegations of fraud, this court as a first appellate court has the mandate to consider if fraud was established. In fact, the respondent has submitted at length on fraud.



15. The issues that arise for determination are whether fraud was established and whether the reliefs sought ought to have issued.
16. The respondent's case in the subordinate court was that the appellant fraudulently caused the suit property to be subdivided after the death of Mufutu. Simply put, the respondent attacked the appellant's title on allegations of fraud. Fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to a standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.
17. There is no dispute that Mufutu was the proprietor of the suit property and that there was an agreement between him and Kinara pursuant to which Kinara assisted him to repay a loan owed to Settlement Fund Trustees in respect of the suit property on the understanding that Kinara would be entitled to a portion of the suit property. From the material on record, Mufutu was registered as proprietor of the suit property on June 16, 1988. He passed away shortly thereafter, on June 28, 1988.
18. The register in respect of the suit property was later closed on October 5, 1993, upon its subdivision into Kakamega/Chekalini/743 and Kakamega/Chekalini/744. Kakamega/Chekalini/743 was registered in the name of Mufutu on October 5, 1993 and later in the name of the respondent on August 3, 2000. On the other hand, Kakamega/Chekalini/744 was registered in the name of Kinara on October 5, 1993 and later in the name of the appellant on August 8, 2005 to hold in trust for Philip Denda Kinara, Timothy O Kinara, and Boaz Shitsama Kinara.
19. The law relating to rights of registered proprietors of land as of the date of trial before the subordinate court was and remains that a registered proprietor of land is entitled to the rights, privileges, and benefits under section 24 of the *Land Registration Act*. Additionally, section 26 of the Act obligated the trial court to accept the certificates of title as conclusive evidence of proprietorship, unless the provisos under section 26 (1) (a) or (b) were established. In other words, the grounds on which a title can be nullified are fraud or misrepresentation to which the registered proprietor is proved to be a party or where it is shown that the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
20. Having chosen to anchor his case for "deregistration" of the subdivisions and in essence cancellation of the appellant's title on fraud, the respondent was duty bound to not only prove fraud but to additionally show that the appellant was party to such fraud.
21. The respondent built his theory of fraud around dates of registration of the subdivisions, mutation, and transfer vis a vis date of Mufutu's death. The respondent did not dispute that there was an agreement between Mufutu and Kinara pursuant to which Kinara was to acquire a portion of the suit property. In fact, he pleaded it in his plaint. His only grouse seems to be that subdivision and transfer were registered after Mufutu's death.
22. The material on record shows that an application was made to Lugari Land Control Board on July 24, 1981 for consent for subdivision of the suit property into two portions of 12 acres and 8 acres followed by transfer of the 8 acres to Kinara and that the said board issued its consent on November 20, 1981. I have perused the copy of register in respect of Kakamega/Chekalini/744 which was registered in the name of Kinara on October 5, 1993, and I note that the size is indicated therein as 3.50 hectares which translates to approximately 8.64 acres which compares favourably with the terms of the consent. I further note that the dates of the application for consent and the letter of consent were during the



lifetime of Mufutu. The transfer form transferring Kakamega/Chekalini/744 to Kinara is stated on its face to have been executed on June 2, 1988, also during the lifetime of Mufutu. It was not shown that the application for consent of the Land Control Board, the consent and the transfer form executed on June 2, 1988 were forgeries.

23. As to the respondent's concerns about the date of registration of the transfer, the answer is that a transfer can be validly registered even after death of the transferor. While addressing a similar situation, the Court of Appeal stated in the case of *Kagina v Kagina & 2 others* (Civil Appeal 21 of 2017) [2021] KECA 242 (KLR) (3 December 2021) (Judgment) thus:
33. We have revisited that rival position on the record and agree with the position taken by the Judge that a deceased person has capacity to divest himself of property during his lifetime known in law as gifts *inter vivos* which in the Judge's opinion and correctly so in our view are not only protected under the Act but are also sanctionable by a court of law irrespective of whether they are perfect or imperfect. By perfect is meant, complete, meaning the transfer of the gift *inter vivos* in favour of the beneficiary was effected and completed during the lifetime of the deceased while by imperfect is meant the transfer of the gift in favour of the recipient was incomplete as at the time of the demise of the deceased. As correctly observed by the Judge, lack of completion of the process of transfer does not of itself render the gift *inter vivos* invalid. It can be perfected by the grant holder if there is no contest over it, or alternatively sanctioned by a court where proven.
34. Our take on the above rival position is that we find no mis-appreciation or misapplication of the law on intermeddling. The position taken by Tanui, J in the *Gitau & 2 others vs Wandai & 5 others case [supra]* is the correct threshold to be applied by a court addressing a complaint of alleged intermeddling in a deceased person's estate and which we find from the record the Judge properly appreciated and applied.
24. Similarly, S. Okong'o, J. held in *Pardeep Singh Ghatabora v Exotic Crafts Limited & another* [2018] eKLR as follows:
- I am of the view that after receipt of the purchase price and the execution of the instrument of transfer, the deceased held the suit property in trust for the 1st defendant pending registration of the said transfer. I am not persuaded in the circumstances that the suit property formed part of the estate of the deceased. As to whether or not the deceased had entered into the said agreement for sale and executed the instrument of transfer, there is no evidence placed before the court to the effect that the deceased was not in sound mental condition when he is said to have executed the said agreement and transfer. As rightly pointed out by the defendants', the signature of the deceased on the two documents was not contested.
25. I have also perused the mutation form dated November 19, 2007 which the respondent relied on. I note that it is not the mutation in respect of subdivision of the suit property. Aware of that, the respondent referred to it in his submissions as a "resubmitted" mutation form. A perusal of the said mutation indicates it was in respect of registration of the appellant as holding Kakamega/Chekalini/744 in trust for Philip Denda Kinara, Timothy O Kinara, and Boaz Shitsama Kinara in equal shares.
26. The burden of proving fraud to the required standard was on the respondent who alleged it and made it the mainstay of his case. He did not prove fraud to the required standard but left it to be inferred. That was not good enough.



27. Having failed to establish fraud, the respondent was not entitled to the reliefs that he sought. The learned magistrate erred in allowing the respondent's claim.
28. The upshot is that this appeal has merit. I therefore make the following orders:
- a. The judgment of the subordinate court is set aside and replaced with an order dismissing the respondent's case.
 - b. The appellant shall have costs of both the case in the subordinate court and of this appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF NOVEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Sitati for the Appellant

No appearance for the Respondent

Court Assistant: E. Juma

