



REPUBLIC OF KENYA



KENYA LAW
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**Ntende v Murithi (Land Case Appeal E004 of 2024)
[2025] KEELC 3924 (KLR) (23 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
LAND CASE APPEAL E004 OF 2024**

BM EBOSO, J

APRIL 23, 2025

BETWEEN

SAMUEL MUTHENGI NTENDE APPELLANT

AND

RENSON MBOGO MURITHI RESPONDENT

(Being an Appeal arising from the Judgment of Hon Mbayaki Wafula, Principal Magistrate, delivered on 25/1/2024 in Marimanti SPMC E&L Case No 18 of 2022)

JUDGMENT

Introduction

1. This appeal challenges the Judgment of the Marimanti Principal Magistrate Court (Hon Mbayaki Wafula PM) rendered on 25/1/2024 in Marimanti PMC Environment & Land Case No 18 of 2022. The two key issues that fell for determination in the said suit were: (i) Whether registration of the respondent as proprietor of land parcel number Chiakariga “A”/506 was procured fraudulently by the respondent; and (ii) Whether the said registration should be annulled and the appellant be registered as proprietor of the said land. These are the two key issues that fall for determination in this first appeal. Before I analyse and dispose the two issues, I will briefly outline the background to the appeal; the grounds of appeal; and the parties’ respective submissions.

Background

2. Through a plaint dated 3/10/2022, the appellant instituted Marimanti PMC E&L Case No 18 of 2022 against the respondent in which he sought an order cancelling the name of the respondent from the land register of Chiakariga “A”/506 (hereinafter referred to as “the suit land”) and decreeing registration of the appellant as the proprietor of the land. He also sought costs of the suit. It was the case of the appellant that he was, at all material times, in occupation of the suit land. He contended that the



respondent fraudulently obtained his registration as proprietor of the suit land. He itemized various particulars of fraud, among them, contentions that the respondent was not a member of the clan that distributed the suit land during the adjudication exercise and that the respondent obtained title to land that he had never occupied. The appellant did not, however, identify his clan or the clan that was responsible for sharing of land in the relevant adjudication section.

3. The appellant filed a defence signed by him in person, bearing the year 2022. The defence did not bear the day and month when it was drawn. The above omissions were, however, not canvassed as issues in the trial court. It does also emerge from the original record of the trial court that vide a post-trial application dated 7/9/2023, the respondent sought leave of the trial court to amend his defence and to bring a counterclaim. Through a ruling dated 16/11/2023, the trial court found the application unmerited and dismissed it. The trial court directed the respondent to file submissions on the main suit.
4. The case of the respondent was that, he was the legitimate registered proprietor of the suit land. He contended that he purchased the suit land from the clan in 1984 vide an agreement dated 19/12/1984.
5. During trial, the appellant testified as PW1 and closed his case without leading any further evidence. The original record of the trial court shows that the appellant neither filed nor adopted a written statement. His full evidence-in-chief was as follows:

“I am Samuel Muthengi from Nkarini. I am a farmer. I know the defendant – Mbogo Murithi. I have sued him because he has been given No 506 in Chiakariga which land is mine. He was given my land fraudulently because I do not know how he was given the land. He is not from our clan. I do not know where he works. I have never seen him on my land. I pray court returns the land to me.”

6. The appellant’s full testimony during cross-examination was as follows:

“The land belonged to my father, but the clan gave you my land – i.e the clan gave my land to the defendant’s father. My father got it as virgin land.”

7. On his part, the respondent testified as DW1 and called two witnesses who testified as DW2 and DW3 respectively. Joseph Jubai Mugwika (DW2) testified that he was a member of the clan and also a member of the Land Adjudication Committee of the Adjudication Section. He stated that although the appellant was not a member of the Clan, the clan gave to the appellant land adjacent to the suit land because he was building there. He added that the respondent gave Kshs. 3,000, one cow, and alcohol to the clan as consideration for the suit land. He added that the appellant too paid consideration for the land that the clan gave him. He reiterated that, although both the respondent and the appellant were not members of the clan, they were both given adjacent parcels of land in the adjudication section.
8. Xeverino Katheru (DW3) testified that he was the Area Manager of Nkarini Location. He stated that he was the Secretary of Kamarau Clan. He confirmed that the clan gave both the appellant and the respondent their respective parcels of land. He added that although both parties to the suit did not hail from Kamarau Clan, the clan gave them land, adding that the two parties paid for the land which they were given by the clan.
9. Upon receiving evidence and submissions, the trial court rendered the impugned Judgment in which it found that the appellant had failed to prove his case to the required standard. The trial court dismissed the appellant’s case.



Appeal

10. Aggrieved by the findings and decree of the trial court, the appellant brought this appeal, advancing the following three

(3) grounds of appeal:

1. The learned magistrate erred in law and in fact in failing to properly analyse the evidence on record and as such arrived at the wrong finding.
2. The learned magistrate erred in law and in fact in failing to find that the plaintiff had proved that the respondent had obtained the appellant's land fraudulently by using a corrupt scheme.
3. The learned magistrate erred in law and in fact in deciding the entire suit against the law and the weight of evidence.

11. The appellant urged this court to allow the appeal with costs.

Appellant's Submissions

12. The appeal was canvassed through written submissions dated 24/1/2025, filed by M/s L. Kimathi Kiara & Co Advocates. Counsel outlined the evidence of PW1, DW1, DW2 and DW3 and submitted that had the trial court properly analysed the evidence, it would have found in favour of the appellant. Counsel urged the court to infer fraud from the evidence of DW2.

13. Counsel further submitted that the respondent and his witnesses "confessed" that the respondent was not from "their clan" but he was given land since he was an agricultural officer who was able to pay the Committee and give them beer, adding that the respondent "confessed that he was not told if the land belonged to someone else." Counsel urged the court to find, on the above basis, that there was fraud in giving the respondent the suit land. Counsel urged the court to allow the appeal with costs.

Respondent's Submissions

14. The respondent filed written submissions dated 24/1/2025 through M/s J. Nelima Associates & Co Advocates. Counsel for the respondent submitted that the trial court subjected the available evidence to proper and thorough analysis and arrived at a correct conclusion, adding that the appellant failed to prove his case to the required standard. Counsel faulted the appellant for failing to file and serve written witness statements despite filing a list of witnesses. Counsel argued that there wasn't much in the 8 lines of the oral evidence that the appellant tendered, adding that despite filing a list of witnesses, the appellant did not lead evidence by the listed witnesses. Counsel submitted that the appellant failed to demonstrate through evidence that the respondent was fraudulently given the suit land.

15. On the allegation that the respondent used corrupt means to acquire title to the suit land, counsel submitted that no evidence was tendered to support that allegation. Counsel emphasized that it was the appellant's oral evidence that he did not know how the respondent acquired title to the suit land, hence there was no basis for alleging fraud. Counsel faulted the appellant for making an allegation of fraud without taking any step to report the alleged fraud to the relevant criminal justice agencies. Counsel urged the court to dismiss the appeal.



Analysis and Determination

16. I have read and considered the original record of the trial court; the record filed in this appeal; and the parties' respective submissions. As observed in the introductory paragraph of this Judgment, the two key issues that fall for determination in this appeal are: (i) Whether registration of the respondent as proprietor of land parcel number Chiakariga "A"/506 was procured fraudulently by the respondent; and (ii) Whether the said registration should be annulled and the appellant be registered as proprietor of the said land. The two issues are intertwined. For this reason, they will be analysed and disposed contemporaneously in the context of the three grounds of appeal that were set out in the memorandum of appeal. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
17. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi vs Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
18. The principle was similarly outlined in *Abok James Odera t/a A J Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates* (2013) eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
19. The appellant was the claimant in the trial court. He alleged that the respondent had fraudulently procured registration as proprietor of the suit land. He sought a declaration to that effect. He also sought an order annulling the respondent's registration and decreeing his (the appellant's) registration as the legitimate proprietor of the suit land. Under Sections 107 and 109 of the *Evidence Act*, the appellant bore the burden of proof because he was the one alleging fraud.
20. Secondly, under the prevailing jurisprudence, the standard of proof that the appellant was required to satisfy in a claim of fraud was one higher than in ordinary civil cases (higher than proof on a balance of probabilities) but not one beyond all reasonable doubt as in criminal cases. Without the appellant discharging the burden of proof to the above standard, the trial court, and indeed this first appellate court, would not have a basis for impeaching the respondent's title under Section 26 as read together with Section 80 of the *Land Registration Act*.
21. Did the appellant discharge his burden of proof? The appellant's claim was anchored on fraud. He itemized particulars of fraud. From a reading of the original record of the trial court, the appellant did not prove fraud. First, he filed a list of witnesses dated 3/10/2022 in which he listed Samuel Muthengi (the appellant himself) and Joseph Njeru Muthengi as the two witnesses who would testify. He did not, however, file and serve the respective witness statements of the two listed witnesses.
22. During trial, the appellant gave brief oral evidence, tendered his documents and closed his evidence-in-chief. He was subsequently cross-examined. He did not tender evidence in re-examination. He closed his case without leading evidence by the second listed witness.



23. The appellant’s entire testimony has been reproduced in the preceding paragraphs of this Judgment. Whereas the appellant contended in his pleadings that the respondent’s title was obtained fraudulently because he (the respondent) was not from the appellant’s clan, the appellant did not lead evidence identifying his clan or the clan that was responsible for the allocation of land through the land adjudication exercise. All he stated was:

“I am Samuel Muthengi from Nkarini. I am a farmer.”

24. On his part, the respondent led evidence by Joseph Jabai Mugwika who was a member of the Land Committee that was responsible for adjudication of land rights in the relevant adjudication section during the land adjudication exercise. The respondent further led evidence by Xeverino Katheru who hailed from Nkarini and served as the Area Manager for Nkarini Location. The two defence witnesses testified that both the appellant and the respondent were not from the clan that coordinated the land adjudication exercise, adding that both parties were, nonetheless, allocated different adjacent parcels of land by the clan after they met the requisite criteria.

25. That is not all. The appellant tendered and relied on an appeal which he lodged to the Minister/Cabinet Secretary under Section 29 of the Land Adjudication Act. It is clear from the record of the trial court that the said appeal was dismissed on 20/4/2017. It is also clear that the dispute that was before the trial court had been adjudicated upon by the relevant adjudicatory bodies under the Land Adjudication Act and those bodies had come to the findings that the respondent was the legitimate owner of the suit land. Without challenging the ultimate decision of the Minister, the appellant alleged fraud on part of the respondent and invited the trial court to so find. Regrettably, he did not tender evidence demonstrating fraud.

26. Lastly, during cross-examination, the appellant stated that the suit land belonged to his father, adding that his father got the suit land as “virgin land”. He stated that the clan improperly gave the land to the respondent. There was, however, no evidence on how the appellant became owner of the said “virgin land.”

27. The totality of the pleadings and evidence that were before the trial court is that the appellant did not discharge the burden of proof. On his part, the respondent properly demonstrated how he obtained his title. For the above reasons, it is the finding of this court that the appellant failed to prove that the registration of the respondent as proprietor of land parcel number Chiakariga “A”/506 was procured fraudulently by the respondent. Consequently, there was no proper basis to warrant annulment of the said registration or to warrant registration of the appellant as proprietor of the said land.

28. In light of the above two findings, this court does not find merit in this appeal. The appeal is rejected and dismissed.

29. In tandem with the general principle in Section 27 of the Civil Procedure Act, the appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 23RD DAY OF APRIL, 2025.

B M EBOSO [MR]

JUDGE

In the Presence of:

Appellant – Absent



Respondent – Absent

Court Assistant – Mwangi

