



**Sifuna & another v Wasike (Environment and Land Appeal E051 of 2021)
[2023] KEELC 22450 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22450 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E051 OF 2021
DO OHUNGO, J
DECEMBER 19, 2023**

BETWEEN

ATIENO SIFUNA 1ST APPELLANT

CASSIM WANYAMA MAKOKHA 2ND APPELLANT

AND

SEVERINO NACHIBATI WASIKE RESPONDENT

*(Being an appeal from the judgment and decree of the Chief Magistrate's
Court at Kakamega (Hon. D Alego, Senior Principal Magistrate)
delivered on 15th November 2021 in Kakamega MCELC No. 101 of 2019)*

JUDGMENT

1. The background of this appeal is that the respondent filed a plaint dated 9th July 2019 in the Subordinate Court. He averred therein that he was the registered proprietor of the parcel of land known as Bunyala/Budonga/1669 and that the appellants fraudulently subdivided the parcel into Bunyala/Budonga/2041 and Bunyala/Budonga/2042 and registered themselves as the proprietors of the said parcels. He prayed for judgment against the appellants for cancellation of parcel numbers Bunyala/Budonga/2041 and Bunyala/Budonga/2042 so as to revert to Bunyala/Budonga/1669.
2. The appellants filed a defence dated 17th February 2020 in which they averred that the first appellant was the registered proprietor of the parcel of land known as Bunyala/Budonga/2041 while the second appellant was the registered proprietor of the parcel of land known as Bunyala/Budonga/2042. They denied the allegations of fraud and added that they purchased the parcels from the respondent. They therefore urged the Subordinate Court to dismiss the suit.
3. The record shows that the matter came up before the Subordinate Court for mention on 24th February 2020 and on 29th June 2020 when counsel for the appellants sought and was granted more time to file documents in compliance with Order 11 of the *Civil Procedure Rules* 2010. The matter was later



listed for mention on 4th September 2020 when there was no appearance for the appellants and again on 5th October 2020 when parties confirmed compliance with Order 11 of the *Civil Procedure Rules* 2010 upon which it was fixed by consent for hearing on 22nd February 2021. Come 22nd February 2021, the court did not sit and counsel for the appellants fixed the matter at the registry for hearing on 26th April 2021. On 26th April 2021, there was no appearance for the appellants and the Subordinate Court adjourned the hearing to 9th August 2021 and ordered that the appellants pay court adjournment fees before 9th August 2021.

4. On 9th August 2021, counsel for the appellants was present in court. The court noted that the court adjournment fees had not been paid. Consequently, the court ordered that the said fees be paid before further orders could be granted. The court then fixed the matter for mention on 15th November 2021. Come 15th November 2021, there was no appearance by the appellants. The respondent protested that he had been attending court and that the appellants did not attend. Relying on his pleadings, list of documents and statements, he urged the court to grant him orders as per his plaint.
5. The record further shows that the Subordinate Court (Hon. D Alego, Senior Principal Magistrate) then rendered itself as follows:

Since service has been consistent by the plaintiff to the defendants including today's date, this matter stands uncontroverted and orders are granted as prayed. Severally, the defence have been ordered to comply with orders dated 26.4.2021, 15.11.2021 but all in futility. In the circumstances the court enters judgment against the defendants as prayed. Costs to the plaintiff.

6. Aggrieved with that outcome, the appellants filed this appeal on 30th November 2021. The following grounds of appeal are listed on the face of the Memorandum of Appeal dated 30th November 2021:
 1. The Honourable Magistrate erred in law by delivering a judgement without hearing any of the parties or considering the case before her on merit but instead basing the judgement on procedural technicalities and not basing her decision on any law.
 2. The Honourable Magistrate erred in law and in fact in delivering a judgment without giving consideration to the defence placed before her by the appellants and as such denying them the right to be heard and to a fair trial as provided for in *the constitution*.
 3. The Honourable Magistrate erred in law in finding for the respondent where no evidence was adduced in support of their case or against the appellants.
 4. The learned magistrate erred in law in not considering the fact that the suit land has been sold to the defendants and there was a sale agreement and properly executed transfer documents, and most importantly that the titles had been issued to the appellants herein.
 5. The learned Magistrate erred in fact and in law in delivering an irregular decision on a day when the matter was fixed for mention to fix a hearing date.
 6. The learned Magistrate erred in fact and in law by basing her decision to cancel legitimate titles based on the fact that counsel on record had not paid court adjournment fee and not on any written law or adduced evidence.
 7. The learned Magistrate erred in fact and in law in placing heavy reliance on the idea that the matter had delayed in court not considering the fact that she was away from the station for half of 2020 and all her matters had in fact delayed due to no fault of the litigants.



8. The Learned Magistrate erred in law and in fact by ruling against the appellants herein by making her decision without considering all the facts before her and ignored her paramount duty as well as her inherent powers of doing substantial justice in the matter having regard to all the circumstances of the case.
 9. The Learned Magistrate erred in law in failing to consider all issues or to do so adequately and critically all the issues of law raised out consequently came to the wrong decision.
 10. The Learned Magistrate erred in law in making the decision she made without considering the matter properly or assigning any good reasoning for her decision.
 11. The Learned Magistrate erred in law and in fact The Learned Judge's decision is unfair and unjust and cannot be maintained as it is contrary to the interest of justice.
7. The appeal was canvassed through written submissions. The appellants argued that in failing to hear the case by taking evidence from the parties, the Subordinate Court violated the appellants' right to a fair hearing. Further, that since the respondent's case was grounded on allegations of fraud, the standard of proof applicable was not met and was instead lowered. The appellants therefore urged this court to allow the appeal and to order a fresh hearing.
 8. In response, the respondent argued that the appellants had shown a pattern of inexcusable delays intended to prolong litigation in the matter. He relied on the case of *Paxton v Allsopp* [1971] 3 All E.R. 370 and argued that the appellants had failed to prosecute their case. He further relied on Order 21 Rule 1 of the *Civil Procedure Rules* 2010 and contended that a court can pronounce judgment at once in open court after hearing a case. He further relied on *Margaret Njeri Mbugua v Kirk Mweya Nyaga* [2016] eKLR and contended that he provided ample evidence to support his claims of fraud and that the appellants defence was a mere denial. In conclusion, he argued that this appeal does not raise an issue of injustice but one of abuse of the court's process. He therefore urged the court to dismiss the appeal.
 9. This being a first appeal, 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.
 10. As can be seen from the narration earlier in this judgment, the appellants had filed their statement of defence and the hearing of the suit had not yet taken off. They did not admit the respondent's claim. In such circumstances, the proper course would have been to set down the suit for hearing and determination on its merits. Indeed, the suit came up for hearing on 26th April 2021 but was adjourned since the appellants' counsel was absent. The record does not show if anybody sought an adjournment, more so considering that the said date had been fixed in the presence of both sides.
 11. On 15th November 2021 when the orders appealed against were made, the matter was listed for mention. The learned magistrate stated in her order that this matter stands uncontroverted and orders are granted as prayed. Needless to emphasise, that was not an accurate position in view of the existence of a defence on record. Additionally, the learned magistrate did not cite any law that empowered the court to enter judgment in such manner on a mention date in a defended claim.



12. As correctly pointed out by the appellants, the respondent sought cancellation of titles on grounds of alleged fraud. The rights, privileges, and benefits that accrue to a registered proprietor of land are provided for under Section 24 of the *Land Registration Act*. Section 26 of the Act obligates the court to accept the certificate of title issued to a proprietor as conclusive evidence of proprietorship, unless the party attacking it establishes the provisos under Section 26 (1) (a) or (b) of the Act.
13. Further, the law is that allegations of fraud must be pleaded, particularised, and strictly proven 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. Further, fraud cannot be simply inferred from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR. Where title to land is impugned on grounds of fraud, it has to be shown that the registered proprietor was party to the fraud.
14. None of the foregoing requirements for nullification of title was established on 15th November 2021 when the learned magistrate entered judgment. I agree with the appellants that the Subordinate Court in essence lowered the standard of proof. The respondent was duty bound to prove his case to the required standard. That obligation would have remained even if the appellants had not filed any defence. Any perceived delays on the part of the appellants did not absolve the respondent from his obligation to prove his case. In the absence of an admission, the respondent was required to offer testimony in support of his case through a hearing.
15. In view of the foregoing discourse, I find merit in this appeal. I make the following orders:
 - a. The judgment and decree of the Subordinate Court is set aside.
 - b. The case before the Subordinate Court be listed for hearing and determination on the merits.
 - c. The appellants shall have costs of this appeal.

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

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

The Appellants present in person

The Respondent present in person

Court Assistant: E. Juma

