



Presbeta Investment Limited v Ndegwa & another (Environment and Land Appeal E048 of 2022) [2023] KEELC 22434 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22434 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E048 OF 2022
LC KOMINGOI, J
DECEMBER 19, 2023**

BETWEEN

PRESBETA INVESTMENT LIMITED APPELLANT

AND

JOSPHAT NGIGI NDEGWA 1ST RESPONDENT

LAND REGISTRAR KAJIADO 2ND RESPONDENT

(Being an Appeal against the judgement and Decree of the Kajiado Chief Magistrate's Court in CM ELC No. E024 of 2022 by Hon. Irene Macharia Kabuya (PM) delivered on 28th September 2022)

JUDGMENT

1. In the Judgement dated 28th September 2022 the Learned Trial Magistrate, Hon. I. Kahuya (PM) dismissed the Appellant's suit with costs to the 1st Respondent.
2. Aggrieved by the said Judgement delivered on 28th September 2022 in Kajiado Chief Magistrate's Court ELC No. E024 of 2022 the Appellant filed a Memorandum of Appeal dated 18th October 2022.

The grounds are that:

1. The learned trial magistrate erred in law and in facts by failing to find despite the evidence adduced that the Appellant is the rightful and true owner of all those properties known as Kajiado/Lorngosua/6602 & 6604 (the suit properties) thus arriving at a wrong decision.
2. The learned trial magistrate erred in law and in facts by failing to find that the 1st Respondent had a burden proof explaining the root of his certificates of



titles, and which burden the 1st Respondent failed to discharge on the required standard.

3. The learned trial magistrate erred in law and in facts by failing to find that the 1st Respondent had no proprietary interests over the properties known as Kajiado/Lorngosua/6602 & 6604 for want of consideration.
4. The learned trial magistrate erred in law and misdirected herself by failing to find that the 1st Respondent had failed to demonstrate through evidence that his alleged acquisition of certificates of titles in respect to the suit properties was legal, formal and free from any encumbrance.
5. The learned trial magistrate erred in law and in facts by concluding that the Appellant had not proved elements of fraud while selectively ignoring the Appellant's documentary evidence tendered and existence of other grounds impeaching the 1st Respondent's certificates of titles.
6. The learned trial magistrate erred in law and in facts by concluding without any factual basis and evidence that the 1st Respondent had acquired the suit properties through contributions made to the Appellant.
7. The learned trial magistrate erred in law and in facts by failing to conclude that the 1st Respondent's certificates of title in respect to the suit properties were impeachable on account of the same being acquired illegally, unprocedurally and through a corrupt scheme.
8. The learned trial magistrate erred in law and in facts by rendering a decision that was not based on the evidence tendered by the parties, the facts and any known legal principles.
9. The learned trial magistrate erred in law and in facts by failing to make a finding that the evidence adduced by the 1st Respondent lacked both probative and evidential value.
10. The learned trial magistrate erred in law and in facts by failing to arrive at a conclusion that the Appellant had discharged his burden of proof on the required standard being on a balance of probabilities.
11. The learned trial magistrate erred in law by shifting the burden of proof to the Appellant on issues pleaded by the 1st Respondent.
12. The learned trial magistrate misdirected herself by rendering a decision in favour of the 1st Respondent while ignoring the Appellant's critical, reliable, cogent evidence and submissions.
13. The learned trial magistrate misdirected herself by considering extraneous matters and issues not pleaded by the parties thus rendering a contradictory, inconsistent, biased and unfair decision not supported by evidence or any known legal principles and judicial precedents.
14. The learned trial magistrate erred in law and in fact by awarding costs of this suit to the 1st Respondent.



3. Reasons Wherefore. The Appellant prays for;
 - a. This Appeal be allowed.
 - b. The Judgement and decree of the Honourable trial court delivered and issued on 28th September 2022 be set aside and the same be substituted with a Judgement in favour of the Appellant in terms of the Plaint dated 8th March 2022.
 - c. The Costs of the Appeal and costs of the lower court suit be awarded to the Appellant.
 - d. Any other relief that the Honourable Court may deem fit to grant.
4. The Appeal was canvassed by way of written submissions.

The Appellant's submissions

5. In the submissions dated 30th August 2023, counsel outlined the issues for determination as whether the learned magistrate erred in dismissing the suit, whether the appeal was merited, what reliefs the appellant was entitled to and who should bear costs.
6. On whether the dismissal of the suit was warranted and the Appeal merited, counsel submitted that the trial court erred by dismissing the suit without taking into consideration evidence that was placed before it on the ownership of the suit properties and without taking into consideration the 1st Respondent had not established the root of his title. Counsel submitted that the Appellant acquired property L.R No. Kajiado/ Lorngosua Block 1 /1836 for a sum of Kshs. 50,000,000 on 15th April 2015 from one Yehoshua Arusi and subsequently caused that land to be subdivided into 442 plots which were sold to its members. Later, the Appellant's Directors learnt from its surveyor that there were seven additional plots including Kajiado /Lorngosua/ 6602 & 6604 registered in the 1st Respondent's name. The Appellant had no information about the additional plots but the 1st Respondent and the Chairman had information concerning them. Counsel submitted that the Appellant adduced evidence showing that the 1st Respondent and the Appellant's former chairman had fraudulently and through a corrupt scheme caused the creation of another mutation and sketch map that had 449 plots and fraudulently transferred the suit properties to himself without payment of consideration, execution of transfer instruments, Board resolution or the Appellant's consent.
7. Therefore, the 1st Respondent's title was acquired without due process being followed contrary to Section 26 of the *Land Registration Act* and should be impeached. Adding that the 1st respondent did not adduce evidence of how he acquired the suit properties to support his allegation as provided by Section 107 of the *Evidence Act*. Reference was made to the following authorities *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR, *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* [2017] eKLR and *Propwa Company Ltd vs Justus Nyamo Gatondo & another* (2020) eKLR where it was held that: "It is trite that when Certificate of Title granted to someone has been called to question, then it becomes the burden of that person to explain the root of the title..."
8. Counsel submitted that with all the evidence tabled that the 1st Respondent had acquired the suit properties illegally, the trial court still relied on the principle of indefeasibility of title. Counsel went on to submit that the issue of fraud had also been reported to different authorities. Therefore, the magistrate erred in finding that fraud against the 1st Respondent had not been proved. As such, having proved that the 1st Respondent acquired the suit property irregularly, the 2nd and 3rd entries in the



register in his favour should be cancelled and properties reverted to the Appellant as was held in *Mary Ngonyo Kiume v Charles Muisyo David*(supra). And the Appeal allowed with costs of the Appeal and the lower court to the Appellant.

The 1st Respondent's submissions

9. In the submissions dated 9th October 2023, on whether the Appellant proved fraud against the 1st Respondent, counsel submitted that the appellant alleged that the 1st Respondent fraudulently caused mutation and transfer of the suit properties but did not produce a copy of the alleged mutation form. What was produced were unsigned sketches of the proposed subdivision for Prebeta SHG and not Presbeta Investment Ltd. Counsel pointed out that mutation forms were prepared by surveyors and if there was any mistake, then the blame should be apportioned to the surveyor and not the 1st Respondent. Counsel went on to submit that the 1st Respondent confirmed that each director and shareholder was to get one free plot but the 1st Respondent and the former Vice chairman Mr. Gitau Githuku were to get an extra plot for their contribution to the company. As such the transfer of the suit properties was authorised by the company and signed by the Vice Chairman and the 1st Respondent. The Appellant therefore ought to have proved the fraud claimed against the 1st respondent which it did not citing *Eviline Karigu (Suing as Administratrix of Estate of Late Muriungi M'Chuka alias Miriungu M'Gichuga) v M'Chabari Kinoro*[2022] eKLR.
10. On whether the trial court shifted the burden of proof, counsel submitted that the Appellant having claimed fraud against the 1st Respondent it was its duty to prove the said fraud and the burden could not shift to the 1st Respondent pointing out that the trial court found that the 1st Respondent was the bona fide registered owner of the suit properties. As such, the trial court did not err by dismissing the Appellant's suit and awarding costs to the 1st Respondent.

Analysis and Determination

11. I have considered the grounds of appeal, the record of appeal and the written submissions. The issues for determination are:
 - i. Whether the trial court erred in dismissing the suit.
 - ii. Whether the Appeal is merited and orders sought should be granted.
 - iii. Who should bear costs of this Appeal?
12. This being the first appeal the court is duty bound to relook at the evidence at the trial court and come up with its own determination as was held by the Court of Appeal in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR:

This being a first appeal, we are entitled to reconsider the evidence, evaluate it and draw our own conclusions but making allowance for the fact that we have not seen or heard the witnesses. (See *Selle V. Associated Motor Boat Company Limited* (1968) EA 123, 126.
13. It is the Appellant's case that it acquired property Kajiado /Lorngosua/ 1836 measuring approximately 125 acres from Yehoshua Arusi for a sum of KShs. 50,000,000 and subsequently subdivided it into 442 plots of a quarter acre each intended for sale to its members. They later discovered the existence of seven additional plots in the final map that were not part of the initial plan. Allegedly, the 1st Respondent, in collaboration with the Appellant's former chairman, affixed the additional plots and fraudulently transferred them to themselves without obtaining the requisite approval and consent



from the Appellant. The Appellant contends that the 1st Respondent failed to furnish evidence substantiating their acquisition of the suit plots Kajiado /Lorngosua/ 6602 & 6604 and implored the court to challenge the legitimacy of the 1st Respondent's title, alleging it was procured through illegal, irregular and un-procedural means. Furthermore, the Appellant asserts that they provided sufficient proof substantiating the claim of fraud and that the dismissal of their suit at the lower court was erroneously arrived at and should be set aside.

14. The 1st Respondent contested the allegations of fraud regarding the mutation and transfer of the suit properties on the grounds that they lacked evidential support. He went on to assert that the transfers of the suit plots were conducted with the Appellant's authorisation pointing out that each director and shareholder, was entitled to receive one extra plot. And that he together with the former Vice Chairman, Mr. Gitau Githuku, were allotted an extra plot each as acknowledgment of their substantial contributions to the company. Challenging the Appellant's claim of fraud, the 1st Respondent stressed that the burden of proving such allegations rested squarely upon the Appellant and the trial court did not err in dismissing the suit.
15. I have perused through the Record of Appeal to determine whether the Appeal is merited and whether the trial court's decision was erroneous or not. In the plaint dated 8th March 2022, the Appellant sought for cancellation and rectification of 1st Defendant's titles to property Kajiado /Lorngosua/ 6602 & 6604 on grounds that they were acquired fraudulently and illegally without a formal board resolution and without payment of consideration and for the Appellant to be declared the owner and be issued with title documents in respect of those plots. In his statement of Defence, the 1st Respondent stated that he together with the former Chairman Mr. Samuel Wairegi Gathura had contributed a lot of money towards the registration of the Appellant and the purchase of the subject land and the transfer of the suit plots was done with the Appellant's approval.
16. The Plaintiff and 1st Defendant (herein Appellant and 1st Respondent testified and produced their bundle of documents as exhibits. It is not in contention that the Plaintiff acquired the property Kajiado /Lorngosua/1836 measuring approximately 125 acres from Yehoshua Arusi for a sum of Kshs. 50,000,000 and that PW1 and the 1st Respondents are Directors of the Plaintiff as per the documents produced.
17. From the judgement dated 28th September 2022, the court notes that it was PW1's evidence that it was resolved that the Appellant's Directors were each to get one plot of land. Therefore, the two additional plots of land acquired by the 1st Respondent were done so illegally. The 1st Respondent testified that the directors were to get extra plots depending on their contribution and it was agreed that he be apportioned three plots. During cross examination he stated that he did not file any documents to prove his financial contribution as most of it was in kind.
18. The Learned Trial Magistrate found that the issue for determination was whether the Plaintiff had proved the element of fraud against the Defendants to warrant issuance of the orders sought and held:

“The Plaintiff is alleging that the title deeds for parcel number Kajiado /Lorngosua/ 6602 and 6604 (herein referred to as the suit properties) were obtained fraudulently. However, no evidence has been furnished to the satisfaction of this court to prove this. There was nothing tangible in the form of documentary evidence to establish these allegations apart from copies of the green cards in the Defendant's names for the suit properties on the one hand and a copy of title deed for the mother title on the other hand.

As admitted by PW1, both himself and 1st Defendant being official of the Plaintiff were given free plots following a resolution that had been passed. However, the said resolution



was not furnished hence there was a possibility as stated by the 1st Defendant that the subject resolution recommended the issuance of additional plots to himself following his immense contribution to the company.

Similarly, there was no direct evidence linking the 1st Defendant to the scenario of the two mutation forms and sketch plans. No documentary evidence was annexed to show that they had been assigned the said survey responsibility or implicated for any illegality. The bundle of correspondence between the Plaintiff and the various authorities were in my opinion proof there existed board room wrangles between the parties which ought to have been resolved through the various alternative dispute resolution mechanisms.

The title deeds in the 1st Defendant's name are to be taken by court as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner as per Section 26 of the Land Registration Act. Title documents are prepared and issued by the Land Registrar and in the absence of contrary documents from their office, the court has no reason to find the title deeds to be fraudulent. The Plaintiff has failed to tender sufficient evidence that prove the particulars of fraud against the Defendants to the satisfaction of the court. Subsequently, the Plaintiff's suit is hereby dismissed with costs to the 1st Defendant."

19. On the issue of evidence, the legal principle is he who alleges must prove. This is stipulated by Sections 107 to 109 of the Evidence Act as follows:

" 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

20. This means that the burden of proof was on the Appellant to prove its claim that the 1st Respondent acquired the suit properties illegally. The trial court's determination highlighted the absence of tangible evidence provided by the Appellant to support allegations of fraud. Furthermore, the court reasoned that the lack of documented evidence regarding the Appellant's resolution to allocate one extra plot to its Directors potentially implied the plausibility of a resolution permitting the 1st Respondent's additional plot.
21. I note from the record that the Appellant produced multiple correspondences and complaints it filed, alleging embezzlement of funds involving some of its Directors, including the former chairman and the 1st Respondent. These complaints were submitted to various authorities such as the Directorate of Criminal Investigations and Director of Public Prosecution. Additionally, a letter dated 26th September 2018 addressed by the Appellant to the 2nd Respondent raised concerns about seven titles, including those of properties Kajjado/Lorngosua/6602 and 6604, allegedly transferred illegally to other individuals. Subsequently, due to reported irregularities in fund handling and land allocation,



the former chairman, 1st Respondent, and the secretary were ousted from their positions as Directors of the Appellant.

22. In light of the Learned Trial Magistrate assertion of plausibility, pertinent questions arise. If it is assumed that the Directors sanctioned additional plot allocations to the 1st Respondent, why would these same Directors initiate investigations into the very plots they purportedly approved for allocation? Furthermore, the decision to remove these individuals from their positions as Directors, based on alleged irregularities, casts doubt on the credibility and integrity of their actions in the allocation process.

23. An allegation of fraud is a serious offence which must be proved as was held by the Court of Appeal in *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* [2013] eKLR: In *R. G. Patel vs. Lalji Makani* (1957) E.A. 314, the predecessor of this Court at pg 317 held: “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.” The Learned Trial Magistrate, after careful consideration, made an accurate determination that fraud had not been substantiated.

24. It is however, crucial to note that in civil cases like the present one, the standard of proof is on a balance of probabilities. This standard dictates that a court is satisfied an event occurred if, based on the evidence presented, the occurrence of the event was more likely than not as was held by the Court of Appeal in *Palace Investments Limited v Geoffrey Kariuki Mwenda & another* [2015] eKLR that;

“The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in *Miller –vs- Minister of Pensions* [1947] 2 ALL ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of 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.”

25. In her Judgement the Learned Trial Magistrate observed;

“During cross examination the witness stated that he did not file any documents to prove his financial contribution towards the purchase of the mother parcel of land but most were in kind. He continued to stat that the transfer forms were retained by the Plaintiff and denied having acted fraudulently in this matter.....”

She further stated; “As admitted by PW1 both himself and the 1st Defendant being officials of the plaintiff were given free plots following a resolution that had been passed. However the resolution was not furnished hence there was a possibility as stated by the 1st Defendant that the subject resolution recommended the issuance of additional plots to himself following his immense contribution to the Company.”

26. I find this to be speculative. There was no basis for the Learned Trial Magistrate to arrive at such a conclusion in the absence of the said resolution.



27. Having considered the above, this court is persuaded that, from the Appellant's evidence, there exists a substantial probability of irregularity in the allocation of the disputed suit properties without requisite Directors' approval. Therefore, while the allegation of fraud might not have been conclusively proven, as rightly adjudicated by the trial court, the evidence put forth by the Appellant strongly indicates a likelihood of impropriety in the allocation process of the suit properties. Consequently, pursuant to the provisions outlined in Section 80 of the *Land Registration Act*, the allocation of these properties ought to be nullified and rectified due to the apparent irregularities in their allocation.
28. The upshot of the matter is that I find merit in this appeal. I hereby sets aside the Judgement dated 28th September 2022 and grant the orders;
- a. That the Appellant is hereby declared the rightful owner of parcels Kajiado/Lorngosua/6602 and 6604.
 - b. That a permanent injunction is hereby issued restraining the 1st Respondent, his agents, servants and/or anyone acting on their instructions from selling, disposing, sub diving, charging, transferring, trespassing or in any manner interfering or dealing with parcels Kajiado/Lorngosua/6602 and 6604.
 - c. That the Land Registrar, Kajiado is hereby directed to cancel and rectify all entries for parcels Kajiado/Lorngosua/6602 and 6604 in the name of Josephat Ngigi Ndegwa to reflect the Appellant, Presbeta Investment Limited as the true owner and consequently issue it with the title deeds within sixty (60) days from the date of this Judgement.
 - d. Costs of the Appeal and the suit in the Lower court are awarded to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 19TH DAY OF DECEMBER 2023.

L. KOMINGOI

JUDGE.

In the presence of:

Mr Njuguna for the Appellant.

Mr. P. Gachuhi for the 1st Respondent.

N/A for the 2nd Respondent.

Court Assistant – Mutisya.

