



REPUBLIC OF KENYA



**Saoyo v Mukuria & another (Environment and Land Appeal E005 of 2023)
[2023] KEELC 22257 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E005 OF 2023
LC KOMINGOI, J
DECEMBER 14, 2023**

BETWEEN

GEORGE LENANA SAOYO APPELLANT

AND

GRACE WAMBUI MUKURIA 1ST RESPONDENT

**ALLAN WAINAINA ALIAS ALLAN GITURA (AS EXECUTOR OF THE ESTATE
OF DANIEL SAOYO SENO) 2ND RESPONDENT**

*(Being an Appeal from the judgement of the Honourable P. Achieng' Senior Principal
Magistrate in Ngong' ELC No. E041 of 2022 delivered on 16th March 2023)*

JUDGMENT

1. In the Judgement dated 16th March 2023, Hon. P. Achieng (SPM), dismissed the Appellant's suit with no Orders as to costs.
2. The Appellant aggrieved by the said decision, in Ngong SPM CC. E041 of 2022 filed a Memorandum of Appeal dated 22nd March 2023 on the grounds;
 1. The learned magistrate erred in both law and in fact when she held that the Plaintiff/ Appellant did not produce any document in court to prove that she was ever the rightful registered owner of title no. Ngong/Ngong/48183.
 2. The learned magistrate erred in both law and in fact when she failed to take into account the particulars of fraud by the 1st Defendant/ Respondent set out in the plaint which particulars were not controverted.
 3. The learned magistrate erred in both law and in fact when she failed to appreciate that the Plaintiff/Appellant was challenging the root of the 1st Defendant's title.



4. The learned magistrate erred in both law and in fact in failing to consider the evidence of the Plaintiff when determining the matter.
3. Reasons Wherefore; The Appellant prays that;
 - a. The appeal be allowed with costs to the Appellant.
 - b. The Judgement of the trial magistrate be set aside and substituted with an order granting all the prayers in the plaint.
4. The Appeal was canvassed by way of written submissions.
5. The Respondents were duly served but did not participate in these proceedings.

The Appellant's Submissions

6. In the submissions dated 20th July 2023, counsel submitted that this being a first appeal the court should reconsider evidence, evaluate itself and draw its own conclusion as was held in *Selle v Associated Motor Boat Company 1968 E.A.*
7. On the ground that the Appellant did not produce any document in court to prove that he was the rightful owner of Title No. Ngong/Ngong/48183 as per paragraph 3 of the judgement, counsel submitted that the mutation form No. 04016066 produced in court by the appellant showed that he was the previous proprietor of the suit property which was fraudulently subdivided by the 1st Respondent giving rise to parcel No. Ngong/Ngong/59696 and 59697. Counsel added that whereas green cards were also valid documents to show ownership, they are not the only documents that could prove ownership.
8. On whether the trial court erred in not taking into account particular of fraud pleaded and that the Plaintiff was challenging the root of the 1st Defendant's title, counsel submitted that the Respondents did not appear in court to defend themselves leaving the particulars of fraud uncontroverted. Adding that the Appellant's signature that effected the transfer was forged and thus the transfer and subdivision was fraudulently executed. As such, the trial court erred in finding that the allegation of fraud had not been proved to the required standard citing *Lazarus Estate Ltd vs Beasley (1956) AER 341* and *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 others [2015] eKLR* which held: "... The purpose of Section 26(1)(b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions..."
9. Counsel submitted that 1st Respondent did not show how she became proprietor of parcel No. Ngong/Ngong/59696 and 59697 as was set out in the case of *Munyu Maina vs Hiram Gathiha Maina [2013] eKLR*. As such, the appeal should be allowed.

Analysis and Determination

10. I have considered the grounds of appeal and the written submissions and find that the issues for determination are:
 - i. Whether the trial Court erred in arriving at its determination;
 - ii. Whether the allegation of fraud against the 1st Respondent was proved;
 - iii. Whether the Appeal is merited and orders sought should be granted.
 - iv. Who should bear costs of this Appeal?



11. 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 conclusion as was held by the Court of Appeal in *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR thus;

“Our duty in this appeal, being a first appeal is to analyze afresh and re-evaluate the evidence presented in the trial court in order to arrive at our own independent conclusion. See *Selle v Associated Motor Boat Co.* (1968) EA 123.”

12. The appellant’s case vide the Complaint dated 21st July 2022 in SPMC at Ngong’ ELC Case No. E041 of 2022 is that his elder brother the late Daniel Saoyo Seno who passed away on 8th April 2019 was the custodian the original title of parcel No. Ngong/Ngong/48183 measuring about 0.694 hectares registered in the Appellant’s name. The Appellant gave his elder brother the original title for safe keeping and at all times knew that the suit property was his. It was not until recently when he discovered that the property had been fraudulently, illegally and un-procedurally transferred to the 1st Respondent and subdivided into parcel No. Ngong/Ngong/59696 and 59697. He particularised the fraud against that 1st Respondent as: forging or causing his signature to be forged on the mutation form, Land Control Board consent for transfer and subdivision; and procuring the land control board consent for transfer and subdivision through misrepresentation.

13. He claimed that he does not know the 1st Respondent, neither had he sold the property to the 1st Respondent, nor executed a transfer or Land Control Board consent forms in favour of the 1st Respondent and was still in actual and physical possession of the property and thus sought to be declared the owner of title No. Ngong/Ngong/48183, the subdivision to parcel numbers Ngong/Ngong/59696 and 59697 be nullified and the 1st Respondent be restricted from dealing with the said parcels in any way.

14. The trial court dismissed the suit with no orders to cost for lack of proof that the Appellant was the registered owner of the suit property.

15. Aggrieved by this decision, the Appellant filed the instant appeal on the grounds that the trial court erred in law and in fact by holding that the appellant did not produce any document in court to prove that he was the registered owner of the suit property, failed to appreciate that the appellant was challenging the root of the 1st Respondent’s title and failed to take into consideration particulars of fraud against the 1st Respondent.

16. The lower court’s judgement on page two reads:

“...The Plaintiff claims that he was the rightful registered owner of land parcel number Ngong/Ngong/48183. He has however not presented any document to prove that. The only documents he has produced before the court are the certificates of official search for lands parcels number Ngong/Ngong/59696 and 59697 and mutation form for subdivision of land parcel number Ngong/Ngong/48183. Even if his claim is that the original title was in custody of his deceased brother, he ought to have obtained documents from the land registry, for instance the green card, to show that the land was registered in his name before ownership changed to the 1st Defendant as he claims. As his case currently stands, it is solely based on word of mouth which the court cannot rely upon, and there is no proof that the Plaintiff was ever registered as the owner of the said parcel of land...”



17. Did the trial court err in finding that the Appellant did not prove his case? The legal principle is that he who alleges must prove and Sections 107, 108 and 109 of the Evidence Act clearly provides 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.”

18. Further, the burden of proof in civil suits is on a balance of probability. Courts have elaborated this principle to mean “what is more likely to have happened”. This standard reflects a realistic and fair approach, ensuring that legal outcomes are based on a preponderance of evidence rather than absolute certainty.

19. In contesting the decision, the Appellant submitted that the trial court erred because the mutation form adduced was proof that he was the previous proprietor of parcel no. Ngong/Ngong/48183. The Mutation form dated 18th March 2013 adduced as evidence at the lower court only shows Title Number Ngong/Ngong/48183 measuring approximately 0.694 hectares was subdivided into parcel numbers 59696 and 59697 measuring 0.55 and 0.05 respectively with a road demarcation of 0.08 hectares. It does not show any history of former or subsequent owners. The Certificate of official search dated 4th July 2022 shows Grace Wambui Mukuria as the registered proprietor of Ngong/Ngong/59696 and 59697 from 9th October 2014 and a Title Deed issued on the same date. It similarly does not show the history of proprietors of the property.

20. For this court to determine the veracity and legitimacy of the allegation of irregular or fraudulent transfer of the property Ngong/Ngong/48183 to the 1st Respondent, it ought to ascertain with evidence that the said property did in the first place belong to the Appellant. The Appellant had a duty of demonstrating that his version of events is more likely to be true than not. The only way to achieve this was through evidence. The “he who alleges must prove” principle is a cornerstone of justice, which means that the Appellant had the burden of substantiating his claim with evidence. From the record of appeal, there is no iota of evidence that the Appellant adduced to prove that he was the legal and lawful owner of the property. Courts only make determination on pleaded and proven facts. This was echoed by the Court of Appeal in *Mary Wambui Kabugu v Kenya Bus Service Limited* [1997] eKLR where it was stated;

“ The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she looked for her husband who had not been seen for three days and found him admitted at Kenyatta National Hospital with multiple injuries and in critical condition.



She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case. On that ground alone I would dismiss the appeal.”

21. This court is in agreement with Learned Trial Magistrate that the Appellant did not prove his case and finds no reason to deviate from that decision.
22. On the issue of fraud, this court finds that the Learned Trial Magistrate did not make a pronouncement on the same. However, the Appellant contends that the lower court’s judgment should have favoured him due to the uncontested nature of the fraud allegation against the 1st Respondent. Whereas this court associates itself with Lord Denning’s sentiment in *Lazarus Estates Ltd vs Beasley (1956) AER 341* submitted by the Appellant that “No court in this land will allow a person to keep an advantage which he obtained by fraud...” it is imperative to underscore that an assertion of fraud must not merely be pleaded but must be proven.
23. The Appellant claimed that for the property to be transferred and subdivided in favour of the 1st Respondent, his signature was forged. It is trite law that fraud being a serious accusation should not only be pleaded but must also be strictly proved. This was the holding of the Court of Appeal in *Demutilla Nanyama Pururmu v Salim Mohamed Salim [2021]* eKLR where it was stated; “... The onus was therefore on the appellant who sought to rely on fraud on the part of the respondent and alleged forgery on his documents to prove to the court that she did not sign any of the documents relied upon by the respondent in support of his case...”
24. In this suit, save for this allegation, there was no proof or evidence that the Appellant’s signature was forged and used to effect the transfer and subdivision. The deficiency in evidentiary support becomes further pronounced as no documents pertinent to the transfer were produced in court, and no expert reports addressing the alleged forgery were presented. In the absence of substantive evidence, the court is confronted with an inherent challenge in making any determination regarding the veracity of the forgery claim.
25. In conclusion, the court fervently urges advocates to conscientiously assist their clients to robustly prosecute their cases with sufficient evidence. It is a source of dismay for the court when suits are dismissed on the grounds of insufficient proof or evidentiary support. The legal profession’s responsibility extends beyond the mere initiation of litigation. It encompasses a duty to diligently prepare and present cases in a manner that enables the court to make informed and equitable decisions.
26. This appeal is therefore dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14TH DECEMBER 2023.

L. KOMINGOI

.....

JUDGE.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR



In The Presence Of:

Mr. Kimari for Mr. Wadegu for the Appellant.

N/A for the 1st Respondent.

N/A for the 2nd Respondent.

