



**Mukhamari v Wasike & 4 others (Environment and Land Appeal  
E017 of 2024) [2025] KEELC 3376 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3376 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E017 OF 2024**

**EC CHERONO, J**

**APRIL 24, 2025**

**BETWEEN**

**MOSES WAMALWA MUKHAMARI ..... APPELLANT**

**AND**

**JULIUS LUBISIA WASIKE ..... 1<sup>ST</sup> RESPONDENT**

**BERITA NASIMIYU WASIKE ..... 2<sup>ND</sup> RESPONDENT**

**GRACE NALIAKA WASIKE ..... 3<sup>RD</sup> RESPONDENT**

**JOTHAM WAFULA WALUCHO ..... 4<sup>TH</sup> RESPONDENT**

**THE HO. ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

*(being an appeal from the Judgment of Hon. V. Yator PM in  
Webuye PM-ELC NO. 17B of 2021 delivered on 17th April 2024)*

**JUDGMENT**

**Introduction.**

1. Vide a Memorandum of Appeal dated 17/04/2024, the Appellant who was the plaintiff in the former suit before the trial court preferred this appeal challenging the judgment delivered on 17/04/2024 in Webuye PMC- ELC CASE NO. 17 OF 2021 wherein the court dismissed the Appellant's case for lack of locus standi with costs to the Respondents.
2. The brief background of the case is that the Appellant sued the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents as the legal representatives of the estate of the late Wasike Murunga-DCD who was the registered owner of land parcel no. Ndivisi/Ndivisi/1829 and 1664 before they were sub-divided and allegedly registered in the name of the 4<sup>th</sup> Respondent. That on or about 31/05/2000, 05/06/2002 and 23/05/2000 the Respondents fraudulently caused the transfer of land parcel no. Ndivisi/Ndivisi/1829 and 1664



- (hereinafter referred to as “the suit properties”) without obtaining letters of administration. He set out particulars of fraud against the Respondents thereunder. His claim was for the nullification of the resultant titles from the alleged sub-division of the abovementioned parcels of land and reverting to the name of Wasike Murunga-dcd for purposes of administration and distribution plus costs of the suit.
3. The 1<sup>st</sup> Respondent filed a statement of defence on 21/06/2021 where he averred that the Appellant was not a beneficiary of the estate of Wasike Murunga-dcd and that the suit properties were transferred to the 1<sup>st</sup> Respondent by the deceased prior to his demise and therefore, did not form part of the estate of the deceased during the succession of his estate. He averred that the High Court of Bungoma dismissed a similar matter being Bungoma HCCC 72 of 1997.
  4. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Respondents filed their respective statements of defence reiterating the averments contained in the 1<sup>st</sup> respondent’s defence and summarized above.
  5. The 5<sup>th</sup> Respondent filed a statement of defence dated 21/06/2021 denying the Appellant’s case. It was averred that the Appellant lacks locus standi to institute the suit as he had no justifiable interest in the suit properties.
  6. During pre-trial directions, the parties agreed to proceed with the hearing of the case by way of viva voce evidence with the Appellant calling four (4) witnesses in support of his claim while the 1<sup>st</sup> to 4<sup>th</sup> Respondents testified as sole witnesses for their respective cases. The 5<sup>th</sup> respondent did not call any witness.
  7. PW1 Moses Wamalwa Mukhamari adopted his witness statement dated 26/04/2022 as his testimony-in-chief. He produced as exhibits; copy of certificate of death of Wasike Murunga-P-Exhibit 1, letter by the land registrar-P-Exhibit 2, official search for Ndivisi/Ndivisi/1829 dated 13/04/2004-P-Exhibit 3, letter to the chief land registrar-P-Exhibit 4, search for Ndivisi/Ndivisi/1829 dated 05/08/2005-P-Exhibit 5, search for Ndivisi/Ndivisi/1664-P-Exhibit 6, mutation for Ndivisi/Ndivisi/1829-P-Exhibit 7, search for Ndivisi/Ndivisi/2403-P-Exhibit 8, green card Ndivisi/Ndivisi/1829-P-Exhibit 9, search for Ndivisi/Ndivisi/3825-P-Exhibit 10, mutation form for Ndivisi/Ndivisi/593-P-Exhibit 11, mutation form for Ndivisi/Ndivisi/1661-P-Exhibit 12 and judgment date 16/11/2021-P-Exhibit 13. He stated that he has brought this case as the 1<sup>st</sup> cousin of Wasike Murunga.
  8. On cross-examination, he testified that his claim is for a share in the deceased’ estate as he was not involved in the succession. He testified that he used to live with the deceased on land parcel no. Ndivisi/Ndivisi/1631 and he was entitled to one acre of the land. He argued that the transfers of the suit properties were done after the demise of the deceased.
  9. PW2 Anne Mukoba Wanyama adopted her witness statement as her testimony-in-chief where she stated that the Appellant had bought land from the deceased.
  10. PW3 Moses Wasanguka Wanyama adopted his witness statement as his testimony-in-chief. He testified that he purchased a portion of land parcel Ndivisi/Ndivisi/1829 from the deceased on 02/10/1999. In re-examination, he testified that the 4<sup>th</sup> Respondents sub-divided the said portion in 4 parts to prevent his claim.
  11. PW4 Samuel Wabomba Katoyi testified that he was the area chief and that he initially sought to resolve a dispute between PW4 and one Jotham over land parcel NO. Ndivisi/Ndivisi/1829 which was unsuccessful and he referred them to court.
  12. DW1 Julius Lubisa Wasike testified that the clan divided the deceased’s estate amongst his beneficiaries which was adopted in the succession. That the Appellant filed an objection against the distribution. He testified that he became aware that the deceased had sold various portions of land to about seven



people. He testified on cross examination that he did not include the suit properties in the deceased's succession because they were not registered in his name.

13. DW2 Grace Naliaka Wasike testified that the Appellant is not a beneficiary of the estate of the deceased and that he had his own land. She testified that she did not know if the deceased sold any land.
14. DW3 Jotham Wafula Walucho testified that he purchased various portions of land in plot no.593 from the deceased and the said plot is subject of litigation in another suit. That the deceased gave him plot no.1829 and he sub-divided it into 4 plots.
15. DW4 Berita Nsimiyu testified that the suit properties were sold by the deceased together with his firstborn son, Nelson Makheti. That the appellant has no right to complain as he is not the owner of the suit properties. She testified that the deceased sold the suit properties to various people including the 4<sup>th</sup> Respondent and therefore, the suit parcels were not included in the succession process.

### **The Appeal.**

16. The Appellant filed this appeal vide the grounds of appeal dated 17<sup>th</sup> April, 2024 raising the following eight (8) Grounds;
  - a. The presiding magistrate erred in law and in fact taking evidence in isolation and issuing biased orders against the appellant in a matter that was properly before court in that she found in favour of the respondent who had not adduced evidence to rebut the well given evidence before court by the appellant and his witness who had proved the case against the respondents.
  - b. That the presiding magistrate erred in law and in fact by considering the water tight evidence adduced by the appellant and his witness as opposed by the respondents and got biased in finding favour of the respondents.
  - c. The learned presiding magistrate erred in law and in fact treating admissible contradicting evidence of the respondents as opposed to corroborated appellants evidence and thereby miscarrying ends of justice.
  - d. That the learned presiding magistrate erred in both law and in fact that the appellant had a prima facie case that succeeded on a balance of probability but dismissed it.
  - e. That the learned magistrate erred in both law and in fact in failing to find that the respondents defence which was full of narratives without legal basis in law given the nature of pleadings and evidence on record.
  - f. That the learned magistrate erred in both land and fact thus in her ruling occasioned great loss and injustice to the appellant.
  - g. That the said judgment and ruling rendered by the learned magistrate herein was against weighty evidence by the appellant and his witnesses.
  - h. That finally the learned magistrate erred in law and in fact and therefore biased in using technicalities in law in contravention of *the Constitution* 2010 and denying the appellant his fundamental rights and privileges.
17. The appellant sought to have the decision of the trial court overturned and substituted with an order allowing his claim.
18. The Appellant filed submissions dated 04/02/2025 in support of his appeal.



## Analysis and determination.

19. I have considered the record of appeal, the judgment by the trial Magistrate, the written submissions as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal principle that I did not have the advantage enjoyed by the trial Magistrate of seeing and hearing the witnesses as they testified. (See *Seascapes Ltd v. Development Finance Company of Kenya Ltd* [2009] KLR, 384). I also remind myself that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982-88] 1 KAR 278).
20. Having considered the pleadings, the evidence on record, the exhibits produced and the submissions filed, it is my view that, although the memorandum of appeal raises eight (8) grounds of appeal, the issue that arises for determination in my view is whether the learned trial Magistrate upon considering the evidence before her erred by dismissing the Appellant's case.
21. The gist of the Appellant's case is that he is entitled to a share of the suit properties which belonged to one Wasike Murunga-deceased by virtue of being a first cousin and therefore, a beneficiary of his estate. He argues that the suit properties were fraudulently registered in the name of the 4<sup>th</sup> Respondent after the demise of the deceased without a grant, without the consent of the Land Control Board, by falsifying transfer documents, misrepresenting that the deceased is alive to effect the said transfer and presenting forged documents. He sought for the titles issued to the 4<sup>th</sup> Respondent to be cancelled and the same to be reverted into the deceased's name and distributed amongst his beneficiaries.
22. The Respondents on their part argued that the suit properties did not form part of the deceased's estate and as a matter of fact, they were not registered in his name. It was also argued that the Appellant was not a beneficiary of the deceased and lacked the capacity to bring this suit as he had no justifiable interest over the suit properties.
23. That the Appellant's capacity to agitate this suit was contested by the Respondents. That this court considers that it is prudent to make a finding on the issue of locus standi before proceeding to the main substance of the case.
24. In the case of *Law Society of Kenya Vs Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, as follows:-

“Locus Standi signifies a right to be heard, A person must have sufficiency of interest to sustain his standing to sue in Court of Law”. Further in the case of *Alfred Njau and Others -Vs- City Council of Nairobi* [1982] KAR 229, the Court also held that:-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings”.
25. Therefore, locus standi means the right to appear before and be heard in a court of law. Without it, even when a party has a meritorious case, he cannot be heard because of that. Locus standi is so important that in its absence, a party has no basis to claim anything before the Court. The thrust of the Respondent's argument is that the suit land is not registered in the Appellant's name and that he is not a beneficiary of the estate of the deceased.



26. Based on that contention, this Court has perused the pleadings filed to inform itself of whether the allegations made are true or false. I have perused the plaint to make this determination and established that the Appellant in paragraph 5 of the plaint averred that he is a first cousin of the deceased and a beneficiary of the deceased's estate and secondly that the suit properties are registered in the name of Jotham Wafula Walucho, the 4<sup>th</sup> Respondent herein. As shown in P-Exhibit 5 and P-Exhibit 6, land parcel no Ndivisi/Ndivisi/1829 was registered in the 4<sup>th</sup> respondent's name on 05/06/2022 while land parcel no Ndivisi/Ndivisi/1664 was registered on 31/05/2000.
27. From the record of appeal, it also emerges that the estate of the deceased was succeeded and administrators appointed i.e Julius Lubisa Wasike, Berita Nasimiyu Wasike, Grace Naliaka Wasike and John Wanjala Namunamba. The Appellant has sued the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in their capacity as the administrators of the estate of the deceased and also sued the 4<sup>th</sup> Respondent as the registered owner of the suit properties. It is important to note that the Appellant in his evidence testified that he is a beneficiary by virtue of being a purchaser. He testified that he purchased a portion of land from the deceased vide a sale agreement dated 02/10/1999.
28. Having espoused the Appellant's alleged interest over the suit land, it is my considered view that he has the locus standi to institute this suit to protect his alleged interests as a purchaser/creditor of the estate.
29. Now, considering whether the Appellant has established a case against the respondents for the orders sought, it is not in dispute that the deceased is said to have died on 09/01/2003 as per the P-Exhibit 1. The suit properties were registered in the name of the 4<sup>th</sup> Respondent on 31/05/2000 and 05/06/2002. Looking at this time period, it is evident that the transfers were done prior to the demise of the deceased. The Appellant argues that the transfers were fraudulent.
30. To succeed in a claim of fraud, a party is required not only to plead fraud but also particularize it in his pleading laying out water-tight evidence upon which the court would make such finding. It is therefore trite law that any allegations of fraud must be pleaded and strictly proved. I am guided by the decision of the Court of Appeal in the case of Kuria Kiarie & 2 Others –vs- Sammy Magera [2018] eKLR where it was held:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria –vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

31. The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules. As regards the standard of proof, the court in the case of Kinyanjui Kamau –vs George Kamau [2015] eKLR expressed itself as follows:-

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo –vs- Ndolo [2008] 1 KLR (G & F) 742 wherein the court stated that: “...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 probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...” In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

32. In my view, the Appellant failed to substantiate his alleged sale, as he neither provided evidence of a sale agreement nor proof of payment of consideration for the land. Additionally, he did not demonstrate that the alleged vendor granted him possession of the claimed land as part performance of the purported agreement. This is pursuant to the applicable provisions of the Section 3(3) of the Amended Law of Contract at the time of the alleged sale i.e 02/10/1999 which provides as follows:

(3) No contract shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it.

Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract.

i. Has in part performance of the contract taken possession of the property of any part thereof or

ii. Being already in possession continues in possession in part performance of the contract and has done some other act in furtherance of the contract”.

33. Furthermore, no evidence was tendered to substantiate his allegations of fraud. His evidence, accompanied by his exhibits did not establish that the Respondents engaged in any fraudulent activities.

34. It is trite that a certificate of title in the name of a proprietor is to be taken by court as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner pursuant to the provisions of section 26 of the Land Registration Act. Title documents are prepared and issued by Land Registrars. In the absence of contrary documents from the office of the Land Registrar, the court has no reason to find the title documents to be fraudulent and make orders as sought by the Appellant.

35. Having considered and reviewed all the evidence and material placed before me, I am satisfied that the Appellant did not prove his claim against the Respondents to the required standard.

36. Accordingly, I find that this appeal lacks merit and the same is hereby dismissed with no orders as to costs as the Respondents did not participate in this appeal.

37. Orders accordingly.

**DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 24<sup>TH</sup> DAY OF APRIL, 2025.**

.....

**HON.E.C. CHERONO**

**ELC JUDGE**

In the presence of;

1. Appellant-present.

2. Respondents/Advocate-absent.



3. Bett C/A.

